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the decision is a reiteration of two principles of constitutional law: that the privilege against self-incrimination protects the innocent as well as the guilty, and that no inference of guilt may be drawn from its invocation.[84] In deciding the *Slochower* case the Supreme Court interpreted Section 903 as permitting a presumption of guilt from its invocation, and Slochower's discharge was based upon this presumption. It would seem the very question which existed in that case is present in the *Lerner* case. The New York Act requires that in order to suspend an employee a finding of "evidence of doubt" must exist. However, a dismissal using the fifth amendment privilege as evidence is precisely what the Supreme Court prohibited in the *Slochower* case. That the legislature intended the invocation of the fifth amendment be considered as evidence under the Act is doubtful, but if they did so, the Act is unconstitutional in this application.[85]

Due Process and the Right to Counsel in Administrative Proceedings

The administrative process is a necessary part of our modern government. The growth of modern society with all of the complexities of government, coupled with the cumbersome and dilatory procedures in our courts, has given rise to the extensive use of administrative agencies. Mr. Justice Frankfurter, discussing the distinction between the administrative and judicial process, stated:

> . . . that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.[1]

In another opinion, Justice Frankfurter commented:

> Unlike courts which are concerned primarily with the enforcement of private rights . . . administrative agencies are predominantly concerned with enforcing public rights although private interests may thereby be affected. To no small degree administrative agencies for the enforcement of public rights were established by Congress because more flexible and less traditional procedures

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[84] See Grunewald v. United States, 353 U.S. 391 (1957); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

[85] If this Act imposed an absolute duty upon employees to answer questions relating to their official conduct by a proper authority it would probably be held constitutional. See Slochower v. Board of Higher Educ., note 84 *supra*, Garner v. Board of Pub. Works, 341 U.S. 716 (1951).

[1] United States v. Morgan, 313 U.S. 409, 422 (1941).

were called for than those evolved by the courts. It is therefore essential to the vitality of the administrative process that the procedural powers given to these administrative agencies not be confined within the conventional modes by which business is done in courts.[2]

This attitude correctly reflects the view that the administrative branch of the government must be granted a large measure of autonomy in procedural matters. However, the limits of this power have not been clearly drawn. For example, the Supreme Court recently held that the exclusion of counsel in a non-criminal administrative investigation was not a denial of due process.[3] Since the right to counsel is an important segment of due process, the decision prompts discussion of the right of individuals to the assistance of counsel at administrative hearings.

Constitutional Analysis

The Federal Constitution guarantees that ". . . the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." [4] The Supreme Court has stated that the conviction of one tried in federal courts without the assistance of counsel, where this right has not been intentionally and competently waived, must be set aside.[5] In addition, Rule 44 of the Federal Rules of Criminal Procedure requires that defendants be advised of their right to retain counsel and to be offered counsel through court appointments if they are unable to obtain counsel.[6] As a result of Rule 44 and the Supreme Court's holding, this problem is negligible in federal courts.

Construction of the sixth amendment has not, however, settled the scope of a state's obligation in affording a defendant the right to have counsel. The procedural guarantees of the fourteenth amendment were judicially recognized as early as 1880, when the Supreme Court reversed a conviction because Negroes had been systematically excluded from jury duty.[7] Further restrictions on state criminal procedure later emerged,[8] but it was not until the *Scottsboro* cases that the full scope of the constitutional limitations on state procedure be-

[2] FCC v. National Broadcasting Co., 319 U.S. 239, 248 (1943) (dissenting opinion).

[3] *In re* Groban, 352 U.S. 330 (1957).

[4] U.S. CONST. amend. VI. See also Walker v. Johnson, 312 U.S. 275 (1941); Johnson v. Zerbst, 304 U.S. 458 (1938). It should be noted, however, that a court is not required to appoint counsel if an accused is able to secure counsel. See, *e.g.*, Humphries v. United States, 68 A.2d 803 (Munic. Ct. App. D.C. 1949).

[5] Betts v. Brady, 316 U.S. 455, 464-65 (1942).

[6] FED. R. CRIM. P. 44.

[7] Strauder v. West Virginia, 100 U.S. 303 (1880).

[8] Manley v. Georgia, 279 U.S. 1 (1929); Tumey v. Ohio, 273 U.S. 510 (1927); Moore v. Dempsey, 261 U.S. 86 (1923).

came apparent. In *Powell v. Alabama*,[9] the first *Scottsboro* case, the Court stressed the importance of the right to the assistance of counsel and brought within the purview of the due process clause of the fourteenth amendment the right to counsel in state capital criminal proceedings. Justice Sutherland attacked the general indifference of the legal system to the right of counsel and, in his oft-cited dictum, stated:

> What, then, does a hearing include? Historically and in practice, in our country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be . . . 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 the law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the *guiding hand of counsel* at every step in the proceedings against him.[10]

The *Powell* opinion raised the question as to the extent to which the sixth amendment's guarantee of the right to counsel would be incorporated—as were the first amendment's guarantees of speech, press and religion[11]—into the due process clause of the fourteenth amendment. The Supreme Court had explicitly stated that the right to counsel in capital cases came within the scope of the due process clause.[12] However, the Court failed to extend the broad right to have counsel to all state criminal cases when it held that the failure to furnish counsel to indigent defendants in all felony cases was not a denial of due process.[13] In order to show a denial of due process in non-capital cases, the accused must show that the absence of counsel is accompanied by other factors,[14] which result in prejudice to him. Following this reasoning a Pennsylvania court noted:

> The Fourteenth Amendment . . . does not impose upon the states any uniform policy concerning representation by counsel in criminal cases; and it cannot be said that the amendment embodies an inexorable command that no trial

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[9] 287 U.S. 45 (1932).

[10] Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (emphasis added).

[11] Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion); DeJonge v. Oregon, 299 U.S. 353 (1937) (freedom of speech and assembly); Grosjean v. American Press Co., 297 U.S. 233 (1936) (freedom of the press); Gitlow v. New York, 268 U.S. 652 (1925) (freedom of speech and press).

[12] Tomkins v. Missouri, 323 U.S. 485 (1945); Powell v. Alabama, 287 U.S. 45 (1932). See BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 126, 129 (1955).

[13] See Bute v. Illinois, 333 U.S. 640 (1948); Foster v. Illinois, 332 U.S. 134 (1947); Betts v. Brady, 316 U.S. 455 (1942).

[14] Such factors would be the youth, inexperience, or ignorance of the defendant or because the trial was tainted with error. See, *e.g.*, Uveges v. Pennsylvania, 335 U.S. 437 (1948); Wade v. Mayo, 334 U.S. 672 (1948).

for any offense, or in any court, would be fairly conducted and justice accorded a defendant who is not represented by counsel.[15]

Accordingly, many state courts have held that, in non-capital cases, there is no constitutional duty upon the court to appoint counsel for an indigent defendant.[16] However, the statutes of the majority of states require the courts to appoint counsel on request in non-capital felony cases.[17]

At what point in criminal prosecutions the constitutional right to counsel accrues is, unhappily, not clear. For example, it has been held that the appointment of counsel is not necessary in habeas corpus proceedings[18] or post-sentence sanity hearings[19] since they are regarded as civil procedures. The general rule, however, is that the right to counsel should be accorded at *any, all and every stage*[20] of the criminal proceedings. Nevertheless, it has been stated that no right to counsel exists at a coroner's inquest or preliminary hearings,[21] a police interrogation following arrest,[22] or the making of a confession.[23] It appears that matters antecedent to trial are not necessarily essential to the fairness of subsequent proceedings since no adjudication of criminal responsibility results.[24]

It is submitted, however, that although the pre-trial proceedings do not result in an adjudication, it is at this point that the facts in many cases are established and segregated. These investigatory stages would seem more determinative of the final outcome of a trial than the cases specify. But, it would appear that the presence of an attorney is not essential before formal arraignment.

Scope of the Right to Counsel

There is no constitutional obligation upon federal or state governments or agencies within their borders to provide counsel in civil

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[15] Commonwealth *ex rel.* Uveges v. Ashe, 161 Pa. Super. 58, 53 A.2d 894, 897 (1947).

[16] See Fellman, *The Right to Counsel Under State Law,* 1955 WIS. L. REV. 281, 288.

[17] *Id.* at 290.

[18] People *ex rel.* Ross v. Ragen, 391 Ill. 419, 63 N.E.2d 874 (1945).

[19] People v. Riley, 37 Cal. 2d 510, 235 P.2d 381 (1951).

[20] The accused ". . . requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932). *But see* Canizio v. New York, 327 U.S. 82 (1946). State courts, however, agree that the right to counsel accrues at arraignment where the accused is required to plead. See Fellman, *supra* note 16, at 293.

[21] Aetna Life Ins. Co. v. Milward, 118 Ky. 716, 726, 82 S.W. 364, 366 (1904) (dictum); State v. Murphy, 87 N.J.L. 515, 94 Atl. 640 (1915) (*semble*).

[22] See Lisenba v. California, 314 U.S. 219 (1941); People v. Coker, 104 Cal. App. 2d 224, 231 P.2d 81 (1951).

[23] Commonwealth v. McNeil, 328 Mass. 436, 104 N.E.2d 153 (1952); State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953) (dictum).

[24] See People v. Kelly, 404 Ill. 281, 89 N.E.2d 27 (1949); State v. Murphy, 87 N.J.L. 515, 94 Atl. 640 (1915).

cases or administrative proceedings.[25] This does not, of course, prevent a person from retaining counsel. The right to be represented by counsel of one's choice is a question apart from the right to have counsel provided.[26] The right of a party to appear in a civil suit with retained counsel is well established as a matter of constitutional due process [27] and common law.[28] Certainly it exists in a criminal action.[29] Whether or not a court would have appointed counsel if the party were indigent has no bearing on an individual's constitutional right to obtain his own counsel.[30] A reasonable opportunity must also be given to employ, and consult with, counsel.[31] To deprive any party of the benefit of these rights embodied within the due process clause of the fourteenth amendment would definitely be contrary to the basic "concept of ordered liberty" [32] and extinguish those guarantees which we rank as "fundamental." [33] The law is well settled that:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, *employed by* and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of hearing, and, therefore, of due process in the constitutional sense.[34]

Thus, it would appear that the right to counsel would apply to judicial type administrative hearings in which due process requires that the elements of fair play be observed and substantial individual rights be protected.[35]

Numerous state decisions have upheld the right to be represented by counsel as a substantial right necessary for a fair hearing.[36] Thus it has been held that an administrative removal hearing, although not a criminal proceeding, is judicial in nature and that fairness requires that the right to counsel be accorded.[37] Perhaps the furthest ex-

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[25] See FORKOSCH, ADMINISTRATIVE LAW § 216 (1956).

[26] See Chandler v. Fretag, 348 U.S. 3, 9 (1954); House v. Mayo, 324 U.S. 42, 46 (1945) (per curiam); Betts v. Brady, 316 U.S. 455, 466-68 (1942); Powell v. Alabama, 287 U.S. 45, 71 (1932).

[27] Chandler v. Avery, 47 Hun 9 (N.Y. Sup. Ct. 1888); McKinley v. Campbell, 217 Ala. 139, 115 So. 98 (1928); Nestor v. George, 354 Pa. 19, 46 A.2d 469 (1946).

[28] See Powell v. Alabama, note 26 *supra.*

[29] Powell v. Alabama, note 26 *supra.*

[30] See Chandler v. Fretag, note 26 *supra.*

[31] Hawk v. Olson, 326 U.S. 271, 277-78 (1945); White v. Ragen, 324 U.S. 760, 764 (1945) (per curiam); Avery v. Alabama, 308 U.S. 444, 446 (1940).

[32] Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

[33] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[34] Powell v. Alabama, 287 U.S. 45, 68, 69 (1932) (emphasis added).

[35] See FORKOSCH, ADMINISTRATIVE LAW § 198 (1956).

[36] See, *e.g.*, People *ex rel.* Long v. Whitney, 143 App. Div. 17, 127 N.Y. Supp. 554 (1st Dep't 1911); Christy v. City of Kingfisher, 13 Okla. 585, 76 Pac. 135 (1904).

[37] People *ex rel.* The Mayor v. Nichols, 79 N.Y. 582 (1880); People *ex rel.* Ellett v. Flood, 64 App. Div. 209, 71 N.Y. Supp. 1067 (3d Dep't 1901).

tension of the right to counsel is found in the recent New York case of *Fusco v. Moses*,[38] where an informer participated in corrupt dealings in toll bridge collections and relayed information to his superiors. When the petitioners were brought up for dismissal hearings, the informer, after retaining the same counsel, accompanied petitioners in order to avoid their suspicion and possible reprisals. The Court of Appeals held, three judges dissenting, that the presence of the informer at the petitioners' conference with counsel was a violation of the petitioners' right of counsel which was sufficient to invalidate the hearings. The court based its decision on the application of the rule previously set down by the United States Supreme Court: "The right to . . . counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." [39]

On the other hand, some state courts, although acknowledging the right to counsel in judicial type proceedings employ less stringent standards of due process. In *Avery v. Studley*, the court stated that the refusal of assistance of counsel in a hearing of any kind may prove unfair and arbitrary, but would not invalidate the result of a removal hearing unless the hearing was a ". . . purely judicial proceeding or . . . a trial before administrative officers closely akin to a trial in court." [40] Similarly, it has been held that there is a distinction between the right to be assisted by counsel and the right to be heard, the former existing only to the extent granted by law.[41]

In the administrative field, the nature of the hearing has become the criterion for establishing the right to counsel.[42] Thus, it is necessary to consider the ends to be achieved in an administrative hearing before it can be determined whether or not there is a denial of due process. The administrative order, issued after a proceeding with the power to adjudicate, is one that affects legal rights in a way different from a proceeding which merely investigates and advises.[43] A proceeding with powers to adjudicate determines issues between the parties while an investigation is conducted to determine whether the facts justify action.[44] There is a clear distinction between directing a witness to appear before an examiner for a quasi-judicial body, and directing a witness to appear before a government agent for in-

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[38] 304 N.Y. 424, 107 N.E.2d 581 (1952).

[39] Glasser v. United States, 315 U.S. 60, 76 (1942).

[40] 74 Conn. 272, 50 Atl. 752, 757 (1901).

[41] State *ex rel.* Charles v. Board of Comm'rs, 159 La. 69, 105 So. 228 (1925); see also Bancroft v. Board of Governors, 202 Okla. 108, 210 P.2d 666 (1949); Miner v. Industrial Comm'n, 115 Utah 88, 202 P.2d 557 (1949).

[42] See GELLHORN & BYSE, ADMINISTRATIVE LAW 913 (1954). Of course, it must be accorded without regard to the type of proceeding if it is made absolute by statute.

[43] See Norwegian Nitrogen Co. v. United States, 288 U.S. 294, 317, 318 (1933).

[44] *In re* SEC, 84 F.2d 316, 317-18 (2d Cir.), *rev'd on other grounds sub nom.*, Bracken v. SEC, 299 U.S. 504 (1936).

vestigation and fact-finding purposes.[45] Accordingly, the right to counsel is usually granted for adjudicatory proceedings [46] and denied in investigatory proceedings.[47]

These differences were most clearly drawn in *Bowles v. Baer*.[48] There the Price Administrator had subpoenaed witnesses to investigate certain transactions. After preliminary questioning, the representative of the Office of Price Administration informed the witnesses that the investigation was to be held in private and that the attorneys and accompanying reporters would have to withdraw. The witnesses refused to testify unless their attorneys and the reporters were allowed to participate. The United States Court of Appeals held that the witnesses had to appear without their counsels and the reporters. The court stated that investigations are informal proceedings held to obtain information to govern future action and are not proceedings in which action is taken against anyone. They have no parties and are usually held in private. On the other hand, a hearing involves parties and is usually open to the public. It determines the issues of fact and concludes by taking some action which affects the rights of the parties. Thus, it would appear that the factors set forth by the court for a hearing necessarily require the assistance of counsel. On the other hand, due process would not be denied if the right to counsel was refused in an investigation as long as the investigatory proceeding was limited to its function.

It should be noted that the constitutional guarantee of the right to assistance of counsel does not exist in every type of governmental proceeding. Thus, a witness has no right to counsel before a legislative body or committee,[49] although by statute the legislature is always free to grant the right to representation by counsel in legislative investigations.[50] Moreover, a witness before a grand jury cannot insist, as a matter of right, on being represented by counsel.[51]

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[45] See Cobbledick v. United States, 309 U.S. 323, 329, 330 (1940); Ellis v. ICC, 237 U.S. 434, 442 (1915); Alexander v. United States, 201 U.S. 117, 121 (1905).

[46] See, *e.g.*, United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950); Fusco v. Moses, 304 N.Y. 424, 107 N.E.2d 581 (1952).

[47] See, *e.g.*, United States v. Pitt, 144 F.2d 169, 172 (3d Cir. 1944); Avery v. Studley, 74 Conn. 272, 50 Atl. 752 (1901). See also Note, *Rights of Witnesses in Administrative Investigations*, 54 HARV. L. REV. 1214 (1941).

[48] 142 F.2d 787 (7th Cir. 1944).

[49] See People *ex rel.* McDonald v. Keller, 99 N.Y. 463, 484, 2 N.E. 615, 626 (1885).

[50] See, *e.g.*, Laws of N.Y. 1954, c. 414, § 73(3).

[51] See, *e.g.*, United States v. Scully, 225 F.2d 113 (2d Cir. 1955); Gilmore v. United States, 129 F.2d 199 (10th Cir.), *cert. denied*, 317 U.S. 631 (1942); *In re* Black, 47 F.2d 542 (2d Cir. 1931); United States v. Levine, 127 F. Supp. 651 (D. Mass. 1955).

Federal Administrative Procedure Act

Section 6(a) of the Federal Administrative Procedure Act was designed to confirm and effectuate the right to appear with counsel before administrative agencies. It states that:

> . . . any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be *accompanied, represented,* and *advised* by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding.[52]

The first sentence recognizes that, in the administrative process, the benefit of counsel shall be accorded as of right, just as it is recognized by the Bill of Rights in connection with the judicial process.[53] The entire section must be considered as one of the "essential rights" [54] which affects the "minimum requirements of a fair administrative hearing." [55] Accordingly, this section should be construed as liberally as possible. This was the approach taken in *United States v. Smith,*[56] which involved a proceeding to enforce a subpoena of a special agent of the Bureau of Internal Revenue requiring defendants to testify in a tax returns investigation. The court rejected the contention that the proceeding was investigatory and therefore analogous to grand jury proceedings with the same need for secrecy. It stated that the intention of the act was to establish uniform standards of fairness for the dealings of administrative bodies with the citizen. Also, that where two interpretations are possible, the interpretation should be preferred which broadens the categories of citizens touched by the administrative process to which protection is extended.

Although the court in the *Smith* case held that the witnesses summoned to appear before special agents were entitled to the presence and advice of counsel, it did not allow the witness to be represented by the same counsel that represented the taxpayer. This limitation was further discussed in *Torres v. Stradley,*[57] which showed that the witness' rights were not infringed upon since they could retain any other attorney without prejudicing the investigation. This ruling, however, seems in conflict with the express provisions of Section 6(a) which grants the right to counsel in any agency proceeding.[58] The court, however, disregarded the literal interpretation

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[52] Administrative Procedure Act § 6(a), 60 STAT. 240 (1946), 5 U.S.C § 1005(a) (1952).

[53] S. Doc. No. 248, 79th Cong., 2d Sess. 16 (1946).

[54] H.R. REP. No. 1980, 79th Cong., 2d Sess. 16 (1946).

[55] S. REP. No. 752, 79th Cong., 1st Sess. 31 (1946).

[56] 87 F. Supp. 293 (D. Conn. 1949).

[57] 103 F. Supp. 737 (N.D. Ga. 1952).

[58] The Attorney General, commenting upon the operation of § 6(a), said that the provision relates only to persons ". . . whose appearance is compelled

of Section 6(a) and reasoned that tax investigations, being wholly fact-finding in nature, are to be distinguished from administrative hearings in which legal rights of the parties may be considered and determined. Therefore, the operation of Section 6(a) was limited.

There are other definite indications that the right to counsel under Section 6(a) is also subject to agency requirements. It is limited by the right of agencies to regulate the qualifications of attorneys who may appear before them.[59] In fact, this agency power to regulate practice has not been changed by the act.[60] Thus, an agency may revoke an attorney's license to practice before it for misconduct.[61] Moreover, the power of federal agencies to allow individuals not attorneys to practice before them remains unchanged.[62] Nor does Section 6(a) impose reasonable time limits during which former employees may not practice before them.[63]

It can also be seen that the Federal Administrative Procedure Act has not extended the right to counsel in every administrative trial or proceeding. For example, in *Niznik v. United States,*[64] appellants were not denied due process when they were refused the right to counsel before the draft board. The court was not bound by the act since Section 2(a)[65] specifically exempts draft boards from its provisions even though a person's liberty is taken from him. On the other hand, it should be noted that until Section 6(a) was enacted, aliens were denied the right to counsel before the Immigration and Naturalization Service.[66]

In re Groban

An Ohio fire marshal subpoenaed the appellants to appear as witnesses in an investigation into the causes of a fire on their business premises. Pursuant to statutory provision,[67] the marshal refused to permit the appellants' counsel to be present at the proceedings. Con-

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or commanded . . . and where appearance is compelled, whether as a party or a witness, the right to counsel exists." ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 61-62 (1947).

[59] Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926).

[60] Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953).

[61] See Camp v. Herzog, 104 F. Supp. 134 (D.D.C. 1952).

[62] The last sentence of § 6(a) expressly provides that the Administrative Procedure Act is not to have any effect upon the matter.

[63] ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 61, 67 (1947).

[64] 173 F.2d 328 (6th Cir.), *cert. denied,* 337 U.S. 925 (1949).

[65] Administrative Procedure Act § 2(a), 60 STAT. 240 (1946), 5 U.S.C. § 1001(a) (1952).

[66] United States *ex rel.* Lew Chung Jon v. Commissioner of Immigration, 18 F. Supp. 641 (S.D.N.Y. 1937), *aff'd,* 96 F.2d 1023 (2d Cir. 1938).

[67] OHIO. REV. CODE ANN. § 3737.13 (Baldwin 1956). The investigation may be private and ". . . exclude . . . all persons other than those required to be present. . . ." *Ibid.*

sequently, the appellants refused to be sworn or to testify without the presence of their counsel. Such refusal was treated as a violation of another statutory provision.[68] The marshal, in accordance with a third section of the statute,[69] committed the appellants to the county jail for contempt. The Supreme Court, four justices dissenting, affirmed the Ohio Supreme Court, and held that the exclusion of the appellants' counsel during the proceeding did not work a denial of due process.[70]

The Court, although recognizing the possibility that criminal charges might ensue, nevertheless abided by the distinction between investigatory and adjudicatory proceedings. Thus, during the investigation, the witnesses may avail themselves of the privilege against self-incrimination, but had no right to the assistance of counsel. The presumption of fair and orderly conduct without coercion or distortion by state officials will prevail until challenged by contrary facts. The presence of counsel may deter the investigatory proceeding so as to make it unworkable. And with so weighty a public interest to protect as fire prevention, the Court found the denial of counsel not contrary to the traditional "fundamental principles of liberty and justice" [71] or violative of the due process clause of the fourteenth amendment.

Justice Black, in his dissenting opinion, reasoned that under the present concept of due process, the appellants and others similarly situated required the assistance of counsel. Justice Black declared that such powers contravened the principles outlined in the *Powell* opinion and showed disregard for " 'this nation's historic distrust of secret proceedings.' " [72] Counsel is necessary, he stated, to prevent the misuse of official power, especially when the investigator may be instrumental in the witness' prosecution and conviction for a criminal offense. It is also extremely difficult for a witness to rely on the privilege against self-incrimination since he may easily unwittingly waive it. Moreover, the Ohio statutes [73] authorize far more than an administrative inquiry for securing information and destroy the procedural safeguards essential for due process.

Although the majority view might appear reasonable, its reliance on the proposition that a witness can protect himself against possible abuses in a secret investigation by the assertion of the privilege against self-incrimination, weakens its position. Surely, it is foreseeable that a witness without the aid of counsel and unprotected by

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[68] *Id.* § 3737.12. "No witness shall refuse to be sworn or refuse to testify. . . ." *Ibid.*

[69] *Id.* § 3737.99. "Whoever violates section 3737.12 . . . may be summarily punished, by the officer concerned . . . until such person is willing to comply with the order of such officer." *Ibid.*

[70] *In re* Groban, 352 U.S. 330 (1957).

[71] *Ibid.* See also Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

[72] *In re* Groban, *supra* note 70, at 338 (dissenting opinion).

[73] See notes 67-69 *supra.*

the safeguards of a judicial inquiry may be misled into not claiming the privilege either by coercion or his own ignorance.[74] The Supreme Court decisions have been explicit in holding that the privilege is solely a personal one[75] for the benefit of the witness.[76] Also, if a witness testifies to some questions, he cannot thereafter claim the privilege, the theory being that by his admissions he has waived the privilege.[77] Although a state can deny the privilege completely without infringing on due process,[78] in those states where the privilege is granted, a witness may waive the right by his failure to invoke it.[79] Such might be the position of the witness in the *Groban* case, since the Ohio legislature has not required as a procedural safeguard that the fire marshal inform the witness that he has the right to assert the privilege.

The courts, however, have kept a watchful eye over the rights of witnesses. In *United States v. Bell,*[80] testimony procured against a witness was excluded. The court, apprehending the dangers which might arise, stated that one cannot rely upon the theory that every person can take care of himself in an inquisitorial examination. It is not like the examination that takes place in open court, in the presence of counsel and before judges, ". . . who are in the habit of exercising the power, if not following the duty, of warning every witness against the danger which confronts him when he is called upon to testify about incriminating matters. And owing to this peculiar nature and character of the examination itself, it needs more watching to prevent an encroachment upon the citizen's constitutional privileges."[81] Thus, the difficulty of applying the privilege against self-incrimination should compel the courts to scrutinize any infringements upon the individual rights guaranteed to a witness. The position of the majority, however, would appear to require the witness to seek refuge behind a wall that is easily breached.

The majority, although the entire Court inferred that the summary contempt proceedings were questionable, restricted itself to the question of whether the exclusion of counsel was denial of due process

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[74] Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948).

[75] See United States v. Murdock, 284 U.S. 141, 148 (1931).

[76] See McAlister v. Henkel, 201 U.S. 90, 91 (1906); Hale v. Henkel, 201 U.S. 43, 69 (1906).

[77] Rogers v. United States, 340 U.S. 367 (1951). See also Caminetti v. United States, 242 U.S. 470 (1917); Powers v. United States, 202 U.S. 150 (1906).

[78] Adamson v. California, 332 U.S. 46 (1947); Turning v. New Jersey, 211 U.S. 78 (1908).

[79] Johnson v. United States, 318 U.S. 189 (1943); United States v. Murdock, 284 U.S. 141 (1931); United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103 (1927).

[80] 81 Fed. 830 (C.C.W.D. Tenn. 1897).

[81] United States v. Bell, 81 Fed. 830, 842 (C.C.W.D. Tenn. 1897).

during the investigatory stages. The Court should not have kept the issues within such narrow procedural limits. Furthermore, the Court should not have restricted itself to appellants' first refusal to answer the fire marshal, sitting as inquisitor. Rather, the Court should have closely considered the nexus between that refusal and the witness' right to counsel when confronted with contempt proceedings which were held by the fire marshal sitting as a judge with the powers of direction and commitment. For it is well settled, except for rare occasions, that a person charged with contempt has a constitutional right to be heard through counsel.[82]

The proceeding in the instant case, although classified as investigatory, is integrated within the criminal process. The fire marshal has not only the statutory power to determine the causes of fires, but also to arrest and charge a person with a crime. Surely, such powers are beyond the simple investigatory stages of a proceeding where the assistance of counsel may be denied. They clearly exemplify powers peculiarly embodied within the criminal process. Thus, to cause a person to testify in such proceedings without legal assistance would be contrary to our basic concepts of due process.

The comparison between the marshal's investigation and that of a grand jury is also unwarranted. The grand jury consists of a group of citizens of fair character and proven integrity, free from all legal exemptions. Its powers are of great scope but well defined by law.[83] On the other hand, in the instant proceeding the marshal alone not only has investigatory powers but also coercive powers which arouse an individual to a defense of his legal rights. Consequently, to permit the exclusion of counsel in the latter proceeding would be an infringement of constitutional rights.

Conclusion

The necessity for the expansion of the administrative process has resulted in more and more informal proceedings. These informal proceedings have been upheld, where no substantive injury occurs, as long as the procedures involved are not opposed to due process concepts of decency and fairness.[84] Sufficient time has not elapsed to determine whether the Supreme Court will act as protector of the constitutional guarantee of the right to counsel in administrative proceedings. The *Groban* case, however, illustrates an undesirable emphasis on the specific form of the proceeding rather than its substance. To adhere to the distinction between investigatory and adjudicatory proceedings when the basic requirements for the protection of individual rights are jeopardized is unwarranted.

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[82] *In re* Oliver, 333 U.S. 257 (1948).

[83] Brown v. Baer, 54 F. Supp. 887 (N.D. Ill. 1943), *modified on other grounds sub nom.*, Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944).

[84] FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

Undoubtedly there is a strong belief among many that judicial reversals on procedural errors in informal proceedings would deter the administrative process. Even if that be true, the court ought not to be so liberal in protecting public rights where individual rights and liberty are involved. Rather, the objections to informal hearings must be closely subject to the Court's scrutiny. This judicial guardianship would guarantee our constitutional rights, and thereby, more effectively balance the scales between our need for the independence of administrative procedures and the preservation of individual property and liberty.

SOME ASPECTS OF WIRETAPPING IN THE FEDERAL AND NEW YORK JURISDICTIONS

Introduction

Wiretapping, a problem of our electronic civilization, has in recent years received widespread publicity. Wholesale invasions of privacy have been the order of the day. The seriousness of the situation has engendered unrestrained comment both in legal and non-legal publications.[1]

The treatment of wiretapping in its social aspects is, of course, beyond the limited bounds of this article. Its purpose is merely to sketch the evolution and present status of the law in the federal and New York jurisdictions with respect to the admissibility of wiretap material in evidence.

The Law in the Federal Jurisdiction

In *Olmstead v. United States*,[2] the United States Supreme Court faced the issue of whether wiretapping constituted an illegal search and seizure within the meaning of the fourth amendment. The defendants there were convicted of violating the National Prohibition Act. The information resulting in their conviction was obtained chiefly through the interception of the defendants' telephone conversations by federal prohibition agents. Defendants contended that the

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[1] See Westin, *The Wire-Tapping Problem: An Analysis and A Legislative Proposal*, 52 COLUM. L. REV. 165 (1952); Note, 31 N.Y.U. L. REV. 197 (1956); Note, 58 W. VA. L. REV. 268 (1956); Time, March 19, 1956, p. 67; Life, March 7, 1955, p. 45; America, Dec. 5, 1953, p. 90; The Reporter, Jan. 6, 1953, p. 6; The Reporter, Dec. 23, 1952, p. 8.

[2] 277 U.S. 438 (1928).