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Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—III

The growing trend toward inquisitions by officials has raised questions of the constitutional rights of persons subpoenaed to appear before government investigators and investigative bodies. After examining, in detail, the practices and procedures of both federal (part I) and state (part II) inquisitors, Mr. Rogge, in the third and final part of his Article, suggests that the due process clauses of the fifth and fourteenth amendments require that the subpoenaed person be afforded the following rights: the right to counsel; the right of appraisal; the right to receive a transcript of his testimony; and the right of immunity from prosecution for those offenses about which he testifies.

O. John Rogge*

X. OUR OUTMODED GRAND JURY

The present inquisitorial trend, which began a century ago, has been accompanied by a marked de-emphasis of the grand jury system. England, where the grand jury system had its early development, if not its origin, and many of the 50 states have abandoned its use. This may be a sad occurrence to some, but the fact remains.

Agitation against the English grand jury began almost 150 years ago. As early as 1827, Bentham, in his *Rationale of Judicial Evidence*, stated that the grand jury had outlived its usefulness by 250 years.¹ Even grand jurors often criticized the "utter uselessness" of the system.² In response to such pressures, and following a period during World War I when Parliament had suspended grand juries,³ in December, 1932, a committee was appointed to consider, among other things, the question of abolishing grand juries. By 1933 the House of Lords, with none of

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1. 2 BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 313 (1827).

2. Quoted in Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. AM. INST. CRIM. L. & C. 3, 12 (1938).

3. Grand Juries (Suspension) Act, 1917, 7 & 8 Geo. 5, c. 4.

the Lords at any stage speaking against the measure, had passed a bill recommending the abolition of the grand jury.⁴ The Attorney General, in moving that the bill be read a second time, reasoned that since "grand juries are not serving any really useful purpose and are at the same time very expensive and very troublesome to a large number of people . . . we ought to be prepared to abolish them."⁵ Even the opposition, in the person of Sir Stafford Cripps, agreed with the government "that this archaic procedure has ceased to have any reality in modern days."⁶ In fact, only one member of the Commons spoke against the proposal; he argued that the grand jury system provided a constitutional safeguard against arbitrary regulations of any new form of government.⁷ Yet, his admonitions, and those of the laymen who spoke against the abolition of the grand jury,⁸ were to no avail—in 1933 the Commons abolished, with insignificant exceptions, grand juries in England.⁹

The story in this country was a comparable one, with the abandonment of the use of the grand jury beginning here over a century ago. Michigan's constitution of 1850, the first inroad, did not require a grand jury; and an 1859 Michigan statute gave its courts "the same power and jurisdiction to hear, try, and

4. 88 H.L. DEB. (5th ser.) 314 (1933).

5. 279 H.C. DEB. (5th ser.) 1601 (1933).

6. *Id.* at 1607.

7. *Id.* at 1622, 1623.

8. See Elliff, *supra* note 2, at 20. A correspondent to *The Law Times*, July 5, 1933 (evidently a grand juror at some point in his life) summed up the situation this way:

Fleet Street, the Strand, and the Temple have decided that a Grand Jury is an anachronism, a superfluity, a formality, a useless vestigial remnant, a third and paralysed arm of the law, a fifth wheel on the legal coach, and we are about to be abolished in the name of efficiency.

Quoted in *id.* at 20. One strong voice outside of Parliament, that of Professor W. S. Holdsworth, still spoke up for the retention of the grand jury. On July 13, 1933 he wrote *The Law Times*:

Ever since 1681, when the Ignoramus of a grand jury saved Lord Shaftesbury from a trial for treason, it is clear that the grand jury is capable of being a real safeguard of the liberties of the subject. These liberties need safeguards even more today than they did in 1681, because bureaucrats of Whitehall who dominate the Cabinet which in turn dominates the House of Commons, have established a more effectual and a more oppressive tyranny than the Stuarts ever succeeded in establishing. We cannot in these days afford to lose one of our few remaining securities for freedom of speech and action.

Ibid.

9. Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 1.

determine prosecutions upon information for crimes, misdemeanors and offences . . . as they possess, and may exercise in cases of like prosecutions upon indictment."¹⁰ Wisconsin empowered its courts similarly in 1871.¹¹ The California constitution of 1879 provided: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a Magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law."¹²

Today, 21 states make an information available as a substitute for a grand jury indictment for all criminal prosecutions, and many of the rest permit a waiver of an indictment in all but capital or life-imprisonment cases.¹³ In some of the less-populous western states, the grand jury never did become deeply rooted. As the Chief Justice of the Supreme Court of Wyoming has written, "the grand jury system has never been employed in this State as a practical matter."¹⁴ Or, as the Assistant Attorney of Oklahoma explained more generally:

In Oklahoma, as I think you will find in most western states, prosecution by information is the usual procedure for felonies as well as other crimes. Although we still provide for grand juries in our statutes, their use and resulting prosecutions by indictment are the exception to the rule. . . . Although it is relatively easy to call a grand jury . . . , in practice they are seldom convened, and, then, usually for the purpose of investigating official misconduct of one form or another.¹⁵

10. Mich. Acts 1859, No. 138, § 1, at 391.

11. Wis. Laws 1871, ch. 137, § 1, at 202, following a state constitutional amendment of the preceding year, WIS. CONST. art. 1, § 8. The act was sustained in *Rowan v. State*, 30 Wis. 129 (1872).

12. CALIF. CONST. art. 1, § 8, upheld in *Hurtado v. California*, 110 U.S. 516 (1884); *Kalloch v. Superior Court*, 56 Cal. 229 (1880).

13. See Watts, *Grand Jury: Sleeping Watchdog or Expensive Antique?*, 37 N.C.L. REV. 290, 291 (1959). Minnesota, for example, by statute in Minn. Laws 1905, ch. 231, § 1 following a state constitutional amendment in 1904, MINN. CONST. art. 1, § 7, provided for informations as an alternative procedure to indictments in certain specified cases; this provision now applies to all but life-imprisonment cases.

14. Letter From Glenn Parker to O. John Rogge, Feb. 16, 1963.

15. Letter From Hugh H. Collum to O. John Rogge, Feb. 28, 1963.

The author received letters, all of which attested that indictment by information had virtually supplanted the grand jury, except in cases where a grand jury was required, from the following Western-state officials: Philip M. Haggerty, Assistant Attorney General of Arizona; E. T. Knudson, Chief Justice of the Supreme Court of Idaho; Thomas G. Nelson, Assistant Attorney General of Idaho; W. A. Dumars, Reporter of the Supreme Court of Kansas; James T. Harrison, Chief Justice of the Supreme Court of Montana; Paul W. White, Chief Justice of the Supreme Court of Nebraska; Gerald S. Vitamvas, Deputy Attorney General of Nebraska; Norman S. Thayer, As-

The abandonment of the use of the grand jury, to a greater or lesser extent, is by no means confined to the less-populous western states. Maine, Vermont, Michigan, and Wisconsin, to take other examples, have likewise done so. The Attorney General of Wisconsin has stated: "Although the Wisconsin Statutes still provide for grand juries, they are practically obsolete in this state since . . . the Wisconsin Constitution was amended in 1870 to permit prosecutions on informations."¹⁶ Of like tenor is a statement of the Attorney General of Vermont: "Most criminal prosecutions in Vermont are started by the information of a prosecuting attorney. Practically the only time grand juries are used are in homicide cases when such proceedings are mandatory."¹⁷ Strong voices still speak up in defense of the grand jury system,¹⁸ particularly in the Supreme Court of the United States and in the state of New York; nevertheless, with the continued growth of inquisitions by officials, the use of the grand jury will probably continue to decline.

In the face of this double trend, a witness subpoenaed to appear before inquisitorial officials should, it will be shown, be accorded four due process rights: counsel who is not confined to ear-whispering; appraisal of the nature of the inquiry as well as the subject matter about which he is to be questioned; a copy of his testimony and of any documentary material he supplies; and immunity from prosecution, unless he has knowingly waived his right of silence.

sistant Attorney General of New Mexico; Wesley N. Harry, Special Assistant Attorney General of North Dakota; Jack A. Swidensky, Assistant Attorney General of Oklahoma; Charles S. Hanson, Presiding Judge of the Supreme Court of South Dakota; Richard Hopewell, Assistant Attorney General of South Dakota; F. Henri Henriod, Chief Justice of the Supreme Court of Utah; Richard B. Ott, Chief Justice of the Supreme Court of Washington; Charles F. Murphy, Assistant Attorney General of Washington; Richard T. Anderson, Assistant Attorney General of Wyoming.

16. Letter From George Thompson to O. John Rogge, Feb. 18, 1963.

17. Letter From Charles E. Gibson, Jr. to O. John Rogge, Feb. 13, 1963. The author also received letters from Leland W. Carr, Chief Justice of the Supreme Court of Michigan and George C. West, Deputy Attorney General of Maine, both indicating that indictment by information is widely used in their respective states. Four decades earlier Professor, later Judge, R. Justin Miller in an article in the *Minnesota Law Review* published excerpts from a comparable collection of letters. Miller, *Informations or Indictments in Felony Cases*, 8 MINN. L. REV. 379, 379-80 n.6 (1924).

18. Much has been written about grand juries. A select list of articles, in addition to those already cited, includes: McClintock, *Indictment by a Grand Jury*, 26 MINN. L. REV. 153 (1942); Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 217, 295 (1931); Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

In suggesting these four due process rights for subpoenaed witnesses, there is no thought of curbing or reversing the current inquisitional trend. If the way of the future is inquisitions by officials, so be it. Nor is there in this suggestion any demand, such as counsel made in *Hannah v. Larche*,¹⁹ for confrontation and cross-examination, as well as appraisal, in administrative investigations. Although confrontation is a sixth amendment right along with appraisal, there is no attempt here to extend it to inquisitions by officials. Let these investigations be sweeping, and let the inquisitors proceed in a truly unhampered, expeditious and effective manner.

The only concern here is to safeguard to individuals subpoenaed to appear before executive or administrative investigators rights comparable to those which they had when grand juries were the accusers and our officials did not have inquisitional powers. England, despite the fact that it has abandoned the use of the grand jury, has done a better job than we have of securing to individuals a certain area free from intrusion by official inquisitors.

XI. MODERN ENGLISH PRACTICE

Those who mourn the passing of the grand jury in England may take some comfort from the habitual restraint which official inquisitors in England exercise in their preliminary questioning of suspects or accused persons. Lapses do occur,²⁰ but they would appear to be exceptional.

In 1848 Parliament passed a statute that specifically required a justice of the peace to advise an accused person of his right to remain silent in a preliminary examination. The act provided that the justice of the peace

19. 363 U.S. 420 (1960); see Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—I*, 47 MINN. L. REV. 939, 942 (1963). See also Newman, *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness*, 60 MICH. L. REV. 169, 175-76 (1961).

20. For example, "Change in the Rules?," *The Economist*, Nov. 9, 1963 (air ed.), p. 548, col. 2, an Article about the Judges' Rules began with this paragraph:

Lord Shawcross this week in Leeds condemned the "kid glove methods" supposed to be used against criminals by the English police and judiciary. The following day, a monstrous tale of police brutality emerged from nearby Sheffield. A Home Office tribunal of inquiry, set up to hear the appeals of two detective constables against their dismissal from the Sheffield police force for using (among other things) a rhinoceros-hide whip on suspects, not only found their dismissal fully confirmed, but implicated more senior officers as well.

shall say to him these Words, or Words to the like Effect: "Having heard the Evidence, do you wish to say anything in answer to the Charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial."²¹

In 1912 the judges, at the request of the Home Secretary, drew up some rules — known as the Judges' Rules — as guides for police officers. They provided, in part:

2. Whenever a police officer has made up his mind to charge a person with a crime he should first caution such person before asking any questions or any further questions as the case may be.
3. Persons in custody should not be questioned without the usual caution being first administered.
4. If the prisoner wishes to volunteer any statement the usual caution should be administered.²²

The Judges' Rules, while not absolute requirements, form the standard for evaluating police practices. Subsequently, other rules were added. The first sentence of rule 7, the most important of these rules, specifies: "A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said."²³

Other law-enforcement officials also adopted rules of conduct

21. The Indictable Offences Act, 1848, 11 & 12 Vict. 215, c. 42, § 18. In 1793, over a half-century before this statute, the court excluded an examination before a magistrate where the accused had refused to sign it. The judge reasoned that the accused had a right "to retract what he had said, and to say that it was false." *The King v. Lambe*, 2 Leach 552, 553 n.(a), 168 Eng. Rep. 379 n.(a) (Assizes 1791). In 1817 still more than three decades before this statute, Chief Baron Richards in *Rex v. Wilson*, Holt 597, 171 Eng. Rep. 353 (Assizes 1817), excluded an examination before a magistrate where the accused had not been cautioned, saying: "An examination of itself imposes an obligation to speak the truth. If a prisoner will confess, let him do so voluntarily." *Id.* at 597, 171 Eng. Rep. at 353. In a similar ruling in 1850, after this statute but without a reference to it, Chief Justice Wilde in *Regina v. Pettit*, 4 Cox Crim. Cas. 164 (1850), in rejecting such an examination, declared: "I reject it upon the general ground that magistrates have no right to put questions to a prisoner with reference to any matters having a bearing upon the charge upon which he is brought before them. The law is so extremely cautious in guarding against anything like torture, that it extends a similar principle to every case where a man is not a free agent in meeting an inquiry." *Id.* at 165.

22. Memorandum by His Majesties Judges of the King's Bench Division, Police Enquiries, Oct. 1, 1912 printed in *The King v. Voisin*, [1918] 1 K.B. 531, 539 n.3.

23. Royal Comm'n on Police Powers and Procedure, *Report*, CMD No. 3297, at 70-71 n.* (1929), quoted in *Culombe v. Connecticut*, 367 U.S. 568, 596 n.41 (1961).

designed to protect the rights of criminal defendants. In 1929 a Royal Commission on Police Powers and Procedures, which had been appointed the preceding year, made a report in which it recommended, among other things:

A rigid instruction should be issued to the Police that no questioning of a prisoner, or a "person in custody," about any crime or offense with which he is, or may be, charged, should be permitted. This does not exclude questions to remove elementary and obvious ambiguities in voluntary statements, under No. (7) of the Judges' Rules, but the prohibition should cover all persons who, although not in custody, have been charged and are out on bail while awaiting trial.²⁴

A case and an anecdote will illustrate the English approach. In the case, a woman was on trial with another for the murder of her husband. At the time of her arrest she admitted her guilt and identified the murder weapon. The arresting officer had not followed up these statements with any questions, and when defense counsel asked him why not, this colloquy took place:

Mr. Justice Humphreys: Do you really suggest, Mr. O'Connor, if after a woman has said—believe it or not—that she was a party to a crime like this, the police officer would be justified in cross-examining her at all?

Mr. O'Connor: I accept your lordship's suggestion at once, and apologise for the question.²⁵

The anecdote concerns a British constable on the witness stand who was asked whether it was true that the accused had made a statement. He answered: "No: he was beginning to do so; *but I knew my duty better*, and I prevented him."²⁶

XII. MODERN FRENCH PRACTICE

Even France, where the inquisitional system had its initial secular development, in 1897 gave an accused person the right to be represented by counsel whenever the *Juge d'Instruction* questioned him. M. Constans, one of the sponsors of the law in the French Senate, said:

The *juge d'instruction* is like other functionaries. He must be controlled. . . . The presence of the lawyer will of itself . . . prevent him from doing anything but his duty.²⁷

24. Royal Comm'n on Police Powers and Procedure, *supra* note 23, at 118.

25. JESSE, TRIAL OF ALMA VICTORIA RATTENBURY & GEORGE PERCY STONER 126-27 (Notable British Trials Series 1935).

26. FORSYTH, THE HISTORY OF LAWYERS 282 n.1 (1875), quoted in *Culombe v. Connecticut*, 367 U.S. 568, 598 n.46 (1961).

27. Quoted in Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure*, 23 J. CRIM. L., C. & P.S. 372, 381 (1932), and in *In re Groban*, 352 U.S. 330, 351-52 n.32 (1957) (Black, J., dissenting).

The *Juge d'Instruction* was required to inform an accused not that he had a right to remain silent, but that he had a right to be defended by counsel and that he need not answer questions until counsel was present. Yet counsel, when present, had only limited rights. He was entitled to speak only when the *Juge d'Instruction* authorized him to do so, although a refusal was to be noted in the minutes. The *Juge d'Instruction* was still free to try to get a confession.

Today in France under articles 114 and 118 of the Code of Penal Procedure, which went into effect on March 2, 1959, an accused before a *Juge d'Instruction* not only has a right to counsel but also is excused from taking an oath to tell the truth. In the words of Professor Robert Vouin of the University of Paris:

In France, the suspected person enjoys an effective protection as soon as he is brought before the examining magistrate as an accused. From that time, actually, he is not only excused from taking an oath to tell the truth, but also he may require the help of a barrister. The latter must be convoked by the judge to every interrogatory, permitted to study the briefing, and allowed to communicate freely with his client any time he desires.²⁸

XIII. DUE PROCESS REQUIREMENTS

1. *Right to Counsel*

The sixth amendment to the Constitution guarantees: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Although the first ten amendments were not intended to be applicable to the states,²⁹ the due process clause of the fourteenth amendment, which went into effect in 1868, has absorbed such of the specifics of the first eight amendments as are "implicit in the concept of ordered liberty"³⁰ and made them applicable to the states. This includes the right to the assistance of counsel.

28. Vouin, *Police Interrogation Privileges and Limitations Under Foreign Law*, 52 J. CRIM. L., C. & P.S. 47, 57 (1961). Professor Vouin continued with the comment: "As these protections do not facilitate their task, the examining magistrate and the police might be tempted to put off their application, delaying as long as possible the time when the suspected person is the object of a formal inculcation. But the jurisprudence has reacted against this trend by formulating a rule that the Penal Procedure Code has just adopted." *Ibid.*

Under article 70 of Code of Penal Procedure, the *Procureur de la Republique* may subpoena any person suspected of having participated in a flagrant crime; but this person, "if he reports himself, accompanied by a defence counsel, . . . may be interrogated only in the presence of the latter." As quoted in *id.* at 58.

29. See *Livingston v. Moore*, 32 U.S. (7 Pet.) 469 (1833); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833).

30. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.).

The leading case on the right to counsel under the fourteenth amendment's due process clause is *Powell v. Alabama*,³¹ which arose out of the Scottsboro prosecution. There Justice Sutherland wrote for the Supreme Court:

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 a hearing, and, therefore, of due process in the constitutional sense.³²

Since then, a long line of decisions makes plain that every defendant in every state criminal case, whether capital or noncapital, is entitled to be represented by counsel of his own choosing. A recent case, *Chandler v. Fretag*,³³ is illustrative. The defendant had pleaded guilty to a house breaking and larceny charge, but when he found that this also involved him in a mandatory sentence of life imprisonment under the Tennessee Habitual Criminal Act, he requested a continuance to enable him to obtain counsel for the habitual criminal accusation. The state court denied his request. The Supreme Court reversed, unanimously ruling, through Mr. Chief Justice Warren, that "regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified."³⁴

Courts may in no way impair this right to independent counsel of one's own choice. For example, in *Glasser v. United States*,³⁵ a federal prosecution involving several defendants, the Supreme Court held that the trial judge's assignment of counsel selected by one defendant to represent another defendant was a violation of the sixth amendment's guarantee of the assistance of counsel. The Court, speaking through Justice Murphy, reasoned:

Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. . . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.³⁶

31. 287 U.S. 45 (1932).

32. *Id.* at 69.

33. 348 U.S. 3 (1954).

34. *Id.* at 9. In *Reickauer v. Cunningham*, 299 F.2d 170, 172 (4th Cir. 1962), the court, referring to counsel of one's choice, wrote: "This right is absolute and no showing of special circumstances is necessary." In *Andrews v. Robertson*, 145 F.2d 101, 102 (5th Cir. 1944), the court observed: "The State Court has no right under the Constitution, to deny a defendant the right to counsel of his own choosing."

35. 315 U.S. 60 (1942).

36. *Id.* at 75-76.

Another illustrative case is *Releford v. United States*,³⁷ in which the attorney retained by the defendant became ill and could not attend the trial. The district judge, instead of granting the defendant a continuance to secure substitute counsel, insisted, contrary to the defendant's wishes, that the attorney who shared offices with the attorney retained by the defendant serve as his counsel. On appeal, the Ninth Circuit held for the defendant, because "where such a person is able to obtain counsel for himself and does not ask the court to appoint counsel, he must be given a reasonable time and a fair opportunity to secure counsel of his own choice."³⁸

As the *Releford* case indicates, a defendant is entitled to a reasonable amount of time to obtain counsel and to consult with him. Language in *Powell v. Alabama* supports this idea,³⁹ and in *Chandler v. Fretag* the Court stated that "a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth."⁴⁰ In addition, counsel must have adequate time and opportunity to prepare his client's defense. As the Supreme Court stated in *Hawk v. Olson*,⁴¹ "the defendant needs counsel and counsel needs time."⁴²

Furthermore, one who stands accused is entitled to private consultations with his counsel.⁴³ In *Coplon v. United States*⁴⁴ the District of Columbia Circuit reversed Judith Coplon's conviction because the government wiretapped the communications between her and her lawyer. The court ruled that this deprived her of the

37. 288 F.2d 298 (9th Cir. 1961).

38. *Id.* at 301.

39.

It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice.

287 U.S. 45, 53 (1932).

The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to consult with counsel and prepare his defense.

Id. at 59.

40. 348 U.S. 3, 10 (1954); *accord*, *House v. Mayo*, 324 U.S. 42 (1945); *Tinkle v. United States*, 254 F.2d 23 (8th Cir. 1958).

41. 326 U.S. 271 (1945).

42. *Id.* at 278; *accord*, *White v. Ragen*, 324 U.S. 760 (1945); *Tinkle v. United States*, 254 F.2d 23 (8th Cir. 1958); *United States v. Helwig*, 150 F.2d 616 (3d Cir. 1947); *Walleck v. Hudspeth*, 128 F.2d 343 (10th Cir. 1942); *Jones v. Kentucky*, 97 F.2d 335 (6th Cir. 1938).

43. See *Yung v. Coleman*, 5 F. Supp. 702, 703 (D. Idaho 1934).

44. 191 F.2d 794 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952).

effective and substantial aid of counsel, in violation of the fifth amendment's guarantee of due process and the sixth amendment's guarantee of the right to counsel in all criminal prosecutions, saying: "The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel."⁴⁵

Nor, in the federal courts, is a criminal defendant's untrammelled right to counsel of his own choice limited to members of the local bar. He can select counsel from some other jurisdiction, so long as that counsel is a duly qualified member of some accredited bar. For example, in *United States v. Bergamo*,⁴⁶ where Pennsylvania defendants selected New Jersey counsel, the Third Circuit ruled: "To hold that defendants in a criminal trial may not be defended by out-of-the-district counsel selected by them is to vitiate the guarantees of the Sixth Amendment."⁴⁷ State courts as a matter of practice often reach the same result on a *pro hac vice* theory.⁴⁸

In a criminal case, a defendant is entitled to the assistance of counsel throughout the proceedings. As the Court stated in *Powell v. Alabama*, "he requires the guiding hand of counsel at every step in the proceedings against him."⁴⁹ When a federal district court "advisedly accepted for itself the duty of representing the defendant upon the return of the verdict, and fully discharged that responsibility," the Tenth Circuit disagreed and reversed, saying:

Assuming that a court can adequately represent the defendant at any step of a contested criminal trial, that is not a substitute for, nor can it be taken in satisfaction of, the constitutional requirement that one charged with crime is entitled to the benefit of counsel who will devote his undivided energies solely and exclusively to the performance of these functions.⁵⁰

45. *Id.* at 795.

46. 154 F.2d 31 (3d Cir. 1946).

47. *Id.* at 35.

48. In *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950), the court held, with reference to members of the New York bar admitted *pro hac vice* in a state criminal prosecution in New Jersey, that "their standing with respect to this case was no different from that of any other regularly admitted local lawyer." *Id.* at 123. In the preceding paragraph of its opinion the court had observed:

. . . And they were admitted *pro hac vice* in accordance with a custom that was apparently recognized as early as 1629 by English judges of Common Pleas. This custom of permitting the appearance of out-of-state lawyers had become "general" and "uniform" in the United States as early as 1876. . . .

Id. at 122.

49. 287 U.S. 45, 69 (1932).

50. *Thomas v. Hunter*, 153 F.2d 834, 839-40 (10th Cir. 1946).

Not only does every person in every proceeding, civil as well as criminal, state as well as federal, have the absolute and unqualified right to obtain independent counsel of his own choice, but also every criminal defendant is entitled to the effective assistance of counsel whether he requests it or not. For the federal courts, Rule 44 of the Federal Rules of Criminal Procedure covers the assignment of counsel:

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 obtain counsel.

At one time the right to the assignment of counsel was not as extensive in state as in federal criminal prosecutions. Although every defendant in state capital cases, as well as every defendant in state noncapital cases "where the circumstances show that his rights could not have been fairly protected without counsel,"⁵¹ was entitled to have counsel assigned to him whether he asked for it or not, this was not true in state noncapital cases where the refusal or failure to appoint counsel did not result in fundamental unfairness. This was *Betts v. Brady*.⁵² But at the last Supreme Court term, in *Gideon v. Wainwright*,⁵³ the Court unceremoniously overruled *Betts v. Brady*. Now, all defendants in all criminal prosecutions, in state as well as federal courts, in non-capital as well as capital cases, have the right to counsel: in the federal courts under the specific provision for "the Assistance of Counsel" of the sixth amendment as well as the due process clause of the fifth, and in the state courts under the due process clause of the fourteenth amendment. In *Gideon*, Mr. Justice Black wrote for the Court: "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."⁵⁴

Twenty-three states and commonwealths by their attorneys general filed a brief amici curiae on behalf of the petitioner asking the Court to overrule *Betts v. Brady*. The attorneys general in the conclusion of their brief amici declared:

51. Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 118 (1956).

52. 316 U.S. 455 (1942).

53. 372 U.S. 335 (1963).

54. *Id.* at 344. Gideon on a retrial, with the benefit of counsel, was acquitted. N.Y. Times, Aug. 6, 1963, p. 2, cols. 2-4. On where to draw the line between crimes and petty offenses, see Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 62-88 (1963).

Betts v. Brady, already an anachronism when handed down, has spawned twenty years of bad law. That in the world of today a man may be condemned to penal servitude for lack of means to supply counsel for his defense is unthinkable. We respectfully urge that the conviction below be reversed, that *Betts v. Brady* be reconsidered, and that this Court require that all persons tried for a felony in a state court shall have the right to counsel as a matter of due process of law and of equal protection of the laws.⁵⁵

The Court agreed.⁵⁶

The Supreme Court's insistence on the right to counsel has been such that at each recent term the Court has set aside a number of convictions because defendants have been denied the effective assistance of counsel. At the 1960 term, *Ferguson v. Georgia*,⁵⁷ *Reynolds v. Cochran*,⁵⁸ and *McNeal v. Culver*,⁵⁹ were decided.

In *Ferguson* the Court held that a Georgia practice which allowed a criminal defendant to make an unsworn statement but denied him the aid of counsel's questioning while making it unconstitutionally deprived him of the effective assistance of counsel. This case arose out of the fact that Georgia retained the old common-law rule that a defendant in a criminal case could not be sworn on his own behalf. Justices Frankfurter and Clark would have gone further than the rest of the Court: they would have held that this old rule itself violated the fourteenth amendment's due process clause. Mr. Justice Clark characterized it "as an unsatisfactory remnant of an age gone by."⁶⁰

Reynolds involved a second-offender statute. The defendant asked for a continuance to enable his lawyer to attend the proceedings. The Criminal Court of Polk County, Florida, denied his request. The Supreme Court reversed, overruling the state's contention that the denial of the defendant's motion for a continuance was harmless error. The Court, in an unanimous opinion by Mr. Justice Black, said:

The argument offered in support of this contention is that since petitioner admitted the only fact at issue in the proceeding—that he had been convicted of a previous felony in 1934 as charged in the informa-

55. Brief for the State Governments Amici Curiae, pp. 24–25. The states and commonwealths as listed were Massachusetts, Minnesota, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Missouri, Nevada, Ohio, North Dakota, Oregon, Rhode Island, South Dakota, Washington, West Virginia, and Alaska, for a total of 22. The state of New Jersey was omitted by inadvertence and added later.

56. 372 U.S. at 345.

57. 365 U.S. 570 (1961).

58. 365 U.S. 525 (1961).

59. 365 U.S. 109 (1961).

60. 365 U.S. at 602.

tion—a lawyer would have been of no use to him. We find this argument totally inadequate to meet the decision in *Chandler*. Even assuming, which we do not, that the deprivation to an accused of the assistance of counsel when that counsel has been privately employed could ever be termed “harmless error,” it is clear that such deprivation was not harmless under the facts as presented in this case. . . .⁶¹

In a footnote, Mr. Justice Black added:

It is significant that in *Chandler* we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel.⁶²

The cases decided at the 1961 term were *Carnley v. Cochran*,⁶³ *Chewning v. Cunningham*,⁶⁴ and *Hamilton v. Alabama*.⁶⁵ In *Hamilton* the Court reversed an Alabama murder conviction because the petitioner did not have counsel at his arraignment, quoting the language from *Powell v. Alabama* to the effect that such an accused needed the guiding hand of counsel at every step in the proceedings against him.⁶⁶

At the last term there were, in addition to *Gideon v. Wainwright*,⁶⁷ *White v. Maryland*⁶⁸ and *Douglas v. California*.⁶⁹ In *White* the Court, following *Hamilton*, upset a Maryland murder conviction because the accused did not have counsel at his preliminary hearing.

In *Douglas*, decided the same day as *Gideon*, the Court vacated a California conviction on the ground that the two defendants there involved were entitled to counsel on an appeal which they had as of right, even though the California District Court of Appeal stated that it had “gone through” the record and had come to the conclusion that “no good whatever could be served by the appointment of counsel.”⁷⁰

At the present term there have already been a dozen comparable rulings. In *Pickelsimer v. Wainwright*,⁷¹ involving 10 Florida prisoners who were convicted without counsel prior to the *Gideon* ruling, and *Newsome v. North Carolina*,⁷² the Court

61. 365 U.S. at 531.

62. *Id.* at 531 n.12.

63. 369 U.S. 506 (1962).

64. 368 U.S. 443 (1962).

65. 368 U.S. 52 (1961).

66. *Id.* at 54.

67. 372 U.S. 335 (1963).

68. 373 U.S. 59 (1963).

69. 372 U.S. 353 (1963).

70. 187 Cal. App. 2d 802, 812, 10 Cal. Rep. 188, 195 (1961).

71. 375 U.S. 2 (1963).

72. 375 U.S. 21 (1963).

vacated judgments of conviction with the indication that it might even apply the *Gideon* ruling retroactively. In *Daegele v. Kansas*⁷³ it indicated similarly with reference to its holding in *Douglas v. California*.

The basic theories of our judicial system demand protection of the right to independent counsel. This is hardly the time either to deprive witnesses subpoenaed to appear before an executive or administrative inquisitor of the right to counsel altogether, or to cut down the role of such counsel to ear-whispering. An excerpt from the record in *FCC v. Schreiber*,⁷⁴ in which the Ninth Circuit recently did limit counsel to ear-whispering, demonstrates what can happen when counsel, although permitted to accompany his client, is so confined.

Chief Hearing Examiner: May I interrupt you, sir. Let me ask whether you are satisfied that, generally speaking, television programs are not having adverse effects on any segments of the population, particularly teenagers?

Mr. Morris: I don't consider myself qualified to answer that question, sir.

Chief Hearing Examiner: Have you given it any thought, sir, in connection with your work? I assume you must have.

Mr. Morris: Yes, a very great deal.

Chief Hearing Examiner: You have no view to give the Commission in that behalf?

Mr. Morris: May I consult with counsel?

Chief Hearing Examiner: I see no reason why counsel should be consulted on a thing of this kind. There is no legal question presented. You have reviewed, over a period of 14 months, some 300 plays being produced and readied for consumption by the public.

Now, you must have some views, you must have given it thought and considerable time. What do you say here now—without consulting counsel? You don't need the advice of counsel to answer a question like that.⁷⁵

On the contrary, counsel should have the right to make objections, to advise his client, and, when the inquisitor has finished with his interrogation, to conduct his own examination of his client to the end that the subpoenaed witness may present his account as best it suits him and his counsel. Of the multitude of inquisitorial agencies we have studied, two show a proper regard in their procedures of the right to counsel in investigative proceedings: the Arkansas State Sovereignty Commission; and the

73. 375 U.S. 1 (1963); *accord*, *Shockey v. Illinois*, 375 U.S. 22 (1963).

74. 201 F. Supp. 421 (S.D. Cal. 1962), *modified and affirmed*, 329 F.2d 517 (9th Cir. 1964).

75. Quoted in brief for Respondents, pp. 33-34.

Hawaii Commission on Subversive Activities. The Arkansas act provides:

Witnesses at Commission hearings shall have the right to be accompanied by counsel, of their own choosing, who shall have the right to advise witnesses of their rights and to make brief objections to the relevancy of questions and to procedure. . . . Every witness who testifies in a hearing shall have a right to make an oral statement and to file a sworn statement which shall be made a part of the transcript of such hearing, but such oral or written statement shall be relevant to the subject of the hearing.⁷⁶

Hawaii has a comparable statutory provision:

The commission shall adopt proper rules to provide:

(b) That witnesses will have the right to be accompanied by counsel, permitted to advise the witness while on the stand of his rights;

(c) That witnesses may be permitted reasonable opportunity at the conclusion of the examination by the commission to supplement their testimony in writing on matters with regard to which they have been previously examined. . . .⁷⁷

These provisions, unfortunately, are exceptions.

Nevertheless, our course as "a maturing society"⁷⁸ has been to enlarge the role of counsel, not to restrict it. Nowhere is this fact better illustrated than in the brief amici of the attorneys general of 23 states and commonwealths in *Gideon v. Wainwright*. If they could say, as they did, that *Betts v. Brady* was already an anachronism when it was decided, then the time has come when with the same approach we can give a due process right to counsel to individuals subpoenaed before official inquisitors in investigative proceedings. *In re Groban*⁷⁹ and *Anonymous v. Baker*⁸⁰ — both sanctioning secret inquisitorial proceedings from which counsel for subpoenaed witnesses are excluded — should

76. ARK. STAT. ANN. tit. 6, § 6-812 (Supp. 1963).

77. HAWAII REV. LAWS ch. 361, § 361-5 (1955).

78. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J., joined by Black, J., Douglas, J., and Whittaker, J.), quoted in *Rudolph v. Alabama*, 375 U.S. 889, 890 (1963) (Goldberg, J., dissenting, joined by Douglas, J. and Brennan, J.) (denial of certiorari); cf. *Massiah v. United States*, 392 U.S. 170, 175 (1968) (U.S. May 18, 1964), in which the Supreme Court held that an indicted defendant was denied his sixth amendment right to counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

79. 352 U.S. 930 (1957); see Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—II*, 48 MINN. L. REV. 557, 558-59 (1964).

80. 360 U.S. 287 (1959); see Rogge, *supra* note 19, at 558-59.

both be overruled as unceremoniously as *Betts v. Brady* was, the next time the question presents itself.⁸¹

2. *Right of Appraisal*

The right of appraisal is one of the fundamental concepts of Anglo-American justice. It is embodied in the sixth amendment to the Constitution, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him. . . ." If necessary, confrontation could be sacrificed in the interest of expediency in administrative investigations; but the right of appraisal should be extended to such proceedings, and six recent Supreme Court decisions, *Watkins v. United States*,⁸² *Deutsch v. United States*,⁸³ *Russell v. United States*,⁸⁴ *Grumman v. United States*,⁸⁵ *Silber v. United States*,⁸⁶ and *Hartman v. United States*,⁸⁷ involving eleven individuals, furnish supporting analogies for a due process right of appraisal in administrative investigations.

In all these cases the Court upset judgments of conviction for contempt of Congress. The contempts consisted of refusals to answer questions either of the Senate Internal Security Subcommittee or of a subcommittee of the House Committee on Un-American Activities. The relevant statute made it an offense to refuse "to answer any question pertinent to the question under inquiry."⁸⁸ In *Watkins* the Court reversed a judgment of conviction with instructions to dismiss the indictment because the petitioner was not apprised of the pertinency of the questions at the time he was called upon to answer them. Mr. Chief Justice Warren in the Court's opinion wrote:

81. On June 4, 1963 Senator Everett M. Dirksen from Illinois, for himself and Senator Edward V. Long from Missouri, introduced a bill, S. 1603, 88th Cong., 1st Sess. (1963), which rewrites the Administrative Procedure Act. 109 CONG. REC. 9379 (daily ed. June 4, 1963). This bill revises the first sentence of section 6(a) to read: "Any person appearing voluntarily or involuntarily before any agency or representative thereof in the course of an investigation or in any agency proceeding shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

82. 354 U.S. 178 (1957).

83. 367 U.S. 456 (1961).

84. 369 U.S. 749 (1962).

85. 370 U.S. 288 (1962).

86. 370 U.S. 717 (1962).

87. 370 U.S. 724 (1962).

88. 54 Stat. 942 (1938), 2 U.S.C. § 192 (1958).

Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.⁸⁹

The Chief Justice stated that the Court was mindful of the complexities of modern government and of the need of Congress for information, but added:

Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations . . . that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses.⁹⁰

89. 354 U.S. at 214-15.

90. *Id.* at 215; *accord*, Knowles v. United States, 280 F.2d 696 (D.C. Cir. 1960) (Mrs. Mary Knowles, the librarian of a library operated by the Quakers of Plymouth Meeting, Pennsylvania); Watson v. United States, 280 F.2d 689 (D.C. Cir. 1960) (Mrs. Goldie E. Watson, a Philadelphia school teacher); Singer v. United States, 247 F.2d 535 (D.C. Cir. 1957) (Professor Marcus Singer of Cornell University); *cf.* Yellin v. United States, 374 U.S. 109 (1963) (conviction of Edward Yellin, a graduate student in engineering at the University of Illinois, reversed because a subcommittee of the House Committee on Un-American Activities had not complied with the Committee's own rules); Scull v. Virginia, 359 U.S. 344, 353 (1959) (the purposes of an inquiry of the Legislative Investigative Committee of the Virginia General Assembly, as announced by its chairman, "were so unclear, in fact conflicting, that Scull did not have an opportunity of understanding the basis for the questions or any justification on the part of the Committee for seeking the information he refused to give"); Sacher v. United States, 356 U.S. 576 (1958) (the Court decided that the questions put to Harry Sacher, a New York lawyer, were not clearly pertinent to the subject on which a subcommittee of the Senate Internal Security Subcommittee had been authorized to take testimony); Brewster v. United States, 255 F.2d 899 (D.C. Cir.), *cert. denied*, 358 U.S. 842 (1958) (the Permanent Subcommittee on Investigations of the Committee on Government Operations, usually known as the McCarthy Committee, had exceeded its authority); United States v. Yarus, 198 F. Supp. 425 (S.D.N.Y. 1961) (the court acquitted Martin Yarus, an actor known professionally as George Tyne, because the government could not introduce sufficient competent evidence of the authority of a subcommittee of the House Committee on Un-American Activities to conduct an investigation); United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956) (where the court acquitted Leon J. Kamin, a research assistant in Harvard's Department of Social Relations, on the ground that the McCarthy Committee had exceeded its authority).

In *Grant v. United States*, 291 F.2d 227 (2d Cir. 1961), the court had this comment on a revenue agent's failure to advise a taxpayer that a civil

In *Deutsch* the Court reversed because the government did not prove the pertinency of the questions put at petitioner's trial.

As our cases make clear, two quite different issues regarding pertinency may be involved in a prosecution under 2 U.S.C. § 192. One issue reflects the requirement of the Due Process Clause of the Fifth Amendment that the pertinency of the interrogation to the topic under the congressional committee's inquiry must be brought home to the witness at the time the questions are put to him. . . . The other and different pertinency issue stems from the prosecution's duty at the trial to prove that the questions propounded by the congressional committee were in fact "pertinent to the question under inquiry" by the committee.⁹¹

audit to determine tax liability had become a search for evidence of fraud:

It would of course be far preferable, so that it may be made certain that the choice of the taxpayer be an informed choice, that written warning be given when the civil audit is suspended as such, and the investigation becomes one to determine whether criminal or civil fraud penalties should be sought by the government. This would not only protect the taxpayer's constitutional rights, but also obviate much of the delay in tax cases caused by such motions as the one before us.

Id. at 228.

91. 367 U.S. at 467-68; *accord*, *O'Connor v. United States*, 240 F.2d 404 (D.C. Cir. 1956) (Harvey O'Connor, an author); *Bowers v. United States*, 202 F.2d 447 (D.C. Cir. 1953) (George L. Bowers, who refused to answer questions of a subcommittee of the Senate's Special Committee to Investigate Organized Crime in Interstate Commerce, frequently known as the Kefauver Committee); *United States v. Peck*, 154 F. Supp. 603 (D.D.C. 1957) (Seymour Peck, an employee of *The New York Times*). In the *O'Connor* case the court stated:

We pointed out that the Fifth Amendment privilege against self-incrimination is a personal privilege which must be seasonably asserted, else it is waived, but that pertinency of the question is an essential element of the crime of contempt and must be proved at the trial. It is true that pertinency is made an essential element by the statute defining the crime, while definiteness is not. . . . But the Sixth Amendment to the Constitution makes definiteness an essential element of every crime. For this reason, definiteness as well as pertinency, must appear at the trial itself.

O'Connor v. United States, *supra* at 405-06.

Between the *Watkins* and *Deutsch* cases came *Barenblatt v. United States*, 360 U.S. 109 (1959). This case involved a judgment of conviction under 54 Stat. 942 (1938), 2 U.S.C. § 192 (1958) against Lloyd Barenblatt, an instructor at Vassar College, who refused to answer questions of a subcommittee of the House Committee on Un-American Activities. But the Court affirmed. In the *Barenblatt* and *Deutsch* decisions the Court divided five to four. In the *Barenblatt* case the dissenters were Mr. Chief Justice Warren and Justices Black, Douglas and Brennan; in the *Deutsch* case they were Justices Frankfurter, Clark, Harlan and Whittaker. On the differences in the Court's approach in the *Watkins* and *Barenblatt* decisions, see Slotnick, *The Congressional Investigating Power: Ramifications of the Watkins-Barenblatt Enigma*, 14 U. MIAMI L. REV. 381 (1960).

In the rest of the cases, the Court reversed because the indictments did not identify the subjects under inquiry at the times the defendants were recalcitrant. The indictments were all in the terms of the statute — they alleged that the questions which the defendants refused to answer “were pertinent to the question then under inquiry.”⁹² The Court held all of them insufficient. Mr. Justice Stewart, speaking for the Court, referred in passing to the distinction he had drawn for the Court in *Deutsch*, between the issue of pertinency there involved and the one involved in *Watkins*.⁹³ He commented that the constitutional provision for indictment by a grand jury “reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166.”⁹⁴ He concluded that

The vice which inheres in the failure of an indictment under 2 U.S.C. § 192 to identify the subject under inquiry is thus the violation of the basic principle “that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him. . . .”⁹⁵

If a recalcitrant witness subpoenaed in a congressional investigation is entitled to be advised of the pertinency of the questions put to him at the time he is asked them, to an indictment (in the event there is one) which identifies the subject under inquiry, and, at his trial, to proof of the pertinency of these questions, an explanation which describes “what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it”⁹⁶ would seem to be warranted as a matter of due process in administrative investigations.

92. 369 U.S. at 752.

93. On this point he wrote: “In the *Watkins* case the Court’s primary concern was not whether pertinency had been proved at the criminal trial, but whether the petitioner had been apprised of the pertinency of the questions at the time he had been called upon to answer them. These two issues are, of course, quite different. See *Deutsch v. United States*, 307 U.S. at 407–408. . . . But identification of the subject under inquiry is essential to the determination of either issue. See *Barenblatt v. United States*, 300 U.S. at 123–125. . . .” 369 U.S. at 759 n.9.

94. *Id.* at 761.

95. *Id.* at 766; *accord*, *Popper v. United States*, 306 F.2d 290 (2d Cir. 1962) (Martin Popper, a New York lawyer); *cf.* *United States v. Seeger*, 303 F.2d 478 (2d Cir. 1962) (the court held the indictment of Peter Seeger, a folk singer, insufficient for failure to allege that an inquiry of a subcommittee of the House Committee on Un-American Activities was within the scope of its authority); *United States v. Lamont*, 236 F.2d 312 (2d Cir. 1956), *affirming* 18 F.R.D. 27 (S.D.N.Y. 1955) (the court ruled similarly with reference to indictments of recalcitrant witnesses before the McCarthy Committee).

96. *Watkins v. United States*, 354 U.S. 178, 215 (1957).

True, these six cases involve judgments of conviction under indictments by a grand jury, but the recalcitrance of subpoenaed witnesses in administrative investigations often constitute contempt or offenses without more. In *In re Groban*⁹⁷ they did. True, under the relevant statute the offenses consisted in the refusals to answer questions "pertinent to the question under inquiry," but congressional investigations are generally as broad as inquisitions by officials. If congressional witnesses are entitled to the detailed right of appraisal which these six cases specify, then subpoenaed witnesses before inquisitorial officials should be entitled on due process grounds to know the nature of the inquiry, as well as the subject matter about which they are to be interrogated.

Nevertheless, provisions for this kind of a right of appraisal in administrative investigations are hard to find, although they do exist. Again the Arkansas State Sovereignty Commission and the Hawaii Commission on Subversive Activities furnish good examples. The Arkansas act provides:

At least twenty-four (24) hours prior to his testifying, a witness shall be given a copy of that portion of the motion or resolution scheduling the hearing; . . . at the same time he shall be given a statement of the subject matter about which he is to be interrogated.⁹⁸

Comparably, Hawaii requires its commission to adopt proper rules to provide "(a) That the subject of any investigation be set forth clearly in advance to witnesses called."⁹⁹ These provisions, however, constitute rare exceptions. Instead, they should be the rule, and due process should be held to require it.

3. *Right to a Transcript*

A third due process right which should be accorded an individual subpoenaed before an official inquisitor is that to a copy, if he wishes it, of any testimony he gives or any documentary material he supplies. In our industrial and automated day and age with more mechanical reproducing devices than one can list, there should be no problem about this.¹⁰⁰ If the witness can afford to pay for a copy, let him do so; if he cannot, give him a copy free.

97. 352 U.S. 330 (1957); see Rogge, *supra* note 19, at 940-41.

98. ARK. STAT. ANN. tit. 6, § 812 (Supp. 1963).

99. HAWAII REV. LAWS ch. 361, § 5 (1955).

100. S. 1663, 88th Cong., 1st Sess. (1963), the bill of Senators Dirksen and Long, which would rewrite the Administrative Procedure Act, revises section 6(b) to provide: "Every person who submits data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except as provided by rules prescribed by the

The only real objection the government can have to this course is that the witness will remain consistent in his account. But if his account is accurate, he should remain consistent. If it is not, let the government prove its errors or falsities by other means than the mouth of the witness who makes them. As for any other objections the government may have, the short answer is that the government should be above any kind of shell game tactics with the individual.

Again, Supreme Court decisions, this time four in number, *Griffin v. Illinois*,¹⁰¹ *Eskridge v. Washington Prison Bd.*,¹⁰² *Lane v. Brown*,¹⁰³ and *Draper v. Washington*,¹⁰⁴ point the way. In *Griffin* and *Eskridge* the Court concluded that indigent defendants in state criminal cases were entitled to a free copy of the trial transcript where this was necessary for them to "be afforded as adequate appellate review as defendants who have money enough to buy transcripts."¹⁰⁵ In *Draper* the Court held that the trial judge's conclusion that an indigent's appeal was frivolous was an "inadequate substitute for the full appellate review available to nonindigents in Washington, when the effect of that finding is to prevent an appellate examination based upon a sufficiently

Supreme Court governing the procedure required by section 9(a)."

Section 9(a), as revised, limits the imposition of certain sanctions "except upon a finding of probable cause by twelve or more jurors of a grand jury, summoned by the district court in the district in which the respondent resides or has his principal place of business." The bill continues:

The district courts shall have authority to summon grand juries having not less than sixteen or more than twenty-three members, which shall be separate from grand juries hearing criminal matters, at such times as the public interest requires upon request in writing by agencies having matters to present to grand juries and pursuant to rules prescribed by the Supreme Court. Such rules shall be prescribed by the Supreme Court as soon as practicable and shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the 1st day of May, and until the expiration of ninety days after they have been thus reported. The release of any information (1) concerning any such grand jury proceeding until after a finding of probable cause by such grand jury and notice thereof to the parties, or (2) concerning any nonpublic investigation by an agency until after the termination of the investigation by the agency with the announcement that it will not commence any such proceeding, shall be governed by the rules prescribed by the Supreme Court.

101. 351 U.S. 12 (1956).

102. 357 U.S. 214 (1958).

103. 372 U.S. 477 (1963); *accord*, *Cooper v. Alabama*, 375 U.S. 23 (1963).

104. 372 U.S. 487 (1963).

105. 351 U.S. at 19; 357 U.S. at 216.

complete record of the trial proceedings themselves."¹⁰⁶

Lane v. Brown involved a postconviction proceeding: there had already been a direct appeal to the state supreme court and a denial of certiorari by the United States Supreme Court.¹⁰⁷ Yet, because the rules of the Indiana Supreme Court permitted an appeal from the denial of a writ of error coram nobis and for such an appeal required a transcript of the coram nobis hearing, the Court held that an indigent was entitled to such a transcript, even though the public defender, who represented him, was "unable to find any error or errors that would have any merit to assign upon an appeal."¹⁰⁸

If under these varying circumstances, defendants in criminal cases are entitled to a transcript or a "sufficiently complete record," then we have reached the point where we can afford to give a due process right to a transcript as well as a copy of documentary evidence to subpoenaed witnesses in inquisitions by officials.

4. *Right to Immunity from Prosecution*

So far we would seem to be on rather firm ground. Now we enter a more controversial area; for as a fourth due process right for individuals subpoenaed to appear before inquisitorial officials, the author suggests immunity from prosecution for offenses that the subpoenaed witness testifies about, unless he has knowingly waived his right of silence.¹⁰⁹ This means converting the Court's ruling in *United States v. Monia*¹¹⁰ into a due process right applicable to any type of compulsory testimony provision;

106. 372 U.S. at 499-500.

107. *Brown v. State*, 239 Ind. 184, 154 N.E.2d 720 (1958), *cert. denied*, 361 U.S. 936 (1960).

108. 372 U.S. at 482 n.10. In *Hardy v. United States*, 375 U.S. 277 (1964), the Court held that an indigent defendant with a new lawyer on appeal was entitled to a free transcript of his entire trial, so that his new lawyer could look for plain errors.

109. The Court established the waiver doctrine under Chief Justice Vinson in the case of Mrs. Jane Rogers, who was treasurer of the Communist party in Denver until 1948. She told about herself, but refused to identify the person to whom she had given the party's books, saying, "I don't feel that I should subject a person or persons to the same thing that I'm going through." Subsequently she based her refusal on her right of silence. Chief Justice Vinson in the Court's opinion told her she had waived it. *Rogers v. United States*, 340 U.S. 367 (1951); *accord*, *United States v. St. Pierre*, 132 F.2d 837 (2d Cir. 1942), *cert. granted*, 318 U.S. 751, *case dismissed as moot*, 319 U.S. 41 (1943). A recent waiver case involving an alleged deviant in the labor field is *Presser v. United States*, 284 F.2d 233 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 816 (1961).

110. 317 U.S. 424 (1943).

and even if there is no such provision. In the *Monia* case the Court held that under the older form of compulsory testimony provision, exemplified by the Compulsory Testimony Act of 1893,¹¹¹ a witness obtained immunity from prosecution even though he had not claimed his right of silence.

In England police officers have to advise accused persons of their right of silence; but such a course would seem strange to many of our officials, and there is no point in arguing for it. Indeed, in *In re Groban*¹¹² Mr. Justice Frankfurter in a concurring opinion in which Mr. Justice Harlan joined, all but made fun of the idea that an individual might not be aware of his right of silence:

We are not justified in invalidating this Ohio statute on the assumption that people called before the Fire Marshal would not be aware of their privilege not to respond to questions the answers to which may tend to incriminate. At a time when this privilege has attained the familiarity of the comic strips, the assumption of ignorance about the privilege by witnesses called before the Fire Marshal is too far-fetched an assumption on which to invalidate legislation.¹¹³

Nor is there any point in making a general attack on the constitutionality of compulsory testimony acts. We have had such acts too long¹¹⁴ and the Supreme Court has sustained them too many times¹¹⁵ for any such attack to be feasible. The author questioned the utility of such acts¹¹⁶ and specifically challenged the validity of the Immunity Act of 1954,¹¹⁷ one of the acts which the Court sustained. He again questioned the utility of such acts in the second installment of this Article.¹¹⁸ Compulsory testimony acts have become so much a part of our way of life, however, that

111. 27 Stat. 443 (1893), 49 U.S.C. § 46 (1958).

112. 352 U.S. 330 (1957).

113. *Id.* at 337.

114. The author traced the history of such acts in ROGGE, *THE FIRST AND THE FIFTH* 204-11 (1960); Rogge, *Compelling the Testimony of Political Deviants*, 55 MICH. L. REV. 375-83 (1957).

115. *Piemonte v. United States*, 367 U.S. 556 (1961) (immunity provision in the Narcotic Control Act of 1956); *Reina v. United States*, 364 U.S. 507 (1960) (same); *Brown v. United States*, 359 U.S. 41 (1959) (Compulsory Testimony Act of 1893); *Ullmann v. United States*, 350 U.S. 422 (1956) (Immunity Act of 1954); *Brown v. Walker*, 161 U.S. 591 (1896) (Compulsory Testimony Act of 1893).

116. ROGGE, *op. cit. supra* note 114, at 269-73; Rogge, *supra* note 114, at 404-11.

117. ROGGE, *op. cit. supra* note 114, at 215-28.

118. Rogge, *Inquisitions by Officials: A Study of Due Process Requirements in Administrative Investigations—II*, 48 MINN. L. REV. 557, 577-78 (1964).

the writer is prepared to accept them — with one qualification, the validity of the clause that became current with the Securities Act of 1933,¹¹⁹ and under which a subpoenaed individual has to claim his privilege against self-incrimination before obtaining immunity from prosecution.

Recently a joint resolution of Congress¹²⁰ gave inquisitorial subpoena powers to the presidential commission, headed by Mr. Chief Justice Warren, to investigate the assassination of President John F. Kennedy. The joint resolution passed the Senate unanimously on December 9, 1963,¹²¹ and the House in like manner on the following day.¹²² The measure would have passed the country at large with almost equal unanimity. It contained a compulsory testimony provision of the type which became current with the Securities Act of 1933: a subpoenaed individual can obtain immunity from prosecution only "after having claimed his privilege against self-incrimination."¹²³ Even this type of immunity provision was considered too favorable for subpoenaed witnesses, for under the joint resolution any member of the Commission as well as any agent or agency designated by it could take testimony, and thus presumably confer immunity from prosecution.¹²⁴

¹¹⁹ 48 Stat. 86 (1933), 15 U.S.C. 77v(c) (1958).

¹²⁰ S.J. Res. 137, 88th Cong., 1st Sess., 109 CONG. REC. 22639-40, 22787 (daily ed. Dec. 9, 10, 1963).

¹²¹ S.J. Res. 137, 88th Cong., 1st Sess., 109 CONG. REC. 22639 (daily ed. Dec. 9, 1963).

¹²² S.J. Res. 137, 88th Cong., 1st Sess., 109 CONG. REC. 22787 (daily ed. Dec. 10, 1963).

¹²³ S.J. Res. 137, 88th Cong., 1st Sess., 109 CONG. REC. 22640, 22787 (daily ed. Dec. 9, 10, 1963).

¹²⁴ The joint resolution gave its inquisitorial subpoena powers to the Commission or any of its members "when so authorized by the Commission." But: "The Commission, or any member of the Commission or any agent or agency designated by the Commission for such purpose, may administer oaths and affirmations, examine witnesses, and receive evidence." This caused Congressman George Meader from Michigan to comment:

I would like to ask the chairman of the Committee on the Judiciary, first, if it has not been the long-standing policy of the Committee on the Judiciary not to adopt legislation authorizing the Attorney General to grant immunity to witnesses; and, second, if this immunity to witnesses is exercised by the Commission, that it is the hope of our Committee on the Judiciary that it will be exercised wholly as Commission action and not by any one member of the Commission or any agent designated by the Commission:

S.J. Res. 137, 88th Cong., 1st Sess., 109 CONG. REC. 22788 (daily ed. Dec. 10, 1963).

But if the privilege against self-incrimination is as well known to subpoenaed individuals as the comic strips, as Justices Frankfurter and Harlan said it was, than it is even better known to official inquisitors. Let us therefore place upon these officials the duty of obtaining from a subpoenaed individual a waiver of his right of silence. Upon their failure to do so, the subpoenaed individual should be immune from prosecution. Let us do this whatever the type of immunity provision, and even if there is no provision at all. The fact that an inquisitorial official is functioning by means of subpoenas (except those of a grand jury or of legislatures)¹²⁵ should be enough, without more, to bring this due process right into operation. The waiver can be recorded either at the outset of the transcript or in a separate document. Some statutes specifically provide for the filing of a written waiver of one's privilege against self-incrimination.¹²⁶

An interesting recent case, *Jones v. United States*,¹²⁷ points in the suggested direction. The government took before a grand jury an individual against whom it sought an indictment and questioned him. Although the prosecutor told him that he need not answer questions, he did not tell him that the grand jury would use his answers to decide whether to indict him. The District of Columbia Circuit not only reversed his conviction but also directed the dismissal of the indictment, saying:

We said in 1955: "No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure." *Powell v. United States* . . . We now answer this question in the negative. We cannot reconcile that procedure, which was used in this case, with the Fifth Amendment guarantee that "No

125. In Maryland the House of Delegates of the General Assembly can act as the grand inquest of the state. The first sentence of § 24 of article 3 of the Maryland Constitution provides: "The House of Delegates may enquire, on the oath of witnesses, into all complaints, grievances and offences, as the Grand Inquest of the State, and may commit any person, for any crime, to the public jail, there to remain, until discharged by due course of law." With reference to § 24, Chief Judge Frederick W. Brune of the Maryland Court of Appeals wrote: "Probably the most important investigative power, other than a grand jury, in this State is the House of Delegates of the General Assembly. . . . This power conferred upon the House of Delegates is rarely exercised in practice." Letter to O. John Rogge, April 24, 1963.

126. See, e.g., FLA. STAT. § 624.0121 (1960); N.Y. INS. LAW § 25.

127. 327 F.2d 867 (D.C. Cir. 1964).

person shall be compelled in any criminal case to be a witness against himself."¹²⁸

Of course the establishment of a due process right of immunity from prosecution, absent a waiver, for subpoenaed witnesses in administrative investigations means that federal immunity provisions that began with the Securities Act of 1933 violate the due process clause of the fifth amendment; and similar state provisions, violate that of the fourteenth. Yet, legislation can easily give us a new batch of such provisions.

In short, let the time and, to the extent of answering questions and producing documentary material, the will of a subpoenaed individual be subject to the pleasure of inquisitional officials, but not his life, liberty or property without the due process protections proposed in this Article. As Mr. Chief Justice Warren in the Court's opinion in *Coppedge v. United States*¹²⁹ cautioned, "when society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps."¹³⁰

128. *Id.* at 4-5; cf. *Seals v. United States*, 325 F.2d 1006 (D.C. Cir. 1963), *cert. denied*, 32 U.S.L. WEEK 3342 (March 31, 1964), where the court held that a confession made by an individual who went into an FBI office voluntarily and was told he was free to leave and was not under arrest had to be excluded from evidence because questioning in a law-enforcement office is inherently coercive.

129. 369 U.S. 438 (1962).

130. *Id.* at 449.

