

Constitutional Law - Right to Counsel - Not  
Limited to an Attorney - United States v. Tarlowski,  
305 F. Supp. 112 (E.D.N.Y. 1969)

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**Constitutional Law—RIGHT TO COUNSEL—NOT LIMITED TO AN ATTORNEY.** *United States v. Tarlowski*, 305 F. Supp. 112 (E.D. N.Y. 1969).

During interrogation by special agents of the Internal Revenue Service for failure to file income tax returns, the agents conducting the investigation requested the defendant's accountant to leave. The agents led the defendant to believe that he could have his attorney present but not his accountant.<sup>1</sup>

The United States District Court for the Eastern District of New York granted defendant's motion to suppress the government's evidence on the ground that the denial of his accountant's assistance infringed upon the defendant's right of due process.<sup>2</sup>

The right to counsel as specifically incorporated in the sixth amendment, guarantees that a defendant may "have the Assistance of Counsel for his defense" in a criminal trial.<sup>3</sup> This right has protected an accused from being deprived of his life or liberty without the assistance of counsel during his trial.<sup>4</sup> The right to counsel is not limited to the sixth amendment, however, as the Supreme Court has recognized that the presence or absence of counsel at the trial is included in the *hearing* requirement which, along with *notice*, constitutes the basic elements of due process.<sup>5</sup> Thus, because of the nature of our adversary system, the complexity of legal proceedings, and the considerable forces of government that are arrayed against the defendant, the right to counsel has become one of the elements of due process of law under the fifth amendment.<sup>6</sup>

Originally limited to the presence of an attorney at trial,<sup>7</sup> the right to counsel has expanded, first under the sixth amendment, then under the fifth amendment, to the pretrial interrogation period. In *Escobedo v. Illinois*,<sup>8</sup> the Court stated that ". . . the right to use counsel at the

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1. *United States v. Tarlowski*, 305 F. Supp. 112, 115 (E.D. N.Y. 1969).

2. "[A]n invasion of the individual's right to determine the conditions under which he will deal with agents of the federal government when under criminal investigation, as is present here, can be considered to be nothing less than a denial of liberty without due process of law." *Id.* at 123.

3. U.S. CONST. amend. VI.

4. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938); *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

5. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

6. Comment, *The Continuing Expansion of the Right to Counsel*, 41 U. COLO. L. REV. 473, 478 (1969). See also *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

8. 378 U.S. 478 (1964).

formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination."<sup>9</sup> In *Miranda v. Arizona*, the Court guaranteed the due process and self incrimination privileges to a defendant by establishing procedural safeguards and standards under which incriminating statements may be used at trial.<sup>10</sup>

Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if defendant so desired.<sup>11</sup>

Throughout the development of the doctrine of right to counsel, however, whether under the sixth, fifth, or fourteenth amendment, the courts have assumed that the counsel with whom the defendant may consult would be an attorney. *Miranda*,<sup>12</sup> *Escobedo*,<sup>13</sup> and more recent cases<sup>14</sup> equate the definition of counsel with the defendant's attorney.<sup>15</sup> Moreover, the term "counsel" as used in relation to constitutional guarantees of federal or state governments has been construed as a duly licensed attorney.<sup>16</sup> One departure from that limitation was *United States ex rel. Caminito v. Murphy*,<sup>17</sup> where the court stated that the defendant's confession was not voluntary where he was denied access to relatives or friends.

In *United States v. Tarlowski*, the district court found that histori-

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9. *Id.* at 487.

10. 384 U.S. 436 (1966).

11. *Id.* at 470.

12. *Miranda v. Arizona*, 384 U.S. 436 (1966).

13. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

14. See *United States v. Wade*, 388 U.S. 218 (1967). In *Wade*, the defendant was denied the presence of his counsel during a "line-up" identification. The Court held that the absence of his attorney at this crucial stage of the proceedings denied the defendant's sixth amendment rights because of the inherently suggestive nature of an identification proceeding and the possibility of suggestive control by the police investigators over the witnesses. *Id.* at 224-25.

15. "[T]hat he has the right to the presence of an attorney . . ." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966); "the accused must be permitted to consult with his lawyer." *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

16. *People v. Cox*, 12 Ill. 2d 265, 146 N.E.2d 19 (1957). This principle has been applied where the defendant's counsel was delinquent in paying his bar association dues. *McKinzie v. Ellis*, 287 F.2d 549 (5th Cir. 1961).

17. 222 F.2d 698 (2d Cir. 1955).

cally all persons have "the right to associate with others of one's own choice at any time . . ." and that right is protected by the fifth amendment.<sup>18</sup> If, therefore, the federal agent limits a person's freedom of association, "this constitutes an invasion of the liberties guaranteed by the due process clause . . ." of the fifth amendment.<sup>19</sup> Through the right of association, *Tarlowski* has expanded the doctrine of right to counsel to include the presence of an accountant during a tax investigation. This approach, however, overlooks the conflict between accountants and attorneys in the federal tax field.<sup>20</sup> In all probability, the presence of an accountant to advise and protect his client from his ignorance during a criminal investigation would be the unauthorized practice of law.<sup>21</sup> Notwithstanding, through the doctrine of right of association, a court has recognized that the right to counsel cannot be filled solely by attorneys and that other advisors must fill this need.<sup>22</sup>

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18. 305 F. Supp. at 121.

19. *Id.* at 123.

20. Austin, *Relations Between Lawyers and Certified Public Accountants in Income Tax Practice*, 36 IOWA L. REV. 227 (1950).

The public conflict . . . between two great professions over their respective functions in one of their fields of common interest—federal income taxation—has been as fruitless and injurious as it has been unedifying. . . . It has produced strife where there should be peace; accusation, distrust and suspicion where there should be understanding; recrimination . . . where there should be only cordial cooperation and harmony.

*Id.* at 227. See also E. Griswold, *We Can Stop the Lawyer-Accountant Conflict over Tax Practice Now: Four Recommendations*, 2 J. TAXATION 130 (1955); Comment, *Relations Between Lawyers and Certified Public Accountants in Federal Tax Practice*, 15 ALA. L. REV. 517 (1963).

21. *Agran v. Shapiro*, 127 Cal. 2d 807, 273 P.2d 619 (1954).

22. The legal profession and legal education have not caught up with the doctrine of right to counsel. There are not enough affordable lawyers to fulfill its promise. Even if such lawyers were available, they would not be intellectually prepared to render the type of legal service most appropriate for many of the non-trial stages of the criminal continuum. . . . Furthermore, the profession must give more consideration to the use of para-professionals to render routine legal service in the criminal justice continuum.

These are the challenges of the doctrine of right to counsel.

Steele, *The Doctrine of Right to Counsel: Its Impact on the Administration of Criminal Justice and the Legal Profession*, 23 Sw. L.J. 488, 523 (1969).