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INTRODUCTION

The Criminal Justice Act of 1964,[1] following twenty-five years of legislative efforts to secure federal funds for the payment of assigned counsel and public defenders, received the support of both houses on August 7, 1964. As a result of the measure's enactment, there has been congressional recognition and an assumption of the public responsibility[2] of providing counsel for the indigent accused in federal courts. While the Act is primarily concerned with the creation of a system of compensating assigned attorneys, provisions as to its administration illustrate the extent of such responsibility.

By specifying the type of offense, stage at which counsel is to be appointed, and duration of such representation, the Sixth Amendment guarantee of counsel is impliedly defined in these areas. The purpose of this note is to analyze and evaluate the validity of limitations indicated by the Act's determinations as to 1) the exclusion of counsel for petty offenders, 2) the time at which counsel is initially made available, and 3) the omission of representation in collateral proceedings.

SUBSTANCE OF THE ACT

Under the Criminal Justice Act of 1964, representation is provided for defendants in criminal prosecutions, other than petty offenses, who are financially unable to retain an attorney. Such "representation" includes, in addition to counsel, investigative, expert and related services. Each district court is directed by the provisions of the Act to formulate a plan whereby legal assistance is furnished by private attorneys, members of a legal aid group, or a combination of these. Counsel for appellate proceedings is to be supplied under a program established by the judicial council of the circuit.

Upon inquiring and determining that the defendant is financially unable to obtain counsel, the court or the United States Commissioner

1. 18 U.S.C. § 3006A (1964).

2. The public responsibility aspect of providing counsel for indigent defendants was initially developed in Gideon v. Wainwright, 372 U.S. 335, 344 (1963) wherein the court stated: "That government hires lawyers to prosecute and defendants who have money hire lawyers to defend are the strongest indication of the widespread belief that lawyers in criminal courts are necessities, not luxuries. 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."

is to appoint an attorney to act as defense counsel.[3] The "defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner through appeal." [4]

Compensation, at a rate not exceeding $15.00 per hour when in court or before a United States commissioner and $10.00 per hour for time spent out of court plus reimbursement for expenses, is limited to $500. in felony cases and $300 where a misdemeanor is charged.[5] In addition to these sums, $300 exclusive of reimbursement for expenses reasonably incurred, is available for investigative, expert and other necessary services. The net result is that the attorney receives some compensation for his time and effort expended on behalf of the defendant and is no longer required to finance the expenses of the defense from his pocket nor forego the employment of investigators or experts who may be essential to the defense because he is unable to personally finance such services.

"Misdemeanors Other Than Petty Offenses"

The federal courts, prior to the Supreme Court decision in *Johnson* v. *Zerbst*,[6] dealt with rather limited aspects of the right to counsel but there was no pronouncement that they were required by the Sixth Amendment to appoint counsel for indigent defendants. *Johnson* made such appointment a jurisdictional prerequisite ruling that an indigent accused of a felony was to be afforded the aid of counsel. *Gideon* v. *Wainwright*,[7] in extending the right to counsel to state defendants, acknowledged that the guarantee was not restricted to capital cases but failed to indicate whether an indigent charged with a sub-felony offense would be entitled to legal representation. While the Supreme Court has never directly held that a right does or does not exist to have

3. "This is the first time a provision of positive law has been enacted stating that a defendant who cannot afford to hire a lawyer is entitled to have one appointed at the time he appears before the commissioner." Shafroth, *The New Criminal Justice Act*, 50 A.B.A.J. 1051 (1965).

4. 18 U.S.C. § 3006A (C) (1964).

5. The same limitations are applicable to representation in an appellate court ie. $500 in a felony case and $300 in a case involving a misdemeanor; "In extraordinary circumstances, payment in excess of the limits stated herein may be made if the district court certifies that such payment is necessary to provide fair compensation for protracted representation, and the amount of the excess payment is approved by the chief judge of the circuit." 18 U.S.C. § 3006A (d) (1964).

6. 304 U.S. 458 (1938).

7. 372 U.S. 335 (1963).

court-appointed counsel in a misdemeanor case,[8] the issue has been considered in the District of Columbia[9] and Fifth Circuit.[10]

The Criminal Justice Act, in enunciating the conditions under which counsel is to be appointed limits the type of offense to felonies and misdemeanors other than petty offenses.[11] Consequently a question arises as to whether this delineation of the right to counsel is justified or unwarrantably deprives the petty offender of the protection afforded by the Sixth Amendment.[12] An examination of the permissibility of summary consideration of petty offenses and the intent of the framers of the Constitution in using the phrase "all criminal prosecutions" readily supports application of the limitation.

It is this phraseology which has proved troublesome by leading to assertions that "all criminal prosecutions" denotes all offenses of a criminal nature. "Even a Supreme Court dictum has entertained the suggestion, arguendo, that petty offenses might be included in 'all criminal prosecutions'...." [13] The view was advanced in *Schick* v. *United States*,[14] where it was stated:

> If the language had remained "criminal offenses" it might have been contended that it meant all offenses of a criminal nature, petty as well as serious, but when the change was made to "crimes" and made in light of the popular understanding of the word "crimes" as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury trial of petty offenses.[15]

It should be noted that discussion as to the right to trial by jury when accused of a petty violation is directly relevant to the discussion of right to counsel in such prosecutions as both are guaranteed by the Sixth Amendment. Thus the troublesome phraseology of "all criminal

8. 19 SW. L. J. 593, 599 (1965).

9. Evans v. Rives, 126 F.2d 633 (D. C. Cir. 1942). (Counsel required where defendant charged with serious misdemeanor.)

10. Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965) (Counsel required where defendant charged with petty offense.)

11. 18 U.S.C. § 3006A ( ) (1964).

12. U.S. CONST. AMEND. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

13. Frankfurter and Corcoran, *Petty Federal Offenses and Trial by Jury*, 39 HARV. L. REV. 917 at 925 (1926).

14. 195 U.S. 65 (1904).

15. *Id.* at 70.

prosecutions" is applicable to both and although the court has never considered the term in a right to counsel context it has in a trial by jury case.

In *District of Columbia* v. *Clawans*,[16] the Supreme Court examined the intent of the framers of the Constitution and ruled that persons charged with a federal "petty offense" are not entitled to trial by jury. The rationale of that decision being that summary consideration was permissible for petty offenses when the Constitution was adopted and there had been no change in the generally accepted standards of punishment which would bar such treatment now.

Pertinent data on the subject is afforded by statutory and constitutional provisions subsisting in the colonies and states prior to the adoption of the Bill of Rights. Why in drafting the Sixth Amendment did Madison use the phrase "all criminal prosecutions"?

> It is right to attribute purpose and not caprice to him,... The explanation likewise lies in history. Madison's language was not his own. He took it from the Bill of Rights with which he was most familiar—that of his own Virginia.[17]

In Virginia,[18] the requirement of trial by jury did not extend to petty offenses;[19] a similar formula existed in Pennsylvania[20] and Maryland.[21] Certainly the framers of the Constitution meant no more than the established practices in their various states by "all criminal prosecutions" and the exclusion of petty offenses was the accepted doctrine in the

16. 300 U.S. 617 at 629 (1937).

17. Frankfurter and Corcoran, *supra* note 13 at 974-5.

18. The VIRGINIA BILL OF RIGHTS, § 8, adopted June 12, 1776, provides in pertinent part: "That *in all capital or criminal prosecutions* a man hath a right to demand the cause and nature of his accusation to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy *trial by an impartial jury*. . . ." [Emphasis Added].

19. Frankfurter and Corcoran, *supra* note 13 at 975. See District of Columbia v. Clawans, *supra* note 16 (court discusses petty offenses at time of adoption of Constitution).

20. The PENNSYLVANIA BILL OF RIGHTS, § 9, adopted September 28, 1776, provides in pertinent part: "*That in all prosecutions for criminal affenses*, a man hath the right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial by an impartial jury. . . ." [Emphasis Added].

21. The MARYLAND BILL OF RIGHTS, § 19, framed November 11, 1776, provides in pertinent part: "That *in all criminal prosecutions*, every man hath a right to be informed of the accusation against him; to have a copy of the indictment or charge. . . to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses against him, on oath; and to a speedy *trial by an impartial jury*. . . ." [Emphasis Added].

colonies and subsequently in the states.[22]

If this would not be enough to justify the exclusion of coverage of petty offenses made by the Act, consideration of the practical aspects of supplying counsel might. Some line must be drawn delineating the right when we consider that funds are limited as is "lawyer-manpower," since it would hardly be feasible to "furnish assigned counsel to 'all' indigent misdemeanor defendants." [23]

STAGE FOR APPOINTMENT: APPEARANCE BEFORE THE COMMISSIONER

The question of whether a criminal defendant has been denied the Sixth Amendment guarantee of counsel is most often brought into issue when the accused has confessed before consulting with an attorney and the prosecution seeks to admit the confession at the trial stage. When the confession was obtained by coercion, be it either physical or mental, there is no doubt that the accused's constitutional rights have been violated.[24] Unfortunately, there is no dividing line or standard with which to determine whether the confession was made voluntarily or was the result of coercive measures. By the same token, the determination of when the appointment of counsel should be made and at what stage the accused should be permitted to consult with his attorney is without strict criteria.

> Counsel then, has been more than a technical aid; it has served to overcome the original unfairness of the balance of state against individual. Historically, this role has been played mainly at trial—the focus of confrontation between the state and the individual. If, however, a critical confrontation occurs at the earlier investigative stage of the process, we might have to alter our conception of the role counsel must play to readjust the balance.[25]

The Supreme Court did alter its conception of the role played by counsel in *Escobedo* v. *Illinois*[26] where the defense attorney was depicted as the guardian of constitutional rights from the time the investigation becomes accusatory. In an opinion rendered by Mr. Justice Goldberg, the right to counsel was described as attaching

22. Frankfurter and Corcoran, *supra* note 13 at 969.

23. Hall & Kamisar, MODERN CRIMINAL PROCEDURE, at 86 (1965).

24. Protection against coerced confessions in federal prosecutions is afforded by the Fifth Amendment which guarantees that no person "shall be compelled in any Criminal Case to be a witness against himself," while as stated in Crooker v. California, 357 U.S. 433, (1958) "it is well established that the Fourteenth Amendment prohibits use of coerced confessions in state prosecutions."

25. 73 YALE L. J. 1000 at 1034 (1964).

26. 378 U.S. 478 (1964).

absolutely when the investigation has focused on the defendant as the offender and the police "purpose is to elicit a confession."

Whether an investigation has "focused" on a particular suspect and if interrogation is employed to obtain a confession is largely dependent upon the circumstances. Unfortunately, the holding failed to specify what condition or conditions constituted a violation of the indigent's constitutional right, thereby permitting the states to interpret and apply the "rule" in a far from uniform manner.[27]

The Criminal Justice Act, in seeking a workable and practical method of providing representation for indigent defendants, has prescribed a definite and ascertainable stage when the Sixth Amendment guarantee of counsel attaches. Upon determining the accused is financially uanble to procure an attorney, the appointment of counsel is made on his first appearance before the United States commissioner or court.[28] Thus the framers of the Act made the defendant's initial appearance for arraignment the stage when the constitutional mandate becomes operative. But in so doing has the Act taken cognizance of the *Escobedo* decision? Insight of its compliance is readily exhibited by examining the Court's reasoning in requiring the aid of an attorney at the accusatory stage in conjunction with the necessity of prompt arraignment.

At first glance, it is immediately apparent that the Court was not motivated solely by *Escobedo's* need of advice from one familiar with the technical aspects of the law. The opinion states that even though he was told of his right to remain silent, he had not been advised what to do "in face of a false accusation that he had fired the fatal shots." [29] By having counsel present after the suspect becomes the accused and police seek incriminating statements, it becomes a certainty that a defendant is not only aware of his constitutional rights but may also be advised by a lawyer in exercising such rights during the questioning.[30] The other and possibly main purpose was recognized by Mr. Justice Douglas' dissent in *Crooker* v. *California* wherein he states that:

> The presence of counsel at the interrogation also serves as a curb on police excesses and on the possibility of the investigator's falsifica-

27. Cooper v. Commonwealth, 205 Va. 883, 140 S.E.2d 688 (1964); People v. Dorado, 40 Cal. Rptr 264, 394 P.2d 952 (1964); People v. Hartgraves, 31 Ill.2d 375, 202 N.E.2d 33 (1964); State v. Fox, 131 N.W. 2d 684 (1964).

28. 18 U.S.C. § 3006A (b) (1964).

29. Escobedo v. Illinois, *supra* note 26 at 485.

30. Enker and Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 MINN. L. REV. 63 (1964).

> tion of the circumstances surrounding the accused's incriminating statements.[31]

The imposition of counsel, as applied under the *Escobedo* decision, is a device to protect individuals from police coercion in securing a confession,[32] consequently, insuring the "benefit" of the constitutional guarantee.[33]

The two-fold purpose of the Supreme Court, is given effect by the provisions of the Criminal Justice Act coupled with the prompt arraignment requirements of the *McNabb-Mallory* rule. "Since the... rule is not a constitutional doctrine but rather is grounded in the Court's powers of supervision over the administration of federal justice, it does not apply to the states." [34] Thus, if a state adopted a statute similar to the Criminal Justice Act, absent a state requirement of immediate arraignment, the same compliance would not result, but "nearly all the states have similar enactments." [35]

In essence, *McNabb* v. *United States*[36] and *Mallory* v. *United States*,[37] aside from factual situations, are identical other than their respective statutory basis for requiring prompt arraignment. The latter was decided after the adoption of Rule 5 (a) of the Federal Rules of Criminal Procedure[38] in 1946 while the former relies upon an earlier Congressional command[39] to the effect that an arresting officer is under a duty to bring the defendant before the nearest United States commissioner or other judicial officer. The Court in *McNabb* ruled that the confessions were inadmissible since the questioning was in disregard of the duty Congress had imposed on federal law officers. Although Congress had not explicitly required exclusion of such evidence, the Court deemed it essential to insure the effectiveness of the Congressional policies embodied therein. The *Mallory* case, on the other hand, was primarily a restatement and affirmation of the "exclusionary rule" of *McNabb* to support the policy of Rule 5 (a). In both cases there is underlying dictum indicating that federal officers may not violate

31. Crooker v. California, 357 U.S. 433, 443 (1958).

32. Enker and Elsen, *supra* note 30 at 69.

33. Justice Jackson, concurring in part and dissenting in part in Watts v. Indiana, 338 U.S. 49, 59 (1949) expressed that "if the State may arrest on suspicion and interrogate without counsel, there is no denying the fact that it largely negates the benefits of the constitutional guaranty of the right to assistance of counsel."

34. 318 U.S. 332, 341 (1942).

35. Mallory v. United States, 354 U.S. 449 (1957).

36. *Supra* note 34.

37. *Supra* note 35.

38. Fed. R. Crim P. 5 (a).

39. 18 U.S.C. § 595 (1946); now covered by Rules 4 and 5 of the Fed. R. Crim. P.

the law in acting to enforce the law, as such contravention will render evidence secured thereby inadmissible.

Though this prompt arraignment condition for admissibility, or *McNabb-Mallory* rule, was not specifically directed toward the right to counsel and the implementation of that right, it has been a consequence.[40] In *Escobedo*, the Court observed, in regard to the period from arrest to indictment, that "the fact that many confessions are obtained during this period points up its critical nature as a 'stage when legal aid and advice' are surely needed." [41] The resulting automatic exclusion of confessions when delay occurs eliminates possible problems of proof under the *Escobedo* rule, since no showing of intent to elicit a confession or that the investigation had focused on the defendant is necessary.[42] By such exclusion nothing is to be gained by detention prior to appearing before the commissioner and both the opportunity and temptation to coerce confessions is minimized. By having the accused before the commissioner without unreasonable and unnecessary delay, he is familiarized with his constitutional rights at the earliest possible stage, as Rule 5 (b) of the Federal Rules of Criminal Procedure requires.[43]

With the advent of the Criminal Justice Act, counsel, if the accused is financially unable to retain an attorney, will also be made available by the United States Commissioner as this would constitute the "initial appearance" described by the Act as the time for appointment. Theoretically then, the suspect is arrested, brought before a magistrate "without unnecessary delay," informed of his constitutional rights, and now, under the Act, supplied with legal representation, all within a relatively short period of time. As a result, the defendant is provided with counsel as early in the proceedings as reasonably possible.

In actual practice, the theoretical model should be effective in the vast majority of cases although two extraneous factors may diminish its performance. The first of these evolves from the reality that magistrates

40. Hall and Kamisar, *supra* note 23 at 126.

41. Escobedo v. Illinois, *supra* note 26 at 488.

42. Lockhart, Kamisar, and Choper, CONSTITUTIONAL CRIMINAL PROCEDURE, at 137 (1964).

43. Fed. R. Crim. P. 5 (b).

> *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to a preliminary examination. He shall also inform the defendant that he is not to be required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

are not always available, as when an arrest takes place in the middle of the night or on a Sunday. The second is the product of a change in enforcement policy resulting in a practice of questioning prior to arresting, such as going to a suspect's home and seeking his consent to "ask a few questions." The latter may be more easily remedied as the securing of such consent might be labeled coercive due to the position held by an officer and the probable inference which the suspect feels might arise from such a refusal. On the whole though, the Criminal Justice Act creates a distinguishable stage for the attachment of the right to counsel and when taken in conjunction with the operation of the *McNabb-Mallory* rule, the dictates of *Escobedo* are clearly satisfied.

The Exclusion of Collateral Proceedings

The Criminal Justice Act by implication has restricted its provisions to proceedings in which there is direct consideration of the case wherein an appointment of counsel is deemed necessary. This consequential exclusion of collateral proceedings results from the legislative stipulation that, "a defendant for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States commissioner or court through appeal." [44] The proceedings thereby excluded may precede or be subsequent to the stages which occur during the stated period. Administrative action with criminal sanctions or leading to a later prosecution, in the absence of some adjudication, are clearly disregarded as there is no initial appearance, as referred to in the Act, at which the appointment might be made. Nor does the Act apply to writs of heabeas corpus brought to vacate sentences of federal or state prisoners.[45] These omissions may be attributed to the absence of a clear establishment of the right to counsel by decision or practice, yet the grand jury investigation, which has been specifically designated as a stage in which counsel is not mandatory and where an attorney may be excluded,[46] would be included in the proceedings from initial appearance to appeal. It is these apparent inconsistencies, with consideration of the status of the right to counsel in the respective proceedings, which must be examined to adequately evaluate the Act.

Counsel and the Great Writ

As a casual analysis of the Act's provisions for appointment procedures

44. 18 U.S.C. § 3006A (c) (1964).
45. Report of the Judicial Conference of the United States at p. 11 (1965).
46. In Re Groban, 352 U.S. 330 (1957).

will indicate, the cases under which compensation for court-appointed counsel is authorized are those involving trial and direct appeal. Thus, there is no extension of the right to counsel to federal or state prisoners that petition for an inquiry into the validity of their conviction by habeas corpus.

The Writ in federal courts is purely statutory[47] under which habeas corpus is available in four different situations.[48] The use of the writ in federal courts then, is primarily, to determine the constitutional validity of all criminal convictions where there has been want of jurisdiction or where the conviction is due to a disregard of the accused's constitutional rights and where the only remedy at his disposal is habeas corpus.[49]

Habeas corpus then, is not a form of direct review examining errors of law or irregularities or a substitute for an appeal,[50] but a collateral attack intended to preserve "constitutional safeguards of human life and liberty." [51] "It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." [52] By failing to provide counsel for an indigent prisoner in a habeas corpus proceeding the safeguard is impaired. The first appeal has been considered a matter of right[53] and in both federal[54] and state[55] courts the right of an indigent defendant to be afforded representation upon an appeal has been established. Surely the benefits to be derived from providing counsel on appeal in presenting the merits of the appellants case are no greater than those to be derived from supplying counsel to a prisoner seeking to vindicate his constitutional rights by habeas corpus. It was this very means of review, although collateral, which has been so instrumental

47. 28 U.S.C. § 2241 (1948).

48. Wright, HANDBOOK OF THE LAW OF FEDERAL COURTS, at 178-9 (1963) where these four situations are described as 1) where a foreign citizen is restrained for an act alleged authorized by his country and a question of international law is raised, 2) where a person in state custody for an act supposedly under federal authority, 3) when any person is held in federal custody, 4) when a person is detained by a state "in violation of the supreme law of the land."

49. Waley v. Johnston, 316 U.S. 101 (1942).

50. Adams v. U.S. ex.cel. McCann, 317 U.S. 269, 274 (1942); Glasgow v. Moyer, 225 U.S. 420, 428 (1912); In Re Gregory, 219 U.S. 210, 213 (1911).

51. Johnson v. Zerbst, *supra* note 6.

52. Bowne v. Johnston, 306 U.S. 19, 26 (1939).

53. Williamson v. Lee Optical Co., 348 U.S. 483, rehearing denied 349 U.S. 925 (1955).

54. Ellis v. United States, 356 U.S. 674 (1957); Johnson v. United States, 352 U.S. 565 (1956).

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

in expanding the right to counsel.[56] Clearly a remedial measure expressly directed to the protection of individual rights guaranteed by the Constitution and available when a denial of such rights is not rectified by appellate review, is no less essential than an appeal *where counsel is required.*

INVESTIGATION BY ADMINISTRATIVE AGENCIES

The restriction of compensation for appointed counsel to all stages from the indigent's first appearance before the commissioner through appeal, by definition does not entail the payment of attorneys representing parties appearing before administrative agencies. This "oversight" in framing the Criminal Justice Act of 1964 quite possibly resulted from the confusion surrounding the conduct of administrative investigation and the assistance of counsel for witnesses called upon to testify. The situation in this regard exists and will continue to exist as:

> The Courts simply do not get a sufficient number of cases on the issue, and, as noted above, judicial opinions are more likely to deal with the minimum required to satisfy due process rather than with comprehensive rules of conduct and representation in administrative proceedings. While the constitutional safeguards must be conscientiously preserved, the solution to the representation problem must come from either the legislature or the agency, or both.[57]

Congress made some progress in "permitting" a witness, compelled to appear before any agency, the right to be represented and advised by counsel[58] which superseded a prevailing view that a witness compelled to appear at an investigation by a federal agency might be denied representation.[59] While the Administrative Procedure Act was intended to "permit" counsel in all investigatory proceedings, its scope has been severely limited by "subsequent legislative exemptions and administrative disregard of the statutory mandate." [60]

In neither the state nor federal system are the police or prosecutor's offices allowed to compel witnesses to submit to interrogation and to produce records. When an accused is questioned, he is not only permitted but guaranteed the assistance of counsel. Yet a person compelled to appear and produce documents by agencies charged with the enforcement of certain statutes, as the Federal Communications Com-

56. Fellman, THE DEFENDANTS RIGHTS, at 73 (1958).
57. 16 AD. LAW REV. 325 at 332 (1964).
58. The Administrative Procedure Act, 5 U.S.C. §§ 1001-11 (1952).
59. Bowles v. Baer, 142 F.2d 787, (7th Cir. 1944).
60. 57 COLUM. L. REV. 887 (1957).

mission, Internal Revenue Service[61] or Federal Aviation Agency, and who frequently deal with criminal infractions of these statutes, is in many cases not permitted representation and if an indigent, not provided with counsel.[62] The rationale of proponents for the exclusion of counsel analogizes these administrative proceedings to hearings before a grand jury, which are also investigative in nature and where counsel is not required.[63]

The major purpose of imposing counsel requirements at pre-trial stages as arraignment, preliminary hearing, and pre-indictment stages, as depicted by *Escobedo*, has been to enable the defendant or prospective defendant to avail himself of the constitutional guarantees which insure that at trial the right to counsel will not have become "a very hollow thing." An individual appearing before an administrative agency being unaware of his constitutional rights might just as easily succumb to the pressure and persistence of the investigator. The purpose of the administrative investigation is by its very nature to gather information to be applied in formulating administrative rules or proposals for legislation or *to uncover facts leading to an adjudicatory proceeding*. It is this last class of investigation wherein the role to be played by counsel is identical with that developed by the "right to counsel cases." Although the administrative proceedings do "not result in any final determination of the witness's rights or liabilities, it may result in a subsequent prosecution, and it is precisely this possibility of future prosecution that gives rise to the problem of right to counsel. . . ." [64]

But Not Grand Jury Proceedings

"From initial appearance through appeal" by definition includes appearances of a defendant before a grand jury, which would seemingly be a simple proposition were it not for the Supreme Court's dicta of *In re Groban*.[65] The appellants in that case were subpoenaed to appear as witnesses in an investigation by the State Fire Marshall into the causes of a fire on their business premises. The witnesses were incarcerated upon their refusal to answer the questions presented without

61. An example of the criminal prosecutions which may result from administrative investigations is evident when it is considered that the Internal Revenue Service has brought to light between 3000 and 4000 criminal liquor cases and about 1000 tax evasion cases per year since 1958. Note, 33 U. Chi L. Rev. 134 at 137 (1965).

62. Mayers, *The American Legal System*, at 131 (1955).

63. Hannah v. Larche, 363 U.S. 420, 429 (1960); United States v. Horton Salt Co., 338 U.S. 632, 642 (1950).

64. *Supra* note 57 at 325-6.

65. 352 U.S. 330 (1957).

counsel. The Supreme Court, hearing the case on appeal from a denial of an application for a writ of habeas corpus, affirmed the lower court's decision stating that the statutory provision permitting the exclusion of counsel did not deprive the appellants' of their right to counsel. In concluding the exclusion was not repulsive to the constitutional guarantee of counsel, the opinion related the proceeding to a grand jury investigation and thus, by implication, supported a similar exclusion in grand jury cases. The right to counsel was to accrue only when the charges were made.[66] Rule 6 (d) of the Federal Rules of Criminal Procedure directly denies the admittance of defense counsel in grand jury proceedings stating:

> *Who May be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer "or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

The 5-4 majority of *In re Groban* expressed concern that the witness's responsibility could not be reasonably adjudicated if counsel were present.[67] The Court fails to make mention of the fact that the prosecutor or special counsel may conduct the questioning. A witness may invoke the protection of the Fifth Amendment and invoke the privilege against self-incrimination but he need not be warned or advised of such rights.[68] It was circumstances strikingly similar to these which led the Supreme Court to extend the right to counsel to pre-indictment situation in *Escobedo* v. *Illinois.* Coercion was not the instrumental key in *Escobedo;* it was that constitutional rights and protections could not be properly exercised without legal representation. Thus, the change of scene is of little significance, as is the change of characters; the threat to constitutional guarantees corrected by *Escobedo* thrives in grand jury proceedings.

Conclusion

The Criminal Justice Act as a remedy for uncompensated court-appointments of defense counsel might be described as adequate in that some such legislation was imperative. It represents some insight on the

66. *Id.* at 333.
67. 58 Colum. L. Rev. 395 (1958).
68. 378 U.S. 478 (1964).

part of legislatures of the public responsibility of insuring due process, but the insight is limited to situations specifically designated by the Supreme Court as coming within the province of "right to counsel". As a guide to the extent of the constitutional requirement of representation the Act lacks perspective. The failure to take cognizance of "vacuums" in the expansion of the guarantee as habeas corpus, grand jury and administrative proceedings, has shifted the burden back to the judiciary who now must complete the undertaking which in effect will necessitate amendment to the present provisions.

Robert P. Wolf