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Constitutional Law: Right to Counsel -- The Right to Assistance of Counsel in Administrative Proceedings

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Constitutional Law

RIGHT TO COUNSEL — THE RIGHT TO ASSISTANCE OF COUNSEL IN ADMINISTRATIVE PROCEEDINGS

Introduction

Since the Supreme Court's recent disposition of *In re Groban*,[1] interest has been awakened in the question of the right to be represented by counsel in proceedings before the various administrative agencies, both on the state and federal level. Only recently have articles appeared giving some extensive treatment to the question.[2] The text writers have summarily dismissed the problem and very few controversies posing the exact concern of the Court in *In re Groban* have found their way to the courts. One recent statement reasons that since there is a right to counsel in criminal cases, a similar right should exist in the administrative proceeding.[3] The only other attempt to meet the problem, also of recent origin, merely reflects the approach of the courts in the isolated instances when the issue has been adjudicated by making the resolution dependent upon the type of proceeding and the minimal requirements necessary to satisfy due process.[4] The purpose of this Note is to analyze this relatively new area of the law and to demonstrate that there is an adequate standard which the courts can follow that will afford maximum protection to the parties, and yet free the agency of procedural mires which destroy the necessary efficiency of the administrative process. The primary purpose of the administrative agency is efficiency, but this necessary goal should not take arbitrary preference over the rights of parties the agency is designed to serve.

I. THE SCOPE OF THE PROBLEM

In re Groban held an Ohio statute[5] providing that the fire marshall should hold private investigations and exclude from such ". . . all persons other than those required to be present" valid, and agreed that by such provisions the fire marshall could exclude counsel which the witness demanded. In accordance with another section of the Ohio Code, the fire marshall had the witness jailed when he refused to testify under the imposed conditions.[6]

In the dissenting opinion, Mr. Justice Black stated that the majority of the Court had failed to consider ". . . this nation's historic distrust of secret proceedings."[7] However, a review of the cases in the federal courts prior to the passage of the Administrative Procedure Act[8] reveals that the courts were willing to deny counsel to parties and give approval to such proceedings when labled as investigations,[9] or by concluding that the peculiar nature of the proceeding did not require counsel.[10] The state courts have also accepted these distinctions.[11] One jurisdiction, while expressly disapproving the result, has failed to overrule the earlier holding.[12]

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1 352 U.S. 330 (1957).

2 Note, 32 ST. JOHN'S L. REV. 67 (1957); Note, 58 COLUM. L. REV. 395 (1957).

3 32 ST. JOHN'S L. REV., *supra* note 2 at 67.

4 58 COLUM. L. REV., *supra* note 2.

5 OHIO REV. CODE ANN. § 3737.13 (Page 1956).

6 *In re* Groban, 352 U.S. 330 (1957). This was a 5-4 decision. The majority assumed that the proceeding was entirely investigatory, and that the presence of counsel might disrupt the proceedings.

7 *Id.* at 338 (dissenting opinion). The dissent was written by the Chief Justice with Justices Douglas and Black joining in the opinion.

8 60 Stat. 237 (1946); 5 U.S.C. § 1001 (1952). It would seem that this act does not cover investigations or all proceedings before administrative agencies. Niznik v. United States, 173 F.2d 328 (6th Cir.), *cert. denied*, 337 U.S. 925 (1949) (selective service); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 880 (1950) (parole); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949) (dictum) (tax investigation).

9 Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944).

10 United States v. Pitt, 144 F.2d 169 (3rd Cir. 1944) (dictum).

11 Avery v. Studley, 74 Conn. 272, 50 Atl. 752 (1901).

12 Steen v. Board of Civil Serv. Comm'rs, 26 Cal. 2d 716, 160 P.2d 816 (1945). This was a 4-3 decision. The dissenting justices cited Krohn v. Board of Water & Power Comm'rs, 95 Cal. App. 289, 272 Pac. 757 (1928), which held that if a statute provided for an investigation, such did not mean a hearing. The dissent contended that this was a valid distinction and should control.

II. WHEN IS ONE ENTITLED TO COUNSEL?

In the absence of express constitutional or statutory provision there is no absolute right to counsel. It has been held that the right to be heard is not necessarily the same as the right to have assistance of counsel, because the right to counsel ". . . is not one of the natural rights of man; but . . . is altogether a creature of the positive law."[13] As to when one is entitled to assistance of counsel, courts have established some rather broad and general criteria. If the proceeding is judicial in nature,[14] or a common-law hearing,[15] one is entitled to counsel, for this is one requirement of due process.[16] However, not every proceeding called a "hearing" demands counsel[17] for, although it may be labled "hearing," it does not have the essential characteristics of the common-law hearing and may be essentially investigatory in nature.[18] Due process does not require that every hearing be judicial in character,[19] but rather, allows it to be limited in scope[20] according to the particular needs of the agency. The text writers[21] and the courts have chosen to label certain proceedings as "judicial" and "hearings" (meaning the common-law concept) as distinct from proceedings that are "legislative" or "investigatory."[22]

The latter grouping usually does not require the presence of counsel, while the former does.[23] Thus, in every instance of a hearing, denial of counsel will not invalidate the proceeding.[24] To date, however, no real standards have been established which the courts can or do follow. No rigid and fixed standard can be established, but the courts should develop some workable guide to afford the individual protection of his rights.

For the purpose of example, three areas of the law will be reviewed where administrative agencies play an important role. These areas are the revocation of licenses, revocation of parole and suspended sentences, and the removal from office of public officers and civil servants. By recognizing the representation problems raised in these areas and analyzing the methods used by the courts in solving them, a minimal standard should emerge.

A. *The License Cases*

The courts still adhere to the distinction of whether a license gives the holder some interest or right, or just a mere privilege. Usually the terms "vested interest" and "property right" are used synonymously.[25] If the court can find a right involved, they will normally require a hearing before permitting revocation of the license. Otherwise the license can be revoked by order without notice. However, the New York courts have retreated from this position, and are willing to construe almost any license as giving rise to some type of vested interest.[26]

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13 State *ex rel.* Charles v. Board of Comm'rs, 159 La. 69, 105 So. 228, 229 (1925).

14 People *ex rel.* Mayor v. Nichols, 79 N.Y. 582 (1879); People *ex rel.* Smith v. Phisterer, 73 N.Y. Supp. 124 (App. Div. 1901).

15 A common-law hearing requires (1) the right to know the charges, (2) right to meet such charges with competent evidence, and (3) the right to be heard by counsel. "Hearing" includes "oral arguments." State *ex rel.* Arnold v. Milwaukee, 157 Wis. 505, 147 N.W. 50 (1914).

16 Almon v. Morgan County, 245 Ala. 241, 16 So. 2d 511 (1944); Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595 (1913).

17 United States *ex rel.* Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950) (dictum).

18 Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933).

19 L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948).

20 Avery v. Studley, *supra* note 11.

21 FORKOSCH. ADMINISTRATIVE LAW § 191 (1956).

22 See Note, 58 COLUM. L. REV. 396-97 (1957).

23 Almon v. Morgan County, *supra* note 16.

24 The Golden Sun, 30 F. Supp. 354 (S.D. Cal. 1939); Avery v. Studley, 74 Conn. 272, 50 Atl. 752 (1901).

25 The various courts have used the terms interchangeably, although "property right" is sometimes used to denote purely economic interest.

26 Wignall v. Fletcher, 303 N.Y. 435, 103 N.E.2d 728 (1952) (driver's license).

The traditional, and still the majority view, holds that a state can, with some exceptions, grant and revoke a license at will as a valid exercise of its police powers.[27] One of the reasons advanced to support this view is that because a license lacks the essential elements of a vested interest or property right, it does not demand constitutional protection, and a person must take the license subject to any and all conditions that the state or authorizing agency may impose. Therefore, it is not necessary for the legislature to provide for either notice or hearing before revocation, and a person accepting the license cannot complain when termination occurs in accordance with its own conditions.[28] Thus, licenses have been revoked without notice or hearing for such activities as the sale and distribution of milk,[29] operation of a drive-in theater,[30] sale of alcholic beverages, operation of taverns,[31] and the operation of a motor vehicle.[32]

The New York courts, although following the property theory, have reached a different result by reasoning that if a license gives the holder a valuable convenience, then the individual is entitled to a hearing before the license can be revoked. Under this theory a driver's license has been given full protection.[33] The acceptance of the valuable convenience conferred by the license as an interest akin to property, or at least as worthy of protection, has enabled the New York courts to afford the licensee a reasonable degree of protection without total abandonment of the traditional property or vested interest formula.

Many of the statutes that authorize the issuance of a license by an administrative agency usually provide for some type of hearing before the license can be revoked.[34] The statutes which do not specifically provide what type of hearing should be granted are usually construed to mean that the hearing must be "judicial" in nature.[35] One court struck down as a violation of due process a licensing statute that provided for a judicial hearing, but failed to provide any means for the agency to compel witnesses to appear or testify, or any other specific procedure whereby the rights of the licensee could be protected.[36] It appears that once the statute has undertaken to provide some elements of procedural due process, there must be a complete presentation of the requirements to save the statute and substantial compliance with its provisions to sustain the hearing.

B. *Revocation of Parole and Suspended Sentences*

A large number of states have held that a parole or suspended sentence can be revoked without notice or hearing.[37] This is the rule on the federal level as Congress may grant parole and suspended sentences as they see fit and summary revocation does

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27 Leakey v. Real Estate Comm'n, 80 Ga. App. 272, 55 S.E.2d 818 (1949); Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 837 (1924). The licenses that are generally protected are those which authorize engagement in some trade, association, or profession. Where the statute authorizes revocation for cause, the implication is that the license is entitled to a hearing. Carroll v. Horse Racing Bd., 16 Cal. 2d 164, 105 P.2d 110 (1940); State *ex rel.* Orleans Athletic Club v. State Boxing Comm'n, 163 La. 418, 112 So. 31 (1927).

28 Marrone v. City Manager, 329 Mass. 378, 108 N.E.2d 553 (1952).

29 Leach v. Coleman, 188 S.W.2d 220 (Tex. Civ. App. 1945); State *ex rel.* Nowotny v. Milwaukee, 140 Wis. 38, 121 N.W. 658 (1909).

30 Marrone v. City Manager, *supra* note 28.

31 Walker v. City of Clinton, 245 Iowa 74, 59 N.W.2d 785 (1953).

32 Gillaspie v. Department of Public Safety, 152 Tex. 459, 259 S.W.2d 177 (1953); Doyle v. Kahl, 242 Iowa 153, 46 N.W.2d 52 (1951); Goodwin v. Superior Court, 68 Ariz. 108, 201 P.2d 124 (1949.

33 Wignall v. Fletcher, *supra* note 26.

34 CAL. GOV'T CODE §§ 11505, 11509; N.H. REV. STAT. ANN. § 310.27 (1955).

35 See cases cited in note 27 *supra.*

36 Jewell v. McCann, 95 Ohio St. 191, 116 N.E. 42 (1917).

37 *In re* Charizo, 138 A.2d 430 (Vt. 1958); *Ex parte* Tabor, 173 Kan. 686, 250 P.2d 793 (1952); Washburn v. Utecht, 236 Minn. 31, 51 N.W.2d 657 (1952); *Ex parte* Anderson, 191 Ore. 409, 229 P.2d 633 (1951); *Ex parte* Dearo, 96 Cal. App. 2d 141, 214 P.2d 585 (1950); Carpenter v. Berry, 95 N.H. 151, 59 A.2d 485 (1948); *In re* Weber, 75 Ohio App. 206, 61 N.E.2d 502 (1945); Mincey v. Crow, 198 Ga. 245, 31 S.E.2d 406 (1944); *Ex parte* Boyd, 73 Okla. Crim. 441, 122 P.2d 162 (1942); Varela v. Merrill, 51 Ariz. 64, 74 P.2d 569, (1937); Pagano v. Bechly, 211 Iowa 1294, 232 N.W. 798 (1930); Brozosky v. State, 197 Wis. 446, 222 N.W. 311 (1928); People v. Dudley, 173 Mich. 389, 138 N.W. 1044 (1912); People *ex rel.* Joyce v. Strassheim, 242 Ill. 359, 90 N.E. 118 (1909) (dictum).

not violate the due process requirements.[38] One of the leading cases is *Varela v. Merrill*[39] wherein the court considered the contentions of the parties at length. The petitioner claimed that he was entitled to be brought into court and granted a hearing at which sufficient evidence would have to be produced to justify the revocation of his parole. The state contended that a parole was solely a matter of grace, not of right, and as such, it could impose any conditions upon parole it deemed advisable. Consequently, no formal hearing or reception of evidence was necessary to validate the revocation order. The Arizona Supreme Court refused the petitioner's application for a writ of habeas corpus, emphasizing that the statute authorizing the revocation[40] was constitutional, since the parolee, after conviction, could have been sentenced for the maximum statutory period. The court concluded that it was only through the benificence of the law that the parole was granted.

A recent Vermont case[41] reiterated this principle holding that when the governor revokes a parole, it will be assumed that he acted regularly and that it is not necessary for him to specify the grounds of his action. *Ex parte Dearo*,[42] a case frequently cited by courts adopting the rule of summary revocation, contains a wealth of authority to support its claim that this is the majority position. However, as illustrated by the dissent in *Ex parte Dearo*,[43] this position has received far less than unanimous judicial approval. A number of courts have held that one has a constitutional right to notice and hearing before a suspended sentence or parole can be revoked.[44] "The suspension of the execution of the sentence gives to the defendant a valuable right. It gives to him the right of personal liberty, which is one of the highest rights of citizenship."[45] A parole may attach any reasonable condition, but the reservation of the right of revocation does not carry with it the authority to exercise it arbitrarily. The parolee must be afforded an opportunity to be heard,[46] although this does not mean a formal trial.[47] Where a statute has given the power of revocation to an administrative agency, the courts have held that the agency must conduct a hearing, afford adequate notice of the charges, receive evidence from both sides, and permit the parolee to be heard by counsel.[48] A Maryland court was very specific in holding that no matter how informal the hearing, the defendant has a right to have counsel present, because this is a necessary ingredient of a fair hearing.[49] Where counsel was first withheld and later permitted to appear as a "friend" of the defendant, and the defendant was not allowed to call any easily obtainable witnesses, the proceeding was declared invalid.[50] "Informal as such a hearing may have been intended, the prisoner should, if he desires, be permitted to have his own counsel present."[51]

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38 Hiatt v. Compagna, *supra* note 8.

39 51 Ariz. 64, 74 P.2d 569 (1937).

40 ARIZ. REV. STAT. ANN. § 13-1657 (1956).

41 *In re* Charizo, 138 A.2d 430 (Vt. 1958).

42 96 Cal. App. 2d 241, 214 P.2d 585 (1950).

43 *Id.* at 589. The main contention is that the holding of the majority violates the due process clause of both the state and federal constitutions.

44 Mason v. Cochran, 209 Miss. 163, 46 So. 2d 106 (1950); Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479 (1946); State *ex rel.* Murray v. Swenson, 196 Md. 222, 76 A.2d 150 (1940); State v. O'Neal, 147 Wash. 179, 265 Pac. 175 (1928); State v. Zolantakis, 70 Utah 296, 259 Pac. 1044 (1927); *Ex parte* Lucero, 23 N.M. 433, 168 Pac. 713 (1917).

45 *Ex parte* Lucero, *supra* note 44 at 715.

46 State *ex rel.* Murray v. Swenson, *supra* note 44.

47 Slayton v. Commonwealth, *supra* note 44. The probationer was not entitled to a judicial hearing but the court indicated that a summary hearing would be sufficient to meet the requirements of due process of law.

48 Jackson v. Mayo, 73 So. 2d 881 (Fla. 1954).

49 Warden v. Palumbo, 214 Md. 407, 135 A.2d 439 (1957). By dicta the court indicated that one would have no right to counsel in a proceeding for application for parole. But see MINN. STAT. ANN. §§ 611.12(3), 611.13(3)(1947) which provide that if the committing judge deems it advisable, he may, by order, direct the public defender to appear before the parole board upon behalf of any applicant.

50 State v. Boggs, 49 Del. 277, 114 A.2d 663 (1955). *Cf.* Lockman v. Rhodes, 129 A.2d 549 (Del. 1957).

51 *Id.* at 665.

Many state statutes provide that revocation proceedings are to be held in open court.[52] These have been interpreted in most instances to mean that a person must be afforded the right to a hearing with the benefit of counsel.[53] One state has extended this right to mean that the person is entitled to a trial by jury,[54] but while this case has never been expressly overruled, its thrust has been tempered by a more recent decision holding that a jury trial is not a requisite to this type of open hearing.[55]

C. *Removal of Public Officials and Civil Servants*

Of all the areas of administrative law where the question of right to counsel has arisen, courts have experienced the least difficulty in resolving the question when it involves the removal of a public official or civil servant.[56] The statute that creates the public office may also provide for judicial type hearings before removal, and from such provisions it may be inferred that the affected public employee may be represented by counsel if he chooses.[57] Where the statute makes no specific demands, many states have chosen to label the proceedings as judicial if the statutes provide that removal can only be for cause.[58] However, some states have held that statutory silence does not give rise to such an inference, as there exists a presumption that the agency acted lawfully and reasonably, and that the aggrieved party has the right to judicial review.[59]

D. *Exercise of Some Plenary Powers of the Government*

Recently, the exercise of some of the plenary powers[60] of the government, particularly on the federal level, has undergone careful study and examination by many eminent authorities. Of great concern has been the Federal Government's policy in deportation proceedings, the rights of persons appearing before investigating committees of legislative bodies, and the powers of the special commissions created by the legislatures to study and report on some specific problem.[61] Among the issues raised regarding these governmental activities has been the individual's right to counsel when testifying before such agencies. Some legislative bodies have recognized the desirability of a person having counsel when appearing before them.[62] However, this Note will not attempt to embrace this particular problem.[63] The problem is of a different nature, as the person testifying is not an affected party (with the exception of deportation proceedings) and any harm caused by the lack of counsel is of an indirect nature.

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52 ILL. ANN. STAT. c. 38, §§ 784-89 (Smith-Hurd 1934); KY. REV. STAT. § 439.060 (1955); N.Y. CODE CRIM. PROC. § 935; TENN. CODE ANN. §§ 40-2901-2908 (1956); GA. CODE ANN. § 27-2705 (1953); N.D. REV. CODE § 12-5311 (1943); NEB. REV. STAT. § 29-2219 (1943); N.C. GEN. STAT. §§ 15-200, 15-200.1 (1953).

53 People v Enright, 332 Ill. App. 655, 75 N.E.2d 777 (1947); Bluensky v. Commonwealth, 284 Ky. 395, 144 S.W.2d 1038 (1940); People v. Hill, 164 Misc. 370, 300 N.Y. Supp. 532 (1937); Howe v. State, 170 Tenn. 571, 98 S.W.2d 93 (1936); Plunkett v. Miller, 161 Ga. 466, 131 S.E. 170 (1925); State *ex rel.* Vadnais v. Stair, 48 N.D. 472, 185 N.W. 301 (1921); Sellers v. State, 105 Neb. 748, 181 N.W. 862 (1921); State v. Burnette, 173 N.C. 734, 91 S.E. 364 (1917). However, not every "hearing" statute means one has a right to counsel. Hiatt v. Campagna, *supra* note 8.

54 State v. Renew, 136 S.C. 302, 132 S.E. 613 (1926).

55 State v. White, 218 S.C. 130, 61 S.E.2d 754 (1950). This holding is based upon the interpretation of a statute; S.C. CODE § 1038-3 (1942). A real inconsistency arises as *Renew* was grounded upon constitutional bases. No mention of *Renew* appears in *White*.

56 See cases cited in note 12 *supra*.

57 *Cf.* Ekern v. McGovern, 154 Wis. 157, 142 N.W. 595 (1913).

58 People *ex. rel.* Mayor v. Nichols, *supra* note 14. See also note 27 *supra*.

59 *Cf.* Price v. Seattle, 89 Wash. 376, 81 Pac. 847 (1905).

60 Plenary powers are job dismissals, immigration policy, congressional investigations, and other similar governmental functions.

61 Recently there has probably been more written in this area in the "popular" field than legal, although it is still regarded as an important legal problem. See Note, *Constitutional Limitations Upon Congressional Investigations*, 5 U.C.L.A. L. REV. 645 (1958).

62 H.R. Doc. No. 57, 83rd Cong., 2d Sess. 366 (Supp.), Rule 11 § 25(K) (1955).

63 For a recent treatment of this problem see 7 BUFFALO L. REV. 267 (1958) and 62 DICK L. REV. 273 (1958).

III. DEVELOPMENT OF THE STANDARD

A close examination of the cases involving the role of the administrative agency in the three areas mentioned above will give some insight into the thinking of the courts. It is evident that although the courts have resolved the issue by a labeling process, they were first required to make a determination of what the agency had done—that is, decide whether or not the agency determination affected some substantial right of the party.[64] It is submitted that this determination of substantial right should be one of the controlling tests and carry over into the so-called "investigatory" proceedings.[65] Investigations of an administrative agency have been looked upon by the courts as merely preparatory to the enforcement of legislation, and therefore similar to a grand jury proceeding.[66] Information obtained is not conclusive against anyone, as there are no interested parties, and no determination or decision of a final nature can be made.[67] On the other hand, a hearing is a formal proceeding which proceeds to a final determination or judgment.[68] The courts have concluded that since administrative investigations are similar to grand jury inquiries, and since no one is entitled to counsel before a grand jury, no one has a right to counsel in an administrative investigation.[69] However, there is in fact little similarity between an administrative agency investigation and a grand jury inquiry. Both are empowered to subpoena witnesses to testify, and to compel the production of records and documents upon demand. But here the similarity ends. The grand jury is an institution of great historical significance in the growth of Anglo-American law. It is a selected panel of private citizens, summoned for a short period of time and, in some instances, for one particular purpose. The grand jury merely indicts, that is, it only determines whether or not there exists sufficient cause for the prosecuting authorities to act. It does not take part in the later prosecution and the subsequent determination of guilt or innocence.[70] But the same *agency* that investigates later prosecutes and takes part in the final determination.[71] In most instances the proceedings of the grand jury are secret.[72] The courts have similarly excluded counsel from investigations upon the grounds that necessity demands secret proceedings,[73] but it is rather strange to exclude an officer of the court for that reason. It may be necessary to exclude the general public and even court reporters, but an attorney stands in a different position.

Whether the primary purpose of an investigation by an administrative body is to sift the evidence and charges and thereby determine what are to be the issues at the later stages of the proceedings, or solely to acquire information, counsel should be present at this stage in order to protect the rights of the individuals involved. As Mr. Justice Jackson, concurring in part and dissenting in part, said in *Watts v. Indiana,*[74]

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64 Substantial right is a term employed by the writer to mean any privilege, right, or activity that the party exercised or engaged in before the agency acted. The terms can be applied to activities as diverse as practicing law and driving an automobile. This contention, to expand further, is that just as a state is not required in every instance to grant a defendant a jury trial, still, if it does, that trial must be maintained with certain standards. Similarly, a state, after granting any right, privilege, or activity, must maintain some type of hearing with opportunity of counsel before the state can abridge or revoke that which it gave.

65 See dissenting opinion in *In re* Groban, *supra* note 7.

66 Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944); Wolley v. United States, 97 F.2d 258 (9th Cir. 1938); SEC v. Torr, 15 F. Supp. 144 (S.D.N.Y. 1936).

67 *In re* SEC, 14 F. Supp. 417 (S.D.N.Y. 1936).

68 DAVIS, ADMINISTRATIVE LAW § 131 (1951).

69 Bowles v. Baer, *supra* note 66.

70 ALEXANDER, LAW OF ARREST § 32(c) (1949).

71 DAVIS, *op cit. supra* note 68, § 131.

72 ALEXANDER, *op cit. supra* note 70, § 32(c).

73 Bowles v. Baer, *supra* note 66.

74 338 U.S. 49, 59 (1949). The issue in this case was the validity of a confession. But this issue is present in administrative investigations, i.e., forcing the party to produce evidence against his interest without affording him any protection. However, *United States v. Levine,* 127 F. Supp. 621 (D. Mass. 1955) contends this works no injury upon the person since any evidence illegally seized adduced at

"to subject one without counsel to questioning which may and is intended to convict him is a real peril to individual freedom" and "[to] interrogate without counsel . . . largely negates the benefits . . . of right of assistance of counsel,"[75] at the later stages.

Two arguments are frequently advanced as to why counsel should or need be excluded from the investigations. One is that the presence of counsel would unnecessarily burden the proceedings, causing delay and confusion. Secondly, it is contended that a witness or party before the investigating body can fully protect himself by asserting the privilege against self-incrimination. To accept either argument is utterly to ignore reality. One of the principal duties of counsel, other than protecting the rights of his client, is to assure that the proceedings are orderly and efficient. As the dissent in *Groban* suggests:

> Perhaps, if a real need could be shown, counsel could be restricted to advising his client and prohibited from making statements or asking questions. And there are other alternatives, much less drastic or prejudical to the witness than complete exclusion of his counsel, which might provide satisfactory protection for the witness without unduly impairing the efficiency of the examination.[76]

The argument that a person can always assert his constitutional privileges is also without merit. When the court itself is not sure of the bounds and limitations of one's constitutional privileges, how can it assert that a private citizen, who has had little or no contact with the "niceties of the law" will be able to protect himself? When the statute that compels him to testify also provides for various contempt charges, how can an uncounseled layman, after being informed of such provisions, determine when he is entitled to assert the privilege against self-incrimination? Other pit-falls await the unsuspecting layman, such as the possibility of waiver. True, the attorney cannot always correctly answer these questions, but by his experience and knowledge he is able to protect more fully the individual's rights.

Presence of counsel does not include the necessity of a formal hearing. Counsel might be present only to advise the witness of constitutional rights.[77] To hold that his presence in such a limited capacity would unduly hamper the operation of an investigation is groundless, unless the investigating agency proposes to operate as a Star Chamber. The test for assistance of counsel should not be whether the proceeding is a "hearing" or "investigation," but rather, what is the agency conducting the proceeding empowered to do, and how will it affect the positions of the persons before it.[78]

It has been recognized that a proceeding before an administrative agency is a civil, rather than a criminal proceeding,[79] and as such, it would seem that the general principles of civil practice should apply. New York recognized this as early as 1901 when it interpreted the section of its constitution giving the right to defend in person with counsel in civil cases to mean that it should apply in removal proceedings before an administrative agency.[80] Certain aspects of civil proceedings have been recognized by the courts as applicable to proceedings before administrative agencies. Thus an agency has no duty to furnish counsel,[81] and a failure to notify a party of his right to counsel will not invalidate the proceedings.[82] Also, neither counsel nor the interested party need

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the investigatory stage can be successfully suppressed at a later stage, either at the hearing or upon review by the courts. But by such procedure a person's rights are unnecessarily violated and there is undue expense and delay.

75 *Ibid.*

76 352 U.S. 330 at 349, n. 28.

77 For example, see 17 N.J. REV. STAT § 52:17B-43.1 (1952) which created a Law Enforcement Council and provided in § 52:17B-43.1 (1952) that any witness at any public or private hearing would have the right to counsel, but only to advise him of his constitutional rights.

78 *In re* Groban, 352 U.S. 330 (1957).

79 Molina v. Munro, 145 Cal. App. 2d 601, 302 P.2d 818 (1956).

80 Smith v. Phisterer, 66 App. Div. 52, 73 N.Y. Supp. 124 (1901).

81 Bancroff v. Board of Registered Dentists, 202 Okla. 108, 210 P.2d 666 (1949).

82 Miner v. Industrial Comm'n, 115 Utah 88, 202 P.2d 557 (1949).

be present at all times during the proceedings.[83] In the event a party does not appear with counsel, the agency is under no duty to act as his counsel or protect his interests.[84] The nature of civil proceedings demand, under the requirements of due process, that the defendant ". . . be served with notice of the proceedings and have a day in court to make his defence."[85] One court has said:

> [P]rocedural due process, broadly speaking, contemplates the rudimentry requirements of fair play, whether in a court or an administrative authority, which includes a fair and open hearing . . . with notice and an opportunity to present evidence and argument; representation by counsel, if desired; and information as to the claims of the opposing party, with reasonable opportunity to controvert them.[86]

The right to be heard, even under the common law, has been held to include the right to be represented by counsel.[87] While due process does not necessarily require a hearing of the judicial type,[88] due process ought to require that a party be fully protected at each stage of the proceedings, rather than have to await subsequent review by the courts. And fully protected should mean represented by counsel.

As in civil proceedings in the courts, certain conditions can be imposed on the litigants, so also, certain conditions may be imposed on the conduct of administrative proceedings. But when the conditions are arbitrary and unreasonable they violate due process,[89] and as such they should be inoperative. It is suggested that exclusion of counsel in most instances is such an arbitrary condition. It has been stated that where there exists (1) an emergency,[90] (2) some preliminary or investigatory power,[91] (3) the exercise of a summary power,[92] or (4) the possibility of a later review by the courts,[93] neither hearing nor counsel is required by due process. But it is submitted, for the reasons already suggested, that contentions (2) and (4) are not valid, and that in the early stages of the emergency situation such procedure without counsel is justified only if later a hearing is afforded the affected party.[94] In many instances, the exercise of the summary powers does not require a hearing or representation by counsel, as there is usually no particular issue in dispute nor any facts that need be determined by a judicial-type process. These would include the operation of the social agencies whose purpose is to administer to a large number of persons as expeditiously as possible. Agencies handling unemployment compensation,[95] veterans claims,[96] or similar agencies, are not

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83 Molina v. Munro, *supra* note 79; Concrete Materials Corp. v. FTC, 189 F.2d 359 (7th Cir. 1951); NLRB v. American Potash & Chemical Corp., 98 F.2d 488 (9th Cir. 1938); Manufacture Light & Heat Co. v. Ott, 215 Fed. 940 (N.D. W.Va. 1914); People *ex rel.* O'Neill v. Bingham, 132 App. Div 667, 117 N.Y. Supp. 429 (1909).

84 Griswald v. Department of A.B.C., 141 Cal. App. 2d 807, 297 P.2d 762 (1956). A party appearing in person can gain no special privileges and is required to object to alleged hearsay and other evidence in the same manner as would counsel.

85 Rees v. City of Walkerton, 86 U.S. (19 Wall.) 107, 122 (1874).

86 Almon v. Morgan County, 245 Ala. 241, 16 So. 2d 511, 515 (1944).

87 Arnold v. Milwaukee, *supra* note 15. Right to counsel includes the right to private consultations between attorney and client. Fusco v. Moses, 304 N.Y. 424, 107 N.E.2d 581 (1952).

88 L.B. Wilson, Inc. v. FCC, 170 F.2d 793 (D.C. Cir. 1948).

89 *Cf.* Hardware Dealers Mutual Fire Ins. Co. v. Glidden Co. 284 U.S. 151, 158 (1931).

90 58 COLUM. L. REV. 395 (1958).

91 *In re* Groban, 352 U.S. 330 (1957).

92 FORKOSCH, ADMINISTRATIVE LAW, ch. 7 (1957). Summary powers are establishment of temporary rate orders, suspension orders, exercise of the police powers (seizure of articles, ultra vires acts), and policy modification.

93 United States v. Levine, 127 F. Supp. 651 (D. Mass. 1955).

94 The fact the agency is to act quickly to protect the public interest does not mean a hearing should not be afforded later. *Cf.* Halsey, Stuart & Co. v. Public Service Comm'n, 212 Wis. 184, 248 N.W. 458 (1933), and compare State *ex rel.* Nowotny v. Milwaukee, *supra* note 29.

95 See MD. CODE ANN. art. 95A § 7 (1957). This statute provides first for an investigation of the claim to determine questions of fact and later for a "fair hearing" before a Board of Appeals, and finally appeal to the courts.

96 Most claims are usually settled by correspondence or conferences and extensive use of records. Where there is a controversy, issues are not decided by pleadings, but again by correspondence and conferences. Hearings may be held with party represented by counsel, but as most claims are settled

required to hold extensive hearings unless the agency refuses to grant a request, and a legal interpretation or a determination of a disputed fact has to be made.[97] Also, where the question to be decided by an agency is wholly legislative, such as the establishment of a tax, presence of counsel would not be necessary, as the persons appearing before it are there as "advisers" and not parties to the action. An appearance before a draft board without counsel would not be prejudical to a person, for the person, though a party to the proceedings, is afforded ample protection by being allowed to appeal to the courts. Aside from these considerations, an agency of this type, composed of laymen who are likewise without the aid of counsel is not suited to cope with purely legal questions, which should find disposition in a court of law.

Another factor that the courts should consider is the position of the person involved. A private individual, less familiar with agency proceedings (or any legal proceeding), should be granted more protection than a corporation whose officers and agents have continual contact with various governmental agencies on both the state and federal level. The courts have recognized a distinction of this type in other areas of the law[98] and should carry it over into the area of the right to counsel.

IV. Conclusion

The assistance of counsel should be retained as one of the most important factors in any legal proceeding, whether before a court of law or an administrative agency. As there is usually no valid reason why counsel should be denied, it is the duty of the courts to protect individuals by allowing them the assistance of counsel upon request. From the largest federal agency to the smallest local body, no proceeding can be sustained unless it is fair and just. Fairness would seem to imply a right to counsel. Generally the Federal Government has recognized this and has attempted to correct the situation by statute, but as previously seen it has not provided a fully adequate remedy. In many of the states, however, both statutory and judicial remedy is lacking. If the courts will carefully consider what the agency is empowered to do, who the persons are before it, and that the proceedings are of a civil nature, they can only conclude that the instances are rare indeed when a party to an administrative hearing may be denied counsel. Investigation-hearing, judication-adjudication are mere labels that do not reach substantive issues. The presence of counsel is one of the essential elements of the administration of justice in our Anglo-American system. To give men rights, but to deny to them the instrumentalities to exercise those rights, is, in effect, to give them nothing.

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upon medical examination or hospitalization, hearings are usually not necessary. *Survey and Study of Administrative Organization, Procedure and Practice,* Part II D, H.R. 85th Cong. 1st Sess. 2070-73 (1957) (Comm. print).

97 This would mean that when a claim was first submitted and during preliminary determinations and procedure, no counsel would be necessary. But as soon as any findings of fact are to be made that will be final or substantially affect any later proceeding, one should be entitled to counsel at such point.

98 The courts give a private individual's records and papers more protection than a corporation's. If this principle had been adopted by the court in either *In re* Groban, 352 U.S. 330 (1957), or Bowles v. Baer, 142 F.2d 787 (7th Cir. 1944), a different, and seemingly more just, decision might have resulted.