

# RIGHT TO COUNSEL

The government must provide every defendant in a criminal action with effective legal representation.

The sixth amendment to the U.S. Constitution states,

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense."

This clause grants to all defendants the right to an attorney from the moment they are taken into police custody.

The decisions of the U.S. Supreme Court have also construed this Right to Counsel Clause to mean that an impoverished, or indigent, defendant has the constitutional right to the presence of a court-appointed attorney at critical stages in the criminal proceedings. These critical stages include custodial interrogation, post-indictment lineups, preliminary hearings, arraignment, trial, sentencing, and the first appeal of conviction.

The Right to Counsel Clause was a reaction against the English practice of denying the assistance of an attorney in serious criminal cases and requiring defendants to appear before the court and defend themselves in their own words. The 1586 trial of Mary Stuart, Queen of Scots, illustrates the harshness of denying the assistance of counsel in a criminal case. Queen Mary was charged with treason for allegedly conspiring to assassinate Queen Elizabeth I. Mary asked for the assistance of counsel, pleading "the laws and statutes of England are to me most unknown;

I am destitute of counsellors ... and no man dareth step forth to be my advocate" (Winick 1989, 787). Her requests were denied, and Mary was summarily convicted and executed by decapitation.

The Framers of the U.S. Constitution considered the deprivation of counsel repugnant to basic principles of criminal justice. According to the Framers, the assistance of counsel was a critical element in maintaining an accusatorial system of justice. (An accusatorial system places the burden on the prosecution to establish the guilt of the defendant. This is opposed to an inquisitorial system, wherein guilt or innocence is determined through interrogation of the defendant.)

For 150 years, the Right to Counsel Clause was construed as simply granting to a defendant the right to retain a private attorney. This did not mean that an impoverished criminal defendant had the right to a court-appointed attorney without cost. In 1932, the U.S. Supreme Court began to reverse this interpretation in *powell v. alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158. In *Powell*, nine black youths were accused of raping a white girl in a train going through Alabama on March 25, 1931. A sheriff's posse rounded up the youths and held them in custody. The youths were not from Alabama, and they were not given the opportunity to contact their family.

The youths were indicted on March 31. On April 6, they were tried with the assistance of unprepared counsel and convicted, and subsequently sentenced to death. The youths thereafter received the assistance of counsel for their appeals. The Supreme Court of Alabama affirmed the convictions. The U.S. Supreme Court reversed the convictions and returned the case to the Alabama state court. According to the Court, the trial court's appointment of an unprepared attorney in a capital case is a violation of the defendant's due process rights.

The Powell decision did not mandate the appointment of an attorney for all impoverished defendants. The Court in Powell merely held that due process requires the appointment of prepared counsel to indigent defendants in a case that involves the death penalty. Powell did, however, provide the basis for the requirement of free counsel for defendants faced with serious federal charges.

In *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), the U.S. Supreme Court held that an indigent federal criminal defendant who faces a serious criminal charge, such as a felony, is entitled to an attorney at the expense of the government. According to the Court, the right to counsel is "one of the safeguards ...deemed necessary to insure fundamental human rights of life and liberty." In making this decision, the Court noted "the obvious truth that the average defendant does not have the professional legal skill to protect himself."

Significantly, the Johnson opinion did not force states to provide the right to counsel for all indigent criminal defendants in state court; this right to counsel applied only to indigent defendants facing serious charges in federal court. In state court, by virtue of the Powell opinion, only indigent defendants accused of capital crimes had the right to a court-appointed attorney. Many states did provide for the right to an attorney for accused felons through statutes; other states did not. In 1963, the Supreme Court corrected these inequalities in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799.

In *Gideon*, defendant Clarence Gideon was charged in a Florida state court with breaking and entering a poolroom with the intent to commit a misdemeanor. Under Florida law, this was a felony. Gideon valiantly represented himself, but he was found guilty and sentenced to five years in prison.

On appeal to the U.S. Supreme Court, Gideon was represented by Abe Fortas, who had been appointed by the Court. Through Fortas, Gideon argued that the right to counsel was a fundamental right and essential to a fair trial. The Court agreed, stating that the "noble ideal" of a fair trial cannot be achieved "if the poor man charged with a crime has to face his accusers without a lawyer to assist him." The Court reversed Gideon's conviction, holding that all states must provide counsel to indigent defendants who face serious criminal charges. The legal basis for the decision was the Due Process Clause of the fourteenth amendment to the U.S. Constitution. This clause forbids states to enact laws denying due process of law to citizens of the United States. On retrial, represented by appointed counsel, Gideon was acquitted.