The History of the Right to Free Counsel in America

by

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"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury, in the State and district wherein the crime was committed; which district should have been previously ascertained by law, and been informed of the nature and cause of the accusation against him; to be confronted with the witnesses against him; to have compulsory process for obtaining in his favor, and to have assistance of counsel for his defense."[1]

Overview

This article looks at the history of the Sixth Amendment right to free counsel. Courts have construed the last clause of the Sixth Amendment to mean that in all cases where a criminal defendant faces jail or prison time, he or she is entitled to free counsel. This article focuses on the evolution of this concept.

The position taken in this article is that the Framers of the Sixth Amendment clearly meant that all criminal defendants have the right to hire counsel. Support for this position is seen in the actions the Framers took both before and after the Sixth Amendment was ratified. More liberal interpretations of the Sixth Amendment have come from the United States Supreme Court. Therefore, this article also focuses on the justifications the Supreme Court gave in extending the right to free counsel from beyond capital cases – first to federal criminal defendants and then to state criminal defendants. In addressing this issue, this article looks at history on the issue of free counsel in America from pre-colonial times to the Supreme Court's ruling in the *Argersinger* case.[2]

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[1] U.S. CONST. Amend.VI.
[2] Argersinger v Hamlin, 407 U.S. 25 (1972).

England and the Right to Counsel

Until 1695, no person accused of a crime in England, including felonies, had a right to counsel.[3] This was particularly bad news for English defendants as all felonies

committed in the 16th and 17th centuries were capital offenses.[4] The lack of the right to counsel, however, had the approval of the public.[5]

A generally accepted reason for this was the fact that the English government was very weak and as such had to take every possible advantage over its enemies.[6] Such a goal, however, could have been accomplished by allowing counsel for all crimes except treason. The fact that this was not the case indicates an incredible paranoia existed among the ruling class of England at the time. Thus under the English view, even a common highwayman represented a threat to the English government.

The right to counsel changed as a result of the Glorious Revolution in 1688.[7] The Revolution, which stabilized the political scene in England, led to the extension of counsel for those accused of treason.[8] The so-called Treason Act of 1695 created a series of reforms in English criminal procedure with respect to the issue of the right to counsel.[9] In addition to those charged with treason, the right to counsel was extended to those who were charged with misdemeanors.[10] In fact, the right to counsel had meaning only for

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[3] William Gangi, the Bill of Rights: Original Meaning and Current Understanding 366 (Eugene W. Hickok, Jr. ed., University Press of Virginal) (1991).
[4] Id.
[5] Alfredo Garcia, The Sixth Amendment in Modern American Jurisprudence: A Critical Perspective 3 (Greenwood Press) (1992).
[6] Id.
[7] Id.
[8] Id.
[9] Id.
[10] Id.

those charged with misdemeanors. It has been suggested by W. Beaney that the English Government did not feel as threatened by misdemeanants as it did felons.[11] Treason, a political crime by definition, was under the jurisdiction of the Star Chamber.[12]

The role of counsel in the Star Chamber was more like the role of counsel of defense attorneys operating under the Chinese Civil Law system.[13] In the Star Chamber, the function of counsel for the accused was to strip away the defendant's ability to defend himself against the charges.[14] There was a requirement that the defendant's answer to the indictment had to bear the signature of counsel.[15] The failure of counsel to sign the answer to the indictment meant that the defendant had confessed to the crime he/she was charged with the indictment.[16] To prevent counsel from signing the various tactics such as threats of sanctions if "frivolous" defenses became commonplace.[17] It would seem

[11] Gangi, supra note 3, at 373, (citing W. Beaney, The Right to Counsel in American Courts (University of Michigan Press, 1955). Gangi, while giving Beaney credit for at least taking a position on the issue, rejects Beaney's position. He says Beaney's view does not seem logical, He then goes on to say that one should not put much faith in views that are based on illogical reasoning. While he criticizes Beaney for his view, he offers nothing to take its place. This seems to be sophism as its worst.

[12] Id.

[13] The "purpose" of a trial under the civil system is a "search for the truth." The average American would not recognize the typical civil defense attorney. This is because the attorney often cooperates with the prosecutor, as well as the trial court. The Chinese system carries the cooperation level to an extreme. The function of the defense attorney in the Chinese system is simply to mitigate for the defendant. Like the Star Chamber, the presumption is if you are brought before the court, you are guilty. Failure to confess, like in the Star Chamber, shows the defendant is lacking in accepting responsibility for what he/she has done. Effectively, the defendant in either system does not have counsel.

[14] Garcia, supra note 5, at 52 (citing 5 Holdsworth: A History of English Law, 196 (1927).

[15] Id.

[16] Id.

[17] Id.

frivolousness would be in the eye of the beholder. In essence, any attempt to defy the Star Chamber was a frivolous defense. One can only imagine the sanctions counsel would face if he dared get in the way of an authority investigating treason. It was, thus,

in defense counsel's interest not to sign the answer and to get his client to confess to his or her crime.

Because of this restricted role of counsel, The Treason Act of 1695, at best, was a shaky beginning to what we now know as the right to counsel. It took until 1836 for a right to counsel in criminal matters to become universally accepted.[18] As far as the right to court appointed counsel, however, England is still roughly 60 years behind America.[19] The rule in England today is that only those who are charged with murder and are indigent will be appointed counsel.[20] With a crime other than murder, the issue of right to counsel for the indigent is a matter of judicial discretion.[21] The current situation in England today would best be compared to the United States Supreme Court's view on the right to appointed free counsel that is found in *Betts v. Brady*.[22]

Given the generally hostile attitude that the English system had toward counsel, it is not surprising that the leaders of the new colonies in America would have had the same

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[18] Garcia, supra note 5, at 3-4.
[19] William M. Beaney, The Right to Counsel in American Courts 13 (University of Michigan Press, 1955).
[20] Id.
[21] Id.
[22] Betts v. Brady, 316 U.S. 455 (1942). While the right to counsel for criminal defendants existed in Maryland at the time, it was up to the trial judge's discretion to appoint counsel. Normally in criminal cases during the Betts era, the defendant would waive his right to a jury trial. Theoretically, this allowed the trial judge better control over the trial and allowed him to better "protect" the rights of the accused. This was the same basis and rationale found under the English system.

such feelings.[23] Naturally enough, the average defendant subjected to British criminal procedures would see first hand the abuses of power that permeated the system. Since

the only lawyer that one ever saw in court represented the government, the "professional" lawyer became a symbol of oppression.[24]

How did the "professional" lawyer become a symbol of oppression? The answer to this can be found in an explanation of English "justice" as described by the *Powell v. Alabama* Court.[25] The Court, citing Zephaniah Swift's book[26] states:

> The attorney for the state then proceeds to lay before the jury, all the evidence against the prisoner, without any remarks or arguments. The prisoner by himself or counsel is then allowed to produce witnesses to counteract and obviate the testimony against him; and to exculpate himself with the same freedom as in civil cases. We have never admitted that cruel and illiberal principle of the common law of England that when a man is on trial for his life, he shall be refused counsel, and denied those means of defense, which are allowed, when the trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten our indignation at the practice: for it is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice, and assistance necessary to make his defense. This doctrine might with propriety have been advanced, at a time when by the common law of England, no witnesses could be adduced on the part of the prisoner, to manifest his innocence, for he could then make no preparation for his defense. One cannot read without horror and astonishment, the abominable maxims of law, which deprived persons accused, and on trial for crimes, of the assistance of counsel, except as to points of law, and the advantage of witnesses to exculpate themselves from the charge. It seems by the ancient practice, that whenever a person was accused of a crime, every expedient was adopted to convict him and every privilege denied him, to prove his innocence. In England, however, as the law now stands, prisoners are allowed the full advantage of witnesses, but excepting in a few cases, the common law is enforced, in denying them counsel, except as to points of law.[27]

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[23] Garcia, supra note 5, at 3-4.
[24] Id.
[25] Powell v Alabama, 287 U.S. 45, 62
[26] Zephaniah Swift, A System of Laws of the State of Connecticut Vol. II, Bk. 5, Crimes and Punishment 398-399, (John Byrne, 1795-1796).
[27] Powell at 63 citing Swift, supra note 26, at 398-399.

After being subjected to the criminal procedural system of England, there is no doubt why hostile feelings manifested themselves in the West Jersey Charter of 1776.[28] This Charter was the basis of government and law in West Jersey. Part of this charter gave

litigants the right to defend their own cases and specifically freed them of the compulsion to hire their own counsel.[29] When one considers the one sided way that trials in England at the time, such an attitude was not surprising. As it will be shown later, the West New Jersey Charter was an aberrant view and was later completely rejected, as was the English Rule, by the whole of New Jersey when it became a colony and later a state.[30]

The Early Days of the American Colonies (1641-1775)

Due to a lack of good or consistent record keeping in the American colonies and then later in the early American states, it is difficult to chart the early views on the right to free counsel in this country. This article will accomplish this task by looking to the statues that existed in the colonies and states. There are problems with this type of analysis, however, as states such as Connecticut did not have a statute concerning the right to counsel until 1818, when it enacted its state constitution. Connecticut, however, had allowed for the appointment of counsel for the indigent by practice since 1750.[31] In direct conflict with the West New Jersey Charter, on the issue of right to counsel, was

[28] Id.
[29] Id.
[30] Beaney, supra note 19, at 20.
[31] Beaney, supra note 19, at 16.

the Body of Liberties. This act, which was adopted, 1641 by Massachusetts, gave what superficially seemed to be an opposite view on the right to counsel.[32] The Body of Liberties functioned as a bill of rights.[33] While it listed most of the rights found in the American Bill of Rights, there is a central difference when it talks about the right to counsel.[34]

The Body of Liberties guaranteed the right to employ counsel.[35] The key word is "employ". Employ is defined in *Blacks Law Dictionary* as meaning: 1) To make use of, 2) To hire, 3) To use as an agent or substitutive in transacting business, and 4) To commission and entrust with the performance of certain acts or functions or with the management of one's affairs.[36] There is nothing in the definition of the word employ that would suggest anything but the right to have counsel if you could afford it.

The effect of the Body of Liberties was to take discretion out of the hands of the judiciary when it came to the issue of employing counsel.[37] No language in the definition of employ would suggest thee was a guarantee of free counsel for the indigent under the Body of Liberties. Nonetheless, the right to employ counsel if one could afford counsel represented a radical departure from the view that had predominated in England, which the government alone had the right to counsel. While the Body of Liberties would not seem to make the government obliged to provide a person with counsel, a criminal defendant now had the previously unknown right to hire one.

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[32] Leonard W. Levy, Original Intent and the Framers' Constitution 142-143, (Macmillan Publishing Company 1988).
[33] Id.
[34] Id.
[35] Id.
[36] Blacks Law Dictionary 543 (7th Ed. 1999).
[37] Levy, supra note 32 at 142-143.

There is a split between authorities concerning the issue of whether the West New Jersey Charter or the Body of Liberties from Massachusetts contains the most

representative view held about the right to appointed counsel in the colonies Justice Sutherland stated in *Powell v. Alabama*[38] that at least twelve of the thirteen colonies under the rule of English common law appeared to have rejected the concept of free counsel for the indigent.[39] Justice Sutherland is not entirely accurate when he makes this statement. As will be shown, once the Revolutionary War started and the states began holding their constitutional conventions, states began rejecting the English Rule.[40]. In general, the colonies improved on the English Rule by taking the right to counsel issue out of the hands of the judiciary.[41]

All of the colonies had an exception allowing free counsel when the defendant was charged with a capital crime.[42] This by itself does not seem to have been a great departure from the English criminal procedure system. There are, however, two notable differences. First, the colonies in America removed judicial discretion in securing the right to counsel by enacting laws that allowed it.[43] This was clearly a rejection of the English system. Second, four of the thirteen colonies had expanded greatly upon the

[38] Powell at 63.
[39] Id.
[40] Beaney, supra note 19, at 17-21
[41] Id. At 14-18
[42] Id. At 15.
[43] Gangi, supra note 3, at 367.

English system.[44] Rhode Island, South Carolina, Pennsylvania, and Delaware made a substantial departure from the English system by granting free counsel it indigents.[45] As will be discussed later, however, it was not until 1776 that American lawyers were

allowed to actually represent their clients consistent with the modern idea of representation.46 Until that date, attorneys were restricted to the English style of lawyering, which was to argue only points or law or legal questions.[47]

A survey of the colonial legislatures reveals the following concerning the issue of free counsel, as well as the right to counsel at all. New York and Virginia gave lip service to the idea of the right to counsel. An intensive study of both colonies court records, by Goebel and Naughton, showed there was not much difference between these two colonies and England in terms of granting counsel. In all fairness that this study has been attacked due to the fact that the colonials did not keep the best records. Often, even when counsel was appointed, no record was every made of the appointment. The study done by Goebel and Naughton is therefore suspect, and other researchers have come to different conclusions.[48]

Even if one accepts that the early statistics are reliable, an attack that seems to be

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[44] Beaney, supra note 19, at 15-17.
[45] Id. At 18. I have chosen to base my analysis of the progress made based on the various statutes that had been enacted in this period. I would most certainly be attacked by Goebel and Naughton for focusing on the statues and not on the colonial records. It is important to focus on the statutes as this shows the true intent of the colonies in attempting to move away from the English system. I seem to have support in this position from Beaney.
[46] Id. At 15-17.
[47] Id. At 18.
[48] Id. At 15.

fatal to Goebel and Naughton concerns the shortage of lawyers. The combination of

English rules on criminal procedure, as well as the early shortage of lawyers realistically meant the accused ended up defending himself.[49] Another factor not discussed in this equation is the size of the American colonies. The small population of lawyers, as well as colonists, was spread over a much larger landmass than England further contributing to the shortage of lawyers that would be able to defend indigents.

There was no statutory provision for the appointment of counsel in criminal cases in Connecticut until the first state constitution was passed in 1818.[50] However, there was a custom in Connecticut of the court appointing counsel if the accused asked for or if there was a mental or physical handicap that prevented the accused from asking for counsel.[51]

Pennsylvania also expanded upon the English version of the right to counsel as it expanded the list of cases where people were entitled to have counsel appointed for all capital crimes.[52] A statute passed in 1718 stated that treason Trials were to follow the same procedures as found in England.[53] This meant that counsel was required. Further the charter listed the many other capital crimes and said that "upon all trials of capital crimes, lawful challenges shall be allowed and learned counsel shall be assigned to the prisoners."[54] As most felonies at that time were capital crimes, this was no small

[49] Id. Beaney citing Charles Warren, A History of the American Bar (Boston: Little, Brown, 1911) Chapters II-VI.
[50] Id. At 16.
[51] Id.
[52] Id.
[53] Id.
[54] Id.

expansion of the rights of indigents to have court appointed counsel.

In the Delaware charter of 1701, the principles espoused in the Pennsylvania Frame of Government (1683) were generally accepted.[55] The charter stated that "all criminals shall have the same Privileges of Witnesses and Council as their Prosecutors."[56]

South Carolina granted the right to court appointed counsel to anyone charged with a capital crime.[57] The statute stated that anyone accused of treason, murder, felony, or other capital offense was to have the right to "make his and their full defense, by council learned in the law… And in case any person… shall desire council, the court… is hereby authorized and required, immediately, upon his or their request, to assign… such and so many council not exceeding two, as the person or persons shall desire, to whom such council shall have free access at all reasonable times."[58] When reading the South Carolina statute with the word "assign" in it, there is no doubt as to its intent. A capital defendant who could not afford counsel would have counsel appointed for him by the court.

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[55] Id.
[56] Id. at 16-17.
[57] Id. at 17.
[58] Id.

Rhode Island, under the leadership of Roger Williams, took the most progressive view on the right to appointed counsel. Rhode Island's act, passed March 11, 1660, expressed the reasons why an accused needed counsel:

> Whereas it doth appeaere that any person…may on good grounds, or through mallice or envie be indicted and accused for matters criminal, wherein the person is so [accused] may be innocent, and yett, may not be accomplished with soe much wisdom and knowledge of the law to plead his own innocencye, & c. Be it therefore inacted…that it shall be accounted and owned from henceforth the lawful privilege of any man that is indicted, to procure an attorney to plead any point of law that make for clearing of his innocencye.[59]

Beaney, in his book The Right to Counsel in American Courts, claims that the Rhode Island act was little more than a statutory embodiment of the English procedure.[60] His later analysis of the Rhode Island law, however, seems to refute this statement.[61] The author correctly makes two points. First, at a minimum, the Rhode Island act took away discretion from the judges.[62] Second, lawyers in American colonies had the same restrictions placed upon them as their English colleagues.[63] Defense lawyers were limited to arguing only points of law and legal questions.[64] These limitations continued in America until 1776.[65] The point missed by Beaney, however, is that no distinction is made between capital and non-capital cases. Though the function of a lawyer in Rhode Island would remain limited, as it was in England, this limited representation was certainly better than no representation at all.

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[59] Id. at 17-18.
[60] Id. at 18.
[61] Id.
[62] Id.
[63] Id.
[64] Id.
[65] Id.

Status of the Right to Free Counsel for the Indigent

It is clear that in Pre-Revolutionary War America five colonies, Pennsylvania, Delaware, South Carolina, Rhode Island, and Connecticut, had undertaken the necessary steps to significantly move away from the English Rule.[66] In three colonies Pennsylvania, South Carolina, and Rhode Island, the right to free court appointed counsel existed for all crimes, capital or not.

The Right to Appointed Counsel in the Revolutionary War America State Constitutions

Once the Revolutionary War had begun, with the exception of Connecticut and R Rhode Island, the remaining eleven colonies began adopting state consititutions.[67] Connecticut and Rhode Island continued to use their seventeenth century charters.[68] Both colonies were liberal on the issue of the right to counsel.[69] Rhode Island followed its charter concerning the appointment of counsel, and Connecticut continued its practices concerning appointment of counsel by tradition.[70]

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[66] Beaney claims only four colonies made a definite advance over the English Rule, Pennsylvania, Delaware, South Carolina, and Connecticut. It is my contention that Rhode Island needs to be included in this list for its early liberal granting of counsel. Beaney discusses Virginia in a similar vein as Rhode Island, but it is clear that Virginia essentially followed the English Rule when it came to assigning counsel. Virginia, however, took the right to assign counsel from the judiciary and made it statutory.

[67] Id.

[68] Id.

[69] Id. at 16-18. As discussed earlier, Connecticut continues its tradition until the passing of its state constitution. The constitution was passed in 1818.

[70] Id.

Georgia had no provision for the right to counsel in its Constitution of 1776.[71] Some twenty years later, Georgia granted the right to counsel.[72] The amendment passed in 1798, stated that: "No person shall be detained from advocating or defending his cause before any court or tribunal, either by himself, counsel, or both."[73]

Virginia also made no provision for the right to counsel in its Constitution of 1776 and failed to add one in its future constitutions.[74] The Bill of Rights of the Virginia Constitution of 1776 only makes a vague reference that prosecutions should be made in accordance with the "law of the land."[75] This sounds more like a caution for prosecutors not to become as abusive as they had been in England. Finally, in 1786 Virginia passed a statute that allowed the accused to retain counsel.[76]

The same "law of the land" reference that was found in the Virginia Constitution can be found in the South Carolina Constitution of 1778.[77] The reference to the law of the land is not as vague as the reference from Virginia, however.[78] The South Carolina Constitution of 1778 requires that criminal proceedings be in accordance with the "law of the land."[79] As South Carolina had granted a wide right to counsel in 1731, the reference to the "law of the land" continued to sustain that right.[80]

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[71] Id. at 19.
[72] Id.
[73] Id.
[74] Id.
[75] Id.
[76] Id.
[77] Id.
[78] Id.
[79] Id.
[80] Id.

No reference to the right to counsel existed in the North Carolina Constitution until the Reconstruction Era.[81] The right to counsel did exist in North Carolina, however, due to an act passed in 1777. The act read: "every person accused of any crime or misdemeanor whatsoever, shall be entitled to council, in all matters which may be necessary for his defense as well as to facts as to law."[82] Further, North Carolina had began to expand what counsel could do in defending a client. The reading of the North Carolina statute shows that the attorney was no longer restricted to arguing points of law or legal questions, but could also question witnesses and introduce evidence.[83] The Delaware Constitution of 1776 that stated "all acts and statutes in force were to continue in force."[84] This continued the previously established right to hire counsel in non-hire counsel in non-capital cases and the right to appointed counsel in capital cases.[85] The Delaware Constitution of 1792 said that: "In all criminal prosecutions the accused hath a right to be heard by himself and his counsel.[86] The Pennsylvania Constitution of 1776 phrased the right to counsel in the terms of the Delaware Constitution of 1776.[87]

The New York Constitution of 1777 said that "in every trial or impeachment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in

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[81] Id.
[82] Id.
[83] Beaney does not share my position in this regard. He simply sees the North Carolina Action as taking the best of the English system and removing it from judicial discretion. *See* Beaney, supra note 19, at 19.
[84] Id. at 19.
[85] Id. 19-20.
[86] Id. at 20.
[87] Id. at 20.

civil actions.[88] What this means is anyone's guess. As there had never been a right to appointed counsel in a civil matter, this would suggest that you would be allowed counsel even in capital cases if you could afford to hire counsel.

On the issue of the right to counsel, New Jersey made the most radical departure from its colonial-period. New Jersey, before its constitutional convention, had no statutory provision for the right to counsel and had followed the English Rule in regards to allowing judicial discretion to determine when counsel is to be granted in non-mandatory cases.[89] The new constitution, stealing a page from the Delaware Charter, now said, that "all criminals shall have the same Privileges of Witnesses and Council as their Prosecutors."[90] In 1795, the Delaware legislature cleared up this ambiguous language.[91] The Act of 1795 "authorized and required the courts in all cases of indictment to assign such person, if not of the ability to procure counsel, such counsel, not exceeding two as he or she shall desire."[92]

The Massachusetts Constitution of 1780 said that "every subject shall have a right to…be fully heard in his defense by himself or his counsel, at his election."[93] The right to counsel was granted by the Maryland Constitution of 1776 that stated that "in all criminal prosecutions, every man hath a right…to be allowed counsel."[94]

The New Hampshire Constitution of 1784 stated that "every subject shall have a

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[88] Id.
[89] Id.
[90] Id. at 20. *See* Beaney, supra note 19, at 16-17 for discussion of the Delaware Charter.
[91] Id.
[92] Id.
[93] Id.
[94] Id. at 20-21.

right…to be fully heard by himself and counsel."[95] An act, passed by the New Hampshire legislature in 1791, took the right to appointed counsel out of the hands of the judges in capital cases.[96] The act stated that a person facing a capital charge "shall at his request have counsel learned in the law assigned to him by the court, not exceeding two, and…shall have a liberty to make his full defense by counsel and himself."[97]

The Independent Republic of Vermont in its Constitution of 1777 stated that "in all prosecutions for criminal offenses a man hath the right to be heard, by himself and his counsel…"[98]

Status of the Right to Free Counsel

By 1818, twelve of thirteen state constitutions had a clause regarding the right to counsel.[99] North Carolina was the sole holdout, but even it passed a statute that gave the right to counsel in all cases, thus destroying the remnants of the English Rule in two ways.[100] First, by statute, North Carolina removed the discretion of the trial judge in determining if a defendant could have an attorney represent him. Second, the statutes written contained no restriction as to what crimes were allowed lawyers and what crimes were not. Any defendant charged with any crime could retain council, as long as they could afford it.

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[95] Id. at 21.
[96] Id.
[97] Id.
[98] Id.
[99] Francis H. Heller, The Sixth Amendment 109 (Greenwood Press, 1969). This Beaney also supports position, supra note 2, at 18-21. This is also a position shared by the writer of this paper based on my research. Justice Roberts in writing the majority opinion in Betts seems to have missed the boat on this issue as he claimed no states had given the right to counsel constitutional status. *See* Gangi, supra note 2, at 366 for Roberts' views.
[100] Beaney, supra note 19, at 19.

Six states, South Carolina, Delaware, Pennsylvania, New Jersey, Rhode Island and Connecticut appointed counsel for indigents in capital cases.[101] Of these states, only Delaware did not have a guarantee of the appointment of free counsel for the indigent.

The Framers on the Right to Appointed Counsel

The purpose of the Sixth Amendment was to end rules that denied representation for criminal defendants.[102] There had been a clear repudiation of the common law rule as to the right to counsel by the states, so it was natural that the Sixth Amendment would reflect that change also.[103] The Framers did not intend the Sixth Amendment to stretch to appointed counsel.[104] There are four main reasons for this analysis: (1) the Judiciary Act of 1789; (2) the Federal Crimes Act of 1790; (3) use of the canons of statutory interpretation, and; (4) the fact that no statutory change concerning the right to counsel occurred until after 1790.

The Judiciary Act of 1789, which was passed one day before the Sixth Amendment was proposed in both houses of Congress, stated in relevant part: That in all the courts of the United States the parties may plead and manage their own causes personally or by the assistance of such counsel or attorney's at law by the rules of the said courts respectively shall be permitted to manage and conduct cases therein.[105]

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[101] Id. at 18-21.
[102] Levy, supra note 32, at 76.
[103] Heller, supra note 99, at 109-110.
[104] Gangi, supra note 3, at 367.
[105] Heller, supra note 99, at 110, citing Section 35 of the Judiciary Act of 1789.

The person mainly responsible for drafting the Judiciary Act of 1789 was Oliver Ellsworth, with the help of William Paterson.[106] Both Ellsworth and Paterson were major actors in the framing of the Constitution and both would end up in active roles in the United States Supreme Court.[107] Ellsworth succeeded John Jay as Chief Justice and Paterson sat on the Court when it decided *Marbury v. Madison.*[108]

The Federal Crimes Act of 1790 became law on April 30, seven months before the ratification of the Sixth Amendment.[109] The Act stated:

> "Every person indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request assign him such counsel not exceeding two, as he may desire, and they shall have access to him at all reasonable hours."[110]

It seems clear from the passing of these two bills that the Framers never intended the Sixth Amendment to do anything else other than allow people the right to use counsel if they could afford it. Ellsworth, the person mainly responsible for drafting the Federal Judiciary Act of 1789 is considered a very influential Framer.[111] The Congress of 1790 were just as much Framers as the people who attended the Constitutional Convention for two reasons. First, it is a safe assumption that many of the Framers found their way into Congress. Second, Congress would be able to get the Framer's direct input. They would not have to rely on statutory interpretation.

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[106] Levy, supra note 32, at 76.
[107] Id. at 76.
[108] Id. at 76.
[109] Beaney, supra note 19, at 28.
[110] Id.

Justice Scalia, in his dissenting opinion makes a compelling statutory construction argument when he states: "Where Congress includes particular language in one section of a statute and omits it in another… it is presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[112] Eskridge refers to this closely related to the statutory canon of *exclusio unius*, or "the inclusion [expression] of one thing suggests the exclusion of all others."[113]

If the Framers had intended for the Sixth Amendment to provide for free counsel, rather than the assistance of counsel, why was there the need for the Federal Judiciary Act of 1789 or the Federal Crimes Act of 1790 which specified that certain federal capital offenses had a right to appointed counsel? Applying Justice Scalia's explanation and the canon of *exlusio unius*, the answer is there would be no need. If not, then both statutes would be superfluous. There is a strong presumption that Congress does not do this.[114] Two other scholars on the subject share this view.[115]

Beaney contends that Congress passed the Act of 1790 because it saw the Sixth Amendment as irrelevant on the issue of appointing free counsel.[116] Heller contends that the Judiciary Act of 1789 did nothing more than to give defendants a statutory right to counsel.[117] Both authors conclude, thus, the Sixth Amendment was supposed to have

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[111] Levy, supra note 32, at 76.
[112] Keen Corp. v United States, 508 U.S. 200, 208 (1993).
[113] William N. Eskridge, Jr. et.al., Legislation and Statutory Interpretation 114 (Foundation Press, 2000).
[114] Eskridge et al., supra note 113, at 337.
[115] Beaney, supra note 19, at 28. *See* also Heller, supra note 100, at 110.
[116] Beaney, supra note 19, at 28.
[117] Heller, supra note 99, at 110.

been "a declaration of a right in the accused, but not any liability on the part of the United States."[118]

The final argument supporting the Framers intent for the Sixth Amendment is the lack of activity by Congress. The Acts of 1789 and 1790 were the sole statutory guidelines until 1938.[119] The canon of *exclusion unius* also strongly supports this position.

Status of the Right to Appointed Counsel

Free counsel for defendant's accused of federal capital crimes is allowed pursuant to the Federal Crime Act of 1790. Furthermore, the Judiciary Act of 1789 allowed all defendants to hire their own counsel. A defendant in federal court who was facing non-capital charges could have counsel appointed by the court. However, the courts were not under any constraint of law to do so. The states left to follow what rule they wished on the appointing of counsel. All states had either constitutional provisions or statutes that called for the appointment of counsel in capital cases. The rule varied from state to state for non-capital cases. Nothing of note would happen on the issue of appointed counsel until 1938.

[118] Id. at 110. Citing Nabb v. United States, 1 Ct. Cl. 173 (1864) & United States v. Van Duzee, 140 U.S. 169 (1861).
[119] Beaney, supra note 19, at 28.

The Modern Era for the Issue of the Right to Court Appointed Counsel

Powell v. Alabama: A False Start

The first step toward the right to free counsel is generally credited to *Powell v. Alabama*.[120] This has become a popular myth. Under the laws of Alabama, the petitioners were entitled to counsel.[121] When it appears that a defendant charged with a capital offense has not employed counsel, it is the duty of the court to appoint attorneys for his defense. Compliance with this section had been fulfilled. At the time of the arraignment, there were nine defendants. The record does not disclose the number of attorneys practicing at the Scottsboro bar. Even without that information, it is clear that a good faith effort on the part of the trial judge might have allowed the defendant's their own lawyer for a total of nine rather than the two appointed.[122] Eight of the nine defendant's trials, all completed in one day, resulted in guilty verdicts.[123] Seven of the eight appeals that went to the Alabama Supreme Court resulted in the upholding of the result of the trial court.[124] The court said that the laws of Alabama had been followed, and the United States Supreme Court agreed with the Alabama Supreme Court when it stated that it was powerless to interfere with that holding.[125] The lone dissenter on the

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[120] Garcia, supra note 5, at 4.
[121] Powell 287 U.S. at 59060. The Court refers to the Constitution of Alabama (1901) Section 6 as well as a state statute, Code 1923, Section 5567 that requires a court in dealing with a death penalty case to appoint counsel if the defendant cannot afford it.
[122] Beaney supra note 18, at 152.
[123] Id. at 153.
[124] Id. at 153.
[125] Powell, 287 U.S. at 60.

Alabama Court, Chief Justice Anderson, felt the haste, the military atmosphere, the mob hostility, and a lack of adequate representation resulted in unfair trials for all defendants.[126]

When the Court reviewed the record in *Powell*, it found that the defendants had not received effective counsel.[127] Given the way the counsel had been selected, there is no doubt about this issue. The Court never articulated this position. It referred to the failure of the trial court to make an effective appointment of counsel.[128] The appointment of a semi-retired lawyer and a lawyer who was unfamiliar with Alabama criminal procedure to represent nine defendants in a trial held later that day is not either effective appointment of counsel or can in any way be construed as receiving effective assistance of counsel.[129]

Powell suggests that "special circumstances" can exist in a capital case that required greater scrutiny from the trial court than normal.[130] These circumstances include: the defendant is unable to employ counsel; incapable of making his own defense adequately because of ignorance; feeble-mindedness; illiteracy; or the lite.[131] When the court sees these circumstances, it is the duty of the court, whether requested or not, to assign counsel for the defendant as a necessary requisite of due process of law.[132] The Court did not believe that the trial court in *Powell* had statutorily fulfilled its duty. The

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[126] Beaney supra note 19, at 153.
[127] Heller, supra note 99, at 121.
[128] *Powell*, 287 U.S. at 69.
[129] Heller, supra note 99, at 122-123.
[130] *Powell* at 71.
[131] Id.
[132] Id.

duty of the court could not be discharged by an assignment at such a time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.[133] Given the slipshod way the attorneys were appointed in Powell, the trial court did not discharge the duties of the court.[134]

Chief Justice Anderson, the sole dissenter in *Powell v. State*, of the Supreme Court of Alabama, felt that it would have been better, given the fact the defendants were from out of state, to have given them more time from the indictment to the trial.[135] This would have at least allowed the defendants the opportunity to contact their families and perhaps arrange for their own counsel.[136] The fact that the defendants were both ignorant and illiterate meant that it would have been unlikely they could have secured their own counsel, but the court should have given them that opportunity.[137] The trial court, however, appears to have been panicked by the intense hostility of the community and the military presence that was in Scottsboro due to the defendants' incarceration there.[138] Add to this the fact that the court was "sure the defendants were guilty," why go through an "unnecessary" delay for something unlikely to produce the same result? This is where the problem arose. The Court saw the issue in Powell as being the trial court's failure to make effective appointment of counsel cause a denial of due process.[139]

The Sixth Amendment, even if it had been applicable to the States at the time of

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133 Id.
134 Garcia, supra note 5, at 5.
135 *Powell v. State*, 141 So. 201, 214.
136 Id.
137 Heller, supra note 99, at 121.
138 *Powell v. State,* 141 So. 201, 214.
139 Heller, supra note 99, at 123-124.

Powell, could not have been the basis for the result reached in that case.[140] The legal theory of selective incorporation[141] had not yet gained wide acceptance, and the prevailing theory was that of "fundamental fairness"[142] The only way that *Powell* could have been decided as a Sixth Amendment question would have been if the right to counsel had been given a different meaning.[143] The Court recognized this and, as such, took the approach that allowed them to avoid Sixth Amendment analysis with the exception of having recognized the right to appointed counsel in felony cses.[144] This essentially maintained the status quo. The *Powell* Court made its ruling based on the prevailing judicial view of a "fundamental fairness" analysis under the Fourteenth Amendment.[145]

The *Powell* Court's stated that there are two separate and distinct rights to counsel.[146] The first right came from the rejection of the English Rule, which stated that the defendant had the right to hire counsel to defend himself.[147] This is the right that can be seen in the Sixth Amendment, as well as the same right that can be found in

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[140] Id. at 126.
[141] Selective Incorporation means that part of the Constitution is applicable to the States through the Due Process Clause of the 14th Amendment. This is essentially a centrist position when compared to No Incorporation as found in the reasoning of Powell and Betts. Total Incorporation means all parts of the Constitution are applicable to the States. The philosophy of Total Incorporation, while having an occasional advocate on the Court, *see e.g. Black,* has never gained wide support. The prevailing view on Incorporation today is Selective Incorporation.
[142] Wayne R. LaFave et al., Criminal Procedure 459, Volume, Sections 8.1-12.5 (West, 2nd, 1999).
[143] Heller, supra note 99, at 123-124.
[144] Beaney, supra note 19, at 154-155.
[145] LaFave et al., supra note 142, at 461.
[146] Id.
[147] Id.

various forms in state constitutions and statutes of all the states, at the time of *Powell* decision.[148]

The second right is for the right to a fair hearing.[149] The predominate question was whether the State of Alabama discharged its duties to grant a fair hearing? Under the particular facts of *Powell*, the appointment of two lawyers for nine defendants, when the Constitution allowed for up to eighteen to be appointed, does not pass muster.[150] When combined with the other factors revolving around the trial, the result was essentially a sham trial, and the State of Alabama seems to have fallen short in what its goal should have been, the granting of a fair hearing or trial. The Court did not seem to be dissuaded by the fact that the trial judge had appointed "all members" of the Scottsboro bar to represent the defendants when they saw what the defendants ended up with representing them.[151] The right to counsel means that the counsel must be a zealous advocate.[152] Given the caliber of the attorneys who were named and the lack of time the attorneys had for their clients to prepare for a capital trial, they certainly fell short of the zealous advocate standard. Thus, *Powell* was more about ineffective assistance of counsel, rather than the right to counsel. The *Powell* Court said that although there was a visible presence of counsel, the defendants were entitled to effective counsel.[153] Appointing counsel of the caliber that the Scottsboro Boys got was the effective equivalent of no counsel at all.

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[148] Id.
[149] Id.
[150] *Powell*, 287 U.S. at 59-60.
[151] LaFave et al., supra note 142. at 459.
[152] Id.
[153] Garcia, supra note 5 at 6.

The Court in *Powell* says something very troubling when referring to a defendant in a criminal trial: "He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[154] The Court's Failure to make the "right to counsel" clause made applicable to the states is troubling. Even under a fundamental fairness analysis, it would seem there would be no justification for the failure to do so.

There are three rules that come from the Powell case. First, the appointment of counsel who merely go through the motions and is not an advocate for their client is the same as the defendant not having an attorney.[155] Second, the court must give all defendants "adequate time" to secure their own counsel.[156] Finally, if a defendant is not capable of making a decision on counsel due to ignorance or mental defect the court must appoint defense counsel.[157]

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[154] *Powell*, 287 U.S. at 69. This quote is inconsistent with the action the Court took. The Court had a dilemma. It had to have realized that all defendants, not simply capital defendants, "needed to be led." There is no rational basis for thinking otherwise. Ultimately, the right to appointed counsel lost out to the Court's refusal to incorporate the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment.

[155] Id.

[156] Justice Sutherland correctly realized that under Powell's particular set of facts, this issue was not likely to have much support on the Court. Give the defendants poverty, they were not going to be able to secure counsel anyway. He felt it was more important to make a statement about the effective appointment of counsel.

[157] *Powell*, 187 U.S. at 70.

Status of the Right to Free Counsel

Powell had no impact on the status of the right to free counsel. At the time of this case, roughly half of the states had any allowance for appointment of counsel in non-capital cases.[158] The only real meaning of *Powell* is that the appointment of counsel must be meaningful, otherwise the appointment is the same as not being allowed counsel at all. There were few cases after *Powell* that the defendant filed a claim based on failure to appoint counsel or failure to make an effective appointment.[159] Only four years later, in *Brown v. Mississippi* the Court ignored an ineffective appointment of counsel.[160] the defendant's attorney had not been appointed until the day before trial. However, this fact was ignored and the case was decided base don a coerced confession.[161] The Court stated that any denial by the state of the aid of counsel would violate the due process of law, citing *Powell* as its authority.[162] The *Brown* Court never considered effective appointment of counsel as an issue. The Court seemed to be saying one day was sufficient time to prepare the defendant's case and less than one day not. Had *Brown* been a run of the mill felony case, perhaps one day might have been enough time to prepare. However, *Brown*, like *Powell*, was also a capital case and it would seem that the few extra hours difference in time would be *de minimus*.[163] The Court in *Brown*, by not addressing the ineffective appointment of counsel issue, stands for the proposition that any appointment of counsel, no matter what method is used, is an appointment of effective counsel. This flies in the face of the *Powell* Court's decision. The final blow to the right to appointed counsel in non-capital cases, came from a Federal District Court in *Wilson*.[164]

158 LaFave et al., supra note 142, at 460.
159 Beaney, supra note 19, at 157.
160 *Brown v. Mississippi*, 297 U.S. 278 (1936).
161 Id.
162 Heller, supra note 99, at 125.
163 *Brown*, 297 U.S. at 278.
164 *Wilson v. Lanagan*, 19 F. Supp. 870 (1937); 99 F. 2nd 544 (1938); 306 U.S. 634 cert. denied (1939).

A defendant had requested counsel in a non-capital case in Massachusetts. State law specified, the court in only appointed counsel in capital cases unless "special circumstances" existed.[165] Because no "special circumstances" existed the court upheld the trial court did not appoint counsel for the defendant.[166] The Circuit Court of Appeals upheld the Federal District Court and the United States Supreme Court denied certiori.[167]

Johnson v. Zerbst: The Right to Appointed Counsel on the Federal Level

In 1938, the Supreme Court found that the Sixth Amendment contained the right to retain counsel s well as the right to appointed counsel in federal felony trials.[168] For the first time, the Court held that when the accused, is not represented by counsel, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.[169] Justice Black wrote that the Sixth Amendment requires assistance of counsel, absent a waiver from the accused.[170] The decision in this case limits the right to counsel to federal courts.[171]

The Court was relied on a "fundamental fairness" analysis. Under this form of analysis, best illustrated by *Baron v. Baltimore*,[172] none of the Bill of Rights were applicable to the states.

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[165] Id.
[166] Beaney, supra note 19, at 158.
[167] Id.
[168] LaFave et al., supra note 142, at 462.
[169] *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938).
[170] Garcia, supra note 5, at 8.
[171] *Johnson v. Zerbst*, 304 U.S. at 463. (1938).
[172] *Baron v. Baltimore*, 32 U.S at 243 (1833).

The U.S. Constitution was designed to serve as a limitation on the federal government, not the state governments.[173] Selective incorporation had not yet gained popularity. Since the Court was dealing with federal prisoners, there was no way this court have extended the rights they had just granted to federal defendants charged with felonies to state defendants charged with felonies.

Status of the Right to Appointed Counsel

After *Johnson*, the right to court appointed attorneys for indigent defendants charged with felonies in the federal system was established based on the Sixth Amendment. The Court had not formally addressed the issue concerning state felony court defendants.

Betts v. Brady: The Peak of Non-Incorporation

In *Betts* the Court finally decided the right of appointed counsel for indigent felony defendants in state court. Betts, charged with the non-capital offense of robbery, seemed to have a strong argument that the right to counsel in cases such as his should not require special circumstances.[174] His reasoning was that in *Palko*,[175] Justice Cardozo had virtually included the Sixth Amendment right to counsel provision in the Fourteenth Amendment.[176] Betts further argued that the right to appointed counsel was an "essential part of liberty."[177] Thus, his argument went that when a denial of a right violated

[173] Id. at 247.
[174] Beaney, supra note 19, at 160.
[175] Palko v. Connecticut, 302 U.S. 319 (1937).
[176] Beaney, supra note 19, at 160.
[177] Id. at 160-161.

the essential part of liberty, such as the right to appointed counsel, federal courts should not treat capital and non-capital defendants differently.[178] This analysis makes sense when considering the fact that when a loss of liberty is involved; the charges the defendant faces should not matter. The charges are not important, the loss of liberty is the issue.

The State arguments were simple and given the circumstances logical. First, Cardoza's comments in *Palko* were dicta.[179] Second, the Court had refused a petition for cert to a case with virtually identical facts.[180] Finally, the Court should focus on the holding of Powell, which essentially stood for the effective appointment of counsel, when that was required, not the dicta in that case.[181]

The Court in *Betts* made one of the more bizarre rulings issued by that August body. First, it creased a "special circumstance" or "prejudice" standard for the defendants to meet before having a constitutional right to appointed counsel.[182] For a defendant to prevail under this standard, the defendant had to show that because of special circumstances, he suffered prejudice by the denial of counsel.[183] The special circumstances were essentially the same mentioned in the *Powell* dicta, low intelligence level, lack of education, and the complexity of the charges.[184]

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[178] Id. at 161.
[179] Id.
[180] *Wilson v. Lanagan*, 19 F. Supp. 870 (1936).
[181] Beaney, supra note 19, at 161.
[182] Garcia, supra note 4, at 8.
[183] Id.
[184] Id.

The Court apparently felt that *Betts*, as a person who was 43 years old, familiar with the criminal justice system, and possessing "ordinary intelligence" failed the test and was not entitled to appointed counsel.[185]

Justice Black, in his dissent in Betts, argued that there are two problems with the "special circumstances test".[186] First, there is the problem that is inherent with the use of the "special circumstances test." Defendants who the court does not initially recognize as meeting the test, such as an "obvious" case of mental retardation, are still forced argue their right against a trained attorney from the prosecutors side.[187] The lack of counsel for the defendant when arguing the right to appointed counsel inevitably resulted in a lack of counsel for the defendants at their trial.[188]

Second, Justice Black argued the courts could not easily determine whether counsel would have made a difference for the defendant with no counsel was named.[189] Black's argument is even more compelling when it is realized that a careful study of Betts' trial transcript showed that a competent defense lawyer could have shown serious problems with the prosecution's case such as the ability to properly cross-examine prosecution witnesses or the ability to understand why an item is admitted into evidence.[190]

The *Betts* majority was concerned about the implications of allowing appointed for counsel for indigent defendant's in state court who had been charged with felonies.[191] They felt that that expansion and incorporation to the states of this right would

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[185] Id.
[186] Id.
[187] Id.
[188] Id. While this seems to be a nonsensical result, but it is no more nonsensical than the analysis this court performed in reaching its decision.
[189] Id.
[190] Garcia, supra note 4, at 8.
[191] Id.

eventually lead to appointed counsel for defendants charged with misdemeanors.[192] With this fact in mind, the Court had an easy way to rule against *Betts*. Justice Roberts wrote:

> The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.[193]

It was clear that as long as Justices such as Roberts were on the bench, the anti-corporation forces would continue to hold sway over the Court. Until selective incorporation gained support, the right to appointed to counsel was never going to rise to the level of a fundamental right to non-capital defendants in state court.

Status of the Right to Appointed Counsel

Nothing was changed in the area of right to appointed counsel by the ruling in *Betts*. The Sixth Amendment was not made applicable to the states through the Fourteenth Amendment. The appendix used by the Court in Betts provides an easy form of analysis on this topic.[194] The states are divided into four categories: Category I: States which require that indigent defendants in non-capital cases as well as capital criminal cases be provided with counsel on request: (a) By Statute: (25) Arizona, Arkansas, California, Idaho,

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[192] Id. The majority's concern seems unfounded as long as there is a potential liberty loss, such as in Argersinger.
[193] Betts, 316 U.S. at 461.
[194] Id. at 477-478.

Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, and Wyoming. (B) By Judicial Decision or Established Practice Judicially Approved: (7) Connecticut, Florida, Indiana, Michigan, Pennsylvania, Virginia, and West Virginia. (C) By Constitutional Provision: (2) Georgia and Kentucky. Thirty-four States out of forty-eight had a right to counsel that exceeded *Betts*.[195]

Category II: States which are without constitutional provision, statute, or judicial decisions clearly establishing this requirement: (10) Colorado, Delaware, Maine, Massachusetts, New Mexico, North Carolina, Rhode Island, South Carolina, Vermont and Wisconsin.

Category III: States in which dicta of judicial opinions are in harmony with the decision by the court below: (2) Alabama and Mississippi.[196]

Category IV: States in which the requirements of counsel for indigent defendants in non-capital cases have been affirmatively rejected: (2) Maryland and Texas.[197]

When Justice Roberts wrote that upon his review of state constitutions and statutory provisions dealing with the right of appointed counsel, he reported that the states had decided it was not a fundamental right.[198] His reasoning was an important and fundamental right would be included into the state constitutions.[199] He believed that with the matter having been delegated to the legislature or the courts in the states the

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[195] Id. at 479-480.
[196] Id. at 480.
[197] Id. at 480.
[198] Id. at 471.
[199] Id.

Fourteenth Amendment could not force the states to furnish counsel in every case.[200]

The Warren Court (1953-1969)

No discussion of the history of the right of appointed counsel would be complete without a discussion of the Warrant Court. No court had greater positive impact on the issue. The Warren Court had the job of keeping the law in sync with the dramatic social change that was occurring.[201] The Warren Court introduced two "radical" concepts to American jurisprudence. First, for the first time, selective incorporation advocates had an important role on the Court. Second, the Warren Court introduced the concept of judicial activism to the Supreme Court.

The philosophy of judicial activism is consistent with the shift of the Warren Court from property rights to personal rights.[202] This shift was accomplished in three ways. First, the acceptance of the preferred position doctrine, which gave personal rights preference over property rights.[203] Second, more of the Bill of Rights was made applicable to the states.[204] Finally, the Warren Court broadened the substantive content of the Bill of Rights incorporated to the states.[205]

When Warren became Chief Justice in 1953 only two parts of the Bill of Rights

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[200] Id. This is a good example of creating the type of ridiculous thinking that dominated the majority opinion. He looked at only two states having constitutional provisions right to appointed counsel, cleverly ignoring the other 32 that had legal provisions for appointed counsel.
[201] Bernard Schwartz, A History of the Supreme Court 263, (Oxford University Press, 1993).
[202] Id. at 281.
[203] Id.
[204] Id.
[205] Id.

pertained to the states; provisions of the First Amendment dealing with freedom of religion and expression and the Fifth Amendment's Just Compensation Clause.[206] Once Justice Frankfurter retired in 1962, swinging the balance of the Court to the judicial activist side, the Warren Court quickly moved to make more of the Bill of Rights applicable to the states through the Due Process Clause of the Fourteenth Amendment.[207]

Within four years, it decided *Mapp, Malloy, and Gideon*,[208] and made the Fourth, Fifth, and Sixth Amendments applicable to the states.[209]

Some observers felt that the Warren Court, by adoption of judicial activism overstepped their bounds. Warren felt that judicial restraint prevented the Court from an effective duty of the Court's constitutional role.[210] The Chief Justice characterized judicial restraint as the "sweeping under the rug of a great many problems basic to American life."[211] As the protection of criminal defendant's rights were a main concern of the Warren Court, the Court was criticized for being "soft on crime." While some of their decisions were unpopular, their decision on the issue of the rights of criminal defendants was concerning the right to appointed counsel was very.[212]

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[206] Lucas A. Powe, Jr., The Warren Court and American Politics 412, (The Belknap Press of Harvard University Press, 2000).
[207] Schwartz, supra note 201, at 272.
[208] Powe, supra note 206, at 413.
[209] Id.
[210] Schwartz, supra note 201, at 276.
[211] Id.
[212] Garcia, supra note 5, at 9.

Gideon v. Wainwright: A Stunning Change of Course

The Court in *Gideon*[213] held that the Sixth Amendment right to counsel clause applies to the states, not just the federal government. In reaching this result, the Court went through the following thought process. First, the Court had construed the Sixth Amendment to require federal courts to provide counsel for indigent defendants unless the right had been completely and intelligently waived.[214] Second, the Court then looked to the fundamental nature of the Bill of Rights guarantees to decide whether the Fourteenth Amendment made them obligatory on the states.[215] Finally, the Court decided the Sixth Amendment's guarantee of counsel is one of the fundamental and essential rights made obligatory upon the states by the Fourteenth Amendment.[216] Because of this ruling, the Court specifically overruled *Betts*.[217]

Abe Fortas, representing Clarence Gideon in the Supreme Court, faced a tough battle. He had to convince the Court of two things. First, he had to convince the Court that allowing appointed counsel in all criminal cases would not be a "radical" decision.[218] His second hurdle was to deflate the federalism issue.[219] He did not want to make it look like the Supreme Court was ordering state courts what to do. He was able to reach his goal by an intriguing argument; the "special circumstances" standard was anti-federalist because it led to federal review of state courts to see if this vague standard was being

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[213] *Gideon v Wainwright* 371 U.S. 335.
[214] Id. at 341.
[215] Id.
[216] Id. at 342-343.
[217] Id. at 345
[218] Garcia, supra note 5, at 9.
[219] Id.

carried out.[220] Once that had been accomplished, he was then able to convince the court that granting counsel in all state prosecutions for felonies was "evolutionary" not revolutionary.[221]

Gideon relies on the notion that a fair trial requires some balance of power between the prosecution and defense.[222] Obviously, there will never is an even balance in criminal cases, but by allowing counsel, the scales may become a little more even.

The Court in a 9-0 vote rejected the flawed reasoning that was the basis for the decision of *Betts* and gave real meaning to the famous quote from *Powell*, "He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[223]

The Status of the Right to Appointed Counsel

The application of Gideon was essentially that all felony defendants in state court would be entitled to appointed counsel if they could not afford it. The right to counsel clause was applicable to the states through the Due Process Clause of the Fourteenth Amendment.

[220] Id.
[221] Id.
[222] Id.
[223] Id.

Right to Counsel Floodgates Open: The Inevitable Result of Gideon

Once the right to counsel clause had been made applicable to the states through the Due Process Clause of the Fourteenth Amendment, a flurry of challenges arose on when that right to counsel arises. The following is a list of situations where a person has a right to counsel and when a person does not. Both Fifth and Sixth Amendment rights to counsel are included:

Extradition: NONE (No U.S. Supreme Court on point)

Preliminary Hearing: 6th *White v. Maryland*, 373 U.S. 59 (1963).

Entering a Guilty Plea: 6th *White v. Maryland*, 373 U.S. 59 (1963).

Sentencing: 6th *Mempa v Rhay*, 389 U.S. 128 (1967).

1st Appeal: No Amendment covers this issue. There is a right to counsel on the first appeal as a manner of right. *Douglas v. California*, 371 U.S. 353 (1963).

Discretionary Appeals: NONE *Ross v. Moffit*, 417 U.S. 600 (1974).

Collateral Attack on Conviction: NONE *Johnson v. Avery*, 393 U.S. 483 (1969) & *Bounds v. Smith*, 430 U.S. 817 (1977).

Criminal Contempt Charges: 6th *Holt v. Virginia*, 381 U.S. 131 (1965).

Custodial Questioning: 5th *Miranda v. Arizona*, 384 U.S. 436 (1966).

Juvenile Hearing: Only when confinement in an institution either juvenile or adult occurs. 6th *In re Gault*, 387 U.S. 1 (1967).

Misdemeanor Conviction and Sent to Jail: 6th *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

Misdemeanor Conviction, No Jail Time: NONE *Scott v. Illinois*, 440 U.S. 367 (1979).

Police Lineup: If adversarial proceedings have begun, 6th otherwise NONE.

This does not pretend to be a complete list; it is offered to show the impact of *Gideon*.

Conclusion

In the study of the history of the right to appointed counsel, there are five major points that stand out. First, you never wanted to stand trial in England in the days of the American colonies. English criminal procedure was an abomination. Second, it is very clear that the intent of the Framers was that the Sixth Amendment only intended to cover the right to the counsel you could afford. The passing of the Federal Judiciary Act of 1789 and the Federal Crime Act of 1790 more than prove this point. Third, for reasons that were never clear, the Framers intended the trial judge to look out for the rights of the accused such as the trial judges "normally" did in Maryland around the time of *Betts*. The concept of the judge protecting the defendant's rights would make more sense had America been founded on a civil law tradition. Fourth, *Powell* and *Betts* represent low points in the history of the Supreme Court. Both decisions feature an incredible lack of logic and the complete ignoring of the facts in as they really existed. Both are a disgrace. Finally, while *Gideon* may have opened the floodgates to the right to counsel, it represents a high point of American jurisprudence.