

# Michigan Law Review

---

Volume 56 | Issue 1

---

1957

## Constitutional Law - Due Process - Right of Witness to Counsel Before State Investigatory Officer

William G. Mateer S.Ed.  
*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Fourteenth Amendment Commons](#)

---

### Recommended Citation

William G. Mateer S.Ed., *Constitutional Law - Due Process - Right of Witness to Counsel Before State Investigatory Officer*, 56 MICH. L. REV. 121 (1957).

Available at: <https://repository.law.umich.edu/mlr/vol56/iss1/9>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

CONSTITUTIONAL LAW—DUE PROCESS—RIGHT OF WITNESS TO COUNSEL BEFORE STATE INVESTIGATORY OFFICER—After a fire occurred on the premises of appellants' corporation, the state fire marshal started an investigation into the causes of the fire, and subpoenaed appellants to appear as witnesses. Ohio law provides that such investigations may be conducted in private<sup>1</sup> and gives the fire marshal power to punish summarily witnesses who refuse to testify.<sup>2</sup> Appellants refused to testify without the presence of their counsel, who had accompanied them to the place of questioning. Appellants were thereafter committed to the county jail by the deputy fire marshal who conducted the investigation. On appeal<sup>3</sup> from denial of a writ of habeas corpus by the Ohio Supreme Court, appellants asserted that the due process clause of the Fourteenth Amendment gave them a right to have the assistance of their own counsel in giving testimony. The appellants disavowed making any direct attack on the fire marshal's power to punish summarily. *Held*, in a five to four decision,<sup>4</sup> the due process clause of the Fourteenth Amendment does not require that appellants

<sup>1</sup> Ohio Gen. Code (Page, 1954) §3737.13.

<sup>2</sup> *Id.*, §3737.99(A).

<sup>3</sup> *In re Groban*, 164 Ohio 26, 128 N.E. (2d) 106 (1955).

<sup>4</sup> Justice Black with Chief Justice Warren and Justices Douglas and Brennan dissenting.

be allowed assistance of counsel in giving testimony as witnesses at a proceeding conducted by the state to investigate the causes of a fire. *In re Groban*, 352 U.S. 330 (1957).

The importance of the principal case lies in the liberal application given the due process clause by the four-member minority.<sup>5</sup> In the opinion of the minority, there is a constitutional right to counsel whenever a witness would be secretly questioned by a state one-man fact finding body.<sup>6</sup> Although the Fourteenth Amendment does not require that the state appoint counsel for an accused in every criminal prosecution,<sup>7</sup> it does require that he be permitted to consult with counsel which he has chosen and paid for.<sup>8</sup> There are substantial differences, however, between that right and the right to consult counsel in proceedings like those in the principal case, where criminal prosecution would be only a possibility which might follow the primary investigation. The investigation, unlike a criminal prosecution, could not have determined the ultimate rights of the appellants. More closely analogous to the right asserted in the principal case, therefore, is the right to counsel in administrative hearings. Section 6(a) of the Administrative Procedure Act,<sup>9</sup> applying to federal administrative agencies, makes it clear that a witness before federal administrative agencies has the right to counsel. This right, however, is not a requirement of due process. Indeed, the inclusion of section 6(a) in the act was considered necessary for the very reason that the witness' right to counsel was by no means certain under the Bill of Rights.<sup>10</sup> A distinction has been drawn between the right to counsel in administrative hearings and in administrative investigations. One case, *Bowles v. Baer*,<sup>11</sup> though observing that there was a right to have counsel present during questioning of the witness at an administrative hearing, distinguished a hearing from an investigation, and held that due process was not violated when counsel was excluded in proceedings of the latter type.<sup>12</sup> This distinction rests upon differences in the two types of proceedings. A hearing has adverse parties; issues of law and fact are tried; action is taken which may materially affect the

<sup>5</sup> The Court now stands at four and four, Justice Reed, who wrote the majority opinion, having retired.

<sup>6</sup> It should be noted that the problem involves not the right to be told of a right to counsel nor the right to have the state appoint counsel, but rather the right to utilize counsel furnished and paid for by the investigated person himself.

<sup>7</sup> *Betts v. Brady*, 316 U.S. 455 (1942). Compare *Powell v. Alabama*, 287 U.S. 45 (1932); *Ex parte Sullivan*, (D.C. Utah 1952) 107 F. Supp. 514.

<sup>8</sup> *Chandler v. Fretag*, 348 U.S. 3 at 9 (1954); *House v. Mayo*, 324 U.S. 42 at 46 (1945); *Powell v. Alabama*, note 7 *supra*, at 69.

<sup>9</sup> 60 Stat. 237 at 240 (1946), 5 U.S.C. (1952) §1001 et seq.

<sup>10</sup> S. Rep. 111, 83d Cong., 1st sess., p. 4 (1953).

<sup>11</sup> (7th Cir. 1944) 142 F. (2d) 787.

<sup>12</sup> *Accord*, *United States v. Levine*, (D.C. Mass. 1955) 127 F. Supp. 651; *The Golden Sun*, (S.D. Cal. 1939) 30 F. Supp. 354; *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); *United States v. Pitt*, (3d Cir. 1944) 144 F. (2d) 169; *State ex rel. Tice v. Brooks*, 160 Kan. 526, 163 P. (2d) 414 (1945); *Niznik v. United States*, (6th Cir. 1949) 173 F. (2d) 328.

parties to the hearing. An investigation has no adverse parties; issues of law and fact are not decided; results are not conclusive.<sup>13</sup> (These same factors, it will be noted, are pertinent in distinguishing a criminal proceeding from an investigation.) The rights of the witness before an investigatory tribunal are preserved by his privilege against self-incrimination<sup>14</sup> and by the right to judicial review of any criminal proceedings that should result from the investigation.<sup>15</sup>

A situation still more closely analogous to the principal case is that of a witness before a grand jury. The majority opinion here points to past federal court decisions<sup>16</sup> holding that there is no constitutional right to counsel during examination of witnesses before the traditional twelve to twenty-three man grand jury. The minority, however, seeks to distinguish between the traditional grand jury and the one-man board in the principal case. The basis for this distinction is twofold. First, the multi-member grand jury assures that the witness' rights will be more nearly preserved than does the one-man board. The ancient fear of the clandestine interrogation leads the minority to reason that fairness is more easily assured when many persons are present than when the entire investigation is in the hands of one person. Secondly, the one-man investigation in the principal case is conducted by a public official charged with administering the law. Such an official is less likely to be impartial than a lay grand jury which is not charged with administering a particular law.<sup>17</sup> Such distinctions lead only to the conclusion that to assert, as the minority has in the principal case, a negative (that there is no right to counsel at the traditional grand jury proceedings) to prove a positive (that there is a right to counsel in one-man investigatory proceedings) has little logical validity. Further, the minority fails to distinguish the problem of the right to counsel from the problems raised by secret proceedings in general. It does not follow, as the minority contends, that because secret proceedings leave much to be desired, there should be a right to counsel in order to overcome such secrecy. The defect may be avoided by permitting the attendance of any third party not prejudiced against the witness.<sup>18</sup>

Unfortunately, counsel for the petitioner in the principal case did not allege that the fire marshal's power summarily to punish in private for

<sup>13</sup> *In re SEC*, (2d Cir. 1936) 84 F. (2d) 316.

<sup>14</sup> OHIO CONST., art. I, §10; *In re Groban*, note 3 *supra*; *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

<sup>15</sup> *Niznik v. United States*, note 12 *supra*.

<sup>16</sup> *In re Black*, (2d Cir. 1931) 47 F. (2d) 542; *United States v. Blanton*, (E.D. Mo. 1948) 77 F. Supp. 812.

<sup>17</sup> It is interesting to note that Justices Frankfurter and Harlan, concurring in the majority opinion, indicate that they might not sustain similar secret questioning by a district attorney, who would be charged with prosecuting the appellants for any crimes discovered.

<sup>18</sup> The Ohio statute in question (see note 1 *supra*), however, provides that the "investigation may be private," and the fire marshal could clearly exclude even disinterested third persons if he chose.

contempt<sup>19</sup> was a violation of the due process requirements of the Fourteenth Amendment. The one-man investigation is very similar to the one-man grand jury system at issue in *In re Oliver*<sup>20</sup> and *In re Murchison*.<sup>21</sup> In the former case the court squarely held that the secret trial of petitioner on charges of contempt violated the due process clause of the Fourteenth Amendment. The petitioner was accorded the right to counsel and a public trial. The latter case held that a judge serving as a one-man grand jury could not later, in a public hearing, adjudge the petitioner guilty of contempt on charges originating in the secret proceedings over which the same judge presided. In both cases the sentencing of the petitioner on charges of contempt was set aside. The facts of the principal case are similar enough to both cases to assume that the same result would have been reached in the principal case had the issue of the fire marshal's power to conduct a secret trial for contempt been placed squarely before the court. Although it was not, the minority's fear that the state proceedings might become a secret inquisition appears primarily to be based on the state official's cumulative power to investigate and, as well, to punish summarily. Without the latter power, which if placed in issue would be clearly invalid under the reasoning of the *Murchison* and *Oliver* cases, the minority's fears appear not to be justified.

*William G. Mateer, S. Ed.*

<sup>19</sup> See note 2 *supra*.

<sup>20</sup> 333 U.S. 257 (1948).

<sup>21</sup> 349 U.S. 133 (1955).