The Sixth Amendment in Modern American Jurisprudence

A CRITICAL PERSPECTIVE

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Contributions in Legal Studies,
Number 67

GREENWOOD PRESS
NEW YORK • WESTPORT, CONNECTICUT • LONDON

Library of Congress Cataloging-in-Publication Data

Garcia, Alfredo.
The Sixth Amendment in modern American jurisprudence : a critical perspective / Alfredo Garcia.
p. cm.—(Contributions in legal studies, ISSN 0147–1074 ; no. 67)
Includes bibliographical references and index.
ISBN 0–313–27877–6 (alk. paper)
1. Criminal procedure—United States. 2. Right to counsel—United States. 3. United States—Constitutional law—Amendments—6th. I. Title. II. Series.
KF9625.Z9G37 1992
345.73′05—dc20
[347.3055] 91–44047

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 91–44047
ISBN: 0–313–27877–6
ISSN: 0147–1074

First published in 1992

Greenwood Press, 88 Post Road West, Westport, CT 06881
An imprint of Greenwood Publishing Group, Inc.

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

10 9 8 7 6 5 4 3 2 1

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To Cindy, whose wisdom far exceeds mine and without whose unswerving support this book would not have been possible; to James and Christina, who provided a constant source of joy; and to my mother, Rosalina, whose courage, dignity, and perseverance in the face of adversity furnished inspiration.

Preface

The bicentennial of the Bill of Rights in 1991 provides an apt occasion for a book focusing on the Sixth Amendment. In comparison to the inordinate amount of scholarly attention devoted to the Fourth and Fifth Amendments, the Sixth Amendment has not generated as much concern.[1] This text represents a modest attempt to fill that void in the literature, because the last significant work on the topic is Francis Heller's historical analysis of the amendment, published in 1951.[2] Heller's work is historically important but has been rendered obsolete by the jurisprudential developments of the last few decades. During that time, the Sixth Amendment has undergone significant change pursuant to its incorporation into the Fourteenth Amendment.

I do not endeavor to furnish a comprehensive treatise on the Sixth Amendment. Rather, I offer an interpretive analysis of the doctrinal development of the amendment by concentrating on the United States Supreme Court's interpretation of the amendment since the 1960s. My perspective is colored by almost a decade of experience in the criminal process, both as a prosecutor and as a defense attorney, in Miami, Florida. Although theory plays a role in the analysis, experience in the "real world" of criminal law informs a large part of the text.

The principal thesis of the book is that the Supreme Court's recent interpretation of the amendment has been marked by doctrinal inconsistency and by a failure to adhere to the functional and symbolic values that are inherent in the amendment. A corollary to this thesis is that the Court has adopted a "crime control" ideology, stressing efficiency rather than the core ideal of a fair trial that the amendment is designed to safeguard. Moreover, my approach differs from the conventional treatment of the topic, which maintains that the recent doctrinal development of the Sixth Amendment has deviated from the Court's interpretation of the Fourth and Fifth amendments.

The book is divided into six chapters, covering the rights to counsel, to confrontation, to compulsory process, to a speedy trial, and to a jury trial, as well as the clash between the right to a free press and the right to a fair trial. The first chapter provides the thematic and structural framework of the book through the lens of the right to counsel, which may be viewed as the touchstone of the Sixth Amendment. The remaining chapters deal with the other discrete, but related, components of the amendment within the context of the adversary system of adjudication. The conclusion assesses how the Court's interpretation of the amendment has advanced or detracted from the interests fostered by the amendment, which is the cornerstone of the criminal adversary process.

I have incurred numerous debts during the course of writing this book. My colleague Don Lively encouraged me to pursue the project, and he read and commented upon most of the manuscript. Similarly, Ellen Podgor reviewed parts of the work and offered helpful suggestions. Dean Jacqueline Allee generously provided financial support during the summer of 1991. Dean Leigh Taylor and his staff furnished technical assistance and an atmosphere conducive to legal research and writing. Mike Bloom (class of 1991) and Gaston Cantens (class of 1993) were invaluable research assistants.

Parts of this book have appeared in the *American Criminal Law Review*, *Duquesne Law Review*, and *Southwestern University Law Review*. I am grateful to the editors of those journals for giving me a forum in which to express my views.

Finally, and most importantly, this book would never have reached fruition without the wonderful and dedicated support of my wife, Cindy. Her love and inspiration were a constant source of strength.

NOTES

1. The only exception to lack of scholarly focus on the Sixth Amendment is the confrontation clause.

2. Heller, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1951).

The Sixth Amendment in Modern American Jurisprudence

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1

The Right to Counsel under Siege: Requiem for an Endangered Right?

The Sixth Amendment[1] occupies a pivotal role in the panoply of rights accorded criminal defendants through the Bill of Rights to the U.S. Constitution. This distinction flows from the amendment's prescriptive, symbolic, and practical value to the adversary system of adjudication. The inherent significance of the amendment within the context of the American criminal justice system rests upon the fact that it fosters and promotes the functional and normative purpose of affording a criminal defendant a fair trial.[2] To a large extent, the amendment embodies the paradigm of a system of justice that furnishes the individual with the pertinent tools with which to defend against the organized power of the state. The complex of rights delineated in the amendment are meant to equalize the balance of power in the criminal process by granting the defendant an indispensable shield against the natural advantage the prosecution enjoys in a criminal trial.[3]

With a few notable exceptions,[4] the Supreme Court's recent Sixth Amendment jurisprudence has been marked by doctrinal inconsistency and by a failure of the Court to adhere to the core values embedded in the amendment.[5] The promise of an expansive interpretation of the amendment engendered by the Warren Court has given way to a fundamentally different conception. As a result, both the functional and symbolic roles of the amendment have been steadily eroded. This trend is particularly evident in three of the clauses that provide criminal defendants with the means to counter the natural advantage the prosecution enjoys and that ensure ''fair process'' norms.[6] These three clauses encompass a defendant's rights to counsel, to confrontation, and to compulsory process.[7] By diminishing the Sixth Amendment rights of criminal defendants, the Court has emphasized a ''crime control'' ideology. Such an ideology conflicts with the values ingrained in the amendment.[8]

My perspective is at variance with the orthodox notion advanced by legal scholars that the recent doctrinal development of the Sixth Amendment has deviated from the Court's restrictive interpretation of the Fourth and Fifth amendment rights of criminal defendants. According to the conventional scholarly approach, the Burger Court fashioned a "hierarchy" of rights in which the protections accorded to criminal defendants under the Sixth Amendment were given precedence over comparable Fourth and Fifth amendment claims.[9] Although this characterization of the Court's doctrinal approach to the Sixth Amendment might have been accurate during the 1970s, it is inapt for the 1980s and 1990s. The new course the Court has chosen was dramatically illustrated in the 1988 Term, in which seven out of eight cases involving Sixth Amendment claims were decided against the interests of the defendants.[10]

Similarly, both the Burger and Rehnquist Courts have indulged in the rhetoric that trial-related rights of criminal defendants deserve greater respect than those not associated with the trial stage.[11] Consequently, the Burger Court rationalized its narrow construction of the exclusionary rule by labelling it a "judicially-created" structural remedy protective of Fourth Amendment rights through its deterrent effect.[12] This depiction of the exclusionary remedy was employed to distinguish it from a criminal defendant's "personal" constitutional rights.[13]

A useful way to understand this "hierarchy" thesis is by dissecting the Court's jurisprudence with respect to the right to counsel. Among the rights enumerated in the Sixth Amendment, the right to counsel may be regarded as the touchstone of the amendment.[14] In the 1960s and 1970s, the Court construed the right to counsel as the mechanism to ensure a criminal defendant a fair trial.[15] As previously suggested, a distinct countertrend has emerged, however, in which the efficiency, "crime control," rationale has significantly abridged a defendant's right to counsel. This outlook has been evident in decisions that have limited the defendant's right to select private counsel of choice[16] and that have also infringed upon this right by allowing the government to strip defendants of the right to choose private counsel through the pretrial forfeiture of allegedly "tainted" (i.e., drug-related) assets.[17] The "efficiency" perspective is also conspicuous in the narrow construction of the applicable criteria employed to resolve ineffective assistance of counsel claims.[18]

Several discrete themes surface from the Court's current treatment of the right to counsel. As the foregoing discussion indicates, the Court has demonstrated a perceptible concern for efficiency and, correspondingly, "crime control," in determining the suitable parameters of the right to counsel. Moreover, the Court has denigrated the dignitary values that are deeply rooted, both historically and functionally, in the Sixth Amendment and, particularly, in the right to counsel.[19] Finally, the Court has improperly relied upon ethical standards to thwart claims propounded by criminal defendants based on the right to counsel.[20]

The purpose of this chapter is to analyze these related themes within the context of the symbolic, functional, and practical values served by the Sixth Amendment's guarantee of the right to counsel. The chapter does not purport

to furnish an exhaustive or comprehensive analysis of the manifold facets of the right to counsel; rather, it aims to identify and critique broad yet significant trends that have adversely impinged upon the right to counsel. This will be accomplished by examining the historical foundation of the right and by probing the functions of the right in light of the conflicting objectives of our adversary process. Therefore, the second part of this chapter will examine the historical background of the right to counsel; the third part will analyze the functional and normative aspects of the right in the context of our adversary system of adjudication; the fourth part will explore the themes that have emerged in the Court's recent jurisprudence on the right to counsel; and the final part will set forth the thesis that the Court's recent doctrinal approach to the right to counsel is based upon ideological and administrative expediency and reflects a myopic view of the practical and symbolic purposes the right fosters in our criminal justice system. In essence, the Court has adopted the tenet that defendants possess a revocable privilege to counsel rather than a fundamental constitutional right.

HISTORICAL FOUNDATION: ENGLISH AND COLONIAL BACKGROUND

The history of the right to counsel is inextricably tied to the English and colonial jurisprudence that led to the genesis of the Sixth Amendment. In examining the historical background, it is evident that the right to counsel did not receive favorable treatment in either English or early colonial jurisprudence; instead, the right was ultimately accepted, especially in the colonies, as a response to political exigencies. In fact, the grudging recognition of the right to counsel in England is betrayed by the fact that defendants accused of felonies other than treason were not entitled to lawyers until 1836.[21]

This antipathy that the British common law displayed toward the assistance of counsel derived from the weakness of the government vis-à-vis its enemies.[22] A historian of British law noted that this refusal to extend the help of counsel to the accused was approved by the public principally "because the government was so weak and its enemies so strong that it was felt, not without reason, that it must take every advantage of its enemies."[23] The Glorious Revolution in 1688, however, led to a more stable political situation and thus to the extension of the help of counsel to defendants accused of treason.[24] In fact, the Treason Act of 1695 ushered in a series of reforms in English criminal procedure that granted accused persons the right to notice and to compulsory process.[25] Despite the progress brought about by these revisions, however, the right to counsel was extended only to defendants charged with misdemeanors or treason.[26]

Given this hostility of the English system toward counsel, it was inevitable that such distrust would be carried over to the colonies. Moreover, to the extent that British criminal procedure was riddled with abuse of power, the "professional" lawyer was bound to become the symbol of oppression. In fact, this aversion to the profession is manifest in the West New Jersey Charter of 1676,

which gave litigants the right to defend their cases and, concomitantly, freed them of the compulsion to hire counsel.[27]

Eventually, a shift in this attitude occurred in the American colonies because, unlike the mother country, they employed the inquisitorial institution of the public prosecutor. The prosecutor wielded great power due to his familiarity with procedural niceties, the "idiosyncrasies" of juries, and the personnel of the court.[28] As a consequence, the assistance of counsel and the allied rights ultimately enumerated in the Sixth Amendment became essential to counter the prosecutor's advantage. Ultimately, the denial of these rights formed part of the grievances listed in the Declaration of Independence.[29]

The right to counsel, therefore, found its way into most state constitutions after the colonies declared their independence.[30] The assistance of counsel, in turn, complemented the correlative right to self-representation.[31] Accordingly, it was natural that opposition to the Federal Constitution arose in part because the procedural protections accorded the accused in state constitutions, with the exception of the jury trial, were conspicuously missing from the new document.[32] This antagonism directed at the Constitution was allayed through the adoption and passage of the Bill of Rights, which included the trial-related safeguards outlined in the Sixth Amendment.

A look at the historical record reveals the extent to which the need for a proper equilibrium of forces between the prosecution and the accused led to the forging of the protections embodied in the Sixth Amendment. As one thoughtful commentator has remarked, the call for a Bill of Rights reflected the American public's insistence upon "the maintenance of a fair balance in criminal trials, and to that end the protection of the rights of the accused."[33] Preserving the rights of the accused, moreover, necessarily implied a repudiation of the English proscription of counsel in serious criminal cases.

Although the American safeguards designed to redress the imbalance of power that existed in English procedure included the right of the accused "to have the Assistance of counsel for his defense,"[34] the Sixth Amendment did not embrace the right to appointed counsel.[35] Rather, what the amendment connoted at the time of its enactment was that "the right to counsel meant the right to retain counsel of one's own choice and at one's expense."[36] Nearly two centuries later, the Supreme Court took into account the transformation and evolution of American jurisprudence and progressively implied the right to appointed counsel as essential to the structure of the Sixth Amendment. The logical culmination of this interpretation was the Warren Court's landmark ruling in *Gideon v. Wainwright*.[37] It is instructive, therefore, to scrutinize this jurisprudential development as a means of distilling the "modern" meaning of the right to counsel.

Modern Historical Evolution

The emergence of an expansive approach toward the right to counsel may be traced to the Supreme Court's seminal decision in *Powell v. Alabama*.[38] In

Powell, the Court determined that the assistance of counsel was ''fundamental'' in nature, and hence essential to ensure a defendant a fair trial.[39] Moreover, the *Powell* Court decided that the right comprehends ''effective'' assistance, rather than the mere perfunctory appearance of counsel.[40] Finally, the majority held that the due process clause of the Fourteenth Amendment required the appointment of counsel in a capital case.[41] Even though the *Powell* decision was carefully limited to its particular facts, it contained the seeds of a fundamental metamorphosis in the Court's conception of an attorney's role in a criminal proceeding. Implicit in this new understanding was the notion that the criminal process should strive to attain a modicum of equity by affording both sides the opportunity of vigorously asserting their positions.

In *Powell*, the Court expanded the scope of the Sixth Amendment by going beyond the original intent of the right to counsel clause. What the clause contemplated was the right of the defendant to choose private counsel; it did not envision the provision of appointed counsel.[42] The *Powell* Court recognized that a ''defendant should be afforded a fair opportunity to secure counsel of his own choice.''[43] Whether counsel was appointed or selected, however, is not the sole calculus in assessing the right to counsel; what the right necessarily implicates in an ''effective,'' ''zealous'' advocate rather than the mere ''*pro forma*,'' passive appearance of a defense attorney.[44]

The factual predicate of *Powell* illustrates the Court's concern for effective advocacy as integral to the assistance of counsel. In that case, the famous ''Scottsboro'' black defendants were charged with the rape of two white women.[45] The cases of the nine youthful defendants were severed, and three separate arraignments and trials were conducted in a single day.[46] More important, counsel appointed to represent the defendants were ill-prepared to represent them; their appearance amounted to a sham.[47] Given the emotionally charged atmosphere in which the trial occurred, a lack of effective counsel inevitably ensured a conviction.

It is within this framework that *Powell* must be viewed. The majority not only abhorred the sham nature of proceedings, but it also condemned the trial court for preventing the defendants from consulting with counsel and preparing their defense.[48] The egregious circumstances out of which *Powell* arose led the Court to reaffirm the ''fundamental character'' of the right to counsel in our adversary system of adjudication.[49] In an oft-quoted passage, the *Powell* Court acknowledged that counsel is indispensable to the balance of power requisite to an adversary system of adjudication, especially when the individual does not have the means to hire an attorney. The majority cogently wrote:

> [T]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put to

trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. . . . He requires the hand of counsel at every step of the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant or illiterate, or those of feeble intellect.[50]

A "logical corollary" of this rationale was that the "right to be heard" by counsel implied "the right to have counsel appointed."[51] Although the *Powell* Court narrowly crafted its holding to apply solely to the factual circumstances of the case,[52] it foreshadowed a broader application of its holding by emphasizing the widespread acceptance of appointed counsel in all criminal prosecutions by most states.[53]

Aside from professing the importance of appointed counsel to the equipoise implied within the adversary process, the *Powell* Court tacitly identified another intrinsic, nonfunctional value: the right of the individual defendant to be treated with a measure of dignity.[54] As the foregoing discussion suggests, the majority was concerned with sustaining the defendants' inestimable self-worth, regardless of financial condition, when faced with the intricacies of the criminal process. At one point in its analysis, the *Powell* Court intimated that, even assuming the absence of a viable defense, the defendants were entitled to the assistance of effective counsel.[55] When confronting the organized force of the government, therefore, the individual defendant, according to the *Powell* decision, deserves a robust advocate who will preserve her right to contest the charges and, at the same time, safeguard her dignity.

The logical extension of the dignitary and adversarial benefits conferred on criminal defendants by *Powell* occurred six years later when the Court decided *Johnson v. Zerbst*.[56] In *Zerbst*, the majority broadened the reach of *Powell* at the federal level by holding that the Sixth Amendment compels the assistance of counsel in all prosecutions, absent waiver by the accused.[57] The *Zerbst* Court reaffirmed the underlying rationale espoused in *Powell* by stressing that, without an attorney, the typical defendant suffers a marked disadvantage against the government.[58] Furthermore, the majority acknowledged that court proceedings present an impenetrable barrier to an unskilled layman, who may see the process as "intricate, complex, and mysterious."[59]

Significantly, *Zerbst* also enlarged the parameters set forth in *Powell* by establishing stringent criteria for a valid waiver of counsel. Rejecting the proposition that failure to assert the constitutional right to counsel because of ignorance may constitute a valid waiver, the *Zerbst* Court instead created a presumption against waiver of the assistance of counsel.[60] A valid waiver entails an "intentional relinquishment of a known right or privilege."[61] Accordingly, an unrepresented defendant must competently and intelligently waive her right to counsel; in turn, the validity of the waiver is to be measured in conformity with the facts of each case, "including the background, experience, and conduct of the accused."[62]

The vitality infused into the right to counsel clause by *Powell* and *Zerbst*

continued unabated in the early 1940s. In *Glasser v. United States*,[63] the Court lent substance to the meaning of effective assistance of counsel and reaffirmed the rigorous waiver standards enunciated in *Zerbst*. *Glasser* dealt with the thorny issue of defining the contours of effective assistance of counsel when a single defense attorney represents multiple defendants charged with the same crime. Such representation leads to a substantial likelihood that counsel will be confronted with the dilemma of protecting conflicting interests. A defense attorney who faces this quandary should decline multiple representation, lest he deprive one of the parties of the right to an effective and zealous defense.

Consistent with this rationale, the *Glasser* Court held that when a trial court is informed that conflicting interests might arise from multiple representation and ignores the potential conflict, the affected defendant is stripped of her right to effective assistance of counsel.[64] Moreover, the majority explicitly declared that such error is not deemed harmless but requires reversal of the conviction.[65]

Further, mere silence by the defendant in the face of the conflict is not tantamount to a waiver of effective assistance of "conflict-free" counsel.[66] Despite the fact that the defendant was a prosecutor who presumably was intimately acquainted with the criminal trial process, the *Glasser* Court refused to construe his silence when the conflict arose as a waiver. Rather, the Court viewed Glasser's experience as one factor to be considered "in determining whether he waived his right to the assistance of counsel."[67] Citing the strict criterion for a valid waiver of counsel established in *Zerbst*, the majority in *Glasser* charged the trial court with the duty of ensuring effective representation for the accused by obtaining an intelligent and competent waiver from the defendant.[68]

Finally, the *Glasser* Court evinced its solicitude for meaningful, effective assistance by maintaining that a defendant should be afforded the "undivided assistance of counsel of choice" regardless of the possibility of a conflict of interest.[69] In addition, the majority disavowed a prejudice-based test for determining ineffective assistance due to a conflict of interest; instead, it noted that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow the courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[70]

Despite the vitality with which the Court interpreted the right to counsel, it was reluctant to tread upon the prerogative of the states to determine the appropriate boundaries of the right. Consequently, in *Avery v. Alabama*[71] the majority reiterated the fundamental character of the assistance of counsel,[72] characterizing it as "sacred,"[73] while simultaneously deferring to the judgment of state courts. *Avery* implicitly endorsed the "fundamental fairness" doctrine, according to which the specific guarantees of the Bill of Rights are deemed to be applicable to the states only if those precepts are essential to the "concept of ordered liberty."[74] In accordance with this perspective, the *Avery* Court held that the defendant was not deprived of the effective assistance of counsel because the trial court denied a continuance, even though defense counsel had been given only three days to prepare for a first-degree murder trial.[75]