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Constitutional Rights at Inquest Proceedings:
The Kennedy Challenge

When Senator Edward M. Kennedy's passenger died in an automobile accident, a Massachusetts medical examiner ruled that the cause of death was drowning. Senator Kennedy later pleaded guilty to a charge of leaving the scene of an accident, but because of alleged suspicious circumstances, a Massachusetts district attorney ordered that an inquest be held to determine whether any criminal negligence was involved. Senator Kennedy's challenge to the procedures established for this inquest raises questions concerning

1. Two weeks after the accident the district attorney for the Southern District of Massachusetts wrote a letter to the justice of the District Court of Dukes County "requesting" the assignment of a justice to preside over the inquest. The justice replied that he had no power of assignment for such a request, and asked the district attorney whether he was exercising his power to "require" that an inquest be held. The district attorney replied in the affirmative, and an inquest was scheduled for September 3, 1969. Petitioner's Brief for Certiorari at 2-5, Kennedy v. Justice of the District Court, — Mass. —, 252 N.E.2d 201 (1969).

2. Senator Kennedy's challenge to the procedures established for the inquest is based on both due process and prejudicial pretrial publicity. Id. at 15, 20, 24, 30, 35.

3. During a pre-inquest hearing attorneys for Senator Kennedy filed a motion in the district court requesting

   . . . that he be permitted the right to be represented by counsel in this proceeding and to have counsel present during the entire proceeding, that his counsel be permitted to examine and cross-examine all witnesses and to seek rulings from the court with respect to the relevancy, competency or materiality of all evidence, to present evidence and to have the power to compel attendance of witnesses in connection therewith.


   I am not satisfied that the United States Supreme Court would read the Due Process Clause into our inquest procedure. That is for the United States Supreme Court to say and not for me. I, therefore, deny the motions. Mr. Clerk, you will so note.

   Now, I think this is the appropriate time to answer some of the questions that were put forth in the request for rulings.

   In all cases where counsel appear for any witnesses, I want written appearances to appear on the record.

   Witnesses will come into the courtroom singularly [and] may be represented during their appearance in the courtroom by counsel for the sole purpose of advice . . . on constitutional rights against self-incrimination and where appropriate [on] privileged communications and for no other purpose and counsel for that witness will leave the courtroom when the witness leaves the courtroom.

cerning the value of the inquest as an investigative technique and focuses attention upon the requirements of due process in regard to the procedures followed at such inquiries. This article will examine the question of whether witnesses at an inquest, who may thereafter be charged with and tried for a criminal offense, are entitled to have counsel present throughout to represent them, to confront and cross-examine witnesses, to object to proffered evidence, to present evidence and to compel the attendance of witnesses. Because the requirements of due process frequently vary with the type of proceeding involved, an awareness of the historical role that the coroner's office and his inquest performed, an understanding of the functions currently performed by the coroner or medical examiner, and a recognition of the purposes and objectives of these inquiries are essential in evaluating the requirements of due process.

The Role of the Coroner

The office of the coroner is well established in Anglo-American law. Originally intended as a safeguard for the pecuniary interests of the King by providing a check on the sheriff, the coroner soon acquired a wide variety of administrative, executive, and judicial duties. Although the coroner traditionally had performed functions related to the administration of criminal justice, particularly homicides, by the eighteenth century the primary responsibility of the coroner was to conduct inquests into deaths occurring un-

4. See Hannah v. Larche, 363 U.S. 420 (1960). When considering the requirements under the due process clause of the Fifth amendment, the Court said: “‘Due process’ is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.” Id. at 442.

5. The Articles of Eyre of 1194 provide the first distinct reference to the office of the coroner. 1 W. Holdsworth, A History of English Law 82-83 (3d ed. 1922).

6. Id.

7. One of the coroner's judicial duties was to hold inquests to determine the Crown's interest in wrecks, royal fish, treasure trove, and unexplained deaths. Id. at 85. As the power of the king declined during the fourteenth century, many of the fiscal duties of the coroner were curtailed and the office declined in power and prestige. Id. at 84-86. See generally R. Hunnissett, The Medieval Coroners 197 (1961).

8. Homicides, oddly enough, provided an important source of revenue to the Crown. The citizenry of the locality that failed to apprehend and present a felon to the King's justices could be fined, the implement which caused even an accidental death was forfeited to the Crown as a deodand, and finally, a finding of guilt at the coroner's inquest resulted in the forfeiture of a felon's lands, goods, and chattels. 1 W. Holdsworth, supra note 5, at 85. See also Palmer, The Coroner as a Vestigial Remnant: The Last Crown of the Crownier, 36 A.B.A.J. 720, 723 (1950).
der violent, unnatural or suspicious circumstances. Although forfeiture of property on conviction of a felony eventually disappeared, the concept of the coroner's inquest, designed to investigate felonious deaths and to ascertain, when possible, those responsible for the death, was introduced to the American colonies and later established by statute or incorporated into the constitutions of the various states.

Presently, there is no uniform law which prescribes the duties of the coroner or medical examiner, the procedures he is to employ, or the specific form and extent of his investigation. The majority of states still retain a variation of the coroner's office, while a minority have established the office of medical or post-mortem examiner in lieu of the coroner.

In states utilizing the coroner system, the coroner is generally charged with the responsibility of investigating deaths, summoning a coroner's jury, subpoenaing witnesses, presiding over the inquest, and recording the findings of the inquest. In Pennsylvania, for example, the coroner first conducts an ex parte investigation to determine "whether or not there is any reason sufficient to the coroner to believe that any such death may have resulted from the criminal acts or criminal neglect of persons other than the deceased, rather than from natural causes or by suicide." If so, the Pennsylvania coroner then orders an autopsy and holds an inquest at which "the coroner's duty shall be to ascertain the cause of death and whether any person other than the deceased was criminally responsible therefor by act or neglect, and, if so, the identity of the person and any further evidence and witnesses regarding the crime." The Pennsylvania coroner, who is assisted by a district

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9. The duty of the coroner "consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death . . . . If any be found guilty by this inquest, of murder or other homicide, he is to commit them to prison for farther trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby . . . ." 1 T. COOLEY'S BLACKSTONE § 348 (4th ed. 1899).

10. The Model Post-Mortem Examinations Act, drafted by the National Conference of Commissioners on Uniform State Laws and approved at the 1954 annual conference, was not enacted in any state, although many states have enacted some of its features. The model act called for the establishment of a Commission on Post-Mortem Examinations comprised of state, public, and private officers who would appoint a Chief Medical Examiner to direct the Office of Post-Mortem Examinations. This office would supersede the office of the coroner. See Ferguson, It's Time For the Coroner's Post-Mortem, 39 J. AM. JUD. SOC'Y 40, 44-46 (1955).

11. The more recent statutory enactments have been of the medical or post-mortem examiner type. See, e.g., IOWA CODE §§ 339.1-.12 (1966); MD. ANN. CODE art. 22, §§ 1-9 (1957); OKLA. STAT. tit. 63 §§ 931-55 (Supp. 1969); R.I. GEN. LAWS ANN. §§ 23-4-1 to -25 (1956); W. VA. CODE ANN. §§ 61-12-1 to -15 (1966). This seems to indicate a movement toward adoption of the suggestions made by the National Conference of Commissioners on Uniform State Laws.


13. Id. § 1238.
attorney in legal matters relating to the inquest, has the power to subpoena witnesses and to exclude the public from the inquest. Similarly, in the District of Columbia, the coroner has the duty to investigate the manner and cause of death, to compel the attendance of witnesses, to summon a coroner's jury, to preside over the inquest, and "if the jury find that murder or manslaughter has been committed on the deceased," to bind over witnesses. In Mississippi the coroner has the traditional duties of holding investigations, subpoenaing witnesses, summoning the coroner's jury, presiding over the inquest, and binding over witnesses. Additionally, the Mississippi coroner has the duty to exercise the duties of the sheriff under certain circumstances. In Arizona the justice of the peace serves as the ex officio coroner. His duties include investigating deaths by suicide and unnatural causes, subpoenaing witnesses, summoning a coroner's jury, and issuing warrants for the arrest of persons ascertained to be guilty of criminal offenses related to the death.

In states using the medical or post-mortem examiner system in lieu of the coroner system, the medical examiner may make a limited investigation into the circumstances surrounding the death, but his principal duties are confined to conducting medical examinations, autopsies, and similar tests. Although the records of the medical examiner may be used in subsequent investigations or proceedings, the medical examiner does not conduct nor preside at inquests. In Maryland, for example, the system of post-mortem examiners provides that the medical examiner shall go to the scene of the death and, "[s]uch medical examiner shall fully investigate the essential facts concerning the medical causes of death and may take the names and addresses of as many witnesses thereto as may be practicable to obtain . . . ." The report of the medical examiner together with the autopsy and other medical reports are kept on file for the use of the state's attorney in any subsequent investigation into the facts surrounding the death. The Maryland system specifically provides that the "chief medical examiner, assistant medical examiners and deputy medical examiners shall not have the power or be required to summons a jury of inquisition." Similarly, in Rhode Island the medical examiner performs an investigation to ascertain the medical causes of death, and if the circumstances surrounding the death

14. Id. §§ 1242, 1245, 1248.
17. Id. § 3906.
19. Id. §§ 22-501 to -519.
20. MD. ANN. CODE art. 22, § 6 (1957).
21. Id. §§ 7-8.
22. Id. § 9.
appear to be suspicious, "he shall at once notify the attorney-general, and the police of the city or town where the body was found or in which it lies."  

There is considerable variation as to the content of the findings made by the coroner or medical examiner in his investigation, the accessibility of records of inquest proceedings, the right to counsel for witnesses during the inquest, and the legal significance of the inquest results. In states which

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24. In states having the coroner system, the findings will usually include the name of the deceased, when, where, how, and by what means he came to his death, and the name of the person ascertained as being criminally responsible if known. For example, the Mississippi statute requires information describing "whether he died by murder, manslaughter, misadventure, misfortune, accident, or otherwise, and when and where, and by what means, and in what manner; and, if by murder, who were principals and who were accessories; and, if by manslaughter, who were the perpetrators ...." Miss. Code Ann. § 3899 (1956). California employs a dual system of reporting determined by the size of the county. Compare Cal. Gov't Code § 27504 (West 1968) (providing that the finding shall include the name of the person who is guilty if death was occasioned by criminal means), with Cal. Gov't Code § 27546 (West 1968) (providing that the finding shall not include the name of anyone as being responsible for the death).

25. Some states regard the record of inquest proceedings as the private property of the state. For example, a Vermont statute provides that "[t]he minutes of testimony so taken shall be the property of the state and the same or copy thereof shall not go out of the possession of such attorney general ...." Vt. Stat. Ann. tit. 13, § 5134 (1958). This provision has withstood the test of litigation, see, e.g., Hackel v. Williams, 122 Vt. 168, 171, 167 A.2d 364, 366-67 (1961); State v. Lavallee, 122 Vt. 75, 78, 163 A.2d 856, 858 (1960); State v. Truba, 88 Vt. 557, 561, 93 A. 293, 295 (1915) (cases holding that transcripts of inquest testimony are unavailable unless by court order at its discretion and only upon a showing of sufficient cause). Other states consider them to be public records, and will provide certified copies to individuals. See, e.g., Ohio Rev. Code Ann. § 313.10 (Page 1953). Connecticut, which utilizes an interesting combination of the coroner and medical examiner, has the more typical statute providing that the records of the coroner shall be public and open to inspection at all reasonable times. Conn. Gen. Stat. Rev. § 6-65 (1958).

26. The majority of states make no provision for the appearance of counsel at the inquest. Some states provide that any person suspected, under investigation, or accused shall be entitled to have counsel present. Connecticut's statutory provision is typical in this respect. "At any hearing before any coroner, the person suspected and under investigation of having criminally caused a death, and the representative of any decedent whose death was so caused, shall be entitled to have counsel present throughout the entire hearing." Conn. Gen. Stat. Rev. § 6-62 (Supp. 1969) (emphasis added). But only a few states permit every person required to attend the inquest the benefit of counsel. Pennsylvania has such a provision. "[A]ny person required to attend may have benefit of counsel at such attendance." Pa. Stat. tit. 16, § 1248 (1956).

27. For variations of the general rule that testimony given at an inquest will be admitted as evidence at a later prosecution depending on whether it was given voluntarily, see Annot., 5 A.L.R.2d 1404, 1444-46 (1949). If a state has adopted a system of medical examiners in lieu of the coroner system, the records of the autopsy and other medical tests will generally be admitted as competent evidence. A Maryland statute provides that the records of the medical examiner "shall be received as competent evidence in any court in this State .... . The records which shall be admissible as evidence under this section shall be records of the results of views and examinations of or autopsies upon the bodies of deceased persons by such medical examiner, or by anyone
permit the presence of counsel during the inquest proceeding, the functions that counsel is permitted to perform and, therefore, the extent to which this representation will be effective, vary extensively. In Wisconsin, for example "[a]ny witness examined at an inquest may have counsel present at the examination but such counsel shall not be allowed to examine his client, cross-examine other witnesses or argue before the person holding the inquest."\textsuperscript{28} Illinois, on the other hand, provides that "[a]ny witness appearing at the inquest shall have the right to be represented by counsel."\textsuperscript{29} And in Texas, when an inquest is held after a suspected witness has been arrested and charged with the crime, "such person and his counsel shall have the right to be present at the inquest, and to examine witnesses and introduce evidence."\textsuperscript{30} Due to these differences in substantive laws and procedures associated with the inquest, the requirements of due process will vary from state to state depending upon the particular system employed and the relevant statutory provisions in force.

\textit{Medical Examiners and Inquests Under Massachusetts Law}

Under Massachusetts law\textsuperscript{31} the medical examiner performs many of the duties once performed by the coroner. These functions include going to the site where the deceased is found for the purpose of determining whether the circumstances surrounding the death require investigation,\textsuperscript{32} notifying the district attorney of his decision to proceed with an investigation,\textsuperscript{33} informing the court of the presence of an accused who is not represented by counsel at the inquest, but reversed and remanded the case on other grounds. \textit{Id.} at 558-60, 237 N.E.2d at 445-46. The concurring opinion in \textit{Murdock} agreed with the results that the majority had reached, but forcefully argued that the admission of the inquest testimony was erroneous. \textit{Id.} at 563-66, 237 N.E.2d at 448-49. In a more recent federal district court case, United States \textit{ex rel. Musil v. Pate}, 296 F. Supp. 1139 (N.D. Ill. 1969), the court determined that the Illinois inquest is a criminal proceeding wherein the rights of an accused witness may be affected and that even an indigent witness has the right to assistance and representation of counsel during the inquest. To construe the Illinois statute as not requiring appointment of counsel would amount to a denial of equal protection. \textit{Id.} at 1141. Thus the court vacated the defendant's conviction and ruled that the inquest testimony given without representation by counsel would be inadmissible at the new trial. \textit{Id.} at 1142.

\textsuperscript{28} \textsc{Wis. Stat. Ann.} \textsection{} 966.065 (Supp. 1969).
\textsuperscript{29} \textsc{Ill. Rev. Stat.} ch. 31, \textsection{} 18.1 (1967). In People v. Murdock, 39 Ill. 2d 553, 237 N.E.2d 442 (1968), the Illinois Supreme Court stated that this provision "has never been construed to give an indigent witness the right to free counsel, even though such witness was then suspected of murdering the decedent." \textit{Id.} at 557, 237 N.E.2d at 445. The \textit{Murdock} case involved an appeal from a conviction of murder, rape and burglary where the defendant's statements made without the assistance of counsel during a coroner's inquest were later used against him at his trial. The court ruled that this testimony was not subject to suppression on grounds that he was not represented by counsel at the inquest, but reversed and remanded the case on other grounds. \textit{Id.} at 558-60, 237 N.E.2d at 445-46. The concurring opinion in \textit{Murdock} agreed with the results that the majority had reached, but forcefully argued that the admission of the inquest testimony was erroneous. \textit{Id.} at 563-66, 237 N.E.2d at 448-49. In a more recent federal district court case, United States \textit{ex rel. Musil v. Pate}, 296 F. Supp. 1139 (N.D. Ill. 1969), the court determined that the Illinois inquest is a criminal proceeding wherein the rights of an accused witness may be affected and that even an indigent witness has the right to assistance and representation of counsel during the inquest. To construe the Illinois statute as not requiring appointment of counsel would amount to a denial of equal protection. \textit{Id.} at 1141. Thus the court vacated the defendant's conviction and ruled that the inquest testimony given without representation by counsel would be inadmissible at the new trial. \textit{Id.} at 1142.

\textsuperscript{32} \textit{Id.} \textsection{} 6. The district attorney may also order further medical examinations.
an autopsy and medical tests,\(^3^3\) and submitting to the district attorney a detailed report of the circumstances surrounding the death and the results of the autopsy and related medical tests.\(^3^4\) Based on the report of the medical examiner the attorney general or the district attorney may require that an inquest be held.\(^3^5\)

As in most states which have eliminated the coroner's office, the Massachusetts medical examiner does not conduct the inquest. Instead, a magistrate for the Massachusetts district court for the county in which the body of the deceased was found conducts the inquest.\(^3^6\) During this inquest the district attorney or a person designated by him may conduct the examination of witnesses,\(^3^7\) who may be compelled to attend,\(^3^8\) "kept separate so that they cannot converse with each other until they have been examined,"\(^3^9\) and later bound over.\(^4^0\) The magistrate conducting the inquest is given wide latitude in determining the procedures to be followed at the inquest, and by law may exclude "[a]ll persons not required by law to attend."\(^4^1\) At the conclusion of the inquest, the magistrate must file a written report of the proceedings of his inquest with the superior court for the county wherein the inquest was held.\(^4^2\) This report must state, \textit{inter alia}, "when, where and by what means the person met his death, his name, if known, and all material circumstances attending his death, and the name, if known, of any person whose unlawful act or negligence appears to have contributed thereto.\(^4^3\)

The objectives of the Massachusetts inquest, therefore, are twofold: (1) to identify the deceased and the cause of his death, and (2) to determine the circumstances surrounding the death and to ascertain the identity of any person whose "unlawful act or negligence" contributed to the death. In circumstances like those in Senator Kennedy's case, the inquiry will focus primarily on this second objective. This is so because the identity of the deceased has been previously determined, and the medical causes of death

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\(^3^3\) \textit{Id.} The district attorney may also order an autopsy.

\(^3^4\) \textit{Id.} §§ 6, 7.

\(^3^5\) \textit{Id.} § 8.

\(^3^6\) \textit{Id.} §§ 7, 9.

\(^3^7\) \textit{Id.} § 8.

\(^3^8\) \textit{Id.} § 10.

\(^3^9\) \textit{Id.} § 8.

\(^4^0\) \textit{Id.} § 8.

\(^4^1\) \textit{Id.} § 13.

\(^4^2\) \textit{Id.} § 8. In Senator Kennedy's case the justice had announced that he would exercise his discretion in this regard by excluding from the inquest "all except legitimate and accredited members of the press, television, radio or other news media." Petitioner's Brief for Certiorari at 2, Kennedy v. Justice of the District Court, — Mass. —, 252 N.E.2d 201 (1969). Presence of counsel for witnesses was restricted to the time when witnesses would be singularly present, and then only for extremely limited purposes. See note 3 \textit{supra}.


\(^4^4\) \textit{Id.}\n
are not susceptible to proof at an inquest proceeding. Medical reports and the autopsy results, if available, will be relied upon to describe the medical causes of death and it is unlikely that an inquest can add any additional medical information to that already available.

Further, when the circumstances prior to the death have received national publicity, there is a greater likelihood that the examination and evidence will be directed toward a determination of the criminal negligence of witnesses admittedly a party to and present during the circumstances under inquisition. It is in this light, then, that the requirements of due process regarding the effective use of counsel and the commensurate procedural safeguards must be examined.

Constitutional Safeguards

The right to effective assistance of counsel stems from both the fifth and sixth amendments to the United States Constitution, as made applicable to the individual states through the fourteenth amendment. The right of a witness summoned to appear and testify at an inquest to have the benefit of effective assistance of counsel and the correlative procedural safeguards under specified circumstances must be, therefore, examined in light of at least two related theories. On the one hand, when under a specific set of circumstances an inquest proceeding becomes, in fact, the critical stage of the pre-

44. The extent to which the first ten amendments are made applicable to the states through the fourteenth amendment has long been a subject of dispute. Mr. Justice Black has suggested that the entire Bill of Rights is incorporated into the fourteenth amendment:

The first ten amendments were proposed and adopted largely because of fear that Government might unduly interfere and prized individual liberties. The people wanted and demanded a Bill of Rights written into their Constitution. The amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments — Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases.

indictment criminal investigative machinery of the state, then the suspected witness is entitled to the full and effective use of counsel and to the rights of confrontation and compulsory process as guaranteed by the sixth amendment. On the other hand, the closer an inquest proceeding approximates a judicial proceeding the more stringent the requirements of due process become. And when the inquest proceeding becomes sufficiently analogous to that of a criminal proceeding a witness summoned to appear and testify is entitled to full procedural safeguards, including the effective and complete use of counsel, cross-examination, compulsory process, and the opportunity to present evidence in his behalf by virtue of the due process clauses of the fifth and fourteenth amendments.

**Sixth Amendment Rights**

The Supreme Court first expressed the view that the right to effective use of counsel under the sixth amendment attached at any critical stage of a criminal proceeding in *Powell v. Alabama*. In *Powell* the defendants, who were convicted of rape and sentenced to death, did not have the benefit of counsel at their arraignment but were represented at trial. In reversing their convictions, the Court said:

> [D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Thus it was made clear that the right to the aid of counsel is not limited to the time of trial but also extends to the critical period of arraignment before trial.

Later, in *Hamilton v. Alabama*, the Court examined the relationship between the need for the effective use of counsel and the time at which the critical stage in the proceedings is reached. In *Hamilton* the Alabama Supreme Court denied relief to a defendant sentenced to death for breaking and entering with intent to ravish on the premise that there was no showing that the defendant had been "disadvantaged," although he had pleaded guilty without the assistance of counsel at the arraignment. After illustrating some ways that a defendant could be prejudiced by lack of counsel under Alabama law, the Supreme Court reversed the conviction, explaining that

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45. 287 U.S. 45 (1932).
46. Id. at 57.
47. 368 U.S. 52 (1961).
arraignment "is a critical stage in a criminal proceeding. What happens there may affect the whole trial. Available defenses may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes." Employing rationale consistent with the theory that lack of effective representation by counsel may adversely affect a subsequent trial, the Supreme Court has determined that the critical stage at which the right to effective use of counsel under the sixth amendment accrues can occur during preliminary hearing, post-indictment noncustodial questioning, post-indictment police line-ups, and custodial questioning prior to indictment.

_Escobedo v. Illinois_ was the first case in which the Supreme Court found that the critical stage invoking the sixth amendment right to effective use of counsel had been reached prior to indictment of the defendant. In _Escobedo_, the defendant had made incriminating statements while being questioned by the police without the protection of counsel. The Court reversed the conviction because the accused's sixth amendment rights had been violated, hence rendering his statements fruits of an illegal procedure and therefore inadmissible at trial. In relating the time when the need for counsel is most crucial to the time when the critical stage accrues and sixth amendment rights attach, the Court said:

> The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained. There is necessarily a direct relationship between the importance of a stage to the police in their quest for a confession and the criticalness of that stage to the accused in his need for legal advice.

In striking the balance in favor of the rights of the suspected individual the Court noted that the critical stage is reached when "the investigation is no

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48. _Id._ at 54.
49. White _v._ Maryland, 373 U.S. 59 (1963) (where a preliminary hearing before a Maryland magistrate was determined to be the critical stage in that criminal proceeding).
50. _Massiah v. United States_, 377 U.S. 201 (1964) (where noncompelled incriminating statements made to government agents in the absence of counsel were precluded from use at a subsequent trial).
51. United States _v._ Wade, 388 U.S. 218 (1967) (where courtroom identifications were excluded from trial because they were based on a police line-up conducted without notice to and in the absence of counsel for the defendant).
52. _Miranda v. Arizona_, 384 U.S. 436 (1966) (where the Court was primarily concerned with the protection of the fifth amendment privilege against self-incrimination but introduced the right to counsel as the means of assuring the preservation of this right).
54. _Id._ at 488.
longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . . .”

Although the holding in Escobedo was narrowly formulated in that it was directed toward police custodial situations, the rationale in favor of insuring the right to effective assistance of counsel during the critical stage of a compulsory proceeding can be logically applied to certain noncustodial situations. An inquest proceeding becomes particularly susceptible to the Escobedo rationale when suspected witnesses are summoned to appear and are compelled to testify before the magistrate. It has been suggested that sixth amendment rights under the Escobedo rationale accrue in noncustodial situations, such as tax investigations.

Emerging from this analysis is the general principle that at some point in an individual’s conflict with the criminal investigative machinery of the state, sixth amendment guarantees to effective assistance of counsel and the correlative right to appropriate procedural safeguards will attach. The precise point at which these rights accrue will vary, and the criteria used in determining this critical point of attachment are described in terms of a shift in the “investigatory-accusatory” dichotomy and a shift in purpose and “focus” toward particular individuals.

An appraisal of the Massachusetts inquest procedure reveals that it can function as part of the criminal investigative machinery of that state. In the abstract the inquest may appear to be an exploratory, investigative pro-

55. Id. at 490.
56. The right to effective assistance of counsel is recognized at all stages of federal criminal proceedings, including appearances before U.S. Magistrates. 18 U.S.C. § 3006A (Supp. IV, 1969). Although military courts of inquiry are not entirely analogous to inquest proceedings, there are sufficient points of similarity to note that any person subject to inquiry or who has a direct interest in the subject of inquiry has the right “to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence.” Uniform Code of Military Justice art. 135, 10 U.S.C. § 935 (1964).
57. Andrews, The Right To Counsel in Criminal Tax Investigations Under Escobedo And Miranda: The “Critical Stage,” 53 IOWA L. REV. 1074 (1968); Hewitt, The Constitutional Rights of the Taxpayer in a Fraud Investigation, 44 TAXES 660 (1966); Lipton, Constitutional Rights in Criminal Tax Investigations, 53 A.B.A.J. 517 (1967); Comment, The Constitutional Right to Counsel in Tax Investigations, 33 U. CHI. L. REV. 134 (1965). But see, e.g., United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967); United States v. Fiore, 258 F. Supp. 435 (W.D. Pa. 1966) (both holding that Miranda does not apply since the investigations were noncustodial). A more recent case, however, has held that a taxpayer was entitled to the Miranda warnings during criminal tax investigations even though the taxpayer was not in physical custody and no decision to prosecute had been made. United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969). And in United States v. Tarlowski, 305 F. Supp. 112 (E.D.N.Y. 1969), it was held that evidence gathered during a criminal tax investigation was subject to suppression because the taxpayer had been denied the right to have his accountant present, even though he had been given the Miranda warnings.
procedure designed only to determine the circumstances surrounding a death. But when "required" by public prosecutors who may conduct the examination of witnesses, and where the court holding the inquest is empowered to appoint an officer,\textsuperscript{58} who is compensated in the same manner as in criminal cases, qualified to serve criminal process to investigate the case and summon witnesses, the inquest soon loses its abstract nonaccusative qualities. In addition, the inquest must name the "person whose unlawful act or negligence appears to have contributed thereto,"\textsuperscript{59} and the court is to issue process for the arrest of "a person charged by the report with the commission of a crime" who is at large and to bind over witnesses if it "finds that murder, manslaughter or an assault has been committed."\textsuperscript{60} Hence, an inquest can exercise an accusatory function depending upon the intent of the prosecutor who requires it, the evidence presented, and the view of the magistrate as to the probative value of such evidence. Although an inquest may start out as primarily investigatory it may become accusatory at any stage after testimony or other evidence is introduced. Thus, the inquest procedure can provide a convenient device for obtaining clues, evidence, and confessions of criminal activities.

In many of these respects the inquest proceedings and functions resemble those of the grand jury. The traditional grand jury, composed of persons from the community where the alleged offense occurred, functions as an extension of the court by investigating alleged criminal violations within its jurisdiction.\textsuperscript{61} Witnesses summoned to appear and testify before a grand jury will generally be examined by a prosecuting attorney, but they will not have the right to be represented by counsel during the proceeding, to cross-examine or confront other witnesses, nor enjoy the benefit of compulsory process.\textsuperscript{62} But the grand jury, unlike the inquest, is unique in that it is the only accusatory body specifically recognized by the Constitution.\textsuperscript{63} "The functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history."\textsuperscript{64} Moreover, the grand jury exercises its functions while "interpos[ing] an independent body of citizens between the accused and the prosecuting attorney and the court."\textsuperscript{65} Only

\begin{footnotes}
\item[59] Id. § 12.
\item[60] Id. § 13.
\item[63] U.S. Const. amend. V.
\end{footnotes}
because of these reasons is it permitted to dispense with the traditional safeguards of representation, cross-examination, and confrontation. Further, a grand jury proceeding is conducted in secret and cannot produce the adverse effects in terms of prejudicial pretrial publicity which are likely to occur during an inquest under circumstances like those in Senator Kennedy's case.

Thus the Massachusetts inquest proceeding may become the critical stage of a pre-indictment criminal investigative process at which a suspected witness's rights under the sixth amendment attach. And when, as in the circumstances of the inquest in Senator Kennedy's case, the determination of criminal negligence becomes a primary function of the inquest, it can hardly be said that general inquisition has not been transformed into an accusatory device focused on a particular individual. As such, the need for legal assistance and representation together with the correlative procedural safeguards becomes critical, and denial of such rights during this pre-indictment stage would "disadvantage" a suspected witness and violate his rights under the sixth amendment as applicable to the states through the fourteenth amendment.

Fifth Amendment Rights—Procedural Due Process

Through the due process clauses of the fifth and fourteenth amendments, a witness summoned to testify at an inquest may be entitled to procedural safeguards similar to those used during a criminal proceeding when the inquest is likely to focus on the witness in an accusatory sense and make determinations regarding his criminal involvement with respect to the circumstances under investigation. Individuals subject to state or federal administrative proceedings are entitled to be treated with a fundamental fairness that is inextricably interwined in the concept of due process. Whether an alleged right or procedural safeguard will be encompassed in the concept of fairness required by due process will depend on the nature of the proceeding and the determination being made. But when a proceeding is sufficiently analogous to an adjudicatory process and its findings affect specific individuals, the rights to representation and assistance of counsel, cross-examination, and presentation of evidence become fundamental aspects of procedural due process. This reasoning has been applied to assure those


67. See cases cited note 44 supra.

68. See generally Kwong Hai Chew v. Colding, 344 U.S. 590, 600 (1953); The Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903).


70. See, e.g., Jenkins v. McKeithen, 395 U.S. 411, 428-29 (1969); Willner v. Com-
subject to juvenile court proceedings representation and assistance of counsel, and more recently, to probation revocation hearings. It has been suggested that due process requires expanded procedural safeguards, including the right to effective assistance of counsel and presentation of evidence, in other areas.

Jenkins v. McKeithen, recently decided by the Supreme Court, is particularly significant because the rights asserted by the appellant in that case were essentially the same as the rights being examined here, and because the functions of and determinations made by that inquiry are analogous to those of a Massachusetts inquest in circumstances like those in Senator Kennedy's case. In Jenkins, the Court analyzed the requirements of due process regarding the procedures employed by the Louisiana Labor-Management Commission of Inquiry. The appellant, a labor union member, challenged the constitutionality of the act establishing the Commission arguing that it denied a person compelled to appear before the Commission "the right to effective assistance of counsel, the right of confrontation, and the right to compulsory process for the attendance of witnesses." The Commission was established to hold hearings concerning alleged violations in the field of labor-management relations; its powers included making rules, compelling the attendance of witnesses, and requiring the production of certain records. The Commission's inquiry was to determine whether there was probable cause to believe that the laws regarding labor-management relations had been violated, but its power was specifically limited to making findings and recommendations: "The commission shall have no authority to and it shall make no binding adjudication with respect to such violation or violations; however, it may, in its discretion, include in its findings the conclusions of the commission as to specific individuals . . . and it may make such recommendations for action to the governor as it deems appropriate."


71. In re Gault, 387 U.S. 1, 41, 57 (1967).
73. See, e.g., 54 IOWA L. REV. 497 (1968) (parole release hearings); 40 TEMP. L.Q. 381 (1967) (civil competency proceedings).
77. Id. at 414-18.
Recent Developments

In determining whether the Commission’s restrictions on the person compelled to attend the inquiry were violative of the due process clause of the fourteenth amendment, the Court pointed up the critical distinction between “investigative and fact-finding” functions and the exercise of “accusatory” functions. Looking to the Act and the purpose of the Commission, the Court found that: “[T]he Commission does not adjudicate in the sense that a court does, nor does the Commission conduct, strictly speaking, a criminal proceeding. Nevertheless, the Act, when analyzed in light of the allegations of the complaint, makes it clear that the Commission exercises a function very much akin to an official adjudication of criminal culpability.” Thus, in a situation similar to that of the Massachusetts inquest, where a Commission of Inquiry was empowered to make findings regarding the alleged guilt of specific individuals but severely limited the right to confrontation and cross-examination, restricted the ability to present evidence, and denied the effective assistance of counsel to a suspected witness, the Court found that the due process requirement of adequate procedural protection was lacking. Although the Court found it “inappropriate to rule on the extent to which the Commission’s procedures may run afoul of the Due Process Clause on the basis of the record before [it],” it specifically held that “due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights.”

The Commission and the Massachusetts inquest proceedings, however, are not entirely analogous. The Commission’s inquiry usually focuses on specific individuals, while a magistrate’s inquest may be more general in its inquiry. But this is not always the case, and in circumstances where a witness has admitted to being present during the events now under inquisition and the

79. Specifically, the Act severely limits the right of a person being investigated to confront and cross-examine the witnesses against him. Only a person appearing as a witness may cross-examine other witnesses. Cross-examination is further limited to those questions which the Commission “deems to be appropriate to its inquiry,” and those questions must be submitted, presumably beforehand, in writing to the Commission.

The Commission’s procedures also drastically limit the right of a person investigated to present evidence on his own behalf. It is true that he may appear and call a “reasonable number of witnesses” in executive session, but should the Commission decide to hold a public hearing, he is limited to presentation of his own testimony and the “pertinent” written statements of others. The right to present oral testimony from other witnesses and the power to compel attendance of those witnesses may be denied in the discretion of the Commission.

80. Id. at 426-29.
81. Id. at 427.
82. Id. at 430.
83. Id. at 429.
inquest has been ordered by a district attorney for purposes of exposing possible criminal negligence, the inquest may be directed more toward specific individuals in an accusatory sense than the inquiry in the *Jenkins* case. Moreover, neither the Commission nor the Massachusetts inquest is empowered to make a final adjudication of a person’s guilt. The Commission is restricted to making recommendations and findings, but under Massachusetts law, in addition to the requirement of reporting the names of specific individuals whose “unlawful act or negligence” appears to have contributed to the death, the magistrate at the inquest “may bind over, for appearance in said court, as in criminal cases, such witnesses as he considers necessary, or as the district attorney may designate,” and may issue process for arrest if the person charged in his report is at large.84 In *Jenkins* the Court determined that the Commission was exercising an accusatory function because it was concerned “with exposing violations of criminal laws by specific individuals.”85 In light of the Massachusetts requirement for charging specific individuals in the magistrate’s report, and because of the potential impact this may have on a witness’s personal freedom, the *Jenkins* requirement of adequate procedural protection is even more compelling in an inquest situation like that in Senator Kennedy’s case.

The Court in reaching its decision in *Jenkins* carefully distinguished it from its earlier decision in *Hannah v. Larche*,86 a case involving a Commission with similar structure and powers as the Louisiana Labor-Management Commission of Inquiry. In *Hannah*, the Court examined the procedures employed by the Commission on Civil Rights87 to investigate alleged voting discrimination. Nothing in this Commission’s procedures assured a witness summoned to appear before it the right to the identity of persons submitting complaints to the Commission, nor the right of confrontation and cross-examination. In holding that the Commission was authorized to adopt such rules of procedure, the Court explained that the purpose of the Commission was to function solely as an investigative and fact-finding agency, and that whether witnesses being investigated would be subject to public opprobrium and scorn, or possible criminal prosecution was purely conjectural.88

The Supreme Court has reached conclusions similar to that in *Hannah* when persuaded that the proceedings under scrutiny were investigatory rather than accusatory.89 In In re *Groban*90 the Court denied that the right to

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85. 395 U.S. at 427.
88. 363 U.S. at 442-43.
89. See, e.g., Anonymous v. Baker, 360 U.S. 287 (1959) where the Court condensed the procedures established for a judicial inquiry into alleged bar violations because the
effective assistance of counsel extended to subpoenaed witnesses during a fire marshal's administrative investigation because the essential purpose of the inquiry was to pursue a legislative policy of fire prevention by discovering the origins of fires, rather than to focus on witnesses in an accusatory sense. The vitality of this five to four decision, where the minority argued that procedural protection was necessary because evidence obtained during the fire marshal's investigation might be used in subsequent criminal proceedings, is dubious when re-examined in terms of the Jenkins rationale.

Conclusion

In light of Escobedo and subsequent cases which have in effect enlarged the scope of the criminal proceedings to include pre-indictment situations where an investigation focuses on specific individuals in an accusatory sense, and in view of the Jenkins requirement of adequate procedural protection where an administrative investigation makes findings regarding alleged criminal violations by particular persons, it would be prudent for states to re-examine their inquest systems. The remnants of the archaic concept of a coroner's inquest designed to safeguard pecuniary interests can be dispensed with by adopting a system of post-mortem examiners and, thereby, disassociating the determination of medical causes of death from investigations designed to reveal the circumstances surrounding deaths due to unnatural causes. The Maryland system of post-mortem examinations, prohibiting medical examiners from conducting inquests and stipulating that recommendations for investigations should be directed to the state's attorney, provides a workable model for other states.

States wishing to utilize the inquest, whether conducted by a coroner, justice of the peace, or magistrate, must structure their inquest proceedings to avoid the constitutional hazards now coming to light. States desiring to

inquiry was a general one and the subpoenaed witnesses were merely witnesses and not potential accused.

91. Id. at 348 (dissenting opinion).
confine the inquest proceedings to determinations regarding the identity of the deceased, the place, means and medical causes of death without naming any person as being criminally responsible for the death should enact a provision like the California statute. Alternatively, if the inquest report is to indicate or include references to specific individuals as allegedly criminally contributing to the death, then the state must assure that all witnesses summoned to appear and testify at the inquest are afforded adequate procedural protection. A statutory provision such as the one in Illinois, providing that any witness shall have the right to be represented by counsel, may be satisfactory if construed to permit counsel to examine his client, cross-examine other witnesses, present evidence, and argue before the person holding the inquest. Statutory provisions prohibiting counsel’s exercise of these procedural safeguards, such as the Wisconsin statute, are subject to severe constitutional inadequacies and may be found to be void in their application under the Jenkins rationale.

The better approach is to either remove the accusatory function from the inquest proceeding entirely and to entrust that function to the grand jury

would be required to comply with principles therein announced. These judicial principles, in effect, close the inquest to the public and news media, provide that inquest records be impounded until such time as it appears certain that no prosecution will be initiated, guarantee that witnesses may be accompanied and advised by counsel during the inquest. But the determination of the extent to which witnesses or counsel may confront, cross-examine, and compel attendance of other witnesses, present evidence, object to proffered testimony, and seek rulings is left to the discretion of the magistrate conducting the inquest. Id. Even though the petitioners argued that the inquest may exercise an accusatory function, the court found that “inquest proceedings are not accusatory and that they should be regarded as investigatory.” Id. at —, 252 N.E.2d at 206. Thus, the new inquest principles reduce the probability that the Massachusetts inquest will generate prejudicial pretrial publicity, but fail to provide adequate procedural safeguards as discussed in the Jenkins case. The Massachusetts court held that the Jenkins rationale was not necessarily applicable to inquest proceedings, saying: “We are by no means clear what the precise ratio decidendi is, or that the decision (see e.g. p. 430) has any necessary application to our investigatory inquest procedure, which has a long historical background. We hope that the Jenkins case will be materially clarified before we are again confronted by it.” Id. at —, 252 N.E.2d at 207. Later in its opinion, the court expressed the belief that the application of the newly formulated principles “will make the Massachusetts inquest procedure less vulnerable to future constitutional objection if so revives expressed in the Jenkins case . . . should be expanded.” Id. at —, 252 N.E.2d at 208. Because the court was unable to discern the ratio decidendi of the Jenkins case and unwilling to concede that the inquest can, in certain situations, exercise an accusatory function, this restructuring of the Massachusetts inquest procedure is likely to be subject to further constitutional challenge along lines of reasoning explored in conjunction with the Jenkins case. Although the Massachusetts’ principles” are valuable in that they demonstrate that the judiciary as well as the legislature can effect changes in quasi-judicial proceedings, the ultimate result achieved may lend support to the proposition that the legislature, through the more extensive resources available to it, is better suited to make such changes.

95. CAL. GOV’T CODE § 27546 (West 1968); note 24 supra.
96. ILL. REV. STAT. ch. 31, § 18.1 (1967); note 29 supra and accompanying text.
97. WIS. STAT. ANN. § 966.065 (Supp. 1969); text accompanying note 28 supra.
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proceeding or the state attorney's indictment, or to enact specific statutory provisions providing that all witnesses summoned to appear and testify at the inquest shall be entitled to have counsel present throughout to represent them, to confront and cross-examine other witnesses, to object to proffered evidence, to present evidence and to compel the attendance of witnesses.

The Home Rule Dilemma in the District of Columbia

Almost two hundred years have passed since the Declaration of Independence was written and issued to King George III of England. One of the principles set forth in that document declares that a government derives its "just powers from the consent of the governed." Eleven years later a Constitutional Convention convened and began the difficult task of drafting a document which sought, among other things, to "establish Justice" and to "promote the general Welfare" of the citizens of the United States. Despite the basic ideals portrayed by these two instruments, there exists within the United States a government whose justness and concern for promoting the general welfare of its citizens has been seriously questioned, since it is a government which derives its powers through means other than the consent of the governed. The government adverted to is that of the District of Columbia. During the past twenty years home rule advocates for the District have increased their efforts in an attempt to gain what they consider to be one of the basic rights of all citizens—the right to choose those officials who are to exercise governmental authority over them. Thus far the opponents of home rule have successfully repelled the arguments which have been presented in behalf of self-government for the Nation's Capital.

That Congress has the power to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia is established in the Constitution

98. This alternative appears preferable in that it would not only alleviate constitutional infirmities resulting from application of the Jenkins rationale to inquest situations, but would also minimize possibilities of infringement on the right to trial by jury resulting from prejudicial pretrial publicity in conjunction with the inquest. That jurors be impartial and indifferent and that they reach a verdict based only on evidence adduced during the trial are fundamental principles inherent in the concept of trial by jury. Turner v. Louisiana, 379 U.S. 466, 471-72 (1965); Irvin v. Dowd, 366 U.S. 717, 722 (1961); Patterson v. Colorado, 205 U.S. 454, 462 (1907).

1. DECLARATION OF INDEPENDENCE.
2. U.S. Const. preamble.
3. Basically, there are three major arguments submitted by home rule proponents: