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THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE: AN EXERCISE IN THE WEIGHING OF UNARTICULATED VALUES

EUGENE L. SHAPIRO*

I. *WHEAT v. UNITED STATES*: RECOGNITION OF THE RIGHT

When, in May of 1988, the Supreme Court acknowledged that the Sixth Amendment encompassed a criminal defendant's interest in retaining counsel of the defendant's choice, it did so with a tone often reserved for statements of the obvious. *Wheat v. United States*¹ does not bear the usual indicia of a landmark decision. The Court tersely accepted, as an outgrowth of its prior holdings, petitioner's claim that the disqualification of his retained attorney because of a potential conflict of interest affected a cognizable right under the Sixth Amendment.² The Court focused its discussion on both the scope of the right and the process by which the presumption in favor of a defendant's counsel of choice might be outweighed.

In fact, the Supreme Court had seldom discussed choice of retained counsel and had done so only peripherally in the Sixth Amendment context. Its strongest statement on the subject was in *Powell v. Alabama*,³ an opinion that highlighted the importance of such choice in a narrow context and that preceded the application of the Sixth Amendment's right to counsel to the states by over thirty years.⁴ In *Powell* the defendants, blacks who had been convicted of rape and sen-

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1. 486 U.S. 153 (1988).

2. See *id.* at 158-59. The Court noted that the Sixth Amendment "secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime." *Id.* at 158 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). It further noted that the purpose of providing such assistance is to ensure that the defendant receives a fair trial, *id.* at 159 (quoting *Strickland v. Washington*, 466 U.S. 668, 669 (1984)), and added that "the right to select and be represented by one's preferred attorney" is "thus" comprehended by the Amendment. *Id.* (citing *Jones v. Barnes*, 463 U.S. 745 (1983); *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983)).

3. 287 U.S. 45 (1932).

4. See *Gideon*, 372 U.S. at 339-44 (holding that the Sixth Amendment right to counsel applies to the states).

tenced to death after a trial that "from beginning to end, took place in an atmosphere of tense, hostile and excited public sentiment," challenged their convictions as violative of due process. The defendants were not represented between arraignment and trial.⁶ Further, they were not asked if they were able to employ counsel, if friends or relatives might help them to do so, or if they wished to have counsel appointed.⁷ The court designated a defense attorney on the morning of the trial, and the defense attorney proceeded to present a pro forma defense with insufficient opportunity for effective preparation.⁸ The Supreme Court stated:

In the light of the facts outlined. . .—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.⁹

It was clear to the Court that the opportunity to obtain counsel must involve an exercise of the defendant's personal choice. "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."¹⁰

Before *Wheat*, issues involving choice of counsel also had arisen in the context of challenges to the denial of a continuance sought for the purpose of retaining an attorney. In *Ungar v. Sarafite*¹¹ and similar cases, the Court made it clear that such a denial would appropriately be assessed under the standard of whether it was so arbitrary as to violate due process.¹² In *Flanagan v. United States*,¹³ the principal

5. *Powell*, 287 U.S. at 51.

6. *Id.* at 57.

7. *Id.* at 52.

8. *Id.* at 57-58.

9. *Id.* at 71. With regard to the effectiveness of the appointment, the Court added: [A]ssuming their inability, even if opportunity had been given, to employ counsel . . . we are of the opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

Id.

10. *Id.* at 53.

11. 376 U.S. 575 (1964).

12. *Id.* at 589; see also *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) (finding that denying the defendant an opportunity to retain any counsel violated due process); cf. *Morris v. Slappy*, 461 U.S. 1, 12-14 (1983) (holding that the denial of a continuance that would

pre-*Wheat* opinion in which the Court had discussed the claim that a defendant's choice of counsel is an interest protected under the Sixth Amendment,¹⁴ the Court did not resolve the issue. Instead, it held that federal law does not permit the immediate appeal of a pretrial disqualification ruling.¹⁵

It therefore was not surprising that in *Wheat* the Government took the position that the implication of the Sixth Amendment by the disqualification remained an unresolved issue and that the Court should assess the matter only under the Due Process Clause's prohibition against arbitrary or unreasonable impediments to the defense.¹⁶ The Government argued:

The Sixth Amendment ensures an accused "the Assistance of Counsel for his defence"; it does not suggest that the defendant is entitled to the attorney of his choice. Moreover, the purpose of the Sixth Amendment right to the assistance of counsel "is simply to ensure that criminal defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). See also *United States v. Morrison*, 449 U.S. 361, 364 (1981). It is not designed to guarantee "a meaningful relationship" between a defendant and the counsel of his choice. *Morris v. Slappy*, 461 U.S. 1, 13 (1982).¹⁷

Thus, while denying the applicability of the Sixth Amendment, the Government asserted that the purposes of the right to counsel could be reduced to one "simple" goal: that of securing a fair trial.¹⁸ In its opinion the Court adopted the Government's distillation of this far-reaching statement from the quoted language of *Strickland*.¹⁹

Wheat squarely rejected the notion that the guarantees of due process provide the only constitutional framework for measuring an impediment to a defendant's choice of retained counsel. The parameters of the Sixth Amendment right to counsel of choice were, however, "circumscribed" at the outset.²⁰ Writing for the Court, Chief Justice Rehnquist stated that a defendant is entitled neither to representation by one who is not admitted to the bar, nor by an attorney he cannot

have allowed the Deputy Public Defender to try the case rather than a senior trial attorney in the Public Defender's Office did not violate the defendant's Sixth Amendment right to counsel).

13. 465 U.S.-259 (1984).

14. See *id.* at 267-68.

15. *Id.* at 269.

16. Brief for the United States at 6-7, *Wheat* (No. 87-4).

17. *Id.* at 11.

18. *Id.*

19. See *Wheat v. United States*, 486 U.S. 153, 159 (1988).

20. *Id.* at 159.

afford or who declines to represent him.²¹ "Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government."²² Viewing the question before it as whether a defendant's Sixth Amendment right is similarly "qualified" by the attorney's representation of other alleged conspirators,²³ the Court then proceeded to outline a methodology for resolving the issue. The Court noted that a Sixth Amendment presumption exists in favor of counsel of choice,²⁴ but that the presumption may be overcome by sufficient countervailing interests.²⁵

What began in the opinion as an apparent list of definitional limitations on the right to counsel thus evolved into a kind of balancing approach for determining which sorts of interferences will be permissible. This fusion of the right's apparent limitations with the methodology for evaluating an alleged abridgement casts doubt upon the definitional status of the initial limitations themselves. The consequences may be significant. At first glance it appears to matter little if the qualification limiting the right to the choice of duly admitted counsel is deemed definitional²⁶ or is instead the product of a balancing of the defendant's right to choice against the state's obviously substantial interests in regulating the practice of law. On the other hand, courts often grapple with such issues as the extent to which former prosecutors' experiences may require their disqualification as defense counsel. In these situations a reading of *Wheat* that views the Sixth Amendment right as inapplicable "by definition" to the choice of an attorney who has had a previous relationship with the Government would be dispositive. It is improbable that the Court intended such a result. Rather, *Wheat* seems to require a careful weighing of the particularized facts and interests in each case.

This weighing process led the *Wheat* Court to conclude that the disqualification of counsel was within the trial court's discretion.²⁷ Wheat was charged with participating in a conspiracy to distribute drugs. A jury had acquitted one alleged conspirator, Gomez-Barajas, on charges related to Wheat's and, in order to avoid a second trial on other charges, Gomez-Barajas offered to plead guilty to tax evasion and illegal importation. The district court had not accepted this plea by the

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 160.

25. *Id.* at 164.

26. *Id.* at 159 ("[t]he Sixth Amendment right to choose one's own [duly admitted] counsel").

27. *Id.* at 164.

time of Wheat's trial. The same attorney represented another alleged conspirator, Bravo. Bravo pleaded guilty to transportation of drugs in lieu of being tried on the conspiracy charge. After those plea proceedings the attorney informed the district court that Wheat had asked him to try his case.²⁸ The district court postponed consideration of this request for a substitution of counsel²⁹ until the day before trial.³⁰

At the hearing the Government argued that the attorney's prior representation of the two codefendants created a serious conflict of interest. It asserted that because the court had not accepted the Gomez-Barajas plea arrangement, a possible rejection would lead to Gomez-Barajas's trial. Because Wheat was familiar with the sources and size of Gomez-Barajas's income, the Government predicted that Wheat would likely be called as a witness. Thus, a conflict of interest would prevent the attorney from cross-examining Wheat.³¹ The prosecution also requested that Bravo be made available as a witness at Wheat's trial in exchange for a sentencing concession. Bravo had been accused of delivering marijuana to a third party's home, and the Government believed that Wheat had received a portion of it. Therefore, full cross-examination of Bravo also would be foreclosed by a conflict.³²

In response, Wheat argued that the circumstances envisioned by the prosecution were highly speculative. If called as a witness, Bravo would assert that he did not know Wheat and impeachment would not be necessary.³³ Wheat also asserted that the conflict was engineered to interfere with his choice of counsel.³⁴ Wheat argued that a trial of Gomez-Barajas was unlikely, and because he was not involved in the crimes charged, his testifying was improbable.³⁵ Finally, all of the defendants consented to the attorney's representation of Wheat and agreed to waive all future claims of conflict of interest.³⁶

In considering the propriety of the district court's ruling, the Court observed that the waivers did not alleviate the problems that a conflict of interest might present. It noted that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted

28. *Id.* at 154-55.

29. In dissent Justices Stevens and Blackmun took issue with this characterization. They viewed the request as one for *additional* counsel of choice. *Id.* at 172-73 (Stevens, J., dissenting) (Blackmun, J., joining in dissent).

30. *Id.* at 155.

31. *Id.* at 155-56.

32. *Id.* at 156.

33. *Id.*

34. *Id.* at 157. In dissent Justices Marshall and Brennan found this to be a significant possibility. *Id.* at 170-71 n.3 (Marshall, J., dissenting) (Brennan, J., joining in dissent).

35. *Id.* at 156-57.

36. *Id.* at 157.

within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.”³⁷ In addition, the Court weighed both the institutional interest in the rendition of just verdicts and the legitimate wishes of the district courts to avoid appellate ineffective assistance claims.³⁸ The Court concluded that the presumption in favor of counsel of choice may be overcome and a waiver refused either when an actual conflict is demonstrated or a serious potential for conflict exists.³⁹ *Wheat* presented the latter situation, and the Court accorded broad latitude to the district court in evaluating the facts.⁴⁰

Although *Wheat* mandates the weighing of a presumption in favor of a defendant’s choice against competing interests, the opinion provides little guidance concerning the strength of that presumption, a key question to any meaningful implementation of the right to choose. The opinion provides surprisingly little information from which to infer a standard for assessing governmental interests or, more specifically, to determine how such interests should be viewed in light of the values underlying the Sixth Amendment right. This paucity of information seems to be a direct result of the Court’s failure to discuss the source of the right in depth. Why is it that the Sixth Amendment provides presumptive protection for a criminal defendant’s choice in retaining an attorney? What is it about the amendment—its language, structure, or the values that it was intended to further—that led the Court to conclude that the very process of choosing an attorney involved an interest within the Sixth Amendment’s scope?

The Court’s discussion is brief:

The Sixth Amendment to the Constitution guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” In *United States v. Morrison*, 449 U.S. 361, 364 (1981), we observed that this right was designed to assure fairness in the adversary criminal process. Realizing that an unaided layman may have little skill in arguing the law or in coping with an intricate procedural system, *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *United States v. Ash*, 413 U.S. 300, 307 (1973), we have held that the Sixth Amendment secures the right to the assis-

37. *Id.* at 160. The court then cited the limitations imposed upon multiple representation by the American Bar Association’s Model Rules of Professional Conduct, its Model Code of Professional Responsibility, and the rules of the California Bar Association, which governed the attorneys in *Wheat*. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1990); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(C) (1980); CAL. PROFESSIONAL RULES CODE Rules 5-101 to -104, 7-103 (West 1981); CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1990 & Supp. 1991).

38. *Wheat*, 486 U.S. at 160-63.

39. *Id.* at 163.

40. *Id.* at 164.

tance of counsel, by appointment if necessary We have further recognized that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronin*, 466 U.S. 648, 657, n.21 (1984). Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. See *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983); *Jones v. Barnes*, 463 U.S. 745 (1983).⁴¹

Although the last-quoted sentence seems to address the extreme position that the honoring of a defendant's choice of counsel must be "inexorable," one might perceive that the tone of the entire passage isolates the Sixth Amendment's goal of assuring a fair trial as the sole purpose of the right to counsel. However, in view of the precedents cited and the present state of Sixth Amendment jurisprudence, it is unlikely that the Court intended such a major shift in its position.⁴²

The quoted language from *Strickland* never purported to set forth a comprehensive view of the Sixth Amendment's goals. The language appeared in the portion of *Strickland* that described the two-pronged test for assessing claims which allege *ineffective* assistance of counsel.⁴³ The Court required a showing that counsel made errors which fell below an objective standard of reasonableness and which prejudiced the defense in such a way that deprives the defendant of "a fair trial, a trial whose result is reliable."⁴⁴ In discussing the first requirement and the methods by which reasonable assistance might be gauged, the Court reviewed the possibility of a "checklist" for evaluating attorney performance:

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the *effective assistance guarantee* of the Sixth Amend-

41. *Id.* at 158-59. The next paragraph outlined the circumscribed nature of the right.

42. See *Fuller v. Diesslin*, 868 F.2d 604, 610 (3d Cir.), *cert. denied*, 110 S. Ct. 203 (1989); see also *infra* text accompanying notes 267-68.

43. See *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984).

44. *Id.* at 687.

ment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.⁴⁵

Similarly, footnote twenty-one of *United States v. Cronin*⁴⁶ was concerned with the narrower right to the effective assistance of counsel. After observing that a criminal trial is neither a game nor a gladiatorial sacrifice,⁴⁷ the Court added, "[T]he appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such. If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance."⁴⁸

Also relevant to an interpretation of this portion of *Wheat* is the Court's simultaneous rejection of the Government's position that the Due Process Clause of the Fifth Amendment provides the appropriate standard for analysis.⁴⁹ If the Court's concern had extended solely to the issue of a fair trial, that provision would have been adequately suited to an assessment of the matter. In addition, confining the values served by the right to counsel to the goal of providing a fair trial would not have been entirely consistent with the tenor of other observations by the Court concerning the focus of the Sixth Amendment—most notably those observations made during the course of the Court's recognition of a defendant's right to self-representation in *Faretta v. California*.⁵⁰

In *Faretta* the Court found that the Sixth Amendment right to the assistance of counsel was provided as an aid to the right of the accused to personally defend.⁵¹ The right to make one's defense had its source in the intent of the framers⁵² and in the language of the Amendment,⁵³ despite the procedural disadvantage often incurred by one who chooses to exercise it. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."⁵⁴ Nevertheless, the "inestimable worth of free

45. *Id.* at 688-89 (emphasis added).

46. 466 U.S. 648 (1984).

47. *Id.* at 657 (quoting *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975)).

48. *Id.* at 657 n.21 (citing *Jones v. Barnes*, 463 U.S. 745 (1983); *Morris v. Slappy*, 461 U.S. 1 (1983)).

49. See *Wheat v. United States*, 486 U.S. 153, 158-59 (1988).

50. 422 U.S. 806 (1975).

51. *Id.* at 819-20.

52. See *id.* at 826-27.

53. *Id.* at 819.

54. *Id.* at 834.

choice"⁵⁵ recognized by those who wrote the Bill of Rights⁵⁶ requires an acknowledgement that "although he may conduct his own defense ultimately to his own detriment, [a defendant's] choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"⁵⁷

Wheat suggested no reasons why the Sixth Amendment's counsel provision, a "supplement" to this design,⁵⁸ should serve narrower interests. In fact, the Court's sole reference to *Faretta* gives no indication that *Faretta*'s policies were to be disturbed. In a rather obvious statement of the scope of *Faretta*'s holding, the Court apparently reaffirmed its vitality. "Our holding in *Faretta v. California*, that a criminal defendant has a Sixth Amendment right to represent *himself* if he voluntarily elects to do so, does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel."⁵⁹

In its opinion in *Flanagan v. United States* in 1984,⁶⁰ the Court itself raised the possibility that a right to counsel of choice might be protected by some interest other than the goal of providing a fair trial,⁶¹ although the Court resolved neither that issue nor the basic question of whether the right was constitutionally protected.⁶² Instead, it confined itself to the issue of whether pretrial disqualification is immediately appealable as a final collateral order under 28 U.S.C. § 1291.⁶³ The Court reviewed the congressional policy against piecemeal review and noted that in the context of a criminal case that policy is especially strong.⁶⁴ The rule that bars appellate review until final judgment permits an exception only when a collateral order meets the three stringent conditions set forth in *Coopers & Lybrand v. Livesay*.⁶⁵ First, the order "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on

55. *Id.*

56. *Id.* at 833-34.

57. *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

58. *See id.* at 820.

59. *Wheat v. United States*, 486 U.S. 153, 159 n.3 (1988) (citation omitted). This statement footnoted the observation that individuals who are not members of the bar may not represent clients other than themselves. *Id.* at 159.

60. 465 U.S. 259 (1984).

61. *Id.* at 268-70.

62. *See supra* text accompanying notes 13-15.

63. 28 U.S.C. § 1291 (1988).

64. *Flanagan*, 465 U.S. at 264 (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam) (quoting *Cobbledick v. United States*, 309 U.S. 323, 325 (1940))).

65. 437 U.S. 463 (1978).

appeal from a final judgment.”⁶⁶

The Court noted that a disqualification order “lacks the critical characteristics” of other types of interlocutory orders that are “immediately appealable in criminal cases.”⁶⁷ Examining whether such an order nevertheless satisfied the three *Coopers & Lybrand* conditions, the Court continued:

Petitioners correctly concede that postconviction review of a disqualification order is fully effective to the extent that the asserted right to counsel of one's choice is like, for example, the Sixth Amendment right to represent oneself. Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. . . . In sum, as petitioners concede, if establishing a violation of their asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not meet the third condition . . . it is not “effectively unreviewable on appeal from a final judgment.”

If, on the other hand, petitioners' asserted right is one that is not violated absent some specifically demonstrated prejudice to the defense, a disqualification order still falls outside the coverage of the collateral-order exception.⁶⁸

The Court then stated that it need not consider whether the third *Coopers & Lybrand* condition was satisfied because “the second . . . condition—that the order be truly collateral—is not satisfied if [the] asserted right is one requiring prejudice to the defense for its violation.”⁶⁹ Although *Flanagan* left the issue unresolved, it certainly raised the possibility that interests “independent of concern for the objective fairness of the proceeding” might be implicated by the recognition of a right to counsel of choice.⁷⁰

The analytical vacuum created by *Wheat*, in which a presumption of indeterminate strength might be overcome by governmental inter-

66. *Flanagan*, 465 U.S. at 265 (quoting *Coopers & Lybrand*, 437 U.S. at 468).

67. *Id.* at 266-67. Orders denying a motion to reduce bail or to dismiss an indictment on double jeopardy or on speech or debate grounds had been recognized as immediately appealable. The rights guaranteed by the Double Jeopardy and Speech or Debate Clauses involve more than the right not to be convicted. They involve the right not to be tried. *Id.* at 266. “[T]he asserted rights in all three situations would be irretrievably lost if review were postponed until trial is completed.” *Id.*

68. *Id.* at 267-68 (citations omitted) (quoting *id.* at 265).

69. *Id.* at 268. If this is the case, “[t]he effect of the disqualification on the defense, and hence whether the asserted right has been violated, cannot be fairly assessed until the substance of the prosecution's and defendant's cases is known.” *Id.* at 268-69. The order, although final, would not be independent of the issues to be tried. *Id.* at 268.

70. *Id.* at 268 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984)).

ests that may or may not serve the unstated values underlying the right to counsel of choice, seems to have been perceived by two of the dissenters. Justice Marshall, joined by Justice Brennan, stated his general agreement with the view that the right to counsel of choice is not absolute, but rather necessitates a presumption in favor of the acceptance of a defendant's decision.⁷¹ Taking issue with the Court's application of these principles to the facts before it⁷² and especially with its "unwarranted deference" to the trial court's decision,⁷³ Justice Marshall focused on the significance of the right to counsel of choice within the overall framework of the Sixth Amendment. He observed that the Court's statements in earlier cases concerning the defendant's choice of counsel "stem largely from an appreciation that a primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense."⁷⁴ Adding that the defendant's personal right to make a defense, acknowledged in *Faretta*, is related to

71. *Wheat v. United States*, 486 U.S. 153, 166 (Marshall, J., dissenting) (Brennan, J., joining in dissent).

72. *Id.* at 168-71. Justice Marshall found that the Government failed to show that the multiple representation posed a substantial risk of a serious conflict of interest imperiling the prospect of a fair trial. *Id.* at 168-69. He found that at the time of *Wheat*'s trial the attorney had effectively completed his representation of Gomez-Barajas and that Gomez-Barajas was neither scheduled to appear as a witness nor likely to be questioned. The argument that the trial court might have rejected Gomez-Barajas's plea agreement and that he might have proceeded to trial rested, according to Justice Marshall, "on speculation of the most dubious kind." *Id.* at 169. He noted that even if this occurred, *Wheat* probably would not have testified at that trial because no indication existed that he had any involvement in or information about crimes for which Gomez-Barajas might yet have stood trial. In fact, Gomez-Barajas had been acquitted of conspiracy to distribute marijuana, which was the only alleged connection between Gomez-Barajas and *Wheat*. *Id.* at 169-70. As to Bravo, Justice Marshall denied that his testimony created a serious potential for conflict.

Bravo could not have testified about petitioner's involvement in the alleged marijuana distribution scheme. As all parties were aware at the time, Bravo did not know and could not identify petitioner; indeed, prior to the commencement of legal proceedings, the two men never had heard of each other. Bravo's eventual testimony at petitioner's trial related to a shipment of marijuana in which petitioner was not involved. . . . Petitioner's counsel did not cross-examine Bravo, and neither petitioner's counsel nor the prosecutor mentioned Bravo's testimony in closing argument.

Id. at 170. The insignificance of Bravo's testimony to any matter in dispute, coupled with the timing of the prosecutor's decision to call him, raised a "serious concern" that the prosecutor had attempted to manufacture a conflict. *Id.* at 170 n.3. Finally, Justice Marshall found the allegation of a conflict "nothing short of ludicrous" in light of the possibilities that counsel could have been added to, rather than substituted for, the defense team and could have been ordered not to take part in the cross-examination of Bravo. *Id.* at 171.

73. *Id.* at 166-68.

74. *Id.* at 165.

this principle, he noted that "[a]n obviously critical aspect of making a defense is choosing a person to serve as an assistant and representative."⁷⁵

Justice Marshall also stated that the fairness and integrity of criminal trials are generally promoted by the defendant's selection of counsel.⁷⁶ In his dissent Justice Stevens briefly echoed this recognition of an institutional value that is served by the right. Joined by Justice Blackmun, Justice Stevens chided the majority for demonstrating "its apparent unawareness of the function of the independent lawyer as a guardian of our freedom."⁷⁷ Although Justice Stevens agreed with Justice Marshall's assessment of the facts and his judgment that the district court abused its discretion, Justice Stevens nevertheless shared the majority's view that judges should be afforded wide latitude in ruling upon such motions.⁷⁸

II. THE FEE FORFEITURE CASES

The Court's most recent opportunity to discuss the nature of the Sixth Amendment right to counsel of choice arose in the fee forfeiture cases of *Caplin & Drysdale, Chartered v. United States*⁷⁹ and *United States v. Monsanto*.⁸⁰ Both cases involved issues that concerned the scope and constitutionality of the Comprehensive Forfeiture Act of 1984,⁸¹ which authorizes the forfeiture of property acquired as the result of racketeering (RICO)⁸² and continuing criminal enterprise (CCE)⁸³ offenses. Unfortunately, while the results of these cases promise to be of broad practical significance, the opinions of the Court added very little to its earlier discussion of the doctrinal foundations of the right to counsel of choice.

Each case emphasized different aspects of the statutory scheme. In *Caplin & Drysdale* the petitioner law firm represented Reckmeyer, who was charged with conducting a drug importation and distribution scheme alleged to constitute a continuing criminal enterprise. Reckmeyer retained the firm during the grand jury proceedings. The

75. *Id.* at 166.

76. *Id.*

77. *Id.* at 172 (Stevens, J., dissenting) (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 371 (1985) (Stevens, J., dissenting)).

78. *Id.* at 172-73.

79. 491 U.S. 617 (1989).

80. 491 U.S. 600 (1989).

81. Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2040-53 (1984) (codified in scattered sections of 18, 19, 21, and 28 U.S.C.).

82. 18 U.S.C. § 1963 (1988).

83. 21 U.S.C. §§ 848, 853 (1988).

indictment sought forfeiture of certain assets in Reckmeyer's possession pursuant to section 853(a)(1) of the CCE statute.⁸⁴ Section 853(a)(1) authorizes forfeiture "to the United States . . . [of] any property constituting, or derived from, any proceeds . . . obtained, directly or indirectly, as the result of such violation."⁸⁵ After indictment the district court acted pursuant to its statutory authority to "preserve the availability"⁸⁶ of the specified assets and entered an *ex parte* restraining order forbidding their transfer by Reckmeyer. Despite this order, Reckmeyer paid the firm approximately \$25,000 for preindictment services. The firm placed this money in an escrow account.⁸⁷

Caplin & Drysdale continued to represent Reckmeyer, and he moved to modify the restraining order to permit the use of some of the contested assets to pay the firm's fees and to exempt such legal fees from postconviction forfeiture. Before the hearing on this motion Reckmeyer entered into a plea agreement. By the terms of the agreement he pleaded guilty to the CCE charge and agreed to forfeit all of the assets specified in the indictment. After the plea was entered, the court denied Reckmeyer's earlier motion to modify the restraining order. Later, in conjunction with sentencing, it entered an order that required Reckmeyer to forfeit virtually all of the assets in his possession.⁸⁸

Caplin & Drysdale then filed a petition pursuant to section 853(n) of the statute, which permits a third party that asserts an interest in forfeited property to request a hearing to adjudicate the merits of the claim.⁸⁹ The firm claimed the \$25,000 in the escrow account for preindictment services, as well as over \$170,000 for additional services. It argued that assets used to pay attorney fees are exempt from forfeiture under section 853, and, if not, that the omission of such an exemption renders the statute unconstitutional.⁹⁰ Section 853(n)(6)(B) of the statute permits a petitioner to establish by a preponderance of the evidence that the petitioner is a "bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture."⁹¹ Relying on this provision, the district court found that Caplin & Drysdale "was a good faith provider of services for value"⁹²

84. *Id.* § 853(a)(1).

85. *Id.*

86. *Id.* § 853(e)(1).

87. Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 620 (1989).

88. *Id.* at 621.

89. *See* 21 U.S.C. § 853(n)(2) (1988).

90. Caplin & Drysdale, 491 U.S. at 621.

91. 21 U.S.C. § 853(n)(6)(B) (1988).

92. *United States v. Reckmeyer*, 631 F. Supp. 1191, 1193 (E.D. Va. 1986) (mem.),

and that Congress had not intended to authorize the forfeiture of bona fide attorney fees.⁹³ The court also concluded that such an authorization would violate a defendant's right to counsel of choice and to the effective assistance of counsel.⁹⁴

A panel of the Fourth Circuit unanimously affirmed the district court's "order[] exempting legitimate attorney fees from forfeiture."⁹⁵ Although the panel concluded that the Act did indeed authorize the forfeiture of assets to be used for legitimate attorney fees, it held that such an application of the statute "violates the 'qualified' right to counsel of choice."⁹⁶ The Fourth Circuit granted rehearing en banc and reversed.⁹⁷ The court agreed that Congress did not intend to exempt attorney fees from forfeiture, but declined to recognize a Sixth Amendment right "to pay an attorney with the illicit proceeds of drug transactions. The difficult policy choices posed . . . provide no basis for the creation of such a right."⁹⁸ Central to the Fourth Circuit's analysis was the Act's "relation-back" provision in section 853(c), which provides as follows:

All right, title, and interest in property described in [section 853(a)] vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be

aff'd sub nom. United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom.* In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

93. See *id.* at 1195.

94. *Id.*; accord United States v. Basset, 632 F. Supp. 1308, 1317 (D. Md. 1986) (mem.), *aff'd sub nom.* United States v. Harvey, 814 F.2d 905 (4th Cir. 1987), *rev'd sub nom.* In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

95. United States v. Harvey, 814 F.2d 905, 909 (4th Cir. 1987), *rev'd sub nom.* In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

96. *Id.* The panel held that the Act contemplated no special exemptions for such fees. To the contrary, it found the language of the Act to be plain and unambiguous, permitting no interpretation that would avoid the serious constitutional issue involved. *Id.* at 913. The court acknowledged a contrary conclusion by most of the district courts that had considered the issue. *Id.* at 914.

97. In re Forfeiture Hearing as to Caplin & Drysdale, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom.* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

98. *Id.* at 640.

ordered forfeited to the United States⁹⁹

The Government's asserted interest in the disputed property therefore vests at the time of the offense and predates any transfer to an attorney.¹⁰⁰ The court regarded the Government's claim to prior ownership of the assets as dispositive of the Sixth Amendment claim. It characterized the right to counsel of choice "as the 'right of any accused, if he can provide counsel for himself *by his own resources* or through the aid of his family or friends, to be represented by the attorney of his choosing.'"¹⁰¹ The court simply held that the right is inapplicable in the context of fee forfeiture because the assumption that a defendant wished to hire counsel with the defendant's own assets was "conspicuously absent."¹⁰² It observed that purely private or financial predicaments often may leave a defendant without the counsel of choice.¹⁰³ Its discussion of the legitimacy of the precise interests underlying the creation of a pre-existing governmental property claim was cursory, a point not lost on the dissenters.¹⁰⁴ The court did, however, state that "[t]he government has a strong interest in seeing that criminal assets are not dissipated prior to trial"¹⁰⁵ and that a goal of the Act is to "'strip these offenders and organizations of their economic power'" through forfeiture.¹⁰⁶

*United States v. Monsanto*¹⁰⁷ presented the Court with several contrasting views below. The Second Circuit found the statute's pre-

99. 21 U.S.C. § 853(c) (1988). The transferee may prevail by establishing in a hearing pursuant to § 853(n)(6)(B) that the transferee "is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." *Id.* § 853(n)(6)(B).

100. *In re Forfeiture Hearing*, 837 F.2d at 640.

101. *Id.* at 644 (emphasis added by court) (quoting *United States v. Inman*, 483 F.2d 738, 739-40 (4th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974)).

102. *Id.*

103. *See id.* at 645 (citing *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring)).

104. Judge Phillips, dissenting, observed:

Indeed, the ultimate constitutional issue might well be framed precisely as whether Congress may use this wholly fictive device of property law to cut off this fundamental right of the accused in a criminal case. . . .

Under developed principles defining the qualified right to counsel of choice, the dispositive issue is whether there are countervailing governmental interests that do justify the drastic expedient of freezing and ultimately forfeiting the assets of RICO and CCE defendants to the point that they cannot retain private counsel for their defense.

Id. at 652 (Phillips, J., dissenting).

105. *Id.* at 644.

106. *Id.* at 648 (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3374).

107. 491 U.S. 600 (1989).

trial procedures to be infirm, but was divided as to the reasons.¹⁰⁸ The defendant was charged in an indictment that alleged RICO, CCE, and illegal possession of firearm counts. The Government also alleged that two parcels of residential property valued at \$365,000 and \$35,000 in cash were subject to forfeiture.¹⁰⁹ On the day the indictment was unsealed, the district court granted the Government's section 853(e)(1)(A) *ex parte* motion, which requested a restraining order to prevent Monsanto from disposing of the residential property pending trial.¹¹⁰ To permit the use of some of the restrained assets to retain counsel, Monsanto then moved to vacate the order. He also requested that such fees be exempt from post-trial forfeiture under section 853(c), asserting both statutory grounds and his Sixth Amendment right to counsel of choice. The district court denied the motion.¹¹¹

On expedited appeal a divided panel of the Second Circuit concluded that Congress did not intend to exempt legitimate attorney fees from forfeiture or, if they did so intend, it was "certainly not clear enough to warrant departure from the plain meaning of the statute."¹¹² Nevertheless, the Second Circuit held that "a post-restraining order adversarial hearing"¹¹³ is required, at which the Government must demonstrate "a probability of convincing a jury beyond a reasonable doubt both that the defendant has violated the statute and that the assets are subject to forfeiture."¹¹⁴ The panel concluded that if the Government meets this burden, a defendant has no Sixth Amendment right to the exemption of attorney fees.¹¹⁵ On the other hand, a finding that the Government has not met its burden would preclude post-trial forfeiture and would not prevent a defendant from securing counsel.¹¹⁶ On remand the district court concluded that the restraining order was

108. *United States v. Monsanto*, 852 F.2d 1400 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 491 U.S. 600 (1989).

109. *Id.* at 1401.

110. *See id.* (citing 21 U.S.C. § 853(e)(1)(A) (1982)).

111. *Id.* The district court did, however, permit the use of "forfeitable assets to pay Monsanto's counsel of choice to the extent of the rates established by the Criminal Justice Act." *See id.* (citing 18 U.S.C. § 3006A (1988)).

112. *United States v. Monsanto*, 836 F.2d 74, 80 (2d Cir. 1987), *reh'g en banc*, 852 F.2d 1400 (2d Cir. 1988) (per curiam), *rev'd*, 491 U.S. 600 (1989).

113. *Id.* at 82.

114. *Id.* at 83 (citations omitted). The panel noted that other courts required such a hearing in the context of procedural due process challenges. *See id.*

115. *Id.* at 83, 85. The court agreed, however, that "forfeitable assets may be invaded for the purpose of paying attorney's fees at [Criminal Justice Act] rates to any private attorney of the defendant's choice who would be willing to represent him for such compensation." *Id.* at 85. In his dissenting opinion Judge Oakes found the statute unconstitutional. *Id.* at 87 (Oakes, J., dissenting).

116. *Id.* at 84.

proper.¹¹⁷

Monsanto's case proceeded to trial, where he was represented by an appointed attorney.¹¹⁸ The Second Circuit's en banc decision in Monsanto's favor was not rendered until the trial had nearly concluded, and original counsel continued to represent Monsanto.¹¹⁹ The jury convicted Monsanto and found that the assets could be forfeited.¹²⁰

On several differing grounds eight members of the Second Circuit concluded that the order denying Monsanto's motion should be vacated and modified to permit him access to restrained assets to pay legitimate attorney fees in connection with the criminal charges against him.¹²¹ The court also held that such fees are exempt from post-trial forfeiture.¹²² Three concurring judges concluded that the statute authorizes neither pretrial restraint nor post-trial forfeiture of funds if a district court designates such funds as legal fees.¹²³ Three other concurring judges found such authorization, but believed that it violated a defendant's Sixth Amendment right to counsel because of the lack of sufficient countervailing governmental interests.¹²⁴ Two judges agreed with the panel's view that a hearing was constitutionally necessary to the validity of a pretrial restraining order, finding it to be mandated by due process. Nevertheless, these two judges regarded judicial creation of the procedure as inappropriate.¹²⁵ Four dissenters agreed, in varying degrees, with the original panel opinion.¹²⁶ None of these opinions foreshadowed the Supreme Court's subsequent treatment of the Sixth

117. See *United States v. Monsanto*, 852 F.2d 1400, 1402 (2d Cir. 1988) (en banc) (per curiam), *rev'd*, 491 U.S. 600 (1989).

118. See *United States v. Monsanto*, 491 U.S. 600, 605 (1989).

119. See *id.* at 605 n.5.

120. *Id.* at 605 n.4.

121. *Monsanto*, 852 F.2d at 1402.

122. *Id.*

123. *Id.* at 1405 (Winter, J., concurring) (Meskill & Newman, J.J., joining). Judge Winter viewed § 853(e)(1)(A) and (c) of the Act as vesting district courts with discretionary power to restrain assets identified in an indictment as subject to forfeiture. *Id.* at 1405-10. This "discretion is to be guided by traditional equitable principles that balance the relative hardships to the parties." *Id.* at 1405. In his view the Government had "no interest derived from the Act in preventing a defendant from making ordinary lawful expenditures during the period from indictment to conviction, including expenditures for the retention of private counsel." *Id.*

124. *Id.* at 1402-03 (Feinberg, C.J., concurring) (Oakes & Kearse, J.J., joining).

125. *Id.* at 1411 (Miner, J., concurring in part and dissenting in part) (Altamari, J., joining). Judges Miner and Altamari did not consider the issue of postconviction forfeiture ripe for review. *Id.*

126. *Id.* at 1412 (Mahoney, J., dissenting); *id.* at 1418 (Pierce, J., concurring in part and dissenting in part); *id.* at 1419 (Cardamone, J., concurring in part and dissenting in part); *id.* at 1420 (Pratt, J., concurring in part and dissenting in part).

Amendment issue.

Most of the Supreme Court's opinion in *Monsanto* is devoted to the scope of the statute's coverage. The Court concluded that neither the statutory description of forfeitable property nor the provisions that govern pretrial restraining orders require, or even permit, the exemption of attorney fees.¹²⁷ Citing both the Government's success at the hearing below and the Second Circuit's omission of the issue from its en banc decision,¹²⁸ the Court declined to consider whether procedural due process requires a hearing before a restraining order may be imposed.

The Court's principal analysis of the Sixth Amendment claims in *Monsanto* and *Caplin & Drysdale* was set forth at length in the latter opinion. In *Caplin & Drysdale* Justice White, writing for the Court, noted at the outset that impecunious defendants have no Sixth Amendment right to choose their attorneys and "have no cognizable complaint so long as they are adequately represented by [appointed counsel]."¹²⁹ He then observed that, unlike the disqualification request in *Wheat*, "nothing in § 853 prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel."¹³⁰ The burden imposed by the forfeiture statute was characterized as limited, because it neither prevented the use of nonforfeitable assets nor imposed any barrier to the ability of defendants "to find lawyers willing to represent them, hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future."¹³¹ As to the defendant who is unable to retain the attorney of the defendant's choice because of for-

127. *United States v. Monsanto*, 491 U.S. 600, 606-14 (1989). With regard to Judge Winter's view, the Court observed:

Whatever discretion Congress gave the district courts in §§ 853(e) and 853(c), that discretion must be cabined by the purposes for which Congress created [the Act]: "to preserve the availability of property . . . for forfeiture." We cannot believe that Congress intended to permit the effectiveness of the powerful "relation-back" provision of § 853(c), and the comprehensive "any property . . . any proceeds" language of § 853(a), to be nullified by any other construction of the statute.

Id. at 613.

128. *Id.* at 615 n.10. In *United States v. Noriega*, 746 F. Supp. 1541 (S.D. Fla. 1990), in which the defendant's assets were frozen as the result of their seizure by troops during the U.S. invasion of Panama and U.S. requests to foreign governments, the court held that due process requires an adversarial postrestraint hearing. *Id.* at 1545-46. The court noted that there had been neither a grand jury indictment setting forth the requisite probable cause for seizure, nor an *ex parte* finding of probable forfeitability by a magistrate or other judicial officer. *Id.* at 1543-44.

129. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989).

130. *Id.* at 625.

131. *Id.*

feiture or threat of forfeiture, no Sixth Amendment objection exists.¹³² With reasoning reminiscent of the Fourth Circuit's, the Court added, "Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of . . . counsel.'" ¹³³ "A defendant has no Sixth Amendment right to spend another person's money for [legal] services" ¹³⁴ The Court analogized the situation to that of a robbery suspect who seeks to use stolen funds for attorney fees, noting that seizure of such proceeds would not violate the Sixth Amendment.¹³⁵ The petitioner had attempted to distinguish that circumstance on the ground that, unlike the robbery victim's pre-existing property interest, the governmental claim to ownership of forfeitable property was created solely through the fictional device of the relation-back provision. The petitioner argued that the governmental interest therefore was of lesser magnitude.¹³⁶

The Court disagreed. It noted that the property rights created by the statute are more substantial than the petitioner's argument acknowledged.¹³⁷ The relation-back provision reflected an approach "known as the 'taint theory' . . . that 'has long been recognized in forfeiture cases,'" including those authorized for violations of the Internal Revenue Code.¹³⁸ Thus, "§ 853(c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time of the criminal act giving rise to forfeiture."¹³⁹ Far from manifesting only a modest interest in dispossessing a criminal of the proceeds of the wrongdoing, the Government's legitimate interests extended to the recovery of all forfeitable assets for their subsequent use in the funding of law enforcement activities.¹⁴⁰ The Government also had an "interest in winning undiminished forfeiture [to ensure that all property be returned] to those wrongfully deprived or defrauded of it."¹⁴¹ Finally, a major purpose of the forfeiture provisions has been to lessen organized crime's economic power. The

132. *Id.* at 625-26.

133. *Id.* at 626 (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting)).

134. *Id.*

135. *Id.*

136. *Id.* (citing Brief for Petitioner).

137. *Id.* at 627.

138. *Id.* (quoting *United States v. Stowell*, 133 U.S. 1 (1890)) (citing S. REP. NO. 225, 200 n.27, 98th Cong., 1st Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374).

139. *Id.*

140. *Id.* at 629 (citing 28 U.S.C. § 524(c) (1988)).

141. *Id.*

public interest in stripping criminals of this undeserved power permissibly includes denying them the ability "to command high-priced legal talent."¹⁴²

The notion that the Government has a legitimate interest in depriving criminals of economic power, even insofar as that power is used to retain counsel of choice, may be somewhat unsettling. But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment rights by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than the reflection of "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." . . . [T]he Court of Appeals put it aptly: "The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money . . . entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense."¹⁴³

The Court concluded that the strong governmental interest in fully recovering all forfeitable assets "overrides any Sixth Amendment interest in permitting criminals to use [those] assets . . . to pay for their defense."¹⁴⁴

The dissent in *Caplin & Drysdale* reflected a distinct shift in emphasis from Justice Marshall's dissent in *Wheat*. Justice Blackmun, joined by Justices Marshall, Brennan, and Stevens, underlined the institutional goals served by the right to counsel of choice in the analysis of whether the presumption in favor of defendants' choice had been

142. *Id.* at 630 (quoting *In re Forfeiture Hearing* as to *Caplin & Drysdale*, Chartered, 837 F.2d 637, 649 (4th Cir. 1988) (en banc), *aff'd sub nom.* *Caplin & Drysdale*, Chartered v. United States, 491 U.S. 617 (1989)).

143. *Id.* (citations omitted).

144. *Id.* at 631. The court then observed, with evident approval, that lower courts have upheld so-called jeopardy assessments to secure potential tax liabilities against constitutional attack. *Id.*

The petitioner also asserted that the forfeiture statute was invalid under the Fifth Amendment's Due Process Clause "because it permits the Government to upset the 'balance of forces between the accused and his accuser.'" *Id.* at 633 (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)). Noting that it was "not sure that this contention adds anything to petitioner's Sixth Amendment claim," the Court rejected the argument. *Id.* It characterized the petitioner's claim as focusing upon the potential for prosecutorial abuse and stated that a due process claim is "cognizable only in specific cases of prosecutorial misconduct . . . or when directed to a rule that is inherently unconstitutional." *Id.* at 634.

In *United States v. Monsanto*, 491 U.S. 600 (1989), the Court also upheld a pretrial restraint and noted that the restraint was "based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615.

outweighed.¹⁴⁵ In the dissenters' view the right plays a "distinct role . . . in protecting the integrity of the judicial process, a role that makes 'the right to be represented by privately retained counsel . . . the primary, preferred component of the basic right' protected by the Sixth Amendment."¹⁴⁶ It "foster[s] the trust between attorney and client that is necessary for the attorney to be . . . effective,"¹⁴⁷ assures "some modicum of equality between the Government and those it chooses to prosecute,"¹⁴⁸ and serves the broader institutional interests in assuring a zealous, independent, and at times specialized defense bar.¹⁴⁹ Characterizing the Court as "paus[ing] hardly long enough to acknowledge 'the Sixth Amendment's protection of one's right to retain counsel of his choosing,' let alone to explore its 'full extent,'" ¹⁵⁰ the dissent objected to the Court's implicit finding that the right is "so insubstantial that it can be outweighed by a legal fiction."¹⁵¹

Although commentators have been troubled by the potential effect of *Monsanto* and *Caplin & Drysdale* on the defense bar,¹⁵² the opin-

145. *Caplin & Drysdale*, 491 U.S. at 635-36 (Blackmun, J., dissenting).

146. *Id.* at 645 (quoting *United States v. Harvey*, 814 F.2d 905, 923 (4th Cir. 1987), *rev'd sub nom. In re Forfeiture Hearing as to Caplin & Drysdale*, Chartered, 837 F.2d 637 (4th Cir. 1988) (en banc), *aff'd sub nom. Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989)).

147. *Id.*

148. *Id.* at 646.

149. *Id.* at 647-48.

150. *Id.* at 644 (quoting majority opinion, *id.* at 626).

151. *Id.*

152. See, e.g., Steve Dettelbach, Recent Development, *Forfeiting the Right to Counsel*, 25 HARV. C.R.-C.L. L. REV. 201, 215 (1990) (arguing that the Supreme Court's use of a balancing test rather than the strict scrutiny standard when considering the right to counsel of choice ignores the burden placed on the criminal justice system); Stephen M. Kightlinger, Case Note, *Caplin & Drysdale, Chartered v. United States: Supreme Court Approves Attorney Fee Forfeiture*, 23 J. MARSHALL L. REV. 471, 485 (1990) (arguing that the effect of *Caplin & Drysdale* is potentially devastating to the adversary system because "[t]he approval of the fee forfeiture system will diminish the ranks of the private criminal defense bar"). Before *Caplin & Drysdale* some observers had feared that the threat of fee forfeiture would impose a serious burden upon the ability of a defendant to retain counsel. See, e.g., Committee on Criminal Advocacy, *The Forfeiture of Attorney Fees in Criminal Cases: A Call For Immediate Remedial Action*, 41 REC. ASS'N B. CITY N.Y. 469, 478-79 (1985) ("In racketeering and drug cases, counsel have also argued that unless restraining orders concerning assets of the defendants are lifted so that defendants can pay counsel their fees or so that fees will not be forfeited at the end of the case, attorneys will withdraw from the case."); Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 775 (1989) ("Application of the forfeiture statutes in this manner precludes representation by any criminal defense attorney with experience in the highly specialized RICO and CCE areas . . ."); Lisa F. Rackner, Note, *Against Forfeiture of Attorneys' Fees Under RICO: Protecting the Constitutional Rights of Criminal Defendants*, 61 N.Y.U. L. REV. 124, 147 (1986) ("The for-

ions are illustrative of the problems that can arise from the Court's failure to explore the underpinnings of the Sixth Amendment right. In light of the rigorous challenges to the asserted governmental interests, it was predictable that a consideration of their validity would receive such attention. The dissenters' criticism of the Court's treatment of the Sixth Amendment right was, however, certainly justified. Although the Court intensively focused on the nature of the overriding governmental interest in obtaining full recovery of forfeitable assets, it neglected to discuss the nature or strength of the individual right that was overridden. In short, because the Court did not express a clear view of the interests served by the right, *Wheat's* so-called weighing of a presumption in favor of the right seemingly became an illusory formula that is more a means of obscuring a bare conclusion as to the validity of a governmental interest than a true balancing of competing values.

More guidance is needed if *Wheat* is to be implemented in the many situations in which the right to counsel of choice may be asserted. Examination of the more frequent issues reveals a variety of governmental interests that may be interposed in derogation of a defendant's exercise of the right and a diversity in the efforts of lower courts to assess such claims properly.

III. AREAS OF APPLICABILITY

Wheat's impact will certainly be perceived in the assessment of restrictions upon *pro hac vice* appearances. In its 1979 opinion in *Leis v. Flynt*¹⁵³ the Court expressly declined to address the issue of a criminal defendant's interest in retaining out-of-state counsel.¹⁵⁴ The Court held only that the denial of an application to appear implicated no due process interests of the attorney.¹⁵⁵ Nevertheless, anticipation of the Court's recognition of a Sixth Amendment right prompted the First Circuit in *United States v. Panzardi Alvarez*¹⁵⁶ to assess a defendant's

feiture of attorneys' fees will create a severe imbalance in the advocacy of RICO cases." Others had questioned the accuracy of this assumption. See, e.g., Kathleen F. Brickey, *Forfeiture of Attorneys' Fees: The Impact of RICO and CCE Forfeitures on The Right to Counsel*, 72 VA. L. REV. 493, 510-15 (1986) (questioning whether the threat of fee forfeiture may have a chilling effect on the willingness of attorneys "to undertake representation of RICO and CCE defendants").

153. 439 U.S. 438 (1979) (per curiam).

154. See *id.* at 442 n.4 (quoting *Flynt v. Leis*, 574 F.2d 874, 877 (6th Cir. 1978), *rev'd per curiam*, 439 U.S. 138 (1979)).

155. *Id.* at 443-44.

156. 816 F.2d 813 (1st Cir. 1987), *cert. denied*, 110 S. Ct. 1140 (1990). Although efforts during the pre-*Wheat* period to articulate the policies served by a perceived right were rare, Brickey, *supra* note 152, at 506-07, occasionally some lower courts did attempt

claim in light of the considerations implicated by that guarantee.

At issue in *Alvarez* was the implementation of a rule of the United States District Court for the District of Puerto Rico that permitted outside counsel to appear in only one case per year.¹⁵⁷ Defendant Panzardi, charged with drug offenses in two cases, initially hired a local attorney and then sought to retain a Florida lawyer to serve as co-counsel on both matters. The trial court approved the out-of-state attorney's application for permission to appear *pro hac vice* and accepted the attorney as counsel of record in one case, but denied his application to defend Panzardi in the other. Relying solely upon the limitation of appearances in the local rule, the district court refused to allow the attorney to participate in the trial, sit at the counsel table, or consult with either the defendant or his attorney during the proceedings.¹⁵⁸ Panzardi was convicted and challenged the district court's ruling as a denial of his right to counsel of choice.¹⁵⁹

Observing that the Sixth Amendment requires a court to pay considerable deference to a criminal defendant's choice of counsel, the First Circuit stated that the right is not absolute. The court added that the exercise of the right "cannot unduly hinder the fair, efficient and orderly administration of justice," nor can it be "manipulated to delay proceedings or hamper the prosecution."¹⁶⁰ The court noted that the district court had not suggested any interference and that the out-of-state counsel had submitted his application to appear *pro hac vice* nearly three months before trial.¹⁶¹ The court noted that a denial of a defendant's choice of an out-of-state attorney to appear *pro hac vice* could be upheld only after an assessment that "properly balance[s] the defendant's interest in retaining counsel of his choice against the public's interest in the prompt, fair and ethical administration of justice."¹⁶²

The First Circuit found no indication that such countervailing interests had existed before the district court. Recognizing that the district court must be able to regulate the conduct of attorneys who practice before it, the court was nevertheless unable to "discern how a simple numerical limitation on the number of *pro hac vice* appearances per year advances the district court's legitimate interest in regulating

to articulate such policies. See *infra* note 270 and accompanying text. Such efforts were, at times, not instructive beyond the context considered. See Rackner, *supra* note 152, at 136.

157. *Panzardi Alvarez*, 816 F.2d at 816.

158. *Id.* at 815.

159. *Id.*

160. *Id.* at 816.

161. *Id.*

162. *Id.* at 817.

the conduct of its attorneys.”¹⁶³

The mere fact that a defendant seeks to retain an out-of-state attorney does not hinder the efficacious administration of justice. His choice of counsel must be respected unless it would unreasonably delay proceedings or burden the court with counsel who was incompetent or unwilling to abide by court rules and ethical guidelines.¹⁶⁴

The Third Circuit required similar particularized findings in *Fuller v. Diesslin*.¹⁶⁵ *Fuller*, a post-*Wheat* decision, involved habeas corpus review of a New Jersey court's denial of admission *pro hac vice* to two out-of-state counsel.¹⁶⁶ Charged along with a codefendant with weapon and drug offenses, Fuller made a motion before the consolidated trial that he be represented by lawyers from Illinois and the District of Columbia. Acting pursuant to a state rule which provided that such counsel be admitted “at the discretion of the court,”¹⁶⁷ the trial judge denied the request, stating that local counsel was competent to represent Fuller adequately and that participation by the two out-of-state counsel would impose a severe inconvenience upon the proceedings.¹⁶⁸ In response to Fuller's motion the trial court stated:

[O]ne [lawyer] from Aspen, Colorado [Fuller's codefendant had unsuccessfully moved the admission of a Colorado attorney], one from either D.C. or Illinois, or wherever, plus local counsel, plus out-of-state defendants. [Defendants were nonresidents, free on bail.] There are too many unknowns in that equation. It's going to be difficult just with the out-of-state clients and in-state attorneys to run anything like a reasonable motion and Appellate schedule . . . without adding two lawyers from two different states, who have multiplicity of obligations and to run it all at the same time.¹⁶⁹

The trial judge also referred to an imminent air controllers' strike, the scheduling obligations imposed by speedy trial rules,¹⁷⁰ and his inability to negotiate trial scheduling with out-of-state judges.¹⁷¹ The judge added that the earliest possible trial date would be four or five months

163. *Id.*

164. *Id.* at 817-18.

165. 868 F.2d 604 (3d Cir.), *cert. denied*, 110 S. Ct. 203 (1989).

166. *Id.* at 605.

167. N.J. R. OF GEN. APPLICATION 1:21-2 (1981); see *Fuller*, 868 F.2d at 606 n.2 (noting that the rule has since been amended).

168. *Fuller*, 868 F.2d at 605. The district court stated that it was “‘satisfied there's an adequate degree of expertise available in this state to handle any of these motions.’” *Id.* at 609 (quoting the district court's opinion).

169. *Id.* at 612-13 (Weis, J., dissenting).

170. *Id.* at 613 (Weis, J., dissenting).

171. See *id.* at 610.

away and that if the disposition of pending motions was delayed and out-of-state counsel were admitted, "we're talking earliest disposition . . . next spring, when the case is a year old and probably longer."¹⁷² Accordingly, the judge stated that "the nature of the probable delay . . . [that] will occur as a result of this matter . . . is so grave as to overcome the "unfettered" right of defendant to counsel of his own choosing."¹⁷³ Fuller subsequently pleaded guilty,¹⁷⁴ but reserved the right to raise the counsel of choice issue on appeal. The habeas corpus petition followed unsuccessful appeals, and the United States District Court granted relief, ruling that Fuller had been denied his right to counsel of choice.¹⁷⁵

The Third Circuit viewed the issue as whether the trial judge's "presum[ption] that the proceedings will be unacceptably delayed where the defendant is represented by out-of-state counsel" constituted an arbitrary denial of Fuller's right to counsel of choice.¹⁷⁶ Turning initially to the question of whether the Sixth Amendment right encompasses the selection of counsel *pro hac vice*, the court found no reason for treating a request for such counsel differently than any other preference for counsel of choice: Such requests are analytically encompassed within the right, and because the bar is highly mobile and has at its disposal modern transportation and communication, they are frequent and likely to increase. Accordingly, the framework generally employed in counsel of choice cases was applicable.¹⁷⁷

Reviewing the necessity of balancing the defendant's right against the requirements of "the fair and proper administration of justice,"¹⁷⁸ the court emphasized the need to avoid arbitrary denials by conducting hearings and making "specific findings of fact consistent with the evidence" as to the suitability of defendant's chosen counsel.¹⁷⁹ The court

172. *Id.* at 612-13 (Weis, J., dissenting) (quoting the district court's opinion).

173. *Id.* at 606 (brackets supplied by court) (quoting the district court's opinion).

174. Fuller also had unsuccessfully sought interlocutory relief. *Id.*

175. *Id.*

176. *Id.* at 605.

177. *Id.* at 607.

178. *Id.*

179. *Id.* at 608 (quoting *United States v. Romano*, 849 F.2d 812, 820 (3d Cir. 1988)). The court also was concerned with the proper standard for reversal. *See id.* at 608-09. For post-*Wheat* commentary endorsing this requirement of particularized balancing, see Thomas C. Canfield, Note, *The Criminal Defendant's Right to Retain Counsel Pro Hac Vice*, 57 *FORDHAM L. REVIEW* 785, 800-01 (1989). After surveying the rules governing admission to practice *pro hac vice*, the author observed:

The connection of *pro hac vice* rules to forum interests is problematic in the counsel of choice context. Local association requirements often may promote the defense team's expertise in local law, but cannot be shown to do so in all cases. No jurisdiction specifies what type of local counsel must be associ-

examined the trial court's conclusion that adequate representation was available from local counsel and stated that "as a logical matter, it is not necessarily true that local counsel will be more knowledgeable about the New Jersey law than out-of-state counsel" and therefore the competence of in-state counsel will not in itself reduce the likelihood of delay.¹⁸⁰ In addition, the court declined to accept the State's assertion that the existence of adequate local counsel should be dispositive of a defendant's Sixth Amendment claim, noting that right to counsel of choice serves significantly different interests in addition to the right to effective assistance of counsel.¹⁸¹

"[T]he most important decision a defendant makes in shaping his defense is his selection of an attorney. The selected attorney is the mechanism through which the defendant will learn of the options which are available to him. . . .

Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment."¹⁸²

Therefore the Government's demonstration of the availability of other competent counsel was insufficient to defeat the defendant's request. Instead, the proper concerns to be weighed against a defendant's choice were those involving the frustration of the proper administration of justice.¹⁸³

Examining the district court's conclusion that the state trial judge's application of a "blanket generalization" concerning travel and scheduling difficulties represented a "failure to scrutinize the particular case at bar,"¹⁸⁴ the Third Circuit agreed that "the trial court's

ated, allowing the foreign attorney to ally himself with a local attorney who may have no expertise in criminal law at all. Moreover, in those jurisdictions requiring only nominal involvement by the local lawyer, a local association requirement provides no clear benefit to the defendant's or state's interests in avoiding ineffective advocacy.

Id. at 793 (footnotes omitted).

180. *Fuller*, 868 F.2d at 609.

181. *Id.* at 610. See *infra* notes 267-68 and accompanying text.

182. *Fuller*, 868 F.2d at 610 (quoting *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979)).

183. *Id.*

184. *Id.* at 610-11 (quoting the district court's opinion). According to the district court, "the record demonstrated that local counsel was unprepared to proceed, but that

wooden approach and its failure to make record-supported findings” based on the facts of the case resulted in an arbitrary denial of Fuller’s right.¹⁸⁶ It acknowledged that in *Williams v. Nix*¹⁸⁷ the Eighth Circuit had permitted a trial court’s presumption that in-state counsel would allow for a more “‘orderly processing of the case,’”¹⁸⁷ but expressly declined to follow this “more expansive” view of a trial court’s discretion.¹⁸⁸ The Third Circuit also noted that the State had not presented a claim of a countervailing state interest for preferring in-state counsel.¹⁸⁹ This distinguished the case from *Bedrosian v. Mintz*.¹⁹⁰ In *Bedrosian* the Second Circuit declined to acknowledge an indigent’s right to the appointment of out-of-state counsel because of the state’s “legitimate interest in developing a pool of competent attorneys to represent indigents.”¹⁹¹ In *Fuller* a vigorous dissent argued that the trial judge had acted within the scope of his discretion in adequately assessing the difficulties of calendar control on the facts before him.¹⁹²

The tendency of both the First and Third Circuits to focus upon potentially countervailing interests in securing the fair and efficient administration of justice involves the very nature of a jurisdiction’s power to authorize and supervise practice before the bar. A state’s interests in requiring “‘good moral character or proficiency in the law’” are concerns of similar magnitude.¹⁹³ Nonetheless, archaic characterizations of a request for counsel *pro hac vice* as implicating “not a right but a privilege”¹⁹⁴ are no longer accurate. *Wheat* will lead to widespread recognition of the need for a specific inquiry into whether denials actually serve such countervailing interests. In *Panzardi Alvarez* and *Fuller* the resolution of the matter was deceptively simple because both courts concluded that no particularized findings had been made.¹⁹⁵ The more

out-of-state counsel was prepared.” *Id.* at 611. The Third Circuit did not specifically endorse the finding.

185. *Id.* at 611.

186. 751 F.2d 956 (8th Cir.), *cert. denied*, 471 U.S. 1138 (1985).

187. *Fuller*, 868 F.2d at 612 (quoting *Williams*, 751 F.2d at 956).

188. *Id.*

189. *Id.* at 610 n.5.

190. 518 F.2d 396 (2d Cir. 1975), *cited in Fuller*, 868 F.2d at 610 n.5.

191. *Bedrosian*, 518 F.2d at 401.

192. *Fuller*, 868 F.2d at 613 (Weis, J., dissenting). The dissent also stated that the district court had “mischaracterized the trial judge’s ruling as resting on per se factors.” *Id.* at 614.

193. *See Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir.) (per curiam) (quoting *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957)), *cert. denied*, 423 U.S. 892 (1975).

194. *Thomas v. Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957) (per curiam), *cert. denied*, 355 U.S. 958 (1958).

195. *See Fuller*, 868 F.2d at 611; *United States v. Panzardi Alvarez*, 816 F.2d 813, 817 (1st Cir. 1987), *cert. denied*, 110 S. Ct. 1140 (1990).

difficult issues are suggested by Judge Weis's dissent in *Fuller*, which found that the inquiry was properly focused and the countervailing interests were sufficient. Adequate findings that are supported by the record seem likely to become the norm, and when they do, the manner in which the balance is struck will depend, as elsewhere, upon just how weighty the defendant's right to choose seems to be.

Wheat also will affect the issue of disqualification of defense counsel based upon the counsel's prior governmental service. Although it delineates the "circumscribed" nature of the right to choose, the opinion contains a broad assertion that "a defendant [may not] insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the Government."¹⁹⁶ A reading of this passage that entirely forecloses a Sixth Amendment right to choose any attorney who has had a relationship with the prosecutor's office would make little sense. Instead, the Supreme Court most likely anticipated the problem of conflicts of interest arising from prior employment and intended to indicate that in such a context a defendant's Sixth Amendment right is not absolute.

Such a conflict would implicate the concerns reflected in both Disciplinary Rule 9-101(B) of the Model Code of Professional Responsibility¹⁹⁷ and Rule 1.11(a) of the Model Rules of Professional Conduct.¹⁹⁸ As do these standards, pre-*Wheat* decisions that considered a defendant's right to counsel of choice focused on the former prosecutor's responsibility for the matter before the court.

For example, in *United States v. Smith*¹⁹⁹ the Fourth Circuit reversed an order that had disqualified a former Assistant United States Attorney from representing a defendant whose prosecution he had su-

196. *Wheat v. United States*, 486 U.S. 153, 159 (1988).

197. Disciplinary Rule 9-101(B) states, "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1980).

198. Rule 1.11(a), which governs successive government and private employment, states:

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11(a) (1990).

199. 653 F.2d 126 (4th Cir. 1981).

pervised on a similar but separate charge four years earlier. The attorney's only involvement as prosecutor in the second charge was the signing of two subpoenas during the investigation of a codefendant. The Fourth Circuit agreed with the district court's finding that the attorney had no substantial involvement with the second case and therefore was not guilty of any actual impropriety in the representation.²⁰⁰ Nevertheless, because a probationary term from the earlier case was pending, the district court, citing Canon 9,²⁰¹ disqualified the attorney because of the "appearance of impropriety,"²⁰² despite its order that had barred the attorney from representing Smith in any probation revocation proceeding stemming from the former conviction.²⁰³ The Fourth Circuit concluded that the district court's disqualification could "only be based on the bald fact that [the attorney] previously prosecuted the same defendant on a different charge and that his probation imposed on the previous charge might be affected by events relating to the trial in the case *sub judice*."²⁰⁴ The Fourth Circuit found no appearance of impropriety violative of Canon 9.²⁰⁵ Citing *Powell v. Alabama*,²⁰⁶ the court noted, "A defendant is not lightly to be deprived of the counsel of his choice."²⁰⁷ It added, "It cannot be a fanciful, unrealistic or purely subjective suspicion of impropriety that requires disqualification. The appearance of impropriety must be real."²⁰⁸

Similar issues have been raised under Canon 9 without reference to a defendant's constitutional right. In *Cleary v. District Court*²⁰⁹ the Supreme Court of Colorado concluded that an allegation of an appearance of impropriety furnished an insufficient basis for disqualifying a former prosecutor who had no personal involvement, knowledge, or contact with the prosecution at hand, and to whom such knowledge could not appropriately be imputed.²¹⁰ The *Cleary* court observed that the question of vertical imputation of knowledge²¹¹ was not present

200. *Id.* at 127-28.

201. "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

202. *Smith*, 653 F.2d at 128.

203. *See id.*

204. *Id.*

205. *Id.* at 129.

206. 287 U.S. 45 (1932).

207. *Smith*, 653 F.2d at 128 (citing *Powell*, 287 U.S. at 53).

208. *Id.* (citing *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581, 589 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975)).

209. 704 P.2d 866 (Colo. 1985) (en banc).

210. *Id.* at 872.

211. Vertical imputation of knowledge involves "the extent to which a superior will be presumed to have knowledge of information known to and conduct performed by

and that any presumption of knowledge therefore was merely rebuttable.²¹²

In *United States v. Miller*,²¹³ a tax prosecution, the Third Circuit acknowledged the defendant's right to counsel of choice.²¹⁴ The court nevertheless affirmed a disqualification order based on an appearance of impropriety that had stemmed from counsel's unexercised advisory responsibilities as an Assistant United States Attorney.²¹⁵ The disqualified counsel had been available in the United States Attorney's office for consultation on all tax cases. The United States Attorney stated in an affidavit that he expected his assistants to seek the attorney's advice on tax issues. The affidavit also stated that counsel's law firm had announced that he had been "Chief of the Criminal Tax Fraud Unit" within the prosecutor's office. The district court ruled, however, that the former prosecutor possessed no actual knowledge of the defendant's case.²¹⁶

The district's local disciplinary rules incorporated both New Jersey's disciplinary rules and the state case law interpreting them.²¹⁷ In discussing DR 9-101(B) the New Jersey Supreme Court had stated that "[i]n addition to actual knowledge, responsibility, whether exercised or not, over the subject matter is automatically disqualifying."²¹⁸ The New Jersey Supreme Court acknowledged that its approach was more restrictive than the approach of the ABA Committee on Ethics and Professional Responsibility.²¹⁹ Nevertheless, in interpreting this restrictive state policy, the Third Circuit declined to distinguish between supervisory responsibility and the advisory role performed by defendant's counsel.²²⁰ Further, the Third Circuit found that the district court acted within its discretion in imposing the disqualification.

[A]n informed and concerned private citizen could conclude that [counsel's] appearance on behalf of appellant involved a conflict of interest with his former responsibilities as an assistant U.S. attorney. Public confidence in the government's prosecutors is essential, but it may be lost if former prosecutors assume private employment that ap-

subordinate[s]." *Id.*

212. *Id.* at 873.

213. 624 F.2d 1198 (3d Cir. 1980).

214. *Id.* at 1203 (citing *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976)).

215. *Id.* at 1202.

216. *Id.* at 1199.

217. *See id.* at 1200.

218. *In re Advisory Opinion on Professional Ethics No. 361*, 390 A.2d 118, 120 (N.J. 1978) (per curiam), *quoted in Miller*, 624 F.2d at 1202.

219. *In re Advisory Opinion*, 390 A.2d at 121 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975)).

220. *Miller*, 624 F.2d at 1202.

pears to involve conflicts of interests. A special concern for avoiding the appearance of impropriety in this case is justified by the fact that [counsel's] firm had publicly announced that [counsel] had been "Chief of the Criminal Tax Fraud Unit within the United States Attorney's Office."²²¹

To emphasize that its sole concern was with appearances, the court added that nothing in its opinion should be read as contradicting the district court's statement that counsel and his firm had behaved ethically and were held in the "highest esteem."²²² The court's consideration of the defendant's right to retain counsel of his choice was cursory, merely stating that "[a]lthough this right deserves respect, it is not absolute,"²²³ and that the defendant "has not pointed to any particular harm that might result from his need to retain new counsel."²²⁴

In *United States v. Washington*²²⁵ the Ninth Circuit declined to "accept the Third Circuit's reliance [in *Miller*] upon such a restrictive reading of the ABA disciplinary rule as a basis for denying a criminal defendant his Sixth Amendment right to counsel of his choice."²²⁶ The court did state, however, that "a criminal defendant [does not have] a right to choose counsel who has an actual conflict of interest because of prior government employment."²²⁷ The defendant in *Washington*, prior to being charged with income tax violations, RICO violations, and other offenses,²²⁸ retained two attorneys who had formerly served with the Organized Crime and Racketeering Section of the Justice Department (the "Strike Force"). The Government initially moved for disqualification of the attorneys before indictment and attachment of defendant's Sixth Amendment rights. The Government sought to exclude one attorney on the basis of an allegation by an FBI agent that the attorney had received unspecified confidential information about the defendant while serving with the Strike Force. The Government sought to disqualify the second attorney on the ground that he had occupied a supervisory position with the Strike Force during the period involved. The first attorney denied the allegation by affidavit. Both attorneys asserted that no conflict of interest existed. The trial court denied the defendant's request for an evidentiary hearing and granted the motion

221. *Id.* at 1202-03 (footnote omitted).

222. *Id.* at 1203 n.2.

223. *Id.* at 1203 (citing *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, 1093 (3d Cir.), *cert. denied*, 429 U.S. 830 (1976)).

224. *Id.*

225. 797 F.2d 1461 (9th Cir. 1986).

226. *Id.* at 1466.

227. *Id.*

228. *Id.* at 1463. The other offenses were Travel Act violations, mail fraud, and obstruction of justice. *Id.*

to disqualify both attorneys. The trial court relied on the reasoning of *Miller* and concluded that the appearance of impropriety created by the attorneys' former employment was sufficient to warrant disqualification.²²⁹ After indictment the defendant asked the court to permit the attorneys to re-enter the case. The court denied the request on substantially the same grounds that it had based the initial disqualifications.²³⁰

The Ninth Circuit initially distinguished *Miller* by characterizing the attorney in *Miller* as possessing "informal supervisory responsibility" over tax cases when the prosecution prepared much of its case.²³¹ However, the court then questioned the suitability of an overriding governmental interest in avoiding an appearance of impropriety that stems from the mere status of an attorney as a former prosecutor. The court believed that the trial court had based its ruling upon this alone.²³²

The *Washington* court noted that "the government bears a heavy burden of establishing that concerns about the integrity of the judicial process justify the disqualification."²³³ The court characterized New Jersey's reading of DR 9-101(B) as a restrictive and insufficient ground for denying a defendant the right to counsel of choice.²³⁴ The court added:

We have grave doubts whether an appearance of impropriety would ever create a sufficiently serious threat to public confidence in the integrity of the judicial process to justify overriding Sixth Amendment rights. It is easy to express vague concerns about public confidence in the integrity of the judicial process. It is quite a different matter to demonstrate that public confidence will in fact be undermined if criminal defendants are permitted to retain lawyers who worked for the government in the field of law implicated by an indictment. We are unwilling to sacrifice a defendant's Sixth Amendment right to counsel of his choice on such an unsubstantiated premise. Indeed, for all we as judges know in a vacuum, the public very well may have greater confidence in the integrity of the judicial process assured that a criminal defendant's right to counsel of his choice will not be lightly denied.²³⁵

229. *Id.* at 1464-65.

230. *Id.* at 1465 n.3.

231. *Id.* at 1465.

232. *Id.* at 1466.

233. *Id.* at 1465 (citing *United States v. Phillips*, 699 F.2d 798, 801-02 (6th Cir. 1983), *overruled on other grounds by United States v. Tosh*, 733 F.2d 422 (6th Cir. 1984)).

234. *Id.* at 1466.

235. *Id.* The court further noted that the question of an actual conflict of interest resulting from receipt of confidential information could only be resolved after an evidentiary hearing and findings by a trier of fact. *Id.*

These divergent views on the significance of an "appearance of impropriety" for Sixth Amendment balancing are in part a reflection of the elastic process of characterizing governmental interests. To recast an observation made by Justice Black in another context, it is far too easy to substitute for one asserted interest a broader, abstract, and more ambiguous description that can expand or contract as the situation requires.²³⁶ In the fee forfeiture cases, for example, the Government initially characterized its interests as "the elimination of the economic power base of narcotics traffickers"²³⁷ and a "tool in combatting two of the most serious crime problems facing the country: racketeering and drug trafficking."²³⁸ Although some elasticity and even hyperbole may be inevitable, once a valid interest is identified the issue highlighted in *United States v. Washington*²³⁹ still remains: To what extent does the Sixth Amendment require a demonstrable basis for concluding that a harm is likely to flow from a defendant's exercise of the right to select an attorney? Again, the strength to be accorded the presumption in favor of a defendant's choice would seem to be relevant to the resolution of the problem.

Situations in which disqualification is sought because of allegations of attorney misconduct or incompetence generate far fewer analytical difficulties. In *United States v. Arrington*,²⁴⁰ for example, the Government accused counsel of participating in a plot to silence a witness.²⁴¹ Testimony by that witness would have made it virtually certain that counsel would have had to testify.²⁴² The Second Circuit upheld both the counsel's disqualification under Disciplinary Rule 5-102(A)²⁴³

236. Discussing the characterization of constitutional rights, specifically the penumbral right of privacy recognized by the Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Black stated:

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures."

Id. at 509 (Black, J., dissenting). This admonition against facile characterization seems instructive on the description of governmental interests.

237. Brief for the United States at 26, *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987) (No. 87-1397), *reh'g en banc*, 852 F.2d 1400 (2d Cir. 1988) (per curiam), *rev'd*, 491 U.S. 600 (1989).

238. *Id.* at 11 (quoting S. REP. NO. 225, 98th Cong., 1st Sess. 191 (1983)).

239. 797 F.2d 1461 (9th Cir. 1986).

240. 867 F.2d 122 (2d Cir.), *cert. denied*, 110 S. Ct. 70 (1989).

241. *Id.* at 123.

242. *Id.* at 128.

243. Disciplinary Rule 5-102 is entitled "Withdrawal as Counsel When the Lawyer Becomes a Witness." It states, "If, after undertaking employment in contemplated or

and the declaration of a mistrial.²⁴⁴ Responding to the argument that the client's waiver of his right to conflict-free representation was sufficient to permit the trial to proceed, the court distinguished the nature of the conflict involved in *Arrington* from the conflict presented by multiple representation. "[P]laced in the position of having to worry about allegations of his own misconduct," counsel would have been "encumbered with a strong incentive to conduct the trial in a manner that would minimize [his] own exposure."²⁴⁵ The court justified its overriding of the waiver in the same manner as the Court in *Wheat v. United States*.²⁴⁶ The court stated:

"[F]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." To this end, a district court "should not be required to tolerate an inadequate representation of a defendant." . . .

. . . While the prospect of allowing someone to defend himself with one hand tied behind his back may present an interesting spectacle in a wrestling ring, the court's "institutional interest in the rendition of just verdicts in criminal cases," and the proper administration of justice require that a criminal defendant not be so encumbered.²⁴⁷

Pre-*Wheat* decisions that considered the applicability of a Sixth Amendment right in other contexts involving allegations of inadequacy or misconduct of counsel have reached similar results.²⁴⁸

Other problem areas involve the potential disqualification of counsel that results from issuing subpoenas upon attorneys for investigative purposes or from the State's calling of the attorney as a witness at trial. Subpoenas are often issued before attachment of the Sixth

pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial" MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102(A) (1980).

244. *Arrington*, 867 F.2d at 129.

245. *Id.*

246. 486 U.S. 153 (1988).

247. *Arrington*, 867 F.2d at 129 (citations omitted) (quoting *Wheat*, 486 U.S. at 160, 162).

248. *See, e.g.*, *United States v. Snyder*, 707 F.2d 139 (5th Cir. 1983) (disqualifying attorney who was also an indicted co-conspirator); *United States v. Hobson*, 672 F.2d 825 (11th Cir.) (per curiam) (disqualifying attorney who allegedly had knowledge of client's criminal activity that, if brought out at trial, could have created a reasonable probability of an appearance of impropriety by the attorney in violation of Canon 9), *cert. denied*, 459 U.S. 906 (1982); *United States v. Dinitz*, 538 F.2d 1214 (5th Cir. 1976) (disqualifying attorney for grossly exceeding permissible grounds of opening statement), *cert. denied*, 429 U.S. 1104 (1979); *United States v. Rogers*, 471 F. Supp. 847 (E.D.N.Y.) (mem.) (holding attorney with hearing disability incompetent and disqualifying him for disrupting trial procedure), *aff'd sub nom.* *United States v. Raife*, 607 F.2d 1000 (1979).

Amendment right.²⁴⁹ In this context courts have been hesitant to develop due process analyses that protect a defendant's choice of counsel.²⁵⁰ Nevertheless, both pre- and postattachment subpoenas have prompted courts and commentators to express concern for the need to impose appropriate judicial controls upon a prosecutor's discretion.²⁵¹

Approaching the issue as an ethical matter, on February 12, 1990, the ABA House of Delegates amended Rule 3.8 of the *Model Rules of Professional Conduct* to provide that a prosecutor shall not subpoena a lawyer to present evidence about a past or present client in a grand jury or other criminal proceeding unless:

- (1) the prosecutor reasonably believes:
 - (i) the information sought is not protected from disclosure by any applicable privilege;
 - (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution;
 - (iii) there is no other feasible alternative to obtain the information; and
- (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding.²⁵²

When this approach is not followed, appropriate Sixth Amendment considerations may be resolved in the context of a hearing upon a motion to quash.²⁵³ At this hearing *Wheat* would likely require an examination of factors that bear upon prosecutorial need similar to those highlighted in the new Model Rule.²⁵⁴ Past decisions that have reviewed prosecutorial requests for defense counsel to testify at trial, including pre-*Wheat* decisions recognizing the implication of Sixth Amendment interests, seem to follow this pattern²⁵⁵ and have occasion-

249. *E.g.*, *Roe v. United States*, 781 F.2d 238, 242-50 (2d Cir.) (en banc), *cert. denied*, 475 U.S. 1108 (1986); *United States v. (Under Seal)*, 774 F.2d 624, 627-28 (4th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986).

250. *See Roe*, 781 F.2d at 245-46.

251. *See generally United States v. Perry*, 857 F.2d 1346, 1347-48 & n.1 (9th Cir. 1988) (commentary cited in dictum).

252. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1990).

253. *See Roe*, 781 F.2d at 250.

254. *See Wheat v. United States*, 486 U.S. 153, 160-61 (1988).

255. *See, e.g.*, *United States v. Diozzi*, 807 F.2d 10 (1st Cir. 1986) (holding that defense counsel's testimony and consequent disqualification was improper when stipulation by counsel would have been sufficient); *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984) (holding that inconsistency between attorney's opening statement at trial and opening statement at earlier mistrial posed sufficient need for disqualification); *Grady v. United States*, 715 F.2d 402 (8th Cir. 1983) (per curiam) (holding that the calling of attorney to testify at trial and his consequent withdrawal were permissible because the testimony tended to establish an element of the Government's case).

ally explored the nature of the particular attorney-client relationship that was sacrificed.²⁵⁶

IV. POTENTIAL FRAMEWORKS FOR ANALYSIS

Predictably, an examination of the historical antecedents of the Sixth Amendment reveals a concern with the basic provision of the assistance of counsel, rather than a narrower focus on the process of choice. English common law before the Amendment's ratification had denied counsel to those accused of all felonies except high treason and misprision of treason, while anomalously providing such assistance to those accused of misdemeanors. It is noteworthy that the statute which in 1695 provided for the assistance of counsel in prosecutions for high treason and misprision of treason left no room for doubt as to the significance of the defendant's choice.²⁵⁷ The statute stated that any person so tried:

shall be received and admitted to make his . . . full defence, by counsel learned in the law . . . and in case any person or persons so accused or indicted shall desire counsel, the court before whom such person or persons shall be tried . . . shall and is hereby authorized and required immediately, upon his or their request, to assign to such person and persons such and so many counsel, not exceeding two, as the person or persons shall desire.²⁵⁸

The injustice of providing a right to counsel to one accused of a petty crime, yet denying it to one charged with a capital offense, was criticized by many, including Blackstone.²⁵⁹ This harsh prohibition had been ameliorated in practice by the time of the framing of the Sixth Amendment, at least insofar as it concerned permitting assistance in the examination of witnesses.²⁶⁰ However, counsel was not permitted to plead before the jury.²⁶¹ It was not until 1836 that a defendant tried for any felony was granted the statutory right "to make full Answer and

256. See, e.g., *United States v. Cunningham*, 672 F.2d 1064, 1070-71 (2d Cir. 1982) (recognizing that the attorney had represented the defendant for more than six years in a substantial amount of litigation and investigation).

257. 7 Will. 3, ch. 3 (1695) (Eng.).

258. *Id.*

259. See 4 WILLIAM BLACKSTONE, COMMENTARIES *355. For discussion of the criticism, see *Powell v. Alabama*, 287 U.S. 45, 60-61 (1932); J.A.C. GRANT, OUR COMMON LAW CONSTITUTION 8 (1960); BERNARD KELLY, A SHORT HISTORY OF THE ENGLISH BAR 108-10 (1908).

260. See GRANT, *supra* note 259, at 5-9.

261. See *id.* at 9; 5 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 468 n.† (Thomas B. Howell ed., London, Bagshaw 1810).

Defence . . . by Counsel learned in the Law."²⁶² In view of their preoccupation with the glaring deficiencies of English law, the framers of state constitutions²⁶³ and colonial provisions²⁶⁴ afforded a right to counsel, when they did so, in only general terms.

Although the underlying values served by the right to choose did not emerge from these historical sources, it is probable that the Supreme Court will arrive at one of three approaches. First, the Court may choose to view the right as significant only insofar as it serves the goal of obtaining a fair trial through effective advocacy. Alternatively, the Court may adopt an approach similar to that of Justice Blackmun's dissent in *Caplin & Drysdale, Chartered v. United States*,²⁶⁵ which focused upon the institutional goals promoted by the right. Finally, like Justice Marshall's dissent in *Wheat*, the Court may view the right to choose counsel as part of the larger Sixth Amendment interest in granting criminal defendants control over their own defenses. Although the values furthered by the latter two approaches are not inconsistent, important differences in emphasis emerge.

Although, as noted earlier, the *Wheat* Court probably did not in-

262. 6 & 7 Will. 4, ch. 114, § 1 (1836) (Eng.).

263. See N.J. CONST. of 1776, art. XVI, reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 256, 260 (1971) (stating that "[a]ll criminals shall be admitted to the same privileges of . . . counsel, as their prosecutors are or shall be entitled to"); PA. DECL. OF RTS. of 1776, art. IX, reprinted in 1 SCHWARTZ, *supra*, at 263, 265 (stating that a defendant "hath a right to be heard by himself and his council"); DEL. DECL. OF RTS. of 1776, § 14, reprinted in 1 SCHWARTZ, *supra*, at 276, 278 (stating that in all criminal prosecutions "every man hath a right . . . to be allowed counsel"); MD. DECL. OF RTS. of 1776, art. XIX, reprinted in 1 SCHWARTZ, *supra*, at 280, 282 (stating that "in all criminal prosecutions, every man hath a right to . . . counsel"); N.Y. CONST. of 1777, art. XXXIV, reprinted in 1 SCHWARTZ, *supra*, at 301, 310 (stating that a criminal defendant "shall be allowed counsel, as in civil actions"); MASS. DECL. OF RTS. of 1780, pt. I, art. XII, reprinted in 1 SCHWARTZ, *supra*, at 339, 342 (stating that a defendant "shall have a right . . . to be fully heard in his defence by himself, or his council, at his election"); N.H. BILL OF RTS. of 1783, pt. I, art. XV, reprinted in 1 SCHWARTZ, *supra*, at 375, 377 (stating that a defendant "shall have a right . . . to be fully heard in his defence by himself, and counsel").

264. See MASS. BODY OF LIBERTIES § 26 (1641), reprinted in 1 SCHWARTZ, *supra* note 263, at 74; PA. CHARTER OF PRIVILEGES art. V (1701), reprinted in 1 SCHWARTZ, *supra* note 263, at 173; DEL. CHARTER art. V (1701), reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 193, 195 (William F. Swindler ed., 1979). See generally Felix Rackow, *The Right to Counsel: English and American Precedents*, 11 WM. & MARY Q. 3, 12-21 (1954) (surveying colonial precedent). A striking exception was a South Carolina law of 1731, mirroring the language of 7 Will. 3, ch. 3 (1695), that required the assignment to a person accused of any felony, including treason, "such and so many council not exceeding 2, as the person . . . shall desire." Act of Aug. 20, 1731, No. 552, § XLIII [Pt. 1] THE FIRST LAWS OF THE STATE OF SOUTH CAROLINA 130 (John D. Cushing ed., Michael Glazer, Inc. 1981); see Rackow, *supra*, at 20.

265. 491 U.S. 617, 635 (1989) (Blackmun, J., dissenting).

tend to isolate the goal of ensuring a fair trial through effective advocacy as the sole basis for the right to counsel of choice, the Court might someday endorse this position. At least one court, observing that *Wheat* should not be so construed, has underlined the principal problem with such an approach.

In *Fuller v. Diesslin*,²⁶⁶ which reviewed the denial of a motion for the admission of out-of-state lawyers *pro hac vice*, the Third Circuit addressed the Government's contention that the availability of effective local counsel prevented the denial of counsel of choice from rising to the level of a constitutional deprivation. The court rejected this approach "because it collapses the right to counsel of choice into the right to effective assistance of counsel."²⁶⁷ The court believed that more was at stake in *Wheat*. It stated:

[E]ven if the right to counsel of choice exists for the purpose of securing effective assistance of counsel to the defendant, as New Jersey suggests, the two rights are not identical. We do not understand the language in *Wheat* to mean that the right to counsel of choice is important *only* insofar as it secures the right to effective assistance of counsel. Rather, it could be fairly interpreted to mean that, although the core value in the sixth amendment is effective assistance of counsel, the amendment also comprehends other related rights, such as the "right to select and be represented by one's preferred attorney."²⁶⁸

A view of the right of choice that focuses only on the goal of providing effective assistance would render *Wheat* redundant and reduce any claim of abridgment to a question of whether the unwanted counsel was effective. If *Wheat* is to add anything of significance beyond the well-established and seemingly comprehensive strictures of *Strickland v. Washington*,²⁶⁹ it must mean more. Rather, *Wheat*'s creation of an additional presumption in favor of defendants' selections of their own attorneys appears to be designed to further additional values not otherwise adequately served.

The notion that such choice serves institutional interests which should not be lightly sacrificed did not originate with the *Caplin & Drysdale* dissent. This view had repeatedly surfaced in earlier judicial opinions, most notably those of the First, Third, and Sixth Circuits.²⁷⁰

266. 868 F.2d 604 (3d Cir.), *cert. denied*, 110 S. Ct. 203 (1989).

267. *Id.* at 610.

268. *Id.* (citation omitted) (quoting *Wheat*, 486 U.S. at 159).

269. 466 U.S. 668 (1984); *see supra* notes 43-44 and accompanying text.

270. *See* United States v. Panzardi Alvarez, 816 F.2d 813, 816 (1st Cir. 1987) (stating that the denial of the right to counsel of choice creates a risk that trust between counsel and client will be undermined); Wilson v. Mintzes, 761 F.2d 275, 279 (6th Cir. 1985) (recognizing that the right to counsel of choice is "necessary to maintaining a vigorous adversary system and the objective fairness of the proceeding") (citing United

While the litigation was pending in the fee forfeiture cases, Professor Morgan Cloud of Emory University proposed a thoughtful, dualistic model for analyzing the issue of institutional interests.²⁷¹ His model takes into account both the function of criminal defense counsel in our criminal justice system and the interests of the defendant. As Professor Cloud pointed out, consideration of the institutional role of counsel is often intertwined with an analysis of the rights of a defendant in our adversary system.²⁷² But his view that these institutional functions are themselves deserving of independent protection seems to have commended itself to the *Caplin & Drysdale* dissenters in their consideration of the impact of fee forfeiture.²⁷³ Regardless of whether the institutional value of criminal defense counsel is characterized as a truly independent and constitutionally cognizable interest, this approach highlights the fact that the individual's right does not exist in a vacuum and that the consequences of an abridgment for the system will have consequences for the defendant as well.

The problem with the approach of the *Caplin & Drysdale* dissent is that, in failing to sufficiently address the nature of the defendant's personal interest, it is subject to the interpretation that institutional values occupy a position of primacy. Such a view—and one would doubt that, after their *Wheat* dissent, Justices Marshall and Brennan would have acceded to it without some commentary—would threaten to stand the Sixth Amendment on its head. The Sixth Amendment confers *personal* rights. That is its spirit and its logic.²⁷⁴ It is "the accused" who, "[i]n criminal prosecutions, . . . shall enjoy the right . . . to have the Assistance of Counsel for his defence."²⁷⁵ To the extent that the right to counsel confers institutional benefits upon society, those consequences warrant consideration. But they remain by-prod-

States v. Morrison, 449 U.S. 361, 364 (1981)); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (stating that denial of counsel of choice undercuts the trust between counsel and client), *cert. denied*, 454 U.S. 1162 (1982); *United States v. Laura*, 607 F.2d 52, 57 (3d Cir. 1979) ("[T]he ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence.").

271. See Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory To Define Individual Constitutional Rights*, 1987 WIS. L. REV. 1 (1987) [hereinafter Cloud, *Forfeiting Defense Attorneys' Fees*]; see also Morgan Cloud, *Government Intrusions Into the Attorney-Client Relationship: The Impact of Fee Forfeitures on the Balance of Power in the Adversary System of Criminal Justice*, 36 EMORY L. J. 817 (1987).

272. Cloud, *Forfeiting Defense Attorneys' Fees*, *supra* note 271, at 7.

273. The dissent was aware of Professor Cloud's article. See *Caplin & Drysdale*, *Chartered v. United States*, 491 U.S. 617, 638 n.5, 642 (1989) (Blackmun, J., dissenting).

274. Cf. *Faretta v. California*, 422 U.S. 806, 820 (1975) (stating that right to counsel is a "personal character upon which the Amendment insists").

275. U.S. CONST. amend. VI.

ucts of the framers' judgment that such worthwhile goals as institutional fairness could best be served by conferring rights upon defendants, who may use or waive the rights after examining their interests in our adversarial system.

In his *Wheat* dissent Justice Marshall viewed the acknowledgment of a distinct and constitutionally protected interest in a defendant's choice of an attorney ultimately as stemming from a noninstitutional value. Specifically, the interest stemmed from a recognition of the Sixth Amendment's vision of a defense effectively managed by the defendant.²⁷⁶ This approach still offers the most plausible explanation for *Wheat*'s methodology and is most consistent with comprehensive Sixth Amendment theory. Justice Marshall noted that the right of the accused to make a defense, recognized in *Faretta*, stems from this common value.²⁷⁷

In *United States v. Curcio*²⁷⁸ Judge Friendly had a similar view of the relevance of *Faretta* and its acknowledgment of the "inestimable worth of free choice."²⁷⁹ Some five years before *Wheat* Judge Friendly examined a claim that the choice of joint representation involved a right of constitutional dimension and observed that the choice, "like that of self-representation, is at once strategic and moral."²⁸⁰ Noting that "the defendants' choice is to be honored out of respect for them as free and rational beings, responsible for their own fates," he observed that "[t]he resolve of the [defendants] to stand before the law together, . . . no less than *Faretta*'s resolve to stand before the law entirely alone, is worthy of constitutional protection."²⁸¹ *Wheat*'s methodology for evaluating a potential conflict of interest has superseded the approach of *Curcio*, but similar observations concerning the pedigree of the right of choice have been echoed elsewhere.²⁸²

Faretta reflected a vision of the Sixth Amendment that has sel-

276. *Wheat v. United States*, 486 U.S. 153, 165-66 (1988) (Marshall, J., dissenting).

277. *Id.* at 165-66.

278. 694 F.2d 14 (2d Cir. 1982).

279. *Faretta v. California*, 422 U.S. 806, 834 (1975).

280. *Curcio*, 694 F.2d at 25.

281. *Id.* The court emphasized the significance of the defendants' right to conflict-free representation and concluded that the trial court had improperly foreclosed joint representation. *Id.* at 22-28.

282. See, e.g., *Wilson v. Mintzes*, 761 F.2d 275, 279 (6th Cir. 1985) ("[R]ecognition of the right . . . reflects constitutional protection of the accused's free choice . . .") (citing *Flanagan v. United States*, 465 U.S. 259 (1984)); *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (stating that given the vast differences in attorneys, "a defendant's decision to select a particular attorney becomes critical . . . and thus falls within the ambit of the sixth amendment"); Winick, *supra* note 152, at 799, 806-10 (urging the application of strict scrutiny rather than the balancing approach of *Wheat* and aptly characterizing the right as embracing "participatory and autonomy" values).

dom been matched in its breadth, viewing the assistance of counsel as a vehicle in service of a broader scheme. As "surely there can be no doubt that [those who wrote the Bill of Rights] understood the inestimable worth of free choice,"²⁸³ the very right to defend was deemed "personal,"²⁸⁴ with the assistance of counsel serving as an aid in the effort.²⁸⁵ Justice Marshall's observation that the right to counsel of choice and the right to conduct one's own defense stem from this common source renders the Court's observation in *Wheat*—that *Faretta*'s right to self-representation does not encompass the right to choose—inapposite.²⁸⁶ Neither *Wheat* nor the Court's subsequent opinions adequately address the source of the right, and lower courts that reach a conclusion similar to Justice Marshall's are left with the task of extrapolating bits and pieces from *Faretta*, the views of individual justices, and their own conceptions of the nature of the Sixth Amendment.

This Article is premised on the assumption that the Court's articulation of the values underlying the right to counsel of choice can and will make a significant difference in its implementation. This premise seems to comport with common sense. If, for example, the right is grounded principally in its service of institutional values, these values are more likely to dissipate in the face of countervailing institutional needs. If, however, as one suspects, the Court recognized the right because it is a manifestation of the value that the Sixth Amendment places upon individual autonomy and dignity, the right is far less likely to be balanced away or its deprivation deemed harmless.²⁸⁷

283. *Faretta*, 422 U.S. at 833-34.

284. *Id.* at 834.

285. *Id.* at 820.

286. See Winick, *supra* note 152, at 810.

287. In this regard, an analogy to the Court's treatment of the right to self-representation might well be of limited value. In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Court stated that the denial of the right to self-representation is not amenable to "harmless error" analysis "[s]ince the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant." *Id.* at 177 n.8. Nevertheless, in *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985), the court concluded that respect for the individual, served by both the right to self-representation and the right to counsel, required that these rights be "respected or denied irrespective of the harmlessness or prejudicial nature of the error." *Id.* at 286 (citing *McKaskle v. Wiggins*, 465 U.S. 168 (1984)). The court quoted language from Justice White's *McKaskle* dissent regarding the traditional harmless error doctrine as peculiarly inapposite in the self-representation context because of defendants' moral rights to choose their own fate. *Id.* at 286 n.19 (quoting *McKaskle*, 465 U.S. at 198 n.6 (White, J., dissenting)). See also *Fuller v. Diesslin*, 868 F.2d 604, 609 (3d Cir.), *cert. denied*, 110 S. Ct. 203 (1989) (similar standard governing arbitrary denials); *United States v. Rankin*, 779 F.2d 956, 960 (3d Cir. 1986) (viewing the language of *Flanagan v. United States*, 465 U.S. 259 (1984), as instructive on the issue).

The present situation is less than desirable. Lower courts remain charged with the responsibility of implementing a balancing process with little guidance as to the magnitude of the personal interests at stake. *Wheat* and its progeny leave one with a sense of lost opportunity and perhaps even of judicial ambivalence of a right freely acknowledged but only grudgingly explained. Hopefully this phenomenon is short-lived, and the Court will soon find the opportunity to clarify just what it is about the Sixth Amendment that compels the recognition of a right to counsel of choice.