Lecture Seven
PROCEDURAL RIGHTS GUARANTEED BY THE U.S. CONSTITUTION

1. The United States constitution guarantees persons and defendants certain rights, some of which are trial rights of defendants which thus do not arise until a person is charged with committing a crime or until a defendant goes to trial. Other rights are possessed by all persons in the United States without regard to whether they have been formally charged with a crime or are defendants in a criminal trial.

   a. All the rights discussed in this lecture are contained in specific provisions of the U.S. Constitution or in amendments that were added to it by the first Congress shortly after the constitution’s adoption. All of those provisions were based on already established English common law rights and to illuminate the meaning of those provisions American courts look to the nature of those common law rights as they existed in England at the time the Constitution was adopted.


   b. For more than 150 years the procedural rights contained in the Constitution were understood as only applying against the federal government and not to the states. Thus, historically, the states were free to develop their own rules of criminal procedure and in fact to some extent did so.

   c. Starting in the 1950's the U.S. Supreme Court began to hold that the rights contained in the amendments to the U.S. Constitution applied against the states as well. The result is that except where state law provides greater or more rights, criminal procedure in the United States is, with few exceptions, now uniformly governed by the federal constitution.

   d. In depth discussion in a single class period, or even in five class periods, of the constitutional rights accorded to individuals and defendants is impossible. Accordingly, this lecture will only superficially examine the nature and major aspects of those rights.

2. Fifth Amendment Privilege Against Self Incrimination

   a. The privilege against self-incrimination is a creation of English common law that
The Fifth Amendment privilege provides that no person shall be compelled in any criminal case to be a witness against himself.

1. Over time courts have construed the privilege to protect a person against compelled, testimonial, self incrimination

2. Compulsion

(a) The compulsion to which the privilege originally applied was judicial compulsion, i.e. compulsion to answer questions on pain of being held in contempt

(i) In the 1950s the privilege was judicially expanded to include compulsion applied by law enforcement and other government agents.

(b) Today the privilege is understood as applying to any compulsion directed at the witness that has its source in the government


(ii) Psychological defect that compels a person to confess

(c) Ruses

(i) The privilege does not apply to ruses that induce confession or incriminating statements because ruses in their nature do not involve compulsion


(d) Compulsion directed at agents of another and third persons

(i) Only the person to whom the compulsion is directed can assert the privilege.

(ii) The fact that government compulsion is directed to an agent of another to produce evidence or to some other person to produce evidence that will incriminate another does not give that other person who may be incriminated by evidence in the possession of the witness the right to assert the privilege. In such instances because no compulsion is being directed at the non-witness, the non-witness cannot assert the privilege.

(3) Testimonial
   (a) The compelled incrimination must be testimonial
      (i) Generally that means the privilege only applies to
          the witness’s spoken words or thoughts that he is
          compelled to write down or otherwise reveal
      (ii) The privilege does not protect a witness from being
          required to say or do things that are incriminatory
          but which do not reveal the contents of his mind

(4) Self-Incrimination
   (a) The testimony must be incriminatory to the person from
       whom it is sought
      (i) The privilege does not allow someone to refuse to
          answer simply because the answer might
          incriminate some other person, even if that other
          person is a close family member
            1) Young v. Knight, 329 S.W.2d 195 (Ky. App.
               Ct. 1959)
   (b) The testimony must incriminate a person under criminal
       laws adopted under the American political system
      (i) Criminal law
        1) The privilege only protects a witness from
           being a witness against himself if his
           testimony incriminates him under the
           criminal law
           a) Does not apply if the testimony will
              subject the witness only to civil
              liability, embarrassment, or risk of
              physical violence from some non-
              governmental agent
      (ii) American political system
        1) If the testimony incriminates a person under
           the criminal laws of a foreign political
           system the privilege is inapplicable
   (c) Person
(i) The self incrimination must be as to a natural person

1) Artificial entities
   a) While legal persons they are not protected by the privilege
   b) Officers of artificial entities
      i) Not protected by the privilege with respect to producing self incriminating records of the entity

ii. Nature of the Right Accorded by the Privilege

(1) Witnesses
   (a) The privilege is a privilege not to answer questions the truthful answer to which would incriminate the witness
   (b) It is not a privilege to be free from being asked incriminating questions
      (i) Prosecutor is free to ask a witness whatever questions he wishes to ask and it is up to the witness to assert the privilege
         1) Only the witness can assert the privilege. It cannot be asserted by another on his behalf, even if that other person is the witness’s attorney
      (ii) If the witness fails to assert the privilege and instead answers the question posed, the privilege is lost as to that answer and it may be used against the witness

(2) Defendants
   (a) The privilege is broader for defendants. Defendants may not be called by the government as a witness at trial
      (i) As a result a defendant has a right not to testify at his trial
      (ii) The government comment on the defendant’s failure to testify
(3) Violation of the privilege and remedy for violation

(a) The privilege is not violated until government attempts to use the compelled testimony against the witness


(b) The remedy for violation is suppress the use of the unconstitutionally obtained evidence together with any evidence derived from that evidence

b. Eliminating the Privilege

i. The privilege against self incrimination can be eliminated and a witness forced to answer a question through a grant of immunity. There are two types of immunity that will eliminate the privilege: 1) transactional immunity and 2) use and derivative use immunity

(1) Transactional immunity immunizes a witness against prosecution for any crimes about which he testifies

(2) Use and derivative use immunity provides that statements that a witness makes and evidence derived from those statements will not be used against him

(3) Kastigar v. United States, 406 U.S. 441 (1972)

ii. The power to grant immunity is a discretionary executive branch power granted by Congress or in the states by the state legislature. The judiciary has no inherent power to grant immunity

(1) United States v. Lenz, 616 F2d 960 (6th Cir. 1980)

iii. A court cannot refuse the executive’s application for immunity

(1) United States v. Leyva, 513 F2d 774 (5th Cir. 1975)

c. Right to be informed of the privilege

i. Generally a person has no right to be informed about the privilege against self-incrimination.

(1) United States v. Plesons, 560 F2d 890 (8th Cir. 1977)

ii. Courts have used the Fifth Amendment privilege against self-incrimination as a basis to create the so-called Miranda rights that have been recited by police in an endless number of American crime movies and television shows

iii. Miranda rights are a judicially crafted limited exception to the general rule and require that a person be informed of the privilege and the right to consult an attorney when a person is in police custody.
iv. The Miranda right only applies when a person would objectively believe he is in police custody. It does not apply simply because the police ask someone questions or because the police intend to arrest the person they are questioning when their questioning is done, unless they somehow communicate the intention to arrest during questioning.


(2) Witnesses in court proceedings are not entitled to Miranda rights because they are not in custody.

(a) *United States v. Kilgro*, 959 F2d 802 (9th Cir. 1992)

(3) Persons incarcerated on a sentence

v. The Miranda rights advise persons in custody that they have a right to remain silent, a right to an attorney, and that anything the person say may be used in evidence against him

(1) Right to Silence

(a) Once a person tells police he does not want to answer questions the police must cease questioning him. After a reasonable interval the police can ask the person if he has changed his mind

(2) Right to Attorney (Miranda Right to Counsel)

(a) Limited to attorneys

(b) Once a person invokes his right to an attorney police questioning must stop until the person has been able to consult an attorney

(c) The Miranda right to counsel is different from the right to counsel guaranteed in the 6th Amendment because the Miranda right to counsel applies before charging and when it is invoked the role of the attorney in the Miranda right to counsel situation is to ensure that questioning is not coercive


vi. Invoking Miranda

(1) Miranda only requires law enforcement to advise a person in custody of his rights. Once the person is advised of the Miranda rights he must invoke them. If he does not the police can question him.

(a) Only the person in custody can invoke his rights. Third persons such as attorneys cannot.
(2) How Miranda rights invoked
   (a) Must be clear invocation of one or more of the rights
      (i) Indecisive expressions
      (ii) Conditional expressions
   (b) Cannot be invoked prior to questioning

vii. Remedy for violation of Miranda
   (1) Suppression of the statements obtained in violation of Miranda but not of anything derived from them

3. Fourth Amendment
   a. The Fourth Amendment provides that persons and their property are to be secure from unreasonable searches and seizures
      i. Applicable to police-citizen encounters and searches
         (1) Searches
            (a) Generally need a warrant
         (2) Arrests
            (a) No warrant necessary
      ii. Police citizen encounters
         (1) Police citizen encounters are usually divided into three different tiers
            (a) Arrests
               (i) Require probable cause but do not need a warrant
            (b) Investigative stops
               (i) Articulable suspicion
            (c) Consensual encounters
               (i) Do not involve arrest or detention. Citizen is free to leave the presence of the police and any answers to police questions are consensual
      iii. Searches
         (1) Generally police must have a search warrant signed by a judge before conducting a search
            (a) Obtaining warrant
(i) Complaint signed by police

1) Describes offenses
2) Describes location
3) Sets out facts which show probable cause to believe that evidence, fruits, or instrumentalities of the described offenses will be found at the location to be searched
4) Sets out facts which describe what is expected to be found in the place to be searched

(b) Warrant

(i) Will state that probable cause to believe that a crime has been committed
(ii) Will describe the place to be searched and the things to be seized
(iii) Warrant determines the scope of the search

1) Can search any place in the location which the court orders searched where the things to be seized might be found
2) Anything found while searching those areas may be seized if on its face it appears connect to a crime or is contraband

(c) Execution

(i) Knock and announce

1) Exception where court waives
(ii) Prosecutor at site
(iii) Execution of warrant

(2) Exceptions to warrant requirement

(a) Arrest warrant

(i) Allows police to go to the defendant’s home and search the home for the defendant without a search warrant
(ii) Limited to places a person could hide

(b) Search incident arrest
(i) Areas within the defendant’s area of grasp

(c) Motor vehicles

(i) When making an arrest the police can search the passenger compartment and any closed containers in the compartment

1) Trunk of vehicles

(d) Consent

4. Fifth Amendment Due Process Clause

a. The Fifth Amendment also provides that no person shall be deprived of life, liberty, or property without due process of law

i. In its most basic understanding this clause

(1) Creates the presumption that a person charged with a crime is innocent

(2) Places on the government the burden of proving the defendant guilty of the crimes

(3) Requires that the evidence prove the defendant guilty beyond a reasonable doubt

b. This clause also requires that the prosecutor disclose to the defendant all evidence that would tend to exculpate the defendant or would be favorable to him

5. Sixth Amendment Right to Counsel

a. The Sixth amendment provides that a person has a right to be represented by a lawyer

i. As originally understood this right simply guaranteed that a defendant had the right to hire an attorney to represent him

(1) It was not understood as guaranteeing a defendant representation by an attorney

(2) In the 1960s the Supreme Court changed the nature of the right guaranteed by the amendment by construing the amendment as guaranteeing legal representation to defendants charged with a crime

b. The Sixth amendment right to an attorney entitles defendants to an attorney who provides effective assistance during the criminal proceeding


ii. The right arises only after formal charging and applies only as to the offenses charged.
(1) A person who has not been charged with a crime has no right to an attorney under the Sixth Amendment.

iii. What Constitutes effective assistance

iv. A defendant who is under indictment and represented, but who has not asserted his Miranda right to counsel, can be questioned about offenses other than those with which he has charged.

6. Confrontation of Witnesses

a. The Sixth Amendment also provides that an accused has the right to be confronted by the witnesses against him. This provision of the Sixth Amendment is aimed at prohibiting the use at trial of out of court statements made by witnesses to others who the defendant did not have an opportunity to cross examine.

i. The confrontation clause bars the use at trial of out of court statements made by the witness to investigators, prosecutors, and others even if those statements were made under oath if the defendant did not have an opportunity to cross examine the witness.

(1) State v. Campbell, 30 S.C.L. 124 (1844)

ii. If the defendant had an opportunity to cross examine the witness and a reason to cross examine the witness on the same subject that is at issue at trial then, assuming the rules of evidence otherwise excuse the witness from being present, the witness’s out of court statement can be used as evidence.

(1) If the issues in the earlier proceeding are different from those in the later proceedings the witness’s statements in the earlier proceeding cannot be used in a later proceeding notwithstanding that he was questioned on those issues by the prosecutor and the defendant had an opportunity to cross examine.

(a) People v. Brown, 374 Ill. App.3d 726 (1st Dist. 2007)

7. Public Trial

a. In the United States grand jury investigations are secret and prosecutors’ offices generally will not divulge the existence of a criminal investigation of a particular person. When a prosecutor’s office is questioned by the news media about whether it is investigating a person for committing a crime the prosecutor’s office will respond with an answer that it does not comment on the existence or non-existence of a criminal investigation. Once a criminal charge is brought, however, the indictment is public record.

i. The Sixth Amendment specifically provides that all trials are to be public trials. Courts have held that neither the defendant nor the government
individually or together can have the court close the trial to the public. Courts have reasoned that the First Amendment which provides simply that Congress shall make no law restraining the freedom of the press creates a right in the media to attend trials


(2) A public trial is seen as providing a number of benefits

(a) Knowledge that the trial is being reported to the public serves as an effective restraint on possible abuse of judicial power

(b) The presence of interested spectators increases testimonial trustworthiness by inducing fear in witnesses that false testimony will be detected

(c) Public disclosure may call the proceedings to the attention of key witnesses who might come forward with testimony

ii. While the Sixth Amendment provides that the defendant has a right to a public trial, the courts have interpreted the amendment more broadly and applied that provision to pre-trial proceedings as well


8. Right to Jury Trial

a. Trial by jury was a creation of English common law that was followed in colonial courts.

b. The Sixth Amendment guarantees defendants the right to be tried by a jury. In a jury trial the jury decides only the facts and not the law. The judge has a duty to instruct the jury about the applicable law and the jury is bound by oath to follow the law. Prior to submission of a case to the jury the judge, defense counsel, and the prosecutor meet in what is called an instruction conference and decide what instructions need to be given to the jury.

i. Territorial limitation

(1) United States

(2) American territories

(a) Incorporated

(b) Unincorporated

ii. The right to trial by jury can be waived by a defendant, but under the U.S. Constitution Congress may provide that such waiver must be agreed to by the prosecution.

(1) *Singer v. United States*, 380 U.S. 24 (1965)
iii. Historically, juries consisted of twelve people who, to reach a verdict, had to agree unanimously. The number of jurors and the number who must agree on a verdict may be changed by the legislature, but almost all American states retain twelve person juries and require unanimous verdicts.

(1) *Burch v. Louisiana*, 441 U.S. 130 (1979)

c. Jury Selection

i. The selection of a jury is done in a pre-trial proceeding called *voir dire*. During this process potential jurors are questioned to determine if they might have some connection with the defendant or the witnesses who are expected to testify and to determine if they have a bias against the defendant or the government. In some jurisdictions *voir dire* questioning is done by the court and in others by the judge.

(1) The defense and prosecution can challenge jurors for cause which means that either side can ask to have a potential juror excused because of prejudice, bias, or because he may have some connection to the defendant, witnesses, or the attorneys.

(2) The defense and prosecution are also each given a certain number of peremptory challenges. In Illinois the number is six and in other jurisdictions it may be different.

(a) Peremptory challenges allow the defense or prosecution to excuse a potential juror without giving a reason and for no reason.

(i) The only limitation on the use of peremptory challenges is that they cannot be used to discriminate based on race or some other protected class.