

OUTLINE

BILL OF RIGHTS

HISTORY

- A. Drafted by James Madison
- B. Inspired by Thomas Jefferson
- C. Adopted by the States on December 15, 1791
- D. Reflected the colonists distrust of the unregulated government power exercised by England
- E. Framers' goal was to limit the power of the Federal government and to guarantee inalienable, fundamental rights
- F. While the rights guaranteed by the Bill of Rights were considered to be "fundamental" rights natural to each person, they were not extended to women, African Americans and Native Americans until much later
- G. Most of the Bill of Rights applies to the States through the 14th Amendment

AMENDMENT I

Text: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Freedom of Speech

- A. Freedom of speech includes the freedom not to speak; the government cannot force you to endorse any symbol or slogan.
- B. Content neutral regulations
 - 1. To restrict speech in a public forum, the government regulation must:
 - a) be content neutral (i.e. a time, place or manner regulation).
 - b) be narrowly tailored (i.e. not over-broad) to serve a significant state interest
 - c) leave open alternative channels of communication

2. To restrict speech in a non-public forum (i.e. military bases, schools, prisons, etc.) the government regulation must only be viewpoint neutral and reasonably related to a legitimate government purpose

Freedom of Religion

- A. Free exercise clause protects religious belief absolutely and religious conduct cannot be regulated for that reason; religious conduct can be regulated indirectly, however, as long as there is a rational basis for doing so and the government need not accommodate affected religions
- B. Under the establishment clause, the government may not coercively endorse one religion over another or religion over non-religion unless there is a compelling state interest; two part test:
 1. Law must have a secular purpose which neither furthers nor inhibits religion
 2. Must avoid excessive government involvement in religion

Freedom of the Press

- A. Defamation
 1. Must be language that damages the plaintiff; statements of opinion can be defamatory only if the statement implies personal knowledge
 2. With written defamation (libel), damages are presumed
 3. With oral defamation (slander), plaintiff bears the burden of proving damages unless slander involves business or profession, a loathsome disease, a crime involving moral turpitude or the unchastity of a woman
 4. Where plaintiff is a public figure, the statement must have been made with malice; malice exists if the defendant either knew or should have known that the statement was false
 5. Truth, governmental privilege in any governmental proceeding and communication between spouses are defenses to defamation

AMENDMENT II

Text: "A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

Historical Basis

The Second Amendment was inserted into the Bill of Rights to protect the role of the states in maintaining and arming the militia. It was designed to protect the state militias from federal legislation enacted to undermine the role of state militias. See United States v. Hale, 978 F.2d 1016, 1019 (8th Cir. 1992)("The Second Amendment prevented federal

laws that would infringe upon the possession of arms by individuals and thus render the state militias impotent."). By guarding against congressional intrusion into the states' authority to maintain their respective militias and by protecting the ability of the militias to equip themselves, the amendment provided an important safeguard against congressional efforts to increase the need for or justification of a national standing army. See Laurence H. Tribe, American Constitutional Law, § 5-2, at 299 n. 6 (2d ed. 1988) ("[T]he central concern of the second amendment's framers was to prevent such federal interference with state militia as would permit the establishment of a standing national army and the consequent destruction of local autonomy.").

Current Issues

- A. National Rifle Association position.
- B. Pre-purchase waiting periods and background checks.

AMENDMENT III

Text: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

Historically, the English quartered troops in colonist's homes, which was unpopular with the colonists.

AMENDMENT IV

Text: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Exclusionary Rule

- A. Evidence that was seized unconstitutionally will be suppressed at trial.
 - 1. Under the fruits of the poisonous tree doctrine, all evidence obtained or derived from the exploitation of illegally obtained evidence will also be suppressed unless:
 - a) good faith (and reasonable) reliance on existing law, defective search warrant, or clerical error;
 - b) independent source;
 - c) intervening act of free will; or
 - d) inevitable discovery

2. Exclusionary rule does not apply to parole revocation, grand jury, or civil proceedings, and does not prevent the use of illegally obtained evidence to impeach the defendant at trial

Arrests and Stops

A. Arrest (taken into custody)

1. Must be based on probable cause, but a warrant is not required unless arresting suspect in his home; note, however, that in the case of hot pursuit, evanescent evidence, or some other emergency, the warrant requirement will be waived
2. Arrests in the home
 - a) must knock and announce before entering unless exigent circumstances
 - b) a nighttime arrest is only authorized where necessary to prevent the escape of the person
3. Incident to an arrest, police may search the person and any areas into which he might reach and grab a weapon or destroy evidence (his “wingspan”)

B. Stop

1. Police may stop a person without probable cause if they have a reasonable articulable suspicion of past or present criminal activity
2. After stopping a suspect, police may “frisk” the suspect if they have a reasonable suspicion that the suspect may be armed; but may not reach inside any pockets unless the police feel something which they reasonably believe is a weapon or contraband
3. Under Delaware law, suspect may detained for up to two hours

C. Search and Seizure

1. Where the suspect has a reasonable expectation of privacy, police may not conduct a search without probable cause and a valid warrant
2. Suspect only has standing to object to a search if they own the property, the search is conducted at their residence, or the search is conducted at a residence where the suspect is an overnight guest
3. A warrant is not required to search an automobile and, if police have full probable cause to search a vehicle, they can search the entire vehicle, including any containers within the vehicle that might contain the object(s) they are looking for
4. Additional requirements for searches in the home

D. Requirements of a valid warrant

1. Probable cause is based upon a totality of the circumstances test, which considers the nature of the informant, predictiveness of the information, and corroboration by police

2. Describes with reasonable precision the place to be searched and the items to be seized
3. Neutral and detached magistrate
4. Searches by public school officials require only reasonable suspicion, unless the official is acting for the government, in which case probable cause is required

E. Consent

1. Police may always conduct a warrantless search if they have a voluntary and intelligent consent to do so; knowledge of the right to withhold consent, while a factor to be considered, is not a prerequisite to establishing a voluntary and intelligent consent
2. Any person with an apparent equal right to use or occupy the property may consent to a search, and any evidence found may be used against the other owners

F. Plain View

1. Police must be legitimately on premises
2. Items seized must be in plain view
3. Must have probable cause to believe items are illegal

AMENDMENT V

Text: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Taking and Just Compensation

- A. Private property shall not be taken for public use, without just compensation
- B. Taking generally requires a physical occupation (i.e. an easement) rather than mere diminution of value; regulations that merely restrict the owner’s use of his property are valid as long as they substantially advance a legitimate state interest and are not a taking as long as they leave a viable economic use for the property
- C. Public use is still public even if it unduly benefits a certain group
- D. Just compensation is determined at the time of the taking

Confessions

- A. A person in custody must waive his Miranda rights prior to interrogation
- B. Custody – fact specific inquiry as to whether the suspect reasonably believed he was not free to leave
- C. Interrogation – any words or actions by the police that are reasonably likely to elicit an incriminating response from the suspect
- D. Waiver- must be knowing, voluntary, and intelligent

Right to Counsel

Once the defendant asserts his right to terminate the interrogation and requests an attorney, may not continue interrogation; fifth amendment right to counsel is not offense specific

Double Jeopardy

The Fifth Amendment right to be free of double jeopardy for the same offense has been incorporated into the Fourteenth Amendment. See Benton v. Maryland, 395 U.S. 784 (1969). The general rule is that once jeopardy attaches, the defendant may not be retried for the same offense. Jeopardy attaches in a jury trial at the empaneling and swearing of the jury. See Crist v. Bretz, 437 U.S. 28 (1978). Certain exceptions permit retrial of a defendant even if jeopardy has attached: hung jury; mistrial for manifest necessity; retrial after successful appeal; or breach of plea agreement. Two crimes do not constitute the same offense if each crime requires proof of an additional element that the other crime does not require, even though some of the same facts may be necessary to prove both crimes. See Blockbuster v. United States, 284 U.S. 299 (1932). The constitutional prohibition against double jeopardy does not apply to trials by separate sovereigns. Thus, a person may be tried for the same conduct by both a state and federal government or by two states, but not by a state and its municipality. See Waller v. Florida, 397 U.S. 387 (1970).

AMENDMENT VI

Text: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”

Right to Counsel

Once the suspect is formally charged with a crime (i.e. when an indictment has been handed down) he also acquires a sixth amendment right to counsel which is offense specific

Pretrial Identification

- A. Sixth amendment right to have counsel present at any post-charge lineup; no sixth amendment right to counsel for photo identifications or when suspect is not yet charged
- B. A defendant can attack an identification as denying due process where the identification is unnecessarily suggestive and there is a substantial likelihood of misidentification

Classroom Suggestion

Conduct an unnecessarily suggestive line-up with students and discuss why it is unconstitutional.

- C. Remedy for an unconstitutional identification is exclusion of an in-court identification unless the in-court identification has an independent source; in determining whether an independent source exists, courts will look at the opportunity to observe the defendant at the time of the crime, the ease with which the witness can identify the defendant, and the existence or absence of prior misidentifications.

Confrontation Clause

Gives defendant only the right to cross-examine a witness, and not the right to confront face-to-face or to be present in the same room.

Right of Trial by Jury

There is no constitutional right to jury trial for petty offenses, but only for serious offenses (i.e., if imprisonment for more than 6 months is authorized). Also, there is no right to jury trial in juvenile delinquency proceedings. See McKeiver v. Pennsylvania, 403 U.S. 528 (1971). In Delaware, juries are made up of 12 jurors unless the parties have stipulated otherwise, despite the fact that there is only a constitutional right to six jurors. A defendant has a right to have the venire from which the jury is selected be from a representative cross-section of the community.

AMENDMENT VII

Text: “In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.”

- A. Provides right to jury trial in civil cases only in Federal Court. Does not apply to the States through the 14th Amendment
- B. Under Superior Court Civil Rule 38, either party may make demand for a jury no more than 10 days after the answer is filed. A party can demand jury trial on only certain issues. The demand must specify 12 person jury or it will be considered a demand for only 6 persons. Rule 48 allows the parties to a verdict by majority rather than unanimous.

AMENDMENT VIII

Text: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Death Penalty

- A. Constitutional requirements
 - 1. Any death penalty statute that does not give the defendant a chance to present mitigating facts and circumstances is unconstitutional
 - 2. There can be no automatic category for imposition of the death penalty
 - 3. States may not limit the mitigating factors by statute; all relevant mitigating evidence must be admissible or the statute is unconstitutional
- B. Aggravating factors – Delaware
 - 1. Factors involving the defendant – defendant escaped from custody and was trying to avoid recapture, defendant was under a sentence of life imprisonment at the time, and any previous convictions by the defendant for felonies involving the use of force
 - 2. Factors involving the victim – victim was handicapped or disabled, victim was under the age of 15 or over the age of 61, victim was law enforcement, corrections employee, firefighter, or judicial officer while engaged in official duties, or victim was hostage or prisoner
 - 3. Factors involving the circumstances of the killing – premeditated and substantial planning, for the purpose of pecuniary gain, to prevent the victim from testifying, money was exchanged for the murder, the murder occurred during flight from a serious crime, more than one person died, death was caused by torture, poison, or explosive device, or the murder qualified as a hate crime
- C. Mitigating factors – mental disorder, limited mental capacity, or substance abuse, troubled childhood, prior good deeds or acts, evidence of remorse, or potential for rehabilitation.

AMENDMENT IX

Text: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

- A. Individuals have rights beyond what are actually listed in the constitution.
- B. Has been interpreted to be one of the bases for the right to privacy.

AMENDMENT X

Text: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

Relation of the Federal Government to the States

- A. Valid federal law (either federal statute or executive order) preempts any inconsistent state law, but state law may always provide greater protection as long as the field has not been preempted.
- B. States may not regulate or directly tax federal entities without federal consent.
- C. Under the Twenty-First Amendment, states have the power to control alcohol consumption within their borders.
- D. States have “police powers,” which permit states to regulate the health and well-being of their citizens.