



Right To Counsel

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Background

During the colonial period and the early years of the Republic the practice in the United States was varied with respect to providing [COUNSEL](#) to suspects in criminal cases. The practice varied from the English method, where no counsel was provided to defendants of [FELONY](#) charges, but counsel was made available for defendants of [MISDEMEANOR](#) charges. Rules in a few states allowed for the appointment of counsel where defendants could not afford to retain a lawyer. The Sixth Amendment to the U.S. Constitution states: "in all criminal prosecutions, the [ACCUSED](#) shall enjoy the right... to have the assistance of counsel for his defense." At the time the Sixth Amendment was ratified, Congress enacted two laws that appeared to indicate an understanding that the Sixth Amendment guarantee was limited: counsel would not be denied to those who wished for and could afford a lawyer. Much later—in 1930s—the Supreme Court began to expand the clause to its present scope.

Police officers ask questions of victims, witnesses, and suspects. If individuals feel that they are suspects in a criminal investigation or even that they could later be considered a suspect, they should speak with a lawyer before they speak with law enforcement officers. What they say to their lawyer is confidential and cannot be used against them. However, what they say to the police can be used against them, even if there is no recorded or written record of that conversation.

Individuals can always inform the police officer that they wish to speak with a lawyer before they answer any questions. If they are in [CUSTODY](#) (have been arrested or otherwise detained), the police must stop their questioning and they will be given an opportunity to speak with a lawyer. The police may return and begin to ask them questions again after a reasonable amount of time. If they have not yet spoken with a lawyer when the police return to question them, they may continue to refuse to answer any questions until they have obtained legal assistance.

What the Sixth Amendment Guarantees

The Sixth Amendment guarantees the right to legal counsel at all significant stages of a criminal proceeding. This right is so important that there is an associated right given to people who are unable to pay for legal assistance to have counsel appointed and paid for by the government. The federal criminal justice system and all states have procedures for appointing counsel for indigent defendants. The Sixth Amendment right to counsel has been extended to the following:

- The interrogation phase of a criminal investigation
- The trial itself
- Sentencing
- At least an initial appeal of any [CONVICTION](#)

If individuals are arrested in the United States they have a range of rights that give them certain protections, even if they are not a citizen of the United States. These rights include the following:

- A trial by a jury (in most cases)
- The jury to hear all of the witnesses and see all of the [EVIDENCE](#)
- Presence at the trial and while the jury is [HEARING](#) the case
- The opportunity to see, hear, and confront the witnesses presenting the case against them
- The opportunity to call witnesses and to have the court issue subpoenas to compel the witnesses to appear
- The chance to [TESTIFY](#) themselves should they choose to do so
- The option to refuse to testify
- Access to a criminal defense lawyer. If individuals cannot afford to hire their own criminal defense lawyer, a [PUBLIC DEFENDER](#) will represent them. This lawyer can act on their behalf before, during, and after the trial
- The right to cross-examine the witnesses giving [TESTIMONY](#) against them
- The right to compel the state to prove its case against them beyond a reasonable doubt.

A judge will appoint an attorney for an indigent [DEFENDANT](#); this attorney will be compensated at government expense if at the conclusion of the case the defendant could possibly be imprisoned for a period of more than six months. In reality, judges almost always appoint attorneys for indigents in practically every case in which a jail sentence is a possibility— regardless of how long the sentence may be. Generally, a judge will appoint the attorney for an indigent defendant at the defendant's first court appearance; for most defendants, the first court appearance is an arraignment or a hearing to set [BAIL](#).

The Miranda Case

In 1966, the United States Supreme Court decision in *Miranda v. Arizona* ushered in a period of court-imposed restraints on the government's ability to interrogate suspects it takes into custody. This famous decision focused on Fifth Amendment protections against [SELF-INCRIMINATION](#), but it also spoke to the right to counsel. One of the most important restraints enumerated in the *Miranda* decision is the prohibition against the government's interrogation of suspects or witnesses after the suspect has invoked the right to counsel. Here's what the Miranda warnings generally say:

- You have the right to remain silent.
- Anything you say can be used against you in a court of law.

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- You have the right to have an attorney present now and during any future questioning. The right to have counsel present at a custodial interrogation is necessary to protect the Fifth Amendment PRIVILEGE AGAINST SELF-INCRIMINATION. A suspect detained for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.
- If you cannot afford an attorney, one will be appointed to you free of charge if you wish. The Supreme Court found it necessary to mandate notice to defendants about their constitutional right to consult with an attorney. They went one step further and declared that if a defendant is poor, the government must appoint a lawyer to represent him.

The Court further instructed the police that if a suspect says he wants a lawyer, the police must cease any interrogation or questioning until an attorney is present. Further, the police must give the suspect an opportunity to confer with his attorney and to have the attorney present during any subsequent questioning.

Individuals need to remember that they can be arrested without being advised of their Miranda Rights. The Miranda rights do not protect individuals from being arrested, but they help suspects keep from unwittingly incriminating themselves during police questioning.

All the police need to arrest a person is PROBABLE CAUSE to believe a suspect has committed a crime. Probable cause is merely an adequate reason based on the facts or events. Police are required to read or give suspects their Miranda warnings only before questioning a suspect. Failing to follow the Miranda rules may cause suspects' statements to be INADMISSIBLE in court; the original arrest may still be perfectly legal and valid.

Police are allowed to ask certain questions without reading the Miranda rights, including the following:

- Name
- Address
- Date of birth
- Social Security number
- Or other questions necessary to establishing a person's identity.

Police can also give alcohol and drug tests without Miranda warnings, but individuals being tested may refuse to answer questions.

Invoking the Right

Because the invocation of Miranda rights, particularly the right to counsel, has created significant burdens on law enforcement's ability to conduct effective interrogations, several recent court decisions have begun to limit a custodial suspect's ability to invoke that right. Specifically, the Court wants to ensure that a suspect's invocation of rights is not frivolous. To do this, courts require that suspects invoke their right to counsel be made unequivocally, as well as in a timely manner.

If individuals are arrested or questioned, the burden is on them to invoke their right to counsel in a clear and unequivocal manner. They should receive notice that they have the right to an attorney, but law enforcement is not required to ask them whether they want an attorney, nor do they need to ask them clarifying questions if they are unclear in their request for an attorney. Not only must invoking the right to counsel be unequivocal, but courts also have begun to insist that invocations of the Miranda right to counsel be made in a timely manner. Individuals should not wait to be asked if they want a lawyer, nor should they expect the police to

read them Miranda warnings before they ask for counsel.

Judicial Proceedings Before Trial

Generally, defendants are entitled to counsel from the time of their arraignment until the beginning of their trial. This is because the defendant's need for consultation, investigation, and preparation are critically important for a fair trial. The courts have gradually expanded this idea to the point that there is a legal concept of "a critical stage in a criminal proceeding" that indicates when a defendant must be represented by counsel.

Custodial Interrogation

Defendants who have been taken into custody and have invoked their Sixth Amendment right to counsel with respect to the offense for which they are being prosecuted may not later waive that right. However, defendants may waive their right under Miranda not to be questioned about unrelated and uncharged offenses.

What happens if the police violate the right to counsel? The remedy for violation of the Sixth Amendment rule is that any statements obtained from defendants under these circumstances will be excluded from the evidence at trial. There is one important exception to the Sixth Amendment [EXCLUSIONARY RULE](#): evidence obtained from defendants held in custody that violates the Sixth Amendment may be used for the sole purpose of impeaching the defendants' testimony at trial.

Lineups and Other Identification Situations

Lineups are considered to be "critical stage" and the prosecution may not admit into evidence in-court identification of defendants based on out-of-court lineups or show-ups if they were obtained without the presence of defendant's counsel. Courts have found that a defendant's counsel is necessary at a [LINEUP](#) because the lineup stage is filled with much potential for both intentional and unintentional errors. Without the defendant's attorney present at the lineup, these errors may not be discovered and remedied prior to trial.

This rule does not apply to other methods of obtaining identification and other evidentiary material relating to the defendant, including the following:

- Blood samples
- DNA samples
- Handwriting samples
- Vocal samples

In these cases, there is far less chance that the absence of counsel at the time the evidence is obtained from the defendant might prevent the defendant from getting a fair trial.

The Sixth Amendment does not guarantee the presence of the defendant's counsel at a pretrial proceeding unless the physical presence of the defendant is involved. Furthermore, the defendant's presence must be required at a trial-like confrontation at which the defendant requires the advice and assistance of counsel.

Post-Conviction Proceedings

In a criminal trial, the law requires a lawyer for defendants to be present at the sentencing stage of the trial. If individuals are convicted of a crime and are placed on [PROBATION](#), they still have the right to counsel at a later hearing on the revocation of their probation and imposition of the deferred sentence. Due process and [EQUAL PROTECTION](#) rather than Sixth Amendment rights, however, will apply in the following three post-trial hearings:

1. For granting [PAROLE](#) or probation
2. For revoking parole when parole was imposed after sentencing
3. For prison disciplinary hearings

Adequate Representation or Ineffective Assistance of Counsel

Indigent defendants who are represented by appointed lawyers and defendants who can afford to hire their own attorneys are both entitled to adequate representation. But "adequate representation" does not mean perfect representation. However, an incompetent or negligent lawyer can so poorly represent a client that the court is justified in throwing out a guilty verdict based on the attorney's incompetence.

If a defendant's lawyer is ineffective at trial and on direct appeal, the defendant's Sixth Amendment right to a fair trial has been violated. In analyzing claims that a defendant's lawyer was ineffective, the principal goal is to determine whether the lawyer's conduct so undermined the functioning of the judicial process that the trial cannot be relied upon as having produced a just result. Proving this requires two steps:

1. The defendant must show that his own lawyer's job performance was deficient. The defendant must prove that his counsel made errors so serious that the lawyer did not function as the counsel guaranteed the defendant by the Sixth Amendment.
2. The defendant must show that the deficient performance unfairly prejudiced the defense. The defendant must show that his lawyer's errors were so serious as to wholly deprive the defendant of a fair trial.

Unless a defendant proves both steps, the conviction or sentence cannot be said to result from a breakdown in the judicial process such that the result is unreliable. When courts review a lawyer's advocacy of a defendant, they are deferential. Courts are bound by a strong presumption that any given lawyer's conduct falls within the range of reasonable professional assistance.

Additional Resources

"*Consumer's Guide to Legal Help on the Internet*". American Bar Association, 2002. Available at <http://www.abanet.org/legalservices/public.html>

Gideon's Trumpet. Lewis, Anthony, Vintage Books, 1989.

Miranda v. Arizona: The Rights of the Accused (Famous Trials). Hogrogian, John G., Lucent Books, 1999.

The Right to the Assistance of Counsel: A Reference Guide to the United States. Tomkovicz, James J. Greenwood House, 2002.

The Sixth Amendment in Modern American Jurisprudence: A Critical Perspective (Contributions in Legal Studies). Garcia, Alfredo, Greenwood Publishing Group, 1992.

Organizations

Federal Defender's Association (FDA)

8530 Wilshire Blvd, Suite 404

Beverly Hills, CA 90211 USA

Fax: (310) 397-1001

E-Mail: defense@afda.org

URL: <http://www.afda.org/>

Legal Services Corporation (LSC)

750 First Street NE, Tenth Floor

Washington, DC 20002-4250 USA

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E-Mail: info@lsc.gov

URL: <http://www.lsc.gov/>

National Association of Criminal Defense Lawyers (NACDL)

1025 Connecticut Ave. NW, Suite 901

Washington, DC 20036 USA

Phone: (202) 872-8600

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URL: www.nacdl.org

National Legal Aid & Defender Association (NLADA)

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