



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

The Bill of Rights: The Rights of the Accused **by Jacob G. Hornberger**

Among the legitimate purposes of government is the punishment of those who violate the rights of others through the commission of violent or forceful acts, such as murder, rape, robbery, theft, burglary, or trespass. As the Framers understood, however, the matter does not end there because an important inquiry immediately arises: How do we ensure that people are not convicted of crimes they haven't committed? That's the purpose of the Sixth Amendment — to protect the innocent from being convicted and punished.

The Sixth Amendment reads as follows:

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 defence.

The idea behind the right to a speedy trial is to ensure that a federal prosecutorial hammer is not held over someone's head for an indefinite period of time and to prevent indefinite detentions of people accused of crimes. The importance of this right was emphasized by the U.S. Supreme Court in *Klopfer v. North Carolina* (1967):

We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, "We will sell to no man, we will not deny or defer to any man either justice or right"; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166).

In *U.S. v. Ewell* (1966), the Supreme Court stated that the provision is “an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself.”

The idea of a public trial is to ensure that government prosecutorial actions are exposed to public view, so as to discourage abuses of prosecutorial power. The old English Star Chamber, whose proceedings were held in secret and which was a model for prosecutorial abuse, comes to mind. So does Germany’s People’s Court under the Hitler regime. As the Supreme Court stated in *In Re Oliver* (1948),

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the lettre de cachet. All of these institutions obviously symbolized a menace to liberty.... Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.

Jury trials and their location

As I pointed out in my January [Freedom Daily](#) article, trial by jury is one of the ultimate safeguards of a free society because of the power that the jury has to acquit an accused if it believes that the law that he is accused of violating is an unjust law.

The reason that federal trials are required to be held in the state and district where the crime was committed is to ensure that federal officials don’t require a defendant to travel hundreds or thousands of miles away from where the witnesses probably reside and where the defendant might live.

Formal notice of the charges

The right to be informed of the nature and cause of the accusation requires a formal written charge (i.e., a grand jury indictment) detailing the offense with which the accused is charged, which better enables him to defend himself against the charges.

Among the most important rights is the right to confront the witnesses on whose testimony the government is relying to prosecute the accused. This right involves two important legal principles — hearsay and cross-examination.

Hearsay is a statement that is made by a person outside the courtroom and, therefore, not subject to being questioned or challenged through cross-examination by the accused or his lawyer. For example, suppose that during a criminal investigation, witness Smith tells Officer

Jones, “I saw Roberts shoot the victim.” At trial, the government calls Officer Jones to the stand and asks him to relate what witness Smith told him during the investigation. Officer Jones says, “He told me that he personally saw the defendant shoot the victim.”

The officer’s statement would constitute hearsay because he’s relating what someone else told him outside the courtroom. While Roberts’s attorney could cross-examine the officer and challenge whether witness Smith actually told him that, the problem that the defense attorney really faces is that he can’t cross-examine witness Smith about the accuracy of his statement.

Why is cross-examination so important? Because the jury is then able to carefully observe the demeanor of the witness as his version of the facts is being challenged through a rigorous cross-examination. The jury is better able to judge whether the witness is lying (which witnesses do sometimes) or telling the truth. As the U.S. Supreme Court put it *Pointer v. Texas* (1965),

It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.... The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution.

By the same token, the accused has the right “to have compulsory process for obtaining witnesses in his favor.” What that means is that if the accused needs the testimony of a reluctant or recalcitrant witness to help establish his innocence, he has the right to secure the issuance of a federal subpoena, which is served on the witness by a U.S. marshal and which orders the witness to appear at trial, on pain of fine and imprisonment for failing to do so.

(Whether the compulsory-process clause violates libertarian principles is an interesting issue for another time.)

Right to counsel

Finally, the Sixth Amendment guarantees that a person accused of a crime has the right to have an attorney defend him in court. The reason is obvious — given the enormous resources of the government, the tremendous skill of government attorneys and the complexities of a criminal trial, an accused would stand little chance if he were required to defend himself. The Supreme Court explained in *Powell v. Alabama* (1932),

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Finally, we should note that pursuant to the express language of the Sixth Amendment, all these procedural rights belong not only to Americans but also foreigners whom U.S. authorities charge with a crime.

Is the Sixth Amendment relevant today? You bet it is, especially given the Pentagon's use of military tribunals in another country, Cuba, for people accused of terrorism. Ever since their arrest, people accused of terrorism at Guantanamo Bay have been indefinitely detained and denied the right to counsel, due process of law, habeas corpus, trial by jury, and even the right to know exactly what they are being charged with. Most of the proceedings are as secret as they were in the Star Chamber and in Hitler's People's Court. Moreover, the federal government is doing everything it can to deny accused terrorist Zacharias Moussaoui the right to cross-examine adverse witnesses and to summon favorable witnesses in his behalf in his federal court prosecution.

Make no mistake about it: If the feds treat foreigners accused of terrorism in this way, they'll do the same to Americans. Just ask Jose Padilla, an American whom the Pentagon has held in a military dungeon for almost three years and whom they have denied all the rights enumerated in the Sixth Amendment.

Our ancestors bequeathed to us the finest criminal justice system in history, a system in which every American should take great pride. As the great criminal defense attorney Edward Bennett Williams put it, "Civil liberties are a great heritage for Americans. They are not rights that the government gives to the people, they are the rights that the people carved out for themselves when they created the government."

Jacob Hornberger is founder and president of The Future of Freedom Foundation.

This article was originally published in February 2005.