

Constitutional Rights, by Judge Karnow

Constitutional Rights

The notion of “constitutional rights” is often tossed about without a good understanding of what it means, and without a sense of the unique position citizens of the United States enjoy as a result of those rights.

This article outlines some of those rights, and suggests a series of issues and questions for discussion. Generally I do not give answers here, keeping the focus on questions, and encouraging readers’ thinking on how our underlying constitutional values inform how we think about these questions.

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Introduction

The idea of “constitutional rights” usually refers to certain rights individual citizens have as against governmental power. These rights are guaranteed by the enduring central document of our nation, the Constitution of The United States—the Constitution of the federal government which reigns supreme throughout the country. States, such as California, also have their own constitutions, and often the rights found there are similar to those in the federal Constitution, but here I’ll limit my comments to the federal Constitution.

People referring to ‘constitutional rights’ usually mean rights in the amendments to the Constitution which became effective in 1791, some years after the original Constitution in 1787 but now an integral part it. People usually mean the rights of the First Amendment (to speak, to freedom of religion, to assemble and petition the government). Or they may mean the Fourth Amendment right to be free of unreasonable searches and seizures; or perhaps the Fifth Amendment right to not be compelled to be a witness against oneself. There are other rights as well, such as to a speedy and public trial, to a jury, and others, but here I’ll provide a short discussion of parts of the First, Fourth and Fifth amendments.

But first, a few general points. These rights were originally drafted to be effective as against the federal government- not state governments, not other people, and not companies. After the Civil War, the Supreme Court interpreted then new amendments (the so-called “Civil War Amendments” to the Constitution) to require the First, Fourth, and Fifth Amendments (and others) to also apply to *state* (and local) governments. But it’s still true that they only apply as against *government*: no matter what your kids protest, they have no first amendment right to say anything they want at the dinner table! And one cannot invoke the Fourth Amendment against a *private* company that, for example, searches you on your way into the office (although that might violate other laws).

Another general point. Because these rights are in the *Constitution*, they cannot be taken

away or diminished simply on the say-so of Congress, or the President, or other governmental officials. Even a unanimous vote of both the House of Representatives and of the Senate, agreed to by the President of the United States, cannot change the Constitution. The constitution can only be changed by a formal amendment, which requires the consent of $\frac{3}{4}$ of the states in the union.

The First Amendment

The First Amendment actually contains a series of guarantees: free speech, a bar on governments establishing religion, a guarantee of free exercise of religion, a right of peaceable assembly, and a right to petition the government. That's a lot, but I'll just focus on the free speech component here.

The title of a recent book by Anthony Lewis on the First Amendment gets it just right—"Freedom For The Thought we Hate." We don't need guarantees for *popular* speech, or for words or expression that everyone enjoys. We need the First Amendment when the speech is unpopular, or hated, when it makes the community angry—when it's something no one wants to hear. Some of that hated speech is hated for good reason-- perhaps it's racist, or demeaning. For example, recently, the Supreme Court upheld the right of what appears to be a form of religious group to make hateful comments and protest in proximity to military funerals. Sometimes the speech is hateful to a local community, but speaks to a worthy goal: the civil rights protests in Alabama in the 1960s comes to mind. The Constitution doesn't pretend to decide whether speech is good or bad, worthy or not—generally we wouldn't want judges making those sorts of decisions—it just protects the right to speak it all, free of governmental bans.

This doesn't mean that the government can't *regulate* speech- the freedom to speak doesn't block governments from setting reasonable times and places for protests, and doesn't block laws against terroristic threats, blackmail, or breaking into a home to deliver an extortionate demand—all actions which obviously involve some speech.

Drawing the right line between (i) "reasonable" regulation and (ii) regulation that actually interferes with free speech rights can be a very difficult problem, and has led to some very interesting decisions in the courts. For example, past decisions have dealt with issues such as these: Am I within my First Amendment rights to scream "fire" in a crowded theater if there is no fire? Are limits on campaign contributions (i.e. no more than \$1000) invalid as restrictions on free speech? Do free speech rights protect the wearing of clothing with rude and offensive words? Does it matter *where* offensive clothing is worn, such as school, in court, or the street? If so, who decides what "offensive" means? Are there free speech rights not to wear *any* clothes in public? How about "offensive" books, such as those some might consider to be overtly racist—is there a Constitutional rights to publish them? Distribute them? Distribute them *anywhere*? Are First Amendment rights implicated by governmental requirements that violent video games be labeled in a certain way, or be sold only to people above a certain age?

Fourth Amendment

This provision bans the government from conducting “unreasonable” searches and seizures. (It also has provisions concerning search warrants, which I won’t discuss here.) A search or seizure occurs every time a police officer stops a car, or makes an arrest, or TSA stops and searches you at an airport, or the government opens your mail, or places a wiretap on suspected criminals’ telephone lines. It happens when the government takes a sample of your blood (they are “seizing” your blood) when you’re suspected of driving under the influence. It happens when officers come into your house to search for something, or stop you while riding your bicycle. The sometimes difficult legal question is this: When are those stops and seizures “reasonable” and when are they not?

Usually, the governmental agent (such a police officer) must have some reasonable suspicion that the person to be stopped is connected with some crime. The police cannot randomly stop people, hoping to discover evidence of a crime (such as drugs in their pocket). They need a reason.

The reason might be: a report of a robbery with the description of the assailant—and the officer sees person who matches the description. Or perhaps a car is weaving all over the road- the officer can stop the car. Perhaps a confidential reliable informant says that a politician is taking bribes- that might be enough to allow the officers to get a warrant to tap the politician’s telephone calls.

In some circumstances, the officers don’t need any particularized suspicion or reason. Police officers can ask anyone for *permission* to search, and if they get consent—real consent—they can search. Court opinions have also singled out airports as places where searches can take place, even if the officers have no reason to think an individual target has been involved with crime. Part of the theory here is that by deciding to fly, we have in effect ‘consented’ to the security procedures. By the same token, people are routinely searched coming into courthouses and some governmental offices. Borders are also special places, and the government can search anyone, including for example their bags and computers, as they cross.

In the Fourth Amendment area, there are many interesting issue. At the time of this writing, the Supreme Court is grappling with a new issue: is it “search” or seizure within the meaning of the Fourth Amendment if police officers place a GPS tracking device on a suspect’s car to see where it goes? We know searches without a particular reason can take place at a border—how wide is the “border”? Does that include a location twenty feet past the border gate? Ten miles away on the only road that connects a town to the border? How good a reason must the officer have to stop a man on a bicycle: suppose the man is unwrapping a small piece of silver foil, which looks like it could be drugs—or perhaps an innocent piece of chewing gum? Suppose a man is found walking half a mile away from a shooting at 2 in the morning—can the police stop on ‘reasonable suspicion’ of being involved in the shooting? Suppose no one else is around? Suppose there are ten other people around? Is the use of a drug-sniffing dog a “search” that may be protected under the Fourth Amendment?

In all these, and many more, cases, courts must determine what “reasonable” means, in order to decide if there has been a Fourth Amendment violation. Why? How is that courts spend so much time on Fourth Amendment issues? Well, it comes up usually in a criminal case. Evidence has been seized as a result of the stop (or search), say, drugs or a gun has been found on the defendant. The government wants to use this evidence at trial. If the evidence has been obtained as a result of an *illegal* search or seizure i.e., in violation of the Fourth Amendment, the court may “suppress the evidence,” that is, ban it from the trial. (This is sometimes known as the exclusionary rule.) Excluding the evidence often results in the dismissal of the charges. Thus it is that courts handle Fourth Amendment issues every day.

Fifth Amendment

Just as with the Fourth Amendment, there are many components to the Fifth Amendment. And again, these are all phrased as guarantees that each of us in this Nation has as against certain kinds of governmental action: action by federal, state, and local officials. I will only mention one of the many Fifth Amendment guarantees here: that which prohibits being compelled to be a “witness” against oneself – the right against self-incrimination. If you are arrested and put on trial for a crime, the government cannot call you to the stand to ask you questions.

Why would this be?—presumably, you as the accused, are in the best position to testify, and know the most concerning whether you are guilty. And we can expect the jury to be very interested in your comments.

The rationale behind the Fifth Amendment guarantee against compelled self-incrimination is fairly obvious: It ensures that suspects will not be coerced, beaten, or otherwise tortured into giving confessions. Not only are confessions given under torture of dubious reliability, but on principle we are revolted by legal systems which depend primarily on confessions, because those systems encourage governmental overreaching, arrests without cause and for ulterior motives, and are not perceived as legitimate by the people. To make sure that governmental authorities do not try to extract confessions in violation of this constitutional amendment, we have, as with the Fourth Amendment, an exclusionary rule. Because we are in particular concerned that confession are voluntary, the courts also require the police to give suspects in custody what are called the *Miranda* warnings (from the name of the case that generated this rule). Why does *Miranda* apply only when suspects are custody? Because being in custody, alone, *is* a form of coercion: people are especially liable to succumb to express and implied threats of pressure under these circumstances. Imagine an exaggerated situation: The suspect is arrested, in handcuffs, in a jail cell, surrounded by twenty police officers with their guns drawn: then one of them asks, “did you rob the bank?” Would a response really be entirely uncoerced under those circumstances?

Under *Miranda*, therefore, suspects must be *told* they have the right not so speak. If a confession is obtained before the *Miranda* warnings were given (and the suspect is in custody), or if the judge finds for some other reasons the statement was not voluntary (i.e.

there was torture), then the statement is excluded from the trial—the jury will never hear it. This exclusionary rule, like the one that applies under the Fourth Amendment, is designed to ensure there is no incentive for the police to avoid complying with the Constitution.

As with so many constitutional questions, many issues come up in this area. When is a suspect “in custody”? Suppose he is detained for a few seconds while the police check his license—is that “custody”? Or he is handcuffed while waiting for an eyewitness to show up for an identification. Suppose the police think a suspect on the sidewalk is armed and so they approach him with guns drawn—is he really in “custody” yet? Other issues come up with the timing of the *Miranda* warnings: suppose the suspect just blurts out a confession before the police even have time to give the warnings? Should that be suppressed under the exclusionary rule? What is the right result when the warnings are given on one day, the suspect then sits in jail for five days before he is brought into an interview room with seven armed cops and he *then* confesses—should the police have given the warnings again? Does it matter if the suspect, after the original warnings, said he invoke his rights and did *not* want to talk? Does the Fifth Amendment apply at hearings other than criminal trials—for example, can you be compelled to testify at Congressional hearings, or at the trial of someone else? (Hint: No. The rights apply to any governmental compulsions). Is it a violation of your Fifth Amendment rights to be compelled to give a DNA sample, or blood sample?

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These are only a few of the many interesting, and sometimes difficult, issues of constitutional law that courts across the country must deal with—and we have only outlined a few of the constitutional rights. Sometimes the answers are fairly straightforward; sometimes they are difficult, and reasonable people can differ on the answer. But the bedrock guarantees are there, a permanent and defining feature of our Nation, governed by the rule of law, enforced by our judges, which no one can ever take away.