The Breakfast Club

Constitutional Minute for 18 April 2023

Right #13: Protection Against Self-Incrimination

If I had a dollar for every time I have seen an actor on TV "plead the Fifth," I'd be a rich man. We all would. It is the most ubiquitous use of the Bill of Rights in movies and TV. Just name any other clause which gets that much "screen time:" "*On advice of counsel, I refuse to answer that question on the grounds that it may tend to incriminate me*."

Many Americans can come close to reciting the Miranda warning verbatim based on the hundreds if not thousands of times we have heard it recited.

In a criminal trial, a jury is not allowed to consider whether or even how many times a defendant "takes the Fifth," and we all know the defendant is not even required to take the stand in his own defense. In a civil trial, however, the jury is allowed to consider in their deliberations whether a defendant pleads the Fifth or not.

The historical source of the Self-Incrimination Clause was the legal maxim "*nemo tenetur seipsum accusare*," which is translated from the Latin as: "no man is bound to accuse himself."

By the time the Fifth Amendment was ratified in 1791, seven state constitutions contained self-incrimination protections, some dating back to 1776,[i] and five states recommended the clause be added to a Bill of Rights as they ratified the Constitution.[ii]

In a 1940 case, *Chambers v. Florida*) the Court declared a confession obtained after five days of prolonged questioning to be coerced and thus inadmissible. Four years later, in *Ashcraft v. Tennessee*, a suspect who had been interrogated continuously for thirty-six hours under electric lights "confessed" but the confession was also declared coerced. Police interrogators simply shifted to more subtle interrogation techniques.

The "right to remain silent" became codified in constitutional law through the famous *Miranda v. Arizona* case,[iii] from which we get our "Miranda Rights." From the majority opinion in that case come these words:

> "The change in the English criminal procedure [adding a protection from self-incrimination] seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

"Impregnability?" Not so as thirty subsequent "Miranda" cases considered nuances in its application.[iv]

In 1980 (*Rhode Island v. Innis*), the court decided you don't have to be in a formal interrogation before you can invoke the right, any questioning that police should know "are reasonably likely to elicit an

incriminating response from the suspect" counts. IOW, whether guilty or not, DON"T ANSWER ANY QUESTIONS!!

In the 2010 case of *Berghuis v. Thompkins*,[v], the Supreme Court held that a defendant in custody must *explicitly* invoke their right to not answer any questions, that it is not enough to simply remain mute. The Court held that unless and until the suspect states that they are relying on this right, any subsequent voluntary statements they make may be used in court and police may continue to interact with (or question) them. Furthermore, any voluntary reply even after lengthy silence can be construed as implying a waiver of the right.

In 2013, the Supreme Court ruled you no longer must be read your "Miranda rights" if you have not been arrested, stating that this right of self-incrimination was now commonly known. Anything you say can be used against you, even if you have not been read your "rights."

In the 2022 case of *Vega v. Tekoh*, if you are *not* read your Miranda warning and any voluntary or compelled statements are used against you in court, you many not sue the arresting officer for not reading you the warning.

Two weeks ago, we covered Grand Juries. An individual called to testify before a Grand Jury does not have the right to have an attorney present during their testimony. They would, however, be free to leave the Grand Jury room whenever necessary to consult with their attorney before returning to answer a question (or invoke the Fifth).

Note however that the self-incrimination clause only protects you when answering questions before a unit of government, whether state or federal (yes, the clause has been incorporated), not when testifying before a non-governmental or private body. There, your refusal to answer questions can result in retaliatory or disciplinary action.

For further reading:

Is There a Right to Remain Silent?: Coercive Interrogation and the Fifth Amendment After 9/11 (Inalienable Rights) 1st Edition , by Alan M. Dershowitz

Miranda: The Story of America s Right to Remain Silent Hardcover, by Gary L. Stuart

Next week: Right #14: Due Process of Law Guarantee

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[i] Massachusetts; New Hampshire, Delaware, North Carolina, Pennsylvania, Vermont; and Virginia.
[ii] The ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally recommended this right be protected.
[iii] *Miranda v. Arizona*., 384 U.S. 436, 442-443 (U.S. 1966)
[iv] https://supreme.justia.com/cases-by-topic/miranda-rights/
[v] *Berghuis v. Thompkins*, 560 U.S. 370 (2010)