

The Breakfast Club
Constitutional Minute for 27 Jun 2023
Right #21: The Right to the Assistance of Counsel

“In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”

We finish up the 6th Amendment this week; you thought it would never end, right?

If you were accused of treason in “merry old England,” you could not be assisted by counsel at trial, you were on your own. And since you could be accused of treason for merely *imagining* the death of the King, you had to watch what you said, even to your closest friends. You would definitely *not* want to discuss that dream you had the previous night where the King and his head became separated. Recall Patrick Henry’s remarks in his famous speech to the Virginia House of Burgesses on May 29, 1765, which he concluded with: “*Caesar had his Brutus; Charles the First his Cromwell; and George the Third . . .*” Henry answered the shouts of “*Treason*” with “*If this be treason, make the most of it;*” which none of the Burgesses seemed ready to do.

After the Glorious Revolution in 1688, Parliament removed the prohibition against the use of counsel in the case of treason. The first colony to incorporate this right into their statutes was Rhode Island in 1660. By 1787, most states guaranteed such a right. Wikipedia informs us that: “of the 194 constitutions in force today, 153 have language to this effect.”¹

The right to counsel mentioned in this amendment applied only to federal court proceedings until 1963 ([Gideon v. Wainwright](#), 372 U.S. 335) when the Supreme Court finally got around to incorporating the right. The Gideon case proved to be one of the Supreme Court’s landmark cases (see Recommended Reading).

In [Moran v. Burbine](#), 475 U.S. 412, 431 (1986), the Court decided that this right “becomes applicable only when the government’s role shifts from investigation to accusation.” Another source stated something similar: “when an official’s tone or words becomes accusatory,” it is time to insist your attorney be present (if you hadn’t already done so).

The Supreme Court has also decided that the right to counsel includes the right to “effective” counsel. I pity the poor public defender juggling a large case load; he or she might be the most susceptible to an “ineffective counsel” charge. The Supreme Court came up with a test that helps them determine whether the defense was effective or not. But note, if your counsel has been deemed to be ineffective, you don’t get off “scot-free,” you’ll get a new trial.

In [Faretta v. California](#) (1975), the court held that a criminal defendant has the right to voluntarily revoke this right and choose *pro se* representation at trial (representing one’s self). But keep in mind the famous saying: “*A person who represents himself has a fool for a client.*”²

One important point to note, the 6th Amendment clearly states that this right only applies to *criminal* prosecutions, not civil actions. But [*In re Gault*](#), 387 U.S. 1 (1967), the Court established a right to counsel for *juvenile delinquency proceedings* using the 14th Amendment's Due Process clause. What about the states? "All states provide a right to counsel by either statute, court decision, or court rule in at least *some* civil proceedings, with the most commonly covered proceedings being termination of parental rights, abuse/neglect, civil commitment, paternity, and civil contempt."³ Bottom line: If you are not a juvenile delinquent and you want a lawyer in a civil action you will probably need to hire one, or find one willing to work *pro bono*.

Consulting with your defense counsel when you are incarcerated can be a challenge, but that access must be provided. In [*Geders v. United States*](#), the Court held that a trial judge's order preventing a defendant from consulting with his counsel during a 17-hour overnight recess between the direct and cross-examination, ostensibly to prevent the coaching of the defendant, deprived the defendant of his right to assistance of counsel.

One question that comes up often is: what rights do illegal immigrants have; does the public have provide them with free legal services when they challenge their detention in court? Apparently, we are, as [this article](#) explains.

About here is where I would insert some lawyer jokes, or "counselor jokes" in keeping with the 6th Amendment. There are [large](#) and [small](#) collections of them on the web. But I have too much respect for our Breakfast Club lawyers to do that. There are four that I know of in three different Clubs, perhaps there are others. What would we ever do without them?

Your right to have "the Assistance of Counsel" for your defense may not seem too important...until you really need it. Be sure to thank "Jemmy" Madison for including it in our Bill of Rights next time you see him.

Now, these two lawyers walk into a bar, see, and.....

For further reading:

[Gideon's Trumpet: How One Man, a Poor Prisoner, Took His Case to the Supreme Court-and Changed the Law of the United States](#), by Anthony Lewis, 1989.

[Free Justice: A History of the Public Defender in Twentieth-Century America \(Justice, Power, and Politics\)](#) by Sara Mayeux, 2020.

Next week: Right #22: Right to a Jury in Common Law Cases (on to the 7th Amendment).

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¹ https://en.wikipedia.org/wiki/Right_to_counsel

² Commonly attributed to Abraham Lincoln, but not located in any of his writings. Found instead in a 1682 book "Humane Prudence, or, The Art by which a Man May Raise Himself and Fortune to Grandeur" by William De

Britaine: *“Take the Advice of some Prudent Friend; for he who will be his own Counsellour, shall be sure to have a Fool for his Client.”*

³ https://en.wikipedia.org/wiki/Right_to_counsel#cite_note-56