CONSTITUTIONALLY *Speaking*

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Framers of the U.S. Constitution Valued Silence

If you've ever watched an episode of *Law & Order* or some other police procedural, you're probably familiar with the Self-Incrimination Clause of the Fifth Amendment, which states, "No person…shall be compelled in any criminal case to be a witness against himself…"

The concept behind the right against self-incrimination, also known as "taking the fifth" and "remaining silent," is that individuals charged with a crime should be proven guilty by the government. They should not be required to prove their innocence.

The Framers of the U.S. Constitution saw firsthand the way a government can abuse the rights of citizens. George Thomas, a professor at Rutgers Law School in Camden who teaches courses on criminal law and constitutional law, says the Framers were heavily influenced by England's Star Chamber.

The Star Chamber was an English court in existence from the late 15th century up to the mid-1600s. It was originally established to enforce laws against socially and politically prominent people. The theory was that the Star Chamber court was needed because ordinary courts would be too intimidated to convict the powerful of criminal acts. Later, it would be used as an instrument of oppression rather than justice.

"The Star Chamber had the power to require people to show up and swear an oath to tell the truth," Professor Thomas says, referring to the coercive ex officio oath

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Explaining the Double Jeopardy Clause

Can you imagine going through the anxiety and expense of a trial, ultimately being **acquitted** of the crime you're accused of only to be tried again for the same crime? The Founding Fathers could, and they addressed it in the Fifth Amendment to the U.S. Constitution.

The Fifth Amendment states in part, "…nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb…" This is known as the Double Jeopardy Clause, and it prevents the government from prosecuting someone for the same crime once they have been either acquitted or convicted.

George Thomas, a professor at Rutgers Law School in Camden who teaches courses on criminal law and constitutional law, explains that the framers of the U.S. Constitution were influenced by *Commentaries on the Laws of England*, a treatise written by

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Hands Off My Property! — The Takings Clause of the Fifth Amendment

While the Fifth Amendment includes rights that are mostly focused on criminal law, it also includes what is known as the Takings Clause, which reads, "… nor shall private property be taken for public use, without just compensation." The Takings Clause is also known as the power of **eminent domain**, a concept coined by a Dutch jurist in the 17th century that recognizes the power of the government to take private property for public use.

Essentially, the clause means the government can take your private property if the purpose of the seizure is for public use. However, before they seize it, the government must compensate you for that property. "Just compensation" has come to mean the fair market value for the property.

"The Founders placed great value on private property rights and therefore wanted to ensure it would be well protected," says Ilya Somin, a professor at Antonin Scalia Law School at George Mason University in Virginia.

John Adams once said, "Property must be secured, or liberty cannot exist." At the Constitutional Convention of 1787, Alexander Hamilton proclaimed, "One great object of government is the personal protection and security of property." James Madison, who is the author of the Fifth Amendment and known as the Father of the U.S. Constitution, wrote in the Federalist Paper No. 10, "The first object of government is the protection of different and unequal faculties of acquiring property."

Public use morphs into public purpose

The first ruling from the U.S. Supreme Court on eminent domain came in 1875 with the case of *Kohl v. United States*. In that case, the federal government wanted to seize land in Cincinnati, Ohio for the construction of a post office.

In the Court's majority opinion, Justice William Story wrote: "The right of eminent domain was one of those means well known when the Constitution was adopted and employed to obtain lands for public uses…The Constitution itself contains an implied recognition of it beyond what may justly be implied from the express grants. The fifth amendment contains a provision that private property shall not be taken for public use without just compensation. What is that but an implied assertion, that, on making just compensation, it may be taken?"

The Takings Clause stipulates that the taking of property should be for public use purposes. Public use was originally interpreted as the building of roads, bridges or schools—projects that benefit the general public.

U.S. Supreme Court decisions, however, have expanded the definition and use of the eminent domain power to include public purpose. Timothy Duggan, an eminent domain attorney in Hamilton who chairs his firm's Condemnation, Redevelopment, and Eminent Domain Group, says, "The distinction between public use and public purpose is often blurry, with the term 'public use' evolving over time."

With the 1954 case of *Berman v. Parker*, the Court held that private property could be taken with just compensation if the taking was for a public purpose. The Court unanimously ruled that, "If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for

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redevelopment would suffer greatly."

For years, the use of eminent domain for redevelopment was limited to condemned or **blighted** areas. In eminent domain law, "blight" refers to the condition or decay in a property or area that could negatively impact the surrounding environment.

With its 5-4 decision in *Kelo v. City of New London* [Connecticut], handed down in June 2005, the U.S. Supreme Court broadened the public use basis for eminent domain to include property that was not blighted and was economically viable on its own. In addition, the decision allowed the government to use the power to benefit a private entity.

"The Court allowed the taking, finding the economic benefits of the project served a public purpose, even though there was no use of the property by the public," says Duggan.

In *Kelo's* majority opinion, Justice John Paul Stevens said that New London had the authority to take more than 15 private properties as long as the owners were fairly paid. The land would be used as part of a large-scale project by a private company to create economic development, new jobs, and increase tax revenue for the New London area.

"Beginning in the early 20th Century, the United States moved from a legal regime [system] where the government was often tightly constrained in its ability to take property to one where takings like those in *Kelo* were far from unusual," Professor Somin wrote in his book, *The Grasping Hand*. "Gradually, relatively narrow definitions of 'public use' were displaced by the doctrine that government could condemn property for virtually any 'public purpose,' defined broadly to include almost any potential benefit that might be created by a taking."

Justice Sandra Day O'Connor voiced concern over the *Kelo* decision and what it would mean for the poor in her **dissenting opinion**.

"Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public," wrote Justice O'Connor. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. The Founders cannot have intended this perverse result."

Eminent domain in New Jersey

Justice Stevens noted in the Court's *Kelo* ruling, "Nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power." All 50 states have laws governing eminent domain.

According to Duggan, there are New Jersey laws that help protect property owners. In one law, he says the government has an obligation to enter into bona fide negotiations with a property owner before filing a condemnation complaint.

"The purpose of this requirement is to provide the property owner with an opportunity to obtain a fair price and avoid litigation," Duggan says. "The law also provides benefits for tenants located at a property taken by the government, including requiring the government to pay certain relocation benefits."

Why the Fifth Amendment?

So, why was the Takings Clause included in an amendment that focused on criminal law provisions? Professor Somin says there is "considerable arbitrariness" as to which rights are in which amendment in the U.S. Constitution, and not everything necessarily makes sense. Professor Somin notes, however, that the Fifth Amendment includes a provision protecting privacy and property rights through the Due Process Clause which says government cannot take away "life, liberty, or property without due process of law," so that may be the explanation.

Duggan points out that the Fifth Amendment did not grant the United States government the power of eminent domain but rather placed a condition on the power.

"Most governments have the inherent power of eminent domain simply by virtue of being the

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government," Duggan says. "However, the Founding Fathers wanted to make certain that if property was taken, the property owner would receive just compensation."

Both Duggan and Professor Somin don't believe that eminent domain has worked the way the Founding Fathers intended.

"In my opinion, I do not believe the Founding Fathers envisioned the expanded definition of public use," says Duggan.

Professor Somin agrees.

"With the move from a narrow definition of public use to a broad one in the early 20th century or so, there have been all sorts of horrible takings which would've horrified the Founding Fathers," Professor Somin says. "Urban renewal and blight takings, which forcefully displaced many thousands of people, things like *Kelo*, there's a lot of uses for eminent domain that I think most of the Founding Fathers would find extremely problematic." ★

DISCUSSION QUESTIONS

1. **Both Professor Somin and Timothy Duggan don't think eminent domain has worked the way the Founders intended. Do you agree or disagree with them? Explain in detail.**
2. **What do you think about the expansion of eminent domain takings from a public use to a public purpose?**

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Grand Juries and Due Process

The Grand Jury Clause and the Due Process Clause are the first and fourth clauses, respectively, of the U.S. Constitution's Fifth Amendment. Essentially, these clauses deal with criminal procedures.

Grand Jury

The Grand Jury Clause states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or **indictment** of a Grand Jury…"

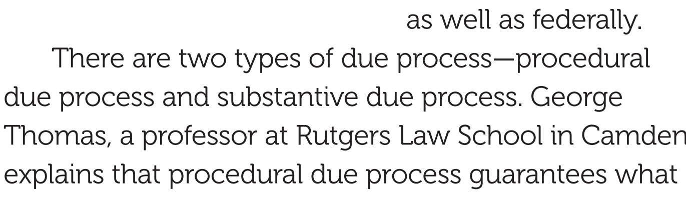
While the other four clauses of the Fifth Amendment were incorporated by the 14th Amendment to apply to the states, the Grand Jury Clause was not. Many state courts employ grand juries as well, but **defendants** don't have a Fifth Amendment right to a grand jury for criminal charges brought in state courts.

A capital crime is one that, if convicted, the defendant could face the death penalty as punishment.

What does an "infamous crime" mean?

In the 1886 case of *Mackin v. United States*, the U.S. Supreme Court stated, "'Infamous crimes' are thus, in the most explicit words, defined to be those 'punishable by imprisonment in the **penitentiary**.'" Later, the Court would decide in the 1957 case of *Green v. United States* that "Imprisonment in a penitentiary can be imposed only if a crime is subject to imprisonment exceeding one year."

So, essentially an infamous crime is a **felony** where the accused faces a prison term of more than one year. These types of federal crimes are the only ones where a defendant is entitled to a grand jury.



A grand jury is made up of ordinary citizens, selected from the regular jury pool and consists of anywhere from 12 to 23 members. Sitting on a federal grand jury requires a longer time commitment than regular jury duty, and can be anywhere from 18 to 36 months. A grand jury, however, doesn't meet every day during that time period, like a regular jury would. Usually, a grand jury meets either once a week or a few times a week over a longer period to hear cases.

A prosecutor presents the case and must convince the members of the grand jury that there is probable cause that the accused should be indicted for the crime. The grand jury does not decide guilt. If it is convinced that there is enough evidence to proceed, it will issue an indictment and a trial will be held with a different jury.

Two types of due process

The Due Process Clause of the Fifth Amendment reads, "No person shall…be deprived of life, liberty, or property, without due process of law…"

The term "due process of law" originated in a 1354 English **statute**. The phrase replaced "law of the land," which appears in England's Magna Carta—"no freeman will be seized, dispossessed of his property, or harmed except by law of the land." According to the Library of Congress, the 1354 statute was one of six that the English Parliament enacted to clarify the meaning of the liberties guaranteed in the Magna Carta.

The Magna Carta, written by the barons of Medieval England in 1215 and signed by King John under duress, established the principle that no one (including a king) is above the law. According to the website of UK Parliament, the document guaranteed certain rights and liberties to the barons, including protection from illegal imprisonment. It also placed limits on royal authority by establishing law as a power in itself.

The Due Process Clause in the U.S. Constitution's Fifth Amendment simply deals with the administration of justice, acting as a safeguard from the arbitrary denial of a citizen's basic rights. The clause is repeated in the 14th Amendment, which ensured that it was applied at the state level as well as federally.

There are two types of due process—procedural due process and substantive due process. George Thomas, a professor at Rutgers Law School in Camden, explains that procedural due process guarantees what the name implies.

"It's certain procedures," he says. "You have a right to a jury trial, you have a right to be found guilty **beyond a reasonable doubt**. You have a right to confront the

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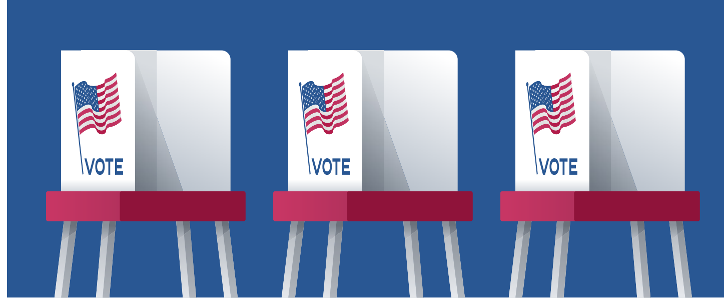
witnesses against you. You have a right to testify or not, as you see fit, and so forth."



Substantive due process, on the other hand, has nothing to do with procedure. Professor Thomas describes this type of due process as a right that, if exercised, the government cannot punish.

"Substantive due process is the right to do something—vote, marry, have schools for children, buy birth control," Professor Thomas says. "It is called 'substantive' because no procedure can take that right away. But not very many of those rights exist."

Substantive due process protects what are known as individual rights. An individual right is one that is required to live a free and equitable life and cannot be interfered with or denied by the government or another individual. For example, the right to privacy is an individual right.

Professor Thomas also gives the example of the right to marry as an individual right. The U.S. Supreme Court effectively said that in its 1967 decision in *Loving v. Virginia*.

The case involved the Lovings, residents of Virginia, who married in 1958 in Washington, D.C. Mildred, a black woman, and Richard, a white man, returned to Virginia shortly thereafter. The couple was then charged with violating Virginia's law banning inter-racial marriage. The Lovings were found guilty and sentenced to a year in jail. The trial judge agreed to suspend the sentence if the Lovings left Virginia and didn't return for 25 years.

The Supreme Court held that the Virginia law violated the Due Process Clause of the Fourteenth Amendment (which applied to the states). "Under our Constitution," wrote Chief Justice Earl Warren, "the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State." ★

DISCUSSION QUESTIONS

1. **As noted in the article, sitting on a grand jury requires a long time commitment. Would serving on a grand jury interest you? Why or why not?**
2. **Why do you think the Framers of the U.S. Constitution included the Due Process Clause in the Fifth Amendment? Explain your answer.**

Silence *Continued from page 1*

that those brought before the Star Chamber were forced to swear. "The Framers of our constitution were afraid of the power of the central government. They wanted to make sure people could not be hauled into court and required to testify."

Here is a description from the Library of Congress of what someone brought before the Star Chamber could expect:

"You are made to stand before a judge who refuses to give you any details about the charge laid against you. You are forced to take an oath before your God to answer truthfully any questions that might be put to you—questions on any topic at all. And you are warned that refusing to answer these questions for any reason will be viewed as **contempt of court**, for which you may be imprisoned, lashed or tortured as it pleases the judge."

Those coming before the Star Chamber found themselves in a situation called "the cruel trilemma" or "cruel choice," meaning that those facing the court had three options, according to the Library of Congress. "You may lie (i.e., violate your oath and thereby sacrifice your soul), you may accept brutal punishment for your refusal to obey the court or, finally, you may incriminate yourself and suffer whatever may be in store for you as a result of a conviction."

Professor Thomas doesn't think that description gets to the heart of the problem with the Star Chamber.

"In a nutshell, it was that courts should not be permitted to compel a witness to testify, whether the witness is guilty or innocent," Professor Thomas says. "That is what informs our Fifth Amendment privilege not to be compelled to be a witness."

In 1637, John Lilburne came before the Star Chamber.

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Lilburne was a member of a political movement called the Levellers. The movement was anti-**monarchy** and advocated for religious liberty and equality under the law. Lilburne famously refused to answer the Star Chamber's questions, saying: "I am unwilling to answer any impertinent questions, for fear that with my answer, I may do myself hurt. This is not the way to get to Liberty."

Lilburne was held in contempt and fined 500 English pounds, which would be more than $120,500 today. He was also sentenced to a public whipping, dragged through the streets and imprisoned. Eventually, Lilburne was released but he never stopped preaching that Englishman are born with liberties, including the presumption of innocence and freedom from coerced self-incrimination. After the mistreatment of Lilburne and many others, the Star Chamber was abolished in 1641.

According to Professor Thomas, our court system owes something else to the Levellers who believed it was a sin to swear an oath.

"If you notice today, when people are sworn in to testify in court, they are asked if they 'swear or affirm' to tell the truth," he says. "If they believe it's somehow wrong to swear an oath, they can get by with saying, 'I affirm that I'm going to tell the truth.'"

CONVICTION

The right to remain silent

The Miranda Warning is another term you may be familiar with from police dramas. It requires law enforcement to advise a suspect of their Fifth Amendment right against self-incrimination and starts out: "You have the right to remain silent. Anything you say can and will be used against you in a court of law," and continues on. The Miranda Warning, named after Ernesto Miranda, comes from the Fifth Amendment right against self-incrimination.

In 1966, the U.S. Supreme Court decided the case of **Miranda v. Arizona** by a 5-4 margin, cementing the rights outlined in the Miranda Warning. The case involved Ernesto Miranda who was arrested in 1963 and accused of the sexually assaulting and kidnapping an 18-year-old woman. Miranda confessed to the crime under police questioning; however, his attorney argued that Miranda wasn't informed that he did not have to speak to police, or that he could request an attorney.

The Court held in *Miranda* that "the prosecution may not use statements…stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." In other words, the police are required to advise suspects in custody of their rights under the U.S. Constitution.

Writing for the majority of the Court in Miranda, Chief Justice Earl Warren cited John Lilburne as an inspiration for self-incrimination protection.

"We sometimes forget how long it has taken to establish the privilege against self-incrimination… the critical historical event shedding light on its origins and evolution was the trial of one John Lilburne, a vocal anti-Stuart Leveller, [Stuart refers to the king at the time of Lilburne] who was made to take the Star Chamber Oath in 1637," Chief Justice Warren wrote. "The oath would have bound him to answer to all questions posed to him on any subject. He resisted the oath and declaimed the proceedings, stating: 'Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so.'"

As a result of the Court's ruling, Miranda's conviction was thrown out and his confession could not be used against him at his re-trial. Relying on other evidence against Miranda, the prosecution secured a conviction. He served 11 years in prison and was paroled in 1972. In 1976, Miranda was stabbed to death in a bar fight in Arizona. The person suspected of killing Miranda was arrested; however, he chose to invoke his Miranda Rights and remained silent. Without a confession, the police had insufficient evidence to hold him. No one was ever charged with Miranda's murder.

So, what were police interrogations like before the Miranda ruling? Professor Thomas says the simple answer is that we don't really know.

"We don't know because none of them were recorded and if they did use coercion, the police would have no interest in admitting it," Professor Thomas says. "What we do know is, even today when suspects waive their Miranda rights, the interrogation can be pretty intense and go on for hours."

It should be noted that, while the Miranda Warning provides protection for suspects, it doesn't mean that they

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Silence *Continued from page 7*

cannot be charged or tried for a criminal act. It simply means that any confession or statement given without a Miranda Warning could be ruled inadmissible by a judge. Other evidence obtained apart from an inadmissible confession, just like in the Miranda case, could be used against the suspect.

Professor Thomas notes there is a myth that if you're not read your rights by the police when being questioned, that the case against you has to be thrown out.

"The remedy for a *Miranda* violation is simply to **suppress** any statements made to the police. It doesn't preclude other evidence," he says.

MIRANDA WARNING

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to an attorney.
4. If you cannot afford an attorney, one will be provided for you.
5. Do you understand the rights I have just read to you? With these rights in mind, do you wish to speak to me?"

Based on the U.S. Supreme Court opinion in **Miranda v. Arizona.*

Remaining really silent

In July 2010, the U.S. Supreme Court added a new layer to the Miranda process. In *Berghuis v. Thompkins*, the Court ruled 5-4 that criminal suspects must specifically tell the police that they want to remain silent or want a lawyer before their Miranda rights are invoked.

The case before the Court involved Van Chester Thompkins, who was arrested in 2001 in connection with a Michigan murder. While in police custody he was read his rights, and he told police he understood them. During nearly three hours of questioning, he mostly remained silent, until one officer asked him if he prayed for forgiveness for "shooting that boy down." When Thompkins responded "Yes," his statement was used against him in court, and he was sentenced to life in prison.

Thompkins fought to have his statement thrown out, claiming he had invoked his Miranda right by generally remaining silent throughout his interrogation. The U.S. Supreme Court disagreed, ruling that once a suspect is read his rights and acknowledges he understands those rights, if he then responds to police questions his right to remain silent is automatically waived.

The majority of the Court indicated that not requiring suspects to state their intentions makes the job of law enforcement more difficult, since police are forced to guess about a suspect's intentions.

"Thompkins did not say that he wanted to remain silent or that he did not want to talk to police," Justice Anthony Kennedy wrote in the Court's majority opinion. "Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.' Here he did neither, so he did not invoke his right to remain silent."

In her **dissenting opinion** Justice Sonia Sotomayor wrote: "Today's decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which counterintuitively requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so." ★

DISCUSSION QUESTIONS

1. **Why do you think England's Star Chamber made such an impression on the Framers of the U.S. Constitution? What did they learn from it?**
2. **Given that anyone questioned by the police has always had a Fifth Amendment "right to remain silent," is the Miranda Warning necessary? Why or why not?**
3. **What do you think about the *Berghuis v. Thompkins* case? Do you agree or disagree with the Court's ruling in the case? Explain your answer.**

Double Jeopardy *Continued from page 1*

Sir William Blackstone, an 18th century English jurist who was known for his explanations of English common law.

"The framers essentially copied Blackstone's double jeopardy principle," Professor Thomas says. "The only change of note was Blackstone limited it to jeopardy of life."

The framers of the U.S. Constitution added the phrase "or limb." Professor Thomas, who wrote a book on double jeopardy—*Double Jeopardy: The History, the Law*—speculates that the addition was made to assure that the protection guarded against re-prosecuting lesser crimes that did not carry the death penalty.

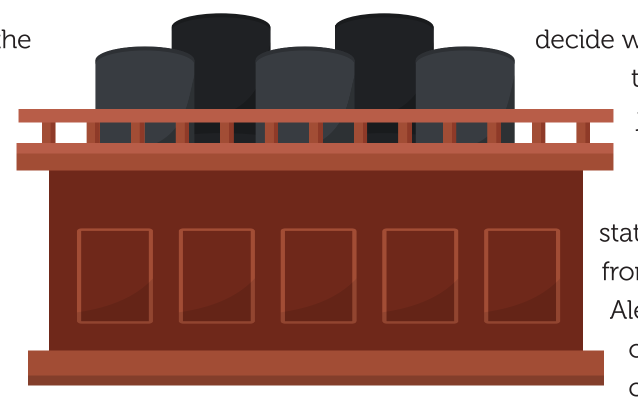
"I think they wanted a broader term there—broader than just life," Professor Thomas says.

The purpose of the Double Jeopardy Clause, Professor Thomas explains, was to limit the power of the federal government. When America was founded, the framers feared that the U.S. Congress would start to act like the English Parliament and the President might start acting like a king, he says.

"One way a corrupt state could attack its enemies would be to keep prosecuting them even after an **acquittal**," Professor Thomas notes. "The framers wanted to make sure the central government could not do that."

Over the years, the U.S. Supreme Court has issued many rulings concerning the Double Jeopardy Clause. In the **majority opinion** for the 1957 case of *Green v. United States* the Court explained the clause's purpose.

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense," Justice Hugo L. Black wrote for the majority of the Court. "The underlying idea…is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."



When does jeopardy kick in?

So, when is someone put "in jeopardy?" In a jury trial, jeopardy is attached to a **defendant** when the jury is empaneled and sworn in by the judge. In a bench trial, where a judge, rather than a jury, decides the outcome of a case, jeopardy attaches when the judge begins to hear the evidence in the case.

What about in the case of a mistrial? Does double jeopardy apply then? A mistrial occurs when a jury cannot reach a **verdic**t, or there is a procedural error of some kind, or the judge determines there has been some sort of misconduct during the trial.

In 2012, the U.S. Supreme Court addressed double jeopardy and mistrials in the case of *Blueford v. Arkansas*. The Court was asked to decide whether the double jeopardy clause prevented the state of Arkansas from retrying Alex Blueford on murder charges after a mistrial was declared due to a **hung jury**.

The charges against Blueford included (in order of severity) **capital murder**, **first-degree murder**, **manslaughter** and **negligent homicide**. Before deliberations, the trial court judge instructed the jury, "If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree. If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter. If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide." The jurors could either convict Blueford on one of the charges or acquit him of all of them.

After several hours of deliberation, the jurors reported that they could not reach a verdict. The judge called them back and asked them to try again. After more time, the jury sent a note saying they were still **deadlocked** and they went back to the courtroom.

At that time, the judge asked the jury foreperson to relate the count on capital murder, and the foreperson replied, "That was unanimous against that." The judge asked for the count on murder in the first degree

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Double Jeopardy *Continued from page 9*

and the foreperson replied, "That was unanimous against that." The judge then asked for the count on manslaughter and the foreperson replied, "nine for, three against." When the judge asked about negligent homicide, the foreperson said, "We did not vote on that, sir. We couldn't get past the manslaughter." The jurors were then sent back to the jury room one more time to deliberate further.

Blueford's attorney asked for a partial verdict on the two most serious charges, but the judge denied the request. When the jury still could not reach a verdict 30 minutes later, the judge declared a mistrial. When the State of Arkansas attempted to retry Blueford, his attorney "moved to dismiss the capital and first-degree murder charges on double jeopardy grounds, citing the foreperson's report that the jurors had voted unanimously against guilt on those offenses." The motion was denied. The Arkansas Supreme Court **affirmed** the trial court's decision in the case and Blueford **appealed** to the U.S. Supreme Court.

In a 6 to 3 decision, the U.S. Supreme Court affirmed the Arkansas Supreme Court's decision, ruling that the foreperson's announcement that the jury had unanimously voted to acquit on the two most serious charges did not constitute a verdict or an acquittal because the jury resumed deliberations.

In the Court's majority opinion, Chief Justice Roberts wrote: "As permitted under Arkansas law, the jury's options in this case were limited to two: either convict on one of the offenses or acquit on all…There were separate [verdict] forms to convict on each of the possible offenses, but there was only one form to acquit, and it was to acquit on all of them…When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. As a consequence, the double jeopardy clause does not stand in the way of a second trial on the same offenses."

In other words, the reason the defendant could be tried again is because while jeopardy had attached to the defendant, double jeopardy did not apply yet because there had been no verdict in the case.

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A Famous Double Jeopardy Case

One of the most famous court cases that invoked double jeopardy was the second murder trial of Jack McCall in 1876. McCall killed Wild Bill Hickok, a gunfighter and lawman who became an American folk hero.

McCall walked into a saloon in Deadwood where Hickok was playing poker. He shot Hickok point blank in the back of the head. Hickok was holding Aces and Eights at the time, which is now commonly referred to as the "Dead Man's Hand."

The details of why McCall killed Hickok are murky. Some reports say McCall lost to Hickok playing cards the previous day and Hickok insulted him by offering him money and scolding him not to play again unless he could cover his losses. During his first trial, McCall claimed he was avenging his brother's death.

McCall was originally tried and acquitted in Deadwood, which was then part of South Dakota Indian Territory and not considered a formal town. The jury, as well as the defense and prosecution were made up of local miners and businessmen. It took two hours for McCall to be found not guilty. After the verdict, an editorial in the Black Hills Pioneer stated: "Should it ever be our misfortune to kill a man…we would simply ask that our trial may take place in some of the mining camps of these hills."

After the trial, McCall fled to the Wyoming Territory where he bragged about killing Hickok. Authorities in Wyoming didn't recognize the acquittal, saying Deadwood had no legal jurisdiction. McCall was later retried in Yankton, the capital of the Dakota Territory. The federal court in Yankton ruled that the first trial was invalid since Deadwood was not under a legally constituted court system. For this reason, the court decided that double jeopardy did not apply.

In his second trial, McCall was found guilty. He was hanged in 1877, becoming the first person to be executed in the Dakota Territory.

Double Jeopardy *Continued from page 10*

Exceptions to double jeopardy

There are exceptions to the Double Jeopardy Clause. For example, the dual-**sovereignty** exception, which allows a state and the federal government to prosecute a defendant for the same crime.

Professor Thomas explains that dual-sovereignty stems from how our nation came together. In the beginning, the 13 colonies were independent states and viewed as separate **sovereigns**.

"The colonies gave up some of their sovereignty in the U.S. Constitution, but they retained a fair amount," Professor Thomas explains. "The dual-sovereignty exception is the notion that because the state, in some measure, is an independent sovereign from the federal government, then it has interests to be protected by its criminal law, and it should be able to prosecute those interests separately from the federal government."

In *Gamble v. United States* (2019), the U.S. Supreme Court ruled on the dual-sovereignty exception. The case involved Terance Gamble who was pulled over by police in Alabama for a damaged headlight. Police searched the vehicle and found a handgun. Gamble was a convicted **felon** and under Alabama state law and federal law, it was illegal for him to possess a handgun. Gamble was tried and convicted under state law and sentenced to one year in prison. He was also prosecuted under federal law, receiving an additional 46-month sentence. The state district court and the 11th Circuit Court of Appeals both held that double jeopardy did not apply in the case due to the dual-sovereignty exception.

When the case came to the U.S. Supreme Court, the Constitutional Accountability Center, the American Civil Liberties Union, and the Cato Institute submitted a joint **amicus brief** to the Court asking them to overrule the dual-sovereignty exception to the Double Jeopardy Clause, claiming it is inconsistent with the clause's history, text and purpose.

"The Framers viewed the Double Jeopardy Clause as a fundamental protection of individual liberty and an important safeguard against government harassment and overreach. The dual-sovereignty exception, by allowing two governments to do together what neither could do alone, undermines the fundamental protection of individual liberty that the Double Jeopardy Clause was adopted to achieve," the brief stated.

In 2019, the U.S. Supreme Court affirmed the lower court's decision with a 7 to 2 ruling. The Court's majority opinion held: "The term 'offence' was commonly understood in 1791 to mean 'transgression,' that is, 'the Violation or Breaking of a Law.' ...As originally understood, then, an 'offence' is defined by a law and each law is defined by a sovereign. So, where there are two sovereigns, there are two laws, and two 'offences.'"

Justice Ruth Bader Ginsburg and Justice Neil Gorsuch issued separate dissents in the case. In her dissent, Justice Ginsburg quoted Alexander Hamilton in Federalist Paper No. 82, who argued that "the United States and its constituent States, unlike foreign nations, are 'kindred systems, parts of ONE WHOLE." She noted that there is no mention of "separate sovereigns" in the Fifth Amendment and that "if two laws demand proof of the same facts to secure a conviction, they constitute a single offense under our Constitution."

Justice Gorsuch wrote, "When governments may unleash all their might in multiple prosecutions against an individual, exhausting themselves only when those who hold the reins of power are content with the result, it is 'the poor and the weak,' and the unpopular and controversial, who suffer first—and there is nothing to stop them from being the last." ★

DISCUSSION QUESTIONS

1. **Consider the arguments for and against the dual-sovereignty exception to the Double Jeopardy Clause portrayed in the article. Explain in detail which side you are on and why.**
2. **Imagine a scenario where a defendant is acquitted of a crime, but years later, new DNA evidence strongly suggests their guilt. Should double jeopardy prevent a retrial in this situation? Why or why not?**
3. **Review the facts of the *Blueford v. Arkansas* case. Do you agree or disagree with the outcome? Explain your reasoning in detail.**

GLOSSARY WORDS

acquitted — cleared from a charge.

affirm — to uphold, approve or confirm.

amicus brief — a friend of the court brief, which is submitted by an entity with strong interests in a case but not a party in the case.

appealed — when a decision from a lower court is reviewed by a higher court because a party requests review.

beyond a reasonable doubt — when a juror is completely convinced of a person's guilt.

blighted — decayed or ruined.

capital murder — a specific type of murder that makes the accused eligible for the death penalty.

coercive — to be persuasive in a negative way or to force a person to think or act in a given way by pressure, threats or intimidation.

contempt of court — intentional failure to comply with a court order or judgment. Contempt of court is punishable by fine or imprisonment, or both.

deadlocked — when a jury is unable to reach agreement on a verdict.

defendant — in a legal case, the person accused of civil wrongdoing or a criminal act.

dissenting opinion — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues.

eminent domain — the power of the government to take private property for public use.

felon — a person convicted of a felony.

felony — a serious criminal offense usually punished by imprisonment of more than one year.

first-degree murder — murder committed with premeditation.

hung jury — a jury that is so divided in its opinions that it is unable to reach a unanimous verdict.

indictment — an official, written accusation charging someone with a crime. An indictment is handed down by a grand jury.

majority opinion — a statement written by a judge or justice that reflects the opinion reached by the majority of their colleagues.

manslaughter — unlawful killing of a human being without premeditation.

monarchy — a government ruled by a monarch (king or queen).

negligent homicide —a criminal offense where a person's negligence caused the death of another.

penitentiary — prison for those convicted of serious crimes.

sovereign — indisputable power or authority.

sovereignty — supremacy of authority over a defined area or population.

statute — legislation that has been signed into law.

suppress — to exclude evidence from a criminal proceeding.

verdict — the outcome of a trial; ruling handed down by a jury or a judge in a trial.

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