

# Lesson 17

## PROCEDURAL AMENDMENTS: AMENDMENTS III, IV, AND V

### Lesson Objectives

*When you complete Lesson 17, you will be able to:*

- Explain the Third Amendment’s ban on quartering troops.
- Understand the 18th century cases that led to the development of the Fourth Amendment.
- Explain the purpose of the Searches and Seizures Clause, the exceptions to the clause, and how the clause is enforced.
- Outline the requirements for a valid warrant under the Warrant Clause, current warrant requirements, and situations in which officials are exempt from these requirements.
- Understand the difference between a jury and a grand jury and explain the accusatory and protective functions of grand juries.
- Understand the purpose of the Grand Jury Exception Clause and the debate regarding the constitutional rights of members of the military.
- Define the rights protected by the Double Jeopardy Clause and the five key concepts related to double jeopardy.
- Describe the history of the Self-Incrimination Clause.
- Describe the history of the phrase “due process of law” and the original meaning of “life, liberty, and property,” and understand how the modern Supreme Court’s interpretation of the Due Process Clause has departed from the clause’s original meaning.
- Describe history and purpose of the Takings Clause.

*Unit 6*

## Part I: Amendment III

### Quartering of Troops – Amendment III

*Essay by Andrew P. Morriss (pp. 322–323)*

Under the Intolerable Acts of 1774, British soldiers were quartered in colonists' private homes to punish colonists. The Third Amendment bans peacetime quartering of troops and requires that wartime quartering must have legislative approval. The Amendment was uncontroversial. Indeed, six of the original 13 states also banned the quartering of soldiers.

The purpose of the Third Amendment is so clear that it rarely is litigated in court. The recent citations of the Third Amendment make no reference to private property rights in wartime and instead argue that the amendment supports a zone of personal privacy that is hidden in the Constitution.



#### Before You Read

Ask: What do you think it means to quarter soldiers in private homes? (to let them stay in private homes) Explain that the Third Amendment restricts the quartering of troops in private lodgings.



#### Active Reading

Ask: According to the commentary, how has the problem of quartering soldiers been solved today? (Communities are paid to host military bases.)



#### Check Understanding

Explain that the Intolerable Acts of 1774 were a series of laws passed in response to the Boston Tea Party. One of these acts was the Quartering Act, which allowed British troops to stay in houses if barracks were not available.

Ask: Why did the colonists consider the Quartering Act “intolerable”? (It was a punishment for rebellion. Colonists had to care for the soldiers, providing them with food, water, shelter, and bedding out of their own pockets.)



#### Discussion Question

The Third Amendment reflects an effort to balance what rights and requirements? (The Third Amendment balances the right to private property against the potential need for wartime military quarters.) Why is this amendment seldom litigated today? (Its meaning is clear, and the creation of military bases has largely solved the problem of quartering troops.)



## Check Understanding

Have students complete the following assessment to check their understanding of Lesson 17, Part 1. Review any material for questions they have missed.

### Multiple Choice: Circle the correct response.

1. The British quartered soldiers in America
  - a. during conflicts with the French and Indians.
  - b. because legislative authority was unclear.
  - c. because there were no army bases.
  - d. **All of the above.**
  
2. How many of the original 13 states banned the private quartering of soldiers?
  - a. 0
  - b. **6**
  - c. 9
  - d. 13

### Fill in the blank: Write the correct word or words in each blank.

1. The Third Amendment reflects an effort to balance \_\_\_\_\_ with the potential need for wartime \_\_\_\_\_.  
(private property rights, military quarters)

### True / False: Indicate whether each statement is true or false.

1. The Third Amendment is one of the most frequently debated and frequently challenged in the Supreme Court. **(False)**
  
2. The most significant episodes of conflict over quartering concerned the British quartering of soldiers in private homes to punish the people of Boston. **(True)**

*Unit 6*

## Part 2:

### Amendment IV

#### Searches and Seizures

Amendment IV

#### Warrant Clause

Amendment IV

### Searches and Seizures – Amendment IV

*Essay by Gerard V. Bradley (pp. 323–325)*

The Searches and Seizures Clause of the Fourth Amendment protects U.S. citizens against unreasonable searches and seizures. Three notable 18th century cases (two from England and one from the colonies) influenced the Framers’ drafting of the Fourth Amendment. The two English cases, *Entick v. Carrington* (1765) and *Wilkes v. Wood* (1763), involved plaintiffs who produced pamphlets criticizing the government. When arresting these individuals, officials seized books and papers from the plaintiffs’ property. A court agreed with the plaintiffs that the officers’ actions constituted trespassing. The third case involved “writs of assistance,” which permitted customs officials to search for smuggled goods without any suspicion that such goods might be found. Several colonial smugglers were caught with illegal items after such a suspicionless search. The smugglers’ lawyer, James Otis, argued that such searches were invalid, but he did not obtain a judgment in favor of the defendants.

The original meaning of the Searches and Seizures Clause is debated. Some argue that the clause has meaning independent from the Warrant Clause: The word “unreasonable” indicates an independent prohibition on the actions of government officials. Others argue that the Searches and Seizures Clause does not authorize the courts to do anything. They assert that the clause is simply a statement of moral principle that explains the Warrant Clause. Under this interpretation, the right to be secure in their persons, papers, and effects is a right of the people, meaning those comprising the political community, rather than an individual right.

What makes a search or seizure “reasonable” is the perennial question in Fourth Amendment litigation. Based on the body of law on the Fourth Amendment, there are four important clarifications and exceptions regarding reasonable searches: (1) in a criminal context, if a police officer can demonstrate probable cause and obtain a warrant for the search, the search is “reasonable”; (2) some warrantless searches are reasonable if exigent circumstances are present, an object is in plain view, or regulatory agencies conduct the search; (3) with reasonable suspicion, police can question individuals without arresting them; (4) some government officials (in the school or airport context, for instance) may conduct random, suspicionless searches to prevent some particular harm.

The Searches and Seizures Clause is enforced through the “exclusionary rule.” Under this rule, if evidence is seized illegally, it cannot be used against the individual in a criminal trial. The exclusionary rule formerly applied in federal court cases but not in state criminal cases. In a controversial ruling in *Mapp v. Ohio* (1961), however, the Supreme Court stated that it applies to both state and federal courts.

The exclusionary rule is controversial in part because it was not within the Framers’ design for the Searches and Seizures Clause. Criminals should not go free because an officer blundered in obtaining evidence. Officers, however, could be sued for trespass. Supporters of the exclusionary rule argue that it deters officers from making illegal searches, since the products of illegal searches cannot be used.



### Active Reading

**Ask:** When can police officers stop an individual for questioning? (when there is some reason for a police officer to suspect that an individual is involved in a criminal activity, although the period of questioning must be brief if the individual is not being arrested) **Ask:** In what types of situations can searches and seizures be conducted when there is no suspicion of criminal activity? (Searches and seizures may be conducted when evidence hidden from view may be classified as dangerous or disruptive. Airport officials can search passengers and their luggage, and public schools may conduct drug testing of athletes.)



### Write About It

Invent a scenario in which a police officer would be able to conduct a search that would be reasonable. Ask students to identify which of the four categories outlined on pages 324-325 applies to their scenario.



### Discussion Question

There is debate about the original meaning and purpose of the Searches and Seizures Clause. **Do you think the Searches and Seizures Clause was designed to be an independent prohibition on the actions of government officials or to be a preamble for the Warrant Clause?** Explain the reasons for your answer. (Answers will vary. Students who think the clause is effective on its own will likely cite the use of the word “unreasonable.” They may also point out that it specifically protects an individual’s person, home, papers, and belongings. Those who think it is introductory or explanatory in nature will most likely argue that the Searches and Seizures Clause is not necessary because the Warrant Clause protects citizens.)

## Warrant Clause – Amendment IV

*Essay by William J. Stuntz (pp. 326–329)*

One of the most clearly written clauses of the Constitution, the Warrant Clause of the Fourth Amendment sets forth the four major requirements for search warrants: (1) probable cause must be present; (2) the official seeking the warrant must swear that the information provided to obtain the warrant is true; (3) the warrant must specify where the search will be conducted; (4) the warrant must state what officials are looking for in their search.

Although the Warrant Clause is clearly worded, two questions are not answered: What constitutes probable cause, and are warrants ever *required* for officers to search a location or arrest an individual? Today, the accepted definition of probable cause is that something (typically, a crime when the term is used in relation to the Warrant Clause) is occurring “more likely than not.”

The second question is not as straightforward. Many historians argue that the Warrant Clause did not necessarily mean that warrants were always required. The Framers crafted the text of the Warrant Clause to protect against the type of behavior involved in *Wilkes v. Wood* (1763), *Entick v. Carrington* (1765), and the *Writs of Assistance Case* (1761). In each of these cases, the Crown conducted very broad searches under very general warrants that did not establish probable cause and did not specify either the site or the purpose of a search. The Warrant Clause specifies what is required for a warrant, but not when warrants are required.

The issue of warrants did not arise much in early America. Police forces emerged in America in the 1830s. Before that point, private parties conducted investigations and would report the evidence to a magistrate or constable, who would conduct the arrest and search the arrestee’s person and home. Warrants protected police officers against lawsuits alleging unlawful searches and seizures.

The application of the Warrant Clause is different today. Current doctrine on the Warrant Clause deals with the conditions of a valid warrant and when a warrant is required. A warrant requires the existence of probable cause and a description of the specifics (place and purpose) of a search. But such warrants may be issued exclusively by judicial officers. Current jurisprudence recognizes administrative warrants, which are warrants used in regulatory settings without probable cause, as valid warrants. Police may not use administrative warrants to enforce criminal laws. In most cases, police need a warrant any time they search an individual’s private home or office space. Law officials must also obtain a warrant for wiretaps.

There are roughly six major categories of exemptions from the warrants requirement. First, police are usually exempt from getting a warrant if circumstance can be classified as *exigent* (that is, if obtaining a warrant in a timely manner would be impossible). For example, an officer may enter a home without a warrant if he hears a scream and a gunshot. Second, police do not need a warrant to arrest people if they are outside their home. However, police must have probable cause to make such an

arrest. Third, police may conduct searches directly related to the arrest of an individual. Fourth, police can legally seize items that an arrestee possesses without first obtaining a warrant. Fifth, police officers do not need a warrant to search any part of a vehicle, including the trunk, but they do need to be able to establish that they had probable cause for doing so. Sixth, police officers can detain and frisk individuals to find weapons, but officers must have reasonable suspicion that the individual is engaged in criminal activity.

There are also exemptions for certain types of non-police government officials, such as school principals, government employers, border personnel, and airport personnel. For example, principals may search student lockers and border guards may search vehicles of individuals entering or leaving the country without first getting a warrant.

Because the Supreme Court has established the situations in which warrants are and are not required, most litigation relating to the Fourth Amendment concerns the Searches and Seizures Clause.



### Before You Read

**Ask:** What is a search warrant? (It is an order issued by a judge. It gives police officers the ability to search a person's property such as a home or office. Police typically suspect the owner of committing a crime and are searching for evidence.)



### Active Reading

**Ask:** According to the Warrant Clause, what are the requirements for a search warrant? (There must be probable cause; the official seeking the warrant must swear that the information relating to the warrant is true; the warrant must identify the property that will be searched; the warrant must outline what officials are looking for.) **Ask:** Why does the author describe warrants as both a "foe" and a "friend" of the police officer? (Around the time of the Founding, it was in an officer's best interest to obtain a warrant. Although a warrant was not necessary, it ensured the officer would not later be sued for an illegal search or seizure. Today, officers must obtain warrants to conduct searches. Therefore, warrants can interfere with the ability of the police to search properties where they suspect criminal activity is occurring and collect evidence of such activity.)



### Discussion Question

**In what sense was the original understanding of the Warrant Clause clear?** (The Warrant Clause made clear the conditions necessary for a valid warrant to be issued.) **In what sense was the original understanding unclear?** (It was unclear with respect to the basic question of whether warrants were ever required for law enforcement officials to conduct searches or make arrests.)



## Check Understanding

Have students complete the following assessment to check their understanding of Lesson 17, Part 2. Review any material for questions they have missed.

### Multiple Choice: Circle the correct response.

- The government critic \_\_\_\_\_ had both his papers and those of his friends seized during a search.
  - Carrington
  - Wood
  - Entick
  - Wilkes**
- The individuals James Otis defended in the court case involving “writs of assistance” were accused of
  - smuggling.**
  - trespassing.
  - stealing.
  - treason.
- The warrant used in the *Writs of Assistance Case* did not meet the requirement in the Warrant Clause regarding
  - the things to be seized.
  - probable cause.
  - oath or affirmation.
  - the place to be searched.**

### Fill in the blank: Write the correct word or words in each blank.

- Although the warrant seems the police officer’s foe today, at the time of the Founding, it was the constable’s \_\_\_\_\_, a legal defense against any subsequent tortuous claim. (**friend**)
- The phrasing of the Warrant Clause limits warrants but does not \_\_\_\_\_ their use. (**mandate**)
- The \_\_\_\_\_ rule is the primary means of enforcing the Searches and Seizures Clause. (**exclusionary**)
- When a warrant is granted, any resulting search is considered \_\_\_\_\_ under the law. (**reasonable**)
- Seizing belongings in an individual’s possession when an arrest is made and creating a record of them once they are brought back to the police station is known as an \_\_\_\_\_ search. (**inventory**)

6. Generally, police need a warrant to search a home or office or to conduct a \_\_\_\_\_ to record sounds. (**wiretap**)

**Short Answer: Write out your answer to each question.**

1. What is the set of basic requirements for search warrants? (**First, probable cause must be present. Second, the official seeking the warrant must swear that the information provided to obtain the warrant is true. Third, the warrant must specify where the search will be conducted. Finally, the warrant must state what officials are looking for in their search.**)
2. What were the three notable 18th century cases that influenced the Framers' drafting of the Fourth Amendment? (***Entick v. Carrington*, *Wilkes v. Wood*, and the *Writs of Assistance Case***)
3. What are the two interpretations of the original meaning of the Searches and Seizures Clause?
  - **The clause has meaning independent from the Warrant Clause: The word "unreasonable" indicates an independent prohibition on the actions of government officials.**
  - **The Searches and Seizures Clause is simply a statement of moral principle that explains the Warrant Clause.**

**True / False: Indicate whether the statement is true or false.**

1. The Warrant Clause specifies when warrants are required. (**False**)

## Part 3: Amendment V

### Grand Jury Requirement

Amendment V

### Grand Jury Exception

Amendment V

### Double Jeopardy

Amendment V

### Self-Incrimination

Amendment V

### Due Process Clause

Amendment V

### Takings Clause

Amendment V

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## Grand Jury Requirement – Amendment V

*Essay by Andrew Leipold (pp. 329–331)*

The Grand Jury Requirement Clause states that an individual cannot be brought to trial for a capital offense without first being indicted by a grand jury. A federal grand jury is typically composed of 23 community members who meet in a closed courtroom to hear the prosecutor present evidence against a suspect. The prosecutor leaves; the jury deliberates; and if a majority agrees that there is enough evidence to justify charging the suspect, the jury issues a “true bill,” which becomes the indictment.

Grand juries have both accusatory and protective functions. The accusatory function has roots in 12th century England, wherein grand jurors were expected to bring evidence and share suspicions about fellow community members. By the 17th century, grand juries served more of a protective function: Jurors would investigate and protect citizens against unfounded charges. The Framers added the grand jury requirement of the Fifth Amendment primarily for its protective functions.

Unlike most other provisions in the Bill of Rights, the Grand Jury Requirement Clause is not incorporated against the states. States do not need to use a grand jury to indict. States that convene grand juries are not required to use the same procedures as federal grand juries use.

Current law restricts the abilities of grand juries to protect against prosecutorial overreach. The Supreme Court has limited a suspect’s ability to challenge the federal grand jury procedures. A suspect cannot control what the jury hears or challenge the indictment. Prosecutors also are not required to present evidence favorable to the suspect.

Changes in the nature of law enforcement have also shifted the grand jury toward a more accusatory function. Prosecutors are highly professionalized, and laws are complex. Although their subpoena power enables grand juries to collect large amounts of evidence, jurors have little ability to determine whether enough evidence has been presented. Also, because the prosecutor controls what evidence the grand jury hears, jurors typically agree with the prosecutor and therefore return a “true bill” most times. As a result of the accusatory aspects of grand juries, many suspects waive the right to have a grand jury review their cases.



### Active Reading

**Ask:** How did grand juries serve a protective role in early America? (A grand jury indictment was necessary to bring the defendant to trial. Grand juries could refuse to indict even though the evidence against an individual was strong. This had the effect of protecting the defendant against the charges.)  
**What does it mean that the “Grand Jury Requirement Clause is not incorporated against the states”?** (States are not required to use grand juries to indict. If they decide to use grand juries, they don’t have to use the same procedures as federal courts.)



### Active Reading

**Ask:** How does a grand jury check the prosecution’s power to indict individuals? (In order to indict an individual, a prosecutor must first secure a true bill. Although rare, grand juries still sometimes refuse to indict.) **What is the difference between a jury and a grand jury?** (Grand juries decide to bring charges against someone. In the criminal context, a jury hears the criminal allegations against the individual and decides whether he or she is guilty or not guilty. Juries also hear civil cases, make factual determinations, and issue verdicts about many non-criminal issues.)



### Discussion Question

**What was the Framers’ motivation for adding the Grand Jury Requirement Clause to the Fifth Amendment?** (They added it primarily for its protective functions. Juries would investigate and protect fellow citizens against unfounded charges.) **How did this motivation differ from the traditional English one?** (Traditionally, grand juries were more often used to expand upon accusations against other citizens in their communities. In other words, these grand juries were more accusatory than protective.)

## Grand Jury Exception – Amendment V

*Essay by David F. Forte (pp. 331–333)*

The Grand Jury Exception Clause identifies cases in which persons may be charged without a grand jury indictment. Specifically, cases involving members of the military or the militia during times of war or public danger are not subject to the Grand Jury Requirement Clause.

After the Fifth Amendment was ratified, Congress defined offenses against the military and how they were to be adjudicated. There was limited judicial review of the decisions of military tribunals. In 1950, the Supreme Court argued that citizens engaged in military service do not have Fifth Amendment rights and that lawful military tribunals are not subject to judicial review because of disputed facts. In the same year, the Uniform Code of Military Justice granted due process rights similar to those under the Fifth Amendment. The Court of Military Appeals has held that members of the military have full constitutional rights unless those rights are explicitly or implicitly excepted.

The Supreme Court can review decisions of the U.S. Court of Appeals for the Armed Forces, and some federal courts can review cases collaterally, primarily through the writ of habeas corpus, to determine whether the military tribunal possessed jurisdiction. In a controversial ruling in *Burns v. Wilson* (1953), the Supreme Court held that military courts have the same responsibility as civilian courts to protect a person's constitutional rights. The Court qualified this ruling by noting that the application of constitutional rights to military personnel may be different from their application to civilians and that civilian courts can review claims only if military courts refuse to consider them.

Federal courts have applied *Burns* in different ways. Sometimes courts do not defer to military courts on constitutional law claims. Other courts will review claims that are not given full consideration in military courts. Overall, though, persons in the military system possess due process rights.



### Check Understanding

**Ask:** What is the purpose of the Grand Jury Requirement Clause? (It ensures that individuals cannot be charged with a capital offense without first being indicted by a federal grand jury.) **Are all courts required to use grand juries?** (No, the clause applies only to federal courts. For that reason, grand juries are often not used by state courts.)



### Discussion Question

What kinds of courts are typically affected by the Grand Jury Exception Clause? What makes these courts exceptional? (The Grand Jury Exception Clause typically refers to military courts. Congress has deemed military offenses to be a separate category of offenses and procedures. Traditionally, there is little or no judicial review of the rulings of military tribunals.)

## Double Jeopardy – Amendment V

*Essay by G. Robert Blakey (pp. 333–335)*

The prohibition against double jeopardy means that a person acquitted of a crime may not be tried again for the same crime by the same court. The concept of double jeopardy came to the U.S. Constitution from English common law. Sir William Blackstone, author of the *Commentaries on the Laws of England*, described the principle that “no man is to be brought into jeopardy more than once of the same offence.” Every state prohibited double jeopardy prior to the Bill of Rights; therefore, it was included in the protections in the Bill of Rights.

The Supreme Court’s interpretation of the clause is complex and often unclear. Over time, the Court has identified three specific protections of the Double Jeopardy Clause. First, if an individual has been acquitted of a crime, he cannot be prosecuted a second time for the same offense. Second, an individual cannot be prosecuted a second time for the same offense if he is found guilty of the crime. Finally, defendants can only receive a single punishment for a single offense. The Court applies the Double Jeopardy Clause, despite the text, to both felonies and misdemeanors. It also applies the clause to the states and to the federal government.

Double jeopardy jurisprudence covers five concepts: sovereign, sanction, trial, retrial, and offense. The clause limits the actions of a single *sovereign*. An individual may be tried for the same offense in federal court and in state court, because individual states and the federal government are distinct sovereigns. The type of *sanction* the court imposes determines whether the Double Jeopardy Clause applies. For double jeopardy to apply, the sanction must be a criminal punishment. Determining when the Double Jeopardy Clause applies depends on when *lawful trial* begins and ends. Jeopardy attaches when a trial begins with the swearing in of either the first witness or the jury and ends with an acquittal. The Double Jeopardy Clause does not always prohibit a *retrial*. If there is a mistrial or hung jury, a second trial is possible without violating the Double Jeopardy Clause. Finally, the definition of an *offense* is crucial to determining violations of the Double Jeopardy Clause. Courts must decide whether an individual offense is part of or distinct from another offense to determine whether it can be brought to trial. The test from *Blockburger v. United States* (1932) was crafted for this end.



### Active Reading

Point out the word “jeopardy” in the Double Jeopardy Clause. Read the Fifth Amendment clause on page 333. **Ask:** What do you think the word “jeopardy” means? (risk of loss, danger) **What is a hung jury?** (when a jury cannot reach a verdict of guilty or not guilty) **What is a mistrial?** (when there was an error in the trial that requires it to be ended without a verdict) **What does it mean to be acquitted of a crime?** (to be found not guilty)



## Work In Pairs

Ask students to create a graphic organizer in the form of a table to summarize the five important concepts related to the Double Jeopardy Clause. The table should include the following headings: Concept, Definition, Real-World Example. Ask students to share the entries they included in their tables.

### Sample answer:

Concept	Definition	Real-World Example
Sovereign	The clause protects against double prosecution by one sovereign.	A person prosecuted by one state court can be prosecuted by a federal court.
Sanction	A sanction must be a form of criminal punishment for the Double Jeopardy Clause to apply.	If a person is just ordered to pay a civil fine, that is not considered criminal punishment.
Trial	The beginning and end of a trial must be clearly defined.	A trial begins when the jury is sworn in.
Retrial	Retrials are sometimes permitted under the Double Jeopardy Clause.	If there is a mistrial, a retrial can be held.
Offense	Individuals cannot be tried more than once for a single statutory offense.	If two offenses have enough elements in common, they are considered a single offense and therefore qualify for protection under the Double Jeopardy Clause.

Unit 6



## Active Reading

What are the three protections of individual rights embodied in the Double Jeopardy Clause? (no second prosecution for the same offense after an acquittal, no second prosecution for the same offense after a guilty verdict, and no multiple punishments for the same offense)

## Self-Incrimination — Amendment V

*Essay by Donald Dripps (pp. 335–337)*

The Self-Incrimination Clause of the Fifth Amendment states that no individual shall be forced to be a “witness against himself” in a criminal case. Some scholars argue that the Framers created this clause to prevent judicial torture and the practice of questioning witnesses after swearing them to the oath *ex officio*.

Other historians argue that an American practice influenced the clause. The Self-Incrimination Clause of the Fifth Amendment protected a widely accepted practice. It was common in early America for defendants to represent themselves in court. They could make voluntary statements and question witnesses, but the accused could not be forced to be a witness in the case and testify against himself and quite possibly lie to protect himself. During the pretrial questioning, the magistrate would press a defendant to admit wrongdoing.

Judicial interpretation of the clause has changed over the years. In the early 1800s, the Supreme Court held that the clause applied to the federal government and not to the states. By the 1880s, the Court reasoned that the clause protected personal books and papers. In 1964, though, it determined that the clause did apply to state government prosecutions. *Miranda v. Arizona* (1966) altered Fifth Amendment jurisprudence significantly, because the Court held that information from an interrogation was presumptively unconstitutional absent specific warnings. Subsequent cases defined the meaning of custody, interrogation, waiver, and the consequences for invoking Fifth Amendment protections. The Court has also recognized certain threats as forms of compulsion that violate the Fifth Amendment: For instance obtaining information by threatening to fire a government employee violates the Fifth Amendment. Reversing its decision from the 1880s, the Court considers private papers and other physical evidence to be protected under the Fourth Amendment, not the Fifth. Finally, evidence is not incriminating if a witness provides it in exchange for immunity.

Witnesses must specifically claim their Fifth Amendment rights to refrain from incriminating themselves. Otherwise, it is assumed they have decided to waive these rights. Likewise, if a defendant chooses to take the stand in a criminal case, he waives his Fifth Amendment rights on cross-examination questions. Finally, waivers of Fifth Amendment rights obtained through coercion are not valid.



### Before You Read

**Ask:** Have you ever heard somebody say “I plead the Fifth” or “I take the Fifth”? What do you think this means? (Answers will vary. Some students may have heard this plea while watching movies or television. They may point out that it was usually used by an individual who had been accused of a crime. Students may say an individual used it to avoid answering a question. A possible reason for this is that the answer might contain information that could later be used against that individual.)



## Make an Inference

**Ask:** Why may an individual be reluctant to provide testimony even if that individual was granted immunity? (Answers will vary. An individual who is granted immunity cannot be prosecuted based on information provided during a specific case. However, it would make officials aware the individual was involved in criminal activity. It could also give them a solid starting point if they wanted to investigate the individual for another offense. For example, authorities might learn about places the individual frequents where criminal activity occurs. If an individual is granted only use and derivative use immunity, he or she is not fully protected against future prosecution for related offenses.)



## Discussion Question

**What early American practice prompted the Self-Incrimination Clause?** (In early America, defendants would represent themselves in court. They could make voluntary statements and question witnesses, but the accused could not be forced to be a witness in the case and testify against himself and quite possibly lie to protect himself. The Self-Incrimination Clause allows people to avoid lying.)

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## Due Process Clause – Amendment V

*Essay by Gary Lawson (pp. 337–341)*

The concept of “due process of law” appeared for the first time in a 1354 statute concerning court procedures. At that time, it simply meant that a defendant had to be given a chance to appear in court. When the Bill of Rights was drafted, eight states had clauses restraining government from depriving persons of life, liberty, or property except pursuant to the law of the land. The Founders likely considered “law of the land” equivalent to the phrase “due process.”

Around the time of the Framing, the phrase “without due process” meant “executive or judicial action without lawful authorization and/or not in accordance with traditional forms of justice.” The Supreme Court extended the principle to Congress, such that Congress could not authorize novel forms of adjudication.

The clause protected against deprivations of life, liberty, or property without due process, but it did not protect against deprivations of other interests. During the ratification of the Due Process Clause, liberty meant the “power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s inclination may direct.” The definition of life was quite broad, to include the enjoyment of life, limbs, body, health and reputation. Property was more ambiguous; it could have referred simply to land or, more broadly, to anything of exchangeable value. Property rights were distinct from privileges or government benefits. The key ques-

tion, though, is whether federal or state law defines these terms for the purpose of the Due Process Clause. It is generally accepted that federal law provides general boundaries, while states—within reason—can define specific interests protected by the Due Process Clause.

The modern application of the clause departs from the Founders' understanding. First, the meaning of "life, liberty, and property" has varied. At one point, the Supreme Court collapsed the three into any interest the loss of which would be grievous. More recently, the Court sees the three as distinct but focuses on liberty and property. The Court has expanded liberty to mean not only the absence of bodily restraint, but the freedom to marry, contract, raise children, worship, etc. Justice Anthony Kennedy has famously remarked that liberty means being able to define one's meaning in the universe. State law primarily defines property to include traditional understandings of property (land, valuable items, etc.) but also government benefits and licenses.

There are several situations that determine the applicability of Due Process Clause protection. First, the clause applies only to government actors. If a private individual deprives another individual of life, liberty, or property, there is no violation of the Fifth Amendment. Second, the deprivation must be intentional. Third, administrative agencies account for most government actions, either in their rulemaking or in their adjudicative functions. The Due Process Clause is not considered to require a legislature (or, in this case, a rulemaker) to follow a certain procedure. The adjudicative process for administrative agencies is subject to due process, but there is a sizable gap between protections in a courtroom and those in administrative adjudication.



### Write About It

Have students read James Madison's essay "Property." In a few paragraphs, have students summarize Madison's main argument. (Answers will vary. However, students should have a good grasp of a few key concepts. They should understand that Madison's definition of "property" extends to much more than land or other goods. It also extends to one's own labor, thoughts, and conscience. Additionally, they should understand that with rights comes the responsibility not to violate the rights of others. Finally, they should understand that the end of government is to protect each person's property impartially.)



### Discussion Question

Read aloud the quote by Justice Anthony Kennedy on page 340 (end of the first paragraph of the right-hand column). *Ask: How does Kennedy's understanding of liberty compare to that of the Framers of the Fifth Amendment?* (Kennedy's understanding of liberty is limitless. His definition of liberty essentially mandates that every person has the right to define his or her own liberty. Kennedy's understanding of liberty clearly departs from that of the Framers of the amendment. At the time the Due Process Clause was ratified,

the Framers understood liberty to mean “power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s inclination may direct.”) [How does Kennedy’s understanding of liberty compare to ideas of liberty the Founders articulated in the Declaration of Independence?](#) (The Founders would also have rejected Kennedy’s idea that liberty is self-defined and boundless. They understood liberty in a broader sense, based on self-evident truths. The Founders had a clear concept of the inalienable rights of man, and designed a government limited to protecting these liberties. Without such limits, the government would be too powerful and could arbitrarily give or take rights with or without the consent of the people.)



### Discussion Question

[How does the currently accepted definition of “life, liberty, and property” compare to the historical meaning and use of the phrase?](#) (During ratification, liberty meant the “power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s inclination may direct.” Life meant the enjoyment of life, limbs, body, health and reputation. Property was more ambiguous; it could have referred to land or to anything of exchangeable value. In recent decades, Supreme Court decisions have collapsed the separate ideas of life, liberty, and property. They have also greatly expanded the meaning of the phrase to include almost anything: interests, government benefits, licenses, the right to marry, and the right to raise children.)

### Takings Clause — Amendment V

*Essay by Douglas W. Kmiec (pp. 341–345)*

The Takings Clause of the Fifth Amendment forbids the government from taking an individual’s private property for public use without compensation. According to James Madison, one of the most important purposes of government is to protect the property of its citizens. Curiously, though, the concept of property is rarely mentioned in the Constitution, and no state requested that the Takings Clause be included in the Bill of Rights. One explanation is that the acquisition and possession of property was a natural right, integral to the common law. Despite the understanding of property as a natural right, James Madison deemed a restriction on government’s power appropriate. Property, moreover, is defined through statutes.

One question related to the Fifth Amendment concerns the source of the federal government’s power of eminent domain. States acquired their takings power through the common law, but, the source of the federal government’s power of eminent domain is unclear. One answer is that the takings power is inherent in the sovereign’s power. Another answer is that the federal government has eminent domain through the Necessary and Proper Clause.

Another question related to the Fifth Amendment concerns how and to what extent either the federal government or a state government can change the definition of property without offending the natural right to property. According to Justice Oliver Wendell Holmes, regulations must not go “too far,” which is not a very formidable judicial limit.

Court decisions over the years have helped to clarify the limits of the government’s power with respect to instituting property regulations. Regulations that authorize physical occupation of a property are considered takings. Regulations that completely eliminate a property’s economic use are also considered takings. The Takings Clause also prevents agencies from using the permit process and regulatory power to achieve what they wish without cost. Whether environmental restrictions constitute a taking is an unresolved legal question.

The most common and most difficult cases related to the Takings Clause concern regulations that significantly reduce the economic use of a property. The Supreme Court typically employs an ad hoc balancing test to determine whether the government’s action constituted a taking, asking (1) what the economic effect is on the property owner, (2) the extent to which regulation interferes with investment, and (3) the extent and character of the government’s action. In most cases, property owners are not successful when they pursue these types of claims. However, they are still willing to seek a judicial remedy when regulations infringe on their property rights.

Most recently, in the case of *Kelo v. City of New London* (2005), the city of New London, Connecticut, used its eminent domain power to acquire private property for a redevelopment project. The property owners argued that the redevelopment was not a public use because the property was going to be transferred to another private party to develop. The Court upheld the city’s acquisition of the property by using a rational basis–like standard that asserted public benefit to be valid public use.



### Active Reading

Point out the use of the word “indefatigable” on page 344 (last paragraph of the left-hand column). Read the sentence containing the word aloud. Point out that the middle of the word sounds like “fatigue.” **Ask:** What do you think the word “indefatigable” means? (tireless, unable to be tired out or fatigued)



### Write About It

Have students read *Kelo v. City of New London* (2005). Students should write a brief report that includes an overview of the situation, the verdict, how the Takings Clause was applied, and the significance of the case.



### Active Reading

Have students summarize the two potential sources of the federal government's eminent domain power. (One answer is that the takings power is inherent in the sovereign's power. Another answer is that the federal government has eminent domain through the Necessary and Proper Clause.)



### Discussion Question

If the Takings Clause of the Fifth Amendment were not in the Constitution, would government still have the power of eminent domain? (Answers may vary. Some may say yes, arguing that eminent domain is a power inherent in the sovereign or granted to the federal government through the Necessary and Proper Clause. Some may say no and point to the debate between the Federalists and the Anti-Federalists about including a Bill of Rights. The Federalists opposed a Bill of Rights, claiming that it would be a pretext for the government to proclaim rights that it does not have. Because no state proposed the Takings Clause and the origin of the federal government's power of eminent domain is questionable, it would seem that the eminent domain power emerged only when Congress's power was restricted in the Takings Clause.)



### Check Understanding

Have students complete the following assessment to check their understanding of Lesson 17, Part 3. Review any material for questions they have missed.

#### Multiple Choice: Circle the correct response.

1. Most modern court cases related to the Takings Clause involve regulations that reduce a property's \_\_\_\_\_.
  - a. **economic use**
  - b. functional use
  - c. value
  - d. dimensions
  
2. Typically, a federal grand jury contains \_\_\_\_ members.
  - a. 20
  - b. 21
  - c. 22
  - d. **23**

3. Amendment V guarantees all of the following except
  - a. that no one can be forced to give a confession of guilt.
  - b. that no one will be put in double jeopardy.
  - c. that no one's property will be taken for public use without fair payment.
  - d. **that excessive bail will not be required.**
  
4. Double jeopardy is
  - a. **being tried twice for the same crime.**
  - b. being asked to pay two kinds of taxes.
  - c. being jailed twice for the same crime.
  - d. being tried for two crimes at the same time.

**Fill in the blank: Write the correct word or words in each blank.**

1. According to \_\_\_\_\_, the phrases "due process of law" and "law of the land" have practically the same meaning. **(Sir Edward Coke)**
  
2. After the Fifth Amendment was ratified, the power to decide how military offenses should be handled was given to \_\_\_\_\_. **(Congress)**
  
3. According to the Double Jeopardy Clause, an individual cannot be prosecuted again for the same crime after a guilty verdict or an \_\_\_\_\_. **(acquittal)**
  
4. Testimony provided by a witness cannot be used to prosecute that witness if the individual is granted transactional \_\_\_\_\_. **(immunity)**

**Short Answer: Write out your answer to each question.**

1. Grand juries have historically served what two functions? **(accusatory and protective)**
  
2. Current double jeopardy jurisprudence falls under what five basic headings?
  - **Sovereign**
  - **Sanction**
  - **Trial**
  - **Retrial**
  - **Offense**
  
3. What are the two potential sources of the federal government's eminent domain power? **(It may be inherent in the sovereign's power or the Necessary and Proper Clause may be the source.)**
  
4. Why did the Founders add the Grand Jury Requirement Clause to the Fifth Amendment? **(primarily to protect those accused of crimes from prosecutorial overreach)**

5. A typical federal grand jury consists of how many citizens from the community? **(23)**
6. What are the three protections of individual rights embodied in the Double Jeopardy Clause?
  - **No second prosecution for the same offense after an acquittal**
  - **No second prosecution for the same offense after a guilty verdict**
  - **No multiple punishments for the same offense**

**True / False: Indicate whether each statement is true or false.**

1. The Supreme Court has ruled that states must use grand juries. **(False)**
2. All state constitutions drafted prior to the Bill of Rights contained a double-jeopardy provision. **(True)**
3. Five states proposed language for the Takings Clause. **(False. No state proposed the Takings Clause.)**
4. Grand juries began as an effort to decrease the king's power. **(False. They began as an effort to increase the king's power.)**
5. In early America, it was common for individuals to represent themselves in court. **(True.)**