

THE RIGHT TO REMAIN SILENT:

From the Star Chamber to Guantanamo Bay©

By

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The right to remain silent came into our justice system as a result of the trials and tribulations of a long line of martyrs. According to an exhaustive study of the history of the development of this area of common law by Leonard Levy, John Lambert was the first person on record to suffer death because he asserted his right to remain silent. Upon being accused of the infamous crime of heresy in 1537, Lambert told his inquisitors, “though I did remember, yet were I more than twice a fool to show you thereof; for it is written in your own law, ‘No man is bound to accuse himself.’”¹

In the late 16th and early 17th centuries, the draconian Star Chamber contributed to the development of the right to remain silent. Active in the Tudor and early Stuart periods of English history, the Star Chamber Court was an outgrowth of the royal council and was made up of judges and “privy councilors.” The purpose of the Star Chamber was to give greater speed and flexibility to common-law courts and equity courts in both civil and criminal matters. As a result of the ruthless inquisitorial nature of the judges controlling the Star Chamber, the term has become synonymous with secret, oppressive or irresponsible court proceedings.

The Star Chamber was eventually abolished by the British House of Commons in 1641, in large part because of the bravery and unswerving dedication of the immortal John Lilburne. He was steadfastly dedicated to maintaining his right to remain silent even in the face of his

inquisitors and he refused to convict himself of a crime by waiving that right.

John Lilburne was committed to prison by the Star Chamber after two of his associates accused him of sedition in order to save their own lives. Under the law at that time, to secure a conviction for sedition, in addition to the accusations of his associates, the government needed John Lilburne's confession. When he was brought before the judges of the Star Chamber, Lilburne refused to answer the questions put to him. He was found guilty of contempt and was sentenced to public whipping and locked in the pillory in the middle of London. He was subsequently whipped over 200 times on the two-mile walk to the pillory and his remarkable courage to withstand the punishment rather than confess won him instant fame. On the way to the pillory and in between floggings, Lilburne told the assembled crowds "the law [of God] requires no man to accuse himself."

Parliament met in April 1641 and determined that Lilburne's imprisonment and punishment were "illegal and against the liberty of the subject" and ordered that he be released and receive reparations for his suffering. Even though Lilburne was freed, the House of Commons had not established by law the right to remain silent. But his case certainly did establish the right against self-incrimination. Under common law, torture was illegal when its purpose was to extort confessions, and it had long been accepted, at least abstractly, that no person should be forced to accuse himself. Still, there was no official recognition that a refusal to answer incriminating questions carried no implication of guilt. The right of an accused person to remain silent in common law proceedings was not afforded to defendants until John Lilburne made his courageous stand.²

John Lilburne's contributions to the development of the right to remain silent did not end with his vindication by Parliament. After John Lilburne and one of his associates, Richard

Overton, published pamphlets attacking Lord Cromwell, he was promptly rearrested and put back into prison. At his trial, John Lilburne again refused to answer any questions and, in addition, he demanded the right to have counsel, time to consult with that counsel, the right to subpoena witnesses in his favor, and he demanded that the court give him the presumption of innocence. After the jury deliberated one hour, a not guilty verdict was returned and he was again freed.³

From these events, the formal rule of excluding forced confessions of accused persons emerged. This rule seems to have been first explicitly stated in 1783 in *Rex v. Wariskshall*,⁴ where the Court asserted:

[A] free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it and therefore it is rejected.⁵

The United States Supreme Court in 1896 contrasted the inquisitorial practices of the British throne and the Star Chamber proceedings to the primacy of the constitutional protection of the right to remain silent in U.S. jurisprudence. In *Brown v. Walker*,⁶ the Court noted:

The maxim, 'Nemo tenetur seipsum accusare,' had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons

The change in the English criminal procedure . . . seems to be founded upon no statute and no judicial opinion but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English, as well as in American, jurisprudence. So deeply did the states, with one accord, make a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.⁷

The United States Supreme Court in the seminal Fifth Amendment case, *Miranda v. Arizona*,⁸ acknowledged the lengthy development of this incalculably valuable right when it noted:

[W]e sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.

The Court in *Miranda* further stated:

[W]e may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come right-fully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." We have recently noted that the privilege against self-incrimination - the essential mainstay of our adversary system - is founded on a complex of values. (Cites omitted) All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government - state or federal- must accord to the dignity and integrity of its citizens. To maintain a "fair state - individual balance," to require the government to "shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.⁹

The protection guaranteed by the provisions of the Fifth Amendment to the Constitution of the United States and by the provisions of Article I, Section I, Paragraph XVI of the Constitution of the State of Georgia can become activated at several critical points. The protective nature of the right to remain silent and the right not to incriminate oneself are triggered by either the interrogation of a person suspected of committing an offense or the taking into custody of a person, whether with or without an arrest warrant. However, the exact event which might activate the protection and the exact moment when that right becomes operative are often difficult to pinpoint. Interrogation and

custody are clear benchmarks by which the moment of activation can be calculated with some precision, but the question is always fact specific. Interrogation in relation to a criminal prosecution is a well-defined trigger in this area; however, there are other events which open the protective umbrella of the right to remain silent and not to incriminate oneself.

In some aspects, our nation's sense of justice has come a long way since 1913. However, in recent years, the courts are no longer bastions of protection for individual rights. There has certainly been an erosion of respect for the right to remain silent when it comes to matters dealing with perceived national security issues. The much touted war on terror's first casualty has been the right to remain silent. Recently FBI and Pentagon officials have been quoted as stating that pursuant to an order signed by Defense Secretary Donald H. Rumsfeld the government authorized methods of interrogation that violated international and domestic law.¹⁰

In a recent interview on a national news show, Clifford May, former Republican National Committee spokesman stated "We don't want these people to have a right to remain silent, even if we never prosecute them under a military court, even if we simply hold them, whichever we do. We want very much to know what they know about future terrorist attacks, about future terrorist groupings, so that we can prevent acts of terrorism. That's the most important reason."¹¹

The United States Supreme Court narrowed the right to remain silent when it ruled that police and government investigators can force people to talk, as long as those admissions are not used to prosecute them. In a 6-3 opinion the Court undercut the historic "Miranda" warning and gave the government permission to more aggressively question witnesses in the hope of obtaining evidence.¹² The court held that while a witness' words cannot be used against them in court, evidence obtained without allowing that person the right to remain silent can be. This

decision will undoubtedly prove useful in the "war on terrorism" as government seek to obtain evidence to fight alleged terrorists.

A public defender stands for the constitutional demand that the government respect the dignity of the individual and his or her historic constitutional rights. Public defenders must continually equip themselves with the tools of determination to rebuild those protections against the vast and sovereign power of the police. Public defenders should be a constant reminder to the courts and to citizens that the Fifth Amendment stands for more than just the right to remain silent; it is an essential element of the constitutional foundation which demands that government maintain respect for the dignity of the individual.

It is the duty of the public defender to insist that the state scrupulously follow the law and to respect the sanctity of an accused person's constitutional rights. Even more importantly, it is up to public defenders to insure that the courts and the police understand that the right of an individual to demand constitutional protections will always be defended. Only when our entire society safeguards the rights of accused persons will all of our vital constitutional protections be guaranteed.

END NOTES

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1. LEONARD W. LEVY, *THE ORIGINS OF THE FIFTH AMENDMENT* viii (New York Oxford University Press 1968), *See also*, John Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71-88 (1891-1892) and John Wigmore, *The Privilege Against Self-Incrimination; Its History*, 15 HARV. L. REV. 610-637 (1901-1902).
 2. LEVY, *supra* note 1, at 282-283.
 3. *Id.* (quoting from a pamphlet written by John Lilburne entitled *Petition of Right* (1628)).
 4. 168 Eng. Rep. 234, L. Leach Cr. Cases 263 (K.B. 1783).
 5. *Id.*
 6. 161 U.S. 591, 16 S.Ct. 644 (1896).
 7. *Id.*
 8. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
 9. *Id.* at 460.
 10. Eggen, Dan, and R. Jeffrey Smith, "FBI Agents Allege Abuse of Detainees at Guantanamo Bay," *Washington Post*, Tuesday, December 21, 2004.
 11. CNN, "American Morning, aired June 24, 2003.
 12. *See, Chavez v. Martinez*, 538 U.S. 760.