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Erwin Chemerinsky • Laurie L. Levenson

Criminal Procedure

Investigation

FOURTH EDITION

Erwin Chemerinsky, University of California, Berkeley
Laurie L. Levenson, Loyola Law School, Los Angeles

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CRIMINAL PROCEDURE: INVESTIGATION

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For our families and for our students

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Our goal is to write the most student-friendly book we can to help teach students about the fascinating area of criminal procedure. Between us, we have over 70 years of experience in teaching in law schools. We have used many different casebooks in teaching criminal procedure and other subjects. We have consistently seen that students strongly prefer a casebook that presents the material in a clear and well-organized fashion and that does not hide the law. That is our goal for this book.

In aspiring to provide such a book, we have made several choices. First, the book focuses on the key cases regarding each issue of criminal procedure. To help students in understanding these cases and provide a context for understanding them, we include brief comments before and after the cases. We recognize that professors have different ways in which they like to discuss these cases. Therefore, rather than providing lengthy notes and questions after each case, we provide suggested discussion questions in our teacher's manual. This method has the benefit of not limiting professors in how they approach the discussion. Also, our experience is that students often find notes filled with rhetorical questions frustrating, and only occasionally do they reflect the questions that the instructor wants to raise.

Second, there are no long passages excerpting the scholarly literature. There is a rich scholarly literature concerning almost every aspect of criminal procedure. At many places, we provide brief essays that describe and cite to this literature. But we have eschewed providing long block quotes of this material and make no pretense of being comprehensive in summarizing the literature. Our goal is to provide a casebook, not a reference tool.

Third, we decided to include "practical" materials in a supplement rather than in the casebook. For example, we think it is useful for students in studying the Fourth Amendment to see a search warrant or in learning about the Fifth Amendment to see an indictment. We considered including these in the casebook but decided for reasons of length to place them in a separate supplement. We recognize that instructors vary as to how they wish to use this material, and having the materials in a supplement was the best solution. We also provide material using other media, such as PowerPoint slides, for professors who wish to use them.

Fourth, the major cases are presented in slightly longer form, with a bit less editing than in many other books. Criminal procedure, of course, is an area of constitutional law, and the law is very much the product of the Supreme Court's decisions. Lawyers practicing criminal law base their arguments on these decisions, and thus we believe that it is desirable to expose students to the cases in their fuller form. Space constraints required more editing than we would have liked, but we have done our best to present the cases in as accurate and full a form as possible.

We do not indicate deletions of material in the cases by ellipses. Our experience is that the necessary frequent use of ellipses is distracting and does not provide useful information to the students. On the other hand, any addition, however small, is indicated by brackets.

Finally, our goal is to be comprehensive on investigation in criminal procedure. We have organized the book roughly along the chronology of a criminal case. Chapter 1 is an introduction and includes an overview of the stages of the criminal justice system. Subsequent chapters examine each step of criminal investigations, beginning in Chapters 2 and 3 with search and seizure issues and the exclusionary rule, continuing in Chapter 4 with police interrogation, and addressing pretrial identification procedures in Chapter 5. Chapter 6 addresses the right to counsel. We were careful in writing the book to be sure that each chapter is independent so that professors can cover the material in any order and use those chapters that fit their curriculum. The issues relating to criminal procedure and adjudication are covered in a separate volume.

Criminal procedure, of course, is an area in which there are constantly new developments. We are grateful to all who sent us comments on the first two editions. We plan to provide an annual supplement and write new editions of this book about every four years. We, of course, continue to welcome comments and suggestions from faculty and students who use it. Our goal is to provide the best possible teaching tool for criminal procedure, and we very much would appreciate any ideas for how to better accomplish this objective.

Erwin Chemerinsky
Laurie L. Levenson

December 2021

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This book is the product of our having taught this material for many years. We are very grateful to our students, who have constantly challenged us to think about this material in new ways. It is to them that we dedicate this book. We also dedicate this book to our families, whose patience, support, and love made this book—and everything else we do—possible.

We are also very grateful to Marcy Strauss for her detailed comments on the first edition and to many users who sent us valuable suggestions.

THE CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. [1] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[2] No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

[4] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[5] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [1] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

[2] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

[5] The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

[6] The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. [1] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

[2] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [1] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

[2] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[3] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [1] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. [1] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2] Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

- [7] To establish Post Offices and post Roads;
 - [8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
 - [9] To constitute Tribunals inferior to the supreme Court;
 - [10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
 - [11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
 - [12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
 - [13] To provide and maintain a Navy;
 - [14] To make Rules for the Government and Regulation of the land and naval Forces;
 - [15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
 - [16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
 - [17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
 - [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
- Section 9.* [1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.
- [2] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
- [3] No Bill of Attainder or ex post facto Law shall be passed.
- [4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.
- [5] No Tax or Duty shall be laid on Articles exported from any State.
- [6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.
- [7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. [1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

Section 1. [1] The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State

having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

[4] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[5] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[6] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [1] The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— to all Cases affecting Ambassadors, other public Ministers and Consuls;— to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;— to Controversies between two or more States;— between a State and Citizens of another State;— between Citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[3] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [1] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [1] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

[3] No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [1] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[1] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth.

ARTICLES IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES, PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II [1791]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III [1791]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI [1798]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII [1804]

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of

a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President. — The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

AMENDMENT XIII [1865]

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State

legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

AMENDMENT XVI [1913]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

AMENDMENT XVII [1913]

[1] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[2] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[3] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

AMENDMENT XVIII [1919]

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XIX [1920]

[1] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

[2] Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XX [1933]

Section 1. The terms of the President and the Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

AMENDMENT XXI [1933]

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

AMENDMENT XXII [1951]

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

AMENDMENT XXIII [1961]

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXIV [1964]

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXV [1967]

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

AMENDMENT XXVI [1971]

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII [1992]

No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of representatives shall have intervened.

CRIMINAL PROCEDURE: INVESTIGATION

INTRODUCTION TO CRIMINAL PROCEDURE

Criminal procedure covers the rules and practices that govern the investigation and prosecution of criminal cases. “Investigatory criminal procedure” generally refers to the rules governing police conduct in investigating a case. These rules derive from the Fourth, Fifth, and Sixth Amendments to the United States Constitution. “Accusatory criminal procedure” generally refers to the rights of a defendant as a case proceeds through the criminal justice system. The rules governing this stage of the criminal process generally derive from the Fifth and Fourteenth Amendment rights to due process, the Sixth Amendment right to counsel and a speedy and public trial, the Eighth Amendment prohibition of excessive bail and double jeopardy, and the rules of procedure enacted by Congress or the states. Although federal constitutional rules govern these areas of criminal procedure, there are other laws that may control, including federal statutory laws, state constitutions, state laws, court rules of procedure, and ethical codes.

Section A of this introduction reviews the roles of the various participants in the criminal justice process. Section B provides an overview of how a case progresses through the criminal justice system. Section C then discusses why procedural rules are important, and section D sets forth the governing constitutional principles. Finally, section E discusses the applicability of constitutional rights to the states through the Incorporation Doctrine, with section F addressing the test for determining when new procedural rules are to be applied retroactively.

A. THE PARTICIPANTS IN THE CRIMINAL JUSTICE SYSTEM

Many types of individuals play a role in the criminal justice system. The rules of procedure constantly attempt to address the needs of each of these participants while also respecting the rights and interests of the others.

1. Defendants

All defendants have an interest in ensuring that their constitutional rights are respected, and that they have an opportunity to zealously contest the charges brought

against them. To ensure that they receive fair trials, defendants will ordinarily be represented by defense counsel—either retained or appointed by the court. Moreover, although some refer to the adversarial system as a “search for the truth,” criminal defendants’ main interest and goal is to avoid conviction.

2. *Defense Counsel*

Defense counsel represents defendants in criminal actions. Unlike prosecutors, who must serve the “interests of justice” regardless of whether doing so entails convicting or acquitting a defendant, “[t]he basic duty defense counsel owe[] to the administration of justice and as . . . officer[s] of the court is to serve as [defendants’] counselor[s] and advocate[s] with courage and devotion and to render effective, quality representation.” ABA Standards Relating to the Administration of Criminal Justice, Defense Standard 4-1.2(b).

Many defendants cannot afford a lawyer, yet a lawyer is critical to having a fair adversarial process. Accordingly, the Supreme Court has recognized a right to the assistance of counsel in all cases in which the defendant faces incarceration.

3. *Prosecutors*

Currently, prosecutors file over 10 million criminal cases annually in the United States.¹ Prosecutors represent the community in criminal actions. Federal prosecutors represent the United States and are assigned by either the local U.S. Attorney’s Office or the Department of Justice. City attorneys, district attorneys, and county prosecutors represent local jurisdictions; the state attorney general represents the state at large. Unlike U.S. Attorneys, most states’ prosecutors are elected officials.

The prosecutor has a unique role in the criminal justice system. “The prosecutor is an administrator of justice, an advocate, and an officer of the court. . . . The duty of the prosecutor is to seek justice, not merely to convict.” ABA Standards Relating to the Administration of Criminal Justice, Prosecution Standard 3-1.2(b)–(c).

Prosecutors enjoy great discretion in the exercise of their duties.

If a case goes to trial, the prosecutor has a duty to represent the government in those prosecutions. Moreover, during the investigative phase of trial, a prosecutor may also be responsible for supervising the work of police and investigators. This duty may require the prosecutor to prepare search warrants, issue subpoenas, and supervise grand jury proceedings.

1. For more information regarding criminal caseloads in state courts, see National Center for State Courts, *Examining the Work of State Courts: An Overview of 2015 State Court Caseloads*, <http://www.courtstatistics.org/~media/microsites/files/csp/ewsc%202015.ashx>.

4. *Victims*

Victims' interests are represented in criminal cases by the prosecutor. Prosecutors, not victims, decide which cases to charge, whether to plea bargain, trial strategies, and even sentencing recommendations. Criminal victims' roles are circumscribed. Some states have passed laws, or even constitutional amendments, that provide victims a limited right to observe criminal proceedings, *see, e.g.*, Ariz. Const. art. II, §2.1(3), and to speak at sentencing, *see, e.g.*, N.Y. Crim. Proc. Law §380.50(2) (McKinney 2007). However, because a crime is considered to be an offense against the entire community and not just individual victims, victims do not control the handling of criminal cases.

5. *Police and Other Law Enforcement Officers*

Police officers are on the front line of the criminal justice system. They serve several purposes, from ensuring the public's safety to investigating allegations of crimes to apprehending individuals responsible for those crimes. Police officers, like prosecutors, wield an enormous amount of discretion. They make the initial decision of whether to investigate a case, and whether to arrest and charge an individual with an offense. Police officers make these decisions even though they are not ordinarily lawyers.

The focus of police officers is on the safety of the community. Although they may be aware of defendants' constitutional rights, the pressure on police officers to ensure community safety and their eagerness to secure convictions may lead to violation of these rights.

Investigative criminal procedure focuses on what procedures police may use when apprehending and investigating defendants. Specifically, it addresses the rules for searches, seizures, and interrogations of defendants.

There are many different types of law enforcement officers in the United States. Each jurisdiction is likely to have its own police force. Currently, there are over 18,000 law enforcement agencies in the United States, with over 15,000 of them consisting of municipal police departments. The primary federal law enforcement agencies include the Federal Bureau of Investigation (FBI), the Secret Service, the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco and Firearms (ATF), the Bureau of Customs and Borders Prosecution (CBP), Immigration and Customs Enforcement (ICE), and the Securities and Exchange Commission (SEC).

6. *Magistrates and Judges*

Magistrates and judges are the neutral decision makers in the criminal justice system. One crucial aspect of their role is to ensure that defendants' constitutional rights are respected. Thus, in federal courts, magistrates determine whether search or arrest warrants should issue, whether there is sufficient evidence to hold an arrested defendant, and even whether bail should be granted. Both magistrates and judges may review police conduct to determine if evidence should be suppressed

because of constitutional violations. Judges have the additional responsibility of supervising criminal trials. Magistrates and judges must perform their responsibilities both efficiently and fairly, and are often faced with huge dockets of cases to process through their courts.

The method of selecting judges and holding them accountable varies. In federal court, federal district court and federal court of appeals judges are appointed by the president and must be confirmed by the Senate; once confirmed, they serve for life unless they resign or are impeached and removed from office. Federal magistrate judges are appointed by the district courts and sit for eight-year terms. Many states elect their state court judges through many different types of election systems, and other states have appointed judges.

7. Jurors

There are two types of jurors in the criminal justice system: grand jurors and trial jurors. Grand jurors oversee investigations of cases and decide whether to return indictments against individuals for specific crimes. Trial jurors (discussed in Chapter 12), by contrast, are the fact-finders in most criminal trials. After listening to all of the evidence, they decide whether there is sufficient evidence to convict a defendant. To make this decision, trial jurors ordinarily have to make key credibility decisions in the case by deciding which side's witnesses to believe.

8. Corrections Officials

Once defendants are convicted, corrections officials have the responsibility of supervising defendants' incarceration or release on parole or probation. Like police officers and prosecutors, corrections officials often have huge caseloads. In 2015, there were close to 5 million individuals on probation or parole in the United States.²

9. Public

The general public also has an interest in the criminal justice system. Indeed, one of the primary concerns for members of the public is their safety.³ The public also has a financial interest in ensuring that cases are efficiently processed, and that government officials respect the constitutional rights of citizens. In a criminal prosecution, the prosecutor has the responsibility of representing the interests of the public. However, the legislature also represents the public by enacting the laws that, to a large extent, govern the prosecutor's and judge's authority.

2. Bureau of Justice Statistics, *Probation and Parole in the United States, 2015, February 2017*, <https://www.bjs.gov/content/pub/pdf/ppus15.pdf>.

3. In 2016, 53 percent of Americans said that they worry a great deal about crime and violence. Source: "In U.S., Concern About Crime Climbs to 15-Year High," Alyssa Davis, April 6, 2016, http://www.gallup.com/poll/190475/americans-concern-crime-climbs-year-high.aspx?g_source=worry+about+crime&g_medium=search&g_campaign=tiles.

10. Media

Finally, the media has an interest in covering criminal cases and serving as a check on government powers. However, the First Amendment rights and interests of the media easily come into conflict with a defendant's Sixth Amendment right to a fair trial. Judges must ensure, to the greatest extent possible, that both the media's and defendants' constitutional rights are respected.

B. STAGES OF THE CRIMINAL JUSTICE PROCESS

Before embarking on a detailed discussion of the rules governing criminal procedure, it is helpful to understand how a case proceeds through the criminal justice system. Although there may be slight variations in the process depending on the nature of a particular case and the jurisdiction in which it is adjudicated,⁴ the typical route for criminal cases is as follows:

1. Step 1: Pre-Arrest Investigation⁵

If a crime occurs, the police may have little time to investigate the case. When time is of the essence, police officers may have to make their own observations, or use the accounts of others at the scene, to gather the minimal amount of information necessary to execute an arrest. For these on-the-scene arrests, the majority of the investigation will occur after the suspect is already in custody. Such investigations may include witness and victim interviews, interrogations of the suspect, identification procedures, undercover follow-up investigations, searches, and issuance of evidence subpoenas. Close to 50 percent of all criminal cases are handled in this manner. Thus, police officers will often have only a few minutes to decide whether to arrest a suspect, and their ability to conduct a pre-arrest investigation will be greatly limited.

In the remainder of cases, however, a lengthy investigation will typically occur before a suspect is arrested. Police will use their investigative tools, such as search warrants, interviews, informants, and evidence collection, to seek formal charges against the suspect before they execute an arrest. A magistrate may then issue an arrest warrant, together with a formal complaint filed by the prosecution, or the prosecution will obtain an arrest warrant in conjunction with a grand jury indictment. When there has been a grand jury indictment, months or years of pre-arrest investigation may have occurred, including witnesses testifying before the grand jury.

4. There are 52 different jurisdictions (each state, the District of Columbia, and federal prosecutions), each having its own rules of procedure.

5. For a detailed discussion of the rules governing pretrial investigations, see Chapters 2 through 5.

2. *Step 2: Arrest*

Police have enormous discretion to decide whether to arrest a suspect. When an arrest occurs, it may be with or without a warrant. Once a suspect is taken into custody, he begins his journey through the criminal justice process. If the police did not use an arrest warrant, they must file an affidavit with the court setting forth the probable cause for the arrest and getting a complaint to hold the defendant for further proceedings. Even if the police did use an arrest warrant, the defendant has the right to appear before a judge, be informed of his constitutional rights, be advised of the charges against him, and be assigned counsel.

For some minor offenses, a suspect may merely receive a citation and will not be formally arrested. A citation or summons requires that the suspect appear at a later date to answer the charges against him. Likewise, if a suspect is not a flight risk, an indictment may be issued along with a summons for the suspect to appear instead of an authorization for an arrest warrant.

If a suspect is arrested, he is taken to the police station for booking. Once his picture and background information is taken, the suspect is placed into a holding facility. Depending on the offense, the suspect may be able to post bail based on an approved bail schedule. If the suspect posts bail, he will be ordered to appear in court on a specific date for further proceedings. If the suspect does not post bail, he will be held in jail until he is released by the court.

3. *Step 3: Filing the Complaint*

For police to be able to hold a suspect after arrest, the prosecution must file charges. Once the prosecution does so, it takes over the decision-making process from the police, and has discretion as to which charges to file. If the suspect has not been indicted, the prosecutor will use a complaint to file initial charges against the suspect. The complaint must be supported by a showing of probable cause based on a sworn affidavit by law enforcement officers.

4. *Step 4: Gerstein Review*

The magistrate judge must review the prosecution's complaint and supporting affidavit to determine whether there is probable cause supporting the initial charges against the defendant. This review is called a "*Gerstein* review" because it was first prescribed by the Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103 (1975). The magistrate's review for probable cause is done *ex parte* and is based on the filings alone—no evidentiary hearing is required. Often, the court will conduct a *Gerstein* review at the time of the defendant's first appearance, as long as that first appearance occurs within 48 hours of the defendant's arrest, as required by the Supreme Court in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

5. Step 5: First Appearance/Arraignment on Complaint

Once the prosecution files a complaint, the defendant is also entitled to appear before the court to be advised of the charges against him, have an opportunity to seek bail, and be advised of his right to retain counsel or to have counsel assigned. For example, Rule 5 of the Federal Rules of Criminal Procedure requires that arresting officers bring the accused before a magistrate judge “without unnecessary delay.” Ordinarily, the first appearance, sometimes called an “initial arraignment” or “preliminary arraignment,” depending on the jurisdiction, will occur within 48 hours of the defendant’s arrest. This proceeding is usually a brief one and is merely a minimal check to ensure that a basis for the defendant’s arrest exists.

6. Step 6: Grand Jury or Preliminary Hearing

Before a defendant is required to stand trial, there must be another screening of the cases that establishes the charges the defendant will face at trial. The Fifth Amendment promises that for all federal felonies, a defendant is entitled to grand jury indictment. With ancient roots in British common law, the grand jury serves as a screening process to formalize charges for trial. It serves as a minimum check on the prosecutor’s decision to bring charges.

A federal grand jury consists of 23 members of the community who listen to evidence presented by the prosecution and decide whether there is probable cause to prosecute the defendant. There is no judge in the grand jury, nor is the defendant or defense counsel entitled to be present.

The prosecutor generally directs the grand jury operations. If there is probable cause, the grand jury issues an indictment, or “true bill.” The indictment sets forth the charges the defendant will face at trial. If the grand jury does not want to indict, it issues a “no bill.” Grand juries also have the power to investigate cases by calling witnesses or issuing subpoenas.

Although some states choose to use grand juries in felony prosecutions, they are not bound to do so by the Fifth Amendment. In addition, they need not use the same procedures as federal grand juries. Thus, unlike federal grand juries, some states may limit the type of evidence that grand juries may hear or give the defense a greater opportunity to present evidence to the grand jury.

Another mechanism to screen cases before trial is the preliminary hearing. The Constitution does not require preliminary hearings, but a majority of jurisdictions use them to decide whether there is enough evidence to hold a defendant for trial and to settle on which charges the prosecution will bring. A preliminary hearing is very different from a grand jury proceeding. No jury is present during a preliminary hearing. The judge presiding over the hearing decides whether there is probable cause to “bind the case over” for trial. Although procedures can

differ by jurisdiction, both sides are generally given an opportunity to present evidence during the preliminary hearing. In some jurisdictions, hearsay evidence can be used to establish probable cause. As an adversarial process, both sides have an opportunity to cross-examine witnesses. The preliminary hearing gives the defendant a preview of the prosecution's case. If the prosecution does not establish probable cause for a particular charge, the court can reject that charge. If all charges are rejected, the court may order the case dismissed. If the defendant is bound over for trial, however, the court will replace the complaint with a formal information charging the defendant with the offenses he will face at trial.

7. *Step 7: Arraignment on Indictment or Information*

Once an indictment or information is filed, the defendant will appear for arraignment on those charges. At the arraignment, the defendant will typically be asked to enter a plea of guilty or not guilty, be advised of the charges against him, and be assigned counsel if counsel has not yet been assigned. The court will then assign a trial date. The trial date must comply with constitutional standards for a speedy trial and any applicable Speedy Trial Acts.

8. *Step 8: Discovery*

To prepare for trial, the parties will engage in discovery. Discovery is the process by which the parties seek to examine the evidence that the other party is likely to use at trial. Statutes and procedural rules often govern discovery. However, defendants also have a due process right to exculpatory evidence and evidence that may impeach the prosecution's witnesses.

In the federal system, discovery of witness statements is covered by separate statutes. In state courts, comprehensive discovery statutes often cover both inculpatory and exculpatory evidence, including witness statements.

9. *Step 9: Pretrial Motions*

Frequently, the parties will file pretrial motions regarding a variety of issues. The defense will seek to suppress evidence illegally obtained by the prosecution, move to change venue, and seek dismissal for speedy trial violations or problems with the charges. The prosecution will also have an opportunity to file pretrial motions. For example, the prosecution may file pretrial motions *in limine* to get pretrial rulings on key evidentiary issues in the case. Pretrial motions help the parties define the scope of their own cases, and to assess the relative strength of the other side's case.

10. Step 10: Plea Bargaining and Guilty Pleas

More than 90 percent of all criminal cases never go to trial. Rather, the vast majority of cases—97 percent in federal court and 94 percent in state courts—end with a guilty or *nolo contendere* (no contest) plea. During the plea bargaining process, prosecutors may choose to reduce the charges or sentence exposure for a defendant in exchange for the defendant's guilty plea, and oftentimes, the defendant's cooperation. Anticipating that plea bargaining will occur, it is not unusual for prosecutors to load up charges against the defendant so that there is room to compromise during plea bargaining.

If a defendant decides to plead guilty, a formal hearing is held for the defendant to enter his plea. A guilty plea is both an admission that the defendant committed the crime, and a waiver of all of the rights the defendant would have had if he proceeded to trial. Thus, at a guilty plea hearing, the defendant will be advised of his right to counsel, right to confront witnesses, right to present evidence, right to a jury, and privilege against self-incrimination. If the defendant waives these rights, the court will ask for a factual basis for the plea. Either the prosecutor or the defense may provide the recitation necessary to establish that there is a basis for the plea. The court will also determine whether the plea is voluntary, and the nature of any inducements for the plea. Finally, the court will advise the defendant of the consequences of pleading guilty. If the defendant's guilty plea is knowing and voluntary, the court will accept the plea. The guilty plea obviates the need for a trial.

A defendant may also enter a *nolo contendere* plea. A *nolo contendere* plea has the same effect in the criminal case as a guilty plea. The defendant can receive the same criminal punishment as a defendant who enters a guilty plea. However, unlike a guilty plea, which serves as an admission for a civil case that the defendant is responsible, a *nolo contendere* plea has no impact on any companion civil case.

11. Step 11: Trial

If a defendant does not plead guilty, the case proceeds to trial. A trial may be a court ("bench") trial or jury trial. If the case is going to be decided by a judge alone, both sides must agree to waive the right to jury trial. The judge will then hear the evidence adduced at trial, and decide whether there is proof beyond reasonable doubt for each of the charges.

The right to jury trial is guaranteed by the Sixth Amendment for all serious offenses, which the Supreme Court has defined as offenses that carry a possible sentence of more than six months in custody. Although there is a popular notion that 12 persons must sit on a jury, the Supreme Court has held to the contrary. States may choose to have juries as small as six persons for noncapital felony cases. However, jurors' verdict be unanimous.

The jury selection process begins with a panel of jurors (called the “venire”) being summoned for jury selection. Potential jurors are questioned in a process called “voir dire” to reveal their backgrounds, attitudes, and any possible biases they may hold. The parties can excuse jurors from the jury by using challenges for cause, or by exercising peremptory challenges. Challenges for cause are allegations that specific jurors cannot be fair. Each side has an unlimited number of challenges for cause. By contrast, each party will have a limited number of peremptory challenges. Peremptory challenges need not be supported by a showing of actual bias by the juror. Each side has wide discretion in exercising peremptory challenges, although it is improper to use them in a discriminatory manner. Once jurors are finally chosen to sit on a case, they are referred to as the “petit” jury.

It is the jury’s job to listen to all of the evidence, consider the court’s jury instructions, and decide whether the defendant is guilty beyond a reasonable doubt. If the jury is not able to reach a decision, it constitutes a hung jury, and the court will declare a mistrial. In general, the prosecution can retry a defendant following a hung jury.

12. Step 12: Sentencing

If the defendant is convicted, he will be sentenced by the court, ordinarily at a separate sentencing hearing. Before deciding on a sentence, the court will receive reports by the probation officer and input from the parties. At the sentencing hearing, the defendant has an opportunity to address the court. Sentencing systems vary greatly in the United States. In some jurisdictions, judges have broad discretion in imposing a sentence. In other jurisdictions, sentencing guidelines and mandatory sentences control a judge’s sentence. If the judge’s sentence must be based on specific factual findings other than a defendant’s prior criminal record, the trier of fact must find the existence of those facts beyond a reasonable doubt if they will increase the defendant’s sentence beyond the presumptive sentence for that crime.

13. Step 13: Appeals and Habeas Corpus

Finally, a defendant is entitled to challenge his conviction on direct appeal or through collateral proceedings known as habeas corpus proceedings. On direct appeal, the defendant may challenge errors by the court or prosecution at trial. A defendant has the right to an initial appeal to an intermediate court. Unless otherwise provided by statute, a defendant does not have the right to review by the state’s high court. On appeal, the burden shifts to the defendant to demonstrate why he did not receive a fair trial, or that there was insufficient evidence to support the jury’s verdict.

After all direct appeals are completed, a defendant also may challenge constitutional violations in his case through a habeas corpus petition. These are sometimes called forms of “collateral review.” Habeas corpus petitions are suits that allege that