

The Breakfast Club

Constitutional Minute for 4 April 2023

Right #11: Right to a Grand Jury Indictment

How many noticed the blooper in last week's essay? I connected the right to a Grand Jury indictment with the 4th Amendment. Sorry, my bad; we're onto the Fifth Amendment this week (but we will be here awhile, five different rights to discuss).

"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...."

First, let's define Grand Jury: A Grand Jury is a jury of common citizens convened to hear the evidence a prosecutor has gathered against an accused and decide whether the evidence is sufficient to conduct a trial or whether the evidence is too "thin" or shaky to proceed to trial. If the evidence is deemed sufficient, the jury issues an indictment, or "true bill" against the person, allowing them to be arraigned and brought to trial.

Next we should note that the amendment, as written, only permits Grand Juries to hear evidence in "capital crimes" (crimes which carry a possible death penalty), and "infamous" crimes." What's an "infamous crime?"

Webster's 1828 defines "infamous" by stating:

IN'FAMOUS, *adjective* [Latin *infamis*; *infamo*, to defame; *in* and *fama*, fame.]

1. Of ill report, emphatically; having a reputation of the worst kind; publicly branded with odium for vice of guilt; base; scandalous; notoriously vile; used of persons; as an *infamous* liar; an *infamous* rake or gambler.
2. Odious; detestable; held in abhorrence; that renders a person *infamous* rake or gambler.
3. Branded with infamy by conviction of a crime. An *infamous* person cannot be a witness.ⁱ

Of course, this definition doesn't help us determine which crimes are included, and the word "infamous" does not appear in the VA Code, so no help there. This is from the Legal Information Institute:ⁱⁱ

"An infamous crime is a felonious offense. In some states, the term may also refer to crimes that involve corruption, such as fraud or embezzlement. In addition to the severity of the offense, other factors that may contribute to a crime being deemed infamous include the degree of harm caused to the victim, the level of planning and premeditation involved, and the degree of public outrage or media attention generated by the offense."

You will hear talk, particularly in conservative circles of two different Grand Juries: one is convened within and by the court system; one is convened outside the court system. I'll discuss them one at a time and in that order.

"A Grand Jury derives its name from the fact that it usually has a greater number of jurors than a trial (petit) jury. One of the earliest concepts of Grand Juries dates back to early Greece where the Athenians used an accusatory body. In early Britain, the Saxons also used something similar to a Grand Jury System. During the years 978 to 1016, one of the Domesday (laws) stated that for each 100 men, 12 were to be named to act as an accusing body. They were cautioned "not to accuse an innocent man or spare a guilty one."

The Grand Jury can also be traced to the time of the Norman conquest of England in 1066. There is evidence that the courts of that time summoned a body of sworn neighbors *to present crimes that had come to their knowledge*. Since the members of that accusing jury were selected from small jurisdictions, it was natural that they could present accusations based on their personal knowledge."ⁱⁱⁱ (Emphasis added; I will discuss the italicized words in the second half of this essay)

I've said before, nearly all of the Bill of Rights has been incorporated by the Supreme Court against the states. One notable exception was the Third Amendment, another is this Grand Jury clause. This means it applies only to federal crimes; there is no uniform guarantee across all the states that a Grand Jury will hear the evidence against you if accused of "a capital, or otherwise infamous state crime." Whether that happens to you will depend on your state's code or Constitution. All states have some sort of provision for grand juries, but apparently only half of the states actually employ them; twenty-two states *require* their use, to varying extents. Here in Virginia, several provisions of the Declaration of Rights speak of juries, but none of a Grand Jury. However, there is [an entire section of the Code of Virginia devoted to Grand Juries](#) so I'm not going to repeat the details here.^{iv}

One point to take note of: the Fifth Amendment's Grand Jury requirement deals with "capital, or otherwise infamous crime[s];" there is no such specification pertaining to Virginia Grand Juries, they can be called for or can consider evidence regardless of the severity or category of the alleged crime.

The second type of Grand Jury I referred to previously comes from a movement which seems to rise and fall in interest from time to time: "Common Law Grand Juries" otherwise known as "Citizen Grand Juries." A group calling itself the [National Liberty Alliance](#) is one group pushing this idea. Feeling powerless to effect change or root out ineffectual or corrupt elected officials, including judges, this and similar groups want to convene, on their own initiative, citizen grand juries outside the court system and issue indictments charging individuals they feel have become corrupt with criminal malfeasance. This movement seems to harken back to 1066 A.D. when Norman Grand Juries convened when crimes "*had come to their knowledge*."

[This Wikipedia page](#) covers some of the details. [Here's a webpage](#) of another group that purports to lay out procedures for impaneling such juries. Because citizen grand juries are operating outside the official court system, I see little hope that any "indictments" they issue will ever be acted upon, and I do not endorse this movement.

The idea of a Grand Jury, recognized by or empowered by the legitimate court system, whether state or federal, is a great protection. I would rather have charges and evidence against me examined by a jury of my peers than by a single judge before an indictment is issued, and I suspect you would as well.

Grand Juries are themselves not a guarantee against corruption. In the last few years some have clearly been empaneled for barely disguised [political witchhunts](#). But in the right hands and used for the right purposes, I believe they can do much good in ensuring justice is fairly administered.

For further reading:

[The People's Panel: Grand Jury in the United States, 1634-1941](#), by Richard D. Younger, Steven M Herbst, et al.

[Common Law Grand Jury Handbook](#), by John Darash

Next week: Right #12: Protection Against Double Jeopardy.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.
Contact: gary@constitutionleadership.org; 757-817-1216

ⁱ Noah Webster, *American Dictionary of the English Language*, 1828.

ⁱⁱ https://www.law.cornell.edu/wex/infamous_crime

ⁱⁱⁱ Source: https://www.sanmateocourt.org/court_divisions/grand_jury/history.php

^{iv} Title 19, Chapter 13. Grand Juries