

## The Breakfast Club

### Constitutional Minute for 23 May 2023

#### Right #17: Right to an Impartial Jury

“In all criminal prosecutions, the accused shall enjoy the right to ... trial, by an impartial jury “

I recall getting a jury summons once; it was long ago when I was still working full time. The period of duty conflicted with a business trip I was scheduled for; I was a program manager and simply had to be at a planning conference. I called the Clerk’s Office and told them I would welcome jury duty at some other time, that I considered it my civic duty. They excused me and I’ve never been summoned again. I doubt I will ever serve on a jury now even if a new summons arrives: I am likely to not survive voir dire.<sup>i</sup> It is unlikely that either side will want someone on the jury who has intently studied the Constitution, including the concept of jury nullification. What’s “jury nullification?” That topic deserves its own essay (next week).

Sir William Blackstone, who we hear from occasionally in these essays, published his four-volume *Commentaries on the Laws of England* in 1765–1770. It reportedly sold more copies in the colonies than in England. Colonial lawyers who studied it quickly became known as “Blackstone Men.” Originalist Supreme Court Justices today still quote Blackstone more frequently than any other legal commentator.<sup>ii</sup> To them, Blackstone represents the best glimpse of the Founder’s view of law. Blackstone described the right to jury trial as a bedrock guarantee of English criminal procedure:

“Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. . . . [T]he founders of the English law have, with excellent forecast, contrived, that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.”<sup>iii</sup>

Trial by jury was understood to be one of the “liberties and immunities of Englishmen” guaranteed by the original colonial charters. All thirteen state constitutions guaranteed the right.

Article III, Section II of the basic Constitution also contains a jury provision:<sup>iv</sup>

“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.”

But this provision was viewed by many at the time as inadequate, there was no mention of jury impartiality or a focus on criminal proceedings, and thus Madison added the present clause to what became Amendment VI of the Bill of Rights.

Notice neither Article III nor the Sixth Amendment mentions a “jury of my peers;” this is a common misconception about the Constitution: you are not guaranteed a jury of the same, economic status, age, race, sex or whatever “peer” criteria you might choose.

In *Thompson v. Utah (1880)*, the Supreme Court, citing Blackstone, ruled that a jury must have 12 people when someone is charged with a serious crime. Note: [Virginia law](#) allows juries of 7 people for misdemeanor charges.<sup>v</sup>

In *Patton v. United States (1930)*, the Court ruled that defendants can give up their right to a jury trial, choosing instead to have a judge alone decide their guilt or innocence.

In 1954 (*Remmer v. United States*), the Court ruled that if a juror has been the target of an attempted bribe, even if thwarted, a defendant’s right to an impartial jury has been violated and a mistrial should be declared.

In *Irvin v. Dowd (1961)*, the Court ruled that a criminal defendant is entitled to have a trial relocated to another community to make sure that the jury will be impartial. This ruling is being ignored or purposely violated in the case of the J6 prisoners.

The same year (*Hoyt v. Florida*), the Court decided that excluding women from juries, as Florida law did at the time, was justified since a “woman is still regarded as the center of home and family life.”

In *Swain v. Alabama (1965)*, the Court ruled that jurors could not be excluded based on race (it had earlier ruled similarly about ethnic groups). It would not be until 1994 that excluding jurors based on sex was ruled unconstitutional (*J.E.B. v. Alabama*, thus reversing *Hoyt v. Florida* ).

There are many, many more Court rulings affecting jury procedure, too many to include in this brief essay. A more complete list, which I have drawn from, can be found [here](#). [Title 28, Chapter 121 of the US Code](#) covers jury procedure for federal courts.

There are lots of [great movies](#) concerning juries. [Here](#) is an interesting documentary on jury duty; I’ve not watched it, but it looks intriguing -- and its free.

For further reading:

[American Juries: The Verdict](#), by Neil Vidmar and Valerie P. Hans, 2007

Next week: Right #17 (continued): Jury Nullification

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<sup>i</sup> French for "to speak the truth." The process through which potential jurors from the [venire](#) are questioned by either the judge or a lawyer to determine their suitability for [jury](#) service. Also the preliminary questioning of witnesses (especially experts) to determine their competence to testify. See, e.g. [Peretz v. United States, 501 U.S. 923 \(1991\)](#). Definition from: [https://www.law.cornell.edu/wex/voir\\_dire](https://www.law.cornell.edu/wex/voir_dire).

<sup>ii</sup> <https://matthewschafer.medium.com/william-blackstone-was-not-that-great-b381d9554bac>

<sup>iii</sup> W. Blackstone, Commentaries on the Laws of England 343 (1769); *see also* [United States v. Wood, 299 U.S. 123, 138 \(1936\)](#).

<sup>iv</sup> So does Amendment 7 concerning civil cases.

<sup>v</sup> §19.2-262.