



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. (U.S. Const.)

JUDICIAL PROTECTIONS AND JUDICIAL EXPANSIONS

By: James Baehr

The Fifth Amendment grew out of a long tradition of discrete judicial protections both criminal and civil. The Amendment consists of five primary protections of the individual against the government: a grand jury review before felony indictments, no repeat trials for the same offense by the same sovereign (double jeopardy), no compelled self-incrimination, no deprivation without due process, and no government seizures of property without just compensation.

The Fifth Amendment's most famous privilege – that against self-incrimination – came out of a colonial rejection of the inquisitorial methods of prior European courts and practices such as the Star Chamber or the Inquisition. Judicial entities such as England's "High Commission" would summon suspects before it and require them "to take an oath to answer truthfully to interrogatories that sought to establish guilt for crimes neither charged nor disclosed" (Levy, 1999). The inquisitorial oaths they required were "used to persecute political and religious dissenters..." like the Puritans, who faced the dilemma of condemning themselves to death by admission or to damnation by dishonesty (Spalding, et. al., 2014).

The grand jury protection – having a jury of peers determine whether the government had probable cause to file a criminal case indictment – grew in popularity in the colonial period as a populist check against perceived abuse of prosecutorial powers. In 1734, John Peter Zenger was accused of seditious libel for criticizing the New York Governor, but three colonial grand juries refused to return an indictment on him (Spalding, et. al., 2014). The ban on double jeopardy in the Amendment – prohibiting a second trial after acquittal – was widely accepted in the colonial period after the trial of patriot leader Alexander McDougall in 1770 increased awareness of it. "It is a rule of law that a man shall not be twice vexed for one and the same cause" went one maxim (Levy, 1999). Debate on these provisions was "short" and agreement widespread that they should be included in the Bill of Rights (Levy, 1999).

The civil side of the equation – prohibiting governmental "takings" of private property without just compensation – implicitly allowed the government to take property for public use by "eminent domain." This power was not commonly used in the colonies as the federal government looked to the states to exercise this power in the early Republic (Spalding, et al, 2014).

But the broadest use of the Amendment today has been the reach of the "due process" clause. The roots of the Fifth Amendment's protections of persons and property run as far back as the signing of Magna Carta in 1215. That document provides that

No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land ([Magna Carta, 1215](#)).

By the time of the Fifth Amendment's drafting, eight state constitutions protected against deprivations of life, liberty, or property except according to the "law of the land," underscoring the importance of the principle of legality (Spalding, et al. 2014). The "law of the land" terminology shifted into the phrase "due process of law" in the Amendment because of a popular colonial era legal scholar's assertion, later disputed, that the phrases had identical meanings (Spalding, et. al., 2014).

In the years since, the "due process" clause of the Fifth Amendment has been read to apply not just to judicial procedures, but to broad categories of substantive rights and protections for different classifications of people and actions, some hotly contested. These fundamental rights are determined mostly by the interpretation of the courts, not Congress, and some legal scholars have taken issue with this interpretive methodology in light of the original meaning of the Amendment. "Substantive due process as it is currently understood—meaning that the government may not violate certain fundamental rights that do not appear elsewhere in the Constitution, and may not draw certain classifications (for instance, based on race or sex), without especially strong justification—is difficult to justify in light of the text and history of the Fifth Amendment" (Harrison, 2021). Justice Scalia put it more directly: "The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so called 'substantive due process') is in my view judicial usurpation" (*City of Chi. V. Morales*, 527, U.S. 41, 85 (1999)). A provision intended to enshrine a commitment to the rule of law in our [fundamental](#) document now has empowered some members of the judiciary as the unelected branch of the government to change the law.

AUTHOR BIOGRAPHY

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