

No.

IN THE SUPREME COURT OF THE UNITED STATES

QAYA MIKEL GORDON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

**APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI**

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Final Judgment of the U.S. District Court for the District of Idaho (Dec. 1, 2022)	5a
Indictment (Nov. 15, 2021)	12a
Constitutional and Statutory Provisions Involved:	
18 U.S.C. § 1153	14a
U.S. Const. art. I, § 8	14a
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NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOV 20 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 22-30198

Plaintiff-Appellee,

D.C. Nos.
3:21-cr-00305-DCN-1
3:21-cr-00305-DCN

v.

QAYA MIKEL GORDON,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the District of Idaho
David C. Nye, Chief District Judge, Presiding

Submitted November 16, 2023**
Seattle, Washington

Before: McKEOWN and GOULD, Circuit Judges, and BENNETT,*** District Judge.

The district court convicted Qaya Mikel Gordon of two counts of assault with a deadly weapon pursuant to the Major Crimes Act (“MCA”), 18 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

§ 1153. The MCA mandates federal criminal jurisdiction over enumerated criminal conduct, including certain types of assault, by Indians in Indian country. 18 U.S.C. § 1153(a); *see also* 18 U.S.C. § 113(a)(3).

In this appeal Gordon challenges the constitutionality of the MCA. The constitutionality of a federal statute is a question of law, which we review *de novo*. *United States v. Lujan*, 504 F.3d 1003, 1006 (9th Cir. 2007). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

1. Gordon contends that the district court lacked jurisdiction because the MCA violates equal protection by discriminating against Indian criminal defendants on the basis of race without a compelling governmental interest and without being narrowly tailored to achieve such an interest. However, the Supreme Court has held that the MCA does not discriminate against Indians on the basis of race. In *United States v. Antelope*, 430 U.S. 641 (1977), the Supreme Court rejected an equal protection challenge to the MCA. The Supreme Court explained that federal Indian laws, including the MCA, are “not based upon impermissible racial classifications.” *Id.* at 645. Instead, federal jurisdiction over Indians “is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” *Id.* at 646.

2. Gordon also challenges jurisdiction by arguing that Congress exceeded its authority when it enacted the MCA. However, the Supreme Court has long held

that Congress's plenary power allows it to legislate criminal laws regarding Indian affairs that occur in Indian country. *Id.* at 648 ("Congress has undoubtedly constitutional power to prescribe a criminal code applicable in Indian country."); *Keeble v. United States*, 412 U.S. 205, 209–10 (1973) (discussing "the power of Congress to confer" criminal jurisdiction over Indians in Indian country "on the federal courts"); *United States v. Kagama*, 118 U.S. 375, 384 (1886) (emphasizing that the federal government's authority to legislate federal Indian laws "has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen"). And the Ninth Circuit has specifically held that Congress had the authority to enact the Major Crimes Act. *United States v. Lomayaoma*, 86 F.3d 142, 146 (9th Cir. 1996) ("Congress did not exceed its powers under the Indian Commerce Clause when it enacted the Indian Major Crimes Act in 1885.").

3. Finally, Gordon invokes the Supreme Court's recent decision in *Haaland v. Brackeen*, 599 U.S. 255, 143 S. Ct. 1609 (2023), to further question the Major Crime Act's validity. Gordon suggests that a concurring opinion in *Brackeen* announced the Court's repudiation of *Kagama*. But *Brackeen* is inapposite because it did not involve the MCA or criminal law. *See* 143 S. Ct. at 1622–23 (summarizing plaintiffs' challenges to the Indian Child Welfare Act, which governs certain child-custody matters). Even if *Brackeen* were relevant to this case, it would only reinforce the Supreme Court's insistence that Congress has

the power to enact federal Indian laws. *Id.* at 1628–29 (“Congress’s power to legislate with respect to Indians is well established and broad. Consistent with that breadth, we have not doubted Congress’s ability to legislate across a wide range of areas, including criminal law, domestic violence, employment, property, tax, and trade.”). Our reading of *Brackeen* focuses on the opinion of the Court in that case because concurring opinions have no binding precedential value. *Maryland v. Wilson*, 519 U.S. 408, 412–13 (1997).

AFFIRMED.

UNITED STATES DISTRICT COURT

District of Idaho

UNITED STATES OF AMERICA) **JUDGMENT IN A CRIMINAL CASE**
)
v.)
QAYA MIKEL GORDON) Case Number: 0976 3:21CR00305-001
) USM Number: 75622-509
)
) Michael Palmer
) Defendant's Attorney
END PAGE

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____
which was accepted by the court.

was found guilty on count(s) One and Two of the Indictment
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 § 113(a)(3)	Assault with a Deadly Weapon Committed within Indian Country	11/01/2021	1
18 § 113(a)(3)	Assault with a Deadly Weapon Committed within Indian Country	11/01/2021	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 1, 2022

Date of Imposition of Judgment

Date of Inspection or Judgment: December

Signature of Judge

David C. Nye, Chief United States District Judge
Name and Title of Judge

December 1, 2022
Date

DEFENDANT: Qaya Mikel Gordon
CASE NUMBER: 0976 3:21CR00305-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: 72 months on each count.

The terms of imprisonment on each count imposed by this judgement shall run concurrently.

The court makes the following recommendations to the Bureau of Prisons:

The defendant will be credited with all time served in federal custody and will be placed in a facility in Herlong, California. It is recommended that the defendant participate in the RDAP program while incarcerated.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____ DEPUTY UNITED STATES MARSHAL

DEFENDANT: Qaya Mikel Gordo

CASE NUMBER: 0976 3:21CR00305-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years on each count.

The terms of supervised release on each count are to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release on supervision and to a maximum of 10 periodic drug tests a month thereafter for the term of supervision as directed by the probation officer. The cost to be paid by both the defendant and the government based upon the defendant's ability to pay.
 - The above drug testing condition is suspended, based on the courts determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
4. The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
6. The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*
7. You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664. *(Check, if applicable.)*
8. You must pay the assessment imposed in accordance with 18 U.S.C. § 3013.
9. If this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment.
10. You must notify the court of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Qaya Mikel Gordon
CASE NUMBER: 0976 3:21CR00305-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer, unless legitimately asserting your Fifth Amendment right against self-incrimination as to new criminal conduct.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

Upon a finding of a violation of supervision or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

A U.S. probation officer has instructed me on the conditions specified by the Court. I fully understand the conditions and have been provided with a written copy of this judgment containing these conditions.

Defendant's Signature _____

Date _____

U.S. Probation Officer/Witness _____

Date _____

DEFENDANT: Qaya Mikel Gordon
CASE NUMBER: 0976 3:21CR00305-001

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall pay any special assessment or other financial obligation that is imposed by this judgment in accordance with the Schedule of Payments as ordered by the Court.

The defendant shall submit his or her person, property, house, residence, vehicle, papers, computers (as defined in 18 § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

The defendant shall participate in a program of testing and treatment for drug and alcohol abuse, as directed by the probation officer. The cost to be paid by both the defendant and the government based upon the defendant's ability to pay.

The defendant shall abstain from the use of alcohol and shall not be present in any location where alcohol is the primary item of sale.

The defendant shall participate in a program of mental health treatment, as directed by the probation officer. The cost to be paid by both the defendant and the government based upon the defendant's ability to pay.

As directed by a mental health professional, the defendant shall take all medications as prescribed. The cost of medication to be paid by both the government and the defendant based upon the defendant's ability to pay.

If determined by the results of the Test of Adult Basic Education (TABE) that the defendant has the cognitive ability to do so, the defendant shall obtain their General Education Development (GED) degree or High School Equivalency (HSE) during the term of supervised release. The costs of education and testing shall be paid by the defendant.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

Participate in a program aimed at addressing specific interpersonal or social areas, specifically for domestic violence and anger management.

The defendant shall have no contact with the identified victims in this case.

Special Conditions of supervised release shall supersede any standard condition that is inconsistent with the special conditions.

DEFENDANT: Qaya Mikel Gordon
CASE NUMBER: 0976 3:21CR00305-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	<u>Assessment</u> \$200	<u>Fine</u> No fine	<u>Restitution</u> \$11,782.08	<u>AVAA Assessment*</u> Not applicable	<u>JVTA Assessment**</u> Not applicable
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The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

	<u>Name of Payee</u>	<u>Total Loss***</u> \$11,782.08	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Larry Payne (Address not for public disclosure)				

TOTALS	<u>\$11,782.08</u>	<u>\$</u>
---------------	--------------------	-----------

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Qaya Mikel Gordon
CASE NUMBER: 0976 3:21CR00305-001**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or

D Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to term of supervision; or

E Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:
 While in custody, the defendant shall submit nominal payments of not less than \$25 per quarter pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

During the term of supervised release, the defendant shall submit nominal monthly payments of 10% of gross income, but not less than \$25 per month, unless further modified by the Court. The defendant shall pay any special assessment or financial obligation owing to the Clerk of the Court, 550 West Fort Street, Boise, Idaho 83724.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number

Defendant and Co-Defendant Names Total Amount
(including defendant number)

Joint and Several Amount

Corresponding Payee, if appropriate

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment (8) penalties, and (9) costs, including cost of prosecution and court costs.

RAFAEL M. GONZALEZ, JR.
ACTING UNITED STATES ATTORNEY
TRACI J. WHELAN, IDAHO STATE BAR NO. 4416
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF IDAHO
6450 N. MINERAL DRIVE, SUITE 210
COEUR D'ALENE, IDAHO 83815
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U.S. COURTS

NOV 16 2021

Recd. _____ Filed _____ Time _____
STEPHEN W. KENYON
CLERK, DISTRICT OF IDAHO

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

QAYA MIKEL GORDON,

Defendant.

Case No. CR 21-305 DCN

INDICTMENT

18 U.S.C. §§ 113(a)(3) and 1153

The Grand Jury charges:

COUNT ONE

**Assault with a Deadly Weapon
18 U.S.C. §§ 113(a)(3) and 1153**

On or about November 01, 2021, in the District of Idaho and within the exterior boundaries of the Nez Perce Indian Reservation, the Defendant, QAYA MIKEL GORDON, an Indian, did knowingly and intentionally assault K.E.P., an Indian, with a dangerous weapon with the intent to do bodily harm to-wit: the Defendant hit K.E.P. repeatedly with a hammer, all in violation of Title 18, United States Code, Sections 113(a)(3) and 1153.

COUNT TWO

**Assault with a Deadly Weapon
18 U.S.C. §§ 113(a)(3) and 1153**

On or about November 01, 2021, in the District of Idaho and within the exterior boundaries of the Nez Perce Indian Reservation, the Defendant, QAYA MIKEL GORDON, an Indian, did knowingly and intentionally assault V.K.S., an Indian, with a dangerous weapon with the intent to do bodily harm to-wit: the Defendant hit V.K.S. repeatedly with a hammer, all in violation of Title 18, United States Code, Sections 113(a)(3) and 1153.

DATED this 16th day of November 2021

A TRUE BILL,

/s/ [signature on reverse]
FOREPERSON

RAFAEL M. GONZALEZ, JR.
Acting United States Attorney
By:



TRACY J. WHELAN
Assistant United States Attorney

18 U.S.C. § 1153 - Offenses committed within Indian country

(a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, a felony assault under section 113, an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

(b) Any offense referred to in subsection (a) of this section that is not defined and punished by Federal law in force within the exclusive jurisdiction of the United States shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.

U.S. Const. art. 1, § 8.

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;

Appendix 15a

To borrow Money on the credit of the United States;

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

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

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

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

To establish Post Offices and post Roads;

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;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

Appendix 16a

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

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;

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 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.

U.S. Const. amend. V.

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.