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Last week’s news was filled with reports that Special Counsel Robert Mueller had impaneled a grand jury (The Wall Street Journal). Or did Mr. Mueller empanel a grand jury (The Washington Post). Aside from the political and legal issues, these reports raised two questions. First, why do we talk of em/impaneling a jury? Second, which is correct – empanel or impanel?

The word “empanel” is derived from the Old French empanelling which is itself derived from the diminutive form of the Latin word pannus and the prefix in. A pannellus is a little piece of cloth and the prefix in is used to denote in or on. Thus, to empanel is to put on a piece of cloth. Sir William Blackstone makes this clear in Book III, Chapter 23 of his Commentaries on the Laws of England:

And he returns the names of the jurors in a panel (a little pane, or oblong piece of parchment) annexed to the writ.

The jury is still out on the correct spelling. The use of the prefix “em” is closer to the word’s French origins. After all, it wasn’t until the reign of Charles II that Parliament required that trials be conducted in English. “Em” remained good enough for Mark Twain in his travelogue, Roughing It:

When the peremptory challenges were all exhausted, a jury of twelve men were empaneled—a jury who swore that they had neither heard, read, talked about, nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sagebrush, and the stones in the street were cognizant of!

Congress, however, ignored the call of history and chose the “im” form in specifying the size of a grand jury: “Every grand jury impaneled before any district court shall consist of not less than sixteen nor more than twenty-three persons”. 18 U.S.C. § 3321. The Federal Rules of Criminal Procedure are consistent. For example, Rule 6(h) provides: “At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror”.

The California Penal Code also uses “im” form but several examples of “empanel” can be found in the Education Code.

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