



Center for Justice & Democracy  
90 Broad Street, Suite 401  
New York, NY 10004  
Tel: 212.267.2801  
[centerjd@centerjd.org](mailto:centerjd@centerjd.org)  
<http://centerjd.org>

## **SAFEGUARDING A PILLAR OF AMERICAN FREEDOM –**

### **AN HISTORICAL PRIMER ON THE RIGHT TO JURY TRIAL IN CIVIL CASES\***

When politicians in Congress or at the state level pass “tort reforms,” they are taking power and authority directly away from juries, or in some cases, eliminating juries altogether. Our founding fathers would not be happy!

#### **THE RIGHT TO JURY TRIAL IS AMONG OUR EARLIEST RIGHTS AS AMERICANS**

**The American colonists believed that trial by jury was an important right of freedom.<sup>1</sup>**

The Massachusetts Body of Liberties, enacted December 10, 1641, was the first colonial charter to provide for civil and criminal jury trials by name. As an indication of how important juries were, this same charter made no mention of rights of free speech or press.<sup>2</sup>

**Colonial juries were often used to counter political oppression.**

In one famous 1670 case, William Penn was indicted for illegal speech and assembly, although it was widely believed the motive behind the indictment was the king’s dislike for his religious beliefs (Penn was a Quaker). A colonial jury found Penn not guilty, even though the court repeatedly threatened to punish the jurors for returning this verdict, and eventually did fine and imprison them. The case helped to abolish the English practice of punishing jurors for bringing what the Court considered to be the wrong verdict.<sup>3</sup>

**England repeatedly attempted to restrict the right to jury trial in the colonies, as colonial administrators made increasing use of judge-trying cases.**

On March 22, 1765, England passed the Stamp Act, which placed stamp duties on all legal documents, newspapers, pamphlets, college degrees and other documents. The British reasoned that since the American colonists had been the chief beneficiaries of the expulsion of the French after the 1754-63 French and Indian War, they should bear the financial responsibility for the government and defense of the American continent.<sup>4</sup>

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\* Based in part on Joanne Doroshov, “The Case of the Civil Jury: Safeguarding a Pillar of Democracy,” Center for Study of Responsive Law, 1992, 1995.

The act aroused strong opposition, in large part because the admiralty courts, which operated without juries, were given jurisdiction to enforce the Act.<sup>5</sup> John Adams said:

[T]he most grievous innovation of all is the alarming extension of the power of courts of admiralty. In these courts, one judge presides alone! No juries have any concern there!<sup>6</sup>

The Stamp Act was finally repealed in 1766, having been in effect only a few months and never enforced.

**In virtually every major document and speech delivered before the Revolution, the colonists portrayed trial by jury as, if not their greatest right, one that was indispensable.**

The colonists' Resolution of the Stamp Act Congress, passed on October 19, 1765, declared, "Trial by jury [is] the inherent and invaluable right of every British subject in these colonies."<sup>7</sup>

Late in 1772, the Boston town meeting passed a resolution charging that the right of trial by jury was in jeopardy from the power of the vice-admiralty courts, which did not provide jury trials.<sup>8</sup>

In 1774, the First Continental Congress declared in its Declaration and Resolves that the colonists were entitled to the "great and estimable privilege of being tried by their peers of the vicinage."<sup>9</sup>

Colonists called trial by jury "a great right" when describing this declaration to the French settlers of Quebec in 1774, in an address urging them to support the American cause.<sup>10</sup>

In the Declaration of the Causes and Necessity of Taking Up Arms in 1775, the colonists listed deprivation of "the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property" as specific grounds for forcibly resisting English rule.<sup>11</sup>

Among the grievances against George III listed in the Declaration of Independence was "depriving us, in many cases, the benefits of trial by jury."<sup>12</sup> (The only other Bill of Rights provision mentioned specifically in the Declaration of Independence was the prohibition against quartering troops.)

**AT OUR COUNTRY'S FOUNDING, THE RIGHT TO CIVIL JURY TRIAL  
WAS CONSIDERED AMONG OUR MOST IMPORTANT RIGHTS**

The early state constitutional drafters considered the civil jury an important instrument for the protection of individual liberties.<sup>13</sup> In fact, legal scholars believe that "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions...."<sup>14</sup>

Section 11 of the Bill of Rights in the 1776 Constitution of Virginia, drafted by plantation and slave owner George Mason, stated, “[I]n controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.”<sup>15</sup>

The Constitution of Pennsylvania, dated August 16, 1776, followed Virginia’s in affirming the right of trial by jury in civil cases: “[I]n controversies respecting property and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred.”<sup>16</sup>

The Constitution of North Carolina, dated December 14, 1776, stated, “[I]n all controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.”<sup>17</sup>

Similar language is found in the constitutions of Vermont in 1777, Massachusetts in 1780 and New Hampshire in 1784.<sup>18</sup>

**The founders’ mistake of excluding mention of the right to civil jury trial in the Constitution almost defeated it.<sup>19</sup>**

The framers of the U.S. Constitution secured the right to jury trial in *criminal* cases by incorporating it directly into the main body of the Constitution.<sup>20</sup> However, they did not secure the right to civil jury trial, or for that matter any of the other individual liberties listed in the Bill of Rights. (Federalists like Alexander Hamilton believed at the time that civil jury practice varied too widely from state to state to be included in the federal constitution.<sup>21</sup>)

There is scant evidence of debate over the issue during the constitutional convention, since the framers originally had considered it unnecessary — and too time-consuming — to include a listing of individual rights in the Constitution.<sup>22</sup>

The civil jury trial issue did come up during discussions among members of the “Committee on Style and Arrangement” who finalized the document’s format after the “Committee on Detail” had completed its work.<sup>23</sup>

During a discussion among committee members Nathaniel Gorham, Elbridge Gerry and George Mason, Gerry urged the “necessity of Juries to guard against corrupt Judges,” later arguing that without juries, “The Judiciary will be a Star Chamber.”

Similarly, Mason complained, “There is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes [cases]; nor against the danger of standing armies in time of peace.”<sup>24</sup>

Thomas Jefferson criticized the document for neglecting to preserve the civil jury trial. Jefferson listed among the rights he wished had been explicitly guaranteed “a trial by jury in all cases determinable by the laws of the land.”<sup>25</sup> Jefferson later said, “I consider [trial by jury] as the only anchor yet imagined by man, by which a government can be held to

the principles of its constitution,<sup>26</sup> and, “Were I called upon to decide whether the people had best be omitted in the legislative or in the judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them.”<sup>27</sup>

Sensing the developing controversy, which threatened ratification, federalist Alexander Hamilton devoted his longest Federalist essay, No. 83, to the civil jury trial, arguing that the constitution’s drafters did not mean to abolish civil jury trials, but rather believed legislatures could better define the right through statutes. However, Hamilton could not quiet the critics.

The almost complete lack of any Bill of Rights was a principal part of the Anti-Federalist attacks on the constitution and the lack of provision for civil juries was a prominent part of this argument; the Supreme Court’s appellate jurisdiction in law and in fact was treated by the Anti-Federalists as a virtual abolition of the civil jury.<sup>28</sup>

Patrick Henry, speaking at the Virginia Constitutional Convention, said: “Trial by jury is the best appendage of freedom.... We are told that we are to part with that trial by jury with which our ancestors secured their lives and property.... I hope we shall never be induced by such arguments, to part with that excellent mode of trial.”<sup>29</sup>

Henry, George Mason and other anti-federalists may have used the “jury trial” issue to stir up political opposition to the constitution, which they opposed more for its usurpation of local political influence.<sup>30</sup> But populist sentiment was strongly in favor of a Bill of Rights, particularly the right to a civil jury trial.

Delaware, Pennsylvania, New Jersey, Georgia and Connecticut ratified the constitution too quickly for organized opposition to form. But beginning with Massachusetts, which convened to discuss ratification in February 1788, states began asking Congress to make certain changes to the constitution “to remove the fears and quiet the apprehensions” of the people. In addition to expressing fear of Congress’s power to levy direct taxes, Massachusetts wanted three amendments germane to civil rights: grand jury indictment, civil jury trial and a declaration reserving to the states all powers not expressly delegated to Congress.<sup>31</sup>

**In 1791, during its first session, Congress drafted the Bill of Rights, ratified as the first ten amendments to the Constitution, securing the right to civil jury trial in the Seventh Amendment, which reads:**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

## NOTES

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- <sup>1</sup> Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639 (1973).
- <sup>2</sup> Perry, Richard and John C. Cooper, *Sources of Our Liberties*, American Bar Foundation (1959) at 151: Massachusetts Body of Liberties, §§ 29, 95 *et seq.*
- <sup>3</sup> Hans, Valerie P. and Neil Vidmar, *Judging the Jury* (1986) at 21-22.
- <sup>4</sup> Perry, Richard and John C. Cooper, *Sources of Our Liberties*, American Bar Foundation (1959) at 262.
- <sup>5</sup> *Id.* at 263.
- <sup>6</sup> *Id.* at 267; *Instructions of the Town of Braintree, Massachusetts on the Stamp Act* (Oct. 14, 1765).
- <sup>7</sup> *Id.* at 270, from the *Journal of the First (of the American Colonies, in the Opposition to the Tyrannical Acts of the British Parliament)*, New York (1845) at 27-29.
- <sup>8</sup> See, e.g., Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 654, n. 47 (1973); *Sources and Documents Illustrating the American Revolution, 1764-1788* at 94 (2d ed. S. Morison 1929).
- <sup>9</sup> Singleton, John N., “Jury Trial: History and Preservation,” 32 *Trial Lawyer’s Guide* (1988) at 273, 274.
- <sup>10</sup> Perry, Richard and John C. Cooper, *Sources of Our Liberties*, American Bar Foundation (1959) at 284.
- <sup>11</sup> *Id.* at 290; Singleton at 274.
- <sup>12</sup> Perry, Richard and John C. Cooper, *Sources of Our Liberties*, American Bar Foundation (1959) at 320.
- <sup>13</sup> Hans and Vidmar at 36.
- <sup>14</sup> Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 655 (1973), citing L. Levy, *Freedom of Speech and Press in Early America History – Legacy of Suppression* 281 (1963 reprint).
- <sup>15</sup> Perry, Richard and John C. Cooper, *Sources of Our Liberties*, American Bar Foundation (1959) at 312.
- <sup>16</sup> *Id.* at 325, 330.
- <sup>17</sup> *Id.* at 356.
- <sup>18</sup> *Id.* at 366, 384.
- <sup>19</sup> Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 656 *et seq.* (1973).
- <sup>20</sup> Article III, §2.3 states: “The trial of all crimes, except in cases of impeachment, shall be by jury.”
- <sup>21</sup> Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 656 *et seq.* (1973).
- <sup>22</sup> *Ibid.*
- <sup>23</sup> Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 658 (1973).
- <sup>24</sup> Farrand, *Records of the Federal Convention of 1787, Vol. II* (1911) at 587, 635, 640.
- <sup>25</sup> Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 668, n. 82 (1973) citing letter from Thomas Jefferson to Francis Hopkinson (from Paris), March 13, 1789, 5 *U.S. Bureau of Rolls & Liberty, Documentary History of the Constitution*, 1786-1870 at 159-60 (1905).
- <sup>26</sup> 3 *The Writing of Thomas Jefferson* 71 (Washington ed. 1861).
- <sup>27</sup> Letter from Jefferson to L’Abbe Arnaud, July 19, 1789, in 3 *Works of Thomas Jefferson* 81-82 (Washington ed. 1854).
- <sup>28</sup> Henderson, *The Background of the Seventh Amendment*, 80 *Harv. L. Rev.* 289, 295 (1966). See also, Wolfram at 714.
- <sup>29</sup> Elliot, Jonathan, *Elliot’s Debates* (1941) at 324, 544.
- <sup>30</sup> Wolfram, Charles W., *The Constitutional History of the Seventh Amendment*, 57 *Minn. L. Rev.* 639, 655, 668 (1973).
- <sup>31</sup> Brant, Irving, *The Bill of Rights* (1965) at 39; Perry and Cooper at 419.