



The Declaration and the state of jury trials in America

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Sunday is Independence Day—a day on which we celebrate the signing of the Declaration of Independence. The Declaration is probably best known for its declaration of natural rights where the founders proclaimed “that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.” Often ignored is the next sentence which states that governments exist to protect these God-given rights.

But there is another part that gets even less attention, and that’s what I want to focus on here. No one ever seems to read the section listing the colonies’ grievances. If you ask people why the colonies declared their independence, you’re likely to hear they were tired of taxation without representation. Or you may hear the colonies didn’t appreciate the quartering of British soldiers in their homes.

Unless you’re talking to a lawyer, you’re not likely to hear the colonies were upset with Great Britain “[f]or depriving us in many cases, of the benefit of Jury trial.” But it was a problem serious enough to include in the list of grievances. Accordingly, when the founders set up a new government under the Constitution, they set out to protect the jury trial. I worry that the founders’ view of what the promise of a jury trial should look like is lost in modern America. Below are two problems I see with the modern jury trial in light of its importance to the founders.

The first problem is simply the rarity of criminal jury trials. Article III of the Constitution states “[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.” For years that meant the accused could not even waive this requirement and request a bench trial (trial in front of a judge only). Today, the overwhelming majority of criminal convictions are not the result of either a jury or bench trial.

According to a law review article by Clark Neily of the Cato Institute, plea bargaining was unknown to the founders. Neily says the importance of trial by jury was one of the few things the Federalists and Anti-Federalists agreed on. Another law review article, this one co-authored by my former Criminal Procedure professor, Stephen E. Henderson, argues that having most criminal convictions take place without any participation by a jury is “anathema to our Founding vision, in which jury service would not only be a civic duty but a regularized hedge against tyranny—a routine and democratic check on our institutions of law enforcement.” Surely Prof. Henderson is right. The men who wrote the Declaration would roll over in their graves if they saw what the right to trial by jury has become.

Another, admittedly controversial, change to the jury trial system deals with nullification or “conscientious acquittal.” To understand how this plays into the Declaration of Independence, a story from history is helpful.

One of the more famous trials of colonial America is the trial of John Peter Zenger. Zenger was a printer who began printing material critical of the local New York governor. To squash this, the governor sought to have Zenger tried for “seditious libel.” Unlike modern law, truth was not a defense to libel in colonial America (under English law). At his trial, Zenger’s lawyer stated that Zenger did not deny publishing the material. He argued, in effect, the law was unjust. The jury made up of Americans acquitted Zenger.

In response to this “nullification,” King George began setting up his own courts and expanding their authority. These courts did not utilize juries but were run by judges appointed by King George. This is one reason the founders believed it necessary to include trial by jury (or lack thereof) as a reason for separation.

The founders believed that trial by jury was “the very palladium of free government.” And they believed that jury service carried with it the power of nullification or conscientious acquittal. Current court precedent still recognizes the power of nullification but does not allow it as a right. Judges routinely deny jury instructions on the subject, and lawyers are rarely allowed to argue it. On this Independence Day weekend, we would do well to consider giving this power more teeth. What better way to ensure participation and safeguard liberty than to empower juries to be injustice preventers—not just finders of fact.

Happy Independence Day!