Chapter 4

The Institution of the Jury in the Works of the Founding Fathers on the Federal Constitution

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INTRODUCTION

This study aims to discuss the origins of the jury institution in the United States. The term "jury" denotes three independent institutions in the US,[1] whose common denominator is that they are composed of randomly selected citizens who make specific decisions as part of the trial. In the grand jury, the panel of jurors decides whether an individual can be indicted. In the trial jury, their task is to assess the evidence presented during the trial and, on such grounds, return a verdict concerning the guilt of the defendant. In a civil proceeding, on the other hand, the panel of jurors (the civil jury) decides conclusively regarding the facts of the case. A model in which those are the citizens who make certain decisions in the judicial proceedings originated in medieval England and was later transferred with the entire acquis of common law to the British colonies in North America. Its essential principles and guarantees were also incorporated into the text of the Constitution of the newly established American state. However, it was a process whose final outcome may be seen as a compromise between the two contemporary political factions. The compromise contributed measurably to the final ratification of the federal Constitution

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[1] See esp. Wojciech Kwiatkowski, *Geneza i praktyka instytucji przysięgłych w amerykańskim procesie karnym* (Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2021).

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by the founding states. Conversely, its present-day significance has been shaped by the case law of the US courts, notably the judgments of the federal Supreme Court.

THE JURY IN THE BRITISH COLONIES IN NORTH AMERICA

A trial in which the evidence is assessed and specific facts ascertained by the citizens as opposed to the judge did not emerge in the British colonies in North America. Nor is it the fruit of the work of the Founding Fathers of the United States. In fact, the institution of the jury was brought to the colonies in North America by the British colonizers, along with the entire body of common law.

In the *First Charter of Virginia* of April 1606 as well as in the later *Instructions for the Governing of Virginia*, King James I guaranteed each colonizer all such rights, guarantees, and privileges that those persons had had or would have been entitled to while in England.[2] Almost from the very beginning of the colony of Virginia, both criminal and civil cases were tried in the presence of a jury, and the principle continued to apply in the successively established British colonies.[3] As early as 1623, those in New England adopted a law on the judiciary according to which "all Criminal facts, and also matters of trespass and debts between man and man should be tried by the verdict of twelve Honest men to be Impanelled by authority in form of a Jury upon their oath."[4] In 1635, the first regular grand jury panel was established in the New England colonies. In Massachusetts, the Bill of Rights of 1641 provided that "in all actions at law it shall be the liberty of the plaintiff and defendant by mutual consent to choose whether they will be tried by the bench or by a jury, unless it be where the law upon just cause hath otherwise determined. The like liberty shall be granted to all persons in criminal cases,"[5] and that "all jurors shall be chosen continu-

[2] "We do for Us, our Heirs and Successors, Declare by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions." The text of both documents originates from John E. Wakelyn, ed. *Americas Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance* (Westport: Greenwood Publishing Group, 2006), 1: 28–37.

[3] After Randy J. Holland, "State Jury Trials and Federalism: Constitutionalizing Common Law Concepts," *Valparaiso University Law Review* 38, no. 2 (2004): 377.

[4] Cited after Leon C. Hills, *History and Genealogy of the Mayflower Planters and First Comers to Ye Olde Colonie* (Baltimore: Genealogical Publishing Com., 1975), 92.

[5] Massachusetts Body of Liberties of 1641. Available at: Liberty Fund Network, accessed October 10, 2022, https://oll.libertyfund.org/page/1641-massachusetts-body-of-liberties. On this issue, see also Susan C. Towne, "The Historical Origins of Bench Trial for Serious Crime," *The American Journal of Legal History* 26, no. 2 (1982): 124–28.

ally by the Freemen of the town where they dwell."[6] Several years later, provisions introduced into the Bill would set out the amount of fines for avoiding jury duty. In the colony of Connecticut, jurors were chosen by the court, but each municipality within a judicial district had to have a representative on the panel.[7]

In numerous jurisdictions, jury panels would handle not only serious crimes, but also minor offenses, or even conduct which merely went against the morals. The same was the case with civil proceedings, which sometimes were concerned with minor, strictly civil disputes. They acted promptly, and if the case was a criminal one, the jury also decided on the penalty, which conformed not only to the law in force in the colony but also to religious precepts. In the colony of New Plymouth, regardless of any other law enforcement bodies operating there, grand jury panels played a role in maintaining public order and upholding local moral norms. Thus, they were invested with powers to investigate violations of the laws, as well as tasked with maintaining peace and promoting prosperity. Recruited from among the members of the local community,[8] the jury panels constituted an ideal forum that provided an opportunity to co-manage a particular administrative entity and exercise certain supervisory prerogatives on behalf of its residents. These included, for example, determining the amounts of local taxes, overseeing how public funds were spent, appointing local officials, or deciding on the layout of public roads.[9]

The decisions that the jury panels took in particular cases also fostered a certain legal distinctiveness, which set the colonists apart from the Crown. While the founding charters issued to the individual colonies stipulated that laws made there could not contravene those made in England, the distance from the higher courts across the ocean, the widespread lack of legal training among those serving as judges,[10] and the very harsh living conditions faced by people from various cultural and religious backgrounds soon caused the colonial law to be "adapted" to the realities in place. It was within that very framework that the jurors played a very important part, delivering conclusive interpretations of the substantive laws that were largely

[6] Massachusetts Body of Liberties of 1641.

[7] Edgar J. McManus, *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620–1692* (Amherst: University of Massachusetts Press, 2009), 63.

[8] As to the principle, active right to vote in this respect was reserved to free males who held land in ownership.

[9] See esp. Matthew P. Harrington, "Law-Finding Function of the American Jury," *Wisconsin Law Review* 377 (1999): 386–87.

[10] Absence of juridical education was ubiquitous among the judges of the colonies and persisted until the early nineteenth century, when the US saw the first comprehensive programs to educate future lawyers. Hence, it should be no surprise that as many as six out of eleven judges on the Supreme Court of Massachusetts in 1760–1774 had no legal background. More broadly in Brian J. Moline, "Early American Legal Education," *Washburn Law Journal* 42 (2004): 775; Albert W. Alschuler and Andrew G. Deiss, "A Brief History of the Criminal Jury in the United States," *University of Chicago Law Review* 61, no. 3 (1994): 905.

detached from the circumstances prevailing in the "New Earth,"[11] having been enacted elsewhere. In doing so, they were guided by the notions of social justice on which the common law was founded as well as the moral norms and values relevant to the community. That particular competence—that is, the right to appraise the law on which the trial relied, translated into the vital role of the jury panels in the dispute between the colonies and the Crown preceding the War of Independence.

THE JURY AND THE WAR OF INDEPENDENCE

In 1751, the General Assembly of the colony of South Carolina issued a proclamation to the effect that "any person who shall endeavor to deprive us of so glorious a privilege of trial by jury was an enemy to the people of the colony."[12] However, this was not the first manifestation of discontent among the people of the British colonies. As tensions grew between the colonists and the Crown, the former saw the power that rested with the citizens on the various jury panels to be the only one that was entirely under their control. Moreover, it was the sole viable instrument against the oppression that they suffered from the representatives of the ruler.

The actual protection against the oppression of the authorities that the jury panels afforded to the colonists was consolidated by a number of high-profile court cases, whose prime examples included the Peter Zener trial and the trial of the soldiers responsible for the Boston Massacre. The first of those[13] involved a New York journalist and author of a series of articles that spoke critically of the governor of the colony of New York. For that reason, bypassing the grand jury, Zenger was indicted directly by the governor. The verdict of acquittal delivered by the jury (despite the incriminating evidence presented by the defendant himself) was deemed a response of the colonists to the provisions on penalties for the felony of disseminating "seditious libel." Standing at the second trial, on the other hand, were Captain Preston and eight British soldiers charged with participation in the Boston Massacre,[14] although it was perceived as a demonstration of the colonists' ability to prosecute the British

[11] The jury's prerogative to interpret law did not apply in some of those, for example, in the colony of New York. See more broadly in William E. Nelson, "The Lawfinding Power of Colonial American Juries," *Ohio State Law Journal* 71, no. 5 (2010): 1004–28.

[12] The South Carolina General Assembly Declaration of 1751, Liberty Fund Network, accessed October 10, 2022, https://wvsae.org/the-foundation-of-liberty/.

[13] On this issue, see esp. Peter A. Davis, *From Androboros to the First Amendment: A History of America's First Play* (Iowa: University of Iowa Press, 2015), 103–29; Richard Kluger, *Indelible Ink: The Trials of John Peter Zenger and the Birth of America's Free Press*, 1st ed. (New York: W. W. Norton & Company, 2016); Neil Vidmar and Valerie P. Hans, *American Juries: The Verdict* (New York: Prometheus Books, 2007), 42–47.

[14] More broadly, see, for example, Jonathan Witmer-Rich, "Restoring Independence to the Grand Jury: A Victim Advocate for the Police Use of Force Cases," *Cleveland State Law Review* 65, no. 535 (2017): 544–45.

military and those royal officials who abused their power. The jurors on the grand jury repeatedly refused to indict those inciting revolt, while trial jury panels also effectively obstructed the enforcement of English customs and fiscal laws in court. Furthermore, it was common for jury panels in civil cases to assess the facts and subsequently interpret civil contracts in a manner that protected the interests of the inhabitants of the colonies in the first place, at the expense of the English merchants.

Since the institution of the jury—being an actual power available to the colonists—came to pose a real threat to the English policies towards the dominions in New Earth, the authorities in London realized that the prerogatives and independence of the people's courts in the colonies had to be curtailed. This was effected through changes in the law governing the selection of jurors. Abrogating the principles that had applied for centuries, whereby the jurors were chosen among the "local community," it was adopted that any particular jury would be selected from a list of individuals compiled by the authorities in London. Enforcement of the Sugar Act and the Stamp Act were also excluded from the jurisdiction of the jury. These matters were devolved to the admiralty courts based in Halifax.[15] Both Acts were later rescinded by the British Parliament, although simultaneously the latter passed laws which, in the case of a charge of treason, contravened the existing common law principle that the place where an act was committed determined the venue of the trial and the selection of the jury.

In July 1776, the colonies promulgated the Declaration of Independence.[16] This document corroborated the creation of states independent from the Crown[17] on the North American continent. An important part of the Declaration was a list of allegations (grievances) of the colonists addressed to the King. For instance, George III was arraigned "for depriving us in many cases, of the benefits of Trial by Jury: For transporting us beyond Seas to be tried for pretended offences."[18] Similar assertions had been advanced in earlier correspondence with the King—that is, in the *Declaration of Rights and Grievances* and the *Appeal to the Inhabitants of Quebec* of 1774, as well as in the *Declaration of Causes and Necessity of Taking Up Arms* of 1775.

Upon the proclamation of the Declaration of Independence, each state adopted its own constitution. Those documents were ideologically consistent with acts such as the Charter of Liberties, and the Bill of Rights of 1689, as well as with the interpretations of British common law by contemporary thinkers such as William

[15] See Zbigniew Lewicki, *Historia cywilizacji amerykańskiej. Era tworzenia 1607–1789* (Warszawa: Wydawnictwo Naukowe Scholar, 2009), 490.

[16] In its entirety, the title read *The Unanimous Declaration of the Thirteen United States of America*.

[17] The widespread rationale behind the Polish translation of "state" as "stan (lit. state as opposed to a political entity)" fails to reflect the essential traits of American federalism. After all, what functions there (currently) is fifty sovereign states, which devolved only a proportion of their competences to the federal bodies.

[18] Declaration of Independence: A Transcription, National Archives, accessed October 10, 2022, https://www.archives.gov/founding-docs/declaration-transcript.

Blackstone and Thomas Coke. Their common feature was that they provided for the right to trial by jury. For instance, the New York Constitution of April 1777 included a provision which stipulated that "this convention doth further ordain, determine, and declare, in the name and by the authority of the good people of this State, that trial by jury, in all cases in which it hath heretofore been used in the colony of New York, shall be established and remain inviolate forever."[19] The Virginia Declaration of Rights of June 1776 stated both the number and place of origin of trial jurors, as well as providing that "the ancient trial by jury is preferable to any other and ought to be held sacred."[20] The Massachusetts Constitution of 1780, on the other hand, prescribes in Article 12 as follows: "And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, except for the government of the army and navy, without trial by jury."[21]

THE JURY IN THE DRAFTS OF THE FEDERAL CONSTITUTION

In 1777, the Continental Congress adopted the Articles of Confederation and Perpetual Union. The instrument established a loose union of states with a common body, namely the Congress. However, such a formula of cooperation between the former colonies proved highly inefficient which, given the external threat, required a completely different modality of cooperation to be discussed. Ultimately enacted in 1787, the Constitution of the United States introduced a thoroughly new paradigm of relations between the erstwhile colonies. In doing so, the Founding Fathers were guided by two fundamental ideas. First, they sought to create a system in which citizens were guaranteed freedom, equality, and active participation in the exercise of power. Second, they wished to safeguard the citizens against the despotic inclinations of those in power. Several methods were envisioned to accomplish those objectives, including the transfer of an extent of power into the hands of the popular court—that is, a jury.

All draft constitutions debated at the Philadelphia Convention contained provisions relating to the jury. The final draft of the Constitution, however, provided

[19] The Constitution of New York: April 20, 1777, Avalon Project—Documents in Law, History and Diplomacy, accessed October 10, 2022, http://avalon.law.yale.edu/18th_century/ny01.asp.

[20] Virginia Declaration of Rights of 1776, National Archives, accessed October 10, 2022, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

[21] The Massachusetts Constitution of 1780, Commonwealth of Massachusetts, accessed October 10, 2022, https://www.mass.gov/info-details/learn-about-the-history-of-the-jury-system.

solely for a trial jury in criminal proceedings. Article III, Section 2, of the Constitution stated that "The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." In this relatively simple sentence, the authors of the Constitution addressed four vital issues. First, the Constitution recognizes that in criminal cases the trial shall take place before the jury, who would decide regarding the guilt of the defendant. Second, the Constitution excludes cases subject to the impeachment procedure from the jurisdiction of the jury. Third, the Constitution establishes a general jurisdiction to conduct a trial in a criminal case (the venue) based on *locus delicti*.[22] Fourth, however, the Constitution asserts that Congress shall possess exclusive competence to determine the jurisdiction of the trial jury when a criminal act has been committed outside the borders of the United States, but with an effect within the US territory, or has been committed to the detriment of a US citizen or the state, or has been committed in an area under the sovereign authority of a federal body.[23]

At the same time, the Constitution failed to offer answers to a number of important questions. First, it was unclear what should be done when an offense was committed in several states or on the territory of one state but in several judicial districts.[24] Second, how should one approach the question of full trial if the prohibited act qualified as a felony under both federal and state law? Such quandaries have been resolved to some extent by the case law of the US Supreme Court. In part, they have also been regulated by Congress (e.g., with regard to tax offenses or interstate transportation).[25]

Moreover, it was also not entirely logical to make it imperative in the Constitution that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[26] After all, such a formula implies that the authorities are in fact statutorily obligated

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[22] Naturally, this means a trial taking place before a federal court for a crime defined in federal statutes.

[23] On this issue see Charles Doyle, *Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried*, CRS Report 2014, no. RS22361, 4–5 and opinions in *Jones v. United States*, 137 U.S. 211 (1890).

[24] While in the early years of the American state governed by the Constitution the boundaries of eleven of the thirteen founding states coincided with the boundaries of the judicial districts, the Founding Fathers were aware that the newly established state would in future have to be divided into judicial units that did not necessarily overlap with the boundaries of the states.

[25] To a degree, such problems were solved by the case law of the US Supreme Court and the statutes enacted by the Congress (e.g., with respect to fiscal felony or interstate transportation). On this issue see Charles Doyle, *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, CRS Report 2018, no. RL33223, FAS Project on Government Secrecy, accessed October 10, 2022, https://fas.org/sgp/crs/misc/RL33223.pdf.

[26] Available at: Constitution Annotated, accessed October 10, 2022, https://constitution.congress.gov/browse/article-3/section-2/clause-3/.

to hold a trial by jury regardless of the nature of the crime or the will of the defendant in this regard. This type of trial-related injunction may also be considered contradictory to the established practice in the founding states, whereby only "more serious" crimes were tried before the jury, while misdemeanors or minor offenses were heard by a justice of the peace or even a representative of the magistracy.[27]

Solutions to vital questions concerning the place of origin of the jurors (vicinage)[28] and the formal requirements that candidates for the position have to satisfy were also lacking in the Constitution. While it was indisputable to all that the principles based on which the trial jury had operated for hundreds of years would be adopted, this was not secured in the content of the Constitution. The draft Constitution by James Madison did include a pertinent provision, but although it was voted through in the House of Representatives, it did not receive the support of the Senate. However, regarding the formal requirements for jury candidates, the shortcomings in this respect were rectified relatively quickly by the parliament. Adopted in 1789, the Federal Judiciary Act devolved relevant competence to the individual states, which today may be seen in terms of the influence of state legislation on the work of a federal, constitutional body such as the trial jury. All jurisdictions adopted that a male with the right to vote, who (except in Vermont) owned property or paid taxes in a given state, was eligible to become a juror. In Maryland, atheists were excluded from jury service. Requirements on intelligence or so-called "good character" were also introduced in numerous legislations.

There is no reliable information that would explain why the Founding Fathers chose not to include provisions pertaining to the grand jury in the Constitution, considering that the institution had enjoyed profound respect in the colonial era. Just as with the absence of formal requirements posited for prospective jurors, it may also be surmised that the matter was omitted because it was taken for granted that the grand jury would operate in line with the principles entrenched in common law or, alternatively, that a law would be passed to that effect. However, given the Federalists' fear of a body whose working methodology (including, in particular, the power to conduct its own inquiry) could prove an obstacle to strong federal authorities, this may have been a deliberate measure. Indeed, a proportion of the US political milieu at the time was wary of the jurors as persons who are potentially capricious, unpredictable, and susceptible to emotions, and hence incapable of making socially and politically difficult decisions.[29] This is indirectly supported by

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[27] Such reasoning has been adopted by the US Supreme Court as it examined *Callan v. Wilson* nearly a century later. See the opinions in *Callan v. Wilson*, 127 U.S. 540 (1888).

[28] In English law, vicinage meant the immediate vicinity of the location where a prohibited act has been committed or, alternatively, the county concerned (or its specific part).

[29] On this issue see esp. Daniel D. Blinka, "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic," *The American Journal of Legal History, Marquette University Law School Faculty Publications* 47, no. 1 (2005): 66–98.

historical facts, as the state of Virginia abandoned the legal reform which intended to grant jurors broad prerogatives both in criminal trial and broadly understood administration of the state.

Also, the issue of trial by jury in civil cases was altogether ignored in the Constitution, although the matter was raised on several occasions during the Convention (by Hugh Williamson of North Carolina, for example).[30] Such an outcome appears to have resulted from a dispute between the two political factions at the time—that is, the *Federalists* and the *Anti-Federalists*. The former believed that the strength and vitality of the state would derive from a strong federal government; at the same time, they stressed that the newly formed state urgently needed sources of funding to develop. The funds in question were to be supplied mainly by foreign loans and taxes. From that standpoint, the civil jury represented a potential threat, since in colonial times such panels routinely refused to recognize debt claims from British merchants or, when they did, the liability was substantially reduced. Similarly, the "ordinary citizens" sitting on the civil juries took a similar approach to tax obligations. It may be noted that a number of delegates at the Philadelphia Convention made attempts to introduce provisions on the civil jury. A relevant amendment was voted through at the committee, although it was not adopted in plenary.

THE DRAFTING AND ADOPTION OF THE BILL OF RIGHTS BY THE STATES

The Constitution ratification process in New York, Pennsylvania, and Maryland was actually a manifesto calling for amendments concerning the most important civic guarantees, as they were seen at the time. The voices of some of the Founding Fathers reverberated quite prominently in the public debate. For instance, it may be worth citing Patrick Henry, who asserted that "trial by jury is the best appendage offreedom. . . . 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."[31] For his part, Richard Henry Lee maintained that "the right to trial by jury is a fundamental right of free and enlightened people and an essential part of a free government."[32] In a text from

[30] On this issue see esp. William V. Dorsaneo III, "Decline of Anglo-American Civil Trial," *SMU Law Review*, 71, no. 1 (2018): 359.

[31] "Fact Sheet: Safeguarding a Pillar of American Freedom—An Historical Primer on the Right to Jury Trial in Civil Cases," Center for Justice & Democracy, accessed October 10, 2022, https://centerjd.org/content/fact-sheet-safeguarding-pillar-american-freedom-historical-primer-right-jury-trial-civil.

[32] "Trial By Jury: 'Inherent And Invaluable,'" West Virginia Association for Justice, accessed October 10, 2022, https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury.

1788, John Dickinson[33] contended that "trial by jury is the cornerstone of our liberty. It is our birthright."[34] Also, in a 1789 letter addressed to Thomas Paine, Thomas Jefferson underlined that "another apprehension is that a majority cannot be induced to adopt the trial by jury; and I consider that as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution."[35] John Madison, on the other hand, argued that "trial by jury cannot be considered as a natural right, but a right resulting from the social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[36] In an essay in *The Federalist*, Alexander Hamilton observed that "the friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it (the jury) as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."[37]

Seeing the need to supplement the Constitution, James Madison came forward with a draft Bill of Rights in June 1789. The document was to be integral to the Constitution, introducing a catalog of individual rights, while a relatively large part of the Bill referred to the jury. Madison's draft included several separate provisions relating to jurors. Section 5 of his proposal stipulated that "no State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[38] In Section 6, the author suggested that a provision on the jury in civil cases be added to the Constitution, according to which no "fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law."[39] Then, Section 7 of the draft affirmed that "The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary, provided that in cases of crimes com-

[33] Dickinson, the author of the series known as *Letters from a Farmer in Pennsylvania*, is considered a "writer of the American Revolution" in the US.

[34] "Trial By Jury: 'Inherent And Invaluable.'"

[35] Thomas Jefferson, "From Thomas Jefferson to Thomas Paine, 11 July 1789," Founders Online, accessed October 10, 2022, https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

[36] James Madison, "Amendments to the Constitution, (8 June) 1789," Founders Online, accessed October 10, 2022, https://founders.archives.gov/documents/Madison/01-12-02-0126.

[37] Alexander Hamilton, "The Federalist Papers: No. 83," Avalon Project—Documents in Law, History and Diplomacy, accessed October 10, 2022, https://avalon.law.yale.edu/18th_century/fed83.asp.

[38] "1789: Madison, Speech Introducing Proposed Amendments to the Constitution," Liberty Fund Network, accessed October 10, 2022, https://oll.libertyfund.org/page/1789-madison-speech-introducing-proposed-amendments-to-the-constitution.

[39] "1789: Madison, Speech Introducing Proposed Amendments to the Constitution."

mitted within any county of which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same state, as near as may be to the seat of the offense. . . . In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."[40]

Finally adopted in September 1789 and approved by the majority of states—as required by the Constitution—in 1791, the ten articles of the Bill of Rights secured most of the fundamental (for the time) individual rights. The Fifth Amendment[41] pertains to the grand jury, the initial part of the Sixth Amendment addresses crucial issues relating to the trial jury in criminal proceedings, while the Seventh Amendment introduces the institution of the civil jury and sets out its essential competencies. Before discussing particular amendments, it is worth noting that none of them specify whether their provisions apply to federal and state authority or only to the former. This is a fundamental question, all the more so since the overwhelming majority of civil and criminal cases in the US are heard before state courts and under state law. Nor do any of the amendments resolve whether serving as a juror is a civic duty or a privilege. Apart from a reference to common law, no clear legal grounds for that duty can be identified. In the eighteenth and nineteenth centuries, it was an honor or a privilege to be a member of a particular social or professional group, though it also entailed an obligation to appear in court and, not infrequently, pay for accommodation and board (a matter of substantial importance given the

[40] "1789: Madison, Speech Introducing Proposed Amendments to the Constitution."

[41] In the Polish translations of the federal Constitution as well as in the Polish literature on the system or the law in force in the US, one often comes across the term "poprawka (lit. correction)" to the Constitution. It is used to refer to those contents of the US Constitution which, over more than 230 years, have been added to the original text or, alternatively, have introduced certain substantive changes. In the opinion of this author, the Polish term is erroneous and, as such, should not be employed (especially in legal publications). After all, when one analyzes the Bill of Rights, it turns out that with very few exceptions, it did not "correct" anything in the original text of the Constitution, but—at most—added completely new provisions. Much the same is the case with most of the contents adopted later. In this context, the term "nowela (novel)" used in this study appears to be a universal notion. Moreover, it is also consistent with the rules of legislative technique applicable in Poland. After all, one speaks of "*nowelizacja* (novel) of Article 55 of the Constitution of the Republic of Poland of 2006" or "*nowelizacja* of the Budget Act," as opposed to "correction" to the aforementioned laws. Hence, the term "poprawka" is used colloquially to refer to the drafts of acts which alter the law previously in effect in a given matter, developed, for example, by the relevant parliamentary committees. It might be added that this particular linguistic mistake is not the only one encountered in translations of specific institutions of American law. Further inaccurate translations include terms such as "hrabstwo (lit. the estate held by a count)" to denote "county" (rather than "okręg (district)" or "powiat (poviat or ≈ district), "jury" as "sędziowie przysięgli (lit. sworn judges)" rather than "przysięgli (≈jurors), or "verdict" as "wyrok (lit. judgment/sentence)". In the author's opinion, this is largely due to the translation of such terms into Polish based on the first available equivalent in the dictionary or the terminology heard in dubbed American motion pictures or in journalistic reports, whilst disregarding the legal culture or the origins of that country's political system. On this issue, see also Zbigniew Lewicki, *Historia cywilizacji amerykańskiej. Era sprzeczności 1787–1865* (Warszawa: Wydawnictwo Naukowe Scholar, 2010), 8.

absence of developed transport routes). Nowadays, such issues have become even more acute, even though a rule has been introduced according to which the expenses that jurors incur while participating in the work of the judiciary are to be covered by state authorities, with jurors also receiving a "daily wage."

FIFTH AMENDMENT TO THE CONSTITUTION

According to the Fifth Amendment, "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." In this rather brief wording, the key provision grants the exclusive competence to indict an individual to the grand (pre-trial) jury and recognizes that the grand jury may exercise its powers in two ways. The first is to issue a "presentment,"[42]—that is, a letter drafted by the panel stating that, in the case they are examining, a felony has been committed. The writ is submitted to the court, bypassing the public prosecutor. This procedure is an alternative to the second option, which is decidedly more frequently used in practice—that is, a petition from the prosecutor to the grand jury to indict an individual.

The Fifth Amendment fails to answer a range of important questions concerning the grand jury. First, it does not indicate whether the obligation to establish a grand jury is binding only on the federation or on the individual states as well. After all, the provenance of the institution is strictly associated with the states, while it was obvious that the vast majority of felonies violate state-level criminal statutes. However, the matter has been clarified in the case law of the US Supreme Court.[43]

The Amendment does not state how many persons should make up a grand jury panel, nor does it specify any formal requirements they are subject to or outline how they will be selected. No information is provided regarding the system under which pre-trial jurors perform their duties (i.e., whether they are elected for a specific term or whether the panel is convened on an ad hoc basis). Furthermore, the Amendment does not explain how the members of the panel reach their decisions. Naturally, no one challenged the existing medieval rules of procedure for this body, according to which only a "decent citizen" from the judicial district where the crime has

[42] A synthetic translation of the term into Polish is lacking. However, "wniosek przysięgłych (motion of the jury)" used in this study appears to reflect the nature of the institution most comprehensively and simultaneously highlights its distinctiveness from the prosecutor's indictment.

[43] In the latter half of the nineteenth century, the Supreme Court found that Fourteenth Amendment was not intended to establish a state criminal proceeding as stipulated in Fifth Amendment to the extent in which it pertains to the grand jury. Consequently, whether such a body would function in a given state was left at the discretion of that state. See the opinions in *Hurtado v. California*, 110 U.S. 516 (1884).

been committed (venue) may be a member of the grand jury and that the pre-trial jury consists of twenty-three persons and takes decisions by an absolute majority.

Moreover, the Fifth Amendment to the Constitution does not clarify which crimes are “capital” or “otherwise infamous” and, as such, should be within the purview of the grand jury.[44] Thus, the power to determine the catalog of such offenses is left to the legislature and the courts. The definition of a dishonorable offense was also considerably influenced by the acquis of common law.

SIXTH AMENDMENT TO THE CONSTITUTION

Pursuant to the Sixth Amendment to the Constitution, “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of (i.e., originating from) the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” To some degree, the above reiterates the provisions of Article III of the Constitution, although it also regulates a number of new issues. First and foremost, it explicitly affirms that the defendant may request the relevant authorities to arrange for their trial by jury. This right is not constrained by the category of the offense involved. The content of the Sixth Amendment is, in a sense, an attempt to “mitigate” the substance of Article III of the Constitution which unconditionally enjoins the authorities to hold a trial by jury at each end of every case. It must be emphasized, however, that over the years this Amendment has provided grounds for excluding certain categories of cases from the jurisdiction of the trial jury in favor of a bench trial, in which a judge decides regarding guilt and penalty.

This Amendment imposes an obligation on the federal authorities to conduct a procedure of selecting the jurors so that it is composed of persons residing in the state and the judicial district where the felony has been committed (vicinage)[45] while stipulating that the boundaries of such district must be statutorily defined beforehand.[46] This particular provision of the Sixth Amendment supplements Article III of the Constitution, which adopts the principle enabling determination of the venue.[47]

[44] In *Duke v. United States* of 1937, the US Supreme Court found that when one has committed an offence subject to a fine not exceeding $500 and six months’ imprisonment without community service, federal public prosecution may bypass the grand jury and submit the indictment directly to the court. See the opinions in *Duke v. United States*, 301 U.S. 492 (1937).

[45] Sixth Amendment does not equate “judicial district” with the “vicinity of the place where the crime has been committed” known from common law (which may be considered the historical meaning of “vicinage”). Hence, in minor states whose judicial district overlaps with the state boundary, the jurors selected in a case may originate from its distant region.

[46] As of 2022, there are ninety four judicial districts in the US.

[47] Moreover, federal law (28 U.S. Code para. 1861 in conjunction with 28 USC para. 1869(d)) admits division of judicial district in view of purposive considerations. Given the content of Sixth Amend-

It should be noted that the authors of the Amendment finally abandoned a term dating back to medieval England, namely peers—that is, the defendant's equals. This equality was conceived in terms of status, origin, education, or wealth.

The Sixth Amendment provides that the defendant has the right to a public trial in court. This means that all trial-related activities should be overt—whether for the parties to the trial, the media, or the public (with the exception of deliberations of the jury). Importantly, it was evident from the outset that the principle also extended to the very selection of jurors in a given case and the particulars through which the potential jurors may be identified. One might add that already in the early years of the American state, this obligation was discharged, for example, through public announcement of the list of jury candidates.

The Sixth Amendment establishes the requirement that those serving on the panel must be impartial with regard to the case. Over more than two centuries of the American state, the standards of jury impartiality have evolved significantly. When that provision was being added to the Constitution, the rule was that only a white and tax-paying, land-owning male was eligible as a juror. This inevitably excluded many social groups from work for the benefit of justice, the most numerous of which were women[48] and people of color.[49] Consequently, one could cite multiple verdicts of the trial jury of which much can be said but not that they were returned by impartial jurors.[50] However, the judge's participation in the jury selection procedure and their supervision of the trial proceedings may be considered an element that satisfies that constitutional imperative. It is also a *voir dire* procedure in which the parties to the trial actively contribute.

Still, the Amendment fails to answer several important questions yet again. First and foremost, there is the composition of the trial jury itself; more specifically, it is not explicitly stated how many people there must be on the jury panel in order for the trial to be deemed compatible with the standards set out in the Constitution. It may be assumed that it was obvious for the representatives of the states work-

ment, this enables jurors to be selected from a different area of the district than where the crime has been committed. In line with judgments in *Barrett v. United States*, 169 U.S. 218 (1898) and *Matheson v. United States*, 227 U.S. 540 (1913), such an approach does not violate the guarantees of the defendant set out in Sixth Amendment to the Constitution. More broadly in David Fellman, *The Defendant's Rights Today* (Madison: University of Wisconsin Press, 1977) 201.

[48] When the Sixth Amendment was being adopted, the Anglo-Saxon rule in force defined women as *propter defectum sexus* and, as such, incapable of performing juror duties. More broadly in Wojciech Kwiatkowski, "Kobiety i czarnoskórzy w ławach przysięgłych w Stanach Zjednoczonych," *Zeszyty Prawnicze* 21, no. 1 (2021): 301–23.

[49] As the American state was established, only three founding states officially (e.g., in their constitutions) denied suffrage to black persons. On the other hand, it was only in 1860 that the first black males sat on the jury. More broadly in Kwiatkowski, "Kobiety i czarnoskórzy w ławach przysięgłych w Stanach Zjednoczonych."

[50] The criminal proceedings in the wake of the Greensboro Massacre are a model example of such a trial.

ing on the Bill of Rights that one would draw on the well-established common law principle that a panel in a criminal trial consists of twelve persons. Nevertheless, the matter was not entirely clear and it was only case law that would resolve the issue. Separately, it should be stressed that the equally vital question of how (i.e., by what majority) the panel arrives at the verdict was not clarified either. Nonetheless, the authors of the Bill of Rights are likely to have naturally opted for the solution which had been applied since the fourteenth century, namely that in a criminal trial the jury must unanimously agree on the verdict as to the guilt of the defendant. Furthermore, the Amendment does not suggest a solution in a situation where a single crime has been committed in at least two states,[51] or on the territory of one state but in more than one judicial district. Nor does the Amendment offer an answer regarding how, subject to the principle of autonomy of individual jurisdictions (dual sovereignty), one should resolve in multi-jurisdictional offenses and whether it is admissible to transfer a criminal trial to another judicial district (change of venue) and, if so, in what circumstances.

SEVENTH AMENDMENT TO THE CONSTITUTION

The Seventh Amendment to the Constitution provides as follows: "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." This Amendment is the only one to address full trial in civil cases, making the United States the only country where that type of institution is applicable in civil proceedings.

The Amendment contains two significant provisions. The first, known as the preservation clause, specifies the types of cases that must be decided by a jury. The other—the re-examination clause—prevents federal judges from overturning jury verdicts as regards the panels' findings of fact which constitute the grounds for the verdict. It may be noted that, as the Seventh Amendment was adopted, it remained unclear which common law the Constitution invoked. By that time, individual states had already developed distinct procedural practices and their own precedents,[52] while the federal courts were new. Hence, "common law" was taken

[51] At present, such crimes include, for example, interstate abduction of a person, terrorist act, espionage, drug trafficking, economic crime, or cybercrime.

[52] As previously noted, the jurors in the colonies made the definitive interpretation of the substantive law. In deciding guilt, they were guided primarily by the social justice underlying common law as well as local moral norms and values relevant to the community in which they lived. It was common in the Puritan colonies for jurors to take advice in the courtroom from anyone who had the knowledge which would help them establish certain facts. It was due to those characteristics that jurors would play an instrumental role in "Americanizing" English common law. In consequence, one could also be

to mean the legal environment inherited from the Crown (i.e., the law and court procedures) employed in the course of the full court trial as at the date of ratification of the Amendment by the states.[53] The types of cases decided by the civil jury panels were to resemble the practice in force in 1791.

Finally, it is worth mentioning that matters that the Seventh Amendment omits entirely include the composition of the panel, the selection of jurors, or the manner in which they determine the verdict. Again, it was evident that one would draw on the relevant custom which had applied prior to the establishment of the United States. Furthermore, the Amendment also does state whether the right to a full trial in civil cases applies in proceedings before state courts.

CONCLUSIONS

In the American realities, the institution of the jury is one of the more prominent components of what is not so much the American judicial process, but "American civilization" in the broadest sense. It also offers evidence that the ideas of the Founding Fathers are still alive and influence the lives of citizens in that country. Even so, both the pre-trial and the two trial juries have undergone a unique process of adaptation to modern realities, primarily through the adjudications of the US Supreme Court. To this day, the latter confronts issues such as the direct analysis of the evidence presented at the trial, the definition of an impartial jury, or attempts to define what a prompt and public trial by jury (in criminal cases) actually means.

As the history of the American state shows, the crucial issue, given the federal makeup of the United States, was extending those provisions of the Constitution which concerned jury participation in pre-trial and trial proceedings to the states. The constitutions of all thirteen original states secured this institution with respect to pre-trial and trial (civil and criminal) juries alike. By the time the Fourteenth Amendment was ratified in 1868, that right had been assured in the constitutions of thirty-six of the thirty-seven states. Today, only a full criminal trial is constitutionally guaranteed in state proceedings (although the catalog of felonies entitling one to a full criminal trial continues to evolve). Meanwhile, the institution of a pre-trial or trial jury in civil cases operates in many jurisdictions, although this is often based on a law passed by the state legislature rather than the state constitution. At

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certain that the law pertaining to the same legal issue differed between colonies (and even townships), which is now one of the core features of American case law.

[53] In the 1830 judgment in *Parsons v. Bedford* (*Parsons v. Bedford*, 28 U.S. 433, 1830), the US Supreme Court explicitly found that the English common law is involved. In *Dimick v. Schiedt* of 1935 (*Dimick v. Schiedt*, 293 U.S. 474 (1935)), the Supreme Court officially held that the Amendment in question should be interpreted in line with the common law of England as at the date of its ratification by the states—that is, in 1791.

that level, the institutions in question have witnessed a number of significant alterations which to some degree blur their historical picture.

Summary: The study aims to discuss the origins of the institution of juries in the legal order of the United States. The term "jury" in the United States refers to three independent institutions, the common denominator of which is that it is a group of randomly selected citizens who make certain trial decisions. Within the grand jury, a panel of jurors decides whether to indict an individual. In a trial jury (trial jury), their task is to evaluate the evidence presented at trial and, based on this, render a verdict on the guilt of the accused. In a civil trial, on the other hand, a panel of jurors (civil jury) decides definitively on the facts that have emerged in the case.

Keywords: trial jury, civil jury, Fifth Amendment, Sixth Amendment, Seventh Amendment

BIBLIOGRAPHY

Alschuler, Albert W., and Andrew G. Deiss. "A Brief History of the Criminal Jury in the United States." *University of Chicago Law Review* 61, no. 3 (1994): 867–928. https://doi.org/10.2307/1600170.

Blinka, Daniel D. "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic." *The American Journal of Legal History, Marquette University Law School Faculty Publications* 47, no. 1 (2005): 35–103. https://doi.org/10.2307/30039492.

Davis, Peter A. *From Androboros to the First Amendment: A History of America's First Play*. Iowa: University of Iowa Press, 2015.

Dorsaneo III, William V., "Decline of Anglo-American Civil Trial." *SMU Law Review* 71, no. 1 (2018): 353–68.

Doyle, Charles. *Venue: A Brief Look at Federal Law Governing Where a Federal Crime May Be Tried*. CRS Report 2014, no. RS22361.

Doyle, Charles. *Venue: A Legal Analysis of Where a Federal Crime May Be Tried*, CRS Report 2018, no. RL33223. FAS Project on Government Secrecy. Accessed October 10, 2022, https://fas.org/sgp/crs/misc/RL33223.pdf.

"Fact Sheet: Safeguarding a Pillar of American Freedom—A Historical Primer on the Right to Jury Trial in Civil Cases." Center for Justice & Democracy. Accessed October 10, 2022, https://centerjd.org/content/fact-sheet-safeguarding-pillar-american-freedom-historical-primer-right-jury-trial-civil.

Fellman, David. *The Defendant's Rights Today*. Madison: University of Wisconsin Press, 1977.

Hamilton, Alexander. "The Federalist Papers: No. 83." Avalon Project—Documents in Law, History and Diplomacy. Accessed October 10, 2022, https://avalon.law.yale.edu/18th_century/fed83.asp.

Harrington, Matthew P. "Law-Finding Function of the American Jury." *Wisconsin Law Review* 377 (1999): 377–440.

Hills, Leon C. *History and Genealogy of the Mayflower Planters and First Comers to Ye Olde Colonie*. Baltimore: Genealogical Publishing Com., 1975.

Holland, Randy J. "State Jury Trials and Federalism: Constitutionalizing Common Law Concepts." *Valparaiso University Law Review* 38, no. 2 (2004): 373–403.

Jefferson, Thomas. "From Thomas Jefferson to Thomas Paine, 11 July 1789." Founders Online. Accessed October 10, 2022, https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

Kluger, Richard. *Indelible Ink: The Trials of John Peter Zenger and the Birth of America's Free Press*. 1st ed. New York: W. W. Norton & Company, 2016.

Kwiatkowski, Wojciech. *Geneza i praktyka instytucji przysięgłych w amerykańskim procesie karnym*. Warszawa: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2021.

Kwiatkowski, Wojciech. "Kobiety i czarnoskórzy w ławach przysięgłych w Stanach Zjednoczonych." *Zeszyty Prawnicze* 21, no. 1 (2021): 301–23. https://doi.org/10.21697/zp.2021.21.1.11.

Lewicki, Zbigniew. *Historia cywilizacji amerykańskiej. Era sprzeczności 1787–1865*. Warszawa: Wydawnictwo Naukowe Scholar, 2010.

Lewicki, Zbigniew. *Historia cywilizacji amerykańskiej. Era tworzenia 1607–1789,* Warszawa: Wydawnictwo Naukowe Scholar, 2009.

Madison, James. "Amendments to the Constitution, (8 June) 1789." Founders Online. Accessed October 10, 2022, https://founders.archives.gov/documents/Madison/01-12-02-0126.

McManus, Edgar J. *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620–1692.* Amherst: University of Massachusetts Press, 2009.

Moline, Brian J. "Early American Legal Education." *Washburn Law Journal* 42 (2004): 775–802.

Nelson, William E. "The Lawfinding Power of Colonial American Juries." *Ohio State Law Journal* 71, no. 5 (2010): 1003–29.

Towne, Susan C. "The Historical Origins of Bench Trial for Serious Crime." *The American Journal of Legal History* 26, no. 2 (1982): 123–59. https://doi.org/10.2307/844838.

"Trial By Jury: 'Inherent And Invaluable.'" West Virginia Association for Justice. Accessed October 10, 2022, https://www.wvaj.org/index.cfm?pg=HistoryTrialbyJury.

Wakelyn, John E., ed. *Americas Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance*, vol. 1. Westport: Greenwood Publishing Group, 2006.

Vidmar, Neil, and Valerie P. Hans. *American Juries: The Verdict*. New York: Prometheus Books, 2007.

Witmer-Rich, Jonathan. "Restoring Independence to the Grand Jury: A Victim Advocate for the Police Use of Force Cases." *Cleveland State Law Review* 65, no. 535 (2017): 535–59.

"1789: Madison, Speech Introducing Proposed Amendments to the Constitution." Liberty Fund Network. Accessed October 10, 2022, https://oll.libertyfund.org/page/1789-madison-speech-introducing-proposed-amendments-to-the-constitution.

Acts of Laws and Regulations

The Constitution of New York: April 20, 1777. Avalon Project—Documents in Law, History, and Diplomacy. Accessed October 10, 2022, http://avalon.law.yale.edu/18th_century/ny01.asp.

Declaration of Independence: A Transcription. National Archives. Accessed October 10, 2022, https://www.archives.gov/founding-docs/declaration-transcript.

Massachusetts Body of Liberties of 1641. Liberty Fund Network. Accessed October 10, 2022, https://oll.libertyfund.org/page/1641-massachusetts-body-of-liberties.

The Massachusetts Constitution of 1780. Commonwealth of Massachusetts. Accessed October 10, 2022, https://www.mass.gov/info-details/learn-about-the-history-of-the-jury-system.

The South Carolina General Assembly Declaration of 1751. Liberty Fund Network. Accessed October 10, 2022, https://wvsae.org/the-foundation-of-liberty/.

The Virginia Declaration of Rights of 1776. National Archives. Accessed October 10, 2022, https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

Case Citations

Barrett v. United States, 169 U.S. 218 (1898).

Callan v. Wilson, 127 U.S. 540 (1888).

Dimick v. Schiedt, 293 U.S. 474 (1935).

Duke v. United States, 301 U.S. 492 (1937).

Hurtado v. California, 110 U.S. 516 (1884).

Jones v. United States, 137 U.S. 211 (1890).

Matheson v. United States, 227 U.S. 540 (1913).

Parsons v. Bedford, 28 U.S. 433 (1830).