An Old Whig III
Philadelphia *Independent Gazetteer*, 20 October 1787 (excerpt)

. . . Let us however give fair play to the answer which has been attempted to be given to this Objection. The author of the speech tells us, that a bill of rights would have been superfluous and absurd; because "no powers are given to Congress but what are expressly given;" and "that we shall still enjoy those privileges of which we are not divested either by the intention or the act that brought that body into existence.—For instance, the liberty of the press.—What controul can proceed from the federal government to shackle or destroy that sacred palladium of national freedom?"—What controul!—Suppose that an act of the continental legislature should be passed to restrain the liberty of the press;—to appoint licensers of the press in every town in America;—to limit the number of printers;—and to compel them to give security for their good behaviour, from year to year, as the licenses are renewed: If such a law should be once passed, what is there to prevent the execution of it?—By the sixth article of the proposed constitution, this act of the continental legislature is "the supreme law of the land; and the judges in every state shall be bound thereby, ANY THING IN THE CONSTITUTION OR LAWS OF ANY STATE TO THE CONTRARY NOTWITHSTANDING."—Suppose a printer should be found hardy enough to contravene such a law when made, and to contest the validity of it.—He is prosecuted we will suppose, in this state—he pleads in his defence, that by the constitution of Pennsylvania, it is declared "that the freedom of the press ought not to be restrained."—What will this avail him? The judge will be obliged to declare that "*nothwithstanding the constitution of any state*," this act of the continental legislature which restrains the freedom of the press, is "the supreme law; and we must punish you—The bill of rights of Pennsylvania is nothing here. That bill of rights indeed is binding upon the legislature of Pennsylvania, but it is not binding upon the legislature of the continent." Such must be the language and conduct of courts, as soon as the proposed continental constitution shall be adopted.

As to the trial by jury, the question may be decided in a few words. Any future Congress sitting under the authority of the proposed new constitution, may, if they chuse, enact that there shall be no more trial by jury, in any of the United States; except in the trial of crimes; and this "SUPREME LAW" will at once annul the trial by jury, in all other cases. The author of the speech supposes that no danger "can possibly ensue, since the proceedings of the supreme court are to be regulated by the Congress, which is a faithful representation of the people; and the oppression of government is effectually barred; by declaring that in all criminal cases the trial by jury shall

be preserved." Let us examine the last clause of this sentence first.—I know that an affected indifference to the trial by jury has been expressed, by some persons high in the confidence of the present ruling party in some of the states;—and yet for my own part I cannot change the opinion I had early formed of the excellence of this mode of trial even in civil causes. On the other hand I have no doubt that whenever a settled plan shall be formed for the extirpation of liberty, the banishment of jury trials will be one of the means adopted for the purpose.—But how is it that "the oppression of government is effectually barred by declaring that in all criminal cases the trial by jury shall be preserved?"—Are there not a thousand civil cases in which the government is a party?—In all actions for penalties, forfeitures and public debts, as well as many others, the government is a party and the whole weight of government is thrown into the scale of the prosecution yet these are all of them civil causes.—These penalties, forfeitures and demands of public debts may be multiplied at the will and pleasure of government.—These modes of harrassing the subject have perhaps been more effectual than direct criminal prosecutions.—In the reign of Henry the Seventh of England, Empson and Dudley acquired an infamous immortality by these prosecutions for penalties and forfeitures:—Yet all these prosecutions were in the form of civil actions; they are undoubtedly objects highly alluring to a government.—They fill the public coffers and enable government to reward its minions at a cheap rate.—They are a profitable kind of revenge and gratify the officers about a court, who study their own interests more than corporal punishment.—Perhaps they have at all times been more eagerly pursued than mere criminal prosecutions.—Shall trial by jury be taken away in all these cases and shall we still be told that "we are effectually secured against the oppressions of government?" At this rate Judges may sit in the United States, as they did in some instances before the war, without a jury to condemn people's property and extract money from their pockets, to be put into the pockets of the judges themselves who condemn them; and we shall be told that we are safe from the oppression of government.—No, Mr. Printer, we ought not to part with the trial by jury; we ought to guard this and many other privileges by a bill of rights, which cannot be invaded. The reason that is pretended in the speech why such a declaration; as a bill of rights requires, cannot be made for the protection of the trial by jury;—"that we cannot with any propriety say 'that the trial by jury shall be as heretofore'" in the case of a federal system of jurisprudence, is almost too contemptible to merit notice.—Is this the only form of words that language could afford on such an important occasion? Or if it were to what did these words refer when adopted in the constitutions of the states?—Plainly sir, to the trial by juries as established by the common law of England in the state of its purity;—That common law for which we contended so eagerly at the time of the revolution, and which now after the interval of a very few years, by the proposed new constitution we seem ready to abandon forever; at least in that article which is the most invaluable part of it; the trial by jury.

Still however the great answer to all the objections that are made or can be made to the proposed constitution is this;—that there is no danger in trusting the Congress with any power: They will not abuse it. I shall conclude this letter with asking such as are willing to satisfy themselves with this answer only to look back for ten or twelve years and recollect what a mighty change has taken place in the political opinions of many people since that time. If they have forgotten let me beg of them to read over the publications of the years, 1774, 1775, 1776 and 1777. What was the spirit, what was the complaints of those times from Congress down to the

smallest meeting of the people? Our present language will be found to give the lie to our former professions; and we have sinned egregiously in wading thro' such an ocean of blood, if we were not well founded in the pretensions upon which we encountered the horrors of a civil war in establishing the revolution.—If such has been the change, as a very short examination will convince any man that has taken place in a few years past, what right have we to trust to the existence of such pure and immaculate virtue in time to come, that we should tamely and implicitly surrender our liberties at discretion into the hands of a government whose constituent members are totally unknown to us. Solomon has told us that no man knows whether a fool or a wise man is to inherit his estate; neither do we know whether honest and virtuous men or knaves and tyrants are to regulate our future councils. Let us then guard ourselves, as far as we can, against the possibility of being enslaved by wicked men, whilst the power of guarding ourselves is in our own hands. I know that the country is distressed; but it is not distressed beyond the power of remedy.—Let us take care that we do not involve ourselves in slavery, from the distresses of which we can never redeem ourselves.

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