

## Patrick Henry in the Virginia Convention, 20 June 1788

Mr. Chairman.—I have already expressed painful sensations at the surrender of our great rights, and I am again driven to the mournful recollection. The purse is gone—The sword is gone—and here is the only thing of any importance which is to remain with us. As I think this is a more fatal defect than any we have yet considered, forgive me, if I attempt to refute the observations made by the Honorable Member in the Chair [Edmund Pendleton], and him last up [James Madison]. It appears to me, that the powers in the section before you, are either impracticable, or if reducible to practice, dangerous in the extreme.

The Honorable Gentleman [Edmund Pendleton] began in a manner which surprised me. It was observed, that our State Judges might be contented to be Federal Judges and State Judges also.—If we are to be deprived of that class of men, and if they are to combine against us with the General Government, we are gone. I consider the Virginian Judiciary as one of the best barriers against strides of power—against that power which we are told by the Honorable Gentleman, has threatened the destruction of liberty. Pardon me for expressing my extreme regret, that it is in their power to take away that barrier. Gentlemen will not say, that any danger can be expected from the State Legislatures. So small are the barriers against the encroachments and usurpations of Congress, that when I see this last barrier, the independency of the Judges impaired, I am persuaded I see the prostration of all our rights. In what a situation will your Judges be in, when they are sworn to preserve the Constitution of the State, and of the General Government? If there be a concurrent dispute between them, which will prevail? They cannot serve two masters struggling for the same object. The laws of Congress being paramount to those of the States, and to their Constitutions also, whenever they come in competition, the Judges must decide in favor of the former. This, instead of relieving or aiding me, deprives me of my only comfort—the independency of the Judges.—The Judiciary are the sole protection against a tyrannical execution of laws. But if by this system we lose our Judiciary, and they cannot help us, we must sit down quietly, and be oppressed.

The appellate jurisdiction as to law and fact, notwithstanding the ingenuity of Gentlemen, still to me carries those terrors which my honorable friend [George Mason] described. This does not include law in the common acceptation of it, but goes to equity and admiralty, leaving what we commonly understand by common law, out altogether. We are told, of technical terms, and that we must put a liberal construction on it. We must judge by the common understanding of common men. Do the expressions, “fact and law,” relate to cases of admiralty and chancery jurisdiction only?—No, Sir, the least attention will convince us, that they extend to common law cases. Three cases are contradistinguished from the rest.—“In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact.” Now, Sir, what are we to understand by these words? What are the cases before mentioned? Cases of common law, as well as of equity and admiralty. I confess I was surprised to hear such an explanation from an understanding more penetrating and acute than mine. We are told, that the cognizance of law and fact, is satisfied by cases of admiralty and chancery.—The words are expressly against it.

Nothing can be more clear and incontestible. This will in its operation destroy the trial by jury. The verdict of an impartial jury will be reversed by Judges unacquainted with the circumstances.—But we are told, that Congress are to make regulations to remedy this. I may be told that I am bold, but I think myself, and I hope to be able to prove to others, that Congress cannot, by any act of theirs, alter this jurisdiction as established. It appears to me, that no law of Congress can alter or arrange it. It is subject to be regulated, but is it subject to be abolished? If Congress alter this part, they will repeal the Constitution. Does it give them power to repeal itself? What is meant by such words, in common parlance? If you are obliged to do certain business, you are to do it under such modifications as were originally designed. Can Gentlemen support their argument by logical or regular conclusions? When Congress by virtue of this sweeping clause, will organize these Courts, they cannot depart from the Constitution; and their laws in opposition to the Constitution, would be void. If Congress, under the specious pretence of pursuing this clause, altered it, and prohibited appeals as to fact, the Federal Judges, if they spoke the sentiments of independent men, would declare their prohibition nugatory and void. In every point of view it seems to me, that it will continue in full force as it is now, notwithstanding any regulations they may attempt to make. What then, Mr. Chairman? We are told, that if this does not satisfy every mind, they will yield. It is not satisfactory to my mind, whatever it may be to others. The Honorable Gentleman [James Madison] has told us, that our Representatives will mend every defect. I do not know how often we have recurred to that source, but I can find no consolation in it. Who are they?—Ourselves. What is their duty?—To alter the spirit of the Constitution—to new model it?—Is that their duty, or ours?—It is our duty to rest our rights on a certain foundation, and not to trust to future contingencies. We are told of certain difficulties. I acknowledge it is difficult to form a Constitution. But I have seen difficulties conquered, which were as unconquerable as this. We are told, that trial by jury is difficult to be had in certain cases. Do we not know the meaning of the term? We are also told, it is a technical term. I see one thing in this Constitution—I made the observation before, and I am still of the same opinion—that every thing with respect to privileges is so involved in darkness, it makes me suspicious—not of those Gentlemen who formed it, but of its operation in its present form. Could not precise terms have been used? You find by the observations of the Gentleman last up [James Madison], that when there is a plenitude of power, there is no difficulty: But when you come to a plain thing, understood by all America, there are contradictions, ambiguities, difficulties, and what not. Trial by jury is attended, it seems, with insuperable difficulties, and therefore omit[t]ed altogether in civil cases. But an idea is held out, that it is secured in criminal cases. I had rather it had been left out altogether, than have it so vaguely and equivocally provided for. Poor people do not understand technical terms—Their rights ought to be secured in language of which they know the meaning. As they do not know the meaning of such terms, they may be injured with impunity. If they dare oppose the hands of tyrannical power, you will see what has been practised elsewhere. They may be tried by the most partial jurors—by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial. I would rather be left to the Judges. An abandoned juror would not dread the loss of character like a Judge. From these, and a thousand other considerations, I would rather trial by jury were struck out altogether. There is no right of challenging partial jurors. There is no common law of America (as has been said) nor Constitution, but that on your table. If there be neither common law, nor

Constitution, there can be no right to challenge partial jurors. Yet this right is as valuable as trial by jury itself.

My honorable friend's [George Mason] remarks were right, with respect to incarcerating a State. It would ease my mind, if the Honorable Gentleman would tell me the manner in which money should be paid, if in a suit between a State and individuals, the State were cast. The Honorable Gentleman perhaps does not mean to use coercion, but some gentle caution. I shall give my voice for the Federal cognizance only where it will be for the public liberty and safety.—Its jurisdiction in disputes between citizens of different States, will be productive of the most grievous inconveniencies. The citizens of bordering States have frequent intercourse with one another. From the proximity of the States to each other, a multiplicity of these suits will be instituted. I beg Gentlemen to inform me of this—in what Courts are they to go, and by what law are they to be tried? Is it by a law of Pennsylvania or Virginia? Those Judges must be acquainted with all the laws of the different States. I see arising out of that paper, a tribunal, that is to be recurred to in all cases, when the destruction of the State Judiciaries shall happen; and from the extensive jurisdiction of these paramount Courts, the State Courts must soon be annihilated.

It may be remarked, that here is presented to us, that which is execrated in some parts of the States.—I mean a retrospective law. This with respect to property, is as odious, as an *ex post facto* law is with respect to persons.—I look upon them as one and the same thing. The jurisdiction of controversies between citizens, and foreign subjects and citizens, will operate retrospectively. Every thing with respect to the treaty with Great-Britain and other nations will be involved by it. Every man who owes any thing to a subject of Great-Britain, or any other nation, is subject to a tribunal that he knew not when he made the contract. Apply this to our citizens. If ever a suit be instituted by a British creditor for a sum which the defendant does not in fact owe, he had better pay it than appeal to the Federal Supreme Court. Will Gentlemen venture to ruin their own citizens? Foreigners may ruin every man in this State by unjust and vexatious suits and appeals. I need only touch it, to remind every Gentleman of the danger.

No objection is made to their cognizance of disputes between citizens of the same State, claiming lands under grants of different States.

As to controversies between a State and the citizens of another State, his [James Madison] construction of it is to me perfectly incomprehensible. He says it will seldom happen, that a State has such demands on individuals. There is nothing to warrant such an assertion. But, he says, that the State may be plaintiff only. If Gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a State, and citizens of another State, without discriminating between plaintiff or defendant. What says the Honorable Gentleman?—The contrary—That the State can only be plaintiff. When the State is debtor, there is no reciprocity. It seems to me that Gentlemen may put what construction they please on it. What!—Is justice to be done to one party, and not to the other!—If Gentlemen take this liberty now, what will they not do when our rights and liberties are in their power? He said it

was necessary to provide a tribunal when the case happened, though it would happen but seldom. The power is necessary, because New-York could not before the war collect money from Connecticut! The State Judiciaries are so degraded that they cannot be trusted. This is a dangerous power, which is thus instituted.—For what?—For things which will seldom happen; and yet, because there is a possibility that the strong energetic Government may want it, it shall be produced and thrown in the general scale of power. I confess I think it dangerous. Is it not the first time, among civilized mankind, that there was a tribunal to try disputes between the aggregate society, and foreign nations?—Is there any precedent for a tribunal to try disputes between foreign nations, and the States of America? The Honorable Gentleman said, that the consent of the parties was necessary: I say, that a previous consent might leave it to arbitration.—It is but a kind of arbitration at best.

To hear Gentlemen of such penetration, make use of such arguments, to persuade us to part with the trial by jury, is very astonishing. We are told, that we are to part with that trial by jury which our ancestors secured their lives and property with, and we are to build castles in the air, and substitute visionary modes of decision to that noble palladium. I hope we shall never be induced by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits.—The unanimous verdict of twelve impartial men, cannot be reversed. I shall take the liberty of reading to the Committee the sentiments of the learned Judge Blackstone, so often quoted, on this subject.—(Here Mr. *Henry* read the eulogium of that writer, on this trial.—The opinion of this learned writer is more forcible and cogent, than any thing I could say. Notwithstanding the transcendent excellency of this trial, its essentiality to the preservation of liberty, and the extreme danger of substituting any other mode, yet we are now about to alienate it. But on this occasion, as on all others, we are admonished to rely on the wisdom and virtue of our rulers. We are told, that the Members from Georgia, and New-Hampshire, &c. will not dare to infringe this privilege—That as it would excite the indignation of the people, they would not attempt it—That is, the enormity of the offence, is urged as a security against its commission. It is so abominable, that Congress will not exercise it. Shall we listen to arguments like these, when trial by jury is about to be relinquished? I beseech you to consider before you decide. I ask you, what is the value of that privilege?—When Congress, in all the plenitude of their arrogance, magnificence, and power, can take it from you, will you be satisfied?—Are we to go so far as to concede every thing to the virtue of Congress? Throw yourselves at once on their mercy—Be no longer free, then their virtue will predominate—If this will satisfy republican minds, there is an end of every thing. I disdain to hold any thing of any man. We ought to cherish that disdain. America viewed with indignation the idea of holding her rights of England. The Parliament gave you the most solemn assurances, that they would not exercise this power.—Were you satisfied with their promises?—No. Did you trust any man on earth?—No—you answered, that you disdained to hold your innate indefeasible rights of any one. Now you are called upon to give an exorbitant and most alarming power.—The genius of my countrymen is the same now, that it was then.—They have the same feelings.—They are equally martial and bold.—Will not their answer therefore be the same? I hope that Gentlemen will, on a fair investigation, be candid, and not on every occasion recur to the virtue of our Representatives. When deliberating on the relinquishment of the sword and purse, we have a right to some other reason, than the possible virtue of our rulers. We are informed, that the

strength and energy of the Government call for the surrender of this right. Are we to make our country strong, by giving up our privileges? I tell you, that if you judge from reason, or the experience of other nations, you will find that your country will be great and respectable, according as you will preserve this great privilege. It is prostrated by that paper. Juries from the vicinage being not secured, this right is in reality sacrificed.—All is gone—and why?—Because a rebellion may arise—Resistance will come from certain counties, and juries will come from the same counties. I trust the Honorable Gentleman [James Madison], on a better recollection, will be sorry for this observation. Why do we love this trial by jury?—Because it prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbours. Has not our mother country magnanimously preserved this noble privilege upwards of a thousand years?—Did she relinquish a jury of the vicinage, because there was a possibility of resistance to oppression? She has been magnanimous enough to resist every attempt to take away this privilege—She has had magnanimity enough to rebel when her rights were infringed.—That country had juries of *hundredors*<sup>Z</sup> for many generations. And shall Americans give up that which nothing could induce the English people to relinquish? The idea is abhorrent to my mind. There was a time, when we would have spurned at it. This gives me comfort, that as long as I have existence, my neighbours will protect me. Old as I am, it is probable I may yet have the appellation of rebel.—I trust that I shall see Congressional oppressions crushed in embryo. As this Government stands, I despise and abhor it. Gentlemen demand it, though it takes away the trial by jury in civil cases, and does worse than take it away in criminal cases. It is gone unless you preserve it now. I beg pardon for speaking so long. Many more observations will present themselves to the minds of Gentlemen when they analyze this part. We find enough from what has been said to come to this conclusion, that it was not intended to have jury trials at all. Because difficult as it was, the name was known, and it might have been inserted. Seeing that appeals are given in matters of fact to the Supreme Court, we are led to believe, that you must carry your witnesses an immense distance to the seat of Government, or decide appeals according to the Roman law. I shall add no more, but that I hope, that Gentlemen will recollect what they are about to do, and consider that they are going to give up this last and best privilege.

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