Anchoring the Constitution

The Sixth and Seventh Amendments keep our government responsive to the people

By Judge Sam Sparks

Sam Sparks is a U.S. District Judge for the Western District of Texas, Austin Division. Judge Sparks has written and spoken extensively about the importance of preserving jury trials and jury verdicts. This speech transcript was delivered to high school history and social studies teachers from Texas at the Teachers Law School, July 24, 2009. The Teachers Law School gathered more than 30 teachers to Austin, Texas, aimed at giving them the tools to help their students better understand and appreciate the value of the American legal systems, civil and criminal. The original title of the speech is, "Trial by Jury: The History, The Constitution, and the Current State." Judge Sparks is a regular contributor for *Voir Dire*.

I've been in the courtroom most of my life, and I'd like to see a show of hands. How many of you would like for me to decide the significant decisions of ***your*** life?

Those decisions, whether:

- You were wrongfully terminated in your employment or you didn't get a promotion that you should;
- You've been discriminated against by age, race, sex, religion, ethnicity, reverse discrimination;
- Your children's school and what curriculum they must receive;
- You've committed a criminal act and, if so, what punishment you should receive;
- You have breached a contract or somebody's breached a contract with you and what remedy should be given;
- You should obtain a divorce and the custody of your children should be given to you or to someone else;
- Whether your children have had excessive discipline or been mistreated at school or in public;
- You or some member of your family should be compensated because of the negligence of others or by a defective product or by a bad medication and, if so, what compensation you should receive;
- You could live in a certain neighborhood and how you can conduct yourself to protect your home and family from outside forces;
- You have a valid claim against your insurance company and, if so, what remedy is available;
- You've had an evaluation of your property's valuation, and your remedies if you do not think that the evaluation was fair;
- You've had the appropriate mental capacity to execute a deed or a will; and
- You have an inheritance or are entitled to property.

Well, I didn't see any of your hands, and about eight months ago, when I debated a Justice on the Texas Supreme Court in Dallas in front of about 200 lawyers, none of them raised their hand either.

So what does this have to do with my speech? Well, I want to tell you a little bit about the right to trial by jury and to emphasize the importance of your teaching the values inherent in the Sixth and Seventh Amendments to the Constitution.

Let me start with a little history. The right to be tried by a jury is simply the right to be judged by your peers, and this concept was first brought into England with the Norman Conquest in 1066. The manner of trials was developed in Europe during feudal times, under circumstances when the king or some feudal lords were absolute rulers with absolute authority. Their word was the law and there was only one crime — and that was a crime against the king, which was punishable by death. There was no appeal.

Jury trials started out with minor criminal cases that the feudal lords just didn't want to fool with, because there was no profit in them. By 1215, King John had lost substantial power over his feudal lords and had lost the respect of the people he governed. So, in 1215, to appease the Scottish, the French, and the English lords, as well as the people under his reign, he signed the Magna Carta at Runnymede.

It established by law the right to jury trial. The Magna Carta provided that no free man shall be taken or imprisoned or disseised *(dispossessed of his property)* or exiled or in any way destroyed. Nor can the government go upon him and set upon him, except by lawful judgment of his peers or by the law of the land.

So point one is that the right of jury trial grew out of the lack of faith in the executive branch of government — kings and lords.

More than 500 years later, the right to a jury trial had been established in all 13 of the American colonies. By 1764, every colony provided for the right of trial by jury, both in civil and criminal cases. And it's important for you to remember that at that time juries not only determined the facts of the case; they also determined the law.

The system of justice was giving King George III and the English Parliament fits over their authority over the colonies — especially with regard to the collection of oppressive taxes. American juries were not finding for the crown, and a description was made by the governor of Massachusetts who wrote to King George saying, "A trial by jury here

is only trying one illicit traitor by his fellows or at least by his well-wishers."

So in 1764, Parliament passed the Sugar Act. One of its provisions assigned trials with regard to collection of taxes and the nonpayment of taxes to the Admiralty Courts in Halifax, Nova Scotia. How many of you have been there? Well, the colonists didn't go either. This provision eliminated the right of jury trial on the collection of taxes.

By 1765, Parliament enacted the Stamp Tax, by which the British crown printed stamps. And if you wanted a contract, you had to buy and put a stamp on that. If you had a deed, you had to buy a stamp to put on it. Any violation of the Act had to be tried in the Vice Admiralty Courts.

There was no right to jury trial in the Admiralty Courts, as all of the judges were appointed by the British crown. The Stamp Act had nothing to do with the Admiralty, but its adoption effectively eliminated civil jury trials in the 13 colonies.

So point two is that the right to trial by jury also grew out of a lack of faith in the legislative branch of government.

Now the effect of these two specific British laws infuriated the colonists. The dispute continued with the passage of the Administration of Justice Act in 1774, which finally required all trials in the colonies to be held in London. And it should not surprise anyone that the First Continental Congress responded directly to this situation in 1774 by resolving the following:

RESOLVED *that our ancestors who first settled these colonies were, at the time of their immigration from the Mother Country, entitled to all of the rights, liberties and immunities of free and natural born subjects within the realm of England.*

RESOLVED *that the respective colonies are entitled to the common law of England and more especially to the great and inestimable privilege of being tried by their peers in the vicinage according the course of that law.*

When the United States Constitution was first drafted, it didn't mention, as you know, the right to a trial by jury, and this was quickly pointed out in two speeches by Patrick Henry and Thomas Jefferson. In Henry's speech at the Virginia Constitutional convention he stated:

Is it necessary for your liberty that you should abandon those great rights by the adoption of this system? Is the relinquishment of the trial by jury and the liberty of the press necessary for your liberty? Will the abandonment of our most sacred rights tend to the security of your liberty? Liberty, the greatest of all earthly blessings, gives us that precious jewel and you may take everything else. How does your trial by jury stand? In the civil cases, gone, not sufficiently secured in criminal cases. This best privilege is gone but we are told that we need not fear because those in power, being our representatives, will not abuse the power we put in their hands. I am not well versed in history but I will submit to your recollection whether liberty has been destroyed most often by the licentiousness of the people or by the tyranny of the rulers. I imagine you will find the balance on the side of tyranny.

Jefferson, as usual, was more succinct. He 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."

Nine of the 13 colonies that passed the draft of the Constitution did so conditionally on the fact that it would embrace the right to jury trials.

And so point three: The right to jury trials also grew out of a lack of faith in a national or a central government, rather than a local government. And, as you may know, in the first Constitutional Convention, the Sixth and Seventh Amendments were drafted.

It's interesting when you read history because there was only one change in one of the Amendments. There were no other drafts, and they were adopted.

The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Seventh Amendment reads:

In Suits at common law, where the value of 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 common law.

Now let me repeat part of the Seventh Amendment because it established the judicial system of the United States as the third branch of government, with equal powers to the executive and legislative branches. "…no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." The jury right of trial [also] grew out of a lack of faith in judges.

Our founding fathers, because of their personal experiences with a government that eliminated jury trials, mandated a government whereby the findings of a jury in a criminal and a civil case cannot be set aside by any judge, by the United States Supreme Court or by the executive or legislative branches of the government.

Now, what this means and what I hope gets through to you today is that when you are selected to be on a jury, in a state case or a federal case, in a criminal case or in a civil case, your verdict cannot be modified or set aside. It is a permanent ruling in that case unless the common law, that is an issue of law, can change or modify it.

When you are sworn to be a juror in a case:

- You swear to listen to the evidence and base your verdict solely on the evidence that you hear with your other jurors.
- You swear that you will deliberate with those jurors and

you will determine the issues in the case – whether it be criminal or civil.

• And you actually become part of the American government.

It's the only time that you'll be part of the active phase of the American government — unless you're elected to the executive or the legislative branches. You become an operative part of the government. That's why we're pretty tough on people who want to get out of jury service because they don't understand that this is the time they can be part of the government.

It's important, of course, that jury trials are held in the locality where the people who are involved in the litigation reside. That comes directly from the Magna Carta. The people who established our constitutional rights didn't trust the king. Didn't trust a president — as you will recall. Didn't trust the national government at all. Didn't like the legislative process. And they'd had a bitter, bitter time with British-appointed judges.

One 20th century commentator wrote:

"Distinguishing between the perception of a judge and the jury, strictly judges do not see the prisoner in the dock. All they see is the usual man in the usual place. They do not see the awful court of judgment. They see only their own workshop. Therefore, the instinct of a Christian civilization has most wisely declared that unto their judgment there shall be upon every occasion infused, fresh blood and fresh thought from the streets. Men shall come in who can see the court and the crowd and the coarse faces of the policemen and the professional criminals, the wasted faces of the wastrels, the unreal faces of counsel, and see it all as one sees a new picture or a ballet heretofore unvisited."

And since 1776, our judicial system has worked. It's really been the envy of the world. Before he died, former Chief Justice Rehnquist observed:

"[T]hose who opposed the use of juries in civil trials seem to ignore that the founders of our nation consider the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or it might be added to that of the judiciary. The guarantees of the Seventh Amendment will prove burdensome in some instances but, as with all other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the amendment."

Civil jury trials serve three distinct functions in our society. First, they incorporate a deliberative democratic body within the third branch of government. Second, they establish a check and balance to the exercise of government and corporate power — and install social norms within the judicial process. And third, they are legitimate both to the process and to the outcome of legal judgments.

As I've already said, Americans originally distrust governmental power, and we now have learned to distrust corporate power. The jury is the public's means of participating in the judicial process. It ensures that the public has a voice, a role in the exercise of all judicial power. The jury system incorporates important community values in the deliberative process. The jury is uniquely the only institution that requires a pledge by each juror to participate in a deliberative process in which they must respect both the law and the facts that have been presented. And in which they must take account of each other's views. There is no other government institution within our society that requires such a deliberative process.

If you don't believe me, watch the Congress.

Our judicial system is unique, as most societies do not trust the ordinary citizen to make significant decisions. But the guiding principle of our democratic governance is that exercise of the power should be dispersed, shared and localized. A jury determines what law controls and the jury answers two questions: What happened and does what happened satisfy the legal standard creating the liability?

Juries serve as a check on the exercise of private power — particularly power exercised by our large corporations — by ensuring that the courts remain open to the public. There's not anything I do every single day that's not in an open courtroom. The sad part is that, a lot of time, there aren't many people there. But no decision in the trial court is made in secret. It's all in the public sector, just like the jury verdict.

First there is an oversight function. Ordinary citizens are present in the courtroom to balance the power between the professional class of lawyers and judges. And the jury system legitimatizes our judicial system in several ways. First, it requires — it doesn't invite — it requires participation by citizens. And second, it validates the results because of the deliberative phase of jury trials by non-lawyers and citizens in the locale of the controversy. The power-sharing arrangement between judges and juries is justice shared.

So we've come a long way, and we've had those two guiding constitutional rights in all of our jurisprudence from the beginning of our country.

The next part I want to talk about is the attack on the jury system. The primary motivation of ABOTA in bringing you here today is to give you information so that you can determine what in your classes you think that young people need to know. Not only about the history, but about the active use of jury trials at the present time.

In 1788 — roughly 10 years after the Constitutional Amendments were adopted — Thomas Jefferson wrote: "It astonishes me to find that so many of our countrymen should be contented to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases. This is degeneracy in the principles of liberty which I would not have expected for at least four centuries."

Well, it came 200 years earlier than his expectations. Today there are more laws made by the Congress

and made by the legislatures, and more laws made by the city and the county. There are more people, more businesses, more legal disputes and more courts. But the phenomenon in the last 15 years is that there are ***fewer*** trials. That's true in the federal courts and it's true in the state courts in every state in the union.

The attacks on the jury system have come in subtle and disguised ways, but the basic theme behind all of them is the arrogant belief that regular people are no longer qualified and prepared to determine the complex matters before the courts today. And ladies and gentlemen, it simply isn't true.

I've been a trial lawyer since 1963. I have tried over 300 cases to a jury verdict all over the United States. These cases range from automobile accident cases to product liability cases to pharmaceutical cases to medical malpractice cases, legal malpractice cases, construction cases and civil rights cases.

I have tried cases in large cities and in small towns, and I never experienced a jury that did an irrational thing. I never had a jury that didn't understand the issues involved and decide them intelligently.

And for the last 18 years I've been presiding over the federal courts. We have trials all the time. I see jurors from as far one way as Brenham, Texas, and as far the other way as Junction come in for jury service here in Austin, and meet with the Central Texas people.

I've seen jurors — some without even high school degrees — sit in a three-week trial and determine the issues in the most complex of all patent cases. Cases where all of the witnesses are Ph.D. electronic and mechanical engineers. Cases involving a disk no bigger than my thumb with electrical impulses running through them called clocks. And juries still can decide these cases.

But legislative bodies, both state and federal, have established legal preemptions that have eliminated the liabilities for railroads, for example. For 20 years I've tried cases representing the railroad. I was a defense lawyer. All I did was defend in crossing cases where trains came into contact with vehicles.

That doesn't go anymore. The Congress has stopped that. Damages for certain pharmaceutical drugs and medical devices are preempted now. If the government has passed judgment on it, no jury can pass judgment on it. Statutes have limited damages and limited the use of punitive damages. In Texas they've limited the liability to almost zero on medical malpractice cases, and the legislation favors arbitration over the jury system.

At the present time — now just think about it — at the present time, it's difficult for an American citizen to build a house, buy a house, buy a car, obtain a credit card, buy or sell securities, have a bank account, or simply sometimes just buy a product from a retail store without signing a contract that any dispute will be determined by arbitration.

I read, not too long ago, where there's a big lawsuit in California because the papers in Los Angeles and San Francisco ran a research and found that in 99% of the cases of arbitration involving credit cards, the credit card companies won. Any employer can put in their policy, as a condition of employment, that any employee will seek arbitration rather than going to the courts on any dispute. Promotion, termination, civil rights discrimination, worker's compensation, medical disability benefits — all arbitration.

Now who do you think sponsored all of this legislation? The railroads, the banks, the security companies, the American Medical Association, the Texas Medical Association, the Business Alliance Association, credit card companies, and builders associations.

Now they say, and you've read in the paper, that jury verdicts are unreasonable and seriously affect the economy of the United States. But nothing could be further from the real truth.

In a very recent four-year study — where every single Texas trial judge was sent a questionnaire — it was determined that in cases where juries awarded compensatory damages, 84% of the trial judges did not believe the damage award was high. And 58% of the judges reported that they didn't think the jury verdicts were disproportionately low. In cases where juries were asked to award punitive damages but did not, 86% of the judges agreed with the jury.

And how many times have you read in your newspaper about all of these frivolous lawsuits? Well, regarding frivolous lawsuits, 44% of the judges reported never seeing a frivolous lawsuit in the last four years; 54.6% of the judges reported seeing fewer than two in the last four years. When asked how many judges had award sanctions for frivolous lawsuits, 65% of all trial judges said that they had never awarded sanctions. Nineteen percent said one to two; 7% said two to three in the last four years.

And on the need for legislation to limit the frivolous lawsuits you read about, 86% of all the judges reported there was no need for any such legislation. And I'm here to tell you that nothing bothers a trial judge more than a frivolous lawsuit. It requires wasted time and wasted energy.

One of the social gains in my professional lifetime in the trial of lawsuits is that I've seen the improvement in medical practice because of medical negligence cases. And I have defended doctors and hospitals for 30 years. I've seen the improvement in the legal profession and in the CPA profession because of lawsuits. I've seen an incredible amount of improvement in medical records because of lawsuits. Architects, engineers and construction companies have improved the workplace incredibly because of lawsuits. And the integrity of the building and construction industry has been improved. So the lawsuits in my lifetime have led to the improvement of life in the United States.

And that brings me here to remind you how important it is to know and teach about the third branch of government. And that its center is the right of a jury trial.

One of the things that you can do every day in your classroom is to knock away the fallacy that our young people get, "Oh no, I've got a jury summons." I hear that every week in my courtroom, but I can tell you as honest as I can that when that person walks out of the jury room after they've been on a jury — particularly a hard jury case — they don't feel that their time was wasted. And many of them understand for the first time the important work that they have done.

Jury service and the right to jury trials separate us from every country in the world. No other country has jury service. You pay a lot of money for it. The largest expense the judiciary has in the United States is to compensate jurors. Every week when I have a jury, it costs the taxpayers between $1,700 and $3,500 for a three-day trial. It's expensive, but it's worth it.

Our system of justice must continue to work because Americans are not going to withdraw the Sixth and Seventh Amendments. The same people who are putting up legislation to limit jury trials don't have the guts to come out and say we need to get rid of the Sixth and Seventh Amendments to the Constitution. It's very important for teachers to know how important it has been historically and how important it can be in the future.

I'm already seeing the arbitration cases starting to slow down. Businesses now have started to realize that it's not a good deal. First off they have to pay at a rate of $1,500 to $4,500 a day to each arbiter. It's not any faster than the trial, and there's no appeal.

In a recent case — one where there was a separation between a husband and wife — the wife called down to the bank and said, "My husband is not living me with me anymore," but she didn't do anything more than that, and the husband went down and took the money out of the joint and savings accounts. And so the woman sued the bank — but she had not put any stop orders. She hadn't gone down there and said don't do it. She hadn't followed any of the bank procedures. The bank had an arbitration provision, so she had to go to arbitration, and the arbiter gave her $87,000.

The law is clear that there wasn't any liability to the bank. The bank asked for an explanation and the arbiter said that they didn't have to give an explanation. And the courts cannot set it aside. It's a matter of contract.

One of my close friends is the General Counsel for — I always called it Humble Oil, but y'all call it something else now — Exxon. He will not allow that company, which is the third-largest corporation in the world, to have an arbitration clause. Because he says that a jury will be a better determiner of any dispute than three lawyers who are overpriced and who want to be arbiters next month.

It comes in cycles but, as you can see, I believe in the jury system, and the reason I believe in it is I've lived it since 1963.