THE DECLARATION OF INDEPENDENCE AND OUR LEGAL TRADITION

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My remarks today are a celebration of sorts. This July marks America's 250th birthday. A quarter millennium since we broke away from the Old World and charted our own course through the currents of world history. And what a journey it has been.

250 years is a major milestone. By some accounts, it is a turning point. In *The Fate of Empires and Search for Survival*, a scholar by the wonderfully British name of Sir John Bagot Glubb wrote about the lifespan of empires. Studying dynasties from the Assyrians, Persians, and Romans to the Ottomans, Romanovs, and British, he noticed a startling pattern: Each empire would typically last around 250 years.[1]

America certainly has an empire's expanse. My long flights crisscrossing the country over the last couple days demonstrate as much. But America is distinctive: We began by splitting from an empire. On July 4, 1776, we declared our reasons. That Declaration set us apart in a more fundamental way—by promising that our government would rest not on imperial domination but on the consent of the governed.

To mark the Declaration's semiquincentennial (quite a mouthful), let us give it a closer read and consider its lasting resonances. To that end, my remarks will proceed in three parts. *First*, I will examine some of the Declaration's grievances about the Crown, focusing on its misuse of the colonial judiciary. *Second*, I will explore how the Founding Generation addressed those grievances, both in the Constitution's written text and in early judicial practice. *Third*, I will propose some takeaways for those of us in the legal community today.

Start with the Declaration. We all know its soaring appeal to certain "self-evident" "truths": "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[2] Other parts of the document are less quotable but just as crucial. The Declaration explained in detail why its authors had taken the drastic step of "dissolv[ing] the political bands" with Britain.[3] Among a laundry list of claims against the King and his cronies, it aimed several at the colonial judiciary.

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[1] JOHN BAGOT GLUBB, THE FATE OF EMPIRES AND SEARCH FOR SURVIVAL 24 (1976), https://archive.org/details/fate-of-empires/mode/ [https://perma.cc/7ZNR-K27Q].

[2] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[3] *Id.* para. 1.

Let me take those one by one. The Declaration accused the King of "ha[ving] obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers."[4] That complaint stemmed from a standoff between the Crown and North Carolina's legislature. The legislature had empowered local courts to attach British merchants' in-colony property so that colonial creditors could recover from them. But in 1772, the King ordered his royal governor to block any law authorizing that mechanism. When North Carolina's legislature refused to budge on attachment, the governor dissolved the legislature altogether. This left North Carolina without superior courts for three years.[5]

When not gutting the courts, the King subjugated them. As the Declaration put it, he "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[6] This was a shocking departure from common law traditions. Over the course of British history, the judiciary had gradually won substantial independence from the Crown. While courts had initially been mere agents of the King—indeed the King historically had sometimes sat with the judges on the bench—William Blackstone recounted how the "kings have delegated their whole judicial power to the judges of their several courts," which possessed "a known and stated jurisdiction" that "the crown itself cannot now alter but by act of parliament."[7] Blackstone also emphasized other safeguards to the courts' "dignity and independence"—including "that their commissions shall be made (not, as formerly, *durante bene placito* [during pleasure], but) *quamdiu bene se gesserint* [during good behavior], and their salaries ascertained and established" by law.[8]

In the years before the Declaration, George III broke from that tradition for the American colonies. He made colonial judges' commissions subject to his whims. Later, in response to the Boston Tea Party, Parliament even transferred the power to pay the salaries of Massachusetts judges from the legislature to the royal governor.[9] In the colonists' eyes, these actions deprived them of their birthright as Englishmen.

The King undermined juries, too. The Declaration faulted the Crown "[f]or depriving [the colonists] in many cases, of the benefits of Trial by Jury."[10] Judgment by one's peers was one of the most ancient rights of British subjects, enshrined as early as 1215 in Magna Carta. But in the runup to independence, the jury became a flashpoint. Both criminal and civil juries in the colonies routinely foiled oppressive British laws. In New York, three separate grand juries refused to indict John Peter Zenger, a prominent printer, for libeling the royal governor. And in Massachusetts,

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[4] *Id.* para. 10.

[5] Akhil Reed Amar & Samarth Desai, *The Annotated Declaration of Independence*, NAT'L CONST. CTR., https://constitutioncenter.org/declaration/annotated-declaration [https://perma.cc/889W-44JP]; *see also* Adam White, *Here the People Rule, and So Does the Law*, AM. ENTER. INST. (July 25, 2025), https://www.aei.org/op-eds/here-the-people-rule-and-so-does-the-law/ [https://perma.cc/XZ65-XS7U].

[6] DECLARATION para. 11.

[7] 1 WILLIAM BLACKSTONE, COMMENTARIES *258.

[8] *Id.*

[9] White, *supra* note 5; *see also* Jennifer Walker Elrod, Jack Buckley DiSorbo & J. Andrew Mackenzie, *The Judicial Compensation Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 454 (Josh Blackman & John G. Malcolm eds., 3d ed. 2025).

[10] DECLARATION para. 20.

grand juries repeatedly rebuffed prosecutions under the Stamp Act.[11] This was also true in the civil context. In *Erving v. Cradock* (1761), a Massachusetts merchant sued a British customs inspector for trespass, and the jury awarded him a large verdict.[12]

In the mid-1760s, Parliament responded with the infamous Sugar and Stamp Acts, which sidelined pesky colonial juries by transferring customs cases to juryless vice-admiralty courts, presided over by royal judges who received fees from litigation.[13] (These vice-admiralty courts were, in effect, the administrative law judges of their day.) This prompted the Stamp Act Congress, a 1765 precursor to the Continental Congress, to declare that "trial by jury is the inherent and invaluable right of every British subject in these colonies"—and that the vice-admiralty courts had "a manifest tendency to subvert the rights and liberties of the colonists."[14]

Of course, the Crown's abuses went beyond the judiciary. Among other things, the Declaration's authors chastised the British "[f]or imposing Taxes on us without our Consent," "[f]or Quartering large bodies of armed troops among us," and for "plunder[ing] our seas, ravag[ing] our Coasts, burn[ing] our towns, and destroy[ing] the lives of our people."[15] This "long train of abuses" left the colonies with no choice but to throw off the British yoke.[16]

We all know what happened next. Against all odds, Washington's ragtag forces managed to defeat the British war machine. Then came the disappointing interlude under the Articles of Confederation, which proved unworkable for a burgeoning republic in need of a more energetic national government. The Articles' shortcomings prompted the Framers to convene in Philadelphia, where they crafted a Constitution that would, in Justice Kennedy's words, "split the atom of sovereignty" between the federal government and the States.[17]

In the summer of 1787, the memories of British subjugation were still fresh on the Framers' minds. They designed the Constitution as a bulwark against many of those misadventures. That is true of the courts just as much as the other branches.

Start with Article III's first sentence: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[18] Article III establishes a Supreme Court that neither the executive nor legislature can dissolve. Incidentally, that is not true across the pond even today, where the Supreme Court of the United Kingdom is a creature of Parliament that could be eliminated tomorrow if Parliament so ordained.

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[11] Julius N. Richardson, *The Grand Jury Requirement*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 634 (Josh Blackman & John G. Malcolm eds., 3d ed. 2025).

[12] Renée Lettow Lerner, *The Civil Jury Trial Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 683 (Josh Blackman & John G. Malcolm eds., 3d ed. 2025).

[13] Amar & Desai, *supra* note 5.

[14] Resolutions of the Stamp Act Congress (Oct. 19, 1765), *reprinted by* THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/resolu65.asp [https://perma.cc/36H7-EMP4].

[15] DECLARATION paras. 16, 19, 26.

[16] *Id.* para. 2.

[17] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[18] U.S. CONST. art. III, § 1.

The Madisonian Compromise also empowers Congress, as the most representative body, to create lower federal courts like the one on which I serve.[19] The Founders gave the federal courts their independent station within the three coordinate branches, enabling judges to decide cases and controversies according to law, not political favor. As Alexander Hamilton wrote in Federalist 78, "[t]he complete independence of the courts of justice" was "peculiarly essential in a limited Constitution."[20] In his view, it would be up to the courts, in the proper exercise of their judicial power, to declare void and disregard "all acts contrary to the manifest tenor of the Constitution."[21]

Now take the next sentence, which provides the bread and butter of judicial independence. Article III guarantees that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[22] This was a direct rebuke of English colonial practice, enshrining in a written Constitution the longstanding English custom that the colonists had learned could be undone by a capricious tyrant. Hamilton maintained that "nothing can contribute so much to [the courts'] firmness and independence as permanency in office."[23] John Adams, in words echoing Blackstone, agreed that federal judges' commissions should last "during good behaviour, and their salaries ascertained and established by law."[24] I thank them both for putting food on the McFadden table.

Finally consider the jury. Thinking back to the summer in Philadelphia, Hamilton observed that "[t]he 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."[25] Article III thus provides that "[t]he Trial of all Crimes, except in Cases of Impeachment; shall be by Jury."[26] To some, that was not enough; the original Constitution did not provide for juries in civil cases. This omission was a chief reason why the Anti-Federalists opposed ratification. George Mason and Elbridge Gerry even withheld their signatures from the draft Constitution on that ground. Although the Anti-Federalists ultimately (and thankfully) could not block ratification, they persuaded some state conventions to recommend adding a civil jury right.[27]

A few years later, the First Congress accepted that proposal—and then some. The Bill of Rights added the Fifth Amendment, which ensures that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury";[28] the Sixth Amendment, which reaffirms that all criminal defendants have "the right to a speedy and public trial, by an impartial jury";[29] and the Seventh Amendment, which extends the jury

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[19] David R. Stras & Andy Hessick, *The Inferior Courts Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 447 (Josh Blackman & John G. Malcolm eds., 3d ed. 2025).

[20] THE FEDERALIST No. 78, at 466 (Alexander Hamilton).

[21] *Id.*

[22] U.S. CONST. art. III, § 1.

[23] THE FEDERALIST NO. 78, *supra* note 20.

[24] John Adams, Thoughts on Government (Apr. 1776), *reprinted by* THE HERITAGE FOUND.: FIRST PRINCIPLES SERIES, https://static.heritage.org/CPP/FP_PS07.pdf [https://perma.cc/U3Q2-8265].

[25] THE FEDERALIST No. 83, at 499 (Alexander Hamilton).

[26] U.S. CONST. art. III, § 2, cl. 3.

[27] Lerner, *supra* note 12, at 683–84.

[28] U.S. CONST. amend. V.

[29] *Id.* amend. VI.

trial right to "suits at common law."[30] From the Founding onward, Americans could rest assured that their liability or guilt would never be a foregone conclusion; instead, it would come down to the judgment of their peers.

In short, the grievances raised in the Declaration 250 years ago were answered almost point-by-point in the Bill of Rights and Constitution, including Article III.

It did not take long for these constitutional guarantees to be tested in action. One early challenge came from the Declaration's author himself. Here I refer to President Thomas Jefferson's conduct during the treason trial of Aaron Burr. Burr is best known today for killing the protagonist of a musical. But there were layers to this complex figure. After serving as an officer in Washington's Continental Army, Burr became a prominent lawyer and politician. He was Jefferson's running mate in the 1800 election—which proved catastrophic. Jefferson and Burr received the same number of electoral votes, sending the election to the House, which broke the tie for Jefferson only after thirty-six rounds of voting. In all its chaos, the 1800 election catalyzed the Twelfth Amendment's reforms.[31]

President Jefferson held a grudge. He never forgave his one-term vice president for what he saw as his ungentlemanly refusal to yield in the 1800 contest.[32] In 1807, when Burr had faded into political obscurity after killing Hamilton, President Jefferson would seek his revenge. Burr had become implicated in a plot, the exact nature of which remains mysterious to this day. According to the most damning accounts, Burr masterminded a paramilitary operation to separate the western States from the Union and install himself as emperor.[33] That is at least the version that President Jefferson propounded. In a public message to Congress, the President declared Burr guilty of treason, before any indictment was issued.[34] President Jefferson would go on to quarterback Burr's treason prosecution in federal court in Richmond, Virginia.

That is where another Founding-era titan entered the stage. We know John Marshall as the Chief Justice who forged the Supreme Court. President Jefferson, who was Chief Justice Marshall's distant cousin but political and personal nemesis, had rebuked the Chief Justice for his opinion in *Marbury v. Madison*. In a letter to Abigail Adams, President Jefferson asserted that *Marbury*'s vision of judicial review "would make the judiciary a despotic branch."[35]

In Richmond, President Jefferson and Chief Justice Marshall met in a different arena. Chief Justice Marshall presided over the Burr trial as the circuit judge in Virginia. Quite a side gig for a Chief Justice. The President, meanwhile, was deeply involved in Burr's prosecution. He regularly issued detailed instructions to the federal prosecutor and even sent him blank pardons "to be

[30] *Id.* amend. VII.

[31] Michael T. Morley, *The Twelfth Amendment*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 718 (Josh Blackman & John G. Malcolm eds., 3d ed. 2025).

[32] R. KENT NEWMYER, THE TREASON TRIAL OF AARON BURR: LAW, POLITICS, AND THE CHARACTER WARS OF THE NEW NATION 21–22 (2012).

[33] *Id.* at 23.

[34] *Id.* at 22.

[35] Thomas Jefferson, Letter to Abigail Adams (Sep. 11, 1804), *reprinted by* NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/documents/Jefferson/01-44-02-0341 [https://perma.cc/9YLW-R27C].

filled up at [his] discretion" to coax Burr's supposed co-conspirators to testify against him.[36] The President's enmity toward Burr and distaste for Chief Justice Marshall teed up a delicate moment for the rule of law.

Within this charged setting, Chief Justice Marshall issued rulings that resonate to this day. I want to highlight two.

First is the presidential subpoena. Burr had moved for President Jefferson to hand over several documents regarding the prosecution, including a cypher letter that President Jefferson had cited in his public pronouncement of Burr's guilt.[37] After lengthy oral argument from both sides, Chief Justice Marshall issued the subpoena to the President. In Chief Justice Marshall's eyes, Burr's Sixth Amendment right to compulsory process in his defense demanded nothing less.[38] Nor was there an absolute presidential carveout to this right: Chief Justice Marshall emphasized that even "the president of the United States may be subpoenaed, and examined as a witness."[39] Although grudgingly, President Jefferson turned over the requested documents.[40] In a sense, his personal involvement in the prosecution had boomeranged against him. Chief Justice Marshall's subpoena decision would become canonical. In fact, the Supreme Court cited it as recently as two terms ago in *Trump v. United States*.[41]

Chief Justice Marshall's second decision was about defining treason. This is a topic addressed in Article III—which states that "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."[42] Article III further provides that "[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."[43] By confining treason within narrow bounds, the Framers guarded against its overuse. Defending the provision at the Pennsylvania Convention, James Wilson contended that, throughout history, "a very great part of the[] tyranny over the people ha[d] arisen from the extension of the definition of treason."[44]

In Burr's case, Chief Justice Marshall hewed to Article III's text. He held that the prosecution had to prove some overt treasonous act. In other words, "war" had to be "levied in fact"—or, at the very least, the evidence had to show an "open assemblage for the purpose of force" against the government.[45] Based on this definition, Chief Justice Marshall granted Burr's motion

[36] Thomas Jefferson, Letter to George Hay (May 20, 1807), *reprinted by* THE LIBR. OF CONG., https://tile.loc.gov/storage-services/service/mss/mtj/mtj1/038//038_0446_0446.pdf [https://perma.cc/9EA6-ZFAV].

[37] NEWMYER, *supra* note 32, at 99.

[38] *Id.* at 151.

[39] United States v. Burr, 25 F. Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694).

[40] NEWMYER, *supra* note 32, at 154.

[41] 603 U.S. 593, 594–95 (2024).

[42] U.S. CONST. art. III, § 3, cl. 1.

[43] *Id.*

[44] James Wilson, Statement at the Pennsylvania Convention (Dec. 7, 1787), *reprinted by* THE CONST. SOURCES PROJECT, https://www.consource.org/document/james-wilson-in-the-pennsylvania-convention-1787-12-7/ [https://perma.cc/XAE2-VSY8].

[45] United States v. Burr, 25 F. Cas. 55, 168 (C.C.D. Va. 1807) (No. 14,693).

to suppress large swaths of the prosecution's evidence.[46] That ruling gutted the largely circumstantial case against Burr, and the jury duly acquitted him.[47] Furious, President Jefferson later sought Chief Justice Marshall's impeachment, though without success.

What do we learn from all of this? To conclude my remarks, I offer three takeaways. (There are always three.) The first is that there is more precedent than one might think. The word "unprecedented" is tossed around all too promiscuously. A President decrying a Supreme Court decision that comes out against him? Efforts to impeach judges who reach unpopular outcomes? Seemingly political prosecutions directed from the top? We have seen it all before—and from none other than the man who drafted the Declaration of Independence. So, take a deep breath next time you hear cries of norms breaking and domestic tyranny.

I say this neither to tar President Jefferson nor to condone all his actions or those of others whose actions mirror his. As a dyed-in-the-wool Virginian and graduate of the university he built, I deeply admire many of Jefferson's contributions to my State and country. My point instead is to echo Madison's insight in Federalist 51: "If men were angels, no government would be necessary."[48] That goes for our Founders just as much as for us today. From the beginning, our Founders knew that the political branches would seek to maximize their own power. That inevitable clash between branches is the sound of freedom for American citizens.

Which brings me to the second takeaway, this one focused on the judiciary. As the Declaration attests, our Founders fought a war for judicial independence. From the rubble of the colonial courts, they built a judiciary that could decide cases according to what the law is, without fear or favor to any party. The pairing of a written Constitution with independent courts empowered to interpret that Constitution is a robust bulwark of our freedom. Of course, one of the Constitution's enumerated protections is the jury trial, thus giving the individual an unassailable right to be judged by his peers. Juries, which are defunct in most of the Western world today, continue to serve as a failsafe against executive overreach here. Chief Justice John Marshall embodied the judicial role both on the Supreme Court and in Richmond. So did Burr's jury. We judges should continue that legacy.

But this duty reaches beyond judges and jurors. My third submission is that it extends to all lawyers and aspiring lawyers. America is sometimes called a nation of lawyers; only rarely in an approving way. There is truth to that cliché: Lawyers occupy a uniquely lofty perch in this country. During my law firm days, I traveled to other countries for work quite frequently. I have yet to find a better (or more lucrative) place to be a lawyer.

Indeed, this observation about lawyers goes back as far as 1831, when Alexis de Tocqueville chronicled early America. Tocqueville compared America's legal profession to a type of aristocracy.[49] Of course, our Constitution expressly forbids titles of nobility,[50] but Tocqueville's point was a different one. He maintained that the legal profession's peculiar influence in American

[46] *Id.* at 180.

[47] NEWMYER, *supra* note 32, at 165.

[48] THE FEDERALIST No. 51, at 322 (James Madison) (authorship historically disputed but now attributed to Madison; *see* FREDERICK MOSTELLER & DAVID L. WALLACE, INFERENCE AND DISPUTED AUTHORSHIP: THE FEDERALIST 263 (1964)) (Clinton Rossiter ed., 1961).

[49] 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 436 (James T. Schleifer trans., Liberty Fund ed. 2010).

[50] U.S. CONST. art. I, § 9, cl. 8.

society "form[s] today the most powerful barrier to the errors of democracy."[51] Indeed, Tocqueville went so far as to "doubt . . . that democracy could govern society for long, and [could not] believe that . . . a republic could hope to maintain its existence, if the influence of lawyers in public affairs did not increase in proportion to the power of the people."[52]

As Tocqueville made clear, ours is not an aristocracy of the Old-World kind. Our power as lawyers is no blank check. It comes with a duty to uphold the rule of law and preserve constitutional limits. No one is exempt from that duty. Everyone must contribute. Prosecutors enforce law and order to protect the American people. Defense counsel ensure that only the guilty are punished and that defendants' constitutional rights are vindicated. Agency lawyers help the federal government advance the people's welfare. State attorneys general prevent the federal government from overreaching. Even big law associates and partners have a role to play. And together, these different lawyers zealously advocating for their clients and presenting the clash of ideas and ideals in the courtroom are a microcosm of the checks and balances the Founders created to safeguard freedom and the rule of law.

If all lawyers play their part, our whole country reaps the benefits. The law is part of what makes our Nation great. At this milestone in our history, I am confident that if we lawyers continue in our American calling, then we will defy Sir John Glubb's thesis: Our empire of laws will last for another quarter millennium and beyond.

[51] TOCQUEVILLE, *supra* note 49, at 431.

[52] *Id.* at 437.