

Instructions in Supreme Court Jury Trials

Robert A. James

THE UNITED STATES SUPREME COURT has, by virtue of Constitutional grant, original jurisdiction over all controversies in which a State or a foreign emissary is a party.¹ Although the number of categories of cases in which the Court has

exclusive jurisdiction is extensively limited by statute, it is still the tribunal of first resort for all controversies between two or more States,² and occasionally exercises its non-exclusive original jurisdiction.³ The Seventh Amendment to the United States Constitu-

Robert A. James is a partner in the law firm of Pillsbury Madison & Sutro LLP, San Francisco, California. A.B., Stanford University, 1980; J.D., Yale Law School, 1983. This article is reprinted, with updates, revisions, and permission, from *The Journal of Attenuated Subtleties* (1 J. ATTEN. SUBT. 5 (1982)).

1 U.S. CONST. art. III, § 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

The intent of the framers in drafting this provision is thoroughly unascertainable. Professor Farrand has concluded that "surprisingly little [is] found in the records of the convention" regarding jurisdiction and the judicial branch in general. Max Farrand, *THE FRAMING OF THE CONSTITUTION* 154 (1913). See, however, the speculation in Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 665 & n.3 (1959) (purpose of clause to insure prestige of tribunal hearing claims involving sovereign or quasi-sovereign entities).

2 28 U.S.C. § 1251(a): "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." Formerly, the exclusive original jurisdiction extended to suits brought against foreign emissaries, but jurisdiction with respect to these actions was made non-exclusive by the Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 809, 810, § 8(b)(1).

3 See, e.g., *United States v. California*, 449 U.S. 408 (1981).

Relatively few original cases have been heard in the Supreme Court's reported history. See Note, *supra* note 1, at 701-719 (123 reported original cases counted as of 1959); Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of its Original Jurisdiction Docket Since 1961*, 45 ME. L. REV. 185, 187-88 (1993) (51 more opinions in original cases between 1958 and 1993); 17 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *FEDERAL PRACTICE AND PROCEDURE* 167 n.1 (1988 & 1997 Supp.) (hereinafter cited as *WRIGHT, MILLER & COOPER*) (zero original cases were added and two original cases were disposed of in 1994 Term, leaving nine on the docket).

tion⁴ and a statute⁵ guarantee the right to trial by jury in the resolution of actions at common law before the Court.⁶

Many readers of the *Green Bag* will recall or admit these general principles, but some might be surprised to learn that there have been Supreme Court jury trials – at least three, in

fact.⁷ The last reported trial occurred in the eighteenth century, but near-brushes occurred in 1876⁸ and again in 1950.⁹ Even today, the assertion in an original jurisdiction action of a party's right to a jury trial "remains a theoretical possibility."¹⁰ Once the possibility is acknowledged, a procedural problem be-

4 U.S. CONST. amend. VII: "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."

5 Judiciary Act of 1789, c. 20, 1 Stat. 73, 80-81, § 13, codified at 28 U.S.C. § 1872: "In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury."

6 The right to trial by jury in the Supreme Court was substantively addressed most recently in *United States v. Louisiana*, 339 U.S. 699 (1950). Justice Douglas for the Court held that the State of Louisiana was not entitled to a jury trial where it sought the equitable remedies of injunction and accounting: "The Seventh Amendment and the statute [28 U.S.C. § 1872], assuming they extend to cases under our jurisdiction, are applicable only to actions at law." *Id.* at 706 (footnote omitted) (emphasis supplied). In later dissents, Justice Douglas reiterated his perception that Supreme Court jury trials are obsolete or extinct (see *Mississippi v. Arkansas*, 415 U.S. 189, 196 n.1 (1974) (Douglas, J., dissenting) (jury trials were "soon abandoned" after early instances); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 511 n.7 (1971) (Douglas, J., dissenting)).

The conditional and historical nature of Justice Douglas's comments might be understood to place in doubt the right to a Supreme Court jury trial. Such an inference would gain no support from the Constitution, the statute or the cases. The language of 28 U.S.C. § 1872 is explicit in its assurance of the right in actions against citizens, see note 5 *supra*; moreover, the text of the Seventh Amendment applies to all suits at common law, not just those against citizens, and contains no limitation of the jury trial to actions in lower courts, see note 4 *supra*. See WRIGHT, MILLER & COOPER, *supra* note 3, at 280 & n.28 (Seventh Amendment may raise "unanswerable questions" to objections to Supreme Court jury trial right). Justice Douglas should be understood as having engaged in his usual discreet practice of refraining from deciding more issues than the essential elements of the case at bar. See generally *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 568 (1851); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 734 (1838) (where court found original jurisdiction equitable in nature, no discussion of right to jury trial for legal actions).

7 Only one Supreme Court jury trial is officially reported, that in *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794), discussed in the text accompanying notes 11-13 *infra*. Two others are evidenced by other Court records, and are discussed in 1 H. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 169 n.1 (rev. ed. 1902), and in *The Supreme Court – Its Homes Past and Present*, 27 A.B.A. J. 283, 286 & n.3 (1941). In *Oswald v. New York* (U.S. Feb. 6, 1795), a jury verdict for \$5,315.06 was entered; in *Cutting v. South Carolina* (U.S. Aug. 8, 1797), the jury found \$5,502.84 in damages.

8 *Casey v. Galli*, 94 U.S. 673, 681 (1876) (parties in original jurisdiction case waived "intervention of a jury").

9 *United States v. Louisiana*, *supra* note 6 (State of Louisiana unsuccessfully demanded trial by jury). Cf. *United States v. California*, 297 U.S. 175, 188 (1936) (in referring further proceedings to district court, then-Justice Stone remarked that "[t]he controversy ... involves issues for which a jury trial may be appropriate, compare *Georgia v. Brailsford*").

10 WRIGHT, MILLER & COOPER, *supra* note 3, at 279. Of course, the Supreme Court may avoid such a jury trial in non-exclusive jurisdiction cases by redirecting the proceedings to the appropriate district court. Even in exclusive jurisdiction cases, the Court typically encourages parties to pursue factual disputes before a special master and summarily approves the master's findings. See, e.g., *Maryland v. Louisiana*, 451 U.S. 725, 734 (1981); *Mississippi v. Arkansas*, 415 U.S. 289 (1974).

comes apparent: how is a multi-member Court to deliver jury charges and other instructions where the nine Justices are not in agreement? This article fills a gaping chasm in the Supreme Court jury trial literature, and the field of legal trivia, by simultaneously identifying and solving a problem that has never arisen.

Luck has smiled on the Supreme Court in the past on this issue. In *Georgia v. Brailsford*,¹¹ the only jury trial detailed in the reports, all the Justices were able to agree on the charge. Chief Justice Jay for the Court, on initially instructing the twelve jurors, remarked: "It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous."¹² When the jurors returned to ask additional questions, the Court was also unanimous in its response; the jury then unanimously rendered its decision.¹³ In the future, of course, the Court may not be fortunate enough to agree on the form and content of jury instructions.

One might ask why the principles applicable to other Court decisions – majority rule, with concurrences and dissents – could not be applied in this context. But jury charges, unlike

other judicial actions, require more than an affirmative or negative response to a motion, petition or evidentiary objection. The body vested with the authority to make findings and interpretations of law must present a single algorithm, a single formulation of legal analysis, to guide the jury in rendering its decision on factual issues. Where the Justices cannot come to agreement upon a unified jury instruction, a decision rule must be adopted to determine which of alternative charges is to be delivered.¹⁴ The jury instruction issue is therefore inextricably intertwined with the problems addressed by modern social choice theory.¹⁵

Some potential decision rules may be summarily dismissed. A "pure race" rule, under which the first instruction to be spoken by a Justice would be adopted, is clearly unjust and unworkable in this context.¹⁶ A rule under which the Chief Justice's instruction always wins is also unacceptable, as it would appear to place more power in that position than is contemplated by the judicial system. A game of chance or skill among proponents of instructions is intriguing and has some precedent as a decision rule,¹⁷ but would be

11 3 U.S. (3 Dall.) 1 (1794). The case involved the post-Revolutionary War effect on various creditors of a State's wartime sequestration of debts.

12 *Id.* at 4.

13 *Id.* at 5. The Court and jury combined to find that property in the debts revested in the creditors after the wartime sequestration was nullified by the Treaty of Paris.

14 Otherwise, one can only imagine the jurors' confusion after receiving instructions in the all-too-frequent clutter of opinions:

WHITE, J., delivered an opinion, Parts I, II, and IV of which are for the Court, and filed a dissenting opinion in Part III. MARSHALL, BLACKMUN, and STEVENS, JJ., joined Parts I, II, III and IV of that opinion; SCALIA, J., joined Parts I and II; and KENNEDY, J., joined Parts I and IV. REHNQUIST, C.J., delivered an opinion, Part II of which is for the Court, and filed a dissenting opinion in Parts I and III. O'CONNOR, J., joined Parts I, II, and III of that opinion; KENNEDY and SOUTER, JJ., joined Parts I and II; and SCALIA, J., joined Parts II and III. KENNEDY, J., filed an opinion concurring in the judgment.

Arizona v. Fulminante, 499 U.S. 279, 281 (1991), cited by Burke Marshall in his *Foreword* to Joseph Goldstein, *THE INTELLIGIBLE CONSTITUTION* xi (1992).

15 See generally Kenneth Arrow, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

16 *But cf.* UNIFORM COMMERCIAL CODE § 9-312(5)(a) (1978) ("pure race" rule for priorities among secured creditors).

17 See *Poker Game Settles New Mexico Mayor Contest* (Reuters Mar. 6, 1998 article) <http://204.71.177.76/text/headlines/980306/politics/stories/gamble_1.html> (state law or local ordinance

extraordinary for an institution so dedicated to the rule of law.

A plurality rule, one which recognizes the jury instruction endorsed by the largest number of Justices, appears to represent the sound and just resolution of the problem. Although opportunities for negotiation and strategy may present themselves,¹⁸ and the possibility of a tie would have to be addressed,¹⁹ the plurality rule would place incentives on Justices to subscribe to the instruction that

most closely approximates their own views of the analysis the jury should apply. The result under the plurality rule test would be the adoption of a single jury instruction, one which commands the widest support among the members of the Court, but which is also consistent with the unarticulated yet powerful principle of equality among Justices.²⁰ One can only hope for the opportunity for another Supreme Court jury trial, in which this pressing question can at long last be settled. *JB*

required tie in Estancia, N.M. mayoral election to be settled by an unspecified game of chance; candidates disagreed on which game to play (single throw of dice or single hand of five-card draw poker) and adopted a coin-toss as the meta-decision rule; incumbent won coin-toss and ensuing poker hand, ace-high). Whether a game of *draw* poker met the legislative mandate of a game of "chance" is open to serious question, but the losing candidate is believed not to have contested the election decision process.

18 See generally John Von Neumann & Oskar Morgenstern, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (3d ed. 1953).

19 Perhaps the Chief Justice rule or a game of chance could here be profitably used; this situation requires a thorough analysis. Indeed, the problem of the equally divided court is one long neglected by commentators and courts alike. Usually, there is a lower court decision that stands if a multi-member appellate court is equally divided. *United States v. Barnett*, 330 F.2d 369 (5th Cir. 1963) (en banc), *certified question answered*, 376 U.S. 681 (1964), however, involved an original contempt proceeding against a state governor brought in and by the Court of Appeals; when the court *en banc* was equally divided, there was no lower decision to affirm.

20 It is not inconceivable to imagine the guarantee of "one person, one vote" applied generally at each level of the entire federal judiciary. Cf. *Reynolds v. Sims*, 377 U.S. 533 (1964) (principle of one person, one vote in state legislative apportionment); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Fifth Amendment due process clause contains equal protection component applicable to federal government).