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## The Founders wouldn't approve

**P**oll: Majority supports special courts for malpractice suits.

That headline recently appeared in the health-care blog of "The Hill," a congressional newspaper. The headline is based on a news release sent out by Common Good, a self-styled, legal reform organization. In its release, Common Good claims that a poll it commissioned shows that 66 percent of voters support the idea of creating special "health courts" to decide medical malpractice claims. In that release, Philip K. Howard, founder of Common Good and a critic of the civil justice system, said, "Americans know they're paying unnecessary health-care costs because our system of medical justice is unreliable."

The solution, Howard said, is the creation of "reliable health courts."

Howard does not explain how Americans "know" that our civil justice system is unreliable. He also provides absolutely no details as to how the poll was conducted or even what the questions were. Every pollster learns in Public Opinion Research 101 that the specific way a question is asked will often determine the answer. Of course, Howard is not talking about a special group of experienced trial judges, organized and empowered to move medical negligence cases along more quickly and efficiently. He is talking about eliminating juries and letting panels of doctors and judges decide these cases.

The health court concept is just the latest incarnation in an ongoing effort to eliminate or drastically reduce the rights of injured patients. The concept is amorphous and its supporters don't agree on all of the details, but virtually every version would strip an injured patient of his or her Seventh Amendment right to a jury trial. The concept is fundamentally un-American. In the 18th century,

Britain's evisceration of the right to trial by jury was one of the direct causes of the American Revolution.

Most commentators would agree that the right to a jury trial in English common law can be traced to the Magna Carta in the 13th century. By the mid-18th century, the right was deeply entrenched in America. When Parliament passed a series of protectionist measures to prohibit the colonists from trading with anyone but favored British business interests, it became clear that American juries would not convict fellow colonists accused of smuggling under the Sugar and Navigation acts. In response, the British abolished jury trials and created "vice admiralty courts" to try colonists. In this 18th century version of "health courts," British naval officers tried and convicted colonists apprehended by the British navy.

The colonists were outraged and not just by the loss of jury trials in criminal cases. One of the most hated effects of the Sugar and Navigation acts was the elimination of the right to seek money damages from customs officials in a civil action tried before a jury. Indeed, one of the main reasons the founders felt the need to declare their independence was this deprivation "... in many cases of the benefit of Trial by Jury."

As originally ratified, the U.S. Constitution protected the right to jury trial in criminal cases but made no mention of civil cases. This omission caused violent opposition and almost prevented ratification. Only the promise of amendment after ratification to provide for the Bill of Rights allowed the consensus necessary for ratification. James Madison was one of the staunchest supporters of the right to a jury trial in all cases. He said freedom of the press, freedom of religion and the right to a trial by jury in criminal and civil cases were the

three most important safeguards of liberty. He called them "the Great Rights" and described the latter using language already present in new state constitutions:

"In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."

In the first Congress, Madison proposed a number of amendments to the Constitution. In 1791, 10 amendments were approved and became known as the Bill of Rights. The Seventh Amendment thus guarantees the right to trial by jury in civil cases and there is no exception for medical negligence cases.

Thomas Jefferson called this right "...[t]he only anchor yet imagined by man by which a government can be held to the principles of its constitution."

Richard Henry Lee stated that this right was just as important as the writ of habeas corpus and the right to a jury trial in criminal cases: "... [they] all stand on the same footing; they are the common rights of Americans." Alexander Hamilton said one of the few things the supporters and opponents of the Constitution agreed upon was the value they set upon the trial by jury. Support among the founders was so universal that there was no recorded debate on the amendment.

"Health courts" are just another manifestation of "vice admiralty courts": Doctors or government appointees sitting in judgment of other doctors. The right of an injured patient to have his or her case decided by a jury is not a privilege or a convenience. It is a fundamental right enshrined in the Bill of Rights. Perhaps Common Good should include that information in its poll questions. ■

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