JUDGE WILLIAM G. YOUNG

In Celebration of the American Jury Trial

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> We hold these truths to be self evident: That all persons are created equal; That they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted among us, deriving their just powers from the consent of the governed.[1]

Now that's about as close to an American creed as you can get,[2] and this afternoon we're going to celebrate and we're going to discuss in the most candid and direct way possible one aspect of the government that we created 227 years ago, the American jury. We didn't start it, but it is in our country that it has come to full flower.

Ninety percent of the jury trials on the planet take place in the United States of America.[3] No country uses juries, the direct democracy of the people, more than we do; it is part of our DNA as Americans.[4]

So in the few minutes as we get rolling here, I want to call to your attention some aspects of the American jury, and then, with our experts here, we will talk about how it actually practically works.

First, I want you to consider that jurors are constitutional officers.[5] Make no mistake, they are constitutional officers, the equal of any judge or any other constitutional officer. Now the Judicial Article III of our Constitution, our Federal Constitution, is drawn in large measure from the Massachusetts Constitution.

But I'll focus on the Federal Constitution. It's very symmetrical. It has only six types of constitutional office; each branch gets two. The legislative branch that makes the

laws has senators and representatives.[6] The executive branch that enforces the law, we have a very strong executive branch, and there's really only one constitutional officer at the top; it is the President of the United States. And given the frailties of the human condition, we have a Vice President of the United States.[7]

So now we're up to four. Everybody else in the executive branch - the cabinet have to be confirmed by the Senate and the like, the generals and admirals, and the boards and commissions, they're not constitutional officers.

The judicial branch of government starts out like this: "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." [8] That is, the trial courts, the district courts. There's a couple of sentences after that that deal with the justices and judges under Article III.[9] They are constitutional officers, the fifth type of constitutional officer.

And then – and it's very important to understand this – then, in the organization of the three branches of government, you don't need the Bill of Rights for this, in Article III, after those couple of sentences about judges, it says this: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[10] Get that. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And, of course, people wouldn't buy it, they wouldn't go for the Constitution, until it had the Bill of Rights.

Now the Sixth Amendment to the Bill of Rights, which we talk about and we know that that guarantees the right of counsel and the right of confrontation and other rights, that doesn't give the right to jury in criminal cases. You don't need that; that's in the organization of the government.[11]

The Seventh Amendment, and I'm glib here but I'm accurate, in essence says this: You know these cases we're trying to juries now - 1787 – and that we tried in our colonial era to juries, we'll always try them to juries as long as the Republic stands.[12]

And so we have the American jury, what Jefferson called the greatest anchor ever devised by humankind for holding a government to the principles of its Constitution.[13]

Now if they're constitutional officers, they have constitutional rights. We tend not to think of these rights appertaining to the jurors themselves because, given our adversary system, they tend to be played out in the Courts when one of the litigants, a defendant in a criminal case most frequently, is insisting on those rights as though they were his rights. They're part of his rights, but they are the rights of the people themselves to sit as jurors, and there are at least four of them. And to understand how important is this endeavor that we are herein jointly engaged, you've got to comprehend at least these four rights:

First, every citizen has an equal right to access to the jury box. It's akin to one man, one vote. [14] And the jury plans of the various district courts and indeed the state court – and I want to pause here and point out that the jury plan of the Commonwealth of Massachusetts is the best in the nation, except for Alaska. Alaska is better only because, given their oil reserves, they declare a general dividend every year and in order to get your check, you are on the jury rolls. Massachusetts is next. The feds in Massachusetts, we take our jurors from the same pool as the state.

Nationwide, every citizen – because what we're talking about is direct democracy, the people themselves ruling directly – they have an equal statistical right to serve on the nation's jurors.

Second, they have the right – they have the right, the jurors, to be free from discrimination, racial, gender, ethnic discrimination, when being chosen for jury service, when being embodied with that constitutional role. You can see that well if you look at the Supreme Court case, *Batson v. Kentucky*,[15] which says if there is an improper challenge and the judge disallows the challenge, the remedy is to seat the challenged juror. That's because it's her right to be seated, her right to sit as a juror in judgment. She cannot be denied that right on basis of race, gender, or ethnic heritage.

Third, the jury has the absolute right accurately to be instructed as to the law. And you say, "Say what?" You know that if a judge gives improper instructions, the judge should be reversed. But if you think of that consequence as a right of the jurors themselves accurately to be instructed in the law, you will see why this is vitally important.

That right of the jury accurately to be instructed in the law is the basis for the phenomenal judicial independence of the judges of the United States. Not so much the judicial independence of the constitutional court, the Supreme Court of the United States. But get this - We are the only country in the history of the world to vest in an individual trial judge, not elected, appointed for life, the power to set aside a statute passed by the majority of both houses of Congress, and signed into law by the President.[16]

Naturally, that trial judge may be appealed to a higher court, but as a society we accept that each individual trial judge has that constitutional power in reserve. And because she has that power, that makes the Constitution alive and as close as your courthouse.

Imagine that you have all the rights that you have now, every one of the rights

you have now, but they can only be vindicated by the Supreme Court of the United States. Go to Washington, seek certiorari. That's not America. And if you ask yourself why as a society we tolerate the individual unelected judicial officer having that enormous power in reserve, and you look to history, there's only one reason. Because that judge has to instruct the jury what the law actually is, and the system simply won't work if everything has to be referred to the top appellate court. We can't keep the jurors waiting. They have the right to adjudicate, the right to decide the case.

And therefore, if we are to have a jury system, we must vest in our trial judges the power to declare the law. Now, of course, we're all sworn. If a higher court has declared it, we follow that. And where they haven't, that is the power in the trial judge. And we trial judges, we ought to remember that. The only reason we have that constitutional power - the only reason - is because there is a jury of citizens in the box.[17]

Then the fourth right. Jurors have the right, the constitutional right, to adjudicate those jury cases once they because ripe for a trial. That was borne in on me last year, 2013, when in fact the government shut down for 15 days. And we were all put to the test of who are "essential" employees. And it began to dawn on us we might in fact run out of money - and the only reason we stayed open is we had money from fees, so we could go maybe about two weeks, period. At the end we were running out of money.

And we came to realize that even if we didn't have any money, we were going to keep going. We were going to keep summoning those jurors. We'd have to tell them they weren't going to be paid, we couldn't guarantee their pay. But if the Congress by not appropriating the money could stop jury trials, then Congress could extinguish that right. So it is the right of the jury to adjudicate. It is not an answer to say, "Well, no, no. We're

not stopping them; we're just delaying them for a time." Unconstitutional.

Unconstitutional because you go back to the first right, that everyone has an equal right to sit on the jury. And once you've got a case ripe for a jury trial – it must go to that jury.

This has a number of very interesting ramifications when you come to realize jurors themselves have a constitutional right to come into Court and adjudicate cases. Judge Ponser in our court he's our judge who sits in Springfield, takes senior status, to which he is certainly entitled and he's a magnificent judge and he richly deserves it, and so we no longer have a judge out there. Now we do, Judge Mastroianni, but for a year and a half, two years, we didn't have a judge out there.

So one way to skin that cat is to say, "Okay, all you Springfield lawyers and litigants come to Boston; Springfield is 90 mile away." Unconstitutional. What about the people who live in the four western counties of Massachusetts? They have a right equal to citizens who live in the eastern part of Massachusetts to sit on the nation's juries.

In jury cases we must – it is constitutionally mandated - that we go out there and draw the juries from the vicinage, to give them that right. So we're talking about very serious constitutional rights. We're talking about the right of people to do things that no judge is empowered to do.

I want to end up by saying this. The American jury has emerged unchanged, or with as little changes as any aspect of our government, over 227 years. What we celebrate, what we talk about this afternoon is so fundamental that if John Adams walked into the Suffolk Superior Court, his mind might be blown by smartphones and everything else, but once he got into that courtroom – our colleague, John Adams, trial lawyer of

Massachusetts - he'd know exactly what was going on.

So why is that? Why do we have this right, this most robust expression of direct democracy? There is only one reason. The people want it. Nobody else wants it except the people directly. Large aggregations of economic power don't want the jury.[18] All studies confirm that – this isn't a class thing – all studies confirm that with all the imperfections of our system, a jury trial is the fairest mechanism to resolve disputes.

So all the economic powers, they don't want it. The executive – this is a nonpartisan statement, I don't care who's President – the executive doesn't want juries; they never have. Look at the recent proposed EPA regulations.[19] Look at the position they take with respect to the Federal Arbitration Act. Look at the wretched fiasco that we call Guantanamo. The Executive doesn't want juries.[20]

The legislature will do what the people want. You don't see any great leaders in the legislature, the Congress, state or federal, – other than on Law Day – beating the drum for juries.[21]

And sadly, the judiciary is lukewarm. The judges aren't so sure about the juries; some of us like them, some of us aren't so sure.[22]

It's the people that want them and the people want them for two reasons, and I'll be done. They want juries. Never has there been an election, state or federal, where a jury right has been curbed, never. We've curbed jury rights, but not through direct elections. The people want juries for one simple reason. They work. They are the best method.

Jefferson was right, they are the best method of evening out economic disparity. They are the fairest method we know. They are the fairest method that any civilization has ever come upon. They work. And I'm going to suggest to you there's two reasons

why they work and one of those reasons will occupy us this afternoon.

The first reason they work is the people who are sitting right down here [indicating the experienced trial lawyer panellists] and really all of you, because here in the United States we have a strong independent bar. We have attorneys who know how to go to court and try these cases. That's why they work.

And the second reason is this. I've had the privilege of serving as a judge for some time now. Now I'm going into my 37th year. I've been a judge longer than some of you have been alive. So if this sounds a priori, I'm not going to retreat from it because I believe it passionately. I believe that Americans have a certain innate decency. Coupled with that, they have an overwhelming sense of duty. Properly charged by a judge who knows what she's doing, there's no runaway juries, there's no sympathy; there is the fair and impartial adjudication of facts.

And how do I know?

We all know the story I'm going to tell you. Go back over a year now, a year and a half. I was in the office April 15th, 2013. It's not a federal holiday; it's Patriot's Day in Massachusetts. And so I went to work. We didn't have juries that day. And like you, I watched the video tapes of the bombing and I watched them over and over again. And amidst the cries and the chaos, I watched people ripping down the barriers between the runners and the crowds to get to the people who were bleeding out. That was after the second bomb went off and everybody knew that it was an actual attack, not some sort of accident. I watched people running into the smoke toward the cries.

And in Newtown, Connecticut, it took five minutes for the shooter to murder his victims. Not one teacher ran out of that building or dove out the windows. They put their

bodies in front their students they had come to teach. On 9/11, everybody who was in the World Trade Center that could get out, got out. And hundreds of firefighters ran in because it was their duty.

Now on the 16th of April last year, and on many other occasions because I'm the jury liaison in our court, I went down to greet the jurors and I looked out at them and there they were - firefighters, teachers, average Americans. And I'm here to tell you that they have the capacity to govern. Every single jury trial in which you participate is both a test and a celebration of a free people governing themselves.

And just because this jury right is subscribed in the words of our Constitution, don't think it is yours by right. It is yours by inheritance. As President Reagan said of freedom[23], so here:

> The jury trial is a fragile thing, never more than one generation away from extinction. It must be fought for and defended in every generation, for it comes but once to a people.

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[1] Declaration of Independence (adopted July 2, 1776). In the original, the word "men" appears in place of "persons" and "us."

[2] Joseph J. Ellis, American Sphinx: The Character of Thomas Jefferson (1996) ("These are the core articles of faith in the American Creed.").

[3] Fred Graham, American Juries, in Anatomy of a Jury Trial, 14 eJournal USA 7-4 (Bureau of Int'l Info. Programs U.S. Dept. State 2009).

[4] See William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67 (2006). See also Powers v. Ohio, 499 U.S. 400, 406-07 (1991) (citing Alexis de Tocqueville, 1 Democracy in America 334-337 (Schocken 1st ed. 1961)).

> Juries were once the primary government regulators in America. Throughout the eighteenth century and well into the nineteenth, at a time when legislation was rare and the executive branch weak, juries not only adjudicated legal disputes but, through court cases, enforced taxes, determined welfare rolls, mandated highway repairs, and generally oversaw public business. In the early days of the Republic, the decisions of juries were also viewed as determining the law of the land, hence defining the legal standards for proper conduct. With the growth of the other branches of government — and the judiciary's assertion in the nineteenth century of control over law fixing — the jury lost its role as the chief regulator of societal conduct. Yet, the regulatory function of juries never entirely ended. The jury's determination of reasonableness in negligence cases provides an example of its continuing participation in the establishment of the parameters of proper social conduct.

Stephan Landsman, Juries as Regulators of Last Resort , 55 Wm & Mary L. Rev. 1061, 1061 (2014) (footnotes omitted).

> The American jury trial [today], viewed from inside, provides the jury the wherewithal to exercise political judgment wisely. There is every reason to believe that juries do exercise this judgment, and do so in a way that is respectful of the values of concern for the individual litigant and for the stability of the legal order.

Robert P. Burns, The Jury as a Political Institution: An Internal Perspective, 55 Wm & Mary L. Rev. 805, 835 (2014). See Erin York Cornell & Valerie P. Hans, Representation Through Participation: A Multilevel Analysis of Jury Deliberations 45 Law & Soc'y Rev. 667 (2011).

[5] This analysis depends heavily on Akhil Reed Amar, America's Constitution: A Biography 236 (2005). See Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96 (1998); Robert P. Burns, The Dignity, Rights, and Responsibilities of the Jury: On the Structure of Normative Argument, 43 Ariz. St. L. J. 1147 (2011).

[6] U.S. Const. Art. I, sec. 1.

[7] U.S. Const. Art II, sec. 1.

[8] U.S. Const. Art III, sec. 1.

[9] Ibid.

[10] U.S. Const. Art III, see 2., par. 3.

[11] U.S. Const., Sixth Amend.

[12] U.S. Const., Seventh Amend.

[13] Letter from Thomas Jefferson to Thomas Paine (1789), in 7 The Writings of Thomas Jefferson 404, 408 (Lipscomb & Bergh eds. 1903) ("I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.").

[14] Duren v. Missouri, 439 U.S. 357, 364 (1979). Nat'l Ctr. for State Courts, Jury Manger's Toolbox: A Primer on Fair Cross Section Jurisprudence 1-2 (2010) available at http://www.jurytoolbox.org/more/Primer%20 on%c20Fair%c20Cross%20Sections.pdf. Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761 (2011). See R. Darcy & Brett M. Stingley, Statistical Criticism of Jury Selection Methods in the Western District of Oklahoma, 30 Buff P. Int. L. J. S (2011-2012)

[15] 476 U.S. 79, 97-101 , (1986). Snyder v. Louisiana, 552 U.S. 472, 485-86 (2008): But see Rivera v. Illinois 556 U.S. 148, 160 (2008) (criticizing "good faith, if arguably overzealous, effort to enforce the antidiscrimination requirements of [Batson]"); United States v. Bowles, 751 F. 3d 35, 38 (2014) (criticizing "district court's sua sponte initiation of a Batson enquiry" after a single minority strike). See Jeffrey Bellin & Junichi P. Semitsu, Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney, 96 Cornell L. Rev. 1075 (2011). Jeanette E. Walston, Do Non-Discriminatory Preremptory Strikes Really Exist, or is a Juror's Right to Sit on a Jury Denied When the Court Allows the Use of Preremptory Strikes? 17 Tex. Wesleyan L. Rev. 371 (2011); William H. Burgess & Douglas G. Smith, The Proper Remedy for the Lack of Batson Findings: the Fall-out from Snyder v. Louisiana, 101 J. Crim. L. & Criminology 1 (2011); Leah M. Provost, Excavating From the Inside: Race, Gender, and Preremptory Challenges, 45 Val. U. L. Rev. 307 (2010)

[16] The William, 28 F. Cas. 614 (D. Mass. 1808) (No. 16, 700) (Davis, J.).

> *The William* was a brigantine that had allegedly violated Jefferson's Embargo Act. The government sought her forfeiture in 1808. Appearing for the government with the U.S. Attorney was a young Salem lawyer, Joseph Story. (Three years later, Joseph Story was named to the Supreme Court. Next to Chief Justice Marshall, he is regarded as the leading constitutional jurist of the early Republic.) In Massachusetts, public feeling against the Embargo Act ran high since it suppressed international maritime commerce and caused many vessels to rot alongside their wharves.

The case was tried before Judge John Davis, a Federalist appointed by President Adams, and a jury. Counsel for *The William* challenged the constitutionality of the Embargo Act. Popular opinion in Massachusetts strongly favored a declaration of unconstitutionality as it would set free the local maritime commerce. At the same time, the national policy, supported by a heavily Jeffersonian Congress, was embodied in the Embargo Act. Moreover, at that period of our constitutional development, Congress sometimes impeached judges with whose views it differed.

Judge Davis came to grips with the constitutionality of the Embargo Act on the eve of the trial. Without citation to Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) (Marshall, C.J.), (The records of the decision contain such a citation but some commentators believe it was added later, once the dust had settled, to bolster the Court's ruling.) Judge Davis held that, as a U.S. District Judge, he had the initial authority to pass on the constitutionality of an Act of Congress and, if unconstitutional, to declare it null and void. This was heady doctrine, indeed. Imagine – a single U.S. District Judge setting aside the will of the entire Congress of the United States because that single judge considered the congressional act unconstitutional. This was unprecedented.

Such an approach, of course was sure to find favor throughout maritime New England. But Judge Davis went on to adopt a much narrower view of judicial authority than Chief Justice Marshall and the Supreme Court had espoused in Marbury v. Madison. In Judge Davis's view, a court could hold an Act of Congress unconstitutional, but as the Embargo Act did not run afoul of any express provision of the Constitution, it was constitutional and Judge Davis so held.

While this ruling upholding the national policy would no doubt find favor in the Jeffersonian Congress, it would outrage seafaring New Englanders, so Judge Davis promptly put the case to trial before a local jury. Just as promptly, after a jury argument that essentially called for jury nullification, that jury found for the owners of *The William*. At first blush, therefore, everyone won. The government succeeded in upholding the Embargo Act and the shipowners got back their brigantine.

In the years that followed, however, the importance of one aspect of Judge Davis's decision in *The William* grew apace. Other judges and commentators focused on Judge Davis's assertion that a single U.S. District Judge could address the constitutionality of an Act of Congress. Gradually, it came to be accepted that issues of constitutionality could appropriately be addressed at the trial level and this aspect of the decision "probably affected the history of the nation to a greater degree than any judicial opinion ever rendered in this Commonwealth." Charles Warren, The Early History of the Supreme Court of the United States in Connection with Modern Attacks on the Judiciary, 8 Mass. L.Q. (No. 2) 1, 20 (1922). Professor Charles Warren is also author of the multivolume history, The Supreme Court in United States History (1926). Today this doctrine is constitutional bedrock, even though the judge who first asserted it never applied it. William G. Young, "Of Iron Men in Wooden Ships Who Went to Sea, With Sails," Legal Chowder: Lawyering and Judging in Massachusetts (MCLE, 2002) 186-87. The title quote is from Prof. Arthur Sutherland, The Ship Blaireux.

[17] In recent years, many judges appear to have forgotten that the true source of their power to render legal interpretations stems from the jury—their co-equal constitutional officers. As a jury foreman told a judge in 1830, "The jury want to know whether what ar you told us, when we first went out, was raly the law, or whether was jist your notion." Jeffrey Abramson, We the Jury: the Jury System and the Ideal of Democracy, 15 (2000). "Juries are central to the constitutional structure of America." Jury instructions are a "constitutional teaching moment." Andrew Guthrie Ferguson, Instructions as Constitutional Education, 84 U. Colo. L. Rev. 233, 233 (2013). It is the *judiciary* which has failed to place the jury trial at the very center of its operations where it belongs:

> [T]hose judges who thought that, by and large, we could do
> without juries and we would still have the same moral authority,
> and our written opinions, our constitutional interpretations
> would still occupy the center stage of political discourse.
> Well, we are rather stunned that the President thought that,
> with respect to those people that he designated as enemies of

the state, by and large, he could do without courts.

William G. Young, Speech to the Florida Bar Association at the Annual Convention, June 28, 2007, *available at* www.bostonbar.org/pub/speeches/young_june07.pdf.

[18] For decades, our civil juries have been incessantly disparaged by business and insurance interests. These interests know what they are doing. Recent analysis has led one commentator to conclude that "a civil justice system without a jury would evolve in a way that more reliably serve[s] the elite and business interests." Valerie P. Hans, Business on Trial: The Civil Jury and Corporate Responsibility 226 (2000). See Gene Schaerr & Jed Brinton, Business and Jury Trials: The Framer's Vision Versus Modern Reality, 71 Ohio St. L.J. 5055 (2011). What is most disturbing about this trend is that it has occurred without the courts offering any defense for the institution upon which their moral authority ultimately depends. *See* Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 141. *But see* United States v. Luisi, 568 F. Supp. 2d 106, 110–11 (D. Mass. 2007) (defending the jury as the cornerstone of the legal system's legitimacy); Ciulla v. Rigny, 89 F. Supp. 2d 97, 100–03 (D. Mass. 2000) (offering a defense of juries). Indeed, federal courts today seem barely concerned with jury trials. *See* Edmund V. Ludwig, *The Changing Role of the Trial Judge*, 85 Judicature 216, 217 (2002) ("Trials, to an increasing extent, have become a luxury . . . when cases are handled as a package or a group instead of one at a time, it is hard, if not impossible, for the lawyers or the judges to maintain time-honored concepts of due process and the adversary system."). Judge Ludwig was at the time a member of the Court Administration and Case Management Committee of the Judicial Conference of the United States. *See* Comm. on Court Admin. & Case Mgmt., Judicial Conference of the U.S., Civil Litigation Management Manual, at iii (2001), *available at* http://www.fjc.gov/public/home.nsf (follow "Publications & videos" hyperlink; then follow "Browse by Subject" hyperlink; then follow "Case Management—Civil" hyperlink). The federal judiciary has been willing "to accept a diminished, less representative, and thus sharply less effective civil jury." *Rigny*, 89 F. Supp. 2d at 102 n.6 (citing Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 Ala. L. Rev. 133, 127–52 (1997)); *see also* Am. Coll. of Trial Lawyers, Report on the Importance of Twelve-Member Civil Jury in the Federal Courts 34 (2002) ("The real question . . . is whether there are any legitimate reasons for departing from [twelve member juries]."); *Developments in the Law: The Civil Jury*, 110 Harv. L. Rev. 408, 1466–89 (1997).

[19] See Craig H. Allen, Proving Natural Resource Damage Under OPA 90, Out With The Rebuttable Presumption in With APA Style Judicial Review, 85 Tul. L. Rev. 1039 (2011).

[20] In fairness, Attorney General Holder has been tireless in seeking to try terror crimes before juries. Sadly, the Obama administration has not backed him with the full force of the Presidency. Matt Apuzzo, A Holder Legacy: Shifting Terror Cases to the Civilian Courts, and Winning N.Y. Times, Oct. 21, 2014 at A 17.

[21] Bipartisan majorities in Congress have severely restricted access to the jury. *See, e.g.*, Employee Retirement Income Security Act, Pub. L. No. 93-406, 88 Stat. 832 (1974); Private Securities Litigation Reform Act, 48 Stat. 899 (1934); Lirette v. Shiva Corp., 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998); Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 63 n.74 (D. Mass. 1997).

Whenever Congress extinguishes a right which, heretofore, has been vindicated in the courts through citizen juries, there is a cost. It is not a monetary cost, but rather a cost paid in rarer coin – the treasure of democracy itself. William G. Young, *An Open Letter to U.S. District Court Judges*, Fed. Lawyer, July 2003, at 30, 32. For further discussion of the critical role of the jury in our democratic society, see *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 994, 1005–06 (D. Mass. 1989); *The Civil Jury*, *supra* note 25, at 1433. *See generally* Christopher J. Peters, *Adjudication as Representation*, 97 Colum. L. Rev. 312 (1997) (discussing how the processes of our court system vindicate and strengthen democracy by involving litigants with standing in the explication and application of our laws).

In fairness, Senator Sheldon Whitehouse of Rhode Island is a thoughtful and long standing proponent of America's jury system. Senator Sheldon Whitehouse, Restoring the Civil Jury's Role in the Structure of Our Government, 55 Wm. & Mary L. Rev. 1241 (2014).

[22] There is today a deep divide in the federal district court judiciary over the role of the jury.

I conceive of trial as the primary means provided by our constitution and laws for the fair and impartial resolution of legal disputes and that all litigants come to court seeking a prompt trial or the credible threat of a trial. See D. Brock Hornby, The Business of the U.S. District Courts, 10 Green Bag 2d 453, 461-62 (2007). This is called the trial model of district court business. This is, however, the minority view.

Today, it is the administrative model of the business of the district courts that holds sway. See Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 Duke L.J. 745, 747 (2010). The administrative model seeks the speedy, inexpensive (to the courts), and cost-efficient resolution of every case. Trials, being costly and inefficient, are disfavored. See generally Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924 (2000).

Both models require hands-on judicial management, of course, but their goals are significantly different. Under the trial model, the judge makes management decisions with an eye toward how the case is going to be tried. Settlement and mediation are constantly encouraged but the judicial function is seen as steering the case toward a prompt and fair trial. The choice to opt-out is left to the litigants. Under the administrative model, the primary goal is case resolution. Trial is an option, but usually a last resort.

These are not theoretical differences in management style. They are actual, palpably different approaches that lead to different institutional competencies and outcomes**.** The issue is **not** judicial management. Everyone agrees judicial management is necessary and beneficial. The issue, rather, is – as one astute commentator has so ably observed – how should district court judges be spending their time? Steven S. Gensler, Judicial Case Management: Caught in the Crossfire, 60 Duke L.J. 669, 689-697 (2010).

I have long argued that the federal judiciary's single minded emphasis on efficiency tends to marginalize the American Jury, supplant other, more important values, and that more comprehensive measures of district court activity are needed today. See United States v. Massachusetts, 781 F. Supp 2d 1, 23-25 (D. Mass. 2011) (citing Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 Duke L.J. 745, 747 (2010)); see also Leonard Post, Federal Tort Trials Continue a Downward Spiral, Nat'l L.J., Aug. 22, 2005; Patrick E. Higginbotham, Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?, 55 S.M.U. L. Rev. 1405, 1405–06 (2002)). It is for this reason that I have, for the past four years, published a ranking of America's most productive federal district courts. See William G. Young & Jordan M. Singer, Bench Presence: Toward a More Complete Model of Federal District Court Productivity, 118 Penn St. L. Rev. 55 (2013); Jordan M. Singer & William G. Young , Measuring Bench Presence: Federal District Judges in the Courtroom, 2008-2012, 118 Penn. St. L. Rev. 243 (2013); William G. Young, Mustering Holmes "Regiments," 48 New England L. Rev. 450, 465-475 (2014) (collecting five years of productivity statistics). I am not alone in these concerns. See Joseph F. Anderson, Jr., Where Have You Gone, Spot Mozingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial, 4 Fed. Cts. L. Rev. 99, 105 (2010); Victor E. Schwartz & Leah Lorber, A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases, 24 Am. J. Trial Advoc. 247, 249 (2000). As Joan A. Lukey, former president of the American College of Trial Lawyers aptly remarks, "If you're going to be in the courtroom… you should be there regularly, not once a year, lawyers who are not comfortable in the courtroom and don't have trial experience are more likely to settle. That has an impact on the bench as fewer trials mean less opportunities for judges to become experienced trial

jurists. All of that becomes cyclical and you end up with fewer trials." Mass. Lawyers Weekly, October 9, 2014 at 2.

> The irony here is that the new palaces of steel and glass [courthouses] arrive at the point where the courts actually empty out in favor of the devolution of adjucative function to the bureaucratic back offices. The courtrooms have the transparency of the void, while the offices thrum and vibrate to the energies of privatized Justice -- the antidemocracy of multiple forms of Alternative Dispute Resolution where only the protagonists engage while the public is shut out. In a parallel development, increasing concerns with security engender both barriers to participation in standard courts and special courts, such as in Guantanamo, that denigrate completely the notion of public participation and with it the safeguards to justice that such participation developed to ensure. Such courts are the particularly sharp edge of less visible but cognate domestic processes, both criminal and civil, which close off avenues to public participation (for example, commercial contracts that include terms requiring that disputes be resolved by private arbitration). Only in certain enlightened spaces is there sign of the successful blending of image and process, marked by the recognition of the violence of judgment, but also, in balance, the price paid in suffering for the possibility of this democratic form of violence to have been achieved and thus a constant reminder of the possibilities of injustice . . . . The danger is that such rare examples of iconography for democratic adjudication" become lost in the welter of self-congratulatory edifices to transparency that provide a front operation to the back-housing of adjudication - as administration.

Eugene McNamee, Review of Judith Resnik & Dennis Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms, 25 Law & Literature 131, 137 (2013).

There has been virtual abandonment by the federal judiciary of any sense that its fact-finding processes are exceptional, or due any special deference. This is similar to what Marc Galanter calls the "jaundiced view"—that there has been a decline in faith in adjudication by the courts and their key constituencies—a "turn from law, a turn away from the definitive establishment of public accountability in adjudication" and that there exists a "very real fear of trials." He argues that lawyers, judges, and corporate users, misled by the media, believe that America is amidst a "litigation explosion" and that trials are expensive and risky because juries are pro-plaintiff, "arbitrary, sentimental and 'out of control.'" *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1266–68, 1272–73 (2005). Federal district court judges used to spend their time on the bench learning from lawyers in an adversarial atmosphere, and overseeing fact-finding by juries or engaging in it themselves. This was their job and they were proud of it. Today, judges learn more reflectively, reading and conferring with law clerks in chambers. Their primary challenge is the proper application of the law to the facts—facts that are either taken for granted, or sifted out of briefs and affidavits, and, in the mode of the European civil justice systems, scrutinized by judges and clerks behind closed doors. For an apt criticism of this approach, see Sabin Willett, *Clericalism and the Guantanamo Litigation*, 1 Northeastern U. L.J. 51, 52 (2009). *See generally* Dennis Jacobs, *The Secret Life of Judges*, 75 Fordham L. Rev. 2855 (2007). While judges do talk to lawyers in formal hearings, these hearings can be short, and usually serve to test and confirm a judge's understanding rather than develop it. *See, e.g.*, Eugene R. Fidell, *Hearings on Motions: A Modest Proposal*, Nat'l L.J., Dec. 22, 2008, at 23 (bemoaning the rarity of hearings on dispositive motions in the D.C. district court: "[e]ven in this digital era, there is still a participatory and symbolic aspect to the administration of justice that remains key to its legitimacy. That interest is not served when business is transacted without human contact."). The major reasons for the decline in the preeminence of factfinding are not structural but cultural. On the civil side, they result from a marked shift in emphasis from the trial of actual disputes to mere litigation

management, resulting in an overuse of summary judgment and a concomitant settlement culture. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 984 (2003). *See, e.g.*, *In re* One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, Named "Flash II", 517 F. Supp. 2d 546, 548, 552 (D. Mass. 2007), *aff'd* United States v. One Star Class Sloop Sailboat Built in 1930 with Hull Number 721, Named "Flash II", 546 F.3d 26 (1st Cir. 2008). On the criminal side, the sentencing guidelines ushered into judicial opinions a degree of sophistry heretofore unknown to the federal judiciary. For seventeen years, an entire generation of federal judges spoke of sentencing based on "facts" determined by a "preponderance of the evidence," when what they had before them was manifestly *not* evidence, but rather "faux facts" that had neither been tested by cross examination nor presented to a jury. United States v. Green, 346 F. Supp. 2d 259, 280–81 (D. Mass. 2004), *vacated in part*, United States v. Yeje-Cabrera, 430 F.3d 1 (1st Cir. 2005), *vacated*, United States v. Pacheco, 434 F.3d 106 (1st Cir. 2006).

Yet as judicial face time with jurors, lawyers, and litigants becomes increasingly rare, and as the federal courtrooms throughout the land go dark with disuse, the moral force of what is decreed is increasingly marginalized. Soon, society may begin to wonder why we have the lower federal courts at all.

Perhaps the Supreme Court is already wondering. The disinterest of the institutional judiciary in the American jury may explain the surprising disdain shown by the Supreme Court for the trial process in the federal district courts. See e.g. Bell Atlantic Co. v. Twombly, 560 U.S. 544, 559-560 (2007). Andrew Siegel, The Court against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence. 84 Tex. L. Rev. 1097 (2006) (demonstrating the disdain shown by the Supreme Court for the lower courts.); David Cole, The Anti-Court Court, New York Review of Books, Aug. 14, 2014.

It need not be this way. "[T]he jury is worth fighting for." Jennifer Walker Elrod, Is the Jury Still Out?: A Case for the Continued Viability of the American Jury, 44 Tex. Tech. L. Rev. 303, 303 (2012).

> Judge D. Brock Hornby recently and provocatively pondered how a reality television show might depict a federal trial court judge today. He envisioned that the judge would be in an office in business attire, spending most of her time pounding away on a keyboard. His vision suggested a person tethered to the computer and all but cut off from the parties and their lawyers –- a virtual judge, practically invisible. He was not describing a ratings hit or a show that critics would praise.
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> That may describe the days of some federal trial judges, but it does not describe their fate. It is not the immutable destiny of judges that they must vanish from sight and sound. It is certainly not the case that in order to assume the role of active case manager a judge must retreat into his or her chambers never to be seen again. Properly understood, active case management creates opportunities for judges to reconnect with the litigating public. Throughout the pretrial process, judges can conduct "live" proceedings in which they do not vanish but instead reappear. And as an added bonus, we think judges who manage their cases well will have yet another opportunity to reappear: at the trials they can sometimes foster by avoiding the crippling costs that drive parties who would like to go to trial to settle instead. That's a reality we'd like to see.

Steven S. Gensler & Lee H. Rosenthal, The Reappearing Judge, 61 U. Kan. L. Rev. 849, 874-75 (2013) (citing D. Brock Hornby, The Business of the U.S. District Courts, 10 Green Bag 2d 453, 463 (2010)). See D. Nev. Short Tr. Rules, available at http://www.nvd.uscourts.gov/Files/USDC%20Short%20Trial%20Ru les.pdf; Stephen D. Susman & Thomas M. Melsheimer, Trial by Agreement: How Trial Lawyers Hold the Key to Improving

Jury Trials in Civil Cases, 32 Rev. Litig. 431 (2013); Bert I. Huang, Trial By Preview, 113 Colum. L. Rev. 1323 (2013).

[23] Ronald Reagan, Inaugural Address as Governor of California, January 5, 1967.