

# A LAMENT FOR WHAT WAS ONCE AND YET CAN BE

HON. WILLIAM G. YOUNG\*

**Abstract:** In the wake of 9/11, the American people showed unwavering faith in justice, fairness, and the rule of law through their steadfast service to the legal system. Yet one of the Bush administration's first orders in the new "war on terror" was effectively to strip the courts and the juries of their role in the "trials" of our enemies, instead creating streamlined military tribunals. This diminished role of the judiciary is unfortunately just the latest feature in a disturbing trend in the federal district courts, which has seen the process of fact-finding in open court exchanged for a reflective in-chambers review of written submissions, and the trial of actual disputes replaced with "litigation management." Most shocking is that the diminishment of the traditional American trial has been facilitated by the judiciary's own institutional policies. Judge William G. Young of the United States District Court for the District of Massachusetts makes a plea to all branches of government and the American people to halt the erosion of the judiciary and return to the founding principles of our democracy.

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\* United States District Judge, District of Massachusetts. The author would like to thank Angela M. Bushnell and her Boston College Law School Article Editing team for their research assistance, and Guarav Singh for his work on Appendices A & B. The author would also like to thank David Chen and David Hine for their outstanding editorial assistance.

## INTRODUCTION

*At what point shall we expect the approach of danger? By what means shall we fortify against it? Shall we expect some transatlantic military giant, to step the Ocean, and crush us at a blow? Never! All the armies of Europe, Asia and Africa combined, with the treasure of the earth (our own excepted) in their military chest; with a Buonaparte for a commander, could not by force, take a drink from the Ohio, or make a track on the Blue Ridge, in a trial of a thousand years.*

*At what point then is the approach of danger to be expected? I answer, if it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide.*

—Abraham Lincoln, January 27, 1838, age 27<sup>1</sup>

At 8:56 AM, Tuesday, September 11, 2001, an unwanted future burst upon us. Terrorists launched a vicious attack upon Americans, unparalleled in ferocity and horror.<sup>2</sup> When it was over, we had lost more people than were killed at Pearl Harbor,<sup>3</sup> but unlike the Imperial Japanese Navy in 1941, the terrorists left no return address.<sup>4</sup>

Yet Americans were undaunted. We had heroes aplenty. Passengers attempted to retake United Flight 93 and, at the cost of their own lives, diverted it from its intended target.<sup>5</sup> New York's firefighters ran into the doomed towers with cool professionalism even as people fled from every exit or jumped to their deaths.<sup>6</sup> Some reported even when expressly told not to, and many others rushed to the crash sites directly from their own houses.<sup>7</sup> President Bush immediately convened a "war council" with advisors from the State Department, Central Intelligence Agency, National Security Agency, and other key departments, and, on September 21, approved the first military plans to attack al Qaeda and Taliban targets in Afghanistan.<sup>8</sup>

The federal courthouse in Boston, with its beautiful glass wall overlooking the harbor, was guarded by Coast Guard reservists in

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<sup>1</sup> FRANCIS TREVELYAN MILLER & EDWARD BAILEY EATON, PORTRAIT LIFE OF LINCOLN: THE GREATEST AMERICAN 113 (1910).

<sup>2</sup> See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 1–14, 339 (2004) [hereinafter 9/11 REPORT].

<sup>3</sup> See *id.* at 311, 552 n.188.

<sup>4</sup> See *id.* at 326, 399, 554 n.6.

<sup>5</sup> *Id.* at 13–14.

<sup>6</sup> *Id.* at 287, 289–91, 298–302, 306–08.

<sup>7</sup> 9/11 REPORT, *supra* note 2, at 314.

<sup>8</sup> *Id.* at 330–38.

Boston whalers mounting .50 caliber machine guns. Border Patrol officers in unfamiliar green uniforms thronged the courthouse cafeteria in between shifts of screening passengers at Logan International airport. Americans stood united in a way not seen since Pearl Harbor, but our unity was not only expressed in our military response or our humanitarian outreach to the victims.<sup>9</sup> Within the judicial branch, citizen response to jury subpoenas spiked to record levels.<sup>10</sup> Amidst all the frenetic activity in the months following September 11, not one potential juror—not one—sought to be excused on the ground that the courthouse itself was a probable terrorist target. Americans came to serve in record numbers simply because their country called them. Still more impressive, and ultimately far more profound, in the year following September 11 the government's conviction rate remained relatively unchanged.<sup>11</sup> In other words, juries continued to perform their constitutional role of providing impartial, even-handed justice even in the face of a looming, inchoate terrorist threat, and never subordinated their independent judgment to that of the government.

Then, on November 13, 2001, the President promulgated an order authorizing military tribunals to try non-citizens meeting certain criteria.<sup>12</sup> Such tribunals were not limited to theaters of active combat operations, but were authorized to sit within the United States itself,<sup>13</sup> where federal district courts have exclusive jurisdiction over the trial of federal crimes.<sup>14</sup> The tribunals did not have to follow the rules of

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<sup>9</sup> See *id.* at xv–xviii, 13–14, 289–311, 326–34.

<sup>10</sup> See Thanassis Cambanis, *Juror Scrutiny Reaches New Level*, BOSTON GLOBE, July 12, 2002, at B1.

<sup>11</sup> Compare U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, app. B at “National Data” (2001), available at [www.ussc.gov/ANNRPT/2001/nat01.pdf](http://www.ussc.gov/ANNRPT/2001/nat01.pdf) (showing trial convictions as 3.4% of national convictions), with U.S. SENTENCING COMM'N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, app. B at “National Data” (2002), available at [www.ussc.gov/ANNRPT/2002/nat02.pdf](http://www.ussc.gov/ANNRPT/2002/nat02.pdf) (showing trial convictions as 2.9% of national convictions).

<sup>12</sup> See Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4(a), reprinted in 10 U.S.C. § 801 (2006).

<sup>13</sup> See *id.* §§ 3(a), 4(c)(1).

<sup>14</sup> Compare *Ex parte Quirin*, 317 U.S. 1, 1, 40 (1942) (holding that an unlawful enemy belligerent may be tried by secret military tribunal within the territorial jurisdiction of the United States District Court), with *Ex parte Milligan*, 71 U.S. 2, 3 (1866) (holding that absent proper declaration of martial law, a secessionist saboteur who is not himself an enemy belligerent may not be tried by military tribunal within the territorial jurisdiction of a U.S. District Court).

evidence,<sup>15</sup> nor were their actions subject to judicial review.<sup>16</sup> The saddest irony is that the government justified these military tribunals in part by conjecturing that jurors might be fearful of serving on such cases,<sup>17</sup> even though Americans were turning out in record numbers for jury service.<sup>18</sup>

I read this Military Order the next day while sitting in my chambers. I remember with distinct clarity looking out over Boston Harbor at the city I love, where I have spent my entire professional life, and thinking, “This cannot be. Surely this will not stand.”<sup>19</sup>

How wrong I was. After some bleating about civil liberties by pundits in the media, the press quickly fell into line, blandly referring to military detention as simply a “parallel track” to being indicted in the federal court system.<sup>20</sup> The creation of these military tribunals thus reduced the citizen jury from the central feature of the U.S. justice system to nothing more than a “parallel track.”<sup>21</sup> This has been the most profound shift in our legal institutions in my lifetime, and—most remarkable of all—it has taken place without engaging any broad public interest.

What is even more devastating is the fact that, rather than being an excrescence on our Constitution, this dismissive view of juries, fact-finding, and judicial review may well prove the most enduring legacy of the Bush administration.<sup>22</sup> This is because the policy making body for the lower level federal courts, the U.S. Judicial Conference, has little concern for any of these things.

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<sup>15</sup> Military Order, *supra* note 12, § 4(c)(3).

<sup>16</sup> *See id.* §§ 4(c)(8), (7)(b)(2).

<sup>17</sup> *See* Elisabeth Bumiller & David Johnston, *A Nation Challenged: Immigration: Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 14, 2001, at A1 (“White House officials said the tribunals were necessary to protect potential American jurors from the danger of passing judgment on accused terrorists.”).

<sup>18</sup> *See* Cambanis, *Juror Scrutiny Reaches New Level*, *supra* note 10.

<sup>19</sup> *Cf.* Thomas L. Friedman, *The Iraqi Invasion: Bush, Hinting Force, Declares Iraqi Assault “Will Not Stand”; Proxy in Kuwait Issues Threat*, N.Y. TIMES, Aug. 6, 1990, at A1 (quoting President George H.W. Bush).

<sup>20</sup> *See, e.g.*, Thanassis Cambanis, *New Federal Security Act Remains Largely Unused*, BOSTON GLOBE, June 23, 2002, at B1.

<sup>21</sup> *See* Adam Liptak, *Accord Suggests U.S. Prefers to Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14.

<sup>22</sup> American exceptionalists (I consider myself one) can but rue the fact that jury trials for those whom the executive has characterized as terrorists apparently survived for seven years longer in Russia than in the United States. *See* Megan K. Stack, *New Law in Russia Ends Jury Trials for “Crimes Against State”*, L.A. TIMES, Jan. 2, 2009, at A3.

## I. JURY TRIALS

*This is a trial court. Trial judges ought go out on the bench every day and try cases.*

—John H. Meagher, 1978<sup>23</sup>

The American jury system is dying—more rapidly on the civil than the criminal side, and more rapidly in the federal than the state courts—but dying nonetheless.

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.”<sup>24</sup> 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.<sup>25</sup> Indeed, federal courts today seem barely concerned with jury trials.<sup>26</sup> The federal judiciary has been willing “to accept a diminished, less representative, and thus sharply less effective civil jury.”<sup>27</sup> The predictable result is that bipartisan majorities in Congress have severely restricted access to the jury.<sup>28</sup>

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<sup>23</sup> John H. Meagher, the senior justice of the Massachusetts Superior Court, told me this when first I joined that bench. Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 30 SUFFOLK U. L. REV. 67, 83, 92 (2006) (quoting Hon. John Meagher in 1978).

<sup>24</sup> VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 226 (2000).

<sup>25</sup> 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).

<sup>26</sup> 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).

<sup>27</sup> 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-

On the criminal side, manipulation of the federal sentencing guidelines has had the consequence of imposing savage sentences upon those who requested jury trials, a choice guaranteed under the Constitution.<sup>29</sup> Small wonder that the rate of criminal jury trials in the federal courts has plummeted.<sup>30</sup>

Yet in a government of the people, the justice of the many cannot be left to the judgment of the few. Nothing is more inimical to the essence of democracy than the notion that government can be left to elected politicians and appointed judges. As Alexis de Tocqueville so elegantly stated, “The jury system . . . [is] as direct and extreme a consequence . . . of the sovereignty of the people as universal suffrage.”<sup>31</sup> Like all government institutions, our courts draw their authority from the will of the people. The law that emerges from these courts provides the threads with which all our freedoms are woven. It is through the rule of law that liberty flourishes. Yet “there can be no universal respect for law unless all Americans feel that it is *their* law . . . .”<sup>32</sup> Through the jury, the citizenry takes part in the execution of the nation’s law, and in that way, each can rightly claim that the law belongs partly to him or her.<sup>33</sup>

Only because juries may decide most cases is it tolerable that judges decide some. However highly we view the integrity and quality of our judges, it is the judges’ colleague in the administration of justice—the jury—which is the true source of a court’s glory and influence. The involvement of ordinary citizens in judicial tasks provides legitimacy to all that is decreed. When a judge decides cases alone, “memories of the jury still cling to him.”<sup>34</sup> A judge’s voice echoes the values and judgment learned from observing juries at work. Ours is not a system

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member juries].”); *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1466–89 (1997).

<sup>28</sup> 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).

<sup>29</sup> See *Berthoff v. United States*, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001) (noting a 500% greater average sentence for criminals found guilty via jury trial over those who pleaded guilty and cooperated).

<sup>30</sup> See *id.* at 68–69.

<sup>31</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273 (J.P. Mayer ed., George Lawrence trans., Harper Collins 2000) (1835).

<sup>32</sup> Irving R. Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967).

<sup>33</sup> See DE TOCQUEVILLE, *supra* note 31, at 273.

<sup>34</sup> *Id.* at 276.

where judges cede some of their sovereignty to juries, but rather one where judges borrow the jury's fact-finding authority.<sup>35</sup>

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.<sup>36</sup> It is the *judiciary* which has failed to place the jury trial at the very center of its operations where it belongs.<sup>37</sup>

[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. And the Congress acquiesced.<sup>38</sup>

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.<sup>39</sup>

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<sup>35</sup> See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 236 (2005) ("A criminal judge sitting without a criminal jury was simply not a duly constituted federal court capable of *trying* cases, just as the Senate sitting without the House was not duly constituted federal legislature capable of enacting statutes.") (emphasis added).

<sup>36</sup> *Luisi*, 568 F. Supp. 2d at 111, 114–19.

<sup>37</sup> See generally Andrew Seigel, *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).

<sup>38</sup> Hon. 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](http://www.bostonbar.org/pub/speeches/young_june07.pdf).

<sup>39</sup> Judge William G. Young, *An Open Letter to U.S. District Court Judges*, FED. LAWYER, July 2003, at 30, 32 [hereinafter *Open Letter*]. For further discussion on 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 27, 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).

## II. FACT-FINDING

*You have to listen to the bastards, Austin. They might just have something.*

—Hon. Franklin H. Ford<sup>40</sup>

Over a quarter century has passed since I first came to the bench. I remember well the extraordinary emphasis that was then placed on fact-finding, and the meticulous observance of the rules of evidence, in order that we might “get it right.”<sup>41</sup>

Yet as I came to learn over the next few years, fact-finding is difficult. Exacting and time consuming, it inevitably falls short of absolute certainty. More than any society in history, the United States entrusts fact-finding to the collective wisdom of the community. Our insistence on procedural safeguards,<sup>42</sup> application of evidence rules,<sup>43</sup> and our willingness to innovate<sup>44</sup> are all designed to enhance impartial fact-finding.

Judicial fact-finding is equally rigorous. Necessarily detailed, judicial fact-finding must draw logical inferences from the record, and, after lucidly presenting the subsidiary facts, must apply the legal framework in a transparent written or oral analysis that leads to a relevant conclusion.<sup>45</sup> Such fact-finding is among the most difficult of judicial tasks. It is tedious and demanding, requiring the entirety of the judge’s attention, all her powers of observation, organization, and

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<sup>40</sup> These are the words of my distinguished predecessor, Franklin H. Ford to his legendary Courtroom Deputy Clerk, Austin W. Jones. See Young, *Vanishing Trials*, *supra* note 23, at 93.

<sup>41</sup> Hon. Raymond S. Wilkins, former Chief Justice of the Massachusetts Supreme Judicial Court. “Facts are like flint,” he used to say. I clerked for Chief Justice Wilkins, and have never met a greater proponent of careful fact-finding.

<sup>42</sup> See, e.g., *Victor v. Nebraska*, 511 U.S. 1, 1–3 (1994) (discussing “beyond reasonable doubt” standard of proof); *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968) (mandating jury trials for serious crimes); *Andres v. United States*, 333 U.S. 740, 748–49 (1948) (requiring jury unanimity in death penalty cases). *But see Apodaca v. Oregon*, 406 U.S. 404, 410–12 (1972) (affirming non-unanimous criminal convictions and holding that the Constitution does not require unanimity in all criminal trial verdicts).

<sup>43</sup> See, e.g., *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 588–95 (1993).

<sup>44</sup> See, e.g., *Fortenberry v. Maggio*, 664 F.2d 1288, 1288 (5th Cir. 1982) (allowing juror note-taking); *People v. Cummings*, 850 P.2d 1, 46–48 (Cal. 1993) (allowing juror questions); THOMAS A. MAUET, *TRIAL TECHNIQUES* 179 (7th ed. 2007) (outlining the panorama of demonstrative aids); ADMINISTRATIVE OFFICE OF THE DISTRICT COURT OF MASS., *CRIMINAL MODEL JURY INSTRUCTIONS FOR USE IN THE DISTRICT COURT* (2009), available at <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/jury-instructions/criminal/pdf/0004-drafting-a-plain-language-jury-instruction.pdf> (providing jury instructions in plain English).

<sup>45</sup> See FED. R. CIV. P. 52(a)(1).

recall, and every ounce of analytic common sense he possesses. Moreover, fact-finding is the one judicial duty that may never be delegated to law clerks or court staff.<sup>46</sup> Indeed, unlike legal analysis, many judges will not even discuss fact-finding with staff, lest the resulting conclusions morph into judgment by committee rather than the personal judgment of the duly constituted judicial officer.

Fair and impartial fact-finding is supremely important to the judiciary because, as Judge Robert E. Keeton has so cogently observed:

Judging is choice. Choice is power. Power is neither good nor evil except as it is allocated and used. Judging in a legal system is professional. Professionals, including judges, represent interests other than their own. One who accepts a professional role in a legal system accepts an obligation to confine the exercise of power within the limits of authority. For each professional role the limits of authority are defined by law . . . . The quality of judging in a legal system depends on commitment. It depends first on commitment to the aim of justice. Second, it depends on commitment to professionalism . . . . Third, the quality of judging depends on commitment to method. Judicial choice, at its best, is reasoned choice, candidly explained.<sup>47</sup>

While trial court legal analysis is appropriately constrained by statutes and the doctrine of stare decisis, the true glory of our trial courts, state and federal, is their commitment to fair and neutral fact-finding. Properly done, facts found through jury investigation or judicial analysis truly are “like flint.”<sup>48</sup>

Yet there has been virtual abandonment by the federal judiciary of any sense that its fact-finding processes are exceptional, or due any special deference.<sup>49</sup> Federal district court judges used to spend their

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<sup>46</sup> Cf. David Crump, *Law Clerks: Their Roles and Relationships with Their Judges*, 69 JUDICATURE 236, 237 (1986) (acknowledging a common criticism of the “overuse” of law clerks who are not constitutionally authorized to perform judicial functions); John B. Cheadle, *The Delegation of Legislative Functions*, 27 YALE L.J. 892, 896 (1918) (noting that a judge cannot further delegate authority with which he himself has been delegated and entrusted).

<sup>47</sup> ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 5 (1999).

<sup>48</sup> Wilkins, *supra* note 41.

<sup>49</sup> 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

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.<sup>50</sup> 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.<sup>51</sup>

The major reasons for the decline in the preeminence of fact-finding 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<sup>52</sup> and a concomitant settlement culture.<sup>53</sup> 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.<sup>54</sup>

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“litigation explosion” and that trials are expensive and risky because juries are 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).

<sup>50</sup> 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).

<sup>51</sup> 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.”).

<sup>52</sup> 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).

<sup>53</sup> 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).

<sup>54</sup> 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).

In so doing, we lost our way. In 1980, the average amount of time a U.S. district judge spent in the court room was 790 hours. In 2008, the average was just 353 hours, of which only 189 were spent in trial.<sup>55</sup> The judiciary hates it when I say this, because the immediate reaction is that we are not working very hard, and that is wrong. We are working as hard, or harder, than ever before. It took seventy-five years for the Federal Supplement, the vanity press for district judges, to fill a thousand volumes; my first published opinion was in Volume 656. My most recent opinions appear in Volume 578 of the *second* Federal Supplement. If I survive another year, I will have opinions *spanning* a thousand volumes. And what are they about? Are they great cases, findings and rulings? There are a few, but as Patricia Wald, former chief of the D.C. Circuit Court of Appeals stated, “[f]ederal jurisprudence is largely the product of summary judgment in civil cases.”<sup>56</sup> If she had added motions to dismiss, she would have gotten it completely right. Page after page of carefully reasoned adjudications explaining why we don’t go to trial—and we wonder why trials are vanishing.

This massive drift away from rigorous fact-finding in open court did not happen randomly. It did not result from the personal predilections of those newly appointed to the trial bench, who are every bit as vigorous and skilled as their predecessors.<sup>57</sup> The shift was instead occasioned by less-than-subtle institutional cues from within the judiciary itself. For years, newly appointed district judges have been taught that the focus of their job is primarily the “management” of their caseload, not the trial of the cases before them.<sup>58</sup> “Of course, we

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<sup>55</sup> In 1980, the average trial time reported by federal judges who were active district judges for at least 11 months was approximately 550 hours. In 2002, the average trial time was just over 250 hours. See FEDERAL JUDICIAL CENTER, REPORT (based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity) [App. A]. Data for fiscal years 2003 and 2004 confirm that trial time has consistently remained lower than it was during the 1980s. See Data derived from the Reports of the Clerk, United States District Court, District of Massachusetts 2005–2008 [App. B]. There has also been a decrease in bench time and trials in the state courts. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004).

<sup>56</sup> Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998).

<sup>57</sup> See *Open Letter*, *supra* note 39, at 31–33.

<sup>58</sup> The brilliant judge Richard S. Arnold cuts directly to the bone:

I think in the 20 years since I was a district court judge, we’ve seen a tremendous increase in volume, tremendous pressure to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.

must be skilled managers. But to what end? To the end that we devote the bulk of *our* time to those core elements of the work of the Article III trial judiciary—trying cases.”<sup>59</sup>

Yet the time spent at trial continues to fall.<sup>60</sup> While courtroom deputy clerks dutifully record the time each judge spends on the bench,<sup>61</sup> the results are a closely guarded secret, known only to the Committee on Judicial Resources which is adjured to not share such information even within the judiciary.<sup>62</sup> Although the Civil Justice Reform Act requires that judge-specific comparative data be published for cases over three years old and motions pending for more than six months,<sup>63</sup> the central uniform measure of actual trial judging is never even mentioned, and those judges who desire to measure their efforts against the most productive courts are rebuffed by internal secrecy.

The Administrative Office of the U.S. Courts annually publishes the number of “trials” in which the federal judiciary engages, and ranks

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Hon. Richard S. Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999). My colleague, Judge Nancy Gertner, has also addressed this issue:

In baby judge school, one trainer went so far as to begin a session on employment discrimination by saying, “Here’s how you get rid of these cases!” “Here’s how you get rid of these cases?” I could have sworn it was about justice, not digging for an excuse to close the case. When I was a baby judge we had more courses on case management, and mediation, than on opinion writing.

Hon. Nancy Gertner, United States District Judge for the District of Massachusetts, “A Quasi-Independent Judiciary,” Address before the Massachusetts Bar Foundation (Jan. 26, 2006) (on file with author); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

<sup>59</sup> *Open Letter*, *supra* note 39, at 33.

<sup>60</sup> *Compare* App. A with App. B.

<sup>61</sup> *See generally* 28 U.S.C. § 604 (2009) (outlining administrative duties of court personnel).

<sup>62</sup> *See* 3 **GUIDE** § A, chap. 2, part B, § 2, Part C, para. 6 (“Access to Committee Reports and Other Material”) (on file with author) (“Reports approved by the Conference for transmission to Congress shall not be publicly released prior to their submission to Congress . . . . Background materials, files, minutes and the like, are considered working papers of the Conference . . . and generally are not available to the public.”).

<sup>63</sup> Civil Justice Reform Act of 1990 (CJRA), 28 U.S.C. §§ 471, 472–482 (1990). This “sunshine” has had the predictable and desirable result of increasing judges’ productivity. *See, e.g.*, A. Leo Levin, *Beyond Techniques of Case Management: The Challenge of the Civil Justice Reform Act of 1990*, 67 ST. JOHN’S L. REV. 877, 900–03 (1993) (commending the reporting requirements of CJRA as possibly the most important and potentially successful features of the Act); Doreen Carvajal, *Awaiting Judgment: New York’s Clogged U.S. Courts Delaying Civil Verdicts for Years*, N.Y. TIMES, Apr. 17, 1995, at 1 (reporting criticism of Federal Judge I. Leo Glasser and his delays in issuing verdicts and decisions in civil cases, in reference to CJRA reports).

the courts accordingly.<sup>64</sup> Words matter,<sup>65</sup> however, and the Conference has debased the term “trial.” The term once denoted a jury or bench proceeding that led to a verdict; now it encompasses any disputed evidentiary hearing.<sup>66</sup> Thus, a criminal case with a motion to suppress, a *Daubert* hearing,<sup>67</sup> a genuine trial, and a sentencing hearing count as four “trials,” as does a civil patent case with a preliminary injunction hearing, a *Markman* hearing,<sup>68</sup> a genuine trial, and a separate damages hearing. As a result, the Administrative Office inflates the actual number of trials by approximately 33%.<sup>69</sup> However much this may impress Congress, such imprecision renders the term “trial” essentially meaningless, a result not lost on scholars<sup>70</sup> and the knowledgeable press.<sup>71</sup> To the judges, the message could not be more clear—trial time, indeed, any on-bench time, matters less than does “moving the business.”<sup>72</sup> Judge Irene M. Keeley, former president of the Federal Judges Association, states:

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<sup>64</sup> See, e.g., STATISTICS DIV., OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 19, 23, 388 tbl. T-1.

<sup>65</sup> See *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.: “A word is . . . the skin of a living thought . . .”).

<sup>66</sup> See Memorandum from Michelle Rynne to Helen Costello (Aug. 22, 2007) (on file with author) (providing guidance on reporting criteria for JS10 Monthly Trials Reports: “The following are types of proceedings which should be reported as trials . . . hearings on preliminary injunctions and temporary restraining orders . . . hearings on mental competency; hearings on petitions for probation revocation . . . hearings on motions to remand; evidentiary hearings . . .”); see also Zach Lowe, *Federal Court Statistics, or: How Numbers Can Drive You Mad*, LAW.COM, Sept. 2, 2008, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202424181868> (last visited Apr. 16, 2008).

<sup>67</sup> See *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 579–95 (1993).

<sup>68</sup> See generally *Markman v. Westview Instruments*, 517 U.S. 370 (1996).

<sup>69</sup> Cf. *Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2008: Hearing on S. 2774 Before the S. Comm. on the Judiciary*, 110th Cong. 88–89 (2008) (statement of William O. Jenkins, Jr., Director Homeland Security and Justice) [hereinafter Jenkins statement].

<sup>70</sup> Cf. Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1470–73 (2003) (comparing the Administrative Office’s database records and case dockets in PACER for tort and inmate cases, and concluding that the Administrative Office method of recording judgments created disparities in the data).

<sup>71</sup> See, e.g., Lowe, *supra* note 66.

<sup>72</sup> The internal process of the Judicial Conference has real world consequences. For example, from time to time the Judicial Conference takes upon itself the authority to advise the President *not* to nominate judges to fill vacancies it deems superfluous. It makes this decision by fixing an arbitrary cutoff point based upon the court’s “weighted caseload,” derived by a methodology that has been sharply (and accurately) criticized by independent observers. See S. REP. NO. 110-427, at 17–19 (2008); Jenkins Statement, *supra* note 69, at 82–

Litigation management is our primary job, and, even with fewer trials, there is a lot of litigation to be managed. We trial judges still spend a lot of time on the bench resolving disputes, even if it is not always during trial. Discovery is a demanding—and growing—part of litigation management expense. Mediation—even when it occurs early—doesn't always succeed in resolving the case. The lawyers engage in extensive, contentious discovery that requires an enormous amount of attention both from magistrate and district judges.<sup>73</sup>

Litigation management: hardly a shining vision. Once divorced from daily interaction with jurors, our written opinions subtly mock the very idea that democratic institutions might be made to serve the cause of justice. This leads us to prefer knowledge over hope, and the jury system is, if nothing else, our country's finest expression of hope. We district judges are more than pint-sized court of appeals aspirants, for we have the sole and unique responsibility for our constitutionally guaranteed modes of fact-finding. 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.

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95; see also JOHN SHAPARD, FED. JUDICIAL CTR., HOW CASELOAD STATISTICS DECEIVE 2–5 (1991), available at [http://www.fjc.gov/public/pdf.nsf/lookup/0020.pdf/\\$file/0020.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/0020.pdf/$file/0020.pdf) (discussing common problems of misinterpretation with caseload statistics). While the “weighted caseload” ranking may be modified by various gestalt factors, none of them have anything to do with the actual work being performed by the judges of the affected court, i.e. the on bench and trial time of those judges.

Even putting aside the larger issues of the separation of powers—the fact that the Judicial Conference is, in effect, advising the President not to enforce a law passed by Congress setting the number of district judges within each judicial district and is interfering with the Senate's constitutional prerogative to advise and consent to such nominations—what message does this communication send to the people of the affected district? Cf. S. REP. NO. 110-427, at 2–5, 20–21 (revealing the extent of the Judicial Conference's influence over Congress's power to constitute the lower courts, and including Sen. John Cornyn's objections on behalf of his district to the Administrative Office's recommendations). Can it be that the speed and quality of justice is too high in those locations and we need to cut back? And what of the active judges in such a district, knocking themselves out to try the cases before them and help other courts as well? Each one must know that, should she falter or fail, it is the official policy of the Judicial Conference that her seat shall lie vacant and her courtroom go dark.

<sup>73</sup> *Conference Represents Federal Trial Judges*, THIRD BRANCH, JUNE 2003, available at <http://www.uscourts.gov/ttb/june03ttb/interview.html> (quoting Hon. Irene M. Keeley).

### III. WHERE ARE YOU GOING, HABEAS CORPUS?

James Robertson's critically acclaimed work on habeas corpus, and the thorough analysis in Jonathan Shaw's "The War and the Writ," together explain the vicissitudes of the constitutionally guaranteed writ of habeas corpus in the years since September 11.<sup>74</sup> It is important to note that the decline of habeas had begun well before that day, however, and that it was significantly encouraged by the judiciary. Even Chief Justice William H. Rehnquist was highly critical of our habeas jurisprudence.<sup>75</sup> As a result of this and similar criticism,<sup>76</sup> Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which, under the guise of ordaining the jurisdiction of the lower federal courts, severely restricted access to the writ by those in government custody.<sup>77</sup> AEDPA likewise restricts, perhaps unconstitutionally, the right of those lower federal courts independently to interpret the Constitution.<sup>78</sup>

Congress, by adjusting the jurisdiction of the lower federal courts, can effectively strip disfavored classes from full access to justice, thereby restricting, if not extinguishing, cherished individual rights and liberties.<sup>79</sup> This is known as "rights stripping,"<sup>80</sup> a legislative technique

<sup>74</sup> See generally James Robertson, *Quo Vadis, Habeas Corpus?*, 55 BUFF. L. REV. 1063 (2008); Jonathan Shaw, *The War and the Writ*, HARV. MAGAZINE, Jan.-Feb. 2009, at 24.

<sup>75</sup> See, e.g., *Coleman v. Balkcom*, 451 U.S. 949, 957-58 (1981) (Rehnquist, J., dissenting) (criticizing the habeas remedy as "endlessly draw[ing] out legal proceedings" and thus rendering the death penalty to be a virtual illusion).

<sup>76</sup> Verbal and political attacks on an independent federal judiciary are as old as the republic, and as healthy. See generally MARK R. LEVIN, *MEN IN BLACK: HOW THE SUPREME COURT IS DESTROYING AMERICA* (2005). We learn from our history, recoiling from extremism. Each generation must strike anew the balance between Congress, the President, and the Judiciary.

<sup>77</sup> Antiterrorism Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2000).

<sup>78</sup> See *Evans v. Thompson*, 524 F.3d 1, 1-5 (1st Cir. 2008) (Lipez, J., dissenting); see also *Bradley v. Henry*, 428 F.3d 811, 816 (9th Cir. 2005) (implying that the AEDPA, as interpreted, places unworkable restrictions on the federal courts' powers of review).

<sup>79</sup> As former House Majority Leader Tom DeLay once remarked, "We set up the courts. We can unset the courts." *Miara v. First Allmerica Fin. Life Ins. Co.*, 379 F. Supp. 2d 20, 70 n.57 (D. Mass. 2005) (quoting Peter Wallsten, *2 Evangelicals Want to Strip Courts' Funds*, L.A. TIMES, Apr. 22, 2005, at A22.)

<sup>80</sup> In addition to the AEDPA, examples of "rights stripping" include its cousins, the Real ID Act of 2005, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. See Pub. L. No. 109-13, § 106(a)(5), 119 Stat. 302 (2005); Pub. L. No. 104-208, § 505(B)(2), 110 Stat. 3009-546 (1996) (codified in scattered sections of 110 U.S.C.). Note that the Real ID Act is part of the much broader Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, 119 Stat. 231 (2005).

that descends directly from bills proposed in the 1980s to strip federal courts of jurisdiction over abortion and busing.<sup>81</sup> As commentators have noted, “jurisdiction stripping” is, in effect, “rights stripping,”<sup>82</sup> because it removed the nuanced views of the 674 federal district judges from the rich common law tradition of evolutionary statutory interpretation, leaving the matter solely to appellate courts. While society has subsequently recoiled from stripping rights from women and minorities, it has had no such hesitancy concerning felons and aliens. Sadly, resort to this technique has become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect.<sup>83</sup>

So it was that at the dawn of the new millennium, with the jury sidelined and marginalized, the judiciary seemed more interested in discussing recondite issues of law than in the robust but tedious process

<sup>81</sup> See Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1552 (2001).

<sup>82</sup> See, e.g., Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129 n.1, 141 (1981) (arguing that such measures unduly burden constitutional rights). *Contra* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 261–69 (1988) (discussing study on parity of state and federal courts).

<sup>83</sup> See *Gonzalez v. United States*, 135 F. Supp. 2d 112, 115 n.5 (D. Mass. 2001), *aff'd*, *Brackett v. United States*, 270 F.3d 60 (1st Cir. 2001), *abrogated by Johnson v. United States*, 544 U.S. 295 (2005).

It is constitutional bedrock that “[t]he 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.” U.S. CONST. art. III, § 1. There is but a single limit on Congress’ broad powers to establish and disestablish inferior courts, expand or trim their jurisdiction, and move jurisdiction from one such court to another. That limit is the American jury. See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .”); *Id.* amend. VII (“In Suits at common law . . . the right of trial by jury shall be preserved . . . .”). These constitutional commands necessarily require the existence of jury trial courts to give them effect.

Efforts to water down the plain language of the Constitution continue to this day. See *The Civil Jury*, *supra* note 27, at 1493–1503 (discussing proposals to limit the jury’s role in complex civil cases); see also Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1686 (2005) (suggesting that the United States has “outgrown” the philosophy undergirding the Seventh Amendment).

The jury, that most vital expression of direct democracy extant in the United States today, thus functions as a practical and robust limitation on congressional power. It is as crucial and central a feature of the separation of powers between the Legislature, the Executive, and the Judiciary as the Supreme Court. See Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 377 (2005) (“[T]he jury can serve . . . as a structural protection within the constitutional scheme.”). Indeed, within her proper fact-finding sphere, a juror is the constitutional equal of the President, a Senator or Representative, or the Chief Justice of the United States.

of hammering out unassailable findings of fact. Thus, the Great Writ was great no more.

#### IV. AND NOW . . . TORTURE

Under the Bush administration, for the first time in the history of our republic, the torture of prisoners<sup>84</sup> became an official instrument of state policy.<sup>85</sup> Neither the weakening of our jury system, the judicial disdain for fact-finding, nor the restrictions on habeas corpus were solely responsible for this development. Yet taken together, the cultural desuetude into which these essential elements of our governance had fallen were all key ingredients of this truly breathtaking shift in the American identity.

In vesting the “judicial power of the United States” in our court system, the Constitution commands, “[t]he trial of all crimes, except in cases of impeachment, shall be by jury.”<sup>86</sup> There was a time when we meant it.<sup>87</sup> Military tribunals once encompassed only what was necessary to maintain our forces in the field, and swept within their ambit only those recognized offenses that harmed our combat operations.<sup>88</sup> For over two hundred years, through the “fiery trial” of the Civil War<sup>89</sup> and two cataclysmic World Wars, we survived and flourished, a beacon of

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<sup>84</sup> For an independent analysis of the extent to which torture by the United States has taken place in recent years, see International Committee of the Red Cross, *Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, WAS 07/76, Feb. 14, 2007, available at <http://www.nybooks.com/icrc-report.pdf>.

<sup>85</sup> I am not such an American exceptionalist as to suggest that individual Americans do not torture, rape, and kill in what they conceive is the national interest; clearly, we do. *See, e.g.*, MICHAEL BILTON & KEVIN SIM, *FOUR HOURS IN MY LAI* 102–63 (1992) (detailing massacre of approximately four hundred civilians, and other atrocities by U.S. troops in the Vietnamese village of My Lai on March 16, 1968). General Sherman had it right when he said, “war is all hell.” *See* STANLEY P. HIRSHSON, *THE WHITE TECUMSEH: A BIOGRAPHY OF GENERAL WILLIAM T. SHERMAN* 372 (1997). Until today, however, our national policy has always abhorred torture, and we have prosecuted those who have conducted it. *See generally* Paul Kramer, *The Water Cure*, *NEW YORKER*, Feb. 25, 2008, at 38 (recounting the public outcry, Congressional hearings, and courts martial related to water-boarding and other atrocities committed by U.S. soldiers in the Philippines between 1899 and 1902).

<sup>86</sup> U. S. CONST. art. III, § 2, cl. 3 (capitalization altered from original).

<sup>87</sup> *See* AMAR, *supra* note 35, at 236.

<sup>88</sup> Military tribunals should not be confused with military courts-martial. Although they can be used to prosecute similar things, the latter provides for trial by jury. *See generally* JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, *MANUAL FOR COURTS MARTIAL UNITED STATES* (2008) (describing court martial procedures, as well as offenses that threaten success of the military mission, such as Spying, Aiding the enemy, and Espionage).

<sup>89</sup> *See generally* CARL SANDBURG, *THE FIERY TRIAL* (Dell Publ’g Co. 1959) (1948).

hope to all humankind, without a doctrine that concerned the treatment of “enemy combatants.”

No more. Jack Goldsmith’s brilliant book, *The Terror Presidency*, reveals the relative ease with which legal and constitutional constraints can be swept away in a time of fear and uncertainty simply by declaring a “new” status for those whom we fear the most.<sup>90</sup> Indeed, the heroes of our time are military lawyers such as Lieutenant Commander Charles Swift. Upon being assigned to defend one of the Guantanamo detainees he was told, “Your job is to plead him out.” Swift replied, “My job is to be his lawyer, Sir.”<sup>91</sup> Other heroes include the free press which brought the horrors of Abu Ghraib to light,<sup>92</sup> and the American people who, notwithstanding the equivocation of their leaders, well understood that waterboarding was torture.

This left Congress in a quandary, and it is in the resulting analysis of the laws that one can see just how far the debate has shifted, and how marginalized the lower federal courts have allowed themselves to become. Ultimately, Congress passed the Detainee Treatment Act (DTA) of 2005<sup>93</sup> and the Military Commissions Act (MCA) of 2006<sup>94</sup> with significant bipartisan majorities. These measures sought both to preserve national security by placing further limitations on habeas, and to refute the charge that we were officially engaged in the systematic torture of prisoners. Yet behind the carefully parsed language, circumlocutions, and strict limitations on judicial review,<sup>95</sup> remains a stark and sobering fact: for the first time in our nation’s history, Congress has legislatively sanctioned the torture of prisoners.<sup>96</sup> This is

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<sup>90</sup> See JACK GOLDSMITH, *THE TERROR PRESIDENCY* 99–140 (2007) (discussing the Bush Administration’s treatment of enemy combatants).

<sup>91</sup> Sabin Willett, *My Worst Moment as a Lawyer*, Remarks at Newburyport, Massachusetts Amnesty International meeting (Dec. 5, 2006), *available at* [http://www.pegc.us/archive/Articles/willett\\_AI\\_20061205.pdf](http://www.pegc.us/archive/Articles/willett_AI_20061205.pdf).

<sup>92</sup> One must also recognize the contributions of Al Jazeera, which, despite much overt propaganda, has displayed flashes of journalistic brilliance and brought home to us here in the United States how we are perceived in much of the world. HUGH MILES, *AL JAZEERA: THE INSIDE STORY OF THE ARAB NEWS CHANNEL THAT IS CHALLENGING THE WEST* 61 (2005) (noting that Al Jazeera has won several international journalism awards).

<sup>93</sup> Detainee Treatment Act (DTA), Pub. L. No. 109-148, div. A, tit. X, §§ 1001–1006, 119 Stat. 2680 (2005). The DTA was tacked onto a broad appropriations bill, the Department of Defense Appropriations Act of 2006.

<sup>94</sup> See generally Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 3930, 120 Stat. 2600.

<sup>95</sup> See, e.g., *id.*

<sup>96</sup> See 151 CONG. REC. S12381, S12385, S12394, S12397 (daily ed. Nov. 4, 2005); JANE MAYER, *THE DARK SIDE* 321 (2008); see also H.R. REP. NO. 109-89, at 524 (2005)

why it was necessary for President Obama, to his great credit, to issue an executive order against torture soon after taking office.<sup>97</sup>

Today, only that order stands between us and the official resumption of torture. To understand how that can possibly be, it is instructive to look at the legislative history of the DTA and MCA. Nowhere will you find mention of a jury,<sup>98</sup> nor do the acts concern themselves much with rigorous fact-finding. Indeed, the fact-finding courts are totally stripped of their usual jurisdiction and review is granted only to a single appellate court without fact-finding jurisdiction or apparatus.<sup>99</sup> Even this review appears to echo the administrative model in that the “facts” to be reviewed are those established by the executive.<sup>100</sup> This is so despite the fact that the very essence of habeas demands that the judiciary sort out the facts.<sup>101</sup> While the status of these acts was placed in limbo by *Boumediene v. Bush*,<sup>102</sup> they may yet prove one of the enduring legacies of the Bush administration.

After all, why ought Congress exalt the American jury when the federal courts themselves seem to care so little about its contributions?<sup>103</sup> There is no reason for Congress to value the fact-finding skills and procedures of the lower federal courts unless those courts themselves recognize this as their core function. Congress may reasonably wonder why habeas should matter so much for foreign

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(acknowledging and condemning the Pentagon’s use of torture at Abu Ghraib and other detention facilities in the report on the National Defense Authorization Act for Fiscal Year 2006, which contained provisions nearly identical to DTA).

<sup>97</sup> See Exec. Order No. 13, 491, 74 C.F.R. 16 (Jan. 27, 2009).

<sup>98</sup> See generally 152 CONG. REC. S10349 (daily ed. Sept. 28, 2006) (debating the MCA); 151 CONG. REC. S12375 (daily ed. Nov. 4, 2005) (debating amendments to the DTA). I suppose this means these Acts are not intended to deal with those who have committed crimes against the United States, as “all crimes, save for Impeachment, shall be tried by jury.” U.S. CONST., art. III, § 2, cl. 3. This procedure applies to all offenders, whatever their status or nationality.

<sup>99</sup> See MCA § 3930; DTA § 1005(e)(1)–(3), *invalidated by* *Boumediene v. Bush*, 128 S. Ct. 2229, 2271 (2008).

<sup>100</sup> See, e.g., Social Security Act, 42 U.S.C. § 405(g) (2006).

<sup>101</sup> See *Boumediene*, 128 S. Ct. at 2271.

<sup>102</sup> *Id.* at 2274.

<sup>103</sup> The *Apprendi* line of cases may yet refute this assertion. See *Apprendi v. New Jersey*, 530 U.S. 446, 497 (2000); see also *Cunningham v. California*, 549 U.S. 270, 294 (2007); *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely v. Washington*, 542 U.S. 296, 314 (2004). Oddly, however, the emphatic reassertion of the jury’s role in criminal cases applies with far less force in the federal courts for “practical” reasons. *Booker*, 543 U.S. at 248. This disjunction is fully explored in *United States v. Kandirakis*, 441 F. Supp. 2d 282, 286–89 (D. Mass. 2006).

detainees when it has so successfully limited it for domestic prisoners<sup>104</sup> and substituted the most pallid of imitations for alien immigrants.<sup>105</sup>

### CONCLUSION

So the great work is laid before each of us—the work of insuring national security and, at the same time, preserving civil liberties. In a symposium featuring leading scholars on the laws of war and the proper response to terrorism, an Article on jury size, trial hours and domestic habeas issues may seem wide of the mark. It is not. I seek here to illustrate a truth so basic it may seem banal—a rend anywhere in the social fabric weakens our shared mantle everywhere. For most of us, these issues arise not in notorious cases, writs of certiorari, or sweeping constitutional decisions.<sup>106</sup> For us, rather, it is the quotidian attention to the rights, needs, and concerns of individual litigants, sometimes poised against the equal rights of society as a whole.

I have argued that the judiciary needs to get back to basics, in order better to explain to society the enormous values that are lost when the jury is sidelined, fact-finding marginalized, and the Great Writ derided. I posit that the lower federal courts are today ill-positioned to meet the compelling challenges of the Twenty-First century. No doubt others, equally concerned and well-informed, will disagree; so much the better, for robust debate is good for society. What we can no longer afford is a papering over of these differences with the bland assertion that all is well with the lower federal courts. It is not.

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<sup>104</sup> See, e.g., *Gonzalez v. United States*, 135 F. Supp. 2d 112, 121 (D. Mass. 2001), *aff'd*, *Brckett v. United States*, 270 F.3d 60 (1st Cir. 2001), *abrogated by Johnson v. United States*, 544 U.S. 295 (2005).

<sup>105</sup> See *Enwonwu v. United States*, 199 F. App'x 6, 6–7 (1st Cir. Sept. 26, 2006).

<sup>106</sup> In over thirty years of judicial service, I have presided over but two so-called “terrorist” cases. One, *United States v. Levasseur*, resulted in acquittal on the charge of seditious conspiracy after an 11 ½ month trial and 22 days of sequestered deliberations. See generally 699 F.Supp. 965 (D. Mass. 1988). The second, *United States v. Reid*, resulted in a guilty plea. See 214 F.Supp.2d 84, 87 (D. Mass. 2002).

It has long been the tradition in the federal district courts that the judge imposes a criminal sentence in open court with the offender present; the judge frequently explains the reasons for the sentence. See generally JEFFREY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 3–31* (2001); PETER G. FISH, *FEDERAL JUSTICE IN THE MID-ATLANTIC SOUTH: UNITED STATES COURTS FROM MARYLAND TO THE CAROLINAS, 1789–1835* (2002). My remarks in sentencing Reid presaged certain of the themes amplified here; they are set forth in App. C. See Transcript of Disposition, *United States v. Reid*, 214 F. Supp.2d 84, 87 (D. Mass. 2002) (Criminal No. 02-10013-WGY) (Jan. 30, 2003).

This much, however, I know is true: “You [die] when you [refuse] to stand up for right. You [die] when you [refuse] to stand up for truth. You [die] when you [refuse] to stand up for justice.”<sup>107</sup> What’s more, “liberty and justice for all”<sup>108</sup> *matter*—today as much as any time in our history. So when the death knell sounds for anyone’s civil liberties, “never send to know for whom the bell tolls; it tolls for thee.”<sup>109</sup> To me, Ronald Reagan may have said it best: “[f]reedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation, for it comes only once to a people.”<sup>110</sup>

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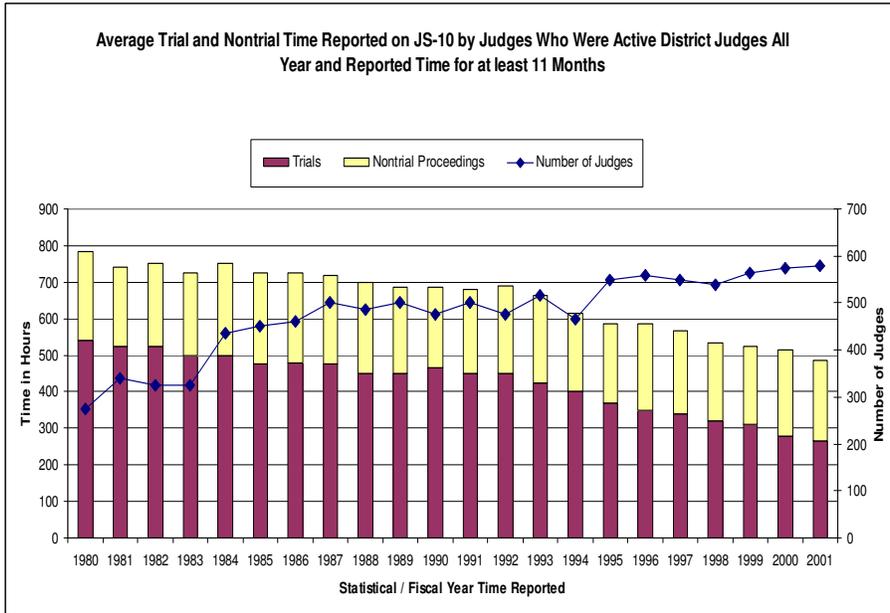
<sup>107</sup> Martin Luther King, Jr., Sermon at Ebenezer (Nov. 5, 1967), *in* THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. (Clayborne Carson ed., 1998).

<sup>108</sup> 36 U.S.C. § 172 (2002) (the Pledge of Allegiance).

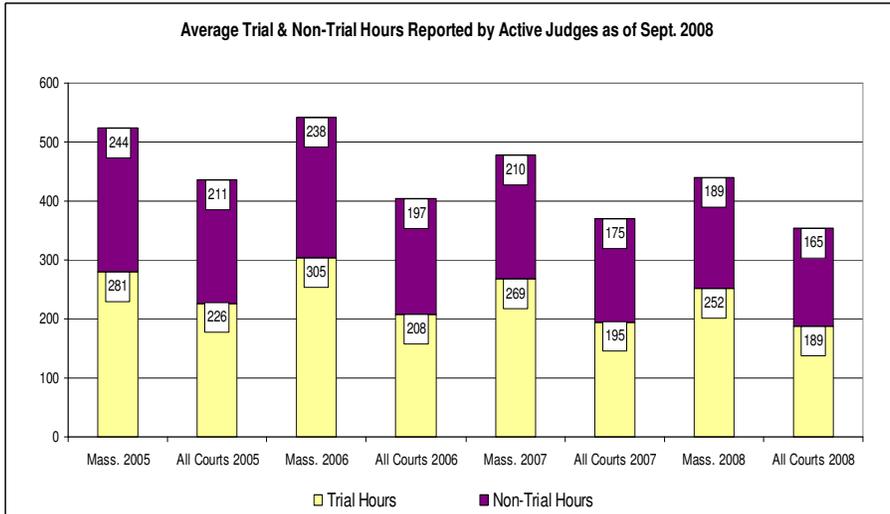
<sup>109</sup> JOHN DONNE, 3 THE WORKS OF JOHN DONNE 575 (Henry Alford ed., 1839).

<sup>110</sup> Ronald Reagan, Governor of California, Inaugural Address (Jan. 5, 1967), *available at* <http://www.reagan.utexas.edu/archives/speeches/govspeech/01051967a.htm>.

APPENDIX A



APPENDIX B



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Criminal No.  
02-10013-WGY

\* \* \* \* \*  
\*  
UNITED STATES OF AMERICA \*  
\*  
v. \*  
\*  
RICHARD C. REID \*  
\*  
\* \* \* \* \*

DISPOSITION  
(Excerpt)

BEFORE: The Honorable William G. Young,  
District Judge

APPEARANCES:

GERARD T. LEONE, TIMOTYH Q. FEELEY, COLIN  
G.K. OWYANG and GARY S. KATZMANN, Assistant United  
Sates Attorneys, 1 Courthouse Way, Boston,  
Massachusetts 02210

OFFICE OF THE FEDERAL DEFENDER (By Owen S.  
Walker, Esq., Tamar R. Birckhead and Elizabeth L. Prevett, Esq.),  
408 Atlantic Avenue, Third Floor, Boston, Massachusetts 02210,  
on behalf of the Defendant

1 Courthouse Way  
Boston, Massachusetts

January 30, 2003

**THE COURT:** Mr. Richard C. Reid, hearken now to the sentence the Court imposes upon you.

On Counts 1, 5 and 6 the Court sentences you to life in prison in the custody of the United States Attorney General. On Counts 2, 3, 4, and 7, the Court sentences you to 20 years in prison on each count, the sentence on each count to run consecutive one with the other. That's 80 years.

On Count 8 the Court sentences you to the mandatory 30 years consecutive to the 80 years just imposed.

The Court imposes upon you on each of the eight counts a fine of \$250,000 for the aggregate fine of \$2 million.

The Court accepts the government's recommendation with respect to restitution and orders restitution in the amount of \$298.17 to Andre Bousquet and \$5,784 to American Airlines.

The Court imposes upon you the \$800 special assessment.

The Court imposes upon you five years supervised release simply because the law requires it. But the life sentences are real life sentences so I need not go any further.

This is the sentence that is provided for by our statutes. It is a fair and just sentence. It is a righteous sentence. Let me explain this to you.

We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.

Here in this court where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice.

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether is it the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist. And we do not negotiate with terrorists. We do not treat with terrorists. We do not sign documents with terrorists. We hunt them down one by one and bring them to justice.

So war talk is way out of line in this court. You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.

In a very real sense Trooper Santiago had it right when first you were taken off that plane and [placed] into custody, and you

wondered where the press and . . . TV crews were, and [he] said, “you’re no big deal.” You’re no big deal.

What your counsel, what your able counsel and what the equally able United States Attorneys have grappled with, and what I have as honestly as I know how tried to grapple with, is why you did something so horrific. What was it that led you here to this courtroom today. I have listened respectfully to what you have to say. And I ask you to search your heart and ask yourself what sort of unfathomable hate led you to do what you are guilty and admit you are guilty of doing.

And I have an answer for you. It may not satisfy you. But as I search this entire record it comes as close to understanding as I know.

It seems to me you hate the one thing that to us is most precious. You hate our freedom. Our individual freedom. Our individual freedom to live as we choose, to come and go as we choose, to believe or not to believe as we individually choose.

Here, in this society, the very winds carry freedom. They carry it everywhere from sea to shining sea. It is because we prize individual freedom so much that you are here in this beautiful courtroom. So that everyone can see, truly see that justice is administered fairly, individually, and discretely.

It is for freedom’s sake that your lawyers are striving so vigorously on your behalf and have filed appeals, [and] will go on in their . . . representation of you before other judges. We care about it. Because we all know that the way we treat you, Mr. Reid, is the measure of our own liberties.

Make no mistake, though. It is yet true that we will bear any burden, pay any price, to preserve our freedoms.

Look around this courtroom. Mark it well. The world is not going to long remember what you or I say here. Day after tomorrow it will be forgotten. But this, however, will long endure. Here, in this courtroom, and courtrooms all across America, the American people will gather to see that justice, individual justice, justice, not war, individual justice is in fact being done.

The very President of the United States through his officers will have to come into courtrooms and lay out evidence on which specific matters can be judged, and juries of citizens will gather to sit and judge that evidence democratically, to mold and shape and refine our sense of justice.

See that flag, Mr. Reid? That's the flag of the United States of America. That flag will fly there long after this is all forgotten.<sup>111</sup> That flag still stands for freedom. You know it always will.

Custody, Mr. Officer. Stand him down.

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<sup>111</sup> Well, perhaps not. I have recently been informed that on March 17, 2009, without discussion or debate, the Judicial Conference of the United States voted to advise the President that the next vacancy in this District ought to be left unfilled. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY REPORT: JUDICIAL CONFERENCE ACTIONS 5 (2009) (on file with author) (recommending to the President and the Senate "not to fill the existing judgeship vacancy in the District of Wyoming and the next judgeship vacancy occurring in the District of Massachusetts, based on the consistently low weighted caseloads in these districts."). Thus, should I be the next judge in this District to falter or fail, it is now the official policy of the Judicial Conference that this position ought sit vacant, the courtroom go dark, and the flag of the United States of America, which has flown so proudly in this courtroom for 24 years, be taken down.