

# AN OPEN LETTER TO U.S. DISTRICT JUDGES



*Dear Colleagues,*

Friends have suggested that I write to you in this format. I am hesitant to do so, for what I have to say is somewhat cross-grained and perhaps unwelcome. Moreover, in a letter of this nature, my conclusions necessarily seem more stark and absolute than I desire, as they are bereft of meaningful reasoned argument and nuance. Still, I hope the issues here raised will at least provide a starting point for discussion. In any event, unwelcome truths are nevertheless true; so here's the thesis:

The American jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic.

As district judges, we ought be in the forefront of a national debate concerning this matter. We are not. In fact, we operate as though we don't much care.

As a result, we have lost focus on our prime mission; our status as the grass-roots guardians of constitutional values is threatened as never before, the business community is no longer supportive of federal district court adjudication, and Congress is marginalizing our functions and may soon significantly reduce our resources.

Do you care? If so, consider:

## **The American jury “is the purest example of democracy in action that I have ever experienced.”<sup>1</sup>**

The American jury must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy.<sup>2</sup>

No other legal institution sheds greater insight into the character of American justice. Indeed, as an instrument of justice, the civil jury is, quite simply, the best we have. “[T]he greatest value of the jury is its ability to decide cases correctly.”<sup>3</sup> We place upon juries no less a task than discovering and declaring the truth in each case. In virtually every instance, these 12 men and women, good and true, rise to the task, finding the facts and applying the law as they, in their collective vision, see fit. In a very real sense, therefore, a jury verdict actually embodies our concept of “justice.” Jurors bring their good sense and practical knowledge into our courts. Reciprocally, judicial standards and a respect for justice flow out to the community.<sup>4</sup> The acceptability and moral authority of the justice provided in our courts rests in large part on the presence of the jury. It is through this process, where rules formulated in light of common experience are applied by the jury itself to the facts of each case, that we deliver the very best justice we, as a society, know how to provide.

The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government. “[T]he jury achieves symbolically what cannot be achieved practically — the presence of the entire populace at every trial.”<sup>5</sup> Through the jury, we place the decisions of justice where they rightly belong in a democratic society: in the hands of the governed.

One could scarcely imagine that the Founders would have created a system of courts with appointed judges were it not for the assurance that the jury system would remain. 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 put it, “[t]he jury system … [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.”<sup>6</sup> Like all government institutions, our courts draw their authority from the will of the people to be governed. The law that emerges from these courts provides the threads from 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>7</sup> Through the jury, the citizenry takes part in the execution of the nation’s laws, and, in that way, each citizen can rightly claim that the law belongs partly to him or her.

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 — that is the true source of the courts’ glory and influence. The involvement of ordinary citizens in a majority of a court’s tasks provides legitimacy to all that is decreed. When judges decide cases alone, they are still surrounded by the recollection of the

jury.<sup>8</sup> Judicial voices, although not directly those of the community itself, echo the values and the judgments learned from observing juries at work. In reality, ours is not a system in which the judges cede some of their sovereignty to juries, but rather it is one in which the judges borrow their fact-finding authority from the jury of the people.<sup>9</sup>

## **The American jury system is dying — more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts — but dying nonetheless.<sup>10</sup>**

In fact, “the civil jury trial has all but disappeared.”<sup>11</sup> For some time now, circumstantial and anecdotal evidence has been mounting that jury trials are, with surprising rapidity, becoming a thing of the past. Judge Patricia Wald started her tribute to professor Charles Alan Wright with this striking sentence: “Federal jurisprudence is largely the product of summary judgment. . . .”<sup>12</sup> Judge Wald is right — and note the compelling inference — that we are today more intellectually concerned with the procedural mechanism that blocks jury trials than we are with the trials themselves. Levels of civil and criminal litigation in the federal courts continue to rise,<sup>13</sup> and, on the civil side, the ratio of trials to settlements and pretrial adjudications remains roughly constant.<sup>14</sup> Yet, the simple fact is that, with ever more work to do in the federal courts, jury trials today are marginalized in both significance and frequency.

Hard evidence confirms this observation. Over the 10 years concluding in 1999, the number of civil jury trials declined 26 percent, and the number of criminal trials was down 21 percent. During the five most recent years of this same period, overall jury trial days went down 12 percent.<sup>15</sup> Furthermore, funds budgeted for jurors in the federal system in FY 2001 declined by nearly 6 percent, compared to FY 2000, in order to adjust to the declining number of jury trial days.<sup>16</sup>

Institutionally, federal courts today seem little concerned with jury trials.<sup>17</sup> Moreover, the federal judiciary has been willing “to accept a diminished, less representative, and thus sharply less effective civil jury.”<sup>18</sup>

On the criminal side of our federal courts, manipulation of the U.S. Sentencing Guidelines has the consequence of imposing savage sentences upon those who request the jury trial guaranteed them under the U.S. Constitution — sentences that are 500 percent longer than sentences received by those who plead guilty and cooperate.<sup>19</sup> Small wonder that the rate of criminal jury trials in the federal courts is plummeting.<sup>20</sup>

Remarkably, the press today blandly refers to “military detention” as simply a “parallel track” to being “indicted in the federal court system.”<sup>21</sup> Indeed, the very act of creating the apparatus for trials before military tribunals, even though it has not yet — so far as the public has been told — been engaged, has the effect of diminishing the American jury, once the central feature of American justice, to nothing more than a “parallel track.”<sup>22</sup>

This is 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 whatsoever.<sup>23</sup>

Our willingness, as a society, to drift from the use of juries reflects a failure in the understanding of the jury's essential function in our American democracy. The jury system is direct democracy at work. It is, in fact, the most vital expression of direct democracy in America today. It is the New England town meeting writ large: the people themselves governing. In fact, the very processes of our judicial system themselves vindicate and strengthen democracy by involving litigants with standing in the application of our laws.<sup>24</sup> Our juries are the ultimate realization of our people working together, under law, to do justice. De Tocqueville recognized with masterful clarity that, in our jury system, Americans had embarked on a stunning experiment in direct popular rule.<sup>25</sup> Studies show that, when people have recourse to a jury trial, inequalities in economic resources are minimized, most potential litigants avoid staking out patently unreasonable positions, and the great bulk of cases ultimately settle.<sup>26</sup>

Whenever Congress extinguishes a right that heretofore has been vindicated in the courts through citizen juries, there is a cost. It is not a monetary cost. It is a cost paid in rarer coin — the treasure of democracy itself.<sup>27</sup>

When people recognize that they have been cut off from their opportunity to govern directly through citizen juries, the sense of government as community — as a shared commonwealth — is severely diminished. Jury service is the citizen's only direct experience of government at the federal level. Severing that shared bond, of course, leaves citizens with their right to vote but, inevitably, as the government draws away from its citizenry, that right seems less valuable. It is not too much to say that, as our government is the ultimate teacher,<sup>28</sup> its devaluation of direct citizen participation carries the implicit message that communitarian efforts are simply not worth very much in an age of individual self seeking.<sup>29</sup>

Nor is this all. As those institutions that empower and reinforce community efforts fray at the edges and fall into desuetude, economic powers to which the law grants an advantage naturally tend to use that advantage, unchecked by the jury's common sense.<sup>30</sup>

Without juries, the pursuit of justice becomes increasingly archaic, with elite professionals talking to others, equally elite, in jargon whose elegance is in direct proportion to its unreality. Juries are the great leveling and democratizing element in the law. They give it its authority and generalized acceptance in ways that imposing buildings and sonorous openings cannot hope to match. Each step away from juries is a step that ultimately weakens the judiciary as the third branch of government.<sup>31</sup> Indeed, it may be argued that the moral force of judicial decisions — and the inherent strength of the third branch of government itself — depends in no small measure on the shared perception that democratically selected juries have the final say over actual fact-finding.<sup>32</sup>

It is the saddest irony that the government offers the protection of jurors within the United States as one of its justifications for the creation of secret military tribunals sitting in remote locations<sup>33</sup> — precisely at the moment after the 9/11 tragedy that average Americans were turn-

ing out in record numbers to perform the sole civic duty prescribed in the Constitution: jury service.<sup>34</sup>

Indeed, it is not too much to say that the greatest threat to America's vaunted judicial independence comes not from any external force but internally, from the judiciary's willingness to allow our jury system to melt away.<sup>35</sup>

### **The district court judiciary is losing (has lost) focus on its primary missions.**

Ours is a dual mission. First, we preside over the largest, most daring, and most successful experiment in direct democracy ever attempted in the history of the world — the American jury system. The continued vitality of that system depends, in no small measure, on the skillful management and warm inspirational support of U.S. District Court judges.

Second, alone among the democracies of the world, we commit first-instance constitutional interpretation to U.S. district judges. In contrast, most countries reserve constitutional adjudication for a special appellate court. The result is plain — the U.S. Constitution is the most vibrantly living written governmental framework and guarantee of individual liberties ever seen — precisely because reasoned, case specific, written interpretation of the fundamental law is as close as the nearest federal district court.

That's what we do. A bit of the very sovereignty of the nation is committed to our charge, and, with this as our trust, we make the jury system flourish so that this dimension of direct democracy works well in tandem with our federal system of representative democracy. At the same time, we provide reasoned explanations of the rule of law (ultimately constitutional law) to our citizens.

Do our institutional actions reflect the burden and glory of these monumental challenges? You know they do not. Our processes are too costly and too slow, yet we were not even included in the last major discussion of these issues and had to scramble to catch up and prevent unwise micromanagement. Today, our processes are slower still and even more costly, yet we can hardly be considered proactive on these issues. We express concern that our jury system is withering, study the matter, discover that much of the decline is statutorily driven, so — ho hum — there is nothing we can do about it. In fact, the demise of our jury system is the single most significant development in American law in our history — and we district judges are uniformly silent. It is today unfashionable, somewhat déclassé, certainly old-fashioned, and out of step to extol the systemic virtues of the American jury and carefully reasoned written adjudication.

Don't get me wrong. Whenever I start off like this, some of my most thoughtful colleagues hear me suggesting that cases ought be forced to trial or ranting against case management. Not so. Not so at all. One of the difficulties inherent in raising these issues is that the debate seems to fall into extreme positions. Those who argue that the district court judiciary ought evolve frequently disparage the trial process itself, while, on the other side, some commentators argue that to engage in case management somehow diminishes the judicial function.<sup>36</sup> Small

wonder the hardworking majority of judges is silent.

My point is more modest. Of course, most cases ought settle. Of course, we must embrace all forms of voluntary ADR. Of course, we 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 and writing opinions. We ought to remember, as the RAND study and all of its progeny confirm, the best case management tool ever devised is an early, firm trial date.

The truth of the matter is that good management and traditional adjudication go hand in hand. We ought to confirm that basic truth, study how it is done, trumpet it, budget for it, and fight for it. The district court judiciary ought to be the nation's most vigorous advocates of our adversary system and the American jury. We fail at our own peril. Here's why.

### **The business community — throughout American history the most vigorous advocate of a strong federal judiciary — has lost interest in us.**

We are too slow, too costly, too unpredictable, say global (and local) business leaders. Sadly, the indictment has much merit. Yet how vigorously are we addressing these legitimate concerns?

For decades, our civil juries have been incessantly disparaged by business and insurance interests, without the courts offering any defense of the single institution upon which their moral authority ultimately depends,<sup>37</sup> with the predictable result that bipartisan majorities in the Congress have severely restricted access to the American jury.<sup>38</sup> These interests know what they are doing. The most sophisticated recent analysis has led one commentator to conclude, "a civil justice system without a jury would evolve in a way that more reliably serve[s] the elite and business interests."<sup>39</sup>

More ominously, for the first time in our history, business has a good chance of opting out of the legal system altogether. Today's expansive reading of the Federal Arbitration Act allows the unilateral imposition of arbitration clauses to trump all sorts of civil rights and consumer protection legislation. Coupled with today's expansive pre-emption jurisprudence, business can (and does) make a rational calculus that leads it to lobby for an ever-diminishing role for the federal district courts. This is never overt, of course. It coalesces around specific issues with specific "reforms" advanced. The Private Securities Litigation Reform Act is a prime example. Yet bit by bit, issue by issue, the doors of our district courts are closing to ordinary citizens. Business once was the strongest supporter of the federal court system. Today, save in the area of intellectual property, it sees itself as having little stake in our continued vitality and chooses instead to fight its battles directly with the regulatory state.

### **The Congress is increasingly marginalizing the district court judiciary — and we are complicit in our own sidelining.**

When was the last time the district court judiciary

protested a diminution in our jurisdiction? Can anyone remember? We didn't do it before the adoption of the Sentencing Guidelines and, other than vigorous objections to the conversion of the guidelines into a system of case-specific mandatory minimums, we've rarely done it since. We are today, largely because of Ralph Mecham's brilliant administration,<sup>40</sup> the best housed (huge court building and renovation program), finest supported (92 support personnel to one judge), most fiscally independent (budget decentralization) judiciary in history. And what is our policy? Other than general platitudes, at the district court level we're all too often unclear what we do, we frequently engage in disparaging it and minimizing its importance, and by the way, dear Congress, we'd like to do less. Our official position is that we'd like to give away diversity jurisdiction. We made no protest over the creation of the redundant and fiscally wasteful Bankruptcy Appellate Panel program, and the presently proposed bankruptcy legislation further restricts our review of bankruptcy court decisions. The President's panel on the Social Security System proposes replacing the district judge review of Social Security decisions with an expanded Article I hearing officer (ALJ) program within the executive branch. AEDPA and IIRIRA strip away rights that were traditionally vindicated in the district courts and crowd them onto the already overburdened dockets of the courts of appeal, confident that, as a practical matter, the exercise of these rights will be markedly diminished.<sup>41</sup>

And what about us? We are utterly supine in the face of our ever-shrinking jurisdiction. After all, these are matters of "policy." Indeed, when Congress asks us how we feel about the diminution of the role of the jury, the Judicial Conference response pallidly explains that we are aware of the modern techniques of juror utilization and promises vigorous support of the jury system. Of course, we don't really mean the last. That would require that we take a position on patients' rights legislation, on amendments to the Federal Arbitration Act to return it to its original purposes, and on a host of proposed legislation that pre-empts state consumer protection but affords no federal remedy that can be vindicated in the courts.

Although we effectively, even superbly, lobby for our budgets, we otherwise are utterly passive in the face of forces that marginalize the strength of our democratic adversary system and the jury's role in it. We are, of course, risk-averse, and so we ought to be in the face of partisan politics. Yet it is highly ethical to speak out on matters of judicial administration, and we will have only ourselves to blame when Congress realizes that it is spending more and more on an ever-shrinking jurisdiction — one that is increasingly divorced from the touchstone of common sense supplied by the nation's juries. In sum, if we don't use our courtrooms, we will lose them — and much more besides.

### **The Europeanization of American law**

This is a lousy title — I'm trying to think of a better one. It does, however, encompass what I am trying to say — that all these many points, taken together, have an increasing tendency to blur the distinctions between the

American adversary system and the European civil justice system. In the latter, trial judges are professional civil servants, roughly equivalent to upper-level bureaucrats. Constitutional adjudication is performed by a specialized, centralized multijudge court. Trial judges are often specialized by task because, in such a system, the advantages of judicial bureaucratization seem overwhelming. In our own system, OSHA hearing officers are a good example. Can't happen here? Don't bet on it. The evidence is all around us. It is the Article I, not the Article III, trial judiciary that is today expanding, vital, and taking on ever more judicial responsibilities. The Federal Long Range Study Committee Report, in contrast, largely written by and protective of the functions of the heavily burdened courts of appeal, opts for a steady-state federal judiciary — saving itself for the really big federal case.

But what of the district court judiciary? Once civil juries are gone, I suppose we can continue to try the few criminal cases the executive cannot force to plead. I am not sanguine about the public funding support for such an enterprise. Surely the fate of the state criminal courts does not hold out much solace for us. Beyond that, let's face it — there's then little jurisprudential difference between us and the immigration law "judges," whose decisions now go straight to the court of appeals. And, sooner or later, Congress and the public will catch on as well. If, absent a jury, hearing officers are truly judges, aren't district judges then nothing but hearing officers?<sup>42</sup>

**"This is a trial court. A trial judge should go on the bench every day and try cases."**

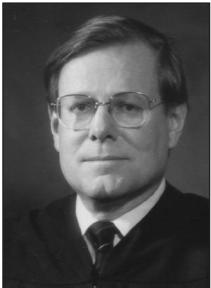
I am the 31st U.S. district judge to sit on a bench whose first occupant was appointed by President George Washington. If you count my prior state judicial service, I have been privileged now to serve for more than a quarter of a century — and I earnestly pray that I have a number of good years left in me. While I hope it is too soon to start thinking about my successor, this much is certain: he or she will be younger, stronger, and much smarter than I am. Will he or she have the same opportunity to participate judicially in the life of our nation that has been my happy and sustaining privilege and duty? I hope so.

The choice is for us to make. Either we will take up the burden of defending our nation's juries and make our voices heard whenever and wherever the right to a jury trial is at issue (and in so doing will secure the core values of the district court judiciary) —

Or we will not.

History will not judge kindly that generation of jurists that allows this "purest example of democracy in action,"<sup>44</sup> this "stunning experiment in direct popular rule"<sup>45</sup> to wither away.

Respectfully,  
William G. Young  
U.S. District Judge



## Endnotes

<sup>1</sup>Juror letter to Hon. Raymond J. Brassard, quoted by him in *Juries Help Keep Our Democracy Working*, BOSTON GLOBE, May 1, 2003, at A19.

<sup>2</sup>H. Ziesel, *The American Jury*, in *Final Report: The American Jury System* 72 (Roscoe Pound & American Trial Lawyers Foundation eds. 1977) (quoting the last paragraph in H. Kalvens and H. Zeisel, *The American Jury* [1966]).

<sup>3</sup>Joiner, *From the Bench*, in *The Jury System in America* 146 (R. Simon ed. 1975).

<sup>4</sup>See Hon. Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 59 (1977).

<sup>5</sup>P. D'Perna, *Juries on Trial* 21 (1984).

<sup>6</sup>Alexis de Tocqueville, *Democracy in America* 29 (H. Reeve text 1945).

<sup>7</sup>Kaufman, *A Fair Jury — The Essence of Justice*, 51 JUDICATURE 88, 91 (1967) (emphasis in original).

<sup>8</sup>de Tocqueville, *supra* at 297.

<sup>9</sup>In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution, 712 F. Supp. 994, 1004–1006 (D. Mass. 1989).

<sup>10</sup>United States v. Reid, 214 F. Supp. 2d 84, 99 n.11 (D. Mass. 2002).

<sup>11</sup>Kevin M. Clermont and Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142 (2002) (citing statistics of the Administrative Office of the United States Courts.)

<sup>12</sup>Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1899 (1998).

<sup>13</sup>See Hon. William H. Rehnquist, *The 1999 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH (Adm. Office of U.S. Courts, Washington, D.C.), Jan. 2000, at 4.

<sup>14</sup>See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 928 (2000).

<sup>15</sup>See David Williams, *Decline in Petit Juror Days*, tbl.2 (Sept. 2, 1999) (unpublished Dist. Ct. Admin. Div. document, Admin. Office of the U.S. Courts, Washington, D.C.).

<sup>16</sup>See *The Judiciary: Congressional Budget Summary Fiscal Year 2000* at 50 (Feb. 2000).

<sup>17</sup>See Hon. Edmund V. Ludwig, *The Changing Role of the Trial Judge*, 85 JUDICATURE 216, 216, 217 (2002) ("Trials, to an increasing extent, have become a societal luxury ... [although] 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 is a member of the Court Administration and Case Management Committee of U.S. Judicial Conference.)

<sup>18</sup>Ciulla v. Rigny, 89 F. Supp. 2d 97, 102 n.6 (D. Mass. 2000) (citing Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice and Civil Judging*, 49 ALA. L. REV. 133, 137–152 (1997) (decrying the failure of the Judicial Con-

ference to restore 12-person juries in civil cases), and *Developments in the Law — The Civil Jury*, 110 HARV. L. REV. 1408, 1466–1489 (1997) (same); see also Am. Coll. of Trial Lawyers, *Report on the Importance of the Twelve-Member Civil Jury in the Federal Courts* (2001), available at [www.actl.com/PDFs/Importance12MemberJury.pdf](http://www.actl.com/PDFs/Importance12MemberJury.pdf).

<sup>19</sup>*Berthoff v. United States*, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001), *aff'd* 308 F.3d 124 (1st Cir. 2002).

<sup>20</sup>*Id.* at 69 and n.34.

<sup>21</sup>Thanassis Cambanis, *New Federal Security Act Remains Largely Unused*, BOSTON GLOBE, June 23, 2002, at B1.

<sup>22</sup>See Adam Liptak, *Accord Suggests U.S. Prefers to Avoid Courts*, N.Y. TIMES, July 16, 2002, at A14.

<sup>23</sup>*United States v. Reid*, 214 F. Supp. 2d at 99 n.11.

<sup>24</sup>See Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312 (1997).

<sup>25</sup>See Alexis de Tocqueville, *Democracy in America*, 337–339 (Schocken 1st ed. 1961).

<sup>26</sup>Marc Galanter, *Viewpoint — How To Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994).

<sup>27</sup>*Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 63 n.74 (D. Mass. 1997).

<sup>28</sup>Louis Brandeis, *True Americanism: Brandeis on Democracy*, 25, 27 (Philippa Strum, ed., 1995).

<sup>29</sup>See Sam Roberts, *Alone in the Vast Wasteland*, N.Y. TIMES, Dec. 24, 1995, at D3.

<sup>30</sup>See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355, 99 S. Ct. 645, 58 L.Ed.2d 552 (1979) (Rehnquist, J., dissenting). *Lirette v. Shiva Corp.*, 27 F. Supp. 2d 268, 271–272 n.3 (D. Mass. 1998); see Stephen N. Subrin, *On Thinking About a Description of a Country's Civil Procedure*, 7 TUL. J. INT'L & COMP. L. 139, 150–152 (1999). See generally *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 63 n.74 (D. Mass. 1997).

<sup>31</sup>See Edward F. Hennessey, Henry Clay and T. Marvell, *Complex and Protracted Cases in State Courts* (National Center for State Courts 1981).

<sup>32</sup>*In re Acushnet River*, 712 F. Supp. at 1006 and n.23.

<sup>33</sup>See Elisabeth Bumiller and David Johnston, *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>34</sup>Thanassis Cambanis, *Juror Scrutiny Reaches New Level*, BOSTON GLOBE, July 12, 2002, at B1.

<sup>35</sup>See *Trial as Error*, *supra* at 1003.

<sup>36</sup>Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

<sup>37</sup>But see *Ciulla v. Rigny*, 89 F. Supp. 2d 97, 100–103 (D. Mass. 2000) (offering such a defense).

<sup>38</sup>See, e.g., Employee Retirement and Income Security Act, 29 U.S.C. § 1001 *et seq.*; *Andrews-Clarke v. Travelers Ins. Co.*, 984 F. Supp. 49, 63 n.47 (D. Mass. 1997); Private Securities Litigation Reform Act, 15 U.S.C. § 78u *et seq.*; *Lirette v. Shiva Corp.*, 27 F. Supp. 2d 268, 271 n.3 (D. Mass. 1998).

<sup>39</sup>Valerie P. Hans, *Business on Trial: The Civil Jury and*

*Corporate Responsibility* 226–227 (2000).

<sup>40</sup>Leonidas Ralph Mecham is, and has been since 1985, the director of the Administrative Office of the U.S. Courts.

<sup>41</sup>AEDPA, the Anti-terrorism and Effective Death Penalty Act, and its cousin IIRIRA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of the U.S.C.), are recent examples of “jurisdiction stripping” legislation, a legislative technique that descends directly from bills proposed in the 1980s to strip federal courts of jurisdiction over abortion and busing, Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1552 (2001). As commentators have noted, “jurisdiction stripping” is, in effect, “rights stripping,” Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 129–130 & n.1 (1981) (arguing that such measures unduly burden constitutional rights); contra Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 U.C.L.A. L. REV. 233, 261–269 (1988) (discussing a study on parity of state and federal courts), because it removes, in a single stroke, the nuanced views of the 674 federal district judges from the rich common law tradition of evolutionary statutory interpretation and leaves the matter solely to 12 circuit courts of appeal and the Supreme Court. Although society — acting through Congress — recoiled from thus rights stripping women and African-Americans, it had no such hesitancy concerning felons and aliens. It is likely that resorting to this technique will become more frequent with the concomitant erosion of the very rights a truly independent judiciary was designed to protect. Circuit judges who argue for the primacy of the courts of appeal in first-instance adjudication — though this is not their intent — strengthen the chance that Congress will again turn to this maneuver to reduce individual liberties. See, e.g., *McConnell v. Federal Election Comm'n.*, 2003 WL 21003103, at \*1 n.1 (D.D.C. May 1, 2003) (Henderson, circuit judge, concurring in part, dissenting in part) (“[T]he Circuit court is far more familiar with, and far better equipped to handle, the briefing-and-argument mode of judicial decision-making than is the trial court”).

<sup>42</sup>See Judith Resnik, *Trial as Error* at 11015–11020.

<sup>43</sup>Hon. John H. Meagher, senior justice of the Massachusetts Superior Court, to the Court in 1978, shortly after I entered upon judicial service. I have never forgotten these words and have tried to live up to them. Everything said above just follows naturally.

<sup>44</sup>Juror letter, *see n.1*, above.

<sup>45</sup>Alexis de Tocqueville, *Democracy in America* at 337–339.