

Judge William G. Young Speech at Judicial Luncheon
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"I consider trial by jury the greatest anchor ever yet devised by humankind for holding a government to the principles of its constitution." Thomas Jefferson, 1792

Fast forward 217 years. We are trying Nygell Jones - felon in possession of a firearm. Now those are rather straightforward cases. This one had a wrinkle. Jones is acquitted. Now when that happens, a judge gets to utter, among what are the most profound words that are given to us to speak, and the judges all know how to do it and the jury comes back and they return their verdict of "not guilty" and the very next thing the judge says, "Mr. Jones, the jury, having found you not guilty, you are discharged. You are free to go without day, unless there be other process against you." Then you turn and you thank the jury and you recess.

Now Jones, no fool, he has hotfooted it out of the courtroom, because, in fact, there are three other detainers against him. And soon we have got four marshals chasing him through the Financial District, to serve those detainers. The marshal comes to me. She is not happy. She says to me, "Judge you can't do that. You have to send him back to us to be processed."

And I explained, I am afraid not too gently, that that is not how it works. That when a jury of the people pronounced the verdict "not guilty," the government lost all hold on Mr. Jones instantly, and if they wanted to serve him with other process, there had better be a deputy marshal in that courtroom, with the process ready to take him into custody.

One more story, because this one catches both the vision and the reality. We are trying a short case, a three or four day case. We are on the second or third day. A juror is coming into Boston, her car breaks down on what we call the Southeast Expressway, a main artery clogged in the morning. Her fuel pump goes. She drifts off into the breakdown lane. She gets out of her car. This is Massachusetts. Nobody stops. Nobody helps her. Everyone just

goes by. She's standing there in the rain. Eventually, our safety net kicks in. Here is a Massachusetts state trooper. He puts on the yellow flashing lights. He gets over into the breakdown lane, protective of her car. He is getting out of his cruiser, when she walks back to him and says, "I am a juror in federal court! Take me to the courthouse!" Mother of God! And you know what the trooper does? He puts her in the cruiser. He turns on the blue lights and he starts barreling up the Southeast Expressway. What's more, he has got a radio. He's patched through to us. We know the juror is coming in. I am ecstatic! This is what we want! This is what we want from jurors. You know, it is just amazing! I am at the window, looking out into the rain. Then the cruiser comes up. It swoops in in front of the courthouse. She gets out. Very slow elevators in our courthouse. Veery slow. Veery slow she comes up. She gets out of the elevator on our floor and she starts running along the hallway. And my clerk --- you know, once you have got an empanelled jury, the judges are not supposed to have direct interaction with the jurors---so it is the clerk who is talking to her. But I am there at the edge of my lobby, ready to go. Is she ever inspiring, and she is out-of-breath and she says, "The trial. . . I tried." We've been down only about 17 minutes, you know. She's done it! And she says she wants to call AAA to get her car towed. It is there on that big highway. So I could never talk to her, but I could step out, usher her into the lobby. I have a phone there. She goes in. She calls. You all know what happens. She's there in the courthouse. Her car is out on the Southeast Expressway. She's not there. They won't tow her car. They are afraid of liability. I go crazy. "Give me that phone. Do you know who this is? You get someone out there to tow that lady's car!" You know, respectfully, that violates about four judicial canons, but it captures the idea. And I honor that juror, because she, at least, has the vision.

So, let's talk just a few moments about juries. I am transparent. Here's the point I am here to make: that the American jury system is the strongest guarantor of judicial independence that we have.

Consider the jury. Consider, first, the structure of our federal government. There are five classes of constitutional offices. Let's go through them. This is review, but you can handle

it.

Article I, sets up the Congress first. Two classes of constitutional offices: the House of Representatives and the Senate. Meant to check each other and to check the other two branches.

Article II, sets up the presidency. A unitary presidency. The only branch of government on duty 24-7. A single president. Also mentioned is the vice president. I read somewhere that he thinks he is not in the executive branch of government, but it doesn't fit my theory. In any event, it is very clear, the vice president is not supposed to be a check on the president, so figure one constitutional officer: the president and the backup, the vice president. Those are the only two constitutional officers in the executive branch of government. Everybody else works for the president.

Article III - now you all know Article III - it reads like this: "The judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress from time to time may ordain and establish." And then the next two sentences talk about judges.

So, we are up to four now. "Representatives," "senators," "president," "judges" and then after those two sentences, it says this. Now this in the organization of government. This isn't in a Bill of Rights. "All criminal cases, except for impeachment, shall be tried by jury." "Jurors," in their fact-finding role, are constitutional officers.

The founders, Akhil Amar tells us could not conceive of a federal judge exercising the jurisdiction of a federal court in criminal matters, unless she were sitting with jurors, who were to check and temper that judge and, together, they were to check the other two branches of government. So, we embarked on what (Alexis) de Tocqueville called the most stunning experiment in direct democracy ever seen.

Direct democracy, the people themselves ruling directly. The New England town meeting

writ large. Has there been, is there, in our form of government, any deeper expression of hope? Hope that the people, themselves, can come to understand the laws and the Constitution, no matter how complex, and then, without bias, can fairly and independently apply that law to the adjudication of particular disputes.

No country, in the history of the world, has turned to jurors more than the United States of America. No country. And look at what has happened. Look at what has happened. The fact that it was necessary to explain the law to real, average people who came in off the streets has worked an extraordinary empowerment on the judiciary of this country. The fact that we share the judicial power with juries has only made judges stronger, so that today the judiciary of the United States is the most independent and most envied judiciary in the world. How so? Very practically, very realistically. Trial judges knew, from the inception of our country, that it was necessary to teach, to explain to others, what the law really meant. And if the essential role of the judiciary was teaching, as all of those of you who are engaged in teaching know so well, you've got to understand the subject matter.

I can't tell you what a revelation that was for me when I went from the bar to the bench, now some 30 years ago.

I had been an active lawyer. I had been a law clerk and I kept reading the decisions of the bench for which I had clerked and, in my shallow advocate's way, I lined them up either for me or against me, or I could distinguish this one. And then I had the responsibility and the privilege of judicial office. And, for the very first time, I had to figure out: What do they mean? What do they want me to tell the jury? How is this supposed to work in actual society?

When you do that, and all judges do, you realize, in a country under a written constitution, it is incumbent upon you to harmonize that supreme law, the Constitution, with the expression of that law by the legislature. And sometimes you can't do it.

Go back to the presidency of Thomas Jefferson and the Embargo Act, in a case called "The William." There, an individual trial judge, exercising his duty to interpret the law -- an individual trial judge, nine years after *Marbury v. Madison*, declared that he --- and in those days it was he --- declared that he had the judicial responsibility to declare an act of Congress unconstitutional. And constitutional scholars have told us that, outside the decisions of the Supreme Court of the United States, the decision of the United States District Court in "The William," is the most significant constitutional decision in our history, because that doctrine has flourished. Yes, trial judges are subject to *stare decisis*. Yes, we must faithfully apply the mandate of the courts that are above us, but we must decide. We must decide in specific cases. We must explain to juries in specific cases, and we cannot wait for the law to be clearly or finally resolved. And so, because we rely upon juries more than any other country, we are the only country, the only country in the history of the world, to give constitutional interpretation to first-line trial judges. No other country does that. All countries --- not all --- most democracies have constitutional courts, the final word on the Constitution, analogous to our Supreme Court. They have one, just like we have the Supreme Court. Germany, Japan, Italy have constitutional courts, and today they are democracies. France, Israel, Russia even, has a constitutional court, and they profess to be democracies. They are not American democracy. The Constitution is as close to all of you and all of our people around us as the closest court. Walk into any court---any court, state and federal---and you will see constitutional issues daily. Why? Because it has to be taught. It has to be explained and, ultimately, it has to be explained to our people. Today, more than 90 percent of the jury trials on the planet take place in the United States.

Yet the American jury system is dying. It is dying faster in the federal courts than in the state courts. It is dying faster on the civil side than that on the criminal side, but it is dying. It will never go entirely, but it is already marginalized. It is not at the center of our political discourse. How is this possible, with our Constitution and every one of the 50 state constitutions guaranteeing the right to trial by jury? The general answer is that we do not care.

There is not, in the United States today a direct attack upon the jury system. No popular referendum that has used the word "jury" has ever passed when it has been put to the people to restrict the right to trial by jury. In every respect, the attack is always indirect. But it is true that the jury -- direct democracy -- is the most vital expression of local government - state or federal - that exists. And local government, after the Civil War and the civil rights movement, is not held in high esteem generally. We tend, today, to think that problems should be solved nationally and from the nation we take our direction.

We must remember that the great authorizing force - the great authorizing standard in America is democracy. Democracy writ large is found in the franchise. Retail democracy, person to person or person to government, is found in the jury. It is the basic authority of our government. But it is dying. Sometimes the attack comes from special interests and they, in the name of reform, they grab the attention of the legislature, and then by indirection, the right to trial by jury is narrowed. More difficulties are thrown in its way, but the attack is not direct.

I am here to say, respectfully, that it is the judiciary that has failed constantly and incessantly to place, at the very center of its operations, the jury trial. In part, this can be traced to the decisions of the Supreme Court, which we must follow. Scholars, in a brilliant article, a contrary article, by a former clerk to Justice Stevens, Andrew Siegel, I don't know him, but the title is "The Court Against the Courts." Alright, now what does that mean? His article is about the disdain shown by the Supreme Court for lower courts and some of his examples are these and they resonate.

It used to be --- it used to be--- that to give up the right to trial by jury required a knowing, intelligent, voluntary and case-by-case waiver. Not when arbitration is in play. Do any of you trade on the New York stock exchange? You've given up your rights. Do you have long distance phone service? You've given up your rights. Do you use cell phones? You've given up your rights. Work for Circuit City or other major employers? You've given up your rights to trial by jury.

What about preemption? Preemption - Congress passes ERISA and the Supreme Court reads preemption broadly and suddenly it's snapping up out of the state court all these consumer protection cases so long as the defendant is an insurance company. Boom, you are here in federal court. I remember such a case, a wrongful death case against an insurance company. Well pled. So I had an initial case management and scheduling conference and I said, "Now when do we go to trial with this case?" The defense lawyer said, "Judge, the case isn't going to trial." I said "Well, we will get a motion to dismiss on it, I guess, but when will we schedule it for trial." "No, it's not going to trial." I said, "Why not?" He said, "It's preempted." I said, "I understand it's preempted. That's what brings it to federal court. I have that concept in mind." He said, "But, Judge, there is no remedy in federal court." "Wait a minute," I said. "Here's this state court case, wrongful death. We've had wrongful death cases at least 200 years in Massachusetts and you snatch this case out of state court. I used to be a state judge. Now we are in federal court and you are telling me you're properly here, but there is no remedy?" And, I can be meaner than that, but he's a very good lawyer and he stands up to me, as you all should, and he says, "That's right." I go crazy. I am off the bench. I tell all the law clerks. "That's wrong, find a way around that." It ain't wrong. That's the law. I throw the lady out of court. That doesn't make it right. But how about the constitutional right to trial by jury?

I only talk about my federal colleagues, but the problem is pervasive. In all honesty, we have lost our way. In 1988, the average on bench time - average - of a United States district judge was 790 hours. You know what it is today? Fiscal 2005, I guess, is the closest I can come. Do you know what it is today? 437, and of that, 225 hours are on trial. That's the average. Now the institutional judiciary hates it when I say that, because your immediate reaction is we're not working and that's wrong. We are working as hard or harder---and I have been privileged to be a federal judge for 22 years---than we have ever worked before. And what are we doing? Do you know it took 75 years for *Federal Supplement*, the vanity press for district judges, to go the first 1000 volumes. I've been a federal judge for 22 years and my first published opinion was 656 F.Supp. And my most recent opinion was 477 F.

Supp. 2d. If I survive three more years, I will have opinions in a 1,000 volumes. Not in all 1,000, but spanning 1,000 volumes. And what are they about? Are they about great cases, findings and rulings? There are a few. You know what they are about? Pat Wald, former chief in the D.C. Circuit, said this in a famous lecture. She said, "The jurisprudence of the federal court is the jurisprudence of summary judgment," and if she had added motions to dismiss, she would have gotten it right. Page after page of these carefully reasoned adjudications with the reasons why we don't go to trial. And you wonder why trials are vanishing. Here's the former president of the Federal Judge's Association right in The Third Branch. That's our house organ. Ask her how it's working. She's telling us what the job is. And she is a very good judge. And here is what she says: "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 and expense. Mediation, even when it occurs early, doesn't always succeed in resolving the case. The lawyers engage in contentious discovery that requires an enormous amount of attention, both from magistrates and judges."

Litigation management. Hardly a shining vision, is it? 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. Now I am not saying that this view of the law on the part of trial judges is unanimous. It's not. Florida is a magnificent exception. What Marc Galanter calls "an island of resistance." Here, among you, you honor the trial process. I would like to think we do in Massachusetts as well. They do in Texas and I refer to a Texas judge. She summed it up this way. She said: "Well, some of them drink white wine and hold conferences. I drink whisky and try cases."

When I came to the state bench in Massachusetts, the senior active judge told me this. He said, "This is a trial court. Trial judges go out on the bench every day and try cases." I always thought that was what the job was. Think for a moment the different tenor, the

different tenor in how a judge learns, if you don't have that 790 hour face time with the judge. The judge is going to work on your case. The judge is going to work terribly hard. He is going to talk to his law clerks. They are smart. Very smart. In pleasant surroundings. This is what a courtroom deputy clerk, the famous courtroom Deputy Clerk Austin Jones told me about the judge for whom he, for many years he was the courtroom deputy. Austin Jones, and it is a name to conjure with in Massachusetts, was courtroom deputy clerk to Franklin Ford. And he told me Frank Ford said this, "You have got to go out on the bench, Austin, and listen to the bastards. They might just have something."

A very few voices have been raised to say that when we get away from daily jury trials, when we get away from fact-finding, which is, of course, what the trial bench contributes to the process, judicial independence is weakened. Truly, the eclipse of fact-finding foreshadows the twilight of judicial independence.

Then, at 8:56 a.m., September 11, 2001, the world turned upside down and the future became present. And words of Ronald Reagan, that I thought were prophetic, became starkly real. "Liberty," said Reagan, while he was governor. "Liberty is a fragile thing. It 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."

And those 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. And the press began to speak of courts as simply a parallel track. And when you have done away with the common sense and practical case-by-case, nonbinding on other cases, resolution of jurors, you face some very ugly issues. For the first time, for the first time in my memory and I think our history, the Congress has had to debate whether torture is a public policy of the United State. Torture - and we don't say that, of course, we say "harsh

interrogation techniques.” But nobody is fooled. Lincoln, a great trial lawyer, had a story for it. He got it from a case where the other side was twisting words like this. In the middle of the case Lincoln looked at him and said, "How many legs does a sheep have?" The other fellow, a straight man, said "Four." Lincoln said, "Now, if you call the tail a leg, how many would it have then?" The other fellow fires back, "Five." And Lincoln said, "No, the sheep would still have four legs. Calling a tail a leg doesn't make it a leg." So here.

And the writ of habeas corpus? The Supreme Court respectfully, waiting for the case – – minimalists, as the Supreme Court ever should be – – says in *Hamdi*, "Mr. President, it's about the writ of habeas corpus. It's in Article I. That's the Congressional article. We are not clear that Congress has suspended it." And then Congress says, "What? Not clear? Alright." And then they do something they do something that all the martial prowess and military power of the Southern Confederacy could never achieve, for those whom the President has designated enemies of the state, they have suspended the writ of habeas corpus. And I suggest to you when they did that, they took the sword of justice and dropped it in the dirt. Now some of them say they want it back, but they are going to find, sadly, that regaining a right once surrendered is far more difficult than fighting for a right long possessed.

Let me tell you what jurors have done during this period. In the days after 9-11, jurors, and I have the nationwide statistics --- this has nothing to do with Massachusetts --- jurors turned out in response to summons for jury service as never before in our history. They came to do the work. They came to support our governmental institutions. And most magnificently, and the studies are now in, and during that period, in the near hysteria following 9-11, in the year following, the conviction rate remained absolutely constant. It didn't go up in favor of the executive branch. The allegiance of jurors to our governmental institutions was an allegiance to justice.

And so I am here for a very simple reason. I am here to ask, to beg you, to think on these things. To ponder these things. And having thought individually, to act on your individual

convictions.

And I am going to give you a place where I want you to go and ponder. I want you to go back into court when they are taking a jury verdict. It doesn't have to be your case. Not all of you are trial lawyers, but you all understand, go into court where they are taking a jury verdict. You all know how it is done. The jury tells us we have a verdict. Things are set up in the courtroom. Everyone is ready: litigants, lawyers, and the jury comes through the door. Everyone looks. How is the jury? Are they looking at the defendant? Are they drawn? Are they haggard? Are they comfortable among themselves? Court is in session. The clerk says, "Madame forelady. Has the jury agreed upon a unanimous verdict?" The forelady says, "Yes." The deputy clerk says, "Pass the verdict slip." It is passed up, with all eyes on the verdict slip. It is passed on to the judge. The judge opens it. Looks at it first. Says, "The verdict is in order and it may be recorded," and gives it back to the clerk. The clerk looks at the jury and says, "Ladies and gentlemen, would you please rise." And they all stand up, awkward now. Dead silence in the courtroom. Everybody watches that verdict slip. And then the clerk says this, "Ladies and gentlemen, hearken to your verdict as the court records it."

At that moment, if ever you have been there, and when next you go, you will know, with an incontrovertible shudder down your spine, that you are witnessing the purest form of democracy known to humankind. And, if you can, at that moment, and I ask you to tear your eyes away from that verdict slip and give way to a larger vision. Holmes says at that moment, if you do that, you will touch the infinite. Because somewhere up there, behind that clerk, will be the flag. You'll see it and -- yes, I am going to do this -- That is the flag of the United States of America. That flag still stands for freedom. You know it always will. For, where a jury sits, there burns the lamp of liberty.

Go, and make it so.

