UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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| IN RE: NEXIUM (ESOMEPRAZOLE) ANTITRUST LITIGATION | ) | CIVIL ACTION NO. 12-md-02409-WGY |

MEMORANDUM AND ORDER

YOUNG, D.J. July 30, 2015

## I. INTRODUCTION

I did not try this case very well. I did try it fairly. As the Supreme Court has recognized, "a litigant is entitled to a fair trial but not a perfect one." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984) (internal quotation marks and alterations omitted); see also Kyle v. United States, 297 F.2d 507, 514 (2d Cir. 1961) (Friendly, J.) (noting that "the interest in obtaining an ideal trial . . . may be outweighed by the interest in avoiding a retrial unlikely to have a different outcome"). The question now before this Court in considering these post-trial motions is thus whether the trial proceedings here were sufficiently fair that one can have a strong degree of confidence in the outcome. The answer to that question is that they were.

This multi-district litigation case is one of a spate of antitrust claims that turns on the Supreme Court's

## VII. ORDER FOR JUDGMENT

As discussed above, the motions for a new trial, ECF Nos. 1450, 1453, must be, and hereby are, DENIED.

When viewed through a certain lens, the jury's finding that the AstraZeneca-Ranbaxy Settlement Agreement is "anticompetitive" in nature supports an argument that the Court enjoin whatever negative effects are stemming from it. Having determined, however, that (1) the AstraZeneca no-AG clause is effectively dismantled as of January 26, 2015 and (2) that the jury was unable to find that Ranbaxy could actually have launched before May 2014 through a Teva partnership, a **DENIAL** of the motion for permanent injunction, ECF. No. 1457, must logically follow. Judgment will enter for AstraZeneca and Ranbaxy.

## VIII. WAS IT WORTH IT? – YES, TRIALS MATTER

"The faces of the United States district courts are fading," laments Judge Patrick Higginbotham as judges retreat from their core function as trial judges to become unseen government administrators. Patrick E. Higginbotham, The Present Plight of the United States District Courts, 60 Duke L.J. 745 (2010).[49] Year by year, federal district

[49] Indeed, it was Judge Higginbotham who first commented on this phenomenon in his seminal article, "So Why Do We Call Them Trial Courts?" Patrick E. Higginbotham, Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola

judges spend less and less time out on the bench, Jordan M. Singer & Hon. William G. Young, Bench Presence 2014: An Updated Look at Federal District Court Productivity, 48 New Eng. L. Rev. 565 (2014),[50] even though it is their presence in the courtroom that best affords principled adjudication to America's most underserved litigants. See Hon. William G. Young, Keynote: Mustering Holmes' "Regiments", 48 New Eng. L. Rev. 451 (2014). The fact that actual trials are so scarce leads distinguished commentators to conclude that the federal courts are in decline. See Koh, supra at 23. One even goes so far as to suggest that the civil jury trial has outlived its usefulness and that the Seventh Amendment ought be repealed. Renee Lettow Lerner, The

University School of Law: So Why Do We Call Them Trial Courts?, 55 SMU L. Rev. 1405 (2002). Today, the marginalization of our trial processes is so well documented as to need no extensive argumentation. See D. Brock Hornby, The Business of the U.S. District Courts, 10 Green Bag 2d 453 (2007).

[50] "After reviewing statistics gathered by the Administrative Office of the U.S. Courts, researchers reported a steady year-over-year decline in total courtroom hours from 2008 to 2012 that continued into 2013. Federal judges spent less than two hours a day on average in the courtroom, or about 423 hours of open court proceedings per active district judge." Judith Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L.J. 2804, 2935 (2015) (footnotes and quotation marks omitted).

Uncivil Jury: Part 5: What to do Now – Repeal and Redesign, THE VOLOKH CONSPIRACY (May 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-uncivil-jury-part-5-what-to-do-now-repeal-and-redesign/.

The remarkable unanimity of opinion as to the present marginalization of our trial processes requires brief comment on the continuing vitality and social utility of jury trials in general[51] and this trial in particular, as well as an even briefer look at some of the alternatives such marginalization has allowed to flourish.

There are, of course, "islands of resistance" to the ominous trend depicted above. Marc Galanter, The Hundred-Year Decline of Trials and the Thirty Years War, 57 Stan. L. Rev. 1255, 1273, n.63 (2005). Jury trials and judicial bench presence have their advocates.[52] See, e.g., Harry T.

[51] That jury trials enhance civil engagement today just as they did in De Tocqueville's time is so well documented as to need no further exposition here. John Gastil, E. Pierre Deess, Philip J. Weiser & Cindy Simmons, The Jury and Democracy: How Jury Deliberation Promotes Civil Engagement and Political Participation, New York, Oxford Univ. Press (2010); Valerie P. Hans, John Gastil, & Traci Feller, Deliberative Democracy and the American Civil Jury, 11 J. Empirical Legal Studies 697 (2014).

[52] "I trace the reawakening of our interest in traditional trial processes to a moving speech given by the Hon. Joseph F. Anderson, Jr., of the District of South Carolina at the 2003 annual meeting of the chief district

Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 Harv. L. Rev. 668 (1986); Steven S. Gensler & Lee H. Rosenthal, The Reappearing Judge, 61 U. Kan. L. Rev. 849 (2013); Alex Kozinski, Criminal Law 2.0, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xx-xxi (2015);[53] 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 (2003); Arthur Miller, Awards Luncheon

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court judges on April 26, 2003. In his speech, Chief Judge Anderson called upon trial judges to devote themselves to the core function of the judicial office, namely the fair and impartial trial of cases. Echoing a similar theme, Alex Sanders, one of America's foremost jurists, minces no words: '[t]rial judges should return to being trial judges, instead of docket managers. They should start treating jury trials as a vindication of the justice system rather than a failure of the justice system. They should revere and respect the jury trial as the centerpiece of American democracy.'" Hon. William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 84-85 (2006).

[53] Judge Rosenthal and Professor Gensler's article offers eminently sensible advice for managing one's docket from the bench. I try hard to follow it. Most of Judge Kozinski's "suggestions for reform" of our jury system are not new and have long been staples of jury practice in this Court, including giving the jury a say in sentencing. See United States v. Kandirakis, 441 F. Supp. 2d 282, 303 (D. Mass. 2006); United States v. Gurley, 860 F. Supp. 2d 95 (D. Mass. 2012). In this case, I used all of his applicable suggestions in order to have an informed and empowered jury. I always do.

Speech, AAJ 2012 Annual Conference, Chicago (July 31, 2012); J. Harvie Wilkinson III, In Defense of American Criminal Justice, 67 Vand. L. Rev. 1099, 1157 (2014).

Even more important than academic advocacy are those real world federal district courts most productive in trials and bench presence. The top five between 2009 and 2014 are (in order) the Southern District of Florida, the Eastern District of New York, the District of Colorado, the Eastern District of California, and the District of Idaho. Young, supra at 93, at 465-74.[54] How can we learn from these courts' efficient use of judicial time to try cases and remain out on the bench? We should, for trials (especially jury trials) still remain, as Thomas Jefferson put it, "'the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.' Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 The Papers of Thomas Jefferson 266, 269 (Julian P. Boyd ed., 1958)." United States v. Orthofix, Inc., 956 F. Supp. 2d 316, 336 n.31 (D. Mass. 2013).

[54] As one might expect, the judges of these courts are strong advocates of our jury trial system. See, e.g., B. Lynn Winmill, Chief Judge of the United States District Court for the District of Idaho, Address at the Idaho State Bar Convention: The Wisdom of the Crowd: Why The American Jury Trial System Works (July 23, 2015).

> [T]oday's courts serve . . . as a site of democratic practices. Courts model the democratic precepts of equal treatment, demonstrate that the state itself is subject to democratic constraints, and facilitate democratic revisions of governing norms. Adjudication is an odd moment in which individuals can oblige others to treat them as equals as they argue in public about their disagreements, misbehavior, wrongdoing, and obligations. Courts are the great leveler, as the goals of participatory parity and reciprocal respect require that all participants, including the government, act as their opponents' equals.
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> Litigation forces dialogue upon the unwilling and temporarily alters configurations of authority. The public facets either make good on egalitarian promises or prompt inquiries (such as the gender, race, and ethnic bias task forces of the 1980s and 1990s) into the failures to live up to them. Moreover, rights of audience divest the litigants and the government of exclusive control over conflicts and their resolution. The public and the immediate participants see that law varies by contexts, decisionmakers, litigants, and facts. Through democratic iterations--the backs-and-forths of courts, legislatures, and the public--norms can be reconfigured.
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> As in other democratic processes, such as majoritarian voting, the outputs are widely varied. Public awareness can generate new rights, such as freedom from domestic violence, and new limitations, such as caps on monetary damages for malpractice . . . .
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> [C]ourt-based publicity . . . enable[s] debate about norms, and the ascent of participatory rights in public judicial processes prompted significant investments in the courts. The shift towards ADR represents the decline of adjudication, and, with it, the role of the federal courts. . . . The current solutions privatize procedures, and those put at risk are not only litigants or members of the potential audience but the judges themselves.

Judith Resnik, supra at 24 at 1836-37.

So it was here: public adjudication aptly and ably aired the grievances of the parties to this case. Witnesses with actual knowledge testified forthrightly through able and searching direct and cross examination. What emerged was a richly detailed picture of how these questioned settlement agreements actually came into being against the real world economic incentives and realities. It is a picture with focus and precision that the pallid affidavits submitted in aid of summary judgment motions could not approach, much less equal.[55]

And what was learned?

First, the wisdom of Justice Breyer's observation in Actavis that arcane questions of patent law need not dominate a pay-for-delay case was unequivocally and irrefutably confirmed. See Actavis, 133 S. Ct. 2223, 2230-31 (noting that "to refer . . . simply to what the holder of a valid patent could do does not by itself answer the antitrust question").

[55] "The affidavit is the Potemkin Village of today's litigation landscape. Purported adjudication by affidavit is like walking down a street between two movie sets, all lawyer-painted façade and no interior architecture." Massachusetts, 781 F. Supp. 2d at 22, n.25.

Second, the jury verdict – amply supported by the evidence – put paid to the Plaintiffs' largely speculative claims of antitrust injury. Tested against the common sense of actual jurors, the Plaintiffs' evidence fell short. Far short. The message is clear – the plaintiffs' bar will need far more detailed evidence of events in the "but-for" world before a jury will find actual antitrust damages.

Most important, here the jury has **found as fact** that the "no-AG" clause central to the AstraZeneca-Ranbaxy Settlement Agreement was a large and unjustified reverse payment with anticompetitive effects outweighing any procompetitive justifications. This real-world **finding** is of surpassing importance. It is as much "a development in the law" as it would be were I to have made this same finding in the context of a jury-waived proceeding, for

> [j]urors are as much constitutional officers as are [judges], U.S. Const., art. III, § 2, cl. 3 (criminal cases), id., Amend. VII (civil cases). Indeed, when applying the law to the facts they have found, jurors are supreme. Their verdicts are an even more important indicia of legal development as they come from the people themselves, a transparent expression of direct democracy.

S.E.C. v. EagleEye Asset Mgmt., 975 F. Supp. 2d 151, 161 n.12 (D. Mass. 2013). No longer can the pharmaceutical industry simply assume that no antitrust liability can

attach to the use of no-AG clauses simply because the FTC cannot, or has not, barred them. Why? An American jury has said so.

To make the point, here are just a handful of important jury findings, each signaling an important development in the law:

- Ciulla v. Rigny, 89 F. Supp. 2d 97, 98 (D. Mass. 2000) (search of a female detainee by matron in a holding cell involving minimal disarray of outerwear nevertheless violated detainee's civil rights where cell had an observation window accessible to male officers);
- United States v. Gurley, 860 F. Supp. 2d 95, 116 (D. Mass. 2012) (jury finding as to drug quantity requires lesser sentence – presaging Alleyne v. United States, 133 S. Ct. 2151 (2013)). See also United States v. Newton, 13-cr-10164, Jury Verdict, ECF No. 418;
- EagleEye Asset Mgmt., 975 F. Supp. 2d at 160-61 (financial advisor violated Securities Exchange Act of 1934 by fraudulently failing to disclose his foreign exchange trading record to his clients notwithstanding the absence of an SEC regulation addressing the issue);
- United States v. O'Brien, No. 12-cr-40026-WGY, Jury Verdict, ECF No. 579, appeal docketed, Nos. 14-2313; 14-2314; 14-2315 (1st Cir. Dec. 9, 2014) (giving state lawmaker patronage power to hire state employee constitutes an illegal gratuity under Mass. Gen. Laws ch. 268A, § 3(a));
- United States v. Wairi, 14-cr-10143-WGY, Jury Verdict, ECF No. 91 (child pornographer's surreptitious videos of young boys showering and changing into swim suits, though a gross invasion of privacy, not "lascivious" as that term is used in 18 U.S.C. § 2256(2)(A));
- Denault et al. v. Town of Chelmsford et al., 14-cv-13687-WGY, Jury Verdict, ECF No. 121 (police officer who ignored town's regulations about return of property liable for conversion notwithstanding that property had been seized lawfully from criminal).

It is well and truly said that "where a jury sits, there burns the lamp of liberty." Hon. William G. Young, U.S. District Judge, Address at the Judicial Luncheon, Florida Bar's Annual Convention in Orlando (June 28, 2007). Another approach to assessing the value of jury trials is to consider what happens wherever the people's jury is excluded. Here are but a few examples, as fresh as today's headlines:

**A. Fact-Finding is Debased**

It must never be forgotten that for seventeen years under the oxymoronic mandatory sentencing guidelines system, every single federal criminal defendant received a sentence that is today unconstitutional. United States v. Booker, 543 U.S. 220, 245 (2005). Fortunately, today the Supreme Court has made clear the constitutional command: "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." Cunningham v. California, 549 U.S. 270, 281 (2007).

Even so, under today's advisory guideline system, we judges continue to enhance criminal sentences without juries and without any evidence at all, piously talking

about “preponderance of the evidence” when all we have before us is a presentence report reiterating multiple hearsay. It need not be this way. The jury appropriately can have a role in sentencing. United States v. Kandirakis, 441 F. Supp. 2d 282, 315 (D. Mass. 2006). See also Kozinski, supra at 95; A Jury Draws a Line, N.Y. TIMES, June 2, 2012, at A20.

**B. Forced Arbitration[56] Destroys Individual Rights**

Today, forced arbitration bestrides the legal landscape like a colossus, effectively stamping out the individual’s statutory rights wherever inconvenient to the businesses which impose them. What is striking is that, other than the majority of the Supreme Court whose questionable jurisprudence erected this legal monolith, e.g. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983), no one thinks they got it right – no one, not the inferior federal courts, e.g. In re Am. Exp. Merchants' Litig., 667 F.3d 204, 206 (2d Cir. 2012) rev'd, Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct.

[56] Forced arbitration arises from arbitration clauses imposed on consumers as a cost of engaging in many of the routine aspects of daily living, e.g. making telephone calls and using the nation’s wireless network.

2304 (2013); Jackson v. Rent-A-Ctr. W., Inc., 581 F.3d 912, 916 (9th Cir. 2009) rev'd, 561 U.S. 63 (2010), not the state courts, e.g. Allied-Bruce Terminix Cos., Inc. v. Dobson, 628 So. 2d 354, 357 (Ala. 1993) rev'd, 513 U.S. 265 (1995); Casarotto v. Lombardi, 274 Mont. 3 (1995) rev'd, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996), not the Equal Employment Opportunity Commission, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1479 (D.C. Cir. 1997) (collecting cases),[57] and certainly not the academic community.[58] Indeed, even the respected American

[57] See also EEOC Notice Number 915.002 (July 10, 1997), http://www.eeoc.gov/policy/docs/mandarb.html.

[58] See generally Ronald G. Aronovsky, The Supreme Court and the Future of Arbitration: Towards A Preemptive Federal Arbitration Procedural Paradigm?, 42 Sw. L. Rev. 131 (2012); Stuart M. Boyarsky, Not What They Bargained for: Directing the Arbitration of Statutory Antidiscrimination Rights, 18 Harv. Negot. L. Rev. 221 (2013); Dustin Charters, Uphill Battle or Insurmountable Peak? The Pursuit to Uphold Provisions Within Arbitration Agreements, 47 Idaho L. Rev. 679 (2011); Carolyn L. Dessin, Arbitrability and Vulnerability, 21 Temp. Pol. & Civ. Rts. L. Rev. 349 (2012); Christopher R. Drahozal, Why Arbitrate? Substantive Versus Procedural Theories of Private Judging, 22 Am. Rev. Int'l Arb. 163, 163 (2011); Joel L. Fishbein, Not Inherently Unfair: Arbitration in the Long-Term Care Setting, 54 No. 8 DRI For Def. 8 (2012); David Horton, Federal Arbitration Act Preemption, Purposivism, and State Public Policy, 101 Geo. L.J. 1217 (2013); Roger J. Perlstadt, Article III Judicial Power and the Federal Arbitration Act, 62 Am. U. L. Rev. 201 (2012); Larry J. Pittman, Mandatory Arbitration: Due Process and Other Constitutional Concerns, 39 Cap. U. L. Rev. 853 (2011); Ankita Ritwik, Tobacco Packaging Arbitration and the State's Ability to Legislate, 54 Harv. Int'l L.J. 523

Arbitration Association withdrew from consumer debt collection arbitration because of "fairness and due process concerns." Press Release, American Arbitration Association, The American Arbitration Association Calls for Reform of Debt Collection Arbitration (July 23, 2009) (on file at https://www.nclc.org/images/pdf/arbitration/testimonysept09-exhibit3.pdf).

> From 1925 until the mid-1980s, obligations to arbitrate rested on consent. Thereafter, the U.S. Supreme Court shifted course and enforced court and class action waivers mandated when consumers purchased goods and employees applied for jobs. To explain the legitimacy of precluding court access for federal and state claims, the Court developed new rationales -- that arbitration had procedural advantages over adjudication, and that arbitration was an effective enforcement mechanism to "vindicate" public rights.
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> The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so -- rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights. The diffusion of disputes to a range of private, unknowable alternative adjudicators also violates the constitutional protections accorded to the public -- endowed with the right to observe state-empowered decision makers as they impose binding outcomes on disputants. Closed processes preclude

(2013); Nantiya Ruan, What's Left to Remedy Wage Theft? How Arbitration Mandates That Bar Class Actions Impact Low-Wage Workers, 2012 Mich. St. L. Rev. 1103 (2012).

> the public from assessing the qualities of what gains the force of law and debating what law ought to require. The cumulative effect of the Supreme Court's jurisprudence on arbitration has been to produce an unconstitutional system that undermines both the legitimacy of arbitration and the functions of courts.

Resnik, supra note 50, at 2804; see also Jessica Silver-Greenberg & Michael Corkery, Failed by Law and Courts, Troops Come Home to Repossessions, N.Y. TIMES, Mar. 17, 2015, at A1.

### C. The Government's Executive Power can Effectively Crush an Individual Who has Committed No Crime

The Seventh Amendment provides unequivocally, "[i]n suits at common law . . . the right of trial by jury shall be preserved." U.S. Const. amend. VII. Properly read, this means **all** suits that historically were beyond the court's equitable and admiralty jurisdiction. See, e.g., Tull v. United States, 481 U.S. 412, 420-21 (1987); Joseph Czerwien, Preserving the Civil Jury Right: Reconsidering the Scope of the Seventh Amendment, 65 Case W. Res. L. Rev. 429 (2014).

Still, the Supreme Court has recognized a limited "public right" exception to trial by jury to allow for administrative tribunals to implement the congressional purposes in creating the administrative state. Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989).

The exception is, however, strictly limited. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982); see also Stern v. Marshall, 131 S. Ct. 2594, 2610 (2011).

Or is it?

> Andrew J. Ceresney, the S.E.C.'s enforcement director, outlined the agency's plans to bring more regulatory lawsuits to its in-house judges . . . [T]he S.E.C.'s promise to expand the use of its internal tribunals has generated intense opposition. Perhaps even more crucially, so has its filing of highly complex cases there.

Gretchen Morgenson, Crying Foul on In-House S.E.C. Courts, N.Y. TIMES, June 28, 2015, at BU1.

Doesn't it seem odd that an officer of the executive branch can decide whether a citizen can seek a jury? And how is it working out? Consider Hopkins v. S.E.C., No. 15-1117 (1st Cir. filed January 16, 2015); Flannery v. S.E.C., No. 15-1080 (1st Cir. filed January 14, 2015), presently pending in the First Circuit. The quasi-independent hearing officer who first examined this enforcement action found against the S.E.C. Dissatisfied with that "trial," the S.E.C. itself went ahead and suspended one offender, fining him $65,000, and now asks the Court of Appeals to defer to its judgment. Ed Beeson, SEC Urges 1st Circ. To Deny Ex-State Street Exec's Appeals, Law 360, July 15,

2015,

http://www.law360.com/securities/articles/679512.

Expressing no opinion whatsoever on the merits (that's the business of the Court of Appeals), I note that if the power to tax is the power to destroy, see McCulloch v. State, 17 U.S. 316, 327 (1819), how much more so is the power to fine, to levy a monetary sanction? Indeed, this is a criminal sanction imposed for non-criminal conduct. Calling it a "civil" fine hardly diminishes its burden. As Lincoln famously said, "[h]ow many legs does a dog have if you call the tail a leg?" The answer is, of course, "four" because "calling a tail a leg doesn't make it a leg." United States v. Bowen, 527 F.3d 1065, 1077 n.9 (10th Cir. 2008). Indeed, I always thought that one of the central purposes of our jury trial right is to "prevent oppression by the Government." Williams v. Florida, 399 U.S. 78, 100 (1970).

### D. "The Eclipse of Fact Finding Foreshadows the Twilight of Judicial Independence."[59]

Article III of our Constitution begins, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress

[59] DeLaventura v. Columbia Acorn Trust, 417 F. Supp. 2d 147, 153 n.7 (D. Mass. 2006).

may from time to time ordain and establish." U.S. Const. art III, § 1. At the very epicenter of judicial power is the power to resolve disputed factual claims and apply the legal framework to the result. Under the Seventh Amendment to the United States Constitution, save for equity and admiralty cases, this power is reserved to the American people themselves, sitting as jurors. What then is one to think of the supra national arbitration tribunals established by the Investor-State Dispute Settlement ("ISDS") procedures of the North American Free Trade Agreement who, free from any judicial review whatsoever, can hand down monetary awards directly against the United States upon claims by foreign investors that enactments passed in America impair the value of their investments? North American Free Trade Agreement, U.S.-Can.-Mex., Arts. 1101-1138.2, Dec. 17, 1992, 2010 WL 2960052 (INS). The matter is of current interest because it is feared that the proposed Trans Pacific Partnership ("TPP") may include similar provisions. See Senator Elizabeth Warren & Representative Rosa DeLauro, Who is writing the TPP?, BOSTON GLOBE, May 11, 2015; Professor Alan Morrison, Is the Trans-Pacific Partnership Unconstitutional?, The Atlantic, June 23, 2015. In essence, these authorities are arguing "surely we have not fallen so low as to dismantle our

democracy in order to trade with China, have we?" The answer remains to be seen.

Small wonder that, over the past eight years, the average American has seen his or her chance of serving on the nation's juries diminish by nearly a third (32.54% to be exact). Statistics maintained by the Administrative Office of the United States Courts show that the percentage likelihood of being selected for federal petit jury service has been steadily declining over the past decade. EagleEye Asset Mgmt., 975 F. Supp. 2d at 155 n.5.[60]

[60] Compare Admin. Office U.S. Courts, 2011 Annual Report of the Director: Judicial Business of the United States Courts 326 tbl. J–2 (2012), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf with Admin. Office U.S. Courts, 2004 Annual Report of the Director: Judicial

Even so, every Monday, potential jurors are summoned to the three courthouses in Massachusetts where this Court sits. They are welcomed and told that their service is as important today as at any time in the long history of our Republic. It ends like this: "Every single jury trial is both a test and a celebration of the right of a free people to govern themselves. Go now and do justice."[61]

Do you care about any of this?

Does it concern you?

It should.

/s/ William G. Young _
WILLIAM G. YOUNG
DISTRICT JUDGE

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Business of the United States Courts 325 tbl.J–2 (2005), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/j2.pdf. This Court calculated an average American's chance of serving on a federal petit jury by taking the number of individuals who gave jury service, and dividing that number by the number of individuals in the United States who are over the age of eighteen. The former number was gleaned from the Administrative Conference reports cited above, the latter from the Census Bureau. EagleEye Asset Mgmt., 975 F. Supp. 2d at 155 n.5.

[61] Juror Welcome Address, District of Massachusetts, Eastern Division, most recently delivered July 27, 2015. See also video tapes: Jury Impanelment (10-11117 Miranda v. Hurley); Charge to Jury (12-10326 Lu v. Boston College) (on file at http://www.mad.uscourts.gov/boston/young.htm).