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The Battle Lines are Drawn: J.A.I.L. versus The Foreign Power A Power Foreign to Our Constitution

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Jury Trials Becoming Extinct Another constitutional guarantee disappearing by a power foreign to our Constitution!

Cases Keep Flowing In, But The Jury Pool Is Idle

<http://www.lexisone.com/news/nlibrary/n043007d.html>

by Adam Liptak

[The New York Times](#)

Trials are on the verge of extinction. They have been replaced by settlements and plea deals, by mediations and arbitrations and by decisions from judges based only on lawyers' written submissions.

Federal courts conducted about 3,600 trials in civil cases last year, down from 5,800 in 1962. That is not an enormous drop— until you consider that the number of cases has quintupled in the meantime.

In percentage terms, only 1.3 percent of federal civil cases ended in trials last year, down from 11.5 percent in 1962.

The trends in criminal cases and in the state courts are broadly similar, though not always quite as striking. But it is beyond dispute that even as the number of lawyers has grown twice as fast as the population and even as the number of lawsuits has exploded, actual trials have become quite rare.

Instead of hearing testimony, ruling on objections and instructing jurors on the law, judges spend most of their time supervising the exchange of information, deciding

pretrial motions and dealing with settlements and plea bargains.

There is, of course, nothing wrong with settlements, at least when they are the product of reasoned and sensible compromise between evenly matched adversaries. But trials are not disappearing simply because more cases are being settled. Instead, they are increasingly being replaced by summary judgments, in which judges evaluate evidence submitted to them on paper.

"During the last years of the 20th century, summary judgment in the federal courts moved from a small fraction of dispositions by trial to a magnitude several times greater than the number of trials," Marc Galanter, who teaches law at the University of Wisconsin and the London School of Economics and Political Science, wrote last year in *The Journal of Dispute Resolution*.

Professor Galanter elaborated in an interview. "Summary judgments are being asked for in about 17 percent of cases and granted in about 9 percent," he said, citing recent data from the Federal Judicial Center. That is a big jump from 1960, when no more than 1.8 percent of federal civil cases ended in summary judgment, according to data from the administrative office of the federal courts analyzed in a 1961 law review article.

"We've moved in a way to a more European way of decision-making, by looking at the court file rather than through encounters with living witnesses whose testimony is tested by cross-examination," Professor Galanter said.

In criminal cases, the vast majority of prosecutions end in plea bargains. In an article called "Vanishing Trials, Vanishing Juries, Vanishing Constitution" in the *Suffolk University Law Review* last year, a federal judge questioned the fairness of the choices confronting many criminal defendants.

Those who have the temerity to "request the jury trial guaranteed them under the U.S. Constitution," wrote the judge, William G. Young of the Federal District Court in Boston, face "savage sentences" that can be five times as long as those meted out to defendants who plead guilty and cooperate with the government.

The movement away from jury trials is not just a societal reallocation of resources or a policy choice. Rather, as Judge Young put it, it represents a disavowal of "the most stunning and successful experiment in direct popular sovereignty in all history."

Indeed, juries were central to the framers of the Constitution, who guaranteed the right to a jury trial in criminal cases, and to the drafters of the Bill of Rights, who referred to juries in the Fifth, Sixth and Seventh Amendments. Jury trials may be expensive

and time-consuming, but the jury, local and populist, is a counterweight to central authority and is as important an element in the constitutional balance as the two houses of Congress, the three branches of government and the federal system itself.

In an article titled "Why Summary Judgment Is Unconstitutional," published last month in the Virginia Law Review, Suja A. Thomas, a law professor at the University of Cincinnati, makes the perfectly plausible argument that the procedure violates the Seventh Amendment, which reserves the job of determining the facts in civil cases to juries.

When judges decide summary judgment motions, Professor Thomas wrote, they intrude on that job. The theory of summary judgment is that judges may rule for one side or the other only after finding that no "genuine" issues of "material" fact are in dispute. They must determine, as the Supreme Court has put it, whether "a reasonable jury could return a verdict" for the party defending against a motion for summary judgment.

All of that pushes judges right up to and sometimes across the constitutional line of determining the facts for themselves.

In 2004, in the process of revitalizing the role of the jury in criminal cases, Justice Antonin Scalia of the Supreme Court wrote that there were good arguments for "leaving justice entirely in the hands of professionals." But that is not the theory of the Constitution, he continued, which enshrined "the common-law ideal of limited state power accomplished by strict division of authority between judge and jury."

The jury trial is a distinctively American tradition in a cultural sense, too. Almost all civil jury trials in the world take place here, and 90 percent of the criminal ones. But that tradition, which Prof. Paul Butler of George Washington University calls "as fundamental a part of our culture as jazz or rock 'n' roll," is dying.

I was on jury duty last week, in a state criminal court in Manhattan. During the orientation on Wednesday, a court officer, with mixed pride and hyperbole, said his was the busiest courthouse in America.

I never saw so much as the inside of a courtroom. After a couple of days of milling around in an assembly room with more than 100 other potential jurors, the State of New York thanked us for our service and sent us home.

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For a current example of the deprivation of jury trials, see

http://www.jail4judges.org/state_chapters/ca/Other/DonBird.htm

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He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation. - Declaration of Independence

"..it does not require a majority to prevail, but rather an irate, tireless minority keen to set brush fires in people's minds.." - Samuel Adams

"There are a thousand hacking at the branches of evil to one who is striking at the root." -- Henry David Thoreau

