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"JUDGMENT BY THE PEOPLE"

ADDRESS

BY

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The newspapers of the country recently performed a valuable public service by calling attention, through their news and editorial columns, to a project involving the wiring of a Federal court jury room with a hidden microphone and the secret recording of jury deliberations. This was done without the knowledge or consent of the jurors.

The purpose of the experiment evidently was to provide a basis, by the group of researchers involved, for determining whether improvements in the jury system could be suggested.

Though I believe the experiment was ill-advised -- and I have already expressed my own strong feeling against the methods employed in that project -- it is not my purpose here to debate that particular project. The Congress is the proper body to consider the need for corrective measures. The Department of Justice will present a proposed bill aimed at forbidding intrusions upon the privacy of the deliberations of grand juries and petit juries of the courts of the United States.

The widespread public interest in the jury-interference incident recalls once again to our minds that the right of trial by jury constitutes one of the distinctive features of our national life in these United States; it is the only institution we have ever known wherein persons neither appointed nor elected to public office make determinations affecting our property, our persons, and, indeed, our very lives. As the Supreme Court cogently observed:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

Reflect for a moment on this extraordinary situation wherein "the butcher, the baker, and the candlestick maker" decide whether fellow human beings of all stations in life shall live or die or be imprisoned or go free; whether they were careful or negligent at the time of an accident; whether the truth of a dispute lies on one side or the other.

The Constitution of the United States provides for this. It requires, in Article III, that the trial of all crimes except impeachment shall be by jury; the Sixth Amendment gives to an accused in a criminal trial the right to a "speedy and public trial, by an impartial jury;" and the Seventh Amendment, which has reference to civil cases, preserves the right of trial by jury in common law suits where the value in controversy exceeds twenty dollars. Similar guarantees are found in early State constitutions.

But trial by jury does not have its genesis in these Constitutions. It came to us as part of our inheritance of the common law of England and out of a wealth of accumulated tradition.

It was embodied in general principle in the Magna Carta in the phrase that no freeman shall be condemned except "by the legal judgment of his peers, or by the laws of the land."

The point of this abbreviated and hasty look into the past is that the end product as we know and utilize it today -- and as we so casually accept it -- is the accretion of many centuries of trial and error, custom and living; and, as put by Mr. Justice Cardozo, our Constitutional right of trial by jury was "born of the fear of the

Star Chamber and of the tyranny of the Stuarts. * * * it stands for a great principle, which is not to be whittled down or sacrificed."

Coming, then, to the present, let us take a good hard look at this body called "the jury."

It is a group, generally of 12 persons, called together in pursuance of a civic duty to determine facts and arrive at a joint, unanimous conclusion in a proceeding at law. In the federal courts, the members of the jury are selected without regard to race, color, sex, or economic position. Qualification, under federal statute, is a simple one: "Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror * * *." There are only four specified grounds for ineligibility: (1) conviction of a felony and loss of civil rights, (2) inability to read, write, speak and understand the English language, (3) incapacity by reason of mental or physical infirmity, and (4) persons who would be incompetent to serve as jurors in the State courts of the particular district.

A typical jury likely reflects twelve different backgrounds, occupations and social interest. It will have the same mixture of prejudice as will be found in any other group of twelve adult citizens selected at large from the community, the same superficial reaction, impatience, kindness, thoughtfulness, stubbornness, flexibility, capacity for analysis, and depth.

Why should you and I trust our property, our rights, our very lives to this group of strangers?

The answer lies, I believe, in the unusual character of this institution. Reflect for a moment on these considerations: The jury lives only for the one particular case and then permanently dissolves into the anonymity of its origin. It seeks no special favor, will receive no material benefit, has no personal interest to serve, and has no ambitions to satisfy. These people are in one place, at one time, for a single purpose only by reason of the accident of selection which, that day, fell to their lot. They will not gain -- except for the satisfaction of discharging a responsibility of citizenship -- and they will not lose. They have come only to listen, reflect upon what they see and hear, and give a personal judgment. It is not their purpose to please or displease the judge, the counsel, the witnesses, or, indeed, the world at large. And regardless of the cynicism of those who are intent upon magnifying occasional errors out of all proportion to end results, that group will usually come up with a judgment which accords with fairness, justice, and plain good sense.

But apart from its personal function of verdict-finding, the jury serves other significant purposes which need to be carefully considered and evaluated in terms of alternatives.

Juries do, of course, act as an aid to the judge in difficult or sensitive factual situations. Beyond that, however, they protect the community from any possibility of predicting a result based upon the disposition, learning, or other characteristics of a single judge. Unvarying prejudice or fixed pre-judgments, an inescapable human failing, easily could destroy the usefulness of a judge who could not have the

aid of the jury.

The composition of the jury also gives us considerable assurance of correct judgment. As they are drawn from the community at large and from no distinct class or body having interest foreign from those of the rest of the nation, they may be deemed fairly to represent the average state of public feeling and spirit; and the verdicts they give constitute a correct index of the opinions entertained by society as it bears upon the rights and liberty of the person.

There is also a national characteristic which may be considered. If Americans were to be distinguished for one moral feature more than another, it would be, I think, a love for fair play and abhorrence of injustice. Now, the very essence of the jury trial is its principle of fairness. The right of being tried by equals, that is, fellow-citizens, who feel neither malice nor favour, but simply decide according to what in their conscience they believe to be the truth, gives to every man a conviction that he will be dealt with impartially. It inspires him with the wish to mete out to others the same measure of equity that is dealt to himself.

In his penetrating analysis of American politics, Democracy in America, the noted 19th Century French historian, De Tocqueville, refers to several other virtues of the jury system upon the citizens of a country. He pointed out that taproot of that enlightened freedom which distinguishes the Anglo-Saxon race is the principle of self-government. The very nature of jury trial consists in making the people themselves the arbiters of their property, liberties and lives. It is here that we

find the attachment of the people to the laws; where they manage their own affairs quite apart from the influence of State or national sovereignty. In this area of national life, no public or private influence may be injected to influence the honest, spontaneous opinion of a free people giving a free choice of verdicts. Here we have all of the great values antagonistic to arbitrary deprivation of rights and fair process.

It is also no small advantage of the system that it calls upon the people to participate in judicial functions; and this makes them in a great degree responsible for the purity of the proceedings of the courts of law.

We are so familiar with the system that we can hardly appreciate its full effect upon our way of life. Yet it cannot fail to react upon and influence the tone of public feeling when so large a portion of the community is frequently called upon to discharge the important functions that devolve upon juries; when they must promise, under oath, to put aside anger and hate and fear; nor allow themselves to be swayed by outside influences while they address themselves to their solemn duties. When they witness the stern impartiality with which justice is administered and listen to the calm and passionless recapitulation of the evidence by the presiding judge, even the most cynical cannot fail to be impressed with the inner strength of this institution.

It would indeed be difficult to conceive of a better security than this right affords against any exercise of arbitrary violence on the part of persons arrogating to themselves action in the name of the government. No matter how ardent may be the wish to destroy or crush an obnoxious opponent, there can be no real danger from any such menace so long as the party attacked can take refuge in a jury. So long as the law of the land

requires that guilt or innocence is to be decided by such a tribunal, the people would need to conspire against themselves before their individual freedom could be abridged.

Then there is the close interrelation between our jury system and freedom of the press. This freedom, which we justly prize as one of the first of the great social blessings, is chiefly indebted to the jury for its vigorous existence. The degree of license which is allowable in the discussion of public questions can never be irrevocably fixed by tyrannical action. A representative twelve always exists to determine whether the people themselves feel offended. That is important.

We have here a curious circle; but a satisfying and compensating one. An enlightened people will not forge chains to enslave themselves. They remain enlightened only in the same degree that the press is free to bring into the open for public view any and all matters proper for discussion. And when the press discharges its natural function, fully and in responsible manner, the people, speaking through its juries if need be, will keep it free.

The press has a special and peculiar interest in the preservation of an institution which stands between it and any hand which would reach out to destroy it.

With respect to the jury system as a means of protecting innocence, it would fly in the face of recorded fact to say that innocent persons are never convicted or that the party in the right in a civil case has never been wronged through erroneous judgment. But would not the same result obtain even if one man, a judge or several judges, were to assume also the fact-finding functions of the jury in all cases?

Certainly, so long as the element of personal conviction of mind prevails, there will be error, whatever care is taken to prevent it. That, of course, is why an appeal is always available to a higher tribunal from initial judgments.

No doubt this margin for error is the weakest point of the judicial system. Feelings of compassion for the prisoner, repugnance to the punishment which the law assesses, or a disposition to side with the individual when a large corporation is a party to the action are sometimes allowed to overpower the sense of duty. Juries do sometimes usurp the power of mercy, forgetting, in such instances, that they have sworn to give a true verdict according to the evidence.

Infrequent error of this kind springs from the instincts of our nature and should neither be magnified disproportionate to the degree of its happening or cause us to wonder as to the efficacy of the system as a whole.

Once in a while we see a "convicting the innocent" collection of cases. They fire the imagination and cause involuntary irritation to arise against a judicial system which brings about such results. Regrettable though these happenings may be, dispassionate consideration will show them to be the inability of man, even with the aid of the most advanced mechanisms, to achieve perfection at all times. When every failure is brought together in one listing without regard to actual continuity in point of time, without regard to the large mass from which these "imperfects" are taken, and without objective review of the immense area of correctness and proper operation of any phase of our national life, the rare exception is too easily assumed to represent the rule.

In criminal cases, let us see what must happen before an innocent man is convicted. The committing magistrate or similar officer, the grand jury, the petit jury, and the presiding judge must all, in different degrees, have concurred in bringing about the result. And, in

this arrangement of process, even if the petit jury arrives at a verdict of guilt, it is still within the province of the judge to set aside the verdict as being contrary to the evidence. And, super-imposed on these obstacles to an incorrect result, is the absolute right of appeal to higher judicial authority. When these facets of the whole problem are each given their proper weight and place in the scheme of judicial administration, we must come to the conclusion that the judicial system as a whole in the United States, and its mainspring, the jury system, remains as the fairest means of dispensing justice that man has yet devised.

I referred, at the beginning of this talk, to the recent jury eavesdropping incident. The strong reaction of the people against the project has been voiced through many newspaper editorials and in letters to me and, apparently, to various members of the Congress. Some of the reasons why this matter has been so disturbing are noted in a United States Supreme Court opinion growing out of the Teapot Dome scandals. In that case, the defendants in a criminal proceeding had the jurors kept under surveillance by private detectives whenever they were not actually within the court house. Although no juror had actually been approached and none apparently was aware of the surveillance, the Court upheld a judgment of criminal contempt against those responsible for the project.

Then, in language strikingly appropriate to the recent jury tapping incident, the Court pointed out the basic evil:

> "The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render

impossible the exercise of calm judgment upon patient consideration. If those fit for juries understand that they may be freely subjected to treatment like that here disclosed, they will either shun the burdens of the service or perform it with disquiet and disgust. Trial by capable juries, in important cases, probably would become an impossibility * * *."

Those who espouse this kind of technique do so under the banner of "improvement." That approach is supposed to give an acceptable gloss to an otherwise reprehensible act. But apply that principle to your own affairs and the absurdity of the argument becomes quickly apparent. Could you say that newspaper techniques might not be improved through secret recordings of conferences between the editors and the staff in determining what stories should be published or the methods to be followed in obtaining a particular news item. Conceivably such secret recordings might be of interest to a research group. But the obvious retort is that the objects of research can be satisfied without such extreme and unconscionable methods.

I have spoken of these matters at some length because I am apprehensive as to the effect of criticisms and experiments which may implant in our people a feeling of distrust and inspire doubt as to the utility of an institution which has stood the test of experience through many ages. This is not to say that what was good enough for my father, and his father before him, ought to be good enough for my children and yours. It would be a sad and dismal prospect indeed if our people believed that any one generation of man had achieved perfection in all of their institutions. But there is a time, a place, a method, and a wisdom which must

act as a balance to the urge for change. Properly approached and properly analyzed there is no more reason to exclude the jury system as a subject for study than any other phase of our national life. But the same cautions apply to any sensitive areas of our system of government. That which exists must not be discarded or tarnished until an acceptable substitute has been presented.

In an age when cynicism seems attractive to many, it becomes more important than ever that public confidence in the machinery of justice not be impaired. No higher purpose is served by the press of the nation than to devote itself -- when any part of that government becomes the target of undermining influences -- to alert the people to the dangers, both obvious and hidden. By exposing the vice in the jury-tapping experiment, the press has, I believe, well served its position as a sentinel on guard for the deprivation of our rights and liberties. May it ever so continue.