



Could Jury Nullification Thwart Bragg's Prosecution of Donald Trump?

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." — Thomas Jefferson, 1789

For several years I practiced law. I was counsel to many people who'd been indicted by a grand jury and subsequently tried before a jury, a jury tasked with deciding the guilt or innocence of my client.

As any litigator will tell you, going to court is at best a dice roll. There is no way to tell — despite the proliferation of professional jury consultants — to predict which way a jury will go in a given case. I've personally sat there with my client, convincing him that his innocence was obvious to anyone who'd heard the evidence, only to have a jury file back into a courtroom and pronounce a guilty verdict. Likewise, I've been certain that my client would be escorted out of the courtroom in cuffs, only to hear "not guilty" pronounced by the jury foreman.

I'm sharing these experiences with you as a way to warn those in the Manhattan district attorney's office who are preparing to present their case against Donald Trump to a jury. Regardless of how certain Alvin Bragg is of Trump's guilt, a jury could listen to his evidence against Trump and yet find the former president not guilty of all the 34 felony charges laid against him.

In fact, it is possible that a jury could hear evidence that to the millions of people who will be following the courtroom proceedings would seem to build an unassailable wall of proof of the former president's guilt, and then, in disregard of that evidence, find the defendant not guilty.

Historically speaking, such a scenario has not only happened, but it has been advocated by many of the men who founded the United States.

The act of a jury finding a person not guilty of charges brought by the government, regardless of the overwhelming evidence presented by the prosecutor, is called *jury nullification*, and it could prove to DA Alvin Bragg the truth of the old saying: Be careful what you wish for, because you might get it.

Jury nullification has proven a boon to the falsely accused and a barricade against partisan prosecution. A jury's right to apply the law and not just weigh the facts is well settled in the history of American



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jurisprudence, and has a very distinguished roster of advocates.

Before one is able to understand why jury nullification is a good idea, one must understand the importance of a trial by jury. Our Founding Fathers universally considered it to be a powerful weapon in the war against tyranny.

In addition to Thomas Jefferson, quoted at the top of this article, most of the leading lights of the Founding Generation considered jury nullification a central plank in the platform of self-government.

In *The Federalist Papers*, Alexander Hamilton wrote that trial by jury was the “very palladium of free government” and a “valuable check upon corruption.”

Hamilton’s fellow *Federalist* author and Supreme Court Chief Justice John Jay informed a jury in a 1794 case that:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

Given the strength of these opinions, then, it is no surprise that the denial of trials by jury was one of the foremost acts of despotism listed by Jefferson in the Declaration of Independence.

As for the concept that juries have not only the *power* but the *obligation* to nullify unjust rulings of a judge, one of the early Republic’s most renowned lawyers, John Adams, wrote:

It is not only [the juror’s] right, but his duty ... to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.

Himself a practicing attorney, Hamilton had personal experience with the exercise of unlawful power by judges. In 1804, he argued that juries had a right and an obligation to acquit a defendant “if exercising their judgement with discretion and honesty they have a clear conviction that the charge of the court is wrong.”

As lawyers trained in the 18th century, both Hamilton and Adams would have learned much of their craft from the *Commentaries on the Laws of England*, written and compiled between 1765-1769 by Sir William Blackstone.

On the proper role of juries as a check on government abuse, Blackstone declared:

Every new tribunal, erected for the decision of facts, without the intervention of a jury ... is a step towards establishing aristocracy, the most oppressive of absolute governments.

Later in our history, juries in Pennsylvania and other Northern states refused to convict Quakers accused of aiding runaway slaves, in direct defiance (nullification) of the Fugitive Slave Act.

So, we can see that the idea that juries may act contrary to the will of a judge has a long and distinguished pedigree in American law. Jury nullification is an act of resistance to government



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oppression that our Founders believed to be fundamental in a republic established upon the principle of equality under the rule of law, rather than upon the arbitrary administration of justice as defined by men.

The Constitution guarantees the right to trial by jury, placing upon the government the burden of proving to a jury the legality and morality of charges against individuals, if the government seeks to deprive the accused of his life, liberty, or property.

As indicated by the statements provided above, our Founding Fathers zealously defended this right and recognized that an informed and empowered jury could effectively protect a wrongly accused defendant from the potentially harmful effects of autocratic judges and overzealous prosecutors.

In defense of the “unalienable rights” possessed by all men — indeed, as the last line of the defense of these rights — jurors can and should reject government tyranny by refusing to convict those people subjected to prosecution for violating unjust laws, or who have broken no law at all.

A hearing on motions made by both sides in the case against Donald Trump is scheduled for December 4. Should the case continue on to trial, experts estimate that it would begin sometime in the spring of 2024.



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