



## Jury Nullification: Miscarriage of Justice or Check on Tyranny?

As the date of the trial of the six policemen indicted for the murder of Freddie Gray approaches, the question of the ability to impanel an impartial jury is being bandied about by the media.

In an op-ed published October 10 by the *Baltimore Sun*, the paper wondered whether “it’ll be next to impossible to field a fair panel” in the forthcoming trial.

The wider question, they insist, is not whether the prosecutors and defense attorneys can winnow the potential jury pool down to 12 men and women who will be willing to keep their minds open to the arguments of the two sides, without coming into the courthouse already convinced of guilt or innocence, but whether those jury members will issue a verdict according to the evidence or presented or according to their own sense of justice.



This, the paper insists, is nothing new. It is a concept known as “jury nullification” and they say it has “bedeviled the criminal justice system here for years.”

“So-called “jury nullification” — the refusal of Baltimore juries to convict even when evidence is strong — is a well known phenomenon,” the paper reports.

Despite the disparaging words printed in the *Sun*, there was a time when jury nullification was considered a central plank of the platform of personal liberty and freedom from tyranny.

Although the subject of state nullification of unconstitutional acts of the federal government has popped up even in mainstream media discussions in recent years, jury nullification is something that is rarely heard of, even among constitutionalists and supporters of the right of the states to oppose federal overreaching.

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.

Thomas Jefferson wrote, “I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution.”

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



Written by [Joe Wolverton, II, J.D.](#) on October 11, 2015

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 Thomas 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, 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."

And Hamilton, again from the *Federalist Papers*, described the jury's check on the judge as a "double security" that "tends to preserve the purity" of both judge and jury.

So, we can see that the idea that juries may act contrary to the will of a judge is nothing new in American law. In fact, it is an act of resistance to government oppression that our Founders believed to be fundamental in a Republic that was to remain free under the rule of law, rather than enslaved according to the rule of men.

Activists in several states are promoting the practice of jury nullification as a way to prevent the miscarriage of justice by the judiciary and the police.

As state lawmakers have come to appreciate the power of jury nullification and its advancement of the cause of the rule of law, laws have been passed in several states allowing juries to override the rulings of judges if they believe the judges are misinterpreting or misapplying the relevant law. Furthermore, in many of these statutes, defense attorneys may now, over a judge's objection, inform a jury that it has a right to judge the application of the law in relationship to the facts in controversy.

Of course, as Cato Institute writer Tim Lynch observed, these laws may not go far enough in restraining the power of corrupt judges:

We don't know how much pressure trial judges will exert on defense counsel.... If the attorney's argument is "too strenuous," the judge may reprimand the attorney in some way or deliver his own strenuous instruction about how the jurors must ultimately accept the law as described *by the court, not the defense*. I'm also afraid what the jurors hear will too often depend on the particular judge and, then, what that judge wants to do in a particular case. [Emphasis in original.]

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

On its website, the Fully Informed Jury Association — the country's leading advocates of jury nullification — sums up the reason jury nullification is a good idea and one supported by constitutional principles of freedom from tyranny:

The primary function of the Independent juror is not, as many think, to dispense punishment to fellow citizens accused of breaking various laws, but rather to protect fellow citizens from



tyrannical abuses of power by the government.

In an editorial, the *Washington Times* sees such persecution as a prime example of the need for jury nullification in the fight against government oppression:

This demonstrates clearly the responsibility of juries to serve as a check against judges and prosecutors who may think they're the last word in all matters of the law. Respect for the law and the courts is necessary for the good of all in a free society, and sometimes, as the number of frivolous and oppressive laws multiply, a little nullification can be a tonic, and a reminder to the lawyers, including judges, of who's really the boss.

The Constitution guarantees the right to trial by jury. This means that the government must bring its case before a jury of the people if government wants to deprive any person of life, liberty, or property. In defense of those "unalienable rights," indeed, as the last line of defense, jurors can reject government tyranny by refusing to convict those subjected to prosecution for violating unjust laws.

In Baltimore, there may be a history of jury nullification in cases where the government believes it has presented an unassailable wall of evidence.

Rather than wonder if this attitude will result in the conviction of policemen by a jury composed of people suspicious of police, however, all Americans should see jury nullification for what it is: a last, legal, and powerful check on government disregard for the rule of law.



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