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Oregon Bill Would Restore Power of Juries to Vote Their Consciences

The Oregon legislature is considering a bill that could re-enshrine juries to the their former place as the last line of defense against legalized despotism.

Senate Bill 924, introduced by state Senator Kim Thatcher, mandates that judges must provide very particular instructions to juries in felony cases. Prior to giving a case to a jury for their consideration, judges must issue them the following instruction:

"As jurors, if you feel that a conviction would not be a fair or just result in this case, it is within your power to find the defendant not guilty even if you find that the state has proven the defendant's guilt beyond a reasonable doubt."

Should a judge fail to provide the requisite instruction, the bill provides that such failure "constitutes a mistrial…."

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."

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.

Obviously, the idea that juries may act contrary to the will of a judge is nothing new in American law, and 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.

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.

Such staunch opposition to official overreach is to be expected from our Founding Fathers, but even during the hedonistic days of "Summer of Love" the U.S. Supreme Court held that "undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge, and contrary to the evidence." (*U.S. v. Moylan*, 1969).

Only a year ago, during a speech she delivered at New York University, Supreme Court Justice Sonia Sotomayor came out in favor of encouraging juries to exercise the demands of their consciences in refusing to accept a judge's interpretation of a law.

"There is a place, I think, for jury nullification — finding the balance in that and the role judges should play," Sotomayor said, commenting on the Second Circuit's decision to excuse a juror based on a suspicion that he was practicing jury nullification by refusing to find a suspect guilty. In its ruling, the Second Circuit wrote, "We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent."

The Second Circuit's statement notwithstanding, support for this layer of protection from systematic despotism is strengthening. The Fully Informed Jury Association (FIJA) is an organization devoted to educating Americans on the benefits of jury nullification. On their website, FIJA explains why jury nullification is not only a good idea, but 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.

Despite all this, the *Washington Times* reported in 2013 that jury nullification proponents in Florida and New Jersey "have been arrested and charged with 'jury tampering' for distributing handbills at the courthouse that essentially publish the text of the New Hampshire law."

In an editorial, the *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.

Naysayers notwithstanding, 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.

Americans should be especially zealous proponents of any method of dismantling institutional abuse of authority, as this is the precise spark — rejection of royal usurpation of power where none was granted by the people — that set off the powder keg of war in 1775.

As of press time, the Oregon bill awaits consideration by the state Senate's Judiciary Committee.