



Written by [Joe Wolverton, II, J.D.](#) on March 11, 2016

New Hampshire House to Consider Codifying Jury Nullification

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

On March 10, the New Hampshire House of Representatives voted in favor of considering a measure codifying jury nullification as part of that state's criminal procedure. The bill — HB 1270 — is sponsored by nine representatives, all of whom are Republicans.



The proposal declares that the state legislature “identifies trial by jury to be an inestimable privilege indicating its importance in the application of law and justice.” Furthermore, it “identifies a role of the people in approving law,” declaring that “the only location for this consent is the jury.”

Specifically, the bill mandates that “the court shall inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy.”

Commonly, jurors are instructed that they may only consider the facts, leaving the application of the law to the judge. If this bill becomes law, however, in New Hampshire jurors will receive the following instruction prior to deliberating on a case:

The test you must use is this: If you have a reasonable doubt as to whether the state has proved any one or more of the elements of the crime charged, you must find the defendant not guilty. If you find that the law does not apply to the proven facts of the case, you must find the defendant not guilty. However, if you find, that the state has proved all of the elements of the offense charged beyond a reasonable doubt, but you find that based upon the facts of this case a guilty verdict will yield an unjust result, you may find the defendant not guilty.

A jury's right to apply the law and not just weigh the facts is well settled in the history of American jurisprudence. The act of a jury finding a defendant not guilty even when the evidence indicates otherwise is commonly called jury nullification, and it 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.

Apart from the quote by Thomas Jefferson at the beginning of this article, most of the leading lights of the founding generation considered trial by jury 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:

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, 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 wrote, "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 oppression that our Founders believed to be fundamental in a republic that 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 wants 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 only an informed and empowered jury could effectively protect a defendant from the potentially harmful effects of autocratic judges.

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.

After being recommended for approval, the New Hampshire jury nullification bill has been added to the calendar of the state House of Representatives.



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