

Jury Nullification and the 2nd Amendment

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Introduction

“ . . . 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.”

John Adams, 1771

You have the ability to overturn any anti-gun law you want. All it takes is a bit of knowledge and a seat on a jury.

In our legal system, juries have a power known as “nullification”. This means that any single juror may refuse to convict a defendant of a crime if that juror believes the law in question is unconstitutional. In effect, a jury can overturn any act of congress or any decision of the Supreme Court.

And you thought the game was rigged! It is. It is rigged in favor of the average citizen.

History of jury nullification

“The jury has the right to judge both the law as well as the fact in controversy.”

U.S. Supreme Court Chief Justice John Jay, 1794

The concept of jury nullification was present in English common law and exercised in America before the revolution.

In London, William Penn was tried in 1671 for the crime of preaching an “illegal” religion. His jury was rightfully incensed and refused to convict him, despite being denied by the court food, water and toilet facilities for several days. The jury was later fined and imprisoned for failing to convict Penn until England’s highest court confirmed their right to nullify the law. And you thought our legal system was heavy handed!

In one of the more famous American instances, John Peter Zenger was acquitted of a seditious libel charge against the Royal Governor of New York (no, not Pataki – someone much more level headed and just). Zenger had published a number of articles critical of the Governor, and had the audacity of using facts to support his claims. The crown arrested and tried him in 1734.



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William Penn

You might say the court, being an appointment by the crown, was less than helpful to Zenger’s cause. The judge told the jury that “Truth is no defense.” In other words, it did not matter if what Zenger had printed was true, it was against the law to print those truths, and the jury was told to disregard this particular nit-pick.

Fortunately for Zenger, he had Andrew Hamilton as his attorney. Hamilton told the jury the story of William Penn and how they had the power to acquit Zenger. The Zenger jury followed suit.

Zenger was not the last of the pre-revolution citizens to defeat the crown through nullification. Indeed the practice was regularly exercised both before and after the revolution. Understanding nullification was merely part of being properly educated in civics.

So, why have we not heard more about nullification

It is hard to pin down when the courts began to obscure this right of yours. In the 1800's (as well as at other points in history) people have tried to "reform" the jury system. These schemes included such mind numbing concepts as not requiring a unanimous verdict to convict, requiring less than a jury of twelve, and even "professional jurors" paid salaries by the government (I wish I was making that last one up, but some citizens are indeed that short sighted and drug addled).



John Jay

In 1895, the Supreme Court ruled that jurors need not be told that they have this power. At this time, the once standard procedure of educating jurors about all of their options began to decay. Judges have been known to reprimand attorneys for reminding jurors of their right, and because of this many otherwise competent defense attorneys refuse to do so.

The situation has devolved to the point where the California Supreme Court (a body not known for their adherence to traditional thinking on the topic of law, the constitution, or sanity) recently upheld the dismissal of a juror who was exercising his rights. Thankfully all other courts remain supportive of this fundamental precept of American law. As recently as 1972, the D.C. Circuit Court of Appeals noted:

" . . . unreviewable and irreversible . . . power to acquit in disregard of the instructions on the law given by the trial judge. The pages of history shine upon instances of the jury's exercise of its prerogative to disregard instructions of the judge. . . " (473 F. 2d 1113)

How it applies to the 2nd Amendment

Jury nullification may be our best tool to reverse the tide of invasive gun control laws. At the very least, it may save some citizens from the ravages of constitution bashers.

According to noted criminologist Gary Kleck, about one-half of all households own guns. This means that one-half of all potential jurors own guns. Statistically speaking, this means that just about any jury can be "hung," requiring a new trial, plenty of publicity, and another chance at nullification.

And we seem to have the public on our side. Many public opinion polls from 1999 through 2001 show that the majority of Americans favor tougher laws on criminals, and fewer gun control laws. This may be because at least half of all jurors live in homes with guns present, or it may just be the good common sense of the average Joe. Either way, in the jury room, you will at least have six people on your side or leaning your direction.

More importantly, it offers us the chance to educate others in the jury deliberation room. If you find yourself on a jury, and you determine that the law in question is a violation of the intent of the 2nd Amendment, then you can vote to acquit based on nullification. You also have the right to educate the other jurors on nullification, the origins of the 2nd Amendment, and why they too should opt for nullification.

Action you can take

"We recognize . . . the 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. . . . If the jury feels that the law under which the defendant is accused, is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic of passion, the jury has the power to acquit, and the courts must abide by that decision." (US vs Moylan, 417 F 2d 1002, 1006 (1969)).

As you can imagine, this is not as easy as it sounds. The tough part will be getting on the jury.

Lawyers, regardless of if they represent the defendant or the government, will avoid mentioning nullification. The District Attorney doesn't want the jury to know they have this power, and the defense attorney doesn't want to violate any of the judge's prohibitions on the subject.

Your first course of action is to shut up! You are under no obligation to tell either attorney anything they do not inquire about. If they don't ask your opinion about the 2nd Amendment, then don't get tossed off the jury by volunteering a patriotic monolog on the subject during jury selection. Likewise, unless specifically asked about your understanding of the concept of jury nullification, then keep off the subject.

But a prosecuting attorney may ask questions that probe the subject. Never, under any circumstance lie about your opinions or knowledge. Doing so is wrong, illegal, and merely drops you to the level of the gun grabbers. But listen to the questions carefully, and answer in a way that is truthful yet avoids disclosing your newfound education on the function of the jury in rectifying the constitution. Given how lawyers talk, responding "I don't understand it (or the question) completely" may be the truth. If pressed, simply ask the questioning attorney to explain it, and continue to ask questions about it. In this manner, the attorney himself will either explain the concept of jury nullification (thus getting the information out to all the other jurors) or be prevented from doing so by the judge.

Even the "just the facts" directive can work to nullification. If an attorney attempts to avoid mentioning jury nullification by asking if the case should be judged solely on the facts, then your answer is "yes" – the "facts" of the case include the law. The law – including the Constitution – can never be divorced from the other "facts" of a legal case.

Finally, you may have a tough time in the jury room. Judges have become fond of falsely instructing jurors that they must decide a case based solely on "the facts." The other eleven jurors may take this literally given the widespread ignorance about jury nullification. It is not advised that you take literature about nullification into the jury room, but you can be authoritative and take this knowledge with you to educate others.

Conclusion

“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.”

Thomas Jefferson

We have fought in the ballot box. We have fought in the legislature. We have fought in rally lines, town hall meetings, and the editorial pages. But we have ignored the ability to *change the law using tools our founding fathers have given us!* And it is a tool that the gun grabbers cannot overcome. Know it and if given the chance, exercise it.

For more information on jury nullification, contact the Fully Informed Jury Association at www.fija.org

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