

from
**Upholding the Law
and Other Observations**

by
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The Power Of The Jury



Two important jury nullification cases were in the papers recently: The California Supreme Court's ruling that nullification, or judgment of the law, was not a power available to a Golden State juror; and the U.S. Supreme Court's refusal to wield it's proudly claimed, but selectively exercised, nullification power in the case of *United States v. Oakland Cannabis Buyers Cooperative*. In the former case, the court's absurd declaration proves the wisdom of the founders in recognizing that there is an irreducible conflict of interest between the citizenry and any organ of government-- even an allegedly independent judiciary. In the latter, the U.S. Supreme Court abrogates its responsibility to serve as a safeguard against overreach by the legislative and executive branches yet again. By declining to stand in judgment of the law on behalf of the whole nation, in its acknowledged capacity as what amounts to a permanent nullification-equipped jury, the court allows injustice to continue and fosters a corrosive disrespect for the law. Together, the two actions underscore the critical importance of jury nullification as a power available to, and practiced by, 'common' citizens.

The California Supreme Court, in accepting the case of a juror who appealed being thrown off a jury for stating explicitly that he did not intend to deliberate the facts regarding one count of a multi-count indictment because he did not consider the act charged to be criminal, deliberately seized the opportunity to mis-educate Californians about the law (and stick it's foot in it's mouth, to boot). It could have declined to hear the case, but instead arrogantly bulled forward, apparently eager to put us rubes in our place.

Nullification *"may sound lofty,"* Chief Justice Ronald M. George wrote, *"but such unchecked and unreviewable power can lead to verdicts based on bigotry and racism."* The court also warned that nullification would leave the fate of defendants to the *"whims of a particular jury"* which could disregard the presumption of innocence or even convict *"by the flip of a coin."* Perhaps the Chief Justice and the California Supreme Court have forgotten that the jury's real power as regards a defendant is that of acquittal, not of conviction-- an improper or suspect conviction by a jury can be overturned by many reviewing tribunals, as well as the trial judge, but a jury's acquittal is the word of God. That fact alone, acknowledged by even the most ardent foes of jury nullification, proves them wrong, for such uncontestable power, while consistent with a right of nullification, is contradictory with the idea that a jury must be bound by instructions from the court as to the applicability of the law. Were the latter true, a mechanism would exist for overturning a jury's acquittal based on a contest of its compliance with those instructions. (Regarding *"verdicts based on bigotry and racism,"* one can only hope that, upon contemplation of selected instances of legislative action insufficiently checked by jury nullification, the Chief Justice would have the grace to reconsider this remark and glumly eat a bit of Jim Crow).

In the U.S. Supreme Court action, the justices declined to consider the constitutionality of the Controlled Substances Act while ruling that California's Medical Marijuana initiative (legalizing the distribution and use of marijuana by a doctor's prescription) could, under the auspices of that act, essentially be ignored by federal courts and law enforcement agencies. Having been given the chance to dodge the issue (because the appellate court whose ruling was being contested did not explicitly raise the constitutional issue), the Supreme Court cravenly seized it, saying, *"Nor are we passing today on a Constitutional question, such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause."*

Article VI of the U. S. Constitution says, *"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby..."* Clearly, consideration of any aspect of a law by a judge within the U.S.A. must first address the question of constitutionality, for no law which fails that test has any force in this country. It is absurd to spend a moment's time deliberating about fine points of applicability, as the court did in this case-- debating, for instance, the philosophical question of whether the virtues of the defendant's claim of medical necessity could outweigh the public policy virtues asserted by the act's supporters (they held that it did not)-- before, or, in fact, without, determining the foundational validity of the act.

It is obvious that the Controlled Substances Act would, in this case, fail the test. The 'Commerce' clause says, *"Congress shall have the power: To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;...."* No nuanced reasoning is required to perceive that even a typically broad, tortured and accommodating reading of this clause cannot empower Congress to legislate over the distribution or use of marijuana grown and consumed

in California by Californians, which was the underlying issue in the case at hand. The simple fact is that California's Medical Marijuana initiative was entirely superfluous except in demonstrating how successful have been the efforts of worshippers of government in eroding the general understanding of Constitutional limitations. California should simply have announced as a matter of state policy that DEA agents would no longer be permitted to arrest and prosecute Californians for medical use of marijuana.

With its cramped ruling in this case, the Supreme Court is obviously guilty of dereliction of duty-- having failed to trouble themselves to judge the law, as they are duty bound to do. In this, they lend the weight of their institutional authority to a dangerous misunderstanding of the nature of the law and set a very bad example for other juries in other trials.

A jury's first duty, as representatives of the sovereign citizenry, is to ask itself the questions, *"Do I have the right to hinder another in doing what the accused is charged with?"* and *"Even if I do, is this act really one of those from which we, the people, sought to protect ourselves when we created this government, and if so, is this law-- which will, by the way, be available in future to be wielded against me and mine in turn based upon the precedent set here today-- really an accurate and finely-enough tuned expression of that purpose?"* Only after these questions are decided in the affirmative does the question of whether indeed the accused committed the act charged arise.

The founders recognized that the energy of the state-- always enormously larger and more powerful than that of any one defendant-- will inevitably and irrepressibly be devoted to a proliferation of laws, regulations, and impositions on people's lives, even in the most carefully designed system. As Jefferson observed, *"It is the natural progress of things for government to gain ground, and liberty to yield."* Therefore, in striking the

necessary balance between the (reluctantly) acknowledged necessity of government and the provision of sufficient safeguards for the liberty and preservation of individual sovereignty which is its purpose, they placed numerous stumbling blocks in the way of the exercise of state power-- any one of which could serve to shield them and their descendants from its might.

Taken together, these various safeguards-- such as a written constitution authorizing a limited scope to government power; a representative legislature appointed by the citizenry and removable if dissatisfactory; an independent judiciary presumed to have no stake in the outcome of a trial; and, at nearly the last resort, the requirement that a representative sampling of the citizenry must offer its imprimatur of approval before the state may act forcefully against one of their fellows-- are designed to give each and all of us an equitable defense against abuse and tyranny. They ensure that it is the people, not an elite ruling class, that have the final say in how the power of the state can be used.

The true rulers in this country-- the citizens-- are engaged in diverse pursuits and leave much that is done in their name in the hands of their representatives. But, like the master who, while permitting his servant to shop, negotiate, and even write the check, wisely reserves to himself the authority to sign and thus commit to the decision, the people reserve to themselves the final authority in the application of force, by means of the power and purpose of the jury. As a representative of the law-making community as a whole, it is the juror's own law that is proposed to be applied, and so it is unquestionably within his authority to consider the virtue and purpose of that law one last time before it is brought to bear.

It is the state's conceit that the constitutional mechanisms of a democratically elected legislature and an allegedly independent judiciary are themselves sufficient

safeguards by virtue of which the fitness of all laws, as ultimately brought to bear, can be relied upon. But the founders were not so arrogant as to presume that those mechanisms were perfect in design, unsusceptible to subversion, incapable of misunderstanding, or proof against the ascension to power of the corrupt, and therefore needed no further checks upon the application of community power. Thus, recognizing that government is, as George Washington is reputed to have said, *"Like fire-- a dangerous servant and a fearful master,"* they blessed us with the potential inconveniences of too much liberty, seen rightly as infinitely preferable to those attending too little of it.

After all, the harm that can be done by one citizen even if unwisely free by the decision of his fellows into (after all) their own midst, is immeasurably less than that which might be accomplished by a government not kept tightly reined-in and susceptible to overrule should it seek to stray. Keeping those reins firmly in hand, in principle and in practice, is among our chief civic responsibilities, careful attention to which is owed both to our own interest and to that of our posterity.

"It is not only his [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 directions of the court."

-John Adams

"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

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

-John Jay

"The friends and adversaries of the plan of the [Constitutional] convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists of this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government."

-Alexander Hamilton

"If it [jury power] is not law, it is better than law, it ought to be law, and will always be law wherever justice prevails."

-Ben Franklin