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'Jury nullification' haunts prosecutors

by Leo F. Scanlon

Despite Marion Barry's announcement on June 13 that he would not run for reelection as mayor of Washington, D.C., the problems facing U.S. Attorney Jay Stephens have only just begun. The political show trial being conducted by the Bush administration is threatened by the probability that no jury composed of black Washingtonians will convict the mayor on the terms demanded by the government. The witch-hunt conducted against Barry has catalyzed popular outrage at the tyrannical tactics of the Justice Department. So fearful of this sentiment is the government, that it is questioning potential jurors about their religious beliefs, asking which church they attend, and probing for any sign of a predisposition to leniency toward the accused.

The specter haunting the prosecution is the threat of "jury nullification"—an

law which is enjoying a revival among political and social movements. Organized support for the notion is being nurtured by a western states-based coalition of libertarians, gun owners, farmers, and others, who have been the target of political prosecutions. This group is supporting the Fully Informed Jury Amendment (FIJA). The Barry case has brought black political machines and civil rights activists into this fight as well, laying the groundwork for an explosive rebellion against the use of the courts to suppress political speech.

Destruction of the jury system

The right of a jury to determine *the facts and the law of a case presented to it* is a fundamental principle of the jury system in Anglo-American law, and is the mechanism by which a jury may curb excesses and tyrannical actions on the part of a politically corrupt prosecutor. During this century, as the U.S. Justice Department and federal judiciary have worked to extend their jurisdiction and power, they have evolved a concept of the jury which strips it of this basic function.

The typical charge to a jury by a judge contains some version of this phrase: "It becomes my duty as a judge to instruct you concerning the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you. . . . You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me." These words are buttressed by pre-trial motions *in limine,* which proscribe the jury from hearing whole categories of evidence. This "one-two punch"

cal prosecution.

The scheme is illegal as well as onerous, and there is a long tradition to recommend the banning of such admonitions by any judge. The right of a jury to negate a political prosecution was established in 1670, when a jury was asked to convict William Penn for preaching Quakerism to an unlawful assembly. Four of the 12 jurors voted to acquit, and were then imprisoned, starved, and fined by the judge, who demanded a guilty verdict, since the Quaker had indeed done what he was accused of. The jurors prevailed, thus establishing that a juror could not be punished for his verdict, and that a jury could disregard a judge's instructions. The same issue arose in the famous sedition trial of revolutionary publicist Peter Zenger, whose lawyer, Alexander Hamilton, convinced a jury to acquit his client, even though the judge ruled that truth would be no defense in the trial. John Adams expressed a sentiment widely held in the 19th century when he said of the juror: "It is not only his 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."

As a consequence, four state constitutions instruct judges to inform juries of their power of nullification, and the Constitution of Maryland states: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

Sparf v. U.S. that the Supreme Court, responding to widespread acquittals won by union strikers and farm activists, ruled that defense teams could not inform jurors that they could judge law and fact, and that judges did not have to tell jurors of their powers to do so.

Nullification has been an issue during every time of turmoil in the history of the republic. It was the common form of resistance to the oppressive navigation acts and other commercial regulations imposed on the colonies by England. The hated, jury-less Admiralty Courts of the 17th century have their parallel in the proceedings of the Environmental Protection Agency and other regulatory agencies today. Nullification was widely used against the fugitive slave laws in the pre-Civil War period as well.

The suppression of this vital political function of the jury in the 20th century has created distortions which are badly in need of correction. Chief among these are the abuses brought upon the civil rights movement by the FBI and its adjunct Ku Klux Klan. In the climate of violence organized in large part by these agencies, corrupt juries convicted innocent civil rights workers.

The intent of the FIJA is to prevent such a breakdown of the legal system today, by forcing every juror to responsibly judge the application of the law. This poses no threat to an honest prosecution, and can help to make a civic virtue of mercy, a great weapon against tyranny.

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