

# **Jury Nullification Results In Hung Jury For Climate Activist**

**Ken Ward, a climate activist who shut down a pipeline in the state of Washington last October, got a hung jury at his criminal trial last week in an example of the power of jury nullification.**

Steve Hanley

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Ken Ward has been a dedicated climate activist for more than 15 years. He is the former Executive Director of New Jersey Public Interest Research Group (NJPIRG), Deputy Director of Greenpeace USA, President of the National Environmental Law Center, and co-founder of Climate Disobedience.

On October 11, 2016, Ward broke into a gated enclosure surrounding a valve for the Trans Mountain Pipeline in Burlington, Washington. The pipeline carries oil recovered from tar sands in Canada to refineries in the US. Ward made no secret of his nefarious activities. He filmed them and posted them on Facebook. Eight other “valve turners” participated in similar activities that day in Montana, North Dakota, and Minnesota.

For his brazen attack on a duly constituted business corporation, Ward was charged with burglary, criminal sabotage, and assemblage of saboteurs. Some people may be surprised to learn that “assemblage of saboteurs” is a crime, but when it comes to protecting property rights instead of the rights of individuals, the American justice system has no peer among world nations.

# The Necessity Defense

Ward and his legal defense team planned to employ a “necessity defense” at his trial. They were prepared to argue that after decades of climate action with no tangible results, Ward’s only choice was to break the law, but Judge Michael Rickert barred Ward and his lawyers from presenting that defense at trial.

Ricket said, “I don’t know what everybody’s beliefs are on [climate change], but I know that there’s tremendous controversy over the fact whether it even exists,” according to *The Guardian*. “And even if people believe that it does or it doesn’t, the extent of what we’re doing to ourselves and our climate and our planet, there’s great controversy over that.”

## **A Hung Jury Leads To A Mistrial**

Despite the fact that Ward had filmed himself doing precisely what the prosecution said he did, the Skagit County district attorney managed to draw the trial out over two full days. Prosecutors are almost always politicians looking to move up. High-profile cases don't come along every day and the DA was determined to milk this for all the free publicity he could muster. When he was done pontificating and preening, the jury took just 5 hours to decide they couldn't agree. As a result, it was declared a hung jury, resulting in a mistrial.

## Shock & Awe

“I was quite astonished really. We provided them with a video of exactly what I did, and the judge didn’t allow us to present the kind of necessary defense that would have given a concrete basis for a jury not to convict so I was quite surprised and heartened,” Ward told *RT News* after the mistrial was declared.

“I don’t have any regrets and think it is right thing to do,” Ward said. “It is clear to me that engaging in this kind of non-violent civil disobedience on climate is by far the most effective thing one can do by almost any measure. Certainly the things I care about most which in engaging and emboldening activists themselves this is huge, and it’s growing.” The mistrial rated an ecstatic tweet from 350.org founder Bill McKibben.

Whoa!!!! Hung jury in Ken Ward’s #climatetrial in WA state. Mistrial! This is a big moment  
(and huge, if temporary, sigh of relief from me)

— Bill McKibben (@billmckibben) February 1, 2017

# Would Do It Again

“I would do it again. I think it by far the most effective thing, the almost needed thing at the moment especially given our current political environment under President Trump,” Ward says. “We are living under what is in effect the first fossil fuel administration.”

Environmental activists Patrick Mazza told reporters after the court announcement: “This is phenomenal. The jury was out for five hours and there were no facts in dispute here so even though the judge didn’t allow that climate information introduced in the trial as a ‘necessity defense.’ There is a lesson in this that ordinary people who feel a call of conscience will respond. They won’t just sit down to authority.”

# Jury Nullification

Perhaps. Jury nullification is a concept that is incorporated into American law because it was part of the English common law at the time the United States was created. According to Doug Linder of the University of Missouri Kansas City, “Jury nullification occurs when a Jury returns a verdict of Not Guilty despite its belief that the defendant is guilty of the violation charged. The jury in effect nullifies a law that it believes is either immoral or wrongly applied to the defendant whose fate they have been charged with deciding.”

That’s not precisely what happened here. The jury was unable to agree on a verdict, which resulted in a mistrial. If they had agreed unanimously on a not guilty verdict, Ward would be free entirely of the charges thanks to the double jeopardy provision of the US Constitution. As it is, he can be retried. In fact, he expects the DA to start the process to call for a new trial shortly.



# Should Jurors Be Told?

Some people think jurors should be told they have the right to refuse to convict if doing so would go against their conscience but most legal experts disagree. Certainly judges and prosecutors don't want jurors to find out how much power they have. Most courts forbid defense attorneys from mentioning the concept to the jury during trial. People who have attempted to educate jurors about nullification have been arrested and jailed.

While climate activists like Bill McKibben may applaud what the jury in Washington did, jury nullification is a double-edged sword. It is what allowed all-white juries in the South for decades to refuse to convict white defendants accused of murdering black men. It is also the likely explanation for the result in the O.J. Simpson murder trial, a decision that was embraced by many blacks and vilified by many whites.

# Implications For The First Amendment

In the dark new era ushered in by Donald Trump, America is faced with shifting legal ground when it comes to 1st Amendment rights to free speech and freedom of the press. As part of the Dakota Access Pipeline protest in North Dakota, law enforcement officials and prosecutors have elected to greatly increase the severity of the crimes charged against participants and reporters. Civil disobedience is now a quaint memory. Today, the trend is to charge people with rioting — an offense that is a felony and carries a possible sentence of up to 40 years in prison.

Suddenly, the simple act of defying public authority comes with far greater consequences. Protesters can always go to trial and hope to get a sympathetic jury, but the reality is, you are far less likely to be released on bail if charged with a felony. Say goodbye to your job, your home, and all your assets. Criminal defense attorneys won't tie their shoes for a retainer less than \$50,000 and legal fees can accelerate rapidly from there. All the more reason to donate to the ACLU now.

The 1st Amendment is under assault from overzealous prosecutors as never before. There is no reason to suppose that the judges Trump will appoint will be sympathetic to the rights of criminal defendants. Civil disobedience today comes with far more risks and penalties than it did for previous generations. Folks who walk across the Edmund Pettis bridge in Selma singing "We Shall Overcome" are not seen as peaceful protesters any more. They are seen as rioters who must suffer the harshest of legal punishments.

# Spread The Word

As much as the courts detest the doctrine of jury nullification, it may offer the best hope for people who wish to publicly dissent from the policies of the various states and the federal government when it comes to climate action, particularly since the Mouth That Roared took over the Oval Office. The only way that potential jurors will learn of their power not to convict is to spread the word. It is an imperfect shield against official misconduct, but it may be the best one available.

Judges have enormous power within their courtrooms. They will tell juries they must follow the letter of the law. Jurors are often intimidated by the power of the people in the black robes. Potential jurors need to know that they can vote their conscience. Pass it on.



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