

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

USA

V

NO. 4:06-po-00038-GMF

VAL FILLENWARTH

Motion for Jury Trial

Now into court comes undersigned counsel who, for the reasons set out in the accompanying memorandum, requests that this court allow a jury to decide these matters both as a matter of right and a matter of discretion. January 13, 2007.

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Certificate of Service

I hereby certify that I electronically filed this pleading with the Clerk of Court using the CM/ECF system, so that copies will be electronically served on counsel of record Melvin E. Hyde and Stuart D. Alcorn January 13, 2007. s/ William P. Quigley, Pro Hac Vice, Attorney for Defendant, c/o Loyola University New Orleans College of Law, Box 902, 7214 St. Charles Avenue, New Orleans, LA 70118. 504.861.5591 (office), 504.710.3074 (cell)
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NO. 4:06-po-00038-GMF

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Memorandum in Support of Motion for Jury Trial

May it please the Court:

Trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives. *Duncan v Louisiana*, 391 US 145, 88 S Ct 1444, 20 LEd2d 491 (1968) at 1451.

"I consider [the trial by jury] as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's constitution."

Thomas Jefferson to Thomas Paine 1789¹

The Sixth Amendment to the US Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

The accused ask this Court to allow this matter to be tried by a jury either as a matter of right or as a matter of discretion.

¹ Letter from Thomas Jefferson to Thomas Paine (July 11, 1789) in 15 *The Papers of Thomas Jefferson* 269 (Julian P. Boyd, ed. 1958), cited in Evan R. Seamone, "A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately," 5 *NYU J Legis. & Pub Policy* 289 (2001-2002) fn 1.

Thomas Jefferson also famously wrote: "Were I called upon to decide whether the people had best be omitted in the Legislative or the Judiciary department, I would say it is better to leave them out of the Legislative." *THE PAPERS OF THOMAS JEFFERSON*, 1789, volume 15, ed. Julian P. Boyd and William H. Gaines, Jr. (Princeton, N.J. Princeton U Press 1958), 282-83 as quoted in William L. Dwyer, *IN THE HANDS OF THE PEOPLE*, (Thomas Dunne Books, 2002).

In April 2004, US District Court Judge Adaleberto Jordan in Miami, granted a trial by jury to Greenpeace in a federal criminal prosecution for a petty offense charged by the government against the advocacy organization.² The federal court exercised its discretion to allow the matter, involving politically controversial civil disobedience, to be decided by citizens in accordance with the letter and spirit of the Sixth Amendment to the Constitution.

The court ruled:

There is something to be said for viewing the jury as a function (or consequence) of the right to self-governance, and I cannot see anything wrong with having members of the community determine whether the government can prove the charges against Greenpeace beyond a reasonable doubt.³

US District Judge Jordan then went on to quote Alexis de Tocqueville:

“The man who judges the criminal is really the master of society. Now the institution of the jury places the people themselves, or at least one class of citizens, on the judge’s bench. The institution of the jury, therefore, really puts the direction of society into the hands of the people or of this class.”⁴

There is no doubt that this court clearly has the discretion to have this matter tried by a jury. “Nothing in the Constitution...precludes the judge from granting a jury trial as a matter of discretion.” *Ross v Bernard*, 396 US 531, 550 (Stewart, J., dissenting on other issues). Though the United States Supreme Court decided that defendants who are subject to federal prosecution for crimes which would result in a sentence of up to 6 months in prison and a \$5000 fine, are not automatically entitled to a trial by jury, *Blanton v City of North Las Vegas*, 489 US 538, 541 (1989), defendants in this matter request a trial by jury.

This request for a trial by jury is of particular importance because these matters involve significant issues of political protest against government action. As Justice Kennedy has observed, “the primary purpose of the jury in our legal system is to stand between the accused

² *US v Greenpeace*, USDC, Southern District of Florida, Miami Division, Case 03-20577. See decision at http://www.greenpeaceusa.org/pdfs/order_pendingmotions.pdf

³ Pages 13-14 of the opinion.

⁴ Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 260 (U. Chicago Press, 2000).

and the powers of the State.” *Lewis v US*, 518 US 322, 335 (1996) (Kennedy, J., concurring in the judgment).

These matters are criminal charges arising out of incidents of non-violent political protest against governmental action and policy to challenge the morality and legality of the continuing operation of the School of Americas, recently renamed the Western Hemisphere Institute for Security Cooperation (hereafter SOA/WHINSEC).

Defendant protestors contend that the SOA/WHINSEC has a history of training soldiers from other countries in methods which are illegal, immoral, and contrary to the laws of international human rights. These arguments are detailed in the accompanying memoranda supporting other motions in this matter and will not be repeated here.

The government obviously disagrees with the protestors and considers these matters simple criminal charges.

Disputes over policy between government and citizens have been an integral part of the development of this country. The political protest of the Boston Tea Party was, in the minds of the duly constituted authorities at least, merely lawless action. As were civil disobedience actions challenging slavery, promoting the rights of women to vote, and the civil rights struggle.

The actions of the individuals charged in this matter are similar to the actions taken by those who opposed the legal tax on tea or the laws prohibiting women from voting or the duly promulgated laws of segregation.

As the US District Court observed in the pre-Blanton decision of *US v Thomas*, 574 F. Supp. 197 (D.C.C. 1983) there can be special circumstances supporting a request for a jury trial in a protest case when there are, as here, “First Amendment implications.” at 198.

The accused ask for a jury trial on three grounds: Article III, Section 3 of the U.S. Constitution; the Sixth Amendment to the U.S. Constitution; and the history of the right to a trial by jury as set out in a prior Supreme Court decision in *Duncan v Louisiana*, 391 US 145, 88 S.Ct. 1444, 20 L Ed 2d 491 (1968).

Article III, Section 3 of the U.S. Constitution specifically states that: “The trial of all crimes, except in cases of impeachment, shall be by jury.”

The Sixth Amendment to the Constitution specifically states that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...”

While the U. S. Supreme Court generally approved the prosecution of petty crimes without the requirement of a jury in *Duncan v Louisiana*, 391 US 145, 88 S.Ct. 1444, 20 L Ed 2d 491 (1968), the Supreme Court did recognize the particular historical and political importance of a right to a trial by jury when individuals are confronting the government. The court traced the special nature of trial by jury to the English system back to, and possibly even before, the Magna Carta.

The U.S. Supreme Court started outlining the importance of the trial by jury by quoting from the 1889 Commentaries on the Laws of England by Blackstone:

“Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.” at *Duncan*, supra, 1448-1449.

The Supreme Court goes on to note the importance of the right to a jury to the American colonists and in the creation of the nation, in pages 1449-1450:

“Jury trial came to America with English colonists, and received strong support from them. Royal interference with the jury trial was deeply resented. Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on

October 19, 1765--resolutions deemed by their authors to state 'the most essential rights and liberties of the colonists.'"

The First Continental Congress, in the resolve of October 14, 1774, objected to trials before judges dependent upon the Crown alone for their salaries and to trials in England for alleged crimes committed in the colonies; the Congress therefore declared: 'That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

The Declaration of Independence stated solemn objections to the King's making 'judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries,' to his 'depriving us in many cases, of the benefits of Trial by Jury,' and to his 'transporting us beyond Seas to be tried for pretended offenses.'"

Later in the opinion, the Duncan court again underscored the importance of trial by jury when a person is, as here, confronting their government. See the following quote from page 1451:

“The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the

citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

The (jury trial) clause was clearly intended to protect the accused from oppression by the Government.” *Singer v. United States*, 380 U.S. 24, 31, 83 S.Ct. 783, 788, 13 L.Ed.2d 630 (1965). 'The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.' P. Devlin, *Trial by Jury* 164 (1956).”

The legal history set out by the *Duncan* court holds the right to a trial by jury out as one of the bulwarks of freedom, a much more fundamental right than one which switches on and off like a mathematically calculated switch. Undersigned counsel has found no decision by the Supreme Court which directly addresses the issue of whether indisputable political protest which could result in incarceration of up to 6 months should be extended the fundamental right to a trial by jury.

The importance of the jury when citizens challenge their government cannot be overstated. Judges are not the same as juries. Indeed, protection against overbearing and oppressive judges was one of the main arguments of the proponents of jury trials when the Bill of Rights were enacted.⁵ Commentators agree that the purpose of the jury is to give the average

⁵ Charles W. Wolfram, “The Constitutional History of the Seventh Amendment,” 57 *Minn. Law Rev.* 639, 670-671 (1973).

person the opportunity to challenge governmental misconduct.⁶ This is particularly important to protect the citizen from oppression by governments. As Dean Pound said:

“The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers.”⁷

Therefore, given the circumstances of this case and the reasons set out above, undersigned counsel requests that this Court grant the motion for trial by jury both as a matter of discretion and of right.

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⁶ William V. Dorsaneo, “Re-examining the Right to Trial by Jury,” 54 SMU L Rev 1695 (2001). Footnote nine of this article provides a great summary: “See for example, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1190 (1991) (“The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”); Akhil Reed Amar & Alan Hirsch, *For the People: What the Constitution Really Says About Your Rights* 52 (1998) (“To the Framers, the value of the jury derived more profoundly from another consideration: the role of ordinary citizens in thwarting various forms of government oppression, corruption, and self-dealing.”); *id.* at 55 (“It is almost impossible to exaggerate the jury’s importance in the constitutional design. No idea was more central to the Bill of Rights—indeed, to America’s distinctive regime of government of the people, by the people, and for the people.”); 1 Laurence H. Tribe, *American Constitutional Law* 617 (2000) (“Thus, it is not an exaggeration to say that ‘the entire issue of a Bill of Rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases.’”) (quoting Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 657 (1973)).

⁷ R. Pound, *Law in Books and Law in Action*, 44 Am.L. Rev. 12, 18 (1910) quoted in note 32 of *US v Dougherty*, 473 F2d 1113, 1130 (DC Cir 1972).