



## Episode 971: Jury Nullification at Work: Free Speech Trumps Statute, Jury Concludes

Guest: Dennis Fusaro

**WOODS:** You have just emerged from rather a harrowing legal ordeal going back to April 2016, so tell us what that was all about, just the basic details of how it is that you wound up in the middle of this. What terrible thing had you done?

**FUSARO:** Well, on October 31st, 2014, an autocal or what people call a robocall was delivered to a list of phone numbers ostensibly in Anne Arundel County, Maryland, with what has been described as a rather snarky parody about transgender public policy, thanking a candidate for coming out publicly in support of that policy and asking people to call the phone number that was apparently on record for him to congratulate him and thank him. The thing about this person, it was a candidate for office. Nobody put a gun to his head asking him to run and to use the power of the state to impose his views on others, and so some people took great offense at the fact that the call asked people to call what was ostensibly his home phone number and many people objected to the content.

But what happened most specifically was several people supporting him filed complaints with the State Board of Elections, the Maryland State Board of Elections, man named Jared DeMarinis. And because they said it didn't have a proper disclaimer or government authority line – and for your listeners, let them understand what this means. The position of the state of Maryland is when you produce what they call campaign material, which is anything that relates to a candidate – so think how broad that is. Or also a prospective or potential candidate. So think how broad that is. If you produce campaign material, the state of Maryland says – about a Maryland candidate; not a federal, but a Maryland candidate – you can't say your words unless you say their words.

And they have a very specific – Well, they have a very specific format in which they want you to say what your words must be in. So you have to say things like the name of the group or the person producing and distributing the call; if it's a group, the treasurer. And of course it can only be a group with a treasurer if it's registered with the state of Maryland, and then you have to say, "Not authorized by any candidate or candidate's committee," or words essentially to that effect. Now, that's in the case of what's called an independent expenditure, something not authorized by a candidate who is registered with the state of Maryland. So that became the controversy and that became the lynchpin on which they used to say this call was illegal and we're going to fine the people that did it and we're going to punish them.

**WOODS:** All right, now, let's hold off for a moment on the actual strategy that you followed as a political strategy. That's a separate question. What I want to focus on now exclusively here is the legal issue.

**FUSARO:** Sure.

**WOODS:** So was it a question of you didn't include in there the name of a group that was the sponsor of this particular message and that was how you violated the statute?

**FUSARO:** Well, that's not quite right. That's one of the philosophical and legal disputes here. It said the call was — By the way, just for reference so everybody knows: I did not hear the full call either in transcript form or audio until sometime after the charges were filed. So I didn't write the script; I didn't author it; I didn't record it. But be that as it may, it did say, "Paid for and authorized by Marylanders for Transgenders," and that became part of the framing on behalf of the state — and I'm going to say this — the progressive leftist advocates for punishing the people who did this call. They're claiming that it's a fake group or it's not a real group. Well, what is a group? I mean, if you, me, and Gary North get together and create a group called Citizens for Better Etiquette on the Internet, are we a group? I say we are because we have the right to associate freely and we have the right to call ourselves that name, unless we're defrauding someone or doing something clearly violating other people's property rights, which we're not. So is it a group or not a group?

But it did say that, but they said that doesn't count or that's not enough or it's missing these lines. There was also some dispute about whether you had to put an address or also some dispute about whether if three people came together in an ad hoc group to produce and distribute this call, did you have to put all three addresses and all three names. It got very convoluted. And the state, the prosecutors, the bureaucrats, in my mind, very cleverly narrowed it down to just saying, Well, it didn't say, "Not authorized by any candidate or any candidate's committee," and that became the lynchpin of their argument.

**WOODS:** You were found not guilty. The case is over so you're free to talk. So what I want to know is, at the time all this happened, were you saying to yourself in the back of your mind, Well, we are skating a bit of a thin line here and we are on potentially legal thin ice and you never know what can happen but we're just going to roll the dice and take our chances? Or was this more of a case of, no matter how carefully you observe these arcane laws, they can always find something to come after you for? Does one of those more describe your situation?

**FUSARO:** No, because for years I've known about *Talley v. California* and *McIntyre v. Ohio*, and I believe that at all times, my involvement, whatever it was, was perfectly protected speech under the First Amendment as explicated by cases like *Talley v. California* and *McIntyre v. Ohio* and a really great case out of the Ninth Circuit. People say, Can anything good come out of the Ninth Circuit? Well, yeah, go look at the case of *Heller* — not the gun *Heller*, but *Dean Heller*, who was Secretary of State in Nevada back in *Heller v. The ACLU of Nevada*. It's a great case. That says that the right of anonymous free speech is protected. And their argument was this was not anonymous or maybe it was pseudonymous, and so the people have a right to know who said this. And that's part of the debate.

**WOODS:** All right, let me ask you something about the tactics themselves before we get into the very interesting result, because of course the outcome of this case is indeed quite interesting. Suppose there were a series of robocalls that urged people to call Ron Paul, and they included Ron Paul's home phone number. Would you in that case say, "Well, free speech. That's the way it goes?"

**FUSARO:** Yeah, because candidates who run for office, nobody puts a gun to their head, and they run out there advocating that they're going to rule over us. And I don't think they should be shielded from input from people. The politicians, the political class wants to go out there and do these policy things to us. They want to impose these rules and these restrictions on our freedom and liberty, and then they don't want to hear back from people disagreeing with them. So I respectfully disagree. Now, an intelligent man like Ron Paul knows how to not give out his phone number.

**WOODS:** Huh. Well, all right.

**FUSARO:** I'm not going to be responsible for stupid politicians.

**WOODS:** I gotcha; I gotcha. Just for background, tell me what was this race exactly and who was running.

**FUSARO:** Okay, this race was a very interesting race. Michael Anthony Peroutka, who had run for U.S. Constitution Party candidate for president in 2004, decided that he wanted to run for political office and local office, because he wanted to set an example – these are the conversations I had with him. He wanted to set running for local office as an example of people who cared about liberty and freedom and the Constitution, set an example of trying to get into office and to in theory and hopefully not become part of the system, but roll back the system. And for that end, he decided to run for Anne Arundel County Council as a Republican. He ran in the primary. He won the primary, a five-way primary. Surprised everybody, won by 38 votes, and then went on in the general election to run against a man named Patrick Armstrong.

The reason it's very interesting of course is, if you know Michael Anthony Peroutka's history, he's said all sorts of terrible things about Republicans, most of which are true. And so they used – The Republican establishment was very upset that this person was running as a Republican. They were even more upset when he won the race. It was a very volatile race. Michael has a very colorful background, a lot of statements, you know; got caught singing "Dixie" as the National Anthem on video, so the left had a field day with him. And they nationalized this race, by the way. Stuff about this race was all over the Internet.

**WOODS:** So when charges were actually brought against you, were you surprised at this?

**FUSARO:** No. And actually, what they first tried to do is they tried to get a grand jury to do felony indictments, and they couldn't get felony indictments, so then the prosecutors went with what are called information or charges issued by the prosecutor. That's why they went – These were misdemeanor charges. The charges were, Failure to put on the disclaimer, a violation of – I don't want to get down into

the statute details and bore your listeners unless they want to know, but, Failure to put the disclaimer on, and then, Conspiracy to not put the disclaimer on, or, To cause the disclaimer to not be put on. So it's two charges, two misdemeanors, potential of one year in jail on each charge and a \$1,000 fine.

**WOODS:** All right, so a \$1,000 fine, fair enough, but a year in jail would just be unthinkable to almost anybody –

**FUSARO:** Well, and I also say this, because if this had been even a drug case, they would have probably – They never offered a plea deal. This was political. They had to get blood. They had to get blood.

**WOODS:** So that would be my question. When it comes to elections and election laws, the government's going to run it the way it wants to run it, and it's going to be serpentine and convoluted and difficult to know exactly – I mean, in other words, I think there are situations that – there are things that a lot of candidates probably do where the relevant FEC statute is not really enforced all that much, but they could come after you any time they want to and go ahead and enforce it. So on stuff like this, I would just ask: is that really the field you want to die on?

**FUSARO:** Well, some people have a boat at the marina; some people want to fight for free speech. You decide what you want to do. But let me just say this: I mean, what they do is right now – I mean, they're trying to move towards criminalizing what they call hate speech. That's what the Slants decision came down from the Supreme Court, thankfully unanimously overruled the restrictions on the Patent and Trademark Office. But they want to define something as hate speech and then criminalize it, but they can't get there yet, so what they do is if they don't like your message, they find some technical failure under their statutes. *Oh, you didn't put a disclaimer on.* So the people who did this robocall, they get punished, but the lefties or the mainstream Republicans who were saying all this stuff and not putting disclaimers on, that was just a mere oversight. That's where the prosecutors hide their discretion. Through that discretion, that's where they hide their ideological agenda. And actually, I'm arguing it's not a Republican-Democrat agenda; it's a control agenda. It's an agenda for protecting the establishment. If you play ball, you're part of the establishment, you'll be protected. If you're a whacky, left-wing Bernie Sanders guy or if you're a right-wing, Ron Paul libertarian or a right-wing, Peroutka guy, hey, we've got to keep those people out of – because they don't fit on the 3x5 card that you talk about.

**WOODS:** All right, so then that is what I'm driving at, that there is obviously discretion here and they overlook problems like this when it comes to other people, but when it comes to people like you, they're going to bring down the hammer.

**FUSARO:** Let me give you a quote from John Dingell, who was House of Representatives in the '80's; he was Chairman of the Rules Committee. Ron Paul probably served with him back then. And Dingell said, I'll let you write substance and I'll write procedure, and I'll screw you every time. What he was saying is you don't get to the substance of an issue – If you have a bill about hog farming, you're never going to get the bill if they control when it comes up, when it's voted on or not. And so same thing here: they decide who they go after under this broad discretion. They decide which offenses are serious challenges to public order and then that one was just a

minor oversight. It just happens that most of the time, it's people who fit within the 3x5 card of establishment thought that get the pass.

**WOODS:** And yet there was an interesting result, let's say, that I keep referring to. So just recently – this was within – when was the decision handed down?

**FUSARO:** August 3rd. Thursday, August 3rd, 2017 in Annapolis, Maryland.

**WOODS:** Okay, so not even a week ago.

**FUSARO:** Right.

**WOODS:** So tell me about the result and, more than that, the significance of the result.

**FUSARO:** Well, I think a jury of 12 men and women, a mix there, unanimously rejected the prosecutor's effort to find us guilty of violating these difficult-to-understand Maryland election law statutes and said, "Not guilty." And they said – they were willing to talk about their decision in the hallway outside the courtroom after it was all over with the prosecutor and one of the defense attorneys and say that these men were exercising their First Amendment rights. Even if the prosecution had proved everything they claimed they were proving, it was still First Amendment – the exercise of First Amendment free speech, that's protected speech, and these Maryland statutes don't apply. It was what classically we call jury nullification. They did not allow the prosecutor and the judge to some extent – although I've got to tell you, the judge in many ways was actually very fair. He let the defense attorneys get free speech arguments into the debate going on in the court room, both in closing arguments and to some extent within the showing of evidence. And so the jury recognized that there was a higher law, our First Amendment law. And of course Maryland has a constitutional provision, which could have just as easily been the grounds on which they rejected the prosecutor's effort.

**WOODS:** So now obviously nobody's interviewed the jurors, but you're saying that, given what their instructions were and given the case that was before them, the only grounds on which they could have come to this decision was a higher-law ground. So therefore you assume there must have been some kind of jury nullification at work.

**FUSARO:** Oh, I believe that's very clear. I mean, the prosecutors were trying to charge conspiracy, yet their evidence was circumstantial. And you know, that's one of the arguments that – We were ready to appeal the higher courts and there's some question about was it a conspiracy or was it a group of two people that didn't – You know, you get into some interesting questions about that. But the jury definitely did nullify the law.

**WOODS:** So –

**FUSARO:** Oh, and may I say this?

**WOODS:** Yeah, please.

**FUSARO:** Article 23 of the Maryland State Constitution, which they will never read to a jury in Maryland, says that juries also have the power to judge the law. They will never read that to a jury. The judge will never make that part of his or her instructions to a jury.

**WOODS:** Oh, yeah, believe me, we know well.

**FUSARO:** But it's actually in the Maryland Constitution.

**WOODS:** Yeah, I know it. It's ridiculous. The stuff with jury nullification is unbelievable. The withholding of information is absolutely unbelievable. Now, I know this sounds like the kind of question Barbara Walters would ask to Hillary Clinton, but I'm going to ask anyway: what was it like for you personally to go through this ordeal for close to a year and a half?

**FUSARO:** Incredibly stressful. There were moments of panic interspersed with long periods of boredom. For instance, this started in the middle of 2015 in Greene County, Virginia, where the Maryland state prosecutor crossed the Potomac, came over to Greene County, Virginia, and tried to extradite a pastor and autocall broker to a grand jury in Maryland. And I've got to tell you, there's an attorney in Virginia named Chris Kachouroff, and if anybody ever needs to use a guy to fight for liberty, this guy, he basically did most of this work pro bono because Chris is a believer. He's very close friends with Herb Titus. I think you might know that name. And we fought a pitched battle in the courts of Virginia before it got over to Maryland.

And see, I explained to Chris what was coming. I explained to him what was going on. Chris, he's a very smart guy, but some of the First Amendment issues weren't quite there with him. He's now an expert. But we had to fight that battle, and the local Virginia commonwealth's attorney, instead of looking at what's going on and saying, We're going to protect Virginia citizens from this intrusion from another state, cooperated with them. He could have told them, Go get your own private attorney to get standing in a Virginia court, but he went on to do it.

So anyway, what was it like? It was stressful at times. Like I told you, it was like this tsunami. You see it's coming but you can't deal with it until it hits you. It's like a bar fight. They got the first punch. You've got a bloody nose and a bruised eye and you're staggering a little bit because they get the first punch. Until you're in the courtroom and you can start defending yourself, they've got the first punch. I spent thousands of dollars; my codefendant spent thousands of dollars. And they brought people down from Canada. They spent hundreds of thousands of dollars. They went through two trials. And I'll tell you this, Tom. If that had been a hung jury, which is what we expected, I'd still be on trial. They'd be bringing it back.

**WOODS:** So you were actually surprised by the outcome?

**FUSARO:** Yeah, I expected either a hung jury or guilty.

**WOODS:** Did you think that you would actually get jail time? I mean, this had to be going through your head.

**FUSARO:** At this point I did, because even though this second – You've got to understand the system in Maryland and Virginia. The district court is a court not of record, so what we did is we let them try us, so we saw all their evidence and we saw all their argumentation. But we knew we'd get a second chance trial de novo, so we appealed to the circuit court. The first judge said, One year in jail, \$1,000 fine, I'm going to suspend all but 30 days of it. You have to be in – it was on a Tuesday – you have to be in jail on Friday.

So that meant that we had to appeal. Filed the appeal on Wednesday or Thursday before; otherwise I had to be in jail on Friday. We did the appeal that stopped that. It wiped it out as a legal fact; it didn't wipe it out as a PR or political reality, and the other side used it. The state prosecutor has that. And by the way, court not of record. This is a court where a judge issued a 14-page opinion in a district court in Maryland. They never do that. They never do that. This guy's used to processing traffic tickets and drug offenses. He's really a clerk. But he decided – he got – if I can say it this way, he got very – he got his knickers in a wad and he wrote this 14-page opinion. I'm convinced it was a political gimme to the state prosecutor, because they're trying to send a message: don't do this in Maryland. And so it's still posted on the state prosecutor's website. I doubt he's going to post much about the jury verdict.

But anyway, so we found out what their argumentation was, we appealed, we got a brand new trial, everything fresh start, and then we began our defense. And at that point, some very good people from a group called Pillar of Law Foundation, Ben Barr and Steve Klein – they're libertarians – they agreed to come on board pro bono to do the appellate constitutional argument should we have to go up the ladder. Because the jury nullified this, we don't, but they made some very good arguments in briefs submitted with the circuit court. I urge people to go read them on their website, PillarofLaw.org.

But so we got a second bite at the apple and then we knew how to defend. And I will say this: my view is – and I think the prosecutors know this, so I'm not giving anything away – the attorneys were able to make law arguments in the way they framed the factual decisions the jury would have to make. In other words – and because you couldn't avoid the First Amendment in this case. The judge, to his credit, there was one point in the trial in opening arguments when one of the defense attorneys said "First Amendment," and the prosecutor got up and objected and the judge overruled him. At that point, I knew we had a shot. We had a shot to get a hung jury. That's what I thought.

**WOODS:** Well, that raises the question – I assume most defense attorneys are not going to rely on the possibility of jury nullification. That's an extremely remote possibility, so they've got to devise some type of argument that's within the parameters of the case that doesn't take for granted that the jury may jump the shark a bit. But in this case, given that the defense was talking about free speech, was that kind of the strategy? We're just going to go for a Hail Mary? What was the defense strategy?

**FUSARO:** Well, I think it was a dual-tracked strategy. It was raising doubts about what did Fusaro do and what did he know and when did he know it [laughing]. And that was track one. That was more of a factual argument. And that's a legitimate factual

argument. That's a legitimate factual issue, because if I were to say to you, Tom, "Hey, get in your car. There's this great guy running for office. Get in your car, go to his district, go door to door for him. In fact, move into his district, register to vote, and vote for him," am I the cause — did I cause you to do that? So that's part of the issue.

And then the other issue was yes, bringing in the First Amendment arguments. And I think it was unavoidable, because even — *McIntyre v. Ohio* is a decision that is recognized and spoken about in the statute law of Maryland. If you go to the code book under Maryland election law, in footnotes you'll see there's an attorney general's opinion saying that campaign material independently produced does not have to have these disclaimers. But the prosecutors were arguing that *Citizens United* had overturned *McIntyre v. Ohio*, in effect. And this is the problem with *Citizens United*, such a messy decision. The left screams about that it gave corporate speech, but the left is also using it to shut down free speech. There are some cases over in Delaware, the Bailey case up in Maine where a Democrat consultant was set upon because he did blog postings and didn't have his disclaimers. All he got was a \$100 fine. So the bureaucrats, the little nebbishes who have this thing about people speaking out of order and not dotting Is and crossing Ts — because that's their agenda. They want to stop all that — they use *Citizens United* to shut down a certain type of free speech, anonymous free speech.

And by the way, I want to say something about anonymous speech. People say you can say anything you want; you just have to put a disclaimer on it. I disagree. Anonymity is the message. If I were to say a very controversial message and then you say, "Oh, Gary North said it," people are going to say, "Oh, Gary North said this?" They'll immediately discount it. They won't even read the message. But if they have to read the message to divine who may have said it, now they're really engaging in the message. I contend it's a different dynamic. It's received in a different way. And it is not merely a question of you can say whatever you want as long as you put these government disclaimers on it. No, they are actually restricting content. They are actually restricting substance.

**WOODS:** Tell me, if you had a 60-second radio spot to summarize for the public the significance of your case, how would you do it?

**FUSARO:** *Citizens of Maryland*, your right of free speech, including anonymous free speech, has been upheld by a jury of your peers in Anne Arundel County, Maryland. It's time now to remove Emmet Davitt from the Office of State Prosecutor and shut that office down so that free speech will no longer be infringed in the state of Maryland, the so-called free state.

**WOODS:** All right, I think you did that in about 28 seconds if my estimate is accurate. All right, very good. What else do you want to tell us about this before we wrap up for today?

**FUSARO:** I would just urge people to recognize that the forces opposed to individual liberty, the forces out there who want to make everything a licensed privilege — you know, if you want to braid hair, you've got to get a license; if you want to do engineering in Oregon now, they're going to prosecute you for doing calculations about speed cameras, they're going to prosecute you for doing engineering without a license.

We have to have more awareness. We have to be prepared to push back on these fights because they want to shut us up. If we're not on that 3x5 card you talk about, what we want to say is made so difficult to say that people are intimidated from saying it. I'm a unique individual. I'm the kind of guy who gets up in the public meeting and points out that the county council or the councilman who wants to raise our taxes or impose a rain tax, Hey, by the way, he doesn't have any clothes on. Everybody else is embarrassed. That's the kind of guy I am. But they want to make it very difficult so that only guys like me will do that, and they want to make an example out of guys like me so that the little people, the calmer people won't speak up and threaten their power. It's all about their power, really.

**WOODS:** Well, it's a very interesting story, and of course I guess you and I are both readers of TargetLiberty.com, which is the less academic of Bob Wenzel's two sites, and yet it's the one I'm totally addicted to, I happily confess. So I was very interested to see the outcome of this case. And I had people saying, You've got to get Fusaro on there and talk about this, so I'm glad we did it. Thanks so much.

**FUSARO:** Thank you, Tom. Appreciate it.