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Pandemic Is No Excuse To Limit Defendants' Trial Rights

By **John Richter and Christina Kung** (August 21, 2020, 5:37 PM EDT)


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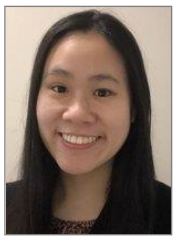
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In 1940, Justice Robert H. Jackson advised federal prosecutors that a "sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."[1]

Few actions could be more at odds with Justice Jackson's wise admonition than a federal prosecutor arguing to a court that a defendant must sacrifice the rights vested in the very U.S. Constitution each prosecutor swears to support and defend because of unilateral decisions made and actions taken by the prosecutors.

But that is exactly what federal prosecutors have done recently in a criminal case in Chicago.

In U.S. v. Vorley et al., the U.S. Department of Justice charged two former Deutsche Bank commodities traders with various offenses stemming from an alleged spoofing conspiracy.[2] To prove their case, the prosecutors chose to retain Texas and Australian consultants to provide expert testimony to the effect that the trades at issue were not made in a manner consistent with an intent to complete the transaction, testimony that undoubtedly would be critical to the outcome of the trial.[3]

The prosecutors then filed a motion to permit their experts to testify at trial via two-way live video due to the current pandemic. Upon the defendants' objection that remote testimony would violate their constitutional rights to confront witnesses against them, these prosecutors argued that the defendants should be made to choose between their rights to a speedy trial and their rights to confront the witnesses against them due to the ongoing pandemic.[4]

That federal prosecutors would take such a position is troubling. Arguing that a defendant must prioritize his constitutional rights and choose whether he wants a speedy trial, or the ability to have witnesses in the case physically present, is not only inconsistent with current law, but fundamentally unfair and inconsistent with a prosecutor's duty to seek truth with humility.

A criminal defendant's Sixth Amendment right to confront witnesses is sacrosanct. It is far from clear that any virtual testimony can or should satisfy it.

As the late Justice Antonin Scalia wrote for the U.S. Supreme Court in rejecting a 2002 proposed change to the federal criminal rules to allow two-way video presentation in open court of testimony from a witness who is at a different location,[5] "[v]irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."[6]

He noted further that while a criminal defendant who saw an advantage to waiving the right to confrontation was free to do so, a criminal defendant could not "be compelled to hazard his life, liberty, or property in a criminal teletrial."[7]

More recently, the U.S. Court of Appeals for the Eleventh Circuit, sitting en banc, rejected the use of two-way video testimony by federal prosecutors and stated "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the [d]efendants' right to confront their accusers face-to-face."[8]

Case law aside, as seekers of the truth and upholders of the Constitution, and not merely combatants in a ring, prosecutors should be advocates for upholding defendants' rights to confront witnesses. Instead, in this case in Chicago, the prosecutors manufactured their own logistical and legal issue by selecting distant experts to testify on subjects that could be established by others closer to the courthouse.

While it may have been understandable prepandemic to have selected such witnesses, once the pandemic hit the prosecutors should have recognized the defendants' constitutional right to have the prosecution's expert witnesses available to be confronted in person. Presumably, given the trial would be in the same town as the Chicago Board of Trade, that should have been feasible.

Notably, the prosecutors did not argue to the court that they had tried to find alternative experts who could come in person but had failed to find any. But even assuming they tried and they could not find alternative experts, they should have sought a constitutional means to uphold the defendants' right to confront the witnesses against them, as is contemplated in the criminal rules. Instead, they sought to shift the burden of their choice in experts to the defendants and to argue that the defendants should sacrifice their constitutional rights to accommodate the prosecution's choices.

Moreover, when the defendants decided to propose a compromise whereby an expert from London could testify remotely in exchange for one of the prosecution's experts testifying remotely, the prosecutors complained that the defendants' proposal was unprincipled and that a waiver of Confrontation Clause rights should not be premised on extracting a tactical advantage.[9]

Again, the prosecutors' arguments bespeak a failure to appreciate the import for a fair trial of in-person confrontation of witnesses against and in the presence of the accused.[10] They also evidence a failure to appreciate that the government is not situated similarly to a criminal defendant when it comes to the right to confrontation.

The prosecutors' own choices in selecting experts and moving to have them testify virtually forced the defendants into a position whereby they had to consider compromising fundamental rights. That never should have had to happen. And forcing that compromise will have a tendency to undermine truth seeking at trial and thereby the confidence in the outcome once the case is tried, whether the issue is preserved for appeal or not.

Undoubtedly, the current pandemic feels unprecedented. Even if it is, that cannot justify a relaxation of due process to accommodate practical considerations. Our nation and our Constitution have endured long and great crises without compromise to our unalienable rights. In 1807, Supreme Court Reporter and U.S. Circuit Court of the District of Columbia Chief Judge William Cranch wrote:

> The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude.[11]

Judge Cranch's wise words are as applicable today as they were in 1807. Federal prosecutors do well and do good when they live by them.

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[1] Robert H. Jackson, Attorney General, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. Am. Judicature Soc'y 18 (1940), at 20.

[2] See Jody Godoy, COVID-19 Puts Ex-Traders' Trial Rights 'In Conflict,' Feds Say, Law360 (July 31, 2020, 5:46 PM), https://www.law360.com/articles/1296971/covid-19-puts-ex-traders-trial-rights-in-conflict-feds-say.

[3] See id.; see also Brief of Petitioner at 2–5, United States v. Vorley, No. 1:18-cr-00035 (N.D. Ill. July 27, 2020), ECF No. 256.

[4] See supra note 3; see also Transcript at 15:8–18, United States v. Vorley, No. 1:18-cr-00035 (N.D. Ill. July 30, 2020).

[5] In 2002, the United States Judicial Conference submitted to the Supreme Court a proposed change to Rule 26 of the Federal Rules of Criminal Procedure that would have allowed for the use of remote testimony in federal criminal trials. The court declined to submit this proposed change. Order of the Supreme Court, 207 F.R.D. 89, 91 (2002). Speaking for a majority of the court, Justice Scalia stated that he shared the majority's view that [the proposed rule change to allow two-way video testimony] is of dubious validity under the Confrontation Clause. Id. at 93 (statement of Scalia, J.).

[6] Id. at 93 (statement of Scalia, J.).

[7] Id. at 95.

[8] See United States v. Yates, 438 F.3d 1307, 1318 (11th Cir. 2006) (en banc). But see United States v. Gigante, 166 F.3d 75 (2nd Cir. 1999) (a decision pre-Crawford v. Washington, 541 U.S. 36 (2004) and rejected in Yates).

[9] See Order at 2, United States v. Vorley, No. 1:18-cr-00035 (N.D. Ill. Aug. 4, 2020), ECF No. 269.

[10] See Crawford v. Washington, 541 U.S. 36, 43–50 (2004) (describing the English and American common law history that provided the foundation for the Sixth Amendment right to confrontation).

[11] United States v. Bollman, 24 F. Cas. 1189, 1192 (C.C.D.D.C. 1807) (Cranch C.J., dissenting); see also Ex parte Bollman, 8 U.S. 75, 79 (1807) (Marshal, C.J.) (reversing the C.C.D.D.C. in accord with Chief Judge Cranch's dissent).