

Is it Time to Request a Bench Trial?

Earlier this month, the United States District Court in the District of Connecticut again postponed jury trials, this time until February 1, 2021, “in the hope that circumstances may permit them to proceed safely.”¹ Other federal courts have done the same thing, with the Southern District of New York, for example, adjourning all jury trials through January 15, 2021.² While the courts “hope” to begin jury trials soon, this next wave of the pandemic and uncertainty regarding vaccine distribution may further delay jury access beyond February. And once jury trials resume, the courts will have to wade through a backlog of cases, delaying trials for non-incarcerated white collar-offenders even further.

What are a defendant’s options in this situation? One option is to ask for a bench trial. To get there, though, the threshold question is whether a bench trial is in a defendant’s best interests. Within the Second Circuit, a total of sixty criminal defendants faced bench trial during the 10-year period ending September 30, 2019.³ Though selection bias may influence these numbers, the success rate is eye-opening: ultimately, half of these defendants (30/60) were acquitted. *Id.* Assuming a bench trial is in a defendant’s interest, the next question is whether the government will agree.

Even when a defendant is willing to waive his or her constitutional right to a trial by jury, the government typically must consent, and the court must grant its approval. The government’s standard position is to object.

However, under today’s extraordinary circumstances, the government may be inclined to relax its typical policy of insisting on jury trials, as prosecutors face a mounting docket of criminal cases. Similarly, courts may be more willing to entertain bench trials to begin chipping away at the growing backlog.

While the government’s consent increases the likelihood of a bench trial, it may not be indispensable as the

¹ [1: //www.ctd.uscourts.gov/sites/default/files/12032020_REDACTED_GeneralOrder_Trials.pdf](https://www.ctd.uscourts.gov/sites/default/files/12032020_REDACTED_GeneralOrder_Trials.pdf)

² <https://www.nysd.uscourts.gov/sites/default/files/2020-11/20mc622%20Standing%20Order.pdf>

³ See Tables D-7, U.S. District Courts Criminal Judicial Business, 2010-2019, available at: <https://www.uscourts.gov/statistics-reports/analysis-reports/judicial-business-united-states-courts>

recent decision in *United States v. Cohn* illustrates.⁴ In *Cohn*, the District Court for the Eastern District of New York held that a prosecutor's right to withhold consent is not absolute and that there may be circumstances in which the government's insistence on a trial by jury would be unreasonable. *See id.* In reaching its decision, the Court considered a multitude of factors, including (1) the length of time during which the charges have been pending; (2) the uncertainty of providing a jury within an ascertainable time frame; (3) the complexity of the case; (4) the defendant's age and health profile, which may bear upon his right to testify in his own defense; (5) the public interest in the case and the delays in its resolution, which implicates the *public's* right to a speedy trial; and (6) the effect a delayed trial could have on evidentiary issues. *Id.* at *1. Of course, whether or not a defendant is incarcerated pending trial should also play an important role in the court's consideration.

Beyond convincing the government and the court that a bench trial is appropriate, counsel should consider whether the particular case is suitable for trial by the court. Considerations include the nature of the alleged offense and how those allegations *alone* would appeal to or offend a jury. While it is often more difficult to convince 12 people beyond a reasonable doubt, there are some cases in which the complicated nature of the facts or the law, or both, may weigh in favor of a bench trial. Moreover, there may be circumstances where a jury is more willing to give government witnesses the benefit of the doubt based merely on the witnesses' identity, whereas a judge is well trained in maintaining objectivity.

On the other hand, in a bench trial, the judge plays the role of both evidentiary gatekeeper and evaluator of that evidence, whether inside or outside the gates. Thus, defendants run the risk that suppressed or prejudicial evidence, though disallowed, remains implanted in the back of the judge's mind once introduced. More obviously, not all defendants are in a hurry to try their cases.

Given the potential availability of bench trials and even the possible willingness of courts to proceed in this manner over the government's objection, defense counsel should evaluate this option carefully. Under current circumstances,

⁴ *See United States v. Cohn*, 2020 WL 5050945, at *6-7 (E.D.N.Y. Aug. 26, 2020).

there may be a unique opportunity to try criminal cases to judges instead of juries. Indeed, a question going forward is whether the pandemic will leave behind a legacy of increased acceptability of bench trials.