The Right to Choose: Trial by Jury, or Judge

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Trial by jury is one of the most celebrated rights in the American Constitution, but what if the accused person would rather be tried by a judge instead? That question has vexed the American legal system for generations.

Dylann Roof is facing the death penalty for the shocking murder of nine African-Americans during a church meeting in Charleston, South Carolina last year. Because of the publicity surrounding his case and the antipathy of the community, Roof requested that he be tried by a judge. Yet, under federal law, prosecutors have the option to accept or reject a jury trial waiver, and they quickly vetoed Roof's bid. His trial is expected to begin in November.

Prosecutors typically approach a jury waiver from a narrow, tactical mindset. That is, if they believe they have a better chance to prevail if the case goes to a jury, they will insist on that procedure. Of course, by requesting a trial before a judge, we know that the accused has reached the opposite conclusion—that an acquittal is more likely if the case were tried before the court. Between those two competing claims one would think that American jurisprudence would side with the individual, not the government.

Unfortunately, the modern trend favors the government. Today, prosecutors routinely deny jury trials to individuals who request them. Yet, in situations where the government is required by law to allow juries, prosecutors suddenly demand a jury when particular persons request to be tried by a judge. As a result, we now have the spectacle of prosecutors imposing bench trials on people who want jury trials and jury trials on individuals who request bench trials. If the decision were left strictly to the accused, the appearance of gamesmanship would end. Since prosecutors should already possess the evidence necessary to convict, they ought to be indifferent to the mode of trial.

In 1965, a man named Mortimer Singer asked the Supreme Court to recognize an unconditional right to trial by judge. He argued that the jury trial provision was written for the benefit of the accused and that each person should decide for himself whether to accept that benefit. That's a strong argument. After all, the very purpose of the Bill of Rights was to protect the individual against overweening government. The Constitution guarantees a right to a "speedy trial," but it

would be perverse to arrest a man one evening and then prosecute him the following day before a legal defense could be thoroughly prepared. If the accused wants a speedy trial, he should get one, but if he wants to delay his trial so that his attorneys can properly prepare, he should get that also. The Constitution also guarantees "the assistance of counsel," but it would be wrong for the government to say that a defendant cannot represent himself if that is how he wants to proceed. Alas, the Supreme Court has not followed this logic with respect to persons who wish to waive their right to a jury trial.

The court's stubborn denial of an unfettered right to trial by judge is puzzling because it is hard to find a good reason for it. The impact on the overall system would be very limited. First, most cases are resolved by plea bargains, not trials. Second, a jury trial conviction requires a unanimous vote so the prosecution must persuade twelve jurors that the accused person is guilty beyond a reasonable doubt. For bench trials, the prosecution only needs to persuade one person, the judge. That math explains why the persons going to trial will ordinarily opt for a jury.

Still, there are circumstances in which the accused may wish to take his case to a judge. Any case that has generated intense media coverage runs a risk that at least some jurors harbor some partial opinions before the case has begun. Even if jurors have not been following the news reports, some may not be able to withstand pressures from the community to render the conviction that some protesters and local activists demand.

Some criminal cases may involve legal issues that are complex. A person accused of tax fraud, for example, might want a judge to hear how his tax return was prepared. Maybe the return contained errors, but a close examination of the tax laws may show an innocent explanation for those errors that would easily make sense to a person trained in the law.

Sometimes a defendant wants to testify in his own defense, but will be advised against it. Public defenders fear that jurors will be hopelessly biased after hearing about a record of previous arrests. Under the evidence rules, prosecutors can use criminal records to cross-examine any person who takes the witness stand. Even though a 10-year-old arrest for assault and battery does not help to determine whether the accused committed a battery last month, it will sway the opinions of some jurors. Since judges see all kinds of cases in their courtrooms, they would be far less susceptible to prosecutorial rhetoric about the past offense and focus more intently on the evidence in the more recent incident.

Interestingly, some state courts, such as Maryland, have recognized the right of the accused to opt for a trial by judge. Two of the police officers in the Freddie Gray case have chosen to be tried by a judge instead of a jury.

The political climate is supposed to be receptive to criminal justice reform. If that is so, lawmakers should tweak federal law and give persons who are accused of crimes the choice of judge or jury.

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