The Breakfast Club

Constitutional Minute for 20 Jun 2023

Right #20: The Right to Confront and Compel Witnesses

"In all criminal prosecutions, the accused shall enjoy the right to… **be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor,** *"*

Because they are so closely related, I've combined these two separate rights.

First, the "**Confrontation Clause**." In U.S. law, the verb "confront" has always been understood to mean more than just a right to see and listen to a witness; it included the right to challenge (or have their lawyer challenge) the witness and cross-examine them.

For centuries, English common law prevented an accused person from calling witnesses in his defense in cases of treason or felony. It also prohibited defense witnesses, if called, from testifying under oath. English law finally corrected that deficiency regarding treason trials with a 1695 statute, and for all criminal cases in 1702.

But English law also allowed for witnesses to be deposed (provide written testimony) and have their statements read in court. This of course prevented the accused or his defense team from cross-examining these witnesses. Here's an example:

Queen Elizabeth I died on March 4, 1603 and King James VI of Scotland was soon chosen as her successor, becoming King James I of England. That summer, Sir Walter Raleigh was charged with high treason and conspiring to kill the new king and place Lady Arabella Stuart on the throne. The evidence against Raleigh consisted of the testimony of a single person, one Lord Cobham, whose testimony was read at the trial even though Cobham was imprisoned nearby. Raleigh, having pled not guilty and having objected to the witness not having been produced, was nevertheless convicted after the jury had deliberated a mere 15 minutes. Raleigh was sentenced to death by quartering. The sentence was almost immediately suspended by the new King and changed to life imprisonment. After 14 years in prison, Raleigh was released by the King on condition that he accept a commission to sail for America, find the lost city of El Dorado and return with riches to replenish the King's empty coffers. Raleigh failed in his expedition and upon returning to England, the stayed execution sentence of 1603 was resurrected and modified slightly to simple beheading (the English had become much more civilized in the interim), which was carried out on October 29, 1618, all due to the testimony of a single witness, read in court.[1]

After the American Revolution, nine of the new state constitutions established a right to call defense witnesses. Two of them, Massachusetts and New Hampshire, added the right to subpoena witnesses. Although the Supreme Court declared the right to confront witnesses "[o]ne of the fundamental guaranties of life and liberty,"[2] preserving "the [by that time]

common-law right of confrontation," until 1965, the Court held that the right was limited to federal court proceedings. In 1965, the Court incorporated the right against the states and began hearing state court-based challenges.[3]

What if a witness dies before trial? In 1894, the Court ruled that if a first trial ends in a mistrial, a transcript of the testimony of a deceased witness was admissible at a second trial of the accused since the witness had been present and available for cross-examination at the first trial.

What if the disruptive behavior of a defendant results in him (or her) being removed from the courtroom and placed in an anteroom? As long as there is a CCTV which allows the accused to see and hear the witnesses testifying against him, the right has not been violated (the defendant's lawyer would obviously remain in the courtroom and cross-examine the witness).

There are a number of exceptions to what is commonly called "The Confrontation Rule:" the right to confront witnesses does not prevent the admission of dying declarations[4] or similar out-of-court statements made under a sense of impending death.[5] A defendant forfeits the right to confront witnesses who are absent when it was his threats that kept them away.[6] But if a witness was absent due to mistakes by the prosecution, then the Confrontation Clause prohibited the admission of a deposition or some other statement of that absent witness.[7]"

The second part of the "witness right", the **Compulsory Process Clause**, gives any criminal defendant the right to call witnesses in his favor. If a witness refuses to testify, the witness can be compelled to do so. However, in some cases the court can permit a defense witness to refuse to testify and of course any witness cannot be compelled to testify in such a way that would incriminate themselves in a crime.

The Compulsory Process Clause was incorporated in *Washington v. Texas*, 388 U.S. 14 (1967).

For further reading:

Call Your First Witness: The Untold Story of Abwehr General Erwin Lahousen, First U.S. Witness at the Nuremberg Trial, by Harry Carl Schaub, 2016.

Witness Communication Training: Helping Witnesses Learn to Deliver and Defend the Truth Under Adverse Examination, by Stuart Simon, Todd Betanzos, et al., 2016.

The Better Witness Handbook: A Guide for Testifying at a Deposition, Hearing or Trial, by Angela M. Dodge PhD and John H. Ryan PhD, 2013.

Next week: Right #22: The Right to the Assistance of Counsel.

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.
Contact: gary@constitutionleadership.org; 757-817-1216

[1] Perhaps thinking of poor Raleigh's experience, a charge of treason in the U.S. Constitution requires the testimony of two witnesses (Article 3, Section 3), aligning it with Deuteronomy 17:6.
[2] Kirby v. United States, 174 U.S. 47, 55 (1899).
[3] Pointer v. Texas, 380 U.S. 400 (1965)
[4] Kirby Op Cit.
[5] Mattox v. United States, 146 U.S. 140, 151 (1892).
[6] Reynolds v. United States, 98 U.S. 145, 158 (1878).
[7] Motes v. United States, 178 U.S. 458, 474 (1900).