

THEIR INCONSTITUTIONALITY AND DUE PROCESS DEFICIENCIES IN THE ALLEGED PROSECUTION

By Raymond J. O'Neil, Jr.

Introduction

In many recent decisions we have suggested a framework for assessing whether constitutional challenges to criminal trials should be predicated on due process grounds, supported by constitutional rules.

At the outset it must be noted that these suggestions concern questions of law because they were prompted by the application of constitutional standards to criminal trials. They do not concern the particularities of individual criminal trials, which are subject to their own specific rules.

At the very minimum these constitutional norms set minimum standards of due process, which trial lawyers are obliged to observe, much as a good trial judge "presides over a trial in accordance with the law." These minimum constitutional standards are not absolute, however, since they are not intended to preclude trial lawyers from using any procedure that they believe will produce a just result. Thus, when trial lawyers are asked to conform to constitutional requirements, they often argue that they are entitled to "constitutional tactics," or "constitutional狡猾," that allow them to "outwit" the prosecution without violating constitutional principles.¹

Definitions

What, then, does one call a "constitutional" defense?

It is, first of all, one that complies with the Constitution's guarantee of a minimum standard of justice, which trial lawyers are obliged to observe, much as a good trial judge "presides over a trial in accordance with the law."

It is, secondly, one that does not violate other constitutional requirements.

Multiple Defenses

For trial lawyers to successfully litigate their cases and minimize damages when they decide to settle, they must often seek more than one defense. This usually involves combining two defenses, or "constitutional tactics" and other forms of pretrial preparation, simultaneously.

For example, when a prosecutor refuses to accept a guilty plea, defense lawyers often argue that the only way to have a trial is to insist that the defense trial lawyer be allowed to introduce the case into the courtroom, thus forcing the trial court to accept the guilty plea.

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