

TRIALS & TRAVEL BAN TRIBULATIONS

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ABSTRACT*

The Travel Bans were among the most shocking actions of the first Trump administration. While not surprising, especially given President Trump’s 2016 campaign rhetoric, the Travel Bans were decried for their inherent racism, as well as for their gender, religious, and national origin discrimination. Regardless of these issues, the Supreme Court deemed President Trump’s third Travel Ban constitutional, fating countless Americans and noncitizens to a cruel and uncertain immigration policy. President Trump’s reelection in 2024 reignited these fears, and in his first year back as President, he reissued his fourth and current Travel Ban.

The Travel Bans involve, and even exacerbate, the criminal jury right concerns that arose during the coronavirus (“COVID”) pandemic, including the rights to confrontation, presence, a speedy trial, and assistance of counsel/effective assistance of counsel. Indeed, when a party is forced by the Travel Bans to virtually testify from a country like Iran, for example, these Sixth Amendment rights are likely to be impacted.

One perhaps unique aspect of the Travel Bans is their ability to infringe on the testimonial oath. American courts require witnesses to swear or affirm, under the penalty of perjury, that their testimony will be truthful prior to testifying. However, such oath or affirmation is meaningless when the witness is testifying virtually from a country like Iran. Specifically, Iran has neither diplomatic relations with the United States nor an extradition agreement with it. Accordingly, witnesses testifying virtually from Iran who violate their oath or

* Portions of this Article are adapted from Brandon Marc Draper, *And Justice for None: How COVID-19 Is Crippling the Criminal Jury Right*, 62 B.C. L. REV. 1-1 (2020), Brandon Marc Draper, *Zoom Justice: When Constitutional Rights Collide in Cyberspace*, NULR OF NOTE (May 7, 2020), <https://blog.northwesternlaw.review/?p=1395> (on file with Syracuse Law Review), Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205 (2021), Brandon Marc Draper, *Virtual Grand Juries*, HOUS. L. REV. 95 (2023), Brandon Marc Draper, *Neither Here Nor There: Redefining “Presence” for a Virtual Criminal Justice System*, 27 SMU SCI. & TECH. L. REV. 167 (2024), and Brandon Marc Draper & David M. Markowitz, *Virtual Deceptions*, 59 MICH. J. L. REFORM (forthcoming 2026).

affirmation cannot be punished for perjury, rendering the testimonial oath meaningless.

Through two hypothetical situations involving witnesses forced to testify virtually from Iran by the Travel Bans, this Article discusses how the Travel Bans, like COVID, implicate criminal jury rights. It argues that these virtual trials would largely comply with the accused's Sixth Amendment rights. However, the Article ultimately concludes that, when witnesses are forced by the Travel Bans to testify virtually in a country like Iran, it is impossible to comply with the testimonial oath requirement. Because of this conclusion, the Article asserts that such criminal trials must be dismissed, even though it will set guilty defendants free, deprive victims of the justice they deserve, and prove to society the unintended consequences of a cruel policy. However, this conclusion helps ensure that our criminal justice system will continue to value robust criminal jury rights and limit changes that will erode these protections.

INTRODUCTION

“My parents came [to the United States] from Syria to build a better life, one free from oppression. . . . After the Muslim ban became a reality, we felt trapped.”¹ Haya, a Syrian American and the only U.S. citizen in her immediate family, told her tragic story to reporters in the aftermath of the first Trump administration's Travel Ban.² She detailed how it altered her family's ability to rejoin her in the United States after they return to Syria for her father's job, stating “We couldn't return to Syria because of the war. We couldn't live permanently in Saudi Arabia or UAE because we are not Saudis or Emiratis. . . . We were stuck.”³ She continued her tragic story, noting “Out of desperation, my parents decided to reach out to distant family members in Canada and see if we could immigrate there as refugees. That's where we are today.”⁴ Amazingly, she concludes with a hint of optimism: “I dream that one day, the country I was born into will treat me as equal instead of discriminating based on nationality and religion.”⁵

Haya's story is shocking, but not surprising. Indeed, President Donald Trump explicitly stated his intent to enact such a ban in his

1. Leila Rafei & Ashoka Mukpo, *The Enduring Harms of Trump's Muslim Ban*, ACLU (Jan. 19, 2021), <https://www.aclu.org/news/immigrants-rights/the-enduring-harms-of-trumps-muslim-ban> (on file with Syracuse Law Review).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

2016 campaign for President, promising “a total and complete shut-down of Muslims entering the United States until our country’s representatives can figure out what is going on.”⁶ Not intended by his promise was the ability of the Travel Bans to implicate Sixth Amendment criminal jury rights, especially when they involved virtual testimony. While these were distinct events, a few years after the Travel Bans were found constitutional, American society experienced another incident that similarly and overlappingly implicated criminal jury rights: the coronavirus (“COVID”) pandemic. Together, these events show the expansion and limits of constitutional, virtual trials in our criminal justice system.

The Article proceeds as follows. Part I discusses the background of President Trump’s Travel Bans and COVID on American society, as the former implicates, and even aggravates, the Sixth Amendment issues that began during the latter. Part II outlines the portions of our Constitution, Federal Rules of Evidence, and Federal Rules of Criminal and Civil Procedure that involve the intersection of criminal jury trial rights and the Travel Bans. It specifically discusses the state of the accused’s rights to confrontation, presence, and to a speedy trial, both in-person and virtually. It also outlines the testimonial oath and its importance to our justice system, especially as it pertains to perjury. Part III poses hypothetical situations involving criminal defendants and witnesses impacted by the travel bans, discusses several aspects of countries impacted by Ban Four, and demonstrates the likely impacts of Ban Four on their criminal jury trial rights. Part IV considers several suggestions for how to address these impacts, including allowing “virtual presence” for defendants at trial, allowing federal prosecutions to survive a defendant’s deportation, updating jury instructions to better advise jurors regarding witness demeanor, and removing the testimonial oath requirement. Ultimately, while the Article recommends modest changes to protect those impacted by the Travel Bans, it strongly opposes any efforts to eliminate the requirement that witnesses must testify under oath and under the penalty of perjury.

6. Jessica Taylor, *Trump Calls For ‘Total And Complete Shutdown of Muslims Entering’ U.S.*, NPR (Dec. 7, 2015, 5:49 PM), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s> (on file with Syracuse Law Review).

I. TRAVEL BAN & COVID BACKGROUND

A. Travel Bans

As President, Trump immediately lived up to his promise to institute his Travel Bans.⁷ Seven days after he was inaugurated, he issued the first of three executive orders on this issue.⁸ Through the first ban (hereinafter “Ban One”), Trump suspended the entry of nationals and refugees of many countries into the United States, which included a permanent ban of Syrian refugees.⁹ It also included the ban of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.¹⁰ Ban One’s effects were short-lived, as a federal district court judge issued a nationwide temporary restraining order on Ban One only one week later.¹¹ Two days after the nationwide injunction was issued, the Ninth Circuit upheld the injunction, holding that “the Government has failed to establish that it will likely succeed on its due process argument in this appeal.”¹² The first Trump administration did not appeal that decision to the Supreme Court.

Not to be deterred, Trump revoked Ban One and issued a second travel ban (hereinafter “Ban Two”).¹³ Unlike Ban One, Ban Two did not apply to lawful permanent residents,¹⁴ nationals from a banned country who previously had United States travel visas,¹⁵ or dual nationals travelling on a non-banned passport.¹⁶ It also eliminated Iraq from the list of banned countries¹⁷ and revoked the permanent ban of

7. See Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), *repealed by* Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), *repealed by* Proclamation No. 10,141, 86 Fed. Reg. 7005 (Jan. 20, 2021).

8. See Exec. Order No. 13,769, 82 Fed. Reg. 8977.

9. See *id.* at 8978–79.

10. *Id.* at 8978.

11. See *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017) (granting a temporary restraining order).

12. *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (reconsideration en banc denied); *Washington v. Trump*, 853 F.3d 933 (9th Cir. 2017) (reconsideration en banc denied); *Washington v. Trump*, 858 F.3d 1168 (9th Cir. 2017) (cert. denied sub nom); *Golden v. Washington*, 583 U.S. 974 (2017) (petition for writ of certiorari to the Court of Appeals for the Ninth Circuit denied).

13. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017), *amended by* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017), *amended by* Proclamation No. 9723, 83 Fed. Reg. 15973 (April 10, 2018), *amended by* Proclamation No. 9983, 85 Fed. Reg. 6699 (Jan. 31, 2020), *revoked by* Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 21, 2021).

14. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 at 13213.

15. See *id.* at 13213.

16. See *id.* at 13214.

17. See *id.* at 13211–12.

Syrian refugees.¹⁸ Despite these and other changes, district courts similarly granted temporary injunctions on Ban Two that led to significant appeals in two circuit courts.¹⁹ Notably, the Fourth Circuit decided that “primary purpose [of Ban Two] is to exclude persons from the United States on the basis of their religious beliefs” and accordingly held that it likely violated the plaintiffs’ rights under the Establishment Clause.²⁰ Because of this holding, the Fourth Circuit upheld the temporary injunction on Ban Two.²¹ The Ninth Circuit also upheld the temporary injunction, holding that Trump “exceeded the scope of the authority [of the Immigration and Nationality Act] delegated to him by Congress.”²² However, these decisions were rendered moot by the first Trump administration’s decision to issue a third travel ban by proclamation (hereinafter “Ban Three”) on September 24, 2017.²³

Ban Three, like Ban Two, did not apply to dual nationals,²⁴ lawful permanent residents, refugees, asylees, or those with a nonimmigrant visa.²⁵ It impacted nationals from the same countries as those impacted by Ban Two and added those from North Korea and Venezuela.²⁶ Here, the impacts varied by country. For example, Somali nationals were barred from obtaining a green card,²⁷ while North Korean and Syrian nationals were subject to a complete suspension of immigration.²⁸ Refugees were separately banned by executive order shortly thereafter.²⁹

After taking these actions, the first Trump administration was sued, which resulted in a district court partially enjoining the refugee

18. See Exec. Order No. 13,780, 82 Fed. Reg. 13209 at 13215–16.

19. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); see also *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017).

20. *Int’l Refugee Assistance Project*, 857 F.3d at 601.

21. See *id.* at 604–05.

22. *Trump*, 859 F.3d at 755.

23. See Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

24. See *id.* at 45168.

25. See *id.* at 45167–68.

26. See *id.* at 45163.

27. See *id.* at 45167.

28. See Proclamation No. 9645, 82 Fed. Reg. at 45166.

29. See Exec. Order No. 13815, 82. Fed. Reg. 50005 (Oct. 24, 2017). The countries subject to a refugee ban were unnamed but “thought to be Egypt, Iran, Iraq, Libya, Mali, North Korea, Somalia, South Sudan, Sudan, Syria, and Yemen.” Jill E. Family, *The Executive Power of Political Emergency: The Travel Ban*, 87 UMKC L. REV. 611, 622 (2019) (citing Ted Hesson, *Trump Targets 11 Nations in Refugee Order*, POLITICO (Oct. 24, 2017, 11:22 PM), <https://www.politico.com/story/2017/10/24/refugee-nations-trump-administration-muslim-244135> (on file with Syracuse Law Review)).

ban and Ban Three.³⁰ The district courts partially enjoining Ban Three separately held that it violated the Establishment Clause as well as the Immigration and Nationality Act.³¹ On appeal, the Courts of Appeals for the Fourth and Ninth Circuits upheld the district courts' decisions to enjoin Ban Three.³² The first Trump administration then appealed these decisions to the Supreme Court, which granted certiorari to decide the constitutionality of Ban Three.³³

Despite Trump's inflammatory rhetoric towards Muslims and immigrants more broadly,³⁴ both during the 2016 campaign and as President, the Supreme Court upheld Ban Three.³⁵ Specifically, it held that Ban Three did not violate the Constitution because the "*Proclamation . . . is facially neutral toward religion.*"³⁶ It was the proclamation's neutrality, and not President Trump's lack thereof,³⁷ that fated Haya, her family, and countless others to the uncertainty and despair of the Travel Bans.

In the leadup to and after this decision, the reasoning behind and impacts of the bans were widely argued by legal scholars. Indeed, scholars discussed issues related to Bans' inherent racism,³⁸ gender

30. See, e.g., *Doe v. Trump*, 288 F. Supp. 3d 1045, 1085 (W.D. Wash. 2017) (refugee ban); *Hawaii v. Trump*, 265 F. Supp. 3d 1140, 1161 (D. Haw. 2017) (Ban Three); *Int'l Refugees Assistance Project v. Trump*, 265 F. Supp. 3d 570, 633 (D. Md. 2017) (Ban Three).

31. See *Trump*, 265 F. Supp. 3d at 1159; see also *Int'l Refugee Assistance Project*, 265 F. Supp. 3d at 632.

32. See *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233 (4th Cir. 2018); *Hawaii v. Trump*, 878 F. 3d 662 (9th Cir. 2017).

33. See *Trump v. Hawaii*, 583 U.S. 1099 (2018).

34. See, e.g., Micah Schwartzman, *Official Intentions and Political Legitimacy: The Case of the Travel Ban in POL. LEGITIMACY* 201, 223 (2019) (concluding "almost everyone knew that [Trump's] purpose was to make good on his campaign promise to ban Muslims from traveling to the United States.").

35. See *Trump v. Hawaii*, 585 U.S. 667, 711 (2018).

36. *Id.* at 702 (emphasis added).

37. Even President Trump's most ardent supporters within academia admitted the religious animus behind the bans. See, e.g., Josh Blackman, *The Travel Bans*, CATO SUP. CT. REV. 29, 58 (2018) (concluding *Trump v. Hawaii* allowed "a capricious president to arbitrarily separate families" based on "egregious orders [that] were borne, at least in part, on religious animus.").

38. See, e.g., Sherally Munshi, *Manners of Exclusion: From the Asiatic Barred Zone to the Muslim Ban*, in DEEPENING DIVIDES 118, 136 (Didier Fassin ed., 2020) (concluding "the main problem is that [the Ban] appears as a form of barely concealed racism reminiscent of slavery or Japanese internment.").

discrimination,³⁹ religious and national origin discrimination,⁴⁰ the weaknesses of United States constitutional law,⁴¹ its use in the War on Terror,⁴² its relationship with the First Amendment,⁴³ litigation strategy,⁴⁴ and the new limits of judicial deference.⁴⁵

After Trump lost the 2020 election, the Biden Administration wasted no time in revoking Ban Three. On January 20, 2021, Inauguration Day, President Biden issued a proclamation that formally ended Ban Three, and in so doing, was explicit in his reasoning.⁴⁶

39. See, e.g., Marcia Zug, *Make Immigration Great Again: How Morales-Santana Could Signal the End of Sexist Immigration Law and Provide a Way to Fight the Travel Ban*, WAKE FOREST L. REV. ONLINE (Dec. 7, 2017), <https://www.wakeforestlawreview.com/2017/12/make-immigration-great-again-how-morales-santana-could-signal-the-end-of-sexist-immigration-law-and-provide-a-way-to-fight-the-travel-ban/> (on file with Syracuse Law Review).

40. See, e.g., Eunice Lee, *Non-Discrimination in Refugee and Asylum Law (Against Travel Ban 1.0 and 2.0)*, 31 GEO. IMMIGR. L.J. 459, 523 (2017) (arguing that the first Trump administration's executive orders are "deeply inconsistent with the U.S. statutory framework for the admission of refugees" which favors non-discrimination).

41. See, e.g., Jill E. Family, *Trump's Travel Ban and the Limits of the US Constitution* 1–14 (on file with Syracuse Law Review, Widener Commonwealth Univ. L. Sch., Rsch. Paper Series No. 17–10, 2017) (discussing how U.S. laws provide little protections foreign nationals, does not guarantee due process for entrants, and provides no right to family life as it relates to immigration law).

42. See, e.g., Khaled A. Beydoun, *The Ban and the Borderlands Within: The Travel Ban as a Domestic War on Terror Tool*, 71 STAN. L. REV. ONLINE 251, 259–65 (March 2019), <https://www.stanfordlawreview.org/online/the-ban-and-the-borderlands-within-the-travel-ban-as-a-domestic-war-on-terror-tool/> (on file with Syracuse Law Review) (analyzing how "the FBI, local law enforcement, and their proxies wield the Travel Ban as a domestic War on Terror tool.").

43. See, e.g., Earl M. Maltz, *The Constitution and the Trump Travel Ban*, 22 LEWIS & CLARK L. REV. 391, 396–407 (2018) (arguing that the Ban did not violate the First Amendment).

44. See, e.g., Avidan Y. Cover, *Quieting the Court: Lessons from The Muslim Ban Case*, 23 J. GENDER, RACE & JUST. 1, 1 (2020) (proposing that, given the makeup of the Supreme Court, "civil-rights lawyers and legal advocacy organizations [should] assess whether litigation risks validating [President Trump's] arrogation of power and concomitant suppression of minority groups' liberties.").

45. See, e.g., Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 211 (2019) (noting that the Supreme Court's failure to listen to "Justice Jackson's warning in *Korematsu* that a decision that grants the political branches too much leeway can linger like a 'loaded weapon.'"); John Ip, *The Travel Ban, Judicial Deference, and the Legacy of Korematsu*, 63 HOW. L.J. 153, 212 (2020) (concluding that the Supreme Court's "posture was so deferential that even unusually unequivocal evidence that the travel ban was motivated by discriminatory animus against Muslims did not suffice to render it invalid.").

46. See Proclamation No. 10141, 86 Fed. Reg. 7005 (Jan. 20, 2021). This proclamation explicitly revoked Ban Three, as well as Executive Order 13780 (protecting the Nation From Foreign Terrorist Entry Into the United States), Proclamation 9723

Specifically, he chided the Trump administration for blocking those from Muslim and African countries from entering the United States.⁴⁷ President Biden further noted that President Trump's actions were "a stain on our national conscience and [were] inconsistent with our long history of welcoming people of all faiths and no faith at all."⁴⁸ However, and as was to be expected, Trump's reelection in 2024 meant that Biden's revocation was merely temporary. Prior to Trump issuing his new ban (hereinafter "Ban Four"), many worried about its impacts, noting the potential to expand the number of countries affected and retroactivity.⁴⁹ On January 20, 2025, Trump signed another executive order to restart the process of issuing a new travel ban,⁵⁰ and on June 4, 2025, he formally executed Ban Four by proclamation.⁵¹ While the full impact of Ban Four remains unknown,⁵² it is clear that the scope of countries included has expanded.⁵³

(Maintaining Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats), and Proclamation 9983 (Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats). *See id.* at 7005.

47. *See id.*

48. *Id.*

49. *See, e.g.,* Andra Shalal, *Rights groups warn Trump executive order would restore Muslim 'travel ban'*, REUTERS (Jan. 23, 2025, 10:11 AM), <https://www.reuters.com/world/us/rights-groups-warn-trump-executive-order-would-restore-muslim-travel-ban-2025-01-23/> (on file with Syracuse Law Review) (claiming that the new ban exceeds the old ban since it includes "language that den[ies] people visas or entry to the U.S. if they 'bear hostile attitudes toward its citizens, culture, government, institutions, or founding principles.'"); Josef Burton, *Trump's New Muslim Ban Is Worse Than His First*, THE NATION (Feb. 24, 2025), <https://www.thenation.com/article/politics/trump-muslim-ban-new-version/> (on file with Syracuse Law Review) (stating that when the new ban is instituted, "everyone from those countries who had been admitted to the US since the last ban was repealed will need to undergo an undefined form of 'reassessment' with an eye toward finding possible reasons for deportation.").

50. *See* Exec. Order No. 14161, 90 Fed. Reg. 8451 (Jan. 20, 2025).

51. *See* Proclamation No. 10949, 90 Fed. Reg. 24497 (June 4, 2025).

52. As of June 16, 2025, Trump is considering adding thirty-six countries to the list of those impacted by Ban Four. *See, e.g.,* Charlie Savage & Edward Wong, *36 More Countries May Be Added to Trump's Travel Ban*, N.Y. TIMES (June 16, 2025), <https://www.nytimes.com/2025/06/16/us/politics/trump-travel-ban.html?smid=fb-nytimes&smtyp=cur> (on file with Syracuse Law Review).

53. *See* Rob Picheta, Nimi Princewill & Nadeen Ebrahim, *What we know about the countries on Trump's travel ban list, and how many people will be impacted*, CNN (June 6, 2025, 6:53 AM), <https://www.cnn.com/2025/06/05/world/us-trump-travel-ban-countries-explainer-intl> (on file with Syracuse Law Review).

B. COVID Background

As will be discussed in Parts II–IV, the Travel Bans can have several negative impacts on jury rights.⁵⁴ While this may seem unusual, it would not be the first time that an apparently unrelated issue implicated criminal jury rights. Most recently, this happened during the COVID pandemic, which began towards the conclusion of the first Trump administration and was “the most severe” health emergency ever declared by the World Health Organization.⁵⁵ As of April 13, 2024, world COVID deaths reached 7,010,681.⁵⁶ Though the United States represented four percent of the world population, we accounted for 25% of all COVID cases and 20% of all COVID deaths.⁵⁷ Unsurprisingly, “the United States saw the largest single-year surge in the death rate since federal statistics became available,”⁵⁸ and COVID became the number one cause of death in the United States.⁵⁹ The health costs of COVID were not limited to death. Many of those who contracted COVID have gone on to suffer from “post-COVID-19 conditions”⁶⁰ like long COVID, which is “persistent symptoms or new

54. See *infra* Parts II-IV.

55. *Coronavirus ‘most severe health emergency’ WHO has faced*, BBC (July 27, 2020), <https://www.bbc.com/news/world-53557577> (on file with Syracuse Law Review).

56. See *COVID-19 Coronavirus Statistics*, WORLDOMETER, <https://www.worldometers.info/coronavirus/> (on file with Syracuse Law Review) (last visited Apr. 13, 2024). Worldometer stopped tracking COVID deaths on April 13, 2024 “due to the unfeasibility of providing statistically valid global totals, as the majority of countries have now stopped reporting.” *Id.*

57. See Shaina Ahluwalia & Roshan Abraham, *Global COVID-19 cases surpass 100 million as nations tackle vaccine shortages*, REUTERS (Jan. 26, 2021, 10:36 PM), <https://www.reuters.com/business/healthcare-pharmaceuticals/global-covid-19-cases-surpass-100-million-nations-tackle-vaccine-shortages-2021-01-27/> (on file with Syracuse Law Review).

58. Denise Lu, *How Covid Upended a Century of Patterns in U.S. Deaths*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/interactive/2021/04/23/us/covid-19-death-toll.html> (on file with Syracuse Law Review).

59. See Jared Ortaliza, Krutika Amin & Cythia Cox, *COVID-19 leading cause of death ranking*, PETERSON-KFF (Nov. 10, 2022), <https://www.healthsystemtracker.org/brief/covid-19-leading-cause-of-death-ranking/#Total%20deaths%20in%20the%20United%20States%20from%20COVID-19%20and%20other%20leading%20causes,%202020-2022> (on file with Syracuse Law Review). For all of 2020, the COVID death rate settled as the third leading cause of death in the United States. See Roni Caryn Rabin, *Covid-19 was the third leading cause of death in the U.S. in 2020, federal health researchers report.*, N.Y. TIMES (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/us/covid-death-rates.html> (on file with Syracuse Law Review).

60. *Post-COVID Conditions: CDC Science*, CDC (Mar. 31, 2023), https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/hcp/clinical-care/post-covid-science.html (on file with Syracuse Law Review).

symptoms that develop [...] at least four to eight weeks after the initial infection with COVID-19.”⁶¹ Of course, COVID’s consequences were not limited to health issues. The global economy experienced its worst recession since World War II.⁶² Domestically, our GDP growth fell by 31.4% in the second quarter of 2020,⁶³ small businesses suffered,⁶⁴ and unemployment reached 14.4%.⁶⁵ Fueled by congressional gridlock,⁶⁶ hypocritical government officials,⁶⁷ and misinformation from the media,⁶⁸ faith in the government continued to fall.

COVID also changed our legal system and how it impacted its participants. Courts responded to government-implemented social

61. Alvin Powell, *A pandemic that endures for COVID long-haulers*, HARV. GAZETTE (Apr. 13, 2021), <https://news.harvard.edu/gazette/story/2021/04/harvard-medical-school-expert-explains-long-covid/> (on file with Syracuse Law Review).

62. See, e.g., Press Release, World Bank Group, COVID-19 to Plunge Global Economy into Worst Recession since World War II (June 8, 2020) (on file with Syracuse Law Review); Dan Burns & Mark John, *COVID-19 shook, rattled and rolled the global economy in 2020*, REUTERS (Dec. 31, 2020, 6:04 AM), <https://www.reuters.com/article/business/covid-19-shook-rattled-and-rolled-the-global-economy-in-2020-idUSKBN2950GG/> (on file with Syracuse Law Review).

63. See Mike Patton, *The Impact Of Covid-19 On U.S. Economy And Financial Markets*, FORBES (Apr. 14, 2022, 2:06 PM), <https://www.forbes.com/sites/mikepatton/2020/10/12/the-impact-of-covid-19-on-us-economy-and-financial-markets/> (on file with Syracuse Law Review).

64. See Alexander W. Bartik et al., *The impact of COVID-19 on small business outcomes and expectations*, 117 PNAS 17656, 17565 (2020), <https://www.pnas.org/content/pnas/117/30/17656.full.pdf> (on file with Syracuse Law Review).

65. See Rakesh Kochhar, *Unemployment rose higher in three months of COVID-19 than it did in two years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), <https://www.pewresearch.org/short-reads/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/> (on file with Syracuse Law Review).

66. See Paul Kane, *Congress deeply unpopular again as gridlock on coronavirus relief has real-life consequences*, WASH. POST (Aug. 1, 2020), https://www.washingtonpost.com/powerpost/congress-deeply-unpopular-again-as-gridlock-on-coronavirus-relief-has-real-life-consequences/2020/07/31/6d2f10c4-d36a-11ea-8c55-61e7fa5e82ab_story.html (on file with Syracuse Law Review); see also Kochhar, *supra* note 65.

67. See, e.g., Miriam Pawel, Opinion, *Gavin Newsom, What Were You Thinking?*, N.Y. TIMES (Nov. 25, 2020), <https://www.nytimes.com/2020/11/25/opinion/gavin-newsom-french-laundry-california.html> (on file with Syracuse Law Review).

68. See Matt Gertz, *Misinformer of the Year: Fox News*, MEDIA MATTERS (Dec. 30, 2020, 7:30 AM), <https://www.mediamatters.org/fox-news/misinformer-year-fox-news> (noting that Fox News “promoted coronavirus misinformation an estimated 13,551 times”) (on file with Syracuse Law Review). See also Sheryl Gay Stolberg & Noah Weiland, *Study Finds ‘Single Largest Driver’ of Coronavirus Misinformation: Trump*, N.Y. TIMES, <https://www.nytimes.com/2020/09/30/us/politics/trump-coronavirus-misinformation.html> (on file with Syracuse Law Review) (last updated Oct. 6, 2021) (stating that President Trump was the “single largest driver” of COVID misinformation).

distancing measures by adopting virtual proceeding options for most court functions.⁶⁹ Texas courts, for example, held over 2.1 million virtual hearings from April 2020 to January 2022.⁷⁰ The benefits of virtual proceedings were immediately apparent. According to the National Center for State Courts, these proceedings essentially eliminated the costs related to in-person court appearances.⁷¹ Furthermore, criminal defendants, jurors, and younger/more diverse individuals were all found to be more likely to appear in court when requested or required to be there.⁷² While virtual options have largely returned to in-person,⁷³ many became a permanent feature of proceedings

69. See, e.g., *As Pandemic Lingers, Courts Lean into Virtual Technology*, U.S. CTS. (Feb. 18, 2021), <https://www.uscourts.gov/data-news/judiciary-news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology> (on file with Syracuse Law Review).

70. See Nathan L. Hecht & Brett Busby, *Access to Justice Transformed*, STATE BAR OF TEX. (June 2022), <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=56936> (on file with Syracuse Law Review).

71. See Brian Ostrom, John Douglas, Suzanne Tallarico, & Shannon Roth, *The Use of Remote Hearings in Texas State Courts: The Impact on Judicial Workload*, NAT'L CTR. FOR STATE CTS. (Dec. 2021), <https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/remote-hearings-and-services/resources-docs/TX-Remote-Hearing-Assessment-Report.pdf> (on file with Syracuse Law Review).

72. See, e.g., *Will Remote Hearings Improve Appearance Rates?*, ST. N.D. CTS. (May 14, 2020), <https://www.ndcourts.gov/news/national/legal-issues/will-remote-hearings-improve-appearance-rates> (on file with Syracuse Law Review) (criminal defendants); Eric Scigliano, *Zoom Court is Changing How Justice is Served*, ATLANTIC (Apr. 13, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/can-justice-be-served-on-zoom/618392/> (on file with Syracuse Law Review) (jurors); Joe Patrice, *Juries For Online Trials Are Younger And More Diverse*, ABOVE THE L. (Mar. 3, 2021, 1:46 PM), <https://abovethelaw.com/2021/03/juries-for-online-trials-are-younger-and-more-diverse/> (on file with Syracuse Law Review) (younger and more diverse jurors).

73. See *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, Pub. L. No. 116-136, §§ 15002(b)(2)(A), (b)(4), 134 Stat. 281, 528–29 (2020) (discussing that the virtual proceeding options were limited to the pandemic).

across the country.⁷⁴ Most notably, the rates of virtual depositions have remained as high as 50% since the pandemic.⁷⁵

These benefits were met with many costs, many of which were predicted at the outset of the pandemic.⁷⁶ Inmate mortality rates increased by 61%.⁷⁷ By November of 2020, 80% of those who died in custody in Texas county jails were yet to be convicted of any crime or receive a jury trial.⁷⁸ Although the federal government attempted to mitigate this result with its compassionate release program,⁷⁹ over

74. See, e.g., ALASKA R. CRIM. P. 38.3; ARIZ. SUP. CT., ADMIN. ORD. NO. 2022 - 88, (Aug. 3, 2022); ILL. COMP. STAT. ANN. RULE 45 (West 2025); *oneCourtMN Hearings Initiative Policy*, MINN. JUD. BRANCH, <https://mncourts.gov/about-the-courts/newsandannouncements/onecourtmn-hearings-initiative-policy-takes-effect> (June 6, 2022) (on file with Syracuse Law Review); *Report of Joint Subcommittee on Post-COVID Judicial Operations*, MD. JUD. (Mar. 9, 2022), <https://online.flip-ppingbook.com/view/545032313/> (on file with Syracuse Law Review); MICH. SUP. CT., ADMIN. ORDER NO. 2020-08, (Aug. 10, 2022); N.C. GEN. STAT. § 7A-49.6; *Final General Emergency Order*, TEX. SUP. CT., <https://www.txcourts.gov/programs-services/archived-programs-services/court-coronavirus-information/> (on file with Syracuse Law Review) (last visited Oct. 25, 2025); U.S. DIST. CT. RULES E.D. CAL. L.R. 428 (2022); see also Allie Reed, *Virtual Court Hearings Earn Permanent Spot after Pandemic's End*, BLOOMBERG L. (May 18, 2023, 3:45 AM), <https://news.bloomberglaw.com/us-law-week/virtual-court-hearings-earn-permanent-spot-after-pandemics-end> (on file with Syracuse Law Review).

75. This number is based upon my personal conversations with representatives from court reporting agencies in 2025. For example, when I spoke to U.S. Legal Support, their representative told me that at least 50% of their depositions occur virtually. Telephone Interview with U.S. Legal Support representative (2025). When I spoke to Veritext Legal Solutions, their representative told me that 30%-40% of their depositions are virtual. Telephone Interview with Veritext Legal Solutions representative (2025).

76. See, e.g., Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV., 59, 72-86 (2020) (noting the likely impacts on a defendant's Eighth Amendment rights due to the pandemic); Brandon Marc Draper, *Zoom Justice: When Constitutional Rights Collide in Cyberspace*, NW. U. L. REV.: BLOG (May 7, 2020), <https://abovethelaw.com/2021/03/juries-for-online-trials-are-younger-and-more-diverse/> (on file with Syracuse Law Review) (proposing potential harms to a defendant's Sixth Amendment rights).

77. See *CLA Law Researchers Find Nationwide Prison Mortality Rates Skyrocketed During the Pandemic*, UCLA L. (Feb. 19, 2023), <https://law.ucla.edu/news/ucla-law-researchers-find-nationwide-prison-mortality-rates-skyrocketed-during-pandemic> (on file with Syracuse Law Review).

78. See Michele Deitch et al., *COVID and Corrections: A Profile of COVID Deaths in Custody in Texas*, LYNDON B. JOHNSON SCH. OF PUB. AFFS, (Nov. 2020), https://law.utexas.edu/faculty/uploads/publication_files/profile-of-covid-deaths-in-custody-in-texas-final.rev2.pdf (on file with Syracuse Law Review).

79. See 18 U.S.C. § 3582(c)(1)(A); see also *Compassionate Release: The Impact of the First Step Act and COVID-19*, U.S. SENT'G COMM'N (Mar. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220310_compassionate-release.pdf (on file with Syracuse Law Review).

3,000 people died in federal or local custody by January 2022.⁸⁰ Sadly, the accused were not the only group to suffer in our justice system during the pandemic. Asians became more likely to be victims of hate crimes,⁸¹ police could point to COVID as their new number one cause of death,⁸² victims suffered from another cause of increased trial delays and case backlogs,⁸³ and our society saw jury trial rates drop to as low as zero percent in some jurisdictions.⁸⁴

There were also several costs beyond those related to death and human suffering. Prior to the pandemic, studies showed that remote proceedings may result in reduced empathy towards the accused.⁸⁵ Such lack of empathy can lead to disastrous results for their cases.⁸⁶

80. See UCLA Sch. of L., Prison L. & Pol’y Program, *COVID-19: Death by Incarceration*, GOOGLE SHEETS, https://docs.google.com/spreadsheets/d/1bTMdmt2IG2UrRDcDhKK2ws_ZS-sXqDsPMVC_2SDb3Lw/edit?usp=sharing (on file with Syracuse Law Review) (last updated Jan. 2022).

81. See Kimmy Yam, *New Report Finds 169 Percent Surge in Anti-Asian Hate Crimes during the First Quarter*, NBC NEWS (Apr. 28, 2021, 5:46 PM), <https://www.nbcnews.com/news/asian-america/new-report-finds-169-percent-surge-anti-asian-hate-crimes-n1265756> (on file with Syracuse Law Review).

82. See Harmet Kaur, *COVID-19 Has Killed More Law Enforcement Officers This Year Than All Other Causes Combined*, CNN (Sep. 3, 2020, 12:13 PM), <https://www.cnn.com/2020/09/03/us/covid-19-police-officers-deaths-trnd> (on file with Syracuse Law Review).

83. See, e.g., Sarah Rafique, *Victims Wait as Courts Face Unprecedented COVID-19 Delays*, ABC13 (Dec. 18, 2020), <https://abc13.com/post/harris-county-crime-backlog-court-houston-victims/8777694/> (on file with Syracuse Law Review); Samantha Ketterer, *‘Waiting and Waiting:’ COVID Only Made Harris County’s Massive Backlog of Murder Cases Worse*, HOUS. CHRON. (Sep. 1, 2020, 7:53 PM), <https://www.houstonchronicle.com/news/houston-texas/crime/article/murder-backlog-covid-hurricane-harris-county-tx-15527248.php> (on file with Syracuse Law Review).

84. See, e.g., Samantha Ketterer, *No ‘Meaningful Relief’: Harris County Trials Plunge from 1,600 a Year to 52 Since COVID*, HOUS. CHRON. (Feb. 10, 2021, 11:31 AM) <https://www.houstonchronicle.com/news/houston-texas/crime/article/covid-jury-trials-harris-county-attorneys-rights-15939448.php> (on file with Syracuse Law Review) (discussing data for civil and criminal cases); Fully Informed Jury Ass’n, *Report on the Status of Trial by Jury in U.S. Courts During the COVID-19 Pandemic* (Dec. 11, 2020) (on file with Syracuse Law Review); Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 26 (Winter 2017).

85. See Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFF L. REV. 1275, 1292–1306 (Dec. 2020) (hereinafter *Bandes & Feigenson 1*). These authors, however, note that there is no definitive proof of a causal link between the virtual setting and a lack of empathy. Indeed, they noted that it may be increased in some cases. See Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20 n.43 (2021).

86. See *Bandes & Feigenson 1*, *supra* note 85 at n.48 (noting the impacts on the accused in hearings related to bail, parole, and immigration consequences.).

Several more costs were observed during the pandemic, including problems with jurors,⁸⁷ judges,⁸⁸ attorneys,⁸⁹ and threats from computer hackers.⁹⁰ Because of these double-sided costs and benefits, as well as those related to technological and administrative matters,⁹¹ the legal community voiced several concerns related to the use of virtual proceedings.⁹² With the exception of jury trials,⁹³ however, opinions changed to largely support some use of virtual proceedings as a permanent part of our justice system.⁹⁴

In addition to increasingly positive attorney sentiments, local governments across the United States found that many of these virtual

87. See, e.g., Michael Pressman, *A Report on the Civil Jury Project's Mock Zoom Jury Trial*, CIV. JURY PROJECT (June 8, 2020) (on file with Syracuse Law Review); Charles Scudder, *In a Test Case, Collin County Jury Renders Verdict on Zoom for the First Time; Too Risky for a Full Trial?*, DALL. MORNING NEWS (May 22, 2020, 4:35 PM), <https://www.dallasnews.com/news/courts/2020/05/22/in-a-test-case-collin-county-jury-meets-on-zoom-for-the-first-time-but-some-lawyers-say-its-too-risky-for-real-trial/> (on file with Syracuse Law Review); see also Debra Casens Weiss, *Potential Jurors Exercised, Curled Up on Bed During Virtual Voir Dire, Motion Says in Asbestos Case*, A.B.A. J. (July 22, 2020, 2:41 PM), <https://www.abajournal.com/news/article/potential-jurors-exercised-curled-up-on-bed-during-virtual-voir-dire-motion-says> (on file with Syracuse Law Review).

88. See, e.g., Joe Patrice, *Fun With Mute Buttons: Civil Rights Violation Edition!*, ABOVE THE L. (July 21, 2020, 3:01 PM), <https://abovethelaw.com/2020/07/fun-with-mute-buttons-civil-rights-violation-edition/> (on file with Syracuse Law Review).

89. See Joe Patrice, *Is This Attorney Naked During A Criminal Hearing?*, ABOVE THE L. (June 26, 2020, 12:12 PM), <https://abovethelaw.com/2020/06/is-this-attorney-naked-during-a-criminal-hearing/> (on file with Syracuse Law Review); see also Joe Patrice, *Yep, That's A Lawyer Having Sex on Camera During A Hearing!*, ABOVE THE L. (Feb. 2, 2021, 10:42 AM), <https://abovethelaw.com/2021/02/yep-thats-a-lawyer-having-sex-on-camera-during-a-hearing/> (on file with Syracuse Law Review).

90. See Carlie Porterfield, *Twitter Hacking Court Hearing Gets 'Zoombombed' with Porn*, FORBES (Aug. 5, 2020, 3:08 PM), <https://www.forbes.com/sites/carlie-porterfield/2020/08/05/twitter-hacking-court-hearing-gets-zoombombed-with-porn/> (on file with Syracuse Law Review).

91. See, e.g., Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205, 255–57 (2021).

92. See, e.g., Jenia I. Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197, 259–65 (2021) (discussing Texas practitioners' opinions on remote proceedings during the pandemic).

93. See *id.* at 255–56; See Brent Mayr & Sierra Tabone, *Blinded Justice: Lessons Learned from Trying a Case via Zoom*, VOICE FOR THE DEF. ONLINE (Jan. 26, 2021) (on file with Syracuse Law Review).

94. See Turner, *supra* note 92, at 259 (surveying attorneys and judges); *Public Opinion Survey Shows Slight Improvement for State Courts During Challenging Times*, NAT'L CTR. FOR STATE CTS. 1–2 (Dec. 20, 2023), p16501coll2_893.pdf (on file with Syracuse Law Review).

proceedings to be fair and constitutional.⁹⁵ Because most of the pandemic occurred after President Biden revoked Ban Three, these courts largely did not consider how these proceedings could harm those impacted by any of Trump's travel bans, including Ban Four. This Article seeks to evaluate those impacts, especially those of Ban Four. Additionally, it employs the virtual proceeding taxonomy created by this author on this topic.⁹⁶

II. TRIAL RIGHTS, OATHS, & ETHICAL OBLIGATIONS

For any criminal trial, the accused is entitled to several rights to ensure that their trial is fair and constitutional. These rights apply regardless of other circumstances, including those jointly implicated by COVID or the Travel Bans, or aggravated by the latter. While these ideals have existed since our nation's founding,⁹⁷ they were formalized through the Sixth and Seventh Amendments,⁹⁸ and given additional protections by Congress.⁹⁹ Criminal jury rights are further protected in federal cases by Article III, Section 2,¹⁰⁰ the Due Process Clause of the Fifth Amendment,¹⁰¹ the Equal Protection Clause,¹⁰² and

95. *See id.*; *see also* *McCumber v. State*, 690 S.W.3d 686, 689 (Tex. Crim. App. 2024) (supporting a confrontation right objection for a witness to testify over zoom); *United States v. Trimarco*, No. 17-CR-583 (JMA), 2020 U.S. Dist. LEXIS 159180, *4 (E.D.N.Y. Sep. 1, 2020) (affirming that live video feeds ensure public trial right).

96. *See* Brandon Marc Draper, *Neither Here nor There: Redefining "Presence" for a Virtual Criminal Justice System*, 27 SMU SCI. & TECH. L. REV. 167, 175–78 (2024). These terms include Fully In-Person ("FIP"), Partially In-Person ("PIP"), Witness Virtual or Remote ("WitVR"), Public Virtual or Remote ("PubVR"), Defendant Virtual or Remote ("DefVR"), Prosecutor Virtual or Remote ("PrVR"), Judge Virtual or Remote ("JudVR"), Juror(s) Virtual or Remote ("JurVR"), Defense Counsel Virtual or Remote ("DCVR"), Legally Virtual or Remote ("LVR"), and Fully Virtual or Remote ("FVR"). *See infra* Appendix.

97. *See, e.g.*, WILLIAM MACDONALD, *Documentary Source Book of American History, 1606–1898*, at 138 (William MacDonald ed., 1908) (noting "that trial by jury is the inherent and invaluable right of every British subject in these colonies," according to the Stamp Act Congress' 1765 resolution.).

98. *See* U.S. CONST. amends. VI, VII.

99. *See, e.g.*, 18 U.S.C. § 3161 (2012); *see also* 28 U.S.C. §§ 1861–78 (1988); FED. R. CIV. P. 38–53; FED. R. CRIM. P. 23–31.

100. *See* U.S. CONST. art. III § 2. ("The Trial of all Crimes . . . shall be by Jury.")

101. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law[.]").

102. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction equal protection of the laws.")

the Federal Rules of Criminal Procedure.¹⁰³ And due to the incorporation doctrine, states also protect the accused's criminal jury rights.¹⁰⁴

A. Sixth Amendment Rights

The scope of the protections provided by the Sixth Amendment have changed throughout our nation's history.¹⁰⁵ Regarding proceedings impacted by the trial bans, especially DefVR and WitVR proceedings, the Constitution does not explicitly state whether such trials are in line with Sixth Amendment rights. Before the travel bans and the pandemic, many courts and statutes allowed trials and other proceedings to occur in PIP formats. Since the pandemic, and with the increased likelihood of someone impacted by the travel bans having to utilize a PIP proceeding, constitutional, evidentiary and statutory jury rights may be impacted in new ways. Until these rights are formally changed, the following demonstrates the state of the jury and related rights most likely to be impacted by the travel bans and virtual proceedings.¹⁰⁶

1. The Right to Confrontation

The confrontation right, namely the right to in-person confrontation, is arguably the strongest jury right afforded to the accused. In limited circumstances, however, the accused's right to in-person confrontation of adverse witnesses "may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."¹⁰⁷ This rule from *Maryland v. Craig*, while it allows for some WitVR Trials to occur, is greatly limited.¹⁰⁸

103. See FED. R. CRIM. P. 23–31.

104. See, e.g., MD. CONST. DECL. OF RIGHTS, art. 5; IOWA CONST., art. 1 § 9; ILL. CONST., art. 1 § 13.

105. See, e.g., Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 488–91 (2009) (discussing the changes of the scope of the Sixth Amendment).

106. Though all of the rights protected by the Sixth Amendment are impacted by virtual proceedings and the travel bans, I am focusing on those most likely to be impacted, namely the right to confrontation, presence, and a speedy trial.

107. *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

108. See, e.g., *U.S. v. De Jesus-Casteneda*, 705 F.3d 1117, 1120 (9th Cir. 2013) (in-person confrontation where the witness was a disguised confidential informant); *Harrell v. Butterworth*, 251 F.3d 926, 928, 931–32 (11th Cir. 2001) (virtual confrontation where the witness was too sick and refused to return to the United States); *Rivera v. State*, 381 S.W.3d 710, 711 (Tex. App. 2012) (holding that allowing a

2. *The Right to be Present*

The right most intertwined with the confrontation right is the right to be present.¹⁰⁹ This right is guaranteed by the Sixth Amendment, Due Process Clause, and Rule 43 of the Federal Rules of Criminal Procedure.¹¹⁰ It requires the accused's presence at all "critical stages"¹¹¹ of criminal litigation and "to the extent that a fair and just hearing would be thwarted by his absence[.]"¹¹²

3. *The Right to a Speedy Trial*

While the accused has the right to a speedy trial in all federal cases, the Sixth Amendment otherwise fails to further define the phrase's meaning. In *Barker v. Wingo*, the Supreme Court filled in this gap, holding that "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant" are to be considered when evaluating the validity of a speedy trial violation.¹¹³ This right was further solidified on the federal level through the Speedy Trial Act of 1974,¹¹⁴ and on the state level, many states followed suit with similar protections.¹¹⁵

4. *The Right to Assistance of Counsel/Effective Assistance of Counsel*

The accused also maintain the right to counsel under the Sixth Amendment and the Supreme Court's ruling in *Gideon v. Wainwright*.¹¹⁶ Regarding the right to effective assistance of counsel, the accused are protected under the standard set forth in *Strickland v.*

witness to testify virtually from Iraq due to their status as an active-duty member of the military did not violate the defendant's confrontation right).

109. See, e.g., *Illinois v. Allen*, 397 U.S. 337, 338 (1970).

110. See U.S. CONST. amend. VI; U.S. CONST. amend. XIV, § 1; FED. R. CRIM. P. 43.

111. These include arraignment, bail, plea, jury selection, trial, and sentencing. See *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 211–12 (2008).

112. See *Snyder*, 291 U.S. at 108.

113. See *Barker v. Wingo*, 407 U.S. 514, 530 (1970).

114. See 18 U.S.C. §§ 3161–3174 (2012).

115. See, e.g., N.Y. CRIM. PROC. LAW § 30.30.

116. See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963). They also maintain a right to counsel under the Fifth Amendment. See U.S. CONST. amend. V. But, as explained in the Supreme Court's decision in *Miranda v. Arizona*, this applies in the pretrial context. See *Miranda v. Arizona*, 384 U.S. 436 (1966); see also, James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 988 (1986) (discussing the Fifth Amendment right to counsel as it relates to Miranda rights).

Washington.¹¹⁷ According to *Strickland*, the accused may prove their counsel was ineffective when their performance was both deficient and that such deficiency prejudiced the defense.¹¹⁸

B. Federal Statutes

Beyond the constitutional rules that harmed virtual witnesses during COVID and are likely to impact those subject to the Travel Bans, federal statutes also dictate whether and how remote witnesses testifying from a foreign country could legally and fairly testify. According to Federal Rule of Criminal Procedure 26, “[i]n every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077.”¹¹⁹ In limited circumstances, such trial testimony may be secured via remote videoconference technology.¹²⁰ While generally disfavored, foreign deposition testimony in criminal cases may also be secured by videoconference technology.¹²¹ Notably, such depositions are disfavored because the sanction for perjury, which occurs when a witness “willfully [...] states [...] any material matter which he does not believe to be true,”¹²² is often absent.¹²³ However, pursuant to Rule 15,¹²⁴ a party “may move that a prospective witness be deposed in order to preserve testimony for trial[,]” and “[t]he court may grant the motion because of exceptional circumstances and in the interest of justice.”¹²⁵ Furthermore, “exceptional circumstances” exist if a

117. See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

118. See *id.* at 687.

119. FED. R. CRIM. P. 26.

120. See, e.g., FED. R. CRIM. P. 5(g), 10(c) (allowing virtual initial appearances and arraignments with the defendant’s consent); 18 U.S.C. § 3509(b)(1) (allowing child witnesses to testify via two-way closed-circuit television (“CCTV”) in proceedings where the child is the alleged victim); Additional exceptions have been created via caselaw. See also *Maryland v. Craig*, 497 U.S. 836 (1990) and its progeny.

121. See, e.g., *United States v. Mueller*, 74 F.3d 1152, 1156 (11th Cir. 1996) (stating that such depositions are only appropriate “when doing so is necessary to achieve justice and may be done consistent with the defendant’s constitutional rights”).

122. 18 U.S.C. §§ 1621, 1623.

123. See, e.g., *United States v. Figueroa*, 298 F. Supp. 1215 (S.D.N.Y. 1969); *United States v. Banki*, 2010 U.S. Dist. LEXIS 27116, at *1 (S.D.N.Y. Mar. 23, 2010).

124. FED. R. CRIM. P. 15.

125. FED. R. CRIM. P. 15(a).

“witness’ testimony is material to the case and if the witness is unavailable to appear at trial.”¹²⁶

Regarding the Federal Rules of Evidence, many of these rules deal with their stated goal of “ascertaining the truth and securing a just determination.”¹²⁷ There is arguably no more honored method of procuring the truth in our country than the process of requiring witnesses to take a testimonial oath before they testify.¹²⁸ Such oath is divided into two parts, the “ritual gesture (the raising of the right hand) and a three-fold promise to tell the truth, the whole truth, and nothing but the truth.”¹²⁹ According to Rule of Evidence 603, “[b]efore testifying, a witness must give an oath or affirmation to testify truthfully.”¹³⁰ Courts have been clear regarding the strict enforcement of this rule.¹³¹ This rule, when considered with Federal Rules of Criminal Procedure 15 and 26, demonstrate the limits on when a WitVR proceeding may occur. In *United States v. Banki*,¹³² for example, in denying defendant’s “motion to present testimony at trial from witnesses located in Iran using live videoconferencing[.]” the Southern District of New York discussed the inherent issues with the defense seeking to have

126. *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984). Such exception may even apply to witnesses adverse to the accused even though such testimony may implicate the accused’s Sixth Amendment rights. *See, e.g., United States v. Abu Ali*, 528 F.3d 210, 239–40 (4th Cir. 2008).

127. FED. R. EVID. 102. *See, e.g.,* FED. R. EVID. 403; FED. R. EVID. 608 (discussing the circumstances in which a witness’s character for truthfulness or untruthfulness may be attacked or supported); FED. R. EVID. 609 (discussing how a witness’ prior criminal conviction may be used to attack their character for truthfulness); FED. R. EVID. 611 (“The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to [...] make those procedures effective for determining the *truth*[.]”).

128. *See, e.g., Clinton v. State*, 33 Ohio St. 27, 33 (1877) (“The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon Him to punish the false-swearer, but on the witness to remember that He will assuredly do so. By thus laying hold of the conscience of the witness and appealing to this sense of accountability, the law best insures the utterance of truth.”).

129. *See* Ian Gallacher, “*Swear Not At All*”: *Time to Abandon the Testimonial Oath*, 52 NEW ENG. L. REV. 247, 256 (2018).

130. FED. R. EVID. 603.

131. *See, e.g., United States v. Fowler*, 605 F.2d 181, 185 (5th Cir. 1979) (holding that statements such as “I am a truthful man,” and “I would not tell a lie to stay out of jail,” do not satisfy Rule 603). Of course, courts may accommodate some alternatives to the traditional testimonial oath. *See, e.g., Ferguson v. C.I.R.* 921 F.2d 588, 589 (5th Cir. 1991) (holding that Federal Rule of Evidence 603 and the First Amendment allowed the following alternative to an oath or affirmation: “I, [name], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.”).

132. *See Banki*, 2010 U.S. Dist. LEXIS 27116 at *1.

some of its witnesses testify from a foreign country like Iran.¹³³ The court noted that because of the lack of diplomatic relations between the United States and Iran, the oath is “nothing more than an empty recital” because the government has no way to prosecute witnesses who testify remotely while in Iran for perjury or making false statements.¹³⁴ It concluded that “the strongest indicator of reliability of a witness’s testimony—the oath—is effectively absent here.”¹³⁵

C. Testimonial Oaths

COVID compromised many aspects of criminal jury trials due to the increased use of virtual proceedings. While the Travel Bans share in these issues regarding virtual trials, they are also prone to aggravate concerns related to the testimonial oath. Prior to COVID and the Travel Bans, there was a broad body of rules, caselaw, and scholarship related to the questioning of the importance and continued use of the testimonial oath in our country. Most recently, Professor Ian Gallacher has urged the United States to abandon the requirement that our justice system require witnesses to take an oath to testify.¹³⁶ In support of his arguments, Gallacher notes the inherent issues in ascertaining the truth,¹³⁷ as well as the lack of perjury prosecutions.¹³⁸

Regarding perjury prosecutions, or the lack thereof, the data noted by Gallacher is staggering. Specifically, he found that in the five-year period from 2014 through 2018, he found that there was an average of 25.6 federal perjury prosecutions per year.¹³⁹ In that same window, there was an average of 842.6 driving while intoxicated prosecutions per year and 5,452.4 unlawful firearm possession prosecutions per year.¹⁴⁰ These results were particularly noteworthy given

133. *Id.* at *2–3.

134. *Id.* at *2. *See also* United States v. Salamey, 2022 U.S. Dist. LEXIS 1256, at *1, *4 (M.D. Fla. Jan. 4, 2022).

135. *Banki*, 2010 U.S. Dist. LEXIS 27116 at *2. While civil proceedings are not the subject of this Article, the fears surrounding an inability to prosecute a witness for perjury prevent depositions in similar civil cases as well. *See, e.g.,* Azizpur v. AAA Life Ins. Co., 2025 U.S. Dist. LEXIS 35758, at *2 (C.D. Cal. Feb. 27, 2025).

136. *See* Gallacher, *supra* note 129.

137. *See id.* at 274–85.

138. *See id.* at 285–89.

139. *See id.* at 286 (citing *Table D-2—U.S. District Courts—Criminal Statistical Tables For The Federal Judiciary (December 31, 2018)*, U.S. CTS., <https://www.uscourts.gov/data-news/data-tables/2018/12/31/statistical-tables-federal-judiciary/d-2> (on file with Syracuse Law Review) (last visited Oct. 21, 2025)).

140. *See id.*

how frequently judges claim to observe parties commit perjury at trial.¹⁴¹

In lieu of the oath, Gallacher recommends a universal affirmation.¹⁴² This affirmation, which already exists for federal courts,¹⁴³ requires the witness privately sign the following statement: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.”¹⁴⁴ This alternative is notable for its brevity as well as its perjury requirement. Specifically, even though Gallacher persuasively points out the limitations of perjury as they pertain to the testimonial oath, he still argues that the oath’s replacement *should include punishment for perjury*.¹⁴⁵

D. Prosecutorial Obligations

Prosecutors serve such a unique function in our legal system that they are subject to rules by which no other type of attorney must abide. These rules were especially vital during COVID and should retain their importance as prosecutors try cases with witnesses subject to the Travel Bans. The American Bar Association offers examples of such rules, specifically as they relate to the function of the prosecutor and ethical rules for prosecutors.¹⁴⁶ With respect to virtual witnesses subject to Ban Four, one rule that is likely to apply is Standard 3-3.4(j), which states that “[t]he prosecutor should ensure that victims and witnesses who may need protections against intimidation or retaliation are advised of and afforded protections where feasible.”¹⁴⁷ Another applicable standard 3-1.3, which states that a prosecutor “generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim.”¹⁴⁸ Or more simply, prosecutors do not have clients and do not owe the legal obligations afforded to clients. Similarly, the comments to Rule 3.8 delve into the prosecutor’s ethical obligations. The first comment makes clear that

141. See Gallacher, *supra* note 129, at 287 (citing COMM. ON CRIMINAL ADVOCACY, *The State of Truth: Judges Speak*, in 56 N.Y. CITY B. ASS’N RECORD 38, 43 (2001) (showing that, according to the judges surveyed, 60% of criminal defendants frequently or commonly commit perjury at trial, and 12% of law enforcement frequently or commonly commit perjury at trial.)).

142. See *id.* at 297.

143. See 28 U.S.C. § 1746.

144. *Id.*

145. See Gallacher, *supra* note 129, at 297.

146. See generally A.B.A., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION (4th ed. 2017); MODEL RULES OF PRO. CONDUCT r. 3.8 (A.B.A. 1983).

147. A.B.A., *supra* note 146, at § 3-3.4(j).

148. *Id.* at § 3-1.3.

a prosecutor “has the responsibility of a minister of justice and not simply that of an advocate.”¹⁴⁹ These special ethical rules for prosecutors heighten the duty owed by them to victims, defendants, and all parties to the criminal justice system.

III. TRAVEL BAN HYPOTHETICALS & LIKELY LEGAL OUTCOMES

Despite robust jury rights on the federal and state level, jury trials have become exceedingly rare in the United States. Not surprisingly, virtual jury trials, including those where only one participant—usually a witness—appears virtually, are even rarer. As such, while there is some case law related to virtual criminal jury trials during COVID, such case law is practically nonexistent regarding such trials as caused by Ban Four. This section outlines the terms of two hypothetical situations. One will involve a criminal defendant subject to Ban Four. The other will involve a witness to a criminal case subject to Ban Four. When I discuss the likely impacts of Ban Four on these parties as they pertain to a jury trial for their cases,¹⁵⁰ I will discuss these results on federal and state cases.

A. Hypotheticals

Before discussing these hypotheticals, a few key features of many countries subject to Ban Four will be briefly explained.¹⁵¹ Iran, whose nationals are subject to full restriction and limited entry, does not have an extradition treaty with the United States and does not have diplomatic relations with the United States.¹⁵² Afghanistan, Chad, the Republic of Congo, Equatorial Guinea, and Eritrea, do not have an extradition treaty with the United States, and while they do have diplomatic relations with our country, their nationals are subject to full restriction and limited entry.¹⁵³ Burundi does not have an extradition treaty with the United States, and its nationals are partially restricted and have limited entry to the United States.¹⁵⁴ And while Cuba and Venezuela

149. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt [1] (A.B.A. 1983).

150. *See infra* Part III.

151. Nationals from Afghanistan, Burma, Chad, Republic of Congo, Equatorial Guinea, Eritrea, Haiti, Iran, Libya, Somalia, Sudan, and Yemen are fully restricted and limited from entering the United States. Nationals from Burundi, Cuba, Laos, Sierra Leone, Togo, Turkmenistan, and Venezuela are partially restricted and limited from entering the United States. *See id.*

152. *See Countries without Extradition 2025*, WORLD POPULATION REV. <https://worldpopulationreview.com/country-rankings/countries-without-extradition> (on file with Syracuse Law Review) (last visited June 25, 2025).

153. *See id.*

154. *See id.*

do not fall into the previous two categories, they have sometimes refused extradition to the United States, and their nationals are partially restricted and have limited entry to the United States.¹⁵⁵

Many countries subject to Ban Four also share their mistreatment of women. For example, the governments of Afghanistan and Iran punish women for removing their niqab, burka, or hijab.¹⁵⁶ Similarly, Iran and Yemen, whose nationals are also subject to full restriction and limited entry into the United States, punish women who speak against men or otherwise limit women's rights in relation to men.¹⁵⁷

155. *See id.*

156. *See, e.g.,* Daa Hadid, *The Taliban orders women to wear head-to-toe clothing in public*, NPR (May 7, 2022, 3:43 PM), <https://www.npr.org/2022/05/07/1097382550/taliban-women-burqa-decree> (on file with Syracuse Law Review) (discussing the Taliban's/Afghanistan's requirement that women "cover in all-encompassing loose clothing that only reveals their eyes—preferably a burqa."); RFE/RL's Radio Azadi & Frud Bezhan, *Taliban Imposes New Dress Code, Segregation Of Women At Afghan Universities*, RADIO FREE EUR./RADIO LIBERTY (Sept. 06, 2022, 9:13 PM), <https://www.rferl.org/a/taliban-dress-code-segregation-women/31446726.html> (on file with Syracuse Law Review) (discussing the Taliban's/Afghanistan's rules requiring "[a]ll female students, teachers, and staff must wear an Islamic abaya robe and niqab that covers the hair, body, and most of the face[.]"); *Taliban detains dozens of women in Afghanistan for breaking hijab rules with "modeling"*, CBS NEWS (Jan. 10, 2024, 12:05 PM), <https://www.cbsnews.com/news/taliban-afghanistan-mass-arrests-women-girls-hijab-rule-violations/> (on file with Syracuse Law Review) (discussing the Taliban's/Afghanistan's rules "rules requiring women and girls to wear the hijab[.]"); *Repressive enforcement of Iranian hijab laws symbolises gender-based persecution: UN experts*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Apr. 14, 2023), <https://www.ohchr.org/en/press-releases/2023/04/repressive-enforcement-iranian-hijab-laws-symbolises-gender-based> (on file with Syracuse Law Review) (noting that, according to Iran's Islamic Penal Code, women who fail to wear a hijab may be punished with imprisonment of 10 days to 2 months or a fine, while acts offensive to public decency would be "punishable by 10 days to two months in prison or 74 lashes.").

157. *See, e.g., Saudi Arabia to Women: "Don't Speak Up, We Know What's Best For You"*, HUMAN RIGHTS WATCH (June 26, 2013, 9:46 AM), <https://www.hrw.org/news/2013/06/26/saudi-arabia-women-dont-speak-we-know-whats-best-you> (on file with Syracuse Law Review) (discussing a Saudi Arabian case where two women were sentenced to prison for "inciting a woman against her husband" where they tried to help a woman living in Saudi Arabia from her abusive husband.); Haleh Esfandiari, *Violence Against Women: A Never-Ending Story in Iran*, WILSON CTR. (Nov. 29, 2022), <https://www.wilsoncenter.org/blog-post/violence-against-women-never-ending-story-iran> (on file with Syracuse Law Review) (discussing Iran's practice of punishing men and women with penalties as severe as death for protesting Iran's discriminatory laws against women.); *Middle East And North Africa 2024*, AMNESTY INT'L, <https://www.amnesty.org/en/location/middle-east-and-north-africa/report-middle-east-and-north-africa/#:~:text=Gender%2Dbased%20violence%20remained%20prevalent,violence%20and%20gender%2Dbased%20discrimination> (on file with Syracuse Law Review) (last visited Oct. 21, 2025) (discussing discriminatory laws against women in Algeria, Iran, Iraq, Libya, and Yemen.); *Saudi Arabia: Law Enshrines Male Guardianship*, HUMAN

As will be discussed in Part IV, these two aspects of countries subject to Ban Four may impact whether and how virtual trials could be conducted in the following hypotheticals.

In addition to this information, both hypotheticals involve several assumptions. First, these hypotheticals assume that the witness seeking to testify virtually is not eligible for a visa that may allow them to legally return to the United States to testify in-person. Specifically, many types of crime victims are eligible for U visas or T Visas.¹⁵⁸ Victims of human trafficking and a laundry list of other serious offenses are eligible for these visas that, if granted, would award them legal status in the United States.¹⁵⁹ In the State of Washington, however, remote testimony is allowed despite the language of its state constitution.¹⁶⁰ With this information in mind, these are the following hypotheticals that are evaluated:

Hypothetical 1: the defendant is a man much like Haya's father and is charged with a felony (hereinafter "Accused").¹⁶¹ Accused lived in the United States, has a daughter who is an American citizen, and is residing in Iran at the time Ban Four was imposed and at the time he was indicted. Accused is a citizen of Iran and resides in Iran, and

RIGHTS WATCH (Mar. 8, 2023, 12:00 AM), [https://www.hrw.org/news/2023/03/08/saudi-arabia-law-enshrines-male-guardianship#:~:text=\(Beirut\)%20%E2%80%93%20Saudi%20Arabia%27s%20first,and%20decisions%20about%20their%20children](https://www.hrw.org/news/2023/03/08/saudi-arabia-law-enshrines-male-guardianship#:~:text=(Beirut)%20%E2%80%93%20Saudi%20Arabia%27s%20first,and%20decisions%20about%20their%20children) (on file with Syracuse Law Review) (discussing Saudi Arabia's male guardianship law that "contains discriminatory provisions against women concerning marriage, divorce, and decisions about their children.").

158. See, e.g., *U and T Visa Certifications*, U.S. DEP'T OF LAB. (Oct. 1, 2025), <https://www.dol.gov/agencies/whd/immigration/u-t-visa> (on file with Syracuse Law Review); *Green Card for a Victim of a Crime (U Nonimmigrant)*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (July 8, 2025), <https://www.uscis.gov/green-card/green-card-eligibility/green-card-for-a-victim-of-a-crime-u-nonimmigrant> (on file with Syracuse Law Review); *Victims of Human Trafficking: T Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (May 15, 2025), <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-t-nonimmigrant-status> (on file with Syracuse Law Review).

159. T visas apply to victims of human trafficking. See *T Nonimmigrant Status*, *supra* note 158. Offenses making one eligible for a U Visa include Abduction, Abusive Sexual Contact, Blackmail, Domestic Violence, Extortion, False Imprisonment, Female Genital Mutilation, Felonious Assault, Fraud in Foreign Labor Contracting, Hostage, Incest, Involuntary Servitude, Kidnapping, Manslaughter, Murder, Obstruction of Justice Peonage, Perjury, Prostitution, Rape, Sexual Assault, Sexual Exploitation, Slave Trade, Stalking, Torture, Trafficking, Witness Tampering, Unlawful Criminal Restraint, and Other Related Crimes. See *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP AND IMMIGR. SERVS. (May 16, 2025), <https://www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status> (on file with Syracuse Law Review).

160. See *State v. Sweidan*, 461 P.3d 378, 384–92 (Wash. Ct. App. 2020).

161. See *supra* Introduction.

as such, he is fully restricted from entering the United States pursuant to Ban Four. Iran does not have an extradition treaty or diplomatic relations with the United States and Iran will not extradite Accused to the United States to face criminal prosecution. Furthermore, the United States, in accordance with Ban Four, will not allow Accused to return to the United States to be prosecuted in person. Finally, Accused is willing to appear and, if necessary, testify remotely from Iran in his trial.

Hypothetical 2: the witness is a woman much like Haya's sister (hereinafter "Witness") and she is the complainant in a case where the defendant is her ex-boyfriend (hereinafter "Defendant"). Witness is someone who lived in the United States and has a sister who is an American citizen. Despite this, Witness fled the United States out of credible concerns her ex-boyfriend would physically retaliate against her for testifying against him, and who is residing in Iran at the time Ban Four was imposed. In addition to the extradition issues present in Hypothetical 1, Witness is also subject to punishment for removing her hijab in Iran, which she wears for religious or out of fear of retaliation from the Iranian government. Witness is also subject to punishment for speaking against her ex-boyfriend. Furthermore, the United States, in accordance with Ban Four, will not allow Witness to return to the United States to testify against her ex-boyfriend. Witness is willing to testify remotely at trial against her ex-boyfriend and her testimony is necessary to secure a conviction. Finally, even if this trial were to take place in-person, the prosecution would be forced to dismiss the charges if Witness did not testify.

B. Likely Legal Outcomes

1. Hypothetical 1:

Because Accused is the defendant, the first issue is whether he is facing federal or state prosecution. If the former, rulings like those in the district court's ruling in *United States v. Resendiz-Guevara* are most likely instructive.¹⁶² In *Resendiz-Guevara*, the defendant was indicted on federal charges by the Department of Justice and later deported by the Bureau of Immigration and Customs Enforcement, both federal executive agencies.¹⁶³ There, the district court reasoned that,

162. See *United States v. Resendiz-Guevara*, 145 F. Supp. 3d 1128 (M.D. Fla. 2015). See also *United States v. Munoz-Garcia*, 455 F. Supp. 3d 915, 917–21 (D. Ariz. 2020) (holding that the defendant's right to counsel and to a speedy trial in a federal prosecution were violated when she was deported mid-prosecution).

163. See *Resendiz-Guevara*, 145 F. Supp. 3d at 1131–32.

when the federal government is prosecuting someone subject to deportation, they have two choices: they could deport him *or* they could prosecute him, not both.¹⁶⁴ If they did both, such action would violate the defendant's Fifth and Sixth Amendment rights.¹⁶⁵ In this case, Accused would not be deported by Ban Four. Rather, he would be prevented from reentering the United States by one branch of the federal government to face prosecution by another branch of the federal government. Assuming Accused would return to the United States but for Ban Four, it seems likely that a court would find his situation legally equivalent to cases like *Resendiz-Guevara* and grant the dismissal of his federal prosecution.

Accused is less likely to receive such relief if he were facing prosecution from a state or local government. In the author's decade of experience as a local prosecutor, when a defendant facing state criminal charges is deported by the federal government, the state court typically grants the prosecutor's application for an arrest warrant. Such warrant remains active should the defendant ever return to the United States, when they will face prosecution for that charge. In the author's experience, the federal government never sought insights or approval from state or local prosecutors prior to deporting a defendant. Thus, it is unlikely that Accused could gain a dismissal when charged by a state or local government.

That result may change, however, if the state were working in conjunction with the federal government to keep Accused from reentering the United States to face prosecution in-person. For example, the Texas Court of Appeals recently noted that it would consider the state's role in a defendant's removal from the United States while awaiting prosecution for a state crime.¹⁶⁶ In *Dominguez Ortiz*, the state disputed the defendant's claim that it was working to secure his deportation.¹⁶⁷ If the state conceded this issue, however, a court could be more likely to side with Accused.

164. *See id.* at 1136.

165. *See id.* at 1139 (specifically finding that the "Defendant's constitutional violations [...] prevents him from consulting with his counsel, preparing a defense, appearing at his trial to face the charges or appearing as a witness, and otherwise preparing a defense").

166. *See, e.g., Ex parte Dominguez Ortiz*, 668 S.W.3d 126, 134–35 (Tex. App. 2023). In *Dominguez Ortiz*, the court denied the defendant's pretrial habeas petition, noting that his claims were not legally cognizable given the facts and circumstances of his case. *See id.* at 140.

167. *See id.* at 134.

The clearest example of a state actor working with the federal government regarding federal immigration policy is present in New York City. Specifically, in 2024, Mayor Eric Adams was federally charged with bribery and campaign finance offenses during Biden's presidency.¹⁶⁸ After Trump returned to the presidency in 2025 and while Mayor Adams' charges were pending, his administration was credibly accused of engaging in a quid pro quo to dismiss Mayor Adams' charges in exchange for his compliance with the administration's punitive immigration policies.¹⁶⁹ While the second Trump administration and Mayor Adams deny a quid pro quo, Mayor Adams has explicitly agreed that he is "collaborating" with the administration to help ICE with its enforcement of criminal actions.¹⁷⁰ Although there does not appear to be any caselaw with these factual circumstances,

168. See *New York City Mayor Eric Adams Charged With Bribery And Campaign Finance Offenses*, U.S. DEP'T. OF JUST. (Sept. 26, 2024), <https://www.justice.gov/usao-sdny/pr/new-york-city-mayor-eric-adams-charged-bribery-and-campaign-finance-offenses> (on file with Syracuse Law Review).

169. See, e.g., Frank G. Runyeon, *SDNY US Atty Resigns, Alleging Trump-Adams 'Quid Pro Quo'*, LAW360 (Feb. 13, 2025, 3:12 PM), <https://www.law360.com/articles/2298034> (on file with Syracuse Law Review) (discussing the resignation of the Interim US Attorney for the Southern District of New York in light of the Department of Justice's order to dismiss Mayor Adams' federal corruption case amid quid pro quo concerns); Emily Sawicki, *Ex-Judges Urge Probe of 'Quid Pro Quo' Claim In Adams Case*, LAW360 (Mar. 3, 2025, 4:09 PM), <https://www.law360.com/articles/2304958/ex-judges-urge-probe-of-quid-pro-quo-claim-in-adams-case> (on file with Syracuse Law Review) (discussing the concerns of fourteen retired federal judges regarding the appearance of a quid pro quo between the second Trump administration and Mayor Adams); Frank G. Runyeon, *Breaking: Clement Advises Judge To Permanently Toss Adams Case*, LAW360 (Mar. 7, 2025, 5:16 PM), <https://www.law360.com/articles/2307818/doj-cites-sdny-prosecutors-texts-in-bid-to-end-adams-case> (on file with Syracuse Law Review) (reporting the results of the court-appointed amicus recommending a dismissal of Mayor Adams' case with prejudice to avoid the ability of the second Trump administration and Mayor Adams to complete a quid pro quo); Molly Crane-Newman & Chris Sommerfeldt, *Federal Judge Ho dismisses public corruption case against Mayor Adams 'with prejudice'*, N.Y. DAILY NEWS (April 2, 2025, 6:16 PM), <https://www.nydailynews.com/2025/04/02/federal-judge-ho-dismisses-public-corruption-case-against-mayor-adams-with-prejudice/> (on file with Syracuse Law Review) (discussing how Judge Ho dismissed Mayor Adams' case "with prejudice" to avoid the "perception that the Mayor's freedom depends on his ability to carry out the immigration enforcement priorities of the administration").

170. The Recount (@therecount), X (Feb. 14, 2025, 11:19 AM), NYC Mayor Eric Adams: "I'm not standing in the way [of ICE]. I'm collaborating." Fox's Steve Doocy: "Now you're collaborating. ... Did you help ICE?" Adams: "In the level of enforcement for criminal actions, yes. The law says, Eric, you cannot do it for civil enforcement." <https://x.com/therecount/status/1890435751453602216> (on file with Syracuse Law Review).

such facts would likely help Accused in gaining pretrial dismissals of their state cases.

Another issue likely preventing the prosecution of Accused is that, under current legal standards, he could not be “present” for trial, and thus, his trial could not proceed as a DefVR Trial. According to Federal Rule of Criminal Procedure 43(c)(1), defendants must at least be “initially present” before they can voluntarily absent themselves from their trials.¹⁷¹ Assuming Accused was charged with a federal crime and prosecutors could avoid the dismissal granted in *Resendiz-Guevara*, they still could not proceed as a DefVR Trial if he was not “initially present.” If this were a state prosecution, the ability to proceed as a DefVR Trial would depend on the state. In states like New Jersey, such a case could occur even if Accused was not “initially present.”¹⁷² But in states like Texas, he would have to be present at least through the duration of jury selection.¹⁷³

Finally, even if Accused had been “initially present” for their federal prosecution or complied with their state’s presence rules for their state prosecution, another issue would arise if Accused chose to exercise his right to testify. Specifically, because Accused could not take the testimonial oath, he would be barred from testifying pursuant to Rule of Evidence 603 or the state equivalent *even though he had a Fifth Amendment right to testify*.¹⁷⁴ As previously discussed, the district court’s decision in *Banki* notes several reasons why such circumstances bar Accused from testifying remotely from Iran. Specifically, the court noted the lack of diplomatic relations and an extradition treaty between the United States and Iran,¹⁷⁵ as well as the lack of a United States embassy or consulate where an officer of the United States could administer her oath and otherwise observe her testimony.¹⁷⁶ Given Accused’s circumstances in this hypothetical, it is similarly unlikely that he could testify remotely at trial from Iran.

171. See FED. R. CRIM. P. 43(c)(1) (“A defendant who was *initially present* at trial, or who had pleaded guilty or *nolo contendere*, waives the right to be present under the following circumstances . . .” (emphasis added)).

172. See N.J. CT. RULES, R. 3:16; *see also* State v. Luna, 936 A.2d 957, 965 (N.J. 2007) (“Trial judges have discretion to decide whether to start a trial when a defendant is inexcusably absent.”).

173. See, e.g., Morrison v. State, 480 S.W.3d 647, 657 (Tex. App. 2015).

174. See U.S. CONST. amend. V.

175. See United States v. Banki, 2010 U.S. Dist. LEXIS 27116, at *7 (S.D.N.Y. Mar. 23, 2010).

176. See *id.* at *9.

2. Hypothetical 2:

Because Witness is not the defendant, and is instead a witness for the prosecution, this hypothetical would likely not implicate Defendant's rights to a speedy trial or assistance/effective assistance of counsel under the Sixth Amendment. While it also would not implicate his right to be present since he could be physically present for his trial, it would force Defendant to make the perhaps unfair but sometimes constitutional choice of pitting his right to be present against his right to in-person confrontation.

Defendant would have a better argument that his right to confrontation would be violated if Witness testified remotely from Iran. However, while the law favors in-person confrontation and the use of remote testimony is greatly limited at trial, courts have allowed witnesses to testify remotely and in compliance with the Sixth Amendment for many reasons.¹⁷⁷ These include those due to concerns related to the witness's safety. In *McCumber v. State*,¹⁷⁸ for example, the Texas Court of Criminal Appeals held that "the trial court's necessity finding was sufficient and was justified by the witness's fear of retaliation[.]"¹⁷⁹ In *McCumber*, the Court of Criminal Appeals found that the witness explained why she feared retaliation from the defendant, that the trial court deemed her explanation credible, and relied on the trial court's finding of credibility to "reverse the judgment of the court of appeals and remand to that court for further proceedings."¹⁸⁰ Thus, in situations like *McCumber* and Hypothetical 2, it appears that Defendant's confrontation arguments would also fail.

Another confrontation issue would arise if Witness decided to testify remotely while wearing a hijab, which she wears for religious or safety concerns and for which Iran punishes women when they fail to do so.¹⁸¹ While a religious hair covering like a hijab is not the same as a disguise, caselaw regarding the latter is informative on this issue. Specifically, some courts have found that witnesses may testify while wearing a disguise that covers a portion of their face due to safety

177. See *supra* notes 107–08.

178. See *McCumber v. State*, 690 S.W.3d 686, 689 (Tex. Crim. App. 2024).

179. *Id.* at 689.

180. *Id.* at 692–94.

181. See, e.g., *Repressive enforcement of Iranian hijab laws symbolises gender-based persecution: UN experts*, UNITED NATIONS (April 14, 2023), <https://www.ohchr.org/en/press-releases/2023/04/repressive-enforcement-iranian-hijab-laws-symbolises-gender-based> (on file with Syracuse Law Review).

concerns.¹⁸² However, such an outcome is not guaranteed.¹⁸³ Interestingly, even though Defendant may legally prevent Witness from testifying in a hijab, they may not want to lodge such an objection. Indeed, one study proved that “[w]hen witnesses wore niqabs . . . or hijabs, . . . observers’ performance at detecting lies improved above chance levels.”¹⁸⁴ According to the researchers, this was the result because, “[l]imiting the amount of visual information available[] forced participants to [‘]base their decisions on verbal cues.[‘]”¹⁸⁵ Thus, Defendant’s best chance to successfully prepare for cross examination may lie in forgoing a valid objection on Sixth Amendment confrontation grounds.

What would not fail, however, is that, because Witness could not take the testimonial oath, she, like Accused, would be barred by Rule of Evidence 603 or related rules from testifying. As previously discussed in Hypothetical 1,¹⁸⁶ Iran’s lack of diplomatic relations and extradition treaty with the United States prevent this case from proceeding as a WitVR Trial. The district court in *Banki* did note, however, its belief that the witness’s testimony could have fallen within the “exceptional circumstances” exception to allow an in-person or remote *deposition* testimony prior to trial pursuant to Federal Rule of Criminal Procedure 15.¹⁸⁷ Thus, while she could not testify virtually at trial, if she could appear in a country like Dubai or appear for virtually from Iran, Witness may still be able to testify for a pretrial deposition virtually or in-person.

While not directly related to Witness’s testimony, there is also the issue of the ethics of having her testify in situations that may be detrimental to their physical well-being. As discussed in Part II,¹⁸⁸ prosecutors do not have clients, and as such, the prosecutor handling this case would not owe the same rights afforded to clients, as to Witness.

182. See, e.g., *United States v. de Jesus-Casteneda*, 705 F.3d 1117, 1120–21 (9th Cir. 2013).

183. See, e.g., *United States v. Alimehmeti*, 284 F. Supp. 3d 477, 489 (S.D.N.Y. Feb. 15, 2018) (holding that the witness could not testify while wearing a niqab).

184. See Julia Simon-Kerr, *Unmasking Demeanor*, 88 GEO. WASH. L. REV. ARGUENDO 158, 171 (2020) (citing Amy-May Leach et al., *Less is More? Detecting Lies in Veiled Witnesses*, 40 L. & HUM. BEHAV. 401, 407 (2016)).

185. See Simon-Kerr, *supra* note 184, at 171.

186. See *Banki*, 2010 U.S. Dist. LEXIS 27116 at *7.

187. See *id.* The court in *Banki* further discussed the potential for conducting an in-person deposition in a country like Dubai since United States officials could administer the oath and observe the witness’s testimony there. See *id.* at *4. They further discussed the ability of the parties to conduct remote depositions of government witnesses. See *id.* (citing *United States v. Abu Ali*, 528 F.3d 210, 239–40 (4th Cir. 2008)).

188. See *supra* Part II (D).

But, assuming the jurisdiction has adopted the ABA's rules regarding prosecutorial standards and ethics, they should advise Witness that she may be subject to retaliation for testifying virtually from Iran without wearing a hijab or for testifying against a man.¹⁸⁹ Furthermore, as a minister of justice, the prosecutor should further consider whether it is appropriate to proceed to trial where their witness is a likely target of such retaliation and without the protection of the United States.¹⁹⁰

IV. POTENTIAL LEGAL SOLUTIONS

As discussed in Part III, the “initial presence” requirement stifles the ability of defendants, like Accused, from proceeding to trial in any federal prosecution and bars a trial in many state cases as well. This and most of the issues presented by Hypotheticals existed in relation to those virtually appearing or testifying during COVID and are likely to remain or be aggravated in such cases caused by the Travel Bans. To avoid the “initial presence” issue, federal and state laws regarding a defendant's presence at trial should be amended to allow for DefVR Trials, either with or without the defendant's consent.¹⁹¹ As long as the defendant did not testify, this type of change would allow for a defendant subject to Ban Four to virtually appear for their trial, regardless of which country from which they were remotely appearing.

Another measure to make such trials involving defendants like Accused more feasible would be to hold federal prosecutions to the same standard as the states. That is, even when a defendant is charged with a federal crime and is deported or barred from reentering the United States by the federal government, allow the case to proceed to trial or at least survive a motion to dismiss. This solution is particularly poor, and not recommended by the author, because it both rewards potentially arbitrary and egregious government behavior—refusing to allow entry into the United States to those of certain religious backgrounds—and harms the accused.

Regarding witnesses like Witness, should they wear a niqab, hijab, or burqa, *and* the WitVR Trial be allowed to proceed, jury instructions could be updated to better instruct jurors on witness demeanor

189. *See supra* notes 146–48 and accompanying text.

190. Because prosecutorial ethics are not the primary purpose of this Article, the full depth of ethical rules related to this issue will be reserved for another Article. However, such a situation may arise where a witness testifies in the United States against drug cartel from a foreign country and then may still be subject to deportation to that country and face punishment as serious as death.

191. For a more robust discussion of how to change these rules, *see* Draper, *supra* note 96, at 179–85.

so that they properly evaluate her testimony. For example, Judge Mark W. Bennett has proposed jury instructions that explicitly instruct jurors regarding flawed views on demeanor.¹⁹² Notably, his instructions state that, according to scientific research, “there is not necessarily a relationship” between confident witness testimony and accurate witness testimony.¹⁹³ His instructions further advise that “common cultural cues, like shifty eyes, shifty body language, the failure to look one in the eye, grimaces, stammering speech, and other mannerisms, are not necessarily correlated to witness deception or false or inaccurate testimony.”¹⁹⁴ Instructions such as these, in conjunction with studies showing that witnesses should focus on verbal cues to best evaluate witness demeanor, should be utilized when witnesses are testifying while wearing niqab, hijab, or burqa.

The issue remains, however, as to how to proceed when parties like Accused or Witness cannot take the testimonial oath because of their physical location, making any potential prosecution for perjury unenforceable. As stated previously, even Gallacher’s proposed solution to the testimonial oath still requires that the witness be subject to punishment for perjury to testify.¹⁹⁵ But, Gallacher still claims that the potential for prosecution for perjury is “an ineffective deterrent to truthlessness at trial.”¹⁹⁶ His claim is backed by the fact that prosecution for perjury rarely occurs.¹⁹⁷ Based on that claim, at first glance, removing the requirement that witnesses be subject to the penalty for perjury may solve the oath issue.

This solution, however, also appears unlikely to occur and is not backed by available scientific evidence. As noted in Professor Helen Silving’s seminal study on the testimonial oath in America noted that China, Russia, Poland, and Switzerland have already abandoned the testimonial oath.¹⁹⁸ While not yet abandoned in Ireland, Irish scholars

192. See Mark W. Bennett, *Unspringing the Witness Memory and Demeanor Trap: What Every Judge and Juror Needs to Know About Cognitive Psychology and Witness Credibility*, 64 AM. U.L. REV. 1331, 1374–75 (2015).

193. *Id.* at 1374.

194. *Id.* at 1374–75.

195. See Gallacher, *supra* note 129, at 297–99.

196. See Gallacher, *supra* note 129, at 289.

197. See *Perjury: The Forgotten Offense*, 65 J. CRIM. L. & CRIMINOLOGY 361, 361 (1974).

198. See Helen Silving, *The Oath: II*, 68 YALE L.J. 1527, 1553–58 (1959).

are urging the same.¹⁹⁹ However, even these countries require that witnesses be subject to the penalties for perjury.²⁰⁰

Available scientific data also supports the idea that removing the “subject to prosecution for perjury” requirement is misguided as well. For example, many scholars have demonstrated how the existence of a social norm, even without an enforced penalty for noncompliance, still encourages compliance with the norm.²⁰¹ Similarly, scholars have shown that in the field of taxes, higher institutional trust is positively correlated with higher rates of tax compliance.²⁰² When this information is taken in conjunction with judicial survey data regarding perceived perjury,²⁰³ it at most calls for robust study into whether the existence of perjury laws in the United States, despite low enforcement rates, nevertheless encourages greater compliance than if such laws did not exist. Furthermore, because the most ardent and articulate critics of the testimonial oath do not call for the removal of potential punishment for perjury, I will not do that here. Instead, and despite my support for continued and expanded use of virtual proceedings, I would not allow trials to proceed where witnesses could not be subject to a valid testimonial oath. For cases involving defendants subject to Ban Four, I would recommend dismissal of all criminal charges. For those involving witnesses, I am recommending dismissal or, if the “exceptional circumstances” exception can be met, attempting to secure the witness’s testimony via a pretrial deposition from a location where the witness would be subject to a penalty for perjury and thus, where they would be able to take the testimonial oath.

199. See, e.g., Alejandro Bans Burtchaell, *Oral Oaths in Ireland: A Case for Reform*, U. COL. DUBLIN L. REV.: SUTHERLAND SYMPOSIUM (March 22, 2003) (Ir.), <https://theucdlawreview.com/2023/03/22/oral-oaths-in-ireland-a-case-for-reform/> (on file with Syracuse Law Review) (discussing Switzerland’s witness testimony laws and recommending similar rules for Ireland).

200. See Silving, *supra* note 198, at 1553–58.

201. See, e.g., Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws*, 15 J. EUR. ECON. ASS’N 245, 245–95 (2017); Panchali Guha, *Why comply with an unenforced policy? The case of mandated corporate social responsibility in India*, 3 POL’Y DESIGN & PRAC. 58, 58–72 (2020) (U.K.).

202. See, e.g., Georgia Kaplanoglou & Vassilis T. Rapanos, *Tax and Trust: The Fiscal Crisis in Greece*, 18 S. EUR. SOC’Y & POL. 283, 283–304 (2013); Larissa Battrancea et al., *Trust and Power as Determinants of Tax Compliance Across 44 Nations*, 74 J. ECON. PSYCH., no. 102191, 2019, at 1, 1–15; John D’Attoma, *More Bang for Your Buck: Tax Compliance in the United States and Italy*, 40 J. PUB. POL’Y. 1, 1–24 (2020) (U.K.).

203. See *supra* note 139 and accompanying text.

CONCLUSION

The Travel Bans implicate, and even aggravate, the criminal jury right concerns that arose during the COVID pandemic. Most notably, they demonstrate how our justice system's requirement that witnesses be subjected to a testimonial oath, and more specifically a penalty for perjury, wholly bars some of the virtual criminal jury trials that the Travel Bans would otherwise create. This limit is not a bug within our justice system. Rather, it is a feature. Indeed, attorneys, defendants, victims, and society at large should rejoice at the fact that our justice system will only let a witness testify at trial if they can be punished for perjury.

This limit, however, is not without consequences. Guilty defendants will have their cases dismissed. Victims will not get the justice they deserve. Society will see another example of how its government can harm bystanders of an already cruel policy. Despite these consequences, the fact remains that our justice system values criminal jury rights and limits the changes it will endure.

APPENDIX: VIRTUAL PROCEEDING TAXONOMY²⁰⁴

Fully In-Person [Proceeding] ("FIP [Proceeding]") is a [proceeding] where all the participants [...] appear at the [proceeding] in-person.

Partially In-Person [Proceeding] ("PIP [Proceeding]") is a [proceeding] where at least one of the participants appears at the [proceeding] from a virtual or remote location because they are unwilling or unable to appear in-person. There are several types of PIP [Proceedings], some of which have already occurred even prior to the pandemic. They are as follows:

Witness Virtual or Remote ("WitVR") is a [proceeding] where at least one witness is unwilling or unable to testify at the [proceeding] in-person and instead testifies from a virtual or remote location. For example, this may happen where the witness is overseas and

204. This taxonomy was previously created by Professor Draper in the context of virtual criminal trials. Because this Article discusses additional criminal proceedings, the definitions here reflect those differences and expand the definition of a Legally Virtual or Remote Proceeding. When evaluating virtual trials, the author will use terms such as "FVR Trial" or "PIP Trial." When evaluating other virtual criminal proceedings, the author will use terms like "FVR Proceeding" or "PIP Proceeding," or specify the type of proceeding.

unable to return to the United States to testify, and they instead testify via Zoom.

Public Virtual or Remote (“PubVR”) is a [proceeding] where at least one member of the public is barred from appearing at the [proceeding] in-person and instead appears from a virtual or remote location. This may occur where a member of the defendant’s family wants to attend in person but must instead watch virtually from another location.

Defendant Virtual or Remote (“DefVR”) is a [proceeding] where the defendant is unwilling or unable to appear for the [proceeding] in-person and instead appears from a virtual or remote location. This may occur where the defendant, for health and safety reasons, cannot attend in person and instead appears from a remote location.

[Plaintiff Virtual or Remote (“PIVR”) is a proceeding where the plaintiff is unwilling or unable to appear for the proceeding in-person and instead appears from a virtual or remote location. This may occur where the plaintiff, for health and safety reasons, cannot attend in person and instead appears from a remote location.]

Prosecutor Virtual or Remote (“PrVR”) is a [proceeding] where the prosecutor is unwilling or unable to appear for the [proceeding] in-person and instead appears from a virtual or remote location. Throughout the pandemic, this occurred when the prosecutor appeared virtually for pretrial proceedings, either from their homes or offices.

[Plaintiff’s Counsel Virtual or Remote (“PCVR”) is a proceeding where the plaintiff’s counsel is unwilling or unable to appear for the proceeding in-person and instead appears from a virtual or remote location. Throughout the pandemic, this occurred when the plaintiff’s counsel appeared virtually for pretrial proceedings, either from their homes or offices.]

Judge Virtual or Remote (“JudVR”) is a [proceeding] where the judge is unable or unwilling to preside over the [proceeding] in-person and instead presides from a virtual or remote location. During the pandemic, this occurred in the context of a probation revocation hearing where the judge presided virtually while all other participants appeared in the courtroom.

Juror(s) Virtual or Remote (“JurVR”) is a [proceeding] where one or more jurors are unwilling or unable to serve in-person and instead complete their jury service from a virtual or remote location. This may occur where a member of the venire is selected for the jury but cannot appear in-person.

Defense Counsel Virtual or Remote (“DCVR”) is a [proceeding] where one or more of the defendant’s attorneys are unable or unwilling to appear in-person and instead appear from a virtual or remote location. Like DefVR cases, this may occur where defense counsel appears from a remote location for health and safety reasons.

Legally Virtual or Remote [Proceeding] (“LVR [Proceeding]”) [varies depending on the type of proceeding. In civil proceedings, it is a proceeding where a majority of the participants are unable or unwilling to appear in-person and instead appear from virtual or remote locations. In a criminal pretrial proceeding that does not involve a defendant, it is a proceeding where a majority of the participants are unable or unwilling to appear in-person and instead appear from virtual or remote locations. In a criminal pretrial proceeding that does involve a defendant, it is a proceeding where the judge and defendant are unable or unwilling to appear in-person and instead appear from virtual or remote locations. In a criminal trial, it is a proceeding where the judge, jury, *and* defendant are unable or unwilling to appear in-person and instead appear from virtual or remote locations.]

Fully Virtual or Remote [Proceeding] (“FVR [Proceeding]”) is a [proceeding] where every participant appears at the [proceeding] in a virtual or remote setting.²⁰⁵

205. See Draper, *supra* note 96, at Part II (A) (internal citations omitted).

