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The Compulsory Process Clause

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THE COMPULSORY PROCESS CLAUSE

Peter Westen

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THE COMPULSORY PROCESS CLAUSE

Peter Westen*

THE Supreme Court has begun to breathe life into a clause of the Constitution that has remained practically dormant since its adoption—the compulsory process clause of the sixth amendment. The defendant's right of compulsory process is a companion and counterpart to his sixth amendment right of confrontation. Together they guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."¹

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1. U.S. CONST. amend. VI. Forty-eight states (all but Nevada and New York) make some provision in their constitutions for compulsory process. Seventeen states guarantee compulsory process with the precise wording of the sixth amendment. ALA. CONST. art. I, § 6; ALAS. CONST. art. I, § 11; ARK. CONST. art. II, § 10; HAWAII CONST. art. I, § 11; IND. CONST. art. I, § 13; KY. CONST. BILL OF RTS., § 11; LA. CONST. art. I, § 9; ME. CONST. art. I, § 6; MICH. CONST. art. I, § 20; MINN. CONST. art. I, § 6; MISS. CONST. art. III, § 26; N.J. CONST. art. I, § 10; ORE. CONST. art. I, § 11; PA. CONST. art. I, § 9; S.C. CONST. art. I, § 18; TENN. CONST. art. I, § 9; W. VA. CONST. art. III, § 14.

Six states use slightly different wording that does not appear to change the clause's meaning. CONN. CONST. art. I, § 8 ("to obtain witnesses in his *behalf*"); DEL. CONST. art. I, § 7 ("compulsory process *in due time, on application by himself, his friends or counsel*, for obtaining witnesses in his favor"); IOWA CONST. art. I, § 10 ("compulsory process for *his* witnesses"); OKLA. CONST. art. 2, § 20 ("for obtaining witnesses in his *behalf*"); R.I. CONST. art. I, § 10; S.D. CONST. art. VI, § 7 ("compulsory process *served* for obtaining witnesses in his behalf").

Fifteen states, with slight variations in wording, emphasize that the purpose of compulsory process is to compel the *attendance* of defense witnesses. ARIZ. CONST. art. II, § 24 ("[i]n criminal prosecutions, the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf"); CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 16; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 8; KAN. CONST. BILL OF RTS., § 10; MO. CONST. BILL OF RTS., art. I, § 18(a); MONT. CONST. art. III, § 16; NEB. CONST. art. I, § 11; N.M. CONST. art. II, § 14; N.D. CONST. art. I, § 13; OHIO CONST. art. I, § 10; UTAH CONST. art. I, § 12; WASH. CONST. art. I, § 22; WIS. CONST. art. I, § 7.

Six states emphasize that the purpose of compulsory process is to enable the defendant to *present* evidence in his favor. Massachusetts and New Hampshire provide that "every subject shall have a right to produce all proofs, that may be favorable to him[*self*]." MASS. CONST. pt. I, art. XII; N.H. CONST. pt. I, art. 15. Vermont provides that "in all prosecutions for criminal offenses, a person hath a right . . . to call for evidence in his favor," VT. CONST. ch. I, art. 10, and Virginia's provision is virtually identical. VA. CONST. art. I, § 8. Georgia and North Carolina refer to the "testimony" of defense witnesses. GA. CONST. art. I, § 1, ¶ V ("compulsory process to obtain the testimony of his own witnesses"); N.C. CONST. art. I, § 23 (the right . . . to confront the accusers and witnesses with other testimony").

The compulsory process clause differs in one significant respect, however, from the confrontation clause and the other procedural guarantees of the sixth amendment: The defendant's rights to be informed of the charges against him, to receive a speedy and public trial, to be tried by a jury, to be assisted by counsel, and to be confronted with adverse witnesses are designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused. They apply in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own. Compulsory process, on the other hand, comes into play at the close of the prosecution's case. It operates exclusively at the defendant's initiative and provides him with affirmative aid in presenting his defense.

Despite its significance, the compulsory process clause for years failed to fulfill its intended role in criminal procedure. Courts tended to construe its specific words without reference to their historical purpose, and assumed that the clause guaranteed the accused only the right to subpoena witnesses to appear in court. Too often courts searched the outer limits of due process and other provisions in the Bill of Rights for principles that lay throughout at the very core of the compulsory process clause. Only recently has this view begun to change. In a series of cases decided since 1967, the Supreme Court has rejected the narrow construction of the clause, and has recognized that compulsory process constitutionalizes the entire presentation of the defendant's case.

Part I of this article traces the history of compulsory process, from its origin in the English transition from an inquisitorial to an adversary system of procedure to its eventual adoption in the American Bill of Rights. Part II examines the Supreme Court's seminal de-

Two states give the defendant compulsory process for witnesses whether or not they are in his favor. FLA. CONST. art. I, § 16 ("[i]n all criminal prosecutions the accused . . . shall have the right to have compulsory process for witnesses . . ."); WYO. CONST. art. I, § 10 ("[t]he right . . . to have compulsory process served for obtaining witnesses").

Texas adopts the wording of the sixth amendment, with the added provision that the accused in some cases be permitted to introduce deposition testimony. TEX. CONST. art. I, § 10 ("[The accused] shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide . . .").

Maryland explicitly guarantees the defendant the right to examine his witnesses under oath. MD. CONST. DEC. OF RTS., art. 21 ("in all criminal prosecutions, every man hath a right . . . to have process for his witnesses [and] to examine the witnesses for and against him on oath . . .").

cision in *Washington v. Texas*,² which recognized after a century and a half of silence that the compulsory process clause was designed to enable the defendant not only to produce witnesses, but to put them on the stand and have them heard. Part III studies the implications of compulsory process for the defendant's case, from the discovery of witnesses in his favor to orders compelling them to testify over claims of privilege.

I. THE ORIGINAL MEANING OF COMPULSORY PROCESS

The constitutional meaning of compulsory process is deeply rooted in the history of English and American criminal procedure. While some constitutional problems may be resolved by the plain meaning of the words involved or by ordinary rules of construction,³ most require a historical inquiry into the framers' intent.⁴ The evidence of this original intent may prove ambiguous or otherwise inadequate, forcing one to rely on supplemental modes of interpretation, such as the meanings ascribed by later generations.⁵ But whether or not history can answer every problem, every answer must come to terms with history.

Historical inquiry is particularly important for understanding the compulsory process clause, because the clause is part of an institution that has survived the passage of time. The clause differs from provisions (*e.g.*, the second amendment "right . . . to keep and bear arms") that have lost their original significance because of changes in underlying institutions.⁶ It is one of a handful of provisions that

2. 388 U.S. 14 (1967).

3. It is generally assumed that, unless obviously used in a technical sense, words should be given their common meaning; the whole should be read to be internally consistent; and all words should be construed to make sense. See Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535-46 (1947).

4. Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), *aff'd.*, 326 U.S. 404 (1945). I am indebted for the quotation and for much in this historical discussion to C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 149-69 (1969).

5. See *Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (Holmes, J.). The task requiring the keenest judgment is to construe the Constitution when the various modes of construction produce contradictory meanings, as when the clear meaning of the words conflicts with their historical meaning or with previous interpretation.

6. When the second amendment was adopted, there was no standing federal army, long distances required isolated communities to fend for themselves in emergencies, the most sophisticated weapons consisted of small arms, and members of the civil defense could be expected to supply their own arms. The right to bear arms was

were grouped together in the sixth amendment as a basic code of procedure for the criminal trial,⁷ which, as an institution, remains essentially the same as in 1791.⁸

The compulsory process clause also differs from those constitutional provisions (e.g., the fifth amendment's "due process" clause) that were framed in general terms and intended to carry an evolving rather than a historical meaning.⁹ The clause was framed in distinctly

viewed as an alternative to a standing army; states were permitted to maintain a militia of citizen-soldiers as a first line of defense against invasions, Indian wars, and insurrections. See *United States v. Miller*, 307 U.S. 174, 178 (1939). See generally Feller & Gotting, *The Second Amendment: A Second Look*, 61 Nw. U. L. Rev. 46 (1966); Rohner, *The Right To Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53 (1966); Sprecher, *The Lost Amendment*, 51 A.B.A.J. 554, 665 (1965).

Since the eighteenth century the nation has gained a standing army and lost the original militia: "We may for a moment, pause to reflect on the fact, that what was once deemed a stable and essential bulwark of freedom, 'a well regulated militia,' though the clause still remains in our Constitution, both State and Federal, has, as an organization, passed away in almost every State of the Union, and only remains to us as a memory of the past, probably never to be revived." *Andrews v. State*, 50 Tenn. 165, 184, 8 Am. R. 8, 17 (1871). The National Guard, which replaced the militia, is organized and funded by Congress, directed by officers of the United States, and supplied with complex and expensive weapons. It is unnecessary and impractical for national guardsmen to provide their own weapons. Today the possession of private firearms in the home or on the person is more likely to promote civil disorder than civil defense. R. POUND, *THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY* 91 (1957).

The third amendment, which prohibits the quartering of soldiers in private homes during peacetime, is also obsolete. See E. DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 60 (1957).

7. J. GOEBEL, 1 *HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 430-31, 437-38, 442-43 n.162, 449, 455 (1971). James Madison drafted all of what eventually became the sixth amendment except for the provisions pertaining to trial by jury and trial in the state and district of the crime's commission, *id.* at 438, and introduced it as a single proposed amendment. He also drafted a separate provision for trial by jury in criminal cases and joined it with a provision for indictment by grand jury. *Id.* at 431. During the debates, however, the last two provisions were severed; the provision for indictment by grand jury was incorporated in the draft fifth amendment with other provisions concerning the initiation of criminal prosecutions, *id.* at 452, while the right to trial by jury was joined with the sixth amendment provisions concerning trial. *Id.* at 455.

8. See *COLONIAL JUSTICE IN WESTERN MASSACHUSETTS 1639-1702*, at 129-58 (J. Smith ed. 1961) [hereinafter *COLONIAL JUSTICE*]; *COURT RECORDS OF PRINCE GEORGES COUNTY, MARYLAND 1696-1699*, at lxxii-lxxxii (P. Crowl & J. Smith ed. 1964) [hereinafter *COURT RECORDS*]; J. GOEBEL & T. NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776)* 558-679 (1944); A. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 50-136 (1930); R. SEMMES, *CRIME AND PUNISHMENT IN EARLY MARYLAND* 21-27 (1938). See generally 1 P. HAMLIN & C. BAKER, *SUPREME COURT OF JUDICATURE OF THE PROVINCE OF NEW YORK, 1691-1704*, at 141-244 (1959).

9. Cf. *Furman v. Georgia*, 408 U.S. 238, 263-69 (1972) (Brennan, J. concurring); 408 U.S. at 321 n.19, 332 (Marshall, J., concurring); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) ("The Court recognized in [*Weems v. United States*, 217 U.S. 349, 378 (1910)] that the words of the [eighth amendment ban on "cruel and unusual punishments"] are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress

narrow terms for rather narrow purposes. Historical inquiry can shed light on what it means in specific cases because it was the product of specific grievances, and because many of the abuses that drew the framers' attention continue to occur.¹⁰

The principal difficulty in determining the original understanding of compulsory process is that the framers adopted James Madison's draft of the sixth amendment, unlike other guarantees in the Bill of Rights, almost without debate and largely as proposed.¹¹ The sixth amendment was noncontroversial (aside from the requirement that the jury be drawn from the district where the crime occurred) because its principles were already accepted at common law.¹² It

of a maturing society" (footnote omitted)). The guarantees of "due process" and "equal protection" are so deliberately generalized in terms and purpose that they, too, are deemed to represent continuing concepts of fairness:

Broadly speaking two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (e.g., "due process," "equal protection of the laws" . . .) Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from the very specific provisions in the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits.

United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring). See Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 161-63, 173-74 (1951); Hurtado v. California, 110 U.S. 516, 528-36 (1884); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59-65 (1955). Discovery of how the framers would have applied some provisions in individual cases is therefore of little value, because they did not intend to incorporate their particular contemporary standards into general constitutional concepts. See Dworkin, *Nixon's Jurisprudence*, N.Y. Review of Books, May 4, 1972, at 27, 27-28.

10. Cf. *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black J., dissenting). The Court uses history differently for different clauses of the sixth amendment. With some guarantees, such as the rights to a speedy trial and to confrontation of witnesses, the Court has said that the historical record is so bare as to be unilluminating. See *United States v. Marion*, 404 U.S. 307, 314 n.5 (1971); *California v. Green*, 399 U.S. 149, 176 n.8 (1970) (Harlan, J., concurring). With respect to the right to jury trial, on the other hand, the Court purports to follow history faithfully. See *Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968). But see *Bloom v. Illinois*, 391 U.S. 194, 198-200 n.2 (1968) ("In any event, the ultimate question is not whether the traditional doctrine is historically correct but whether the rule that criminal contempts are never entitled to a jury trial is a necessary or an acceptable construction of the Constitution.").

11. See note 115 *infra* and accompanying text.

12. I. BRANT, *THE BILL OF RIGHTS, ITS ORIGIN AND MEANING* 35-36 (1965). See *Callan v. Wilson*, 127 U.S. 540, 549 (1888); *United States v. Reid*, 53 U.S. (12 How.) 361, 363-64 (1851). Edmund Randolph said of the Virginia Declaration of Rights, which served as a model for the sixth amendment, that it "reenacts in substance, modes for defence, for accused persons, similar to those under the English law." 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 248 (1971). Trial by jury was also well accepted at common law and, indeed, was specifically protected

accepted the contemporary criminal procedure of George III, but rejected the earlier practices of the Tudors and Stuarts.¹³ The grievances that produced it were suffered not by eighteenth century Americans, but by sixteenth and seventeenth century Englishmen. To discover what the framers intended by their silent adoption of compulsory process, therefore, one must understand the prior history of English procedure. As shown below, compulsory process by 1791 represented the culmination of a long-evolving principle that the defendant should have a meaningful opportunity, at least on a par with that of the prosecution, to present a case in his favor through witnesses.

A. *The History of Compulsory Process in England*

The history of compulsory process in England is one part of the more general development from an inquisitorial to an adversary trial procedure. Criminal cases in the late medieval period were tried by jurors on the basis of their own prior knowledge of the facts without hearing from witnesses for either side.¹⁴ Later, as the jury began to consider independent testimony from prosecution witnesses, it still refused to hear sworn testimony from the defendant or his supporting witnesses.¹⁵ Not until the eighteenth century, as Alexander Hamilton and his contemporary William Blackstone began their studies of the law, did the defendant finally receive an equal opportunity with the prosecution to present his case through witnesses.¹⁶

in article III of the Constitution. The debate over the sixth amendment did not concern the right to jury trial as such, but rather the right to have the jury drawn from the place where the crime occurred; it was designed by framers mindful of recent abuses by which defendants were transported at great inconvenience back to England to be tried by juries that knew nothing of the circumstances of the crime. As eventually adopted, it guaranteed the accused the right to a jury "of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," reflecting a compromise between those who preferred a jury drawn from the "vicinage" and those who would have omitted any specific venue provision. See J. GOEBEL, *supra* note 7, at 431, 438-39, 449, 453-55; F. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES* 92-101 (1951).

13. See I. BRANT, *supra* note 12, at 152-53, 163; F. HELLER, *supra* note 12, at 20; 3 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1786 (1833); *United States v. Reid*, 53 U.S. (12 How.) 361 (1851). English criminal procedure in the eighteenth century was considered the most enlightened in the world, and was emulated not only by the leaders of the American Revolution, but by other revolutionary societies. 11 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 580-81 (1938).

14. See text at notes 22-24 *infra*.

15. See text at notes 37-38 *infra*.

16. See text at notes 73-76 *infra*.

1. *The Emergence of Jury Trial (1066-1450)*

Although little is known about trial by jury during the medieval period (1066-1450),¹⁷ the royal common law courts were apparently only one of several tribunals with jurisdiction over criminal cases (breaches of the peace),¹⁸ and the petty jury was only one of several methods by which such cases were tried. Depending on the circumstances, charges could be brought in the common law courts by both the King and private parties;¹⁹ if brought by the King, again depending on circumstances, the charges could be tried by physical ordeal or petty jury; if brought by private parties the charges could also be tried by physical combat or compurgation.²⁰

The predominant mode for trying criminal cases by the middle of the medieval period was the petty jury.²¹ The composition and

17. S. MILSOM, *HISTORICAL FOUNDATION OF THE COMMON LAW* 360 (1969). For a history of the jury during this period see J. THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 47-182 (1898).

18. It may be somewhat artificial to make a sharp distinction between "civil" and "criminal" cases during the medieval period. 2 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 197-99, 357-69, 453-54 (4th ed. 1936). Nonetheless, in so far as "criminal" cases were cases resulting in loss of life, limb, or liberty, initiated by the King or of direct interest to him, they could be tried not only in the common law courts but in a variety of local communal courts, 1 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 71-72, 76-81, 135-37 (6th ed. 1938), county and borough courts, *id.* at 142-48, feudal manorial courts, *id.* at 176-78, ecclesiastical courts, *id.* at 615-21, itinerant royal commissions, *id.* at 264-76, the King's Council, *id.* at 477-80, and Parliament. *Id.* at 377-91. See also J. BELLAMY, *THE LAW OF TREASON IN ENGLAND IN THE LATER MIDDLE AGES* 138-76 (1970).

19. J. BELLAMY, *CRIME AND PUBLIC ORDER IN ENGLAND IN THE LATER MIDDLE AGES* 121-31, 135 (1973); 1 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 244-54 (1883).

20. J. BELLAMY, *supra* note 19, at 130-44; 1 W. HOLDSWORTH, *supra* note 18, at 298-312. Compurgation, or "wager of law," was a trial by oath. Each party produced witnesses who supported his version of events by testifying to his trustworthiness. See note 21 *infra*. There is some dispute as to whether trial by compurgation was used in criminal cases. Compare 1 J. STEPHEN, *supra* note 19, at 244 n.2, with 2 W. HOLDSWORTH, *supra* note 18, at 108-10. The answer may be that compurgation was not used in cases to which the King was party but was used in criminal cases initiated by private parties. See J. BELLAMY, *supra* note 19, at 142-44. See also J. THAYER, *supra* note 17, at 26.

21. J. BELLAMY, *supra* note 19, at 142-44. See also 1 W. HOLDSWORTH, *supra* note 18, at 302-05. The other modes of trial did not provide for independent testimony concerning the facts. The defendant acted alone in trials by ordeal and combat, while his "compurgators" in trials by compurgation testified exclusively to his honesty, rather than to the events in question. J. BELLAMY, *supra*, at 131, 142-44; 1 W. HOLDSWORTH, *supra*, at 306-07, 309-11, 321-31; 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 607 (5th ed. 1942).

One reason, perhaps, for the predominance of trial by jury was that the King was taking an increasing role in the prosecution of criminal cases. 2 W. HOLDSWORTH, *supra* note 18, at 197-98, 256-58, 360. Trials by compurgation and combat were not used in cases to which the King was a party. See J. THAYER, *supra* note 17, at 26, 39-46. The only other form of trial was by ordeal, and that was abolished by 1215, *id.* at 37, leaving only trial by jury.

function of the medieval jury, however, were distinctly different from what eventually emerged in the modern period. Above all, criminal trials made no provision for independent witnesses;²² the primary witnesses were the jurors themselves, selected because of their knowledge of the events and persons involved.²³ They were summoned from the neighborhood where the crime occurred and placed under oath as a body of inquest to ascertain the facts. There were no rules of evidence to govern their deliberations.²⁴ In the event of conflict between what the jurors believed to be true and what others reported, the jury was responsible for coming to its own verdict.²⁵ Although the accused could be interrogated at trial,²⁶ he could not give evidence himself or call witnesses in his favor. It is said that he was not even permitted to make a statement, except to enter a plea of guilty or not guilty.²⁷

By the early fifteenth century, however, with increasing use, the jury trial had largely freed itself from the older trial procedures and had assumed its modern form.²⁸ Two significant and related changes were the growing practice of calling independent witnesses to testify

22. J. BELLAMY, *supra* note 19, at 147, 160. See 3 W. HOLDSWORTH, *supra* note 21, at 638; 9 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 177-78 (3d ed. 1944).

23. J. BELLAMY, *supra* note 19, at 147; 3 W. HOLDSWORTH, *supra* note 21, at 616; 1 J. STEPHEN, *supra* note 19, at 254-58. For a contemporary description of the fifteenth-century jury as a group of twelve witnesses, see the encomium by Chief Justice Fortescue (1395-1479), J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIE* 59-63 (S. Chrimes transl. 1947).

24. 3 W. HOLDSWORTH, *supra* note 21, at 616. Rules of evidence came only when witnesses had become separate from jurors; they were designed to regulate the interaction of witnesses and jury. 9 W. HOLDSWORTH, *supra* note 22, at 127-28; J. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE* 119, 123-24 (1974). During the earlier period, when jurors acted both as witnesses and as triers, their treatment of the facts in particular cases was regulated in several ways. They could be struck from the jury because of their ignorance of the facts, see 1 J. STEPHEN, *supra* note 19, at 260; because of their personal relationship to the parties, 9 W. HOLDSWORTH, *supra*, at 186; and because of their prior service on the charging jury. J. THAYER, *supra* note 17, at 83. In addition, they could be punished by "attaint" for returning a false verdict. *Id.* at 137-68. "Attaint" was used to punish jurors who (as witnesses) falsified the facts, much as perjury is used today to punish witnesses who falsify their testimony.

25. 1 W. HOLDSWORTH, *supra* note 18, at 336; J. THAYER, *supra* note 17, at 137-38. If the jury returned a verdict that was deemed false, they, not the witnesses, were subject to attaint. D. VEALL, *THE POPULAR MOVEMENT FOR LAW REFORM 1640-60*, at 21 (1970). Indeed, not until 1670 (Bushel's Case) were juries wholly immune from punishment for verdicts returned on the evidence. J. THAYER, *supra*, at 166-70. See note 82 *infra*.

26. J. BELLAMY, *supra* note 19, at 146-47.

27. J. BELLAMY, *supra* note 18, at 166. The House of Commons in 1399 petitioned Henry IV to allow anyone accused in Parliament or in any other court to be heard and to defend himself. "Henry IV found it politic not to accede to the request." J. BELLAMY, *supra* note 19, at 169.

28. 1 J. STEPHEN, *supra* note 19, at 265.

for the Crown and the transformation of the jury from a group of witnesses into a group of judges. Finding twelve jurors with personal knowledge of the facts had become increasingly difficult by the end of the medieval period; nonobservers were more frequently called to complete the requisite body of jurors. Perhaps that experience explains the establishment of separate juries, and the practice of calling persons acquainted with the facts as witnesses rather than jurors.²⁹ In any event, courts that had previously been hostile to the use of independent witnesses were beginning to welcome their testimony.³⁰ Jurors who had acted as both witnesses and triers of fact were beginning to act solely as the triers of evidence produced by others.³¹

2. *The Nature of an Inquisitional Process (1450-1600)*

The most distinctive feature of the emergent criminal trial in Tudor England (1485-1603) was the imbalance of advantage between the state and the accused. The prosecution had a marked advantage both in preparing its case and in presenting its case at trial.³² It could interrogate the accused—sometimes with torture—question and take

29. *Id.* at 260-61. See also J. THAYER, *supra* note 17, at 122-36.

30. 1 W. HOLDSWORTH, *supra* note 18, at 335-36. For a history of the modern use of witnesses see 9 W. HOLDSWORTH, *supra* note 22, at 177-85. The new role for witnesses is reflected in various statutes of the time (1500-1700). Statutes were passed to require two witnesses in some cases, and at least one witness in others, to support a criminal conviction. J. THAYER, *supra* note 17, at 179. A statute of 1555 required justices of the peace, after examining witnesses, to take recognizances from them and bind them over for trial, in order to ensure their presence at trial. 2 & 3 Phil. & M., c. 10, discussed in J. COCKBURN, *HISTORY OF ENGLISH ASSIZES 1558-1714*, at 102-03 (1972); J. LANGBEIN, *supra* note 24, at 15-17, 24-25, 35. Statutory incentives were even given to encourage witnesses to come forward with incriminating evidence. 6 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 406 (2d ed. 1937).

31. 6 W. HOLDSWORTH, *supra* note 30, at 304, 319, 335-36; J. LANGBEIN, *supra* note 24, at 118-19, 124. Sir John Fortescue (1395-1479) drew a sharp distinction between the French trial by "witnesses," which he condemned, and the English trial by "jury," which he praised. J. FORTESCUE, *supra* note 23, at 43-47, 59-73. Fortescue, however, was not criticizing the use of witnesses in criminal trials. Rather, he was criticizing the practice of trying cases by counting the number of witnesses on each side and applying rigid rules of credibility to their testimony, instead of leaving the ultimate decision to a jury of twelve men from the neighborhood. For a description of the medieval "trial by witnesses" in England, which was similar to trial by oath or compurgation, see J. THAYER, *supra* note 17, at 17-24.

32. 9 W. HOLDSWORTH, *supra* note 22, at 223-29; 1 J. STEPHEN, *supra* note 19, at 324-26. According to Sir James Stephen, the imbalance of advantage between the state and the accused continued well into the seventeenth century:

In . . . all the trials [between 1678 and 1688], the sentiment continually displays itself, that the prisoner is half . . . proved to be an enemy to the King, and that, in the struggle between the King and the suspected man, all advantages are to be secured to the King. . . . A criminal trial in those days was not unlike a race between the King and the prisoner, in which the King had a long start and the prisoner was heavily weighted.

Id. at 397.

statements from other witnesses, and bind witnesses over for trial.³³ At trial the prosecution could present its case through counsel, summon witnesses to testify, and place its witnesses under oath.³⁴

The defendant, on the other hand, had very few of the rights later protected by the American Bill of Rights. While he could be released before trial on bail, hear the charges against him, and receive a public trial by a jury drawn from the neighborhood, he had no guarantees against excessive bail, inordinate delay, self-incrimination, or cruel and unusual punishments.³⁵ He was particularly hampered in preparing his defense. He was not informed of the charges against him until the day of his trial; he was denied the assistance of counsel at all stages of the proceeding, which seriously handicapped the gathering of evidence by incarcerated defendants; he was prohibited (if incarcerated) from interviewing persons with knowledge of the events.³⁶ He was also hampered in presenting his defense. He had no right to confront the witnesses against him in person; he had no right to summon witnesses in his favor, or, indeed, to present witnesses who were willing to testify voluntarily.³⁷ He was permitted to make an unsworn statement in his defense, but it lacked weight because it was not made under oath.³⁸ In short, while changes were under way that would soon transform the criminal trial into a truly adversary proceeding, criminal trials in the sixteenth century were primarily one-sided inquests into the truth of the prosecution's charges.³⁹

33. J. LANGBEIN, *supra* note 24, at 23; 1 J. STEPHEN, *supra* note 19, at 325.

34. See *The King v. Thomas*, 80 Eng. Rep. 1022 (K.B. 1613). See also J. LANGBEIN, *supra* note 24, at 25.

35. The right to be free from excessive bail and from cruel and unusual punishments was guaranteed by the Bill of Rights of 1689. 1 W. & M. sess. 2, c. 2. The writ of habeas corpus to challenge pretrial detention and denials of a speedy trial was made available by the Habeas Corpus Act of 1679. 31 Car. 2, c. 2. The privilege of the accused to refuse to answer incriminating questions at trial was created by the common law courts during the period 1640-1699. 9 W. HOLDSWORTH, *supra* note 22, at 199-201.

36. 9 W. HOLDSWORTH, *supra* note 22, at 229, 232-33; 1 J. STEPHEN, *supra* note 19, at 350. It has been persuasively argued that the defendant did have the benefit of legal advice, or "counsel" as we presently understand it, during the medieval period. See Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1018-22 (1964).

37. 5 W. HOLDSWORTH, *supra* note 30, at 192-93, 195.

38. J. LANGBEIN, *supra* note 24, at 25; D. VEALL, *supra* note 25, at 20.

39. See J. COCKBURN, *supra* note 30, at 122; D. VEALL, *supra* note 25, at 20. At his trial for treason in 1603, for which he was eventually executed, Sir Walter Raleigh asked the court to confront him personally with the witness whose pretrial deposition was being used against him, arguing that "the Common Trial of England is by Jury and Witnesses," to which the Chief Justice replied "No, by Examination." *Trial of Sir Walter Raleigh*, 2 COMPLETE COLLECTION OF STATE TRIALS 1 (T. Howell ed. 1816) [hereinafter STATE TRIALS].

The major obstacle to presenting a defense was that the defendant was prohibited from calling witnesses, even if they were present in court and willing to testify. While the rule against defense witnesses was applied even in celebrated cases,⁴⁰ its rationale remains a mystery. The rule may have rested on the belief that it would be inappropriate for witnesses to give sworn testimony against the Crown, and useless for them to give unsworn testimony.⁴¹ It may have rested on the assumption that as long as the defendant could speak for himself he had no need for independent witnesses.⁴² Some argued that defense

The famous description of the sixteenth century trial as an "altercation" between prosecution and accused comes from the contemporary account by Sir Thomas Smith. 2 T. SMITH, *DE REPUBLICA ANGLORUM* 94-104 (L. Alston ed. 1906). See also 1 J. STEPHEN, *supra* note 19, at 325-26, 332, 336.

40. See, e.g., *Trial of Nicholas Throckmorton*, 1 STATE TRIALS, *supra* note 39, at 869 (Guildhall 1554). Sir Throckmorton was indicted for compassing the death of Queen Mary by aiding in the rebellion of Sir Thomas Wyatt. During his trial he tried to call a witness named Fitzwilliams to testify to his innocence. Fitzwilliams was present in the courtroom and ready to testify. There was no question about the relevance or materiality of the testimony. Yet he was turned away and told to "go your ways, Fitzwilliams, the court hath nothing to do with you." *Id.* at 885. Throckmorton could not understand why the court was willing to hear false testimony against him but unwilling to hear true words in his favor. *Id.* at 884-85 ("Why should he [Fitzwilliams] not be suffered to tell [the] truth? And why be ye not so well contented to hear truth for me, as untruth against me?"). The prosecution of Throckmorton was so vigorous that the jury itself was imprisoned and fined for eventually acquitting him. 1 J. STEPHEN, *supra* note 19, at 329. Cf. *Trial of John Udall*, 1 STATE TRIALS, *supra*, at 1271 (Croydon assizes 1590). Udall was tried for the felony of authorizing a book that disparaged the Queen. The evidence against him consisted of a written statement by Nicholas Thompkins that Udall had admitted being the author. Udall produced witnesses who were ready to impeach Thompkins' statement, but they were barred from giving testimony against the Queen. *Id.* at 1281. At a later stage of the proceedings Udall protested that, if permitted, he could have established his innocence: "I . . . offered to produce sufficient Proof for it; but your lordships answered, that no Witnesses might be heard in my behalf, seeing it was against the queen: which seemeth strange to me; for methinks it should be for the queen to hear all things on both sides, especially when the life of any of her subjects is in question." *Id.* at 1304. It is said that on appointing a new chief justice, Queen Mary (1553-1558) specifically instructed him "that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favour of the adversary, her majesty being party; her highness's pleasure was, that whatsoever could be brought in favour of the subject should be admitted to be heard." 4 W. BLACKSTONE, COMMENTARIES *352-53. Her instructions were evidently ignored. See *Trial of Sir Nicholas Throckmorton*, 1 STATE TRIALS, *supra*, at 869, 884-85, 887-88 (Guildhall 1554). Although the great treason trials may have been atypical of procedure in less notorious cases, this article is concerned with English legal history as understood by the framers of the American Bill of Rights, who relied for their information almost entirely on the *State Trials* reports. See note 92 *infra*.

41. Witnesses were generally assumed incompetent to give lawful testimony unless they were sworn to tell the truth. Witnesses against the Crown were not sworn until much later. See notes 52-73 *infra*. Cf. text at notes 45-46 *infra*.

42. See *Trial of Sir Henry Vane*, 6 STATE TRIALS, *supra* note 39, at 119, 152 (K.B. 1662); *Trial of Sir Nicholas Throckmorton*, 1 *id.* at 869, 888 (Guildhall 1554).

witnesses were superfluous in a system that placed the burden of proof on the prosecution: There was no need for defense testimony until the prosecution sustained its burden of proof, and at that point contrary testimony was immaterial.⁴³ One commentator suggests that the rule had no purpose other than to give the government an added advantage in prosecuting its enemies at a time when its powers were relatively weak.⁴⁴ More likely, the rule arose at a time when the jurors themselves were considered the sole "witnesses" to the facts, and simply failed to adjust to reflect the new role of the jury as a trier of evidence presented by others.

Whatever its rationale, the rule began to change. Parliament enacted statutes in 1589 and 1606 that gave the accused the right, in limited cases, to present witnesses in his favor.⁴⁵ By the middle of the seventeenth century—without discussion—witnesses for the accused were routinely permitted to give unsworn testimony in his favor.⁴⁶

The accused, however, still lacked two advantages possessed by the Crown: the right to compel his witnesses to appear and testify and the right to have his witnesses sworn. The common law courts themselves originally lacked the subpoena power to compel attendance. They relied instead on the power to arrest witnesses and bind them over for trial and on the discretion of the Chancellor to issue subpoenas on the parties' behalf.⁴⁷ In 1562 a statute was passed requiring witnesses to appear and testify after being served with "process" by "courts of record."⁴⁸ The common law courts, which

43. Cf. 1 J. STEPHEN, *supra* note 19, at 351-53.

44. *Id.* at 354-55.

45. The statute of 1589 gave persons accused of embezzling the Queen's "armour, ordinance . . . or any victuals" the right "to make any lawful proof that he can, by lawful witness or otherwise, for his discharge and defense in that behalf. . . ." 31 Eliz. c. 4, § 2. The statute of 1606-1607 permitted Englishmen who committed offenses in Scotland to be tried in England, and to be given the right to call witnesses in their favor. 4 Jac. 1, c. 1.

46. See *Trial of Thomas White, alias Thomas Whitebread*, 7 STATE TRIALS, *supra* note 39, at 311, 359-60 (Old Bailey 1679); *Trial of Colonel James Turner & Others*, 6 *id.* at 565, 605, 613 (Old Bailey 1664); *Trial of Henry Vane*, *id.* at 119, 152 (K.B. 1662); *Trial of William Hulet*, 5 *id.* at 1185, 1191-92 (Old Bailey 1660); *Trial of Connor Lord Macguire*, 4 *id.* at 653, 666-67 (K.B. 1645).

47. J. KENYON, *THE STUART CONSTITUTION 1603-1688*, at 90 (1966).

48. Provided also, and be it further enacted by authority aforesaid, That if any person or persons, upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and having tendered unto him or them, according to his or their countenance or calling, such reasonable sum of money for his or their costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful

had no compulsory "process" of their own, implemented the act by adopting the process of "subpoena" used in chancery.⁴⁹ They did not, however, use their new subpoena power to compel the appearance of the defendant's witnesses, despite the resulting disparity between defendants with volunteer witnesses and those with recalcitrant witnesses.⁵⁰ As a result, innocent defendants went to their deaths because they were denied coercive means for securing the presence of witnesses in their favor.⁵¹

The same prosecutorial advantage existed with respect to the use of sworn testimony. The courts routinely placed prosecution witnesses under oath; except in misdemeanor cases, however, courts refused to swear defense witnesses.⁵² Indeed, a defense witness in one case was restricted to giving unsworn testimony until he happened to say something that favored the Crown, whereupon at the prosecutor's request he was immediately placed under oath.⁵³ The great advantage of testimony under oath—clearly understood at the

and reasonable let or impediment to the contrary; that then the party making default, to lose and forfeit for every such offense ten pounds, and to yield such further recompense to the party grieved, as by discretion of the judge of the court, . . . by reason of the non-appearance of the said witness or witnesses. . . .

5 Eliz., c. 9 (1562).

49. 9 W. HOLDSWORTH, *supra* note 22, at 131, 185.

50. No distinction was drawn between compelling a witness to attend trial and compelling him to testify, because (with the possible exception of the lawyer/client privilege) testimonial privileges did not come into existence until much later. *Id.* at 201-02. Persons with knowledge of the facts, if present, could be ordered to testify. Accordingly, witnesses were simply ordered to testify at a certain time and place. See note 48 *supra*.

51. See, e.g., *Trial of William Ireland, Thomas Pickering & John Grove*, 7 STATE TRIALS, *supra* note 39, at 79, 120-21 (Old Bailey 1678); 1 J. STEPHEN, *supra* note 19, at 388 n.3. Ireland, who was tried for the "Popish Plot" to assassinate Charles II, contended at trial that he knew witnesses who would establish his alibi, but that he had been unable to contact them from prison. When they did not appear voluntarily, and the court did not subpoena them, Ireland was found guilty and executed, although it was later discovered that he had been telling the truth.

James Turner, who was eventually executed for burglary, argued at trial that he could exculpate himself if he had the means for compelling the attendance of certain witnesses who were reluctant to appear on his behalf voluntarily, but who would testify if officially compelled. The court denied his request on the ground that it had no power to subpoena witnesses to testify against the Crown. See *Trial of Colonel James Turner & Others*, 6 STATE TRIALS, *supra*, at 565, 570 (Old Bailey 1664). See also *Trial of Edward Fitzharris*, 8 *id.* at 223, 373 (House of Lords 1681); *Trial of Henry Vane*, 6 *id.* at 119, 152 (K.B. 1662).

52. See, e.g., *Trial of Thomas White, alias Thomas Whitebread*, 7 STATE TRIALS, *supra* note 39, at 311, 359 (Old Bailey 1679); *Trial of William Hulet*, 5 *id.* at 1185, 1191-92 (Old Bailey 1660). For reasons that are not apparent, witnesses for the defense were presumably sworn in misdemeanor cases. See 2 M. HALE, PLEAS OF THE CROWN 283 (1778); *Trial of Thomas Rosewell*, 10 STATE TRIALS, *supra*, at 147, 267 (K.B. 1684).

53. *Trial of Hopetill Tyndal*, 79 Eng. Rep. 855, 856 (K.B. 1633).

time⁵⁴—was its credibility. Sworn testimony was given under an oath to God and carried penalties of perjury, while unsworn testimony was gratuitous. By permitting only prosecution witnesses to testify under oath, and by instructing the jury to attach greater weight to sworn testimony, the courts were tipping the balance against the accused.⁵⁵

The rationale for the rule against sworn testimony is also disputed.⁵⁶ Its proponents believed that placing two contradictory witnesses under oath would necessarily produce perjury by one of them;⁵⁷ that the defendant had no need for sworn witnesses, because the prosecution had a duty to present a case so compelling that no witnesses could refute it;⁵⁸ and that the defendant could rely on the mercy of the court to safeguard his interests.⁵⁹ Critics of the rule—including Coke, Hale, and Jeffreys (all Chief Justices)—considered the arguments without merit and the rule unwise.⁶⁰ Whatever its

54. Consider the desperate but futile effort by Thomas White (who eventually was convicted and executed) to persuade the court to permit his witnesses to be sworn. *Trial of Thomas White, alias Thomas Whitebread*, 7 STATE TRIALS, *supra* note 39, at 359-60 (Old Bailey 1679).

55. J. COCKBURN, *supra* note 30, at 121. "[A] practice was gradually introduced of examining witnesses for the prisoner, but not upon oath: the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown." 4 W. BLACKSTONE, *supra* note 40, at *353 (footnote omitted). See also 1 J. STEPHEN, *supra* note 19, at 398.

56. Wigmore suggests that perhaps trial by sworn witnesses was considered antagonistic to the emerging trial by "jury," where it is the jurors, rather than the "witnesses" or "oath-helpers," who take the oath: "[U]nless the jurors think that they need it, or the court calls for it, any other man's oath is merely a meddlesome intrusion upon the carefully selected body of triers." 2 J. WIGMORE, EVIDENCE § 575, at 677 (3d ed. 1940). However, that would not explain the practice of permitting prosecution witnesses but not defense witnesses to be sworn. See text at note 34 *supra*.

57. 1 J. STEPHEN, *supra* note 19, at 351-53, quoting 2 D. HUMES, COMMENTARIES ON LAW OF SCOTLAND 70 (1800).

58. At the trial of Sir Thomas White, Chief Justice Scroggs refused to administer an oath to witnesses for the defense by quoting Edward Coke for the proposition that "evidence should be so plain that nothing could be answered to it; and therefore no evidence should be sworn against the king." *Trial of Thomas White, alias Thomas Whitebread*, 7 STATE TRIALS, *supra* note 39, at 311, 359-60 (Old Bailey 1679). Actually, however, Coke made that argument ("*quod in criminalibus, probationes debent esse luce clariores*") to justify the denial of sworn testimony. E. COKE, THIRD INSTITUTE 137, 210 (6th ed. 1680).

59. Coke in 1613 defended the English practice of denying sworn testimony to the accused against criticism from Jesuit jurists by arguing that "the law of England, is a law of mercy; . . . and it is far better for a prisoner to have a Judges [*sic*] opinion for him, than many counsellors at the Bar; the Judges to have a special care . . . to see . . . that justice be done to the party." *The King v. Thomas*, 80 Eng. Rep. 1022 (K.B. 1613). But see note 60 *infra*.

60. Coke, despite his earlier defense of the rule, see note 59 *supra*, wrote later that he could not find "*scintilla juris*" to support the rule, and that permitting sworn testimony on each side would lead to a better discovery of the truth ("truth cannot appear without witness"). E. COKE, *supra* note 58, at 79. Hale could find no

origins, the rule was probably retained simply to give one more advantage to the prosecution.⁶¹

3. *The Development of an Adversary Process (1600-1700)*

The defendant's right to obtain subpoenas for his witnesses, and to introduce their testimony under oath, finally emerged in the seventeenth century. The first significant development was a statute to settle hostilities between England and Scotland—enacted against the opposition of both the Crown and the House of Lords—that provided that Englishmen committing crimes in Scotland be tried in the northern counties of England, and permitted the defendants to subpoena witnesses and place them under oath.⁶² By 1702 that limited exception would finally be the rule in England in all criminal cases.⁶³

It was no accident that the movement to strengthen the proce-

explanation for the rule ("the reason thereof is not manifest"), and considered it ironic that sworn testimony could be given for the accused if it happened to come by accident from the mouth of a government witness, but not if it came directly from a defense witness. 2 M. HALE, *HISTORY OF THE PLEAS OF THE CROWN* 283 (1800). Jeffreys thought it a "hard case" that misdemeanor defendants, but not felony defendants, should have the benefit of sworn witnesses. "But yet you know as well as I, that the practice of the law is so; and the practice is the law." *Trial of Thomas Rosewell*, 10 *STATE TRIALS*, *supra* note 39, at 147, 267 (K.B. 1684).

61. See 1 J. STEPHEN, *supra* note 19, at 354; 3 J. STORY, *supra* note 13, at 664. Cf. text at note 44 *supra*.

62. Be it therefore enacted . . . that all offense . . . committed . . . by any of His Majesty's natural born subjects of this Realm of England . . . within the Realm of Scotland . . . shall be from henceforth inquired thereof . . . before His Majesty's Justice. . . . At which trials, for the better discovery of the truth, and for the better information of the conscience of the jury and justice, there shall be allowed unto the party so arraigned the benefit of such witnesses only to be examined upon oath that can be produced for his better clearing and justification. . . .

4 Jac. I., c. 1, § b (1606-1607). The statute, however, gave the jury the power and election . . . to receive and admit only such sufficient good and lawful witnesses upon their oaths, either for or against the party arraigned, as shall not appear to them [the jurors] . . . to be unfit and unworthy to be witnesses in that case, either in regard to their hatred and malice, or their favour and affection, either to the party prosecuting or to the party arraigned, or of their former evil life and conversation.

4 Jac. I., c. 1, § 16 (1606-1607). It has been argued that the earlier statute, 31 Eliz., c. 4, § 2 (1589), *see* note 45 *supra*, which permitted the accused in limited cases "to make any lawful proof that he can, by lawful witnesses," was also intended to include sworn testimony. See 2 M. HALE, *supra* note 52, at 283.

The provision for defense witnesses was opposed by both the Crown and the House of Lords because it conflicted with the prevailing rules in England and Scotland. See 1 H.C. JOUR. 378-79, 382-83, 388 (1607).

63. See notes 74-75 *infra* and accompanying text. By 1702 the only remaining major imbalance between the prosecution and the accused with respect to witnesses was the refusal to allow the defendant himself to testify under oath, a disability that was finally abolished in the nineteenth century. Criminal Evidence Act, 61 & 62 Vict., c. 36 (1898). See J. WIGMORE, *supra* note 56, § 579.

dural rights of the accused culminated when it did. The seventeenth century had witnessed a succession of celebrated treason trials, as one faction after another seized power: first the Royalists under Charles I, then the Puritans under Cromwell, then the restored Stuarts, and finally the Protestant revolutionaries of 1688. By the end of the century Englishmen of every class and belief had experienced injustice in the criminal courts. They were thus eager to reform a system that permitted the state to bring its entire weight to bear on the man in the defendant's dock while denying him a proper opportunity to defend.⁶⁴

The major reform movement came during the Puritan rebellion and commonwealth (1640-60), when memories of Star Chamber procedure were still fresh.⁶⁵ The Levellers and Diggers published tracts calling for, *inter alia*, an end to the rules that denied the accused "the benefit of witnesses."⁶⁶ A reform commission appointed by Parliament and led by Matthew Hale recommended that defense witnesses be permitted to testify under oath in all criminal cases.⁶⁷ Parliament passed at least one act that permitted the accused to subpoena witnesses in his favor and place them under oath.⁶⁸ The criminal courts in some cases gave the accused the benefit of compulsory process.⁶⁹

64. See I. BRANT, *supra* note 12, at 26; I J. STEPHEN, *supra* note 19, at 369, 415-16, 419.

65. 9 W. HOLDSWORTH, *supra* note 22, at 230-31. Cf. I J. STEPHEN, *supra* note 19, at 337-38, 341. The Star Chamber gained a bad reputation because of the "astounding[ly]" severe sentences it imposed, *id.* at 338, and because of its "inquisitorial" methods, namely the secret interrogation of the accused before trial, the use of torture, the presumption of guilt, the use of written depositions against the accused, and the compulsion to answer incriminating questions under *ex officio* oath. In some ways, however, its procedure was even fairer to the accused than common law procedure, because it gave the defendant notice of the charges against him, permitted him to testify in his favor under oath, and granted him the assistance of counsel. *Id.* at 338, 341; D. VEALL, *supra* note 25, at 22-24.

66. See *Foundations of Freedom or An Agreement of the People (1648)*, in LEVELLER MANIFESTOES OF THE PURITAN REVOLUTION 294, 302 (D. Wolfe ed. 1944); *An Agreement of the Free People of England (1649)*, in THE LEVELLER TRACTS 1647-1653, at 318, 326 (W. Haller & G. Davies ed. 1964). See also D. VEALL, *supra* note 25, at 154.

67. The recommendations of the Hale Commission are reprinted in 6 L. SOMERS, A COLLECTION OF SCARCE AND VALUABLE TRACTS 234-35 (W. Scott ed. 1811).

68. Provided also, That it shall be lawful for any person or persons who shall be indicted for any of the offences aforesaid, to produce at their respective Tryals any witness or witnesses, for the clearing of themselves from the said offences whereof they shall be so indicted: And the Justices before whom such Tryal shall be so had, shall have power, and are hereby Authorized to Examine the said Witnesses upon Oath.
An Act for suppressing the detestable sins of Incest, Adultery and Fornication (10 May 1650), in 2 ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 387, 389 (C. Firth & R. Rait ed. 1911). See also D. VEALL, *supra* note 25, at 160-62.

69. See, e.g., *Trial of Nathanael Reading*, 7 STATE TRIALS, *supra* note 39, at 259, 278 (K.B. 1679); *Trials of John Twyn*, 6 *id.* at 514, 516 (Old Bailey 1663) ("If you

The return of the Stuarts and the celebrated, often virulent treason trials accompanying the Restoration (1660-88) briefly interrupted the reform.⁷⁰ But perhaps because of those new abuses, reform reasserted itself in bolder form in the Revolution that produced the Bill of Rights of 1689 and other procedural guarantees since incorporated in the American Bill of Rights.⁷¹ The achievement was perhaps best reflected in a celebrated address by John Hawles, Solicitor-General to William III, in 1695, in which he likened the abuses of the previous era in English procedure to the Inquisition, and specifically condemned the practice of denying the accused equal access with the prosecution to witnesses and counsel.⁷² In the same year Parliament passed a statute giving defendants in treason cases the same subpoena power for their witnesses "as is usually granted to compel witnesses to appear against them," and also the right to place

have any witnesses on your part, let's know their names, we will take care they shall come in."); *Trial of Major Richard Faulconer*, 5 *id.* at 323, 357 (Westminster Hall 1653).

70. For a detailed description of the Restoration trials see 1 J. STEPHEN, *supra* note 19, at 369-416.

71. See 9 W. HOLDSWORTH, *supra* note 22, at 230-31, 234-35; 1 J. STEPHEN, *supra* note 19, at 415-16. By the close of the seventeenth century criminal defendants had largely obtained the rights to be free from excessive bail, to have review of pretrial detention by habeas corpus, to be informed of the charges against them, to be assisted by counsel, to refuse to answer incriminating questions, to be confronted with the adverse witnesses, and to be free from cruel and unusual punishments. The right to confront and cross-examine, so flagrantly denied Sir Walter Raleigh at his trial in 1603, *see* note 39 *supra*, began to emerge by 1650 and triumphed by the end of the century. D. VEALL, *supra* note 25, at 160; 9 W. HOLDSWORTH, *supra* note 22, at 228-29. The right to counsel came more sporadically. By the middle of the seventeenth century the defendant was permitted assistance of counsel in misdemeanor cases and the advice of counsel on legal issues in more serious cases. By the end of the century he enjoyed the full right of counsel in treason cases and the assistance of counsel in felony cases on all matters except the actual addressing of the jury. He was finally afforded the full right of counsel in felony cases in 1836. J. COCKBURN, *supra* note 30, at 121-22; 9 W. HOLDSWORTH, *supra* note 22, at 235; J. KENYON, *supra* note 47, at 426.

72. The truth is, when I consider the practice of late times, and the manner of usage of the prisoners, it is so very much like, or rather worse than the practice of the inquisition, as I have read it . . . I will therefore recount some undeniable circumstances of the late practice . . . [T]here is a proclamation to call in all persons to swear against him [the accused], none is permitted to swear for him; all the impertinent evidence that can be given is permitted against him, none for him; as many counsel as can be hired are allowed to be against him, none for him. Let any person consider truly these circumstances, and it is a wonder how any person escapes: it is downright tying a man's hands behind him, and baiting him to death, as in truth was practiced in all these cases.

. . . . There is an unreasonable disadvantage put on the prisoner, that a witness produced on his part, of equal credit with the witness against him, shall not have equal credit given him, because he is not on his oath: whereas he is ready to deliver the same things on his oath, if the court would administer it to him

Remarks on Colledge's Trial, 8 STATE TRIALS, *supra* note 39, at 723, 733-34, 736.

their witnesses under oath.⁷³ In 1702 Parliament extended the act by permitting defense witnesses to be sworn in all felony cases.⁷⁴ Although the felony statute made no similar mention of the subpoena power, the courts commonly construed it to include compulsory process.⁷⁵

Thus, by the time Blackstone wrote his *Commentaries on the Laws of England* shortly before the American Revolution, he was able to state as a matter of principle that "in all cases of treason and felony, all witnesses *for* the prisoner should be examined upon oath, in like manner as the witnesses *against* him,"⁷⁶ and further "that he shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him."⁷⁷ It was this cumulative English experience that crossed the ocean to the American colonies.

B. *The History of Compulsory Process in America*

The right of the accused to present his defense developed in the American colonies much as it had in England. As part of the common

73. [E]very such person so accused [of treason] . . . shall be received and admitted to make his and their full defence, by counsel learned in the law, and to make any proof that he or they can produce by lawful witness or witnesses, who shall then be upon oath, for his or their just defence in that behalf

. . . . [A]ll persons so accused [of treason] . . . shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them at any such trial or trials, as is usually granted to compel witnesses to appear against them.

7 & 8 Will. 3, c. 3, §§ 1, 7 (1695).

74. [E]very person . . . who shall be produced or appear as a witness or witnesses on behalf of the prisoner, upon any trial for treason or felony, before he or she be admitted to depose, or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth, in such manner, as the witnesses for the Queen are by law obliged to do

1 Anne 2, c. 9, § 3 (1701). Cf. text at note 46 *supra* (unsworn testimony).

75. As to . . . Whether a Defendant in criminal Cases have the Right to Process to bring in his Witnesses: I take it that in Prosecutions for Misdemeanors the Defendant may take out *Subpoena's* [*sic*] of Course, but that in Capital cases he hath no right by the Common law to any process against his witnesses without a special order of the court. But [after discussing 7 & 8 Will. 3, c. 3, § 7 (1695)] it seems that since the Statute of *1 Annae* 9 . . . which ordains, That the witnesses for the prisoner shall be sworn, process may be taken out against them of course in any case whatsoever.

2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 30, at 435 (4th ed. 1762) (footnotes omitted). Cf. 2 M. BACON, A NEW ABRIDGMENT OF THE LAW 296 (1736). Parliament implicitly accepted this construction of the 1702 statute; it did not act again in the area until 1867, when it extended the subpoena power to indigents who could not afford to pay witness fees. In doing so it implicitly recognized that except for indigence there was no barrier to the subpoenaing of defense witnesses in criminal cases. The Criminal Law Amendment Act, 30 & 31 Vict., c. 35, § 3 (1867), *repealed by* The Criminal Law Amendment Act, 15 & 16 Geo. 5, c. 86, § 49(4)(5) (1925).

76. 4 W. BLACKSTONE, *supra* note 40, at *354 (emphasis original).

77. *Id.* at *345 (emphasis original).

law brought from England by the colonists, the right was deemed so essential that most of the new states included it among the liberties protected by their constitutions. When the framers failed to include it in the federal Constitution, several ratifying states insisted that a bill of rights be adopted to include it in some form. James Madison's original formulation of the compulsory process clause was promptly adopted without change. Within a few years, in the trial of Aaron Burr, John Marshall gave it the most sweeping construction it would receive for the next 160 years.

1. *The Colonial Period*

The principles that eventually merged into the compulsory process clause had taken root in America long before independence. The colonists, after all, were British citizens first and Americans second. The royal charters that authorized the original settlements in America guaranteed the colonists all of the rights and liberties of Englishmen.⁷⁸ Laws enacted by Parliament for Great Britain were to have the same effect in the colonies. The common law, while permitting some local variation and adaptation, was as much the law of America as that of England.⁷⁹ The unfairness of criminal procedure under the Stuarts was experienced on both sides of the Atlantic, as was the countervailing movement for reform.⁸⁰

The experience of the Pennsylvania colony and its founder is illustrative. While still in England, William Penn experienced something of the administration of criminal justice under Charles II at his own celebrated trial. He was arrested in 1670 and tried at the Old Bailey for delivering a sermon on London's streets to an unlawful assembly of Quakers. Trying to defend himself against the charges without the assistance of counsel, he was interrupted by the court

78. The 1606 Virginia Charter granted by James I, for example, declared that "all . . . Persons . . . which shall dwell and inhabit within . . . any of the said several Colonies . . . and every of their children . . . shall have and enjoy all Liberties, Franchises, and Immunities . . . as if they had been abiding and born, within this our Realm of England . . ." 1 B. SCHWARTZ, *supra* note 12, at 59-60. The same guarantee can be found in various forms in the charters of New England (1620), the Massachusetts Bay (1629), Maryland (1632), Connecticut (1662), Rhode Island (1663), Carolina (1663), and Georgia (1732). *Id.* at 53.

79. See generally Chafee, *Colonial Courts and the Common Law*, in *ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW* 53 (D. Flaherty ed. 1968); Goebel, *King's Law and Local Custom in Seventeenth Century New England*, 31 COLUM. L. REV. 416 (1931); Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 N.Y.U. L. REV. 450, 468-69 (1967).

80. See I. BRANT, *supra* note 12, at 17-18, 163; R. RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791*, at 3, 8-10 (1955); 1 B. SCHWARTZ, *supra* note 12, at 3 ("All too few people in this country realize the extent to which our modern liberties are based upon the crucial battles waged against seventeenth-century Stuart tyranny.").

and forcibly removed to a walled-off corner of the courtroom where he remained while the trial proceeded in his absence.⁸¹ Although he was eventually acquitted by a jury that ignored the judge's instruction to convict,⁸² Penn remembered his experiences, and later set about to organize the laws of Pennsylvania to prevent such abuses.

The royal charter Penn received in 1681 for his proprietary colony authorized him to issue governing laws, provided they "be consonant to reason, and not repugnant or contrary, but (as near as conveniently may be) agreeable to the Laws, Statutes and Rights of this our Kingdom of England."⁸³ He promulgated two of the most influential organic acts in American history—the *Frame of Government* in 1682 and its successor, the *Charter of Liberties*, in 1701. Both are particularly important for present purposes, because they included procedures aimed at protecting the accused from the kind of abuse Penn himself had suffered. They guaranteed the defendant the right to be informed of the charges, to be released on bail, to be tried in public, to be present at trial, to plead his cause, to be assisted by counsel, to be tried by a jury of twelve, and to be free from unreasonable fines.⁸⁴

Penn's two charters also made specific provision for the right of the accused to put on a defense. Indeed, in that respect Penn not only kept pace with English developments, but anticipated them. In 1677, as an adviser to the proprietary Quakers of West New Jersey, and later in his own *Frame of Government*, he provided for sworn testimony by defense witnesses in all cases, something that did not come in England until 1702.⁸⁵ Similarly, the *Charter of Liberties*

81. *Trial of William Penn & William Mead*, 6 STATE TRIALS, *supra* note 39, at 959-60 (Old Bailey 1670). See also *Illinois v. Allen*, 397 U.S. 337, 351, 355 n.3 (1970); W. DIXON, *WILLIAM PENN: AN HISTORICAL BIOGRAPHY* 74-98 (1851).

82. The case is more important for what subsequently happened to the jury than for what happened to Penn, for it led to a landmark decision on the scope of habeas corpus and the right to a jury trial. When the jury refused to return a guilty verdict as directed, the court ordered the jurors fined and imprisoned. One of the jurors, Edward Bushell, sought release in the Kings Bench on a writ of habeas corpus. The court, through Chief Justice Vaughn, released Bushell, on the ground that the trial court had no power to direct the jury to return a verdict against the defendant, and that the jury could not be punished for reaching a verdict with which the court disagreed. *Case of the Imprisonment of Edward Bushell*, 6 STATE TRIALS, *supra* note 39, at 999 (K.B. 1670).

83. Charter of King Charles II of England and William Penn's Frames of Government for Pennsylvania, in B. FRANKLIN, *A COLLECTION OF CHARTERS AND OTHER PUBLIC ACTS RELATING TO THE PROVINCE OF PENNSYLVANIA* 3 (1740).

84. 1 B. SCHWARTZ, *supra* note 12, at 132, 140-42, 173. So heralded was the Charter that the bell now referred to as the "Liberty Bell" was originally cast for the fiftieth anniversary celebration of its adoption. *Id.* at 170.

85. Concessions and Agreements of West New Jersey, ch. XX (1677), in *id.* at 128-29; *Frame of Government*, "Laws Agreed upon in England," art. XXVI (1682), in *id.* at 142. There is some confusion about the date of enactment of the English

extended to all criminal cases a principle that in England applied only in treason cases, namely, that "all criminals shall have the same Privileges of Witnesses and Counsel as their prosecutors."⁸⁶ The Pennsylvania assembly, in turn, made explicit in 1718 what was still implicit in England—that the defendant in felony cases is entitled to "process" to compel the attendance of his witnesses at trial.⁸⁷

Pennsylvania was not unique. Although colonial records for the seventeenth century are not as detailed as one would wish,⁸⁸ they indicate that criminal proceedings in America were similar to contemporary proceedings in England and followed a corresponding development. Thus, while it appears that the defendant in colonial New York had no right before 1690 to place his witnesses under oath except in misdemeanor cases, by 1700 he was permitted to subpoena and swear his witnesses in all criminal cases.⁸⁹ Similarly, by 1750 the defendant had the right to subpoena witnesses in his favor, call them to the stand, and place them under oath, in Maryland, Massachusetts, Pennsylvania, and Virginia.⁹⁰

2. *The Revolutionary Period*

The authors of the early state constitutions may not have experienced abuses under the Tudors and Stuarts, but they were familiar

statute, 1 Anne 2, c. 9, § 3, which extended to all felony defendants the right to present sworn testimony. The Statutes of the Realm record the date as 1702, 8 Statutes of the Realm 168-69, while the Statutes at Large record it as 1701. 10 Statutes at Large 488. In either event, its effective date was clearly 1702.

86. Pennsylvania Charter of Privileges art. V (1701), in 1 B. SCHWARTZ, *supra* note 12, at 173 (presumably including the "privilege" of the subpoena power). For the English treason statute of 1695 see note 73 *supra*.

87. And that upon all trials of the said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners, and [defendants] shall have process to compel witnesses to appear for them upon any of the said trials, But before such witnesses shall be admitted to . . . give any manner of evidence, they shall first take an oath or affirmation, *To say the truth, the whole truth, and nothing but the truth . . .*"
Act of May 31, 1718, 1 Laws of Pennsylvania, ch. 236, § 4 (Bioren ed. 1810). The subpoena power, which had been granted by statute to defendants in treason cases in England (1695), see text at note 73 *supra*, was thereafter granted by the courts to all defendants. See note 75 *supra*.

88. For a bibliography of primary sources for the period see Flaherty, *An Introduction to Early American Legal History*, in ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 3, 20-32 (D. Flaherty ed. 1969).

89. See J. GOEBEL & T. NAUGHTON, *supra* note 8, at 476-84, 562, 572, 627-28, 633.

90. *Maryland*: COURT RECORDS, *supra* note 8, at 1; *Massachusetts*: COLONIAL JUSTICE, *supra* note 8, at 146, 149; *Pennsylvania*: Act of May 31, 1718, 1 Laws of Pennsylvania, ch. 136, § 4 (Bioren ed. 1810); *Virginia*: H. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 99 (1965); A. SCOTT, *supra* note 8, at 50-130. Thomas Jefferson, in his monumental draft penal code for Virginia, provided that defendants be given subpoena power for their witnesses and the right to question them under oath. Bill No. 103, in 2 THE PAPERS OF THOMAS JEFFERSON 612, 615 (J. Boyd ed. 1950). His draft was adopted by Virginia without change in 1785. *Id.* at 616.

with the histories of those who had. The great treason trials of Throckmorton and Raleigh, the Star Chamber proceedings against the Puritans, the abusive persecution of the "Popish Plotters," and the proceedings against William Penn, were well known to American lawyers and nonlawyers alike.⁹¹ Published histories and inexpensive pamphlets conveyed the English experience to this continent. The most celebrated trials were contained in a ten volume, 1765 edition of Salmon's *State Trials*, which was owned by many individuals and libraries in America, including the City Library of Philadelphia, which was used by the framers in drafting the Constitution.⁹²

The new states expressed the importance of allowing the defendant to present witnesses both in their own bills of rights and in their later pressure for a federal bill of rights.⁹³ Each of the original thirteen colonies and Vermont (admitted as a state in 1791) declared its independence from England and set up a separate government between 1776 and 1783. All but Rhode Island specifically provided for civil liberties, nine in separate bills of rights and four—Georgia, New Jersey, New York, and South Carolina—directly in the body of their constitutions. Nine states—all but Connecticut, Georgia, New York, and South Carolina—specifically provided for the defendant's right to produce witnesses in his favor.⁹⁴

Particulars varied from state to state, but the provisions reflected a common principle. Three states emphasized the right to present evidence, guaranteeing the accused the right "to call for evidence in his favour."⁹⁵ Two emphasized the subpoena power, giving the defen-

91. I. BRANT, *supra* note 12, at 22, 32-35, 56, 104-05, 124, 152, 163.

92. *Id.* at 34, 152. It is said that *State Trials* (see note 39 *supra*) presents a distorted view of English procedure in routine cases, because the *causes célèbres* it reports were atypical. See J. COCKBURN, *supra* note 30, at 124-25. It is also persuasively argued that the *State Trials* reports, which are presented as eye-witness accounts, may be embellished and even fictional accounts written long after the fact. See G. CLARK, *THE CRITICAL HISTORIAN* 89-115 (1967). For present purposes, however, it is irrelevant whether the reports are misleading or inaccurate. The important point is that they were accepted without question by the American colonists, and formed the basis of their views of criminal procedure.

93. The state representatives to the First Continental Congress drafted a bill of rights that included a declaration "[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." Declaration and Resolves of The First Continental Congress, 1774, art. 5, in 1 B. SCHWARTZ, *supra* note 12, at 217 (emphasis added). It can be argued that trial according to the common law meant a trial in which the defendant enjoyed the privilege of witnesses. See F. HELLER, *supra* note 12, at 21. The American Declaration of Independence complained that George III had "depriv[ed] us, in many cases, of the benefits of trial by jury." See 1 B. SCHWARTZ, *supra*, at 253.

94. For a documentary record of the constitutions of the new revolutionary states see 1 B. SCHWARTZ, *supra* note 12, at 179-379.

95. VA. DEC. OF RTS. art. 8 (1776), in *id.* at 235; PA. DEC. OF RTS. art. IX (1776),

dant the right to produce "all proofs that may be favorable" to him.⁹⁶ North Carolina combined the right to put on a defense with the right of confrontation, guaranteeing the right "to confront the accusers and witnesses with other testimony."⁹⁷ Delaware emphasized the defendant's interest in sworn testimony, giving him the right "to examine evidence on oath in his favour."⁹⁸ New Jersey opted for a principle of equality between the parties: "[A]ll criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."⁹⁹ Maryland consolidated several interests, guaranteeing the defendant the right "to examine [his] witnesses . . . on oath," and "to have process for his witnesses."¹⁰⁰

Some of the state provisions originated in English statutes, some in colonial enactments, and some were original.¹⁰¹ Regardless, they all reflected the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case. The states pressed the principle so vigorously that the framers of the federal Bill of Rights included it in the sixth amendment in a distinctive formulation of their own.

3. *The Bill of Rights*

The delegates to Philadelphia in the summer of 1787 were primarily concerned with organizing a strong national government to replace the existing Confederation.¹⁰² Although they provided for some civil liberties in the body of the proposed Constitution,¹⁰³ they rejected a proposal for a separate bill of rights. They sent the proposed Constitution to the states for ratification over the objection of

in *id.* at 265; VT. DEC. OF RTS. art. X (1777), in *id.* at 323. The Virginia declaration was the first in time and served as a model for the others. *Id.* at 262, 319.

96. MASS. DEC. OF RTS. art. XII (1780), in *id.* at 342; N.H. BILL OF RTS. art. XV (1783), in *id.* at 377.

97. N.C. DEC. OF RTS. art. VII (1776), in *id.* at 287.

98. DEL. DEC. OF RTS. § 14 (1776), in *id.* at 278.

99. N.J. CONST. art. XVI (1776), in *id.* at 260.

100. MD. DEC. OF RTS. art. XIX (1776), in *id.* at 282.

101. The New Jersey provision, N.J. CONST. art. XVI (1776), in *id.* at 260, contained essentially the same wording as the Pennsylvania Charter of Privileges (1701), *quoted* note 86 *supra*. The Massachusetts and New Hampshire provisions appear to have been taken from 31 Eliz., c. 4, § 2 (1589), *quoted* note 45 *supra*. *See also* 7 & 8 Will. 3, c. 3, § 1 (1665), *quoted* note 73 *supra*.

102. For discussions of the adoption of the Bill of Rights see I. BRANT, *supra* note 12; E. DUMBAULD, *supra* note 6; R. RUTLAND, *supra* note 80.

103. *See, e.g.*, U.S. CONST. arts. I, §§ 9, 10 (prohibition of bills of attainder and ex post facto laws passed by Congress and the states, respectively) III, § 2 (trial by jury in the state in which the crime was committed).

the anti-federalists, who began to rally their opposition around the omission of a bill of rights.

The Articles of Confederation had contained no bill of rights because the Confederation was considered too frail to threaten civil liberties, and because the member states were considered strong enough to protect their citizens. The new Constitution, on the other hand, created a national government of sufficient power to arouse concern. Accordingly, while some states ratified without hesitation, in others a movement began to ratify the Constitution on the understanding that it be immediately amended to include a bill of rights. The first such list of proposed amendments was issued by a dissenting minority in Pennsylvania, and followed by official recommendations from Massachusetts, South Carolina, New Hampshire, Virginia, and New York, and another dissenting list from Maryland. North Carolina felt so strongly about its proposed bill of rights that it refused to ratify the Constitution until the Bill of Rights was approved by Congress in 1789 and sent to the states.¹⁰⁴

Four of the recommending states proposed specific provisions for the right of the accused to present witnesses in his favor. The formulations differed from state to state, and sometimes departed from the formulation contained in the states' constitutions. Virginia and the dissenting minority in Pennsylvania, copying their state versions, recommended that the defendant be guaranteed the right "to call for evidence in his favor."¹⁰⁵ North Carolina, which had a different version in its constitution,¹⁰⁶ also proposed that the defendant be able "to call for evidence . . . in his favor."¹⁰⁷ New York, which had no comparable provision, recommended that the defendant be guaranteed "the means of producing his Witnesses."¹⁰⁸ The importance of the recommendations was not their particular wording, but the pressure they brought to bear on the first Congress to include a provision for defense witnesses in the Bill of Rights.

James Madison, who drafted much of the Bill of Rights, must have been aware of the states' pressure to amend the Constitution. Although he originally urged ratification without a bill of rights, he had changed his position by the time the first Congress convened in 1789. In fact, he had campaigned for his seat in the House of Repre-

104. For a documentary history of the ratification of the Constitution see 2 B. SCHWARTZ, *supra* note 12, at 627-980.

105. *Id.* at 664-65, 841.

106. *See* text at note 97 *supra*.

107. 2 B. SCHWARTZ, *supra* note 12, at 967.

108. *Id.* at 912-13.

sentatives by promising his Virginia constituents that he would push for amendments.¹⁰⁹ He must have been aware, too, of the specific need to provide for defense witnesses. Presumably he realized that the new government could not survive without the continued support of the two most important states—Virginia and New York—and that both had included a provision for defense witnesses in their ratification amendments. He had been a member of the Virginia ratifying convention that in 1788 had recommended the Virginia provision.¹¹⁰ He knew that New York had nearly rejected the Constitution and that it was already calling for a second convention to adopt a satisfactory bill of rights.¹¹¹ He knew also that North Carolina was refusing to ratify the Constitution until a proper bill of rights was adopted.¹¹²

Records do not indicate why Madison formulated the compulsory process clause precisely as he did. The remainder of his draft sixth amendment was almost identical to an amendment recommended by Virginia in ratifying the Constitution.¹¹³ The provision for the defendant's right to produce witnesses, however, differed from the Virginia version. Instead of guaranteeing the accused the right "to call for evidence," Madison substituted the present "right . . . to have compulsory process for obtaining witnesses in his favor." Only a statement in Blackstone's *Commentaries on the Laws of England* and a provision in the Maryland Constitution were even arguably comparable.¹¹⁴ Madison's unique phrasing suggests that he wished to fashion

109. R. RUTLAND, *supra* note 80, at 195-96.

110. 2 B. SCHWARTZ, *supra* note 12, at 764-65. The Virginia recommendations for witnesses, and for criminal procedure generally, were taken from an existing provision in the 1776 Virginia Declaration of Rights. Madison, then twenty-six, had also been a member of the committee of the state constitutional convention that had drafted the earlier provision. 1 *id.* at 231-34.

111. 2 *id.* at 854-55. The Constitution technically went into effect when New Hampshire became the ninth state to ratify, but it was generally recognized that as a political matter the Union would not survive unless Virginia and New York also ratified. R. RUTLAND, *supra* note 80, at 162.

112. Madison received a copy of the North Carolina amendments before the House of Representatives began to debate his proposed bill of rights. R. RUTLAND, *supra* note 80, at 204-05.

113. "[I]n all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair trial by an impartial jury of his vicinage . . ." Virginia Recommendation No. 8 (1788), in 2 B. SCHWARTZ, *supra* note 12, at 841 (emphasis added). The Virginia Recommendation, in turn, was taken almost verbatim from the Virginia Declaration of Rights, which George Mason had drafted in 1776. The right of the accused "to call for evidence," which appears in other state constitutions and recommendations, presumably originated with Mason. See 1 K. ROWLAND, *THE LIFE OF GEORGE MASON* 433-36 (1892).

114. See text at notes 76, 100 *supra*. Madison may well have referred to Black-

a neutral version that would satisfy the various states without adopting the language of any existing statute or recommendation.

Significantly, the compulsory process clause, despite its peculiar and narrow wording, was adopted by Congress and accepted by the states without substantive change.¹¹⁵ The clause was mentioned only once in the record: Representative Burke of South Carolina moved that it be amended to guarantee the accused the right to a continuance of his trial if his subpoenas for material witnesses were not served. The proposal was rejected as superfluous on the ground that the courts could be trusted to construe the clause to achieve its intended (but unarticulated) purposes.¹¹⁶

An important question, given the paucity of debate regarding the substance of the right of compulsory process, is what weight, if any,

stone in drafting his amendments. Blackstone had a profound influence on the framers, perhaps even surpassing his influence in England. D. LOCKMILLER, SIR WILLIAM BLACKSTONE, ch. X (1938) ("Blackstone in America"). When Madison was authorized by the Continental Congress in 1783 to draw up a list of recommended books for its library, he specifically included the works of Blackstone. I. BRANT, *supra* note 12, at 31, 33.

115. Madison assumed that his amendments would be incorporated directly into the body of the Constitution, rather than added as a supplement. Accordingly, he drafted his criminal procedure amendments in two parts: the first (concerning everything but jury trial) as an amendment to article I, section 9, and the second (the jury provisions) as an amendment to the jury provisions of article III, section 2. The first part provided: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." 2 B. SCHWARTZ, *supra* note 12, at 1026-27.

The proposed bill of rights, introduced in the House on June 8, 1789, was referred to a committee of eleven, consisting of one member from each state, and then to the floor of the House, where it was debated first in the committee of the whole and then in the chamber. The House passed the bill on August 24; the Senate passed it with some changes on September 9; the joint conference accepted the final version on September 25; Virginia's ratification on December 15, 1791, was the last necessary for adoption. See J. GOEBEL, *supra* note 7, at 456. During the entire two-and-a-half year debate the compulsory process clause was mentioned only once, during a discussion in the House sitting as a committee of the whole. See text at note 116 *infra*. The only difference between Madison's original draft of the compulsory process clause and the final version was that Madison would have allowed the defendant to have a compulsory process . . . , while the final version omitted the article "a." Compare 2 B. SCHWARTZ, *supra*, at 1027 with *id.* at 1165. For a documentary history of the adoption of the Bill of Rights see *id.* at 1006-24.

116. Mr. Burke moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence. Mr. Hartly said, that in securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court. Mr. Smith, of South Carolina, thought the regulation would come properly in, as part of the judicial system.

2 B. SCHWARTZ, *supra* note 12, at 1114.

to attribute to the precise wording of the compulsory process clause. Is it significant that Madison chose words that, while guaranteeing the accused the right to subpoena witnesses, do not specifically guarantee him the right to place them under oath, or call them to the stand, or compel them to testify, and that do not necessarily ensure him parity with the prosecution? Did Madison, his fellow congressmen, and the ratifying states intend to guarantee only one aspect of the historic right to call witnesses, and leave the others unprotected? Or did they give explicit protection to the subpoena power with the understanding that it implicitly included the other features of the right to present a defense?

Madison may have departed from the Virginia recommendation ("the right . . . to call for evidence") in order to gain the support of New York, which had emphasized the subpoena power in its recommendation ("the accused ought . . . to have the means of producing his witnesses"). The essential question, however, is whether he intended by so doing to limit the scope of the clause. Although it can be argued that he intended to confine the defendant to the right to compel his witnesses to attend trial, this narrow construction is inconsistent with Madison's goal of achieving consensus.¹¹⁷ While he may have felt strongly about specific amendments (*e.g.*, the religion clauses), Madison did not draft the Bill of Rights as a statement of his personal views. Rather, he drafted it to obtain a consensus by the almost mechanical process of choosing central and recurring themes from among the various recommendations. In that light it is unlikely that he intended to confine the defendant to the subpoena power. Only two of the state provisions and recommendations emphasized the subpoena power; most referred generally to the defendant's right to present evidence on an equal basis with the prosecution.¹¹⁸

117. Madison proposed only amendments to which "no serious objection ha[d] been made by any class of our constituents: such as would be likely to meet with the concurrence of two-thirds of both Houses, and the approbation of three-fourths of the State Legislatures." 2 B. SCHWARTZ, *supra* note 12, at 1025 (address by Rep. Madison, June 8, 1789). Cf. F. HELLER, *supra* note 12, at 29; R. RUTLAND, *supra* note 80, at 206. He formulated his bill by studying the various state recommendations, state provisions, and newspaper accounts, J. GOEBEL, *supra* note 7, at 427-28, 436; R. RUTLAND, *supra*, at 202; 2 B. SCHWARTZ, *supra*, at 1008; and by selecting the provisions he considered important. See Letter from James Madison to Edmund Randolph, Aug. 21, 1789, in 5 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 191-92 (1905). When George Mason, Madison's colleague from Virginia and author of the Virginia Declaration of Rights, proposed to the Constitutional Convention in Philadelphia (1787) that it add a bill of rights to the draft Constitution, he said that such a bill could be put together without any effort; indeed, "with the aid of the State declarations [of rights]," he said, "a bill might be prepared in a few hours." 1 B. SCHWARTZ, *supra*, at 438.

118. See text at notes 95-100, 105-08 *supra*.

More likely, therefore, Madison adopted his formulation not to exclude the general views of Virginia and the other states but to ensure that the clause also included New York's minority view. Accordingly, while he may have emphasized the subpoena power to prevent it from being overlooked, he probably assumed that it would implicitly protect the more conspicuous and common aspects of the defendant's right to present witnesses in his favor.

Furthermore, Madison's contemporaries do not appear to have attached any significance to the narrow wording of the compulsory process clause. Madison's proposed amendments were widely publicized throughout the states.¹¹⁹ During the House and Senate debates, and presumably in committee,¹²⁰ the bill was continually juxtaposed with various state formulations, some of which were adopted in place of Madison's formulations.¹²¹ And, although the same process of comparing presumably occurred in the states when the bill was submitted for ratification, no one suggested that Madison's provision was narrowly limited to the subpoena power. The state representatives must have assumed that his formulation was implicitly as broad as their comparable state provisions. The use of sworn testimony provides a good illustration of the clause's implicit meaning. In contrast to several state provisions, the compulsory process clause says nothing about permitting defense witnesses to testify under oath, yet it has always been deemed implicitly to include sworn testimony "as a matter of constitutional right."¹²²

Finally, when the original Congress implemented the compulsory process clause it gave it broad meaning beyond the subpoena power. In 1790 Congress enacted a statute that, while guaranteeing that the accused in a capital case "shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to

119. R. RUTLAND, *supra* note 80, at 205.

120. See note 115 *supra*.

121. 2 B. SCHWARTZ, *supra* note 12, at 1114-16, 1127-37, 1150-53.

122. Joseph Story, in his authoritative *Commentaries on the Constitution*, reviewed the history and adoption of the compulsory process clause, and concluded that one of its accomplishments was to guarantee the defendant the right to introduce sworn testimony:

The wisdom of these provisions [compulsory process and right to counsel] is, therefore, manifest, since they make matter of constitutional right, what the common law had left in a most imperfect and questionable state. The right to have witnesses sworn, and counsel employed for the prisoner, are scarcely less important privileges, than the right of a trial by jury. The omission of them in the constitution [of 1789] is a matter of surprise; and their present incorporation [in the sixth amendment] is a matter of honest congratulation among all the friends of rational liberty.

3 J. STORY, *supra* note 13, § 1786, at 665-66. See *United States v. Reid*, 53 U.S. (12 How.) 361, 363-64 (1851); 4 ST. G. TUCKER, *BLACKSTONE'S COMMENTARIES* 360 n.24 (1803).

compel witnesses to appear on behalf of the prosecution against him," specifically added that he "shall be allowed, in his . . . defence to make any proof that he can produce, by lawful witnesses."¹²³ Congress said nothing to indicate that the constitutional provision was any narrower than the statute; indeed, the courts have treated the two alike.¹²⁴ A parallel development is evident in state courts. Although respective provisions still vary from one state to another, and from the precise wording of the sixth amendment, they have been construed in substantially identical fashion.¹²⁵ The courts have evidently recognized that the meaning of the compulsory process clause is not limited to its literal terms, but must be derived from the context in which it was adopted.¹²⁶ As Chief Justice Taney observed, the principles of compulsory process were early understood to be "substantially the same with those which had been previously adopted in the several States."¹²⁷

4. *The Trial of Aaron Burr*

Within a few years of its adoption, Chief Justice John Marshall, presiding as circuit judge, gave a sweeping construction to the compulsory process clause in the treason and misdemeanor trials of Aaron Burr.¹²⁸ His two opinions in the case deserve attention because

123. Act of April 30, 1790, ch. 9, § 29, 1 Stat. 119, *as amended*, 18 U.S.C. § 3005 (1970). This act had been introduced in the House in June 1789 and in the Senate in July 1789, the same summer in which Congress was debating the Bill of Rights.

124. *See, e.g.*, *Wallace v. Hunter*, 149 F.2d 59, 60-61 (10th Cir. 1945); *Casebeer v. Hudspeth*, 121 F.2d 914, 916 (10th Cir. 1941), *cert. denied*, 316 U.S. 683 (1942).

125. For a list of the various state provisions see note 1 *supra*. The Maryland provision, *see text at note 100 supra*, despite its distinctive wording, has been read to have the same meaning as the federal provision, namely, to "declare and secure the pre-existing rights of the people as those rights had been established by usage and the settled course of law." *Lanasa v. State*, 109 Md. 602, 610, 71 A. 1058, 1061 (1909). *Cf. State v. Prouty*, 94 Vt. 359, 370, 111 A. 559, 564 (1920).

126. "[T]he provisions of the [sixth amendment] are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers v. United States*, 233 U.S. 604, 610 (1914). *Cf. Johnson v. Louisiana*, 406 U.S. 356, 370-71 n.6 (1972) (Powell, J., concurring); *Duncan v. Louisiana*, 391 U.S. 145, 159-62 (1968); *Salinger v. United States*, 272 U.S. 542, 548 (1926). *But see Bloom v. Illinois*, 391 U.S. 194, 198-200 n.2 (1968).

127. *United States v. Reid*, 53 U.S. (12 How.) 361, 363-64 (1851).

128. *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807). Beveridge called the proceedings "the greatest criminal trial in American history." 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 275 (1919). For an account of Burr's alleged conspiracy and his trial see L. BAKER, *JOHN MARSHALL* 447-518 (1974); 3 A. BEVERIDGE, *supra*, at 274-545; 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 301-15 (1922); Berger, *The President, Congress, and the Courts*, 83 YALE L.J. 1111, 1111-22 (1974); Freund, *The Supreme Court, 1973 Term, Foreword: On Presidential Privilege*, 88 HARV.

they represent a contemporary construction of the clause by the pre-eminent constitutional jurist of the time.¹²⁹ Marshall was an active lawyer in Virginia at the time of the Constitutional Convention and a member of the Virginia convention that ratified the Constitution with a recommendation that it be amended to give the accused the right "to call for evidence in his favor." He understood compulsory process to reflect a purpose broad enough to bring the President of the United States to bar on behalf of the most notorious of defendants.

It was not a propitious moment for reasoned adjudication. Aaron Burr, a former Senator and Vice-President of the United States, was accused of planning to precipitate war with Spain and set up a separate government in the western states by force. His archenemy, President Thomas Jefferson, was so successful in poisoning public opinion that the Senate approved a bill suspending habeas corpus to prevent the courts from releasing Burr and his alleged co-conspirators. Yet, despite the popular pressure, and despite the likelihood that Jefferson would exploit the trial to remove him from office, Marshall resolved all doubts in favor of Burr's right of compulsory process: "[T]he right given by this article must be deemed sacred by courts, and the article should be so construed as to be something more than a dead letter."¹³⁰

The case began with a message from Jefferson to the Congress in 1807,¹³¹ charging on the basis of certain letters from General James Wilkinson in New Orleans that Burr was planning to dismember the states west of the Alleghenies, invade Mexico, and set up a separate government under his control. The message concluded with Jefferson's statement that Burr's guilt was established "beyond question."

L. REV. 1, 23-31 (1974); Wills, Book Review, N.Y. Review of Books, May 2, 1974, at 15; Letter from Garry Wills, N.Y. Review of Books, July 18, 1974, at 36.

129. "[Marshall] had better opportunities than any student of history or law today to discover the intention of the framers of the federal Constitution." C. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 113 (1912). The opinion of judges in the founding era is entitled to special weight in construing the Constitution. Cf. *Adamson v. California*, 332 U.S. 46, 64 (1947) (Frankfurter, J., concurring) (interpretation given the fourteenth amendment by contemporaries of its authors).

130. 25 F. Cas. at 33. The Senate bill to suspend habeas corpus for a period of three months in treason cases was passed with only one dissenting vote, and then referred to the House where it was rejected. 3 A. BEVERIDGE, *supra* note 128, at 346-48. Marshall was aware of the temper of the times, saying at the start of the trial that "it would be difficult or dangerous for a jury to venture to acquit Burr, however innocent they might think him." *Id.* at 401.

131. Special Message to Congress, *Annals of the Congress of the United States*, 9th Cong., 2d Sess., at 39 (Jan. 22, 1807). The message was in response to a request by the House that Jefferson give fuller details of the conspiracy that Jefferson had mentioned cryptically in his State of the Union Address on December 2, 1806. See 3 A. BEVERIDGE, *supra* note 128, at 337-42.

Burr was promptly arrested in Louisiana, transported to the circuit court in Richmond, Virginia, and bound over to the grand jury.¹³²

In the course of the proceedings Burr made two motions for the Wilkinson letters, directing that Jefferson himself be subpoenaed to produce a letter of October 21, 1806, and that the United States attorney be subpoenaed to produce a letter of November 12, including portions the government deemed privileged.¹³³ The motions resulted in two opinions by Marshall: one of June 13 on whether the President could be subpoenaed at all, and one of September 4 on whether the case should be discontinued until the United States attorney produced correspondence he considered privileged.¹³⁴

The government raised several objections to the motion to subpoena Jefferson: (1) The motion for a subpoena *duces tecum* was too broad, because "process" under the sixth amendment extends only to "witnesses" for the defense, and not to their papers. (2) The motion was inadequate because, instead of showing precisely how he intended to use the Wilkinson letters, Burr simply alleged that the letters "[m]ay be material to his defence."¹³⁵ (3) The motion was premature, because Burr had not yet been indicted by the grand jury, and because the rights guaranteed by the sixth amendment are trial rights, which do not come into play until "criminal prosecutions" commence on the return of a true bill.¹³⁶ (4) The motion, even if otherwise proper, was invalid in so far as it ran against the President of the United States.¹³⁷

132. The proceedings consisted of four stages: the proceedings before trial (March 30-August 3, 1807); the treason trial on charges that Burr plotted to wage war against the United States, which ended in Burr's acquittal (August 3-September 1); the misdemeanor trial on charges that Burr plotted to attack Spain in Mexico, which also ended in Burr's acquittal (September 2-September 15); and Burr's commitment to a federal district court in Ohio on misdemeanor charges (September 15-October 20). For a verbatim record of the proceedings see T. CARPENTER, *THE TRIAL OF COL. AARON BURR* (1807); D. ROBERTSON, *REPORTS OF THE TRIALS OF COLONEL AARON BURR* (1808) (excluding Burr's commitment to Ohio).

133. The pretrial subpoena for Jefferson to produce the October 21 letter was requested on June 9 and issued on June 13. See 1 D. ROBERTSON, *supra* note 132, at 113-14, 177-89. The subpoena for the United States attorney to produce the November 12 letter was requested and issued on September 4, during Burr's misdemeanor trial. See 2 *id.* at 507-13. There has been some suggestion, based on a remark by one of Jefferson's lawyers, that still a third subpoena was issued, going to Jefferson to produce the letter of November 12. See 3 T. CARPENTER, *supra* note 132, at 38. But the better view is that only two subpoenas were issued, only one of which went to Jefferson. See Wills, Book Review, *supra* note 128, at 15-19. The lawyers agreed to dispense with Jefferson's personal appearance, so long as the letter itself was produced. See 1 D. ROBERTSON, *supra*, at 116, 121, 124.

134. See note 128 *supra*.

135. 1 D. ROBERTSON, *supra* note 132, at 132, 136-43, 149-50 (emphasis added).

136. *Id.* at 121-24, 154-55.

137. One of Jefferson's lawyers seemed to concede that the President could be

Marshall resolved the issues on June 13, drawing authority from the compulsory process clause, "general principles," "general practice," and the federal statute governing the trial of capital cases.¹³⁸ He understood the various sources of authority to be internally consistent with one another: He construed the constitutional command as consistent with prior practice, and the federal statute as "declaratory of the common law in cases where this constitutional right exists."¹³⁹ Because he did not distinguish among the various sources his opinion can be assumed to rest on constitutional grounds.

Marshall disposed of some of the issues summarily. Although the sixth amendment speaks of process for *witnesses* rather than *papers*, he rejected the "literal distinction" as "too much attenuated to be countenanced by in the tribunals of a just and humane nation."¹⁴⁰ He construed the clause in light of its purpose—to enable the defendant to present evidence—and concluded that it must include papers. Concerning materiality, he considered sufficient a showing that "there exist[s] any reason for supposing that the [subpoenaed] testimony may be material . . ."¹⁴¹ That Wilkinson was expected to testify against Burr at trial and that Wilkinson's prior correspondence might prove useful in impeaching his credibility were sufficient to justify a subpoena for the Wilkinson letters.¹⁴² A requirement that the accused make a greater showing before he knows what the letters contain and "before he knows positively what the witness will say . . ." at trial would, Marshall thought, be unreasonable.¹⁴³

Marshall took greater care in disposing of the remaining arguments. He held that Burr had a constitutional right to obtain subpoenas before as well as after indictment.¹⁴⁴ Because compulsory

subpoenaed, *id.* at 130-31, but the United States attorney later withdrew the concession, and Marshall did not rely on it. Berger, *supra* note 128, at 1113.

138. See text at note 123 *supra*.

139. 25 F. Cas. at 33.

140. 25 F. Cas. at 35.

141. 25 F. Cas. at 38 (emphasis added).

142. 25 F. Cas. at 36. Marshall ordered the disclosure be made before trial. In so far as his reasoning rests on constitutional grounds, as it appears to do, it casts doubt on the constitutionality of the Jencks Act, 18 U.S.C. § 3500(a) (1970), which prohibits the pretrial statements of government witnesses from being disclosed before trial. Cf. *United States v. Gleason*, 265 F. Supp. 880, 887 (S.D.N.Y. 1967).

143. 25 F. Cas. at 36. Marshall returned to the issue in his second opinion: "Now, if a paper be in possession of the opposite party, what statement of its contents or applicability can be expected from the person who claims its production, he not precisely knowing its contents?" 25 F. Cas. at 191.

144. "Upon immemorial usage, then, and upon what is deemed a sound construction of the constitution and law of the land, the court is of opinion that any person charged with a crime in the courts of the United States has a right, before as well as

process is designed to enable the accused to present a defense, he must have time to prepare that defense. To achieve its purpose at trial, it must be available before trial. In short, the right attaches as soon as the defendant has an interest in preparing his defense, which in Burr's case occurred upon his arrest.¹⁴⁵ With respect to the President, Marshall found nothing in the Constitution to justify immunity from subpoena: "In the provisions of the constitution, and of the statute, which give to the accused a right to the compulsory process of the court, there is no exception whatever."¹⁴⁶ The President, unlike the King of England, is governed by law and answerable to the courts. If Jefferson wished to assert a privilege against disclosing the letters, the appropriate time would be when the subpoena was returned. In the meantime Marshall saw no choice but to issue subpoenas "for papers to which the accused may be entitled, and which may be material in his defence."¹⁴⁷

Jefferson complied with the subpoena by producing the letter of October 21.¹⁴⁸ He also delivered a bundle of material, presumably including the letter of November 12, to United States attorney George Hay, with instructions that Hay withhold any portions he

after indictment, to the process of the court to compel the attendance of his witnesses." 25 F. Cas. at 33.

145. "General principles, then, and general practice are in favor of the right of every accused person, so soon as his case is in court, to prepare for his defence, and to receive the aid of the process of the court to compel the attendance of his witnesses." 25 F. Cas. at 33.

146. 25 F. Cas. at 34. Burr was not the first defendant to succeed in subpoenaing elected officials on his behalf. The defendant in *United States v. Cooper*, 4 U.S. (4 Dall.) 341, 25 F. Cas. 626 (No. 14,861) (C.C.D. Pa. 1800), on trial for seditious libel, asked that a letter be sent to various members of Congress requesting their attendance at trial. The court, speaking through Justice Chase, ruled that he was entitled to an official subpoena compelling their attendance, and to a continuance of the trial until they appeared: "The constitution gives every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of congress from the service, or the obligations, of a subpoena, in such cases." 4 U.S. (4 Dall.) at 341, 25 F. Cas. at 626. Cf. *United States v. Seeger*, 180 F. Supp. 467 (S.D.N.Y. 1960) (Weinfeld, J.) (right of compulsory process to subpoena congressman). However, the court rejected a request that the President also be subpoenaed. *United States v. Cooper*, 25 F. Cas. 631, 632-33 (No. 14,865) (C.C.D. Pa. 1800). It is unclear why the second request was rejected. See 1 ST. G. TUCKER, *supra* note 122, at 358 n.*. In any event, the parties to *Burr* agreed that *Cooper* had no precedential value on the presidential issue, perhaps because of Chase's scandalous reputation in seditious libel cases, for which he had since been impeached. See 1 D. ROBERTSON, *supra* note 132, at 132-33, 135-36.

147. 25 F. Cas. at 35.

148. There was some delay because the original had apparently been lost. See 2 D. ROBERTSON, *supra* note 132, at 484-85. Burr at first refused to be satisfied with a copy, but eventually agreed, and it was produced. See *id.* at 504. See generally Berger, *supra* note 128, at 1115 n.25.

considered privileged and "not directly material for the purposes of justice."¹⁴⁹ When Burr learned of the letter of November 12 he subpoenaed Hay to produce it. Hay delivered an edited version, arguing that the deleted portions had been written to the President in the strictest confidence, and had no bearing on the issues at trial; Hay offered, moreover, to deliver the unedited original to the court and to defense counsel for their private inspection, and promised to abide by the court's ruling on the propriety of the deletions.¹⁵⁰ The defense, however, was not satisfied with limited disclosure, and moved to postpone the case indefinitely until the letter was disclosed not only to the lawyers, but to Burr himself and to the public.¹⁵¹

Burr's motion for a continuance prompted the second Marshall opinion. Marshall gave Burr what he wanted by ordering that "the paper be produced, or the cause be continued,"¹⁵² but avoided a direct confrontation with the President. While he agreed that the President possessed a qualified privilege to withhold information that "the public interest required . . . to be kept secret . . .,"¹⁵³ he ruled that Jefferson had failed properly to assert the privilege: The privilege was personal to the President and had to be asserted by the President himself, rather than through his attorney Hay.¹⁵⁴ Accordingly, Marshall ruled that while he would consider entering a protective order to prohibit unnecessary public disclosure of the letter, he had no choice but to halt the proceedings until the letter was produced for Burr's personal inspection.¹⁵⁵

Marshall also used the occasion to define the standard that would govern disputes between the President and Burr if the President properly invoked his personal privilege. The courts, he said, must balance the President's need for secrecy against the defendant's need for disclosure. A strong claim on one side might outweigh a weak

149. 25 F. Cas. at 190; 1 D. ROBERTSON, *supra* note 132, at 210; 2 *id.* at 502.

150. 2 D. ROBERTSON, *supra* note 132, at 501, 509-11, 513-14, 523.

151. *Id.* at 507-11, 514-19, 532. Burr, in other words, insisted on making the determination himself whether the Wilkinson letters were relevant to his defense. *Cf. Alderman v. United States*, 394 U.S. 165, 180-85 (1969).

152. 25 F. Cas. at 192.

153. 25 F. Cas. at 192.

154. 25 F. Cas. at 192.

155. The only ground laid for the court to act upon is the affidavit of the accused; and from that the court is induced to order that the paper be produced, or the cause be continued. In regard to the secrecy of these parts which it is stated are improper to give out to the world, the court will take any order that may be necessary. I do not think that the accused ought to be prohibited from seeing the letter; but, if it should be thought proper, I will order that no copy of it be taken for public exhibition

25 F. Cas. at 192.

claim on the other. The scales, however, are weighted in favor of the accused, for it would be "a very serious thing, if such letter should contain any information material to the defence, to withhold from the accused the power of making use of it."¹⁵⁶ No matter how strong the President's interest in secrecy, the defendant is entitled to any information "absolutely necessary in the defence" or "essential to the justice of the case,"¹⁵⁷ and it is for the courts to make the necessary determination.¹⁵⁸ If the President refuses to disclose such information, the courts have no choice but to halt the prosecution.¹⁵⁹ Although Jefferson responded to the opinion by personally invoking privilege with respect to certain portions of the letter, and by directing Hay to withhold them from the court,¹⁶⁰ the controversy was never finally resolved. By the time Jefferson's response arrived Burr had decided to drop his request and proceed with the trial.¹⁶¹ The jury acquitted him a few days later.

The *Burr* opinions are important both for what Marshall did

156. 25 F. Cas. at 192.

157. Perhaps the court ought to consider the reasons which would induce the president to refuse to exhibit such a letter as conclusive on [the privilege], unless such letter could be shown to be absolutely necessary in the defense. . . . But on objections being made by the president to the production of a paper, the court would not proceed further in the case without such an affidavit as would clearly shew the paper to be essential to the justice of the case.

25 F. Cas. at 192.

158. Marshall justified judicial review of presidential action in much the same terms he used in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). He said that it would "be a blot in the page which records the judicial proceedings of this country . . ." to withhold exculpatory evidence from the accused, 25 F. Cas. at 35, and would "tarnish the reputation of the court which had given its sanction to its being withheld." 25 F. Cas. at 37. He added that he would personally "deplore, most earnestly, the occasion which should compel me to look back on any part of my official conduct with so much self-reproach as I should feel, could I declare, on the information now possessed, that the accused is not entitled to the letter in question, if it should be really important to him." 25 F. Cas. at 37.

Marshall did not specify whether the courts should make the necessary determination by inspecting the disputed information *in camera* or by considering circumstantial evidence of the privilege in the form of affidavits; however, he made it clear that courts would not automatically accept the President's assertion of privilege. See Freund, *supra* note 128, at 29.

159. Marshall stated his conclusion in the negative. He referred to the practice in civil cases of ordering a nonsuit against a plaintiff who fails to produce material evidence, and observed that he would not "take any definite and decisive step with respect to the prosecution, founded on the refusal of the president to exhibit a paper . . ." unless the defendant made a showing that the paper was material to his defense. 25 F. Cas. at 191-92.

160. 3 T. CARPENTER, *supra* note 132, at 46.

161. It is unclear why Burr dropped the request. 3 A. BEVERIDGE, *supra* note 128, at 522 n.4. His lawyers may have concluded that the letter was not really helpful to his defense, for it does appear that they (along with Marshall) were shown the letter in confidence. See 2 D. ROBERTSON, *supra* note 132, at 504-05, 511. But see note 162 *infra*.

and did not say. The question of enforcing the first subpoena by contempt or otherwise did not arise, because Jefferson produced the first letter voluntarily. Marshall did not have to subpoena Jefferson to produce the second letter because it was in Hay's possession by then. He did not have to find Hay in contempt for continuing to withhold portions of the second letter because Burr decided to drop the matter. On the other hand, Marshall did decide that when the President uses the courts to bring a prosecution he must comply with measures taken by the courts to preserve the integrity of their processes. And he declared that if the President denies the court access to evidence that may bear on the defendant's innocence, the court has an independent responsibility—not to find him in contempt (which can help the accused very little)—but to suspend prosecution until material evidence is made personally available to the accused.¹⁶²

II. THE EMERGING DOCTRINE: WASHINGTON V. TEXAS

The compulsory process clause, despite John Marshall's warning,¹⁶³ seemed destined to become a "dead letter." Until 1967 the Supreme Court addressed it only five times, twice in dictum and three times while declining to construe it.¹⁶⁴ The lacuna was so acute that two noted commentators observed as late as 1960 that "[t]he question of compulsory process seems not to have been the subject of constitutional adjudication, either under the sixth or fourteenth amendments, at least not in the federal courts."¹⁶⁵ In part because litigants failed to brief the issue, courts reached for other grounds on which to decide cases that warranted compulsory process analysis.

The defendant's right to obtain a continuance of his trial in order to subpoena witnesses provides a good example. The framers specifi-

162. Marshall addressed this issue again during proceedings to commit Burr to an Ohio court on misdemeanor charges. *See* note 132 *supra*. When Burr once more demanded the letter in order to impeach Wilkinson, Marshall concluded that Burr had not shown that the letter was material to the probable cause hearing. But he did permit Burr to draw a favorable inference from the suppression, and added that if it were a trial (rather than a probable cause hearing) he might have to discontinue the case. 3 T. CARPENTER, *supra* note 132, at 284.

163. *See* text at note 130 *supra*.

164. *Pate v. Robinson*, 383 U.S. 375, 378 n.1 (1966); *Blackmer v. United States*, 284 U.S. 421, 442 (1932); *United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (dictum that compulsory process does not require defense subpoenas to issue at government expense); *Ex parte Harding*, 120 U.S. 782 (1887); *United States v. Reid*, 53 U.S. (12 How.) 361, 363-65 (1851) (dictum), *overruled in* *Rosen v. United States*, 245 U.S. 467 (1918) [*see* *Washington v. Texas*, 388 U.S. 14, 21-22 (1967)].

165. Snee & Pye, *Due Process in Criminal Procedure: A Comparison of Two Systems*, 21 OHIO ST. L.J. 467, 491 (1960).

cally considered amending the compulsory process clause to guarantee the defendant enough time to serve his subpoenas, but concluded that such an amendment would be superfluous and that the courts could be trusted to construe the clause accordingly.¹⁶⁶ The same conclusion follows from the nature of the right itself, for if trying the defendant before he can retain counsel violates the right to counsel,¹⁶⁷ trying him before he can call witnesses violates the right of compulsory process.¹⁶⁸ Instead of recognizing the relevance of the sixth amendment, however, courts have relied upon the due process clause.¹⁶⁹ In one case a court agreed that the defendant had been denied adequate time to call his witnesses, and apologized for the "necessity" of basing its decision on a standard so vague and uncertain as the "fundamental fairness" requirement of due process.¹⁷⁰

Another example is *Ferguson v. Georgia*,¹⁷¹ in which the defendant challenged a statute that prohibited him from making a sworn statement in his defense.¹⁷² The provision was part of a larger statutory scheme that declared the defendant incompetent to testify as a regular witness but permitted him to make unsworn statements. The Court was troubled by the statutes, but divided in its approach. The

166. See note 116 *supra* and accompanying text.

167. *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

168. The better view is that it violates the specific provision for compulsory process—rather than the more general provision for due process—to deny the defendant sufficient time to issue subpoenas for his witnesses, see *Paoni v. United States*, 281 F. 801, 803-04 (3d Cir. 1922); to have his subpoenas executed, see *Keener v. Tennessee*, 281 F. Supp. 964, 969-70 (E.D. Tenn. 1968); and to permit his witnesses to travel to the trial. See *Smith v. Commonwealth*, 155 Va. 1111, 1118-19, 156 S.E. 577, 579-80 (1931) (state provision).

169. See, e.g., *Ungar v. Sarafite*, 376 U.S. 575, 589 n.9 (1963); *United States ex rel. Snyder v. Mack*, 372 F. Supp. 1077, 1080-82 (E.D. Pa. 1974); *Shepherd v. State*, 108 S.2d 494, 496-97 (Fla. Dist. Ct. App. 1959); *Hainesworth v. State*, 9 Md. App. 31, 33-34, 262 A.2d 328, 330 (1970); *People v. Sweeney*, 43 App. Div. 2d 564, 349 N.Y.S.2d 63 (1973) (Benjamin, J., dissenting).

170. "We deplore the vagueness, the uncertainty, the necessity of reliance on individual notions—inherent in applying as a standard of due process a concept such as 'fairness' or 'fundamental fairness essential to the very concept of justice' or 'a sense of justice' But . . . [o]n the record as we read it, MacKenna [the defendant] did not have his day in court to meet the prosecution's case." *MacKenna v. Ellis*, 280 F.2d 592, 604 (5th Cir. 1960), modified on rehearing en banc, 289 F.2d 928 (5th Cir.), cert. denied, 368 U.S. 877 (1961).

171. 365 U.S. 570 (1961).

172. The statute, No. 21, [1868] Ga. Acts 24, as amended, No. 17, [1874] Ga. Laws 22-23, provided in pertinent part: "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it." At the time Georgia was "the only State—indeed, apparently the only jurisdiction in the common-law world—to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial." 365 U.S. at 570.

concurring members argued that the "unsworn statement" statute was invalid only as part of the incompetency statute, and that unless the Court was willing to decide the validity of the latter it should dismiss the ban on sworn statements for absence of a "substantial federal question."¹⁷³ The majority, unwilling to pass upon the validity of the incompetency statute, which the parties had not drawn into question, concluded that the rule against sworn statements was invalid "in the context of"¹⁷⁴ the incompetency statute because it abridged the defendant's right to counsel by precluding his lawyer from asking him questions about the unsworn statement in the presence of the jury.¹⁷⁵ Neither the parties nor the Court raised the issue of compulsory process.

The majority correctly invalidated the rule against sworn statements without reaching the validity of the incompetency statute. Had the defendant been fully competent to testify in his own behalf as an ordinary witness he would have had no grounds to insist on making an additional unexamined "statement" under oath.¹⁷⁶ To that extent, the ban on sworn statements was invalid only "in the context of" the incompetency statute. But it does not follow that, once having declared the defendant incompetent to testify as an ordinary witness, the state could also arbitrarily regulate the manner in which he made "statements" in his behalf. Nor does it follow that the defendant first had to challenge the incompetency statute in order to contest the discrimination between sworn and unsworn statements. Regardless of the validity of the incompetency statute,¹⁷⁷ the defendant was prejudiced by the accompanying rule that permitted him to make statements in his defense but arbitrarily prohibited him from making the statements under oath.

The majority's rationale, however, was erroneous. *Ferguson* was "not a right-to-counsel case."¹⁷⁸ The defendant was fully assisted by counsel in preparing his unsworn statement. His lawyer was free to draft every word of the statement, including rhetorical questions if he so wished. The defendant could not have said anything more or

173. 365 U.S. at 600 (Frankfurter, J., concurring).

174. 365 U.S. at 596.

175. 365 U.S. at 593-96.

176. See *United States v. Cartano*, 420 F.2d 362, 365 (1st. Cir. 1970): "[A] contrary rule might be unfair to society. It would permit a defendant to pick and choose, determining which portions of his story he will tell on the witness stand, where he is subject to cross-examination, and which he will save for the jury, where anything he may say cannot be challenged."

177. Cf. text at notes 207-19 *infra*.

178. 365 U.S. at 599 (Frankfurter, J., concurring).

less if orally questioned by his lawyer. The essential defect from the defendant's viewpoint, rather, was that the statement was unsworn, not that it was unassisted. Indeed, the majority implicitly recognized that the problem was not that the defendant would have said something different if questioned by counsel, but that his statement would have carried greater weight with the jury if given under oath.¹⁷⁹ The Court ignored the most appropriate rationale on which to base its result, namely, that having permitted the defendant to make a statement in his defense, the state violated his right of compulsory process by prohibiting him from presenting the evidence under oath, on a comparable basis with witnesses for the prosecution.¹⁸⁰

The blind spot in *Ferguson*, however, was soon eliminated. The 170-year blackout on compulsory process came to an end in *Washington v. Texas*.¹⁸¹ Chief Justice Warren's opinion compares in scope with Marshall's sweeping opinions in *United States v. Burr*.¹⁸² Marshall extended compulsory process to the period before trial and made it a means for discovery; Warren read it to reach beyond the mere production of witnesses and made it a means by which to have defense witnesses heard. The opinion is important, beyond its immediate holding, for its use of history, its standard of analysis, and its reliance on the specific words of the sixth amendment instead of the "fundamental fairness" requirement of due process.

The facts were simple. The defendant, Jackie Washington, and a man named Fuller were tried in a Texas state court for murder. Defendant Washington testified that Fuller took the gun from him before the shooting, that he tried in vain to persuade Fuller to withdraw peacefully, and that he ran from the scene of the crime before the shooting started. In support he called Fuller as a defense witness. Fuller, who had already been tried and convicted, was ready to exonerate Washington by testifying that he acted on his own in firing the fatal shot. His offer of proof was material because he was the only other eye-witness to the incident, and it was reliable because it was corroborated in some respects by other testimony.¹⁸³ Nonetheless, Fuller was disqualified from testifying on Washington's behalf because a Texas statute rendered "accomplices" incompetent to testify

179. 365 U.S. at 586-89.

180. See note 122 *supra* and accompanying text.

181. 388 U.S. 14 (1967). For another recent analysis of *Washington* see Comment, *The Preclusion Sanction—A Violation of the Constitutional Right To Present a Defense*, 81 YALE L.J. 1342 (1972).

182. See text at notes 128-62 *supra*.

183. Fuller was seen carrying the gun immediately after the shooting. 388 U.S. at 16.

for one another.¹⁸⁴ Denied the opportunity to call Fuller as a witness, Washington was convicted and sentenced to fifty years in prison.

The Supreme Court, in an opinion in which all but Justice Harlan joined, unanimously reversed the conviction. The Court framed the compulsory process question broadly. The defendant was denied the benefit of Fuller's exculpatory testimony not because the state refused to compel Fuller's attendance at trial, but because under the statute his testimony was inadmissible: "We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court."¹⁸⁵ The Court answered the question in the defendant's favor. It declared the accomplice statute unconstitutional under the compulsory process clause because it denied the defendant "the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."¹⁸⁶

The Court began by deciding that compulsory process is so essential to a fair trial that it must be deemed applicable to the states through the due process clause of the fourteenth amendment.¹⁸⁷ The Court then determined that historically the compulsory process clause was designed to secure more than the presence of defense witnesses: The framers intended to repudiate the ancient rule at common law that barred the defendant from calling witnesses in his favor, and, instead, to permit such witnesses to be heard:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.¹⁸⁸

The Texas accomplice rule was invalid under the compulsory process clause because it "arbitrarily" disqualified an entire class of material witnesses from testifying for the defense. The disqualification was arbitrary because it was based on "a priori categories that pre-

184. The statute provided in pertinent part: "Persons charged as principals, accomplices or accessories . . . can not be introduced as witnesses for one another" 388 U.S. at 16 n.4.

185. 388 U.S. at 19.

186. 388 U.S. at 23.

187. 388 U.S. at 18.

188. 388 U.S. at 19.

sume [the witnesses] unworthy of belief . . ." without any individual showing that they were untrustworthy, or that the jury was incapable of properly evaluating their testimony.¹⁸⁹

Washington's importance is greater than its immediate holding. First, the Court's use of history was significant, not only in concluding that compulsory process governs the testimonial competence of defense witnesses as well as their personal attendance, but also in defining the constitutional standard for determining the validity of specific rules of competence. Justice Harlan, while agreeing that Texas denied the defendant a fair trial by rendering his accomplice incompetent to testify in his behalf, denied that the error had anything to do with "compulsory process." The Court, he said, had "to strain this constitutional provision . . ." to reach its result.¹⁹⁰ As another commentator put it: "The compulsory process clause . . . cannot be construed to give the defendant a substantive right to have the testimony of his witness entered into evidence. It gives the defendant only the right to have compulsory process to obtain witnesses in his behalf—to have subpoenas issued for their appearance in court."¹⁹¹

The Court rejected Harlan's literal construction in favor of a historical construction. Without detailing the long history of the defendant's right to present witnesses in his favor, the Court concluded that the clause was originally intended to permit witnesses to testify for the defense: "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."¹⁹² The framers assumed they were providing some

189. 388 U.S. at 22. The Court noted in the margin that it was not passing upon the constitutionality of "testimonial privileges" such as the privilege against self-incrimination and the husband-wife privilege, or upon rules that disqualify individual witnesses "who, because of mental infirmity or infancy, are incapable of observing events or testifying about them." 388 U.S. at 23 n.21.

190. 388 U.S. at 24.

191. Note, *Criminal Law—Right of Defendant To Have Testimony of Co-Participant*, 20 BAYLOR L. REV. 467, 472 (1968). Another commentator writes:

The Court's reliance upon compulsory process . . . obscured the traditional distinction between compulsory process to secure witnesses and rules on competency of witnesses to testify . . .

The reason the Court ignored these traditional distinctions is that although freedom from arbitrary rules regarding competency . . . may be an essential fair trial procedure, this freedom is not specified in the Bill of Rights. . . . [T]he Court stretched the language of the sixth amendment to cover this case.

Note, *The Sixth Amendment Guarantee of Compulsory Process Is Violated by a State Statute that Bars a Co-participant in a Crime from Testifying on Behalf of Another Defendant*, 46 TEXAS L. REV. 795, 797-98 (1968) (footnotes omitted; emphasis added).

192. 388 U.S. at 23. The Court continued:

[T]he right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the

real protection for the defendant's case, and would have been surprised at the suggestion that the courts had a duty to subpoena defense witnesses but could arbitrarily bar them from testifying.¹⁹³ Their English ancestors had not struggled so long for something that could be circumvented so easily. Rather, the explicit right to subpoena witnesses carries with it an implicit right to put them on the stand to be heard.

The Court next applied the compulsory process clause to the specific rule at issue. Having relied upon historical evidence to conclude that compulsory process bears upon general matters of competency, the Court rejected the "dead hand of the common-law rule of 1789"¹⁹⁴ as a standard for measuring the validity of the Texas accomplice rule. It refused, in other words, to apply to compulsory process the same strictly historical test it apparently applies to the seventh amendment and other provisions of the sixth amendment.¹⁹⁵ Instead of inquiring whether the accomplice rule existed at common law in 1789, the Court inquired whether the rule was "arbitrary" by present constitutional standards.

Although the Court did not explain its simultaneous use and disregard of history, its approach is neither unprincipled nor unsound. The accomplice rule was itself an exception, even in 1789, to the prevailing principle that witnesses are competent to testify for the defense. The spirit and trend of the common law already favored the abolition of the remaining disabilities, including the disqualification of accomplices.¹⁹⁶ There is no reason to believe that

accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

The Court relied principally on Joseph Story's *Commentaries on the Constitution of the United States* (1833).

193. "In light of the common-law history, and in view of the recognition . . . that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law." 388 U.S. at 22.

194. 388 U.S. at 22, quoting *Rosen v. United States*, 245 U.S. 467, 471 (1918).

195. For a description of the historical test used to define the seventh amendment in accord with the common law of 1791 see Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). The same test has been used to define the scope of the sixth amendment right of confrontation. See *Salinger v. United States*, 272 U.S. 542, 548 (1926). But see note 10 *supra*.

196. For the history of the abolition of testimonial disqualifications during the nineteenth century see 2 J. WIGMORE, *supra* note 56, §§ 492, 501, 509, 519, 575-76, 600, 602. Virginia abolished the accomplice rule as early as 1849. See *United States v.*

the framers intended to freeze the defendant's constitutional rights forever in the form of rules already undergoing change. It is perfectly sound to conclude that they intended instead to protect the main and evolving principles of the common law without their accompanying minutiae, and to leave to future courts the task of applying those principles in specific cases.¹⁹⁷

Second, having rejected the strictly historical standard, *Washington* is important for the standard of analysis it ultimately adopted. The Court construed the compulsory process clause to embody the principle that the government cannot "arbitrarily" disqualify witnesses from testifying for the defense. The controlling factor is the standard it used in deciding whether the accomplice rule was "arbitrary." The Texas rule—formerly well-accepted at common law and routinely applied in the federal courts¹⁹⁸—was not irrational. It assumed that accomplices were unreliable witnesses because "each would try to swear the other out of the charge."¹⁹⁹

The Court nevertheless found the rule "arbitrary," not because it failed to prevent perjury, but because it employed means that were too drastic under the circumstances. Without so stating, the Court implied that the state had no "compelling interest" in using disqualification as a means for avoiding perjury. The Court concluded that Texas could adequately satisfy its interest in avoiding perjury without excluding the accomplice's testimony, by leaving its weight and credibility to the jury.²⁰⁰ It implied, in other words, that, given

Reid, 53 U.S. (12 How.) 361, 362 (1851). For a review of Supreme Court cases in the area see *Funk v. United States*, 290 U.S. 371 (1933).

197. It is likely that the framers intended to guarantee only the fundamental principle that the defendant be permitted to call witnesses in his favor. Cf. *Colegrove v. Battin*, 413 U.S. 149, 155-57 (1973); *Williams v. Florida*, 399 U.S. 78, 92-93 (1970); *Galloway v. United States*, 319 U.S. 372, 392 (1943): "The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

198. See 2 J. WIGMORE, *supra* note 56, § 580. In criminal trials the federal courts followed the rules of evidence of the states where they presided, as such rules existed at the time the states were admitted to the Union. *United States v. Reid*, 53 U.S. (12 How.) 361, 366 (1851).

199. *Benson v. United States*, 146 U.S. 325, 335 (1892).

200. The Court did not use an "alternative-means" analysis in so many words. However, it quoted a statement from *Rosen v. United States*, 245 U.S. 467 (1918), that "'truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding . . . leaving credit and weight of such testimony to be determined by the jury or by the court . . .,'" and then announced that "[a]lthough *Rosen v. United States* rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment." 388 U.S. at 22. The Court must have been referring to the above quotation in *Rosen*, rather than to its holding,

the benefits of cross-examination and cautionary instructions, a jury determination of credibility constituted an adequate and constitutionally permissible alternative for minimizing the dangers of perjury; therefore, despite its legitimate interest in avoiding perjured testimony, the state was not justified in imposing the onerous and unnecessary burden of disqualification on the defendant's constitutional right to present witnesses.²⁰¹

Third, *Washington* is important because the Court construed the defendant's right to present witnesses in his favor without reference to the corresponding rights of the prosecution. Justice Harlan invited the Court to invalidate the Texas rule not because it was arbitrary, but because it discriminated against the accused. The rule prohibited accomplices from testifying for one another yet permitted them to testify for the prosecution. Harlan could conceive of "no justification for this type of discrimination between the prosecution and the defense in the ability to call the same person as a witness" ²⁰² He was unwilling to say, however, whether the disqualification would be invalid if it applied "across-the-board" ²⁰³ to the prosecution as well as the defense.

The Court, while agreeing with Harlan that the rule was discriminatory, ²⁰⁴ refused to rest on that narrow ground. It distinguished between the discriminatory effect of the rule and its "arbitrary" effect. Even if the rule disqualified accomplices from testifying for both parties in the case, it was nonetheless "arbitrary" because it imposed an unnecessary burden on the defendant's constitutional right to present a defense.

Finally, the case is important because it was decided on the specific words of the compulsory process clause, rather than on the general notions of "fairness" underlying the due process clause. ²⁰⁵ Justice

because *Rosen* involved a prosecution witness rather than a defense witness, and on its facts presented no sixth amendment issue. To say that truth is "more likely" to be arrived at by letting the testimony come in is to say, at the very least, that leaving credibility to the jury is an alternative that adequately protects against unreliable testimony.

201. The "alternative-means" or "less drastic means" test is only a variation of "compelling state interest" analysis. To say that the state has an adequate and less drastic alternative at its disposal is simply to say that the state has no compelling state interest in adhering to the harsher alternative. Cf. *United States v. Jackson*, 390 U.S. 570, 582-83 (1968).

202. 388 U.S. at 24. Harlan evidently believed that an accomplice is just as likely to perjure himself for the state (to win leniency) as for his friends.

203. 388 U.S. at 25.

204. 388 U.S. at 22.

205. Another court had anticipated Harlan's approach a few months earlier by refusing to commit itself to a particular construction of the compulsory process

Harlan, who concurred in the result, argued that the conviction should be reversed on its "peculiar" facts because it denied the defendant a fair trial. Rejecting the ad hoc approach of due process adjudication, the Court provided guidance for future cases by giving definite meaning to the more specific terms of the sixth amendment.

III. THE PRESENT SCOPE OF COMPULSORY PROCESS

The Supreme Court, after giving the compulsory process clause an expansive construction in *Washington*, did not return to the clause or to *Washington* for several years. Indeed, the significance of *Washington* seems not to have been fully appreciated by the practicing bar or the courts.²⁰⁶ Surprisingly, the Court itself again reached for less convincing grounds to resolve issues to which the compulsory process clause was more directly applicable.

*Brooks v. Tennessee*²⁰⁷ is a good example. The defendant was tried and convicted under a statute that permitted defendants to testify in their defense only at the outset of their case, before hearing the testimony of their other witnesses. The statute was designed to minimize perjury by making it difficult for the defendant to tailor his testimony to conform to the testimony of his other witnesses. Brooks, who did not wish to testify first, was denied permission to testify at the close of his case. He challenged the validity of the statute on the ground that it abridged his constitutional right to decide when to present himself as a witness for the defense.

The Supreme Court, over the dissents of Justices Burger, Blackmun, and Rehnquist, invalidated the statute. The parties neither argued the compulsory process clause's applicability nor cited *Washington*, and the Court analyzed the problem under other clauses of the Constitution. It concluded that by prohibiting the defendant from testifying at the close of his case the statute violated both his privilege against self-incrimination and his right to counsel: the former by penalizing him for remaining silent at the outset of his case²⁰⁸ and the latter by interfering with his lawyer's "tactical de-

clause, instead invalidating the accomplice rule as a denial of the fair trial required by the due process clause. *Bonner v. Beto*, 373 F.2d 301, 304 (5th Cir. 1967).

206. See, e.g., *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974): "Lacouture did not subpoena [the witness], and had she done so, her [compulsory process] rights would have been exhausted by [the witness] physical availability at court" But see *State v. Leong*, 51 Hawaii 581, 465 P.2d 560 (1970) (state compulsory process provision).

207. 406 U.S. 605 (1972).

208. 406 U.S. at 607-12.

cision" to call him as a witness at the close of his defense.²⁰⁹

Neither of the Court's reasons for invalidating the statute as applied to Brooks is convincing. The statute could have affected the defendant in one of two ways: It could have coerced him into taking the stand at a time when he would have otherwise remained silent or prevented him from testifying at a time when he wished to speak in his own behalf. Had the statute forced Brooks to testify when he preferred to remain silent it would have arguably abridged his privilege against self-incrimination. However, it had precisely the opposite effect on him. It prevented him from making an exculpatory statement at a time when he preferred to speak. It did not abridge his right to remain silent. On the contrary, it compelled him to remain silent at the point in the development of his evidence at which he deemed his testimony most relevant.²¹⁰

Nor did the statute violate his right to counsel. The Court cited but failed to explain the relevance of *Ferguson*,²¹¹ in which the defendant's counsel was at least precluded from questioning the defendant during the latter's statement. The Tennessee statute in *Brooks*, on the other hand, did not prevent counsel from doing anything for his client, but rather prevented the latter from doing something for himself, namely, testifying at a time when his testimony was needed.²¹²

Whatever its errors in relying on the privilege against self-incrimination and the right to counsel, the Court was clearly correct in invalidating the statute. The defect in *Brooks* was the same as in *Washington*: The statute "arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."²¹³ The accomplice in *Washington* was disqualified on the

209. 406 U.S. at 612-13. Justice Stewart concurred only in the right to counsel rationale. 406 U.S. at 613.

210. "Petitioner Brooks never took the stand, and it is therefore difficult to see how his right to remain silent was in any way infringed by the State. Whatever may be the operation of the statute in other situations, petitioner cannot assert that it infringed his privilege against self-incrimination—a privilege which he retained inviolate throughout the trial." 406 U.S. at 617 (Rehnquist, J., dissenting). *But see* Amsterdam, *A Selective Survey of Supreme Court Decisions*, 9 CRIM. L. BULL. 389, 404-06 (1974).

211. 406 U.S. at 612. *See* text at notes 171-80 *supra*.

212. "The crucial fact here is not that counsel wishes to have a witness take the stand at a particular time, but that the defendant—whether advised by counsel or otherwise—wishes to determine at what point during the presentation of his case he desires to take the stand." 406 U.S. at 618 (Rehnquist, J., dissenting).

213. 388 U.S. at 23.

assumption that he would commit perjury by trying to exonerate his friend, while the defendant in *Brooks* was disqualified on the assumption that he would commit perjury by tailoring his testimony to fit that of his prior witnesses. In *Brooks*, as in *Washington*, the Court suggested an alternative less drastic than disqualification, namely, permitting the testimony while leaving credibility to the jury.²¹⁴

The only difference between the two cases is that the witness in *Washington* was the defendant's accomplice, while in *Brooks* it was the defendant himself. But the compulsory process clause draws no distinction between the defendant and other "witnesses in his favor." While it is true that defendants at common law were incompetent to testify in their own behalf, that was not the issue in *Brooks*. The question was whether the state, having deemed the defendant fully competent, could arbitrarily regulate the timing of his testimony.

Even if the defendant's competency to testify in his own behalf had been the issue in *Brooks*, the result would have been the same under the compulsory process clause. It is now widely accepted that the defendant has a constitutional right to testify in his own defense.²¹⁵ Some courts ground the right in due process,²¹⁶ others in the right to counsel.²¹⁷ It should be clear since *Washington*, however, that the right of the accused to call witnesses in his favor, including himself, rests upon the compulsory process clause. The most important witness for the defense in most criminal cases is the defendant himself. If, despite its unambiguous language, the compulsory process clause were held not to include the defendant, it would leave a major gap in the defendant's case.

That defendants were deemed incompetent to testify in their own behalf in 1789 is immaterial. In invalidating the accomplice rule

214. "This is not to imply that there may be no risk of a defendant's coloring his testimony to conform to what has gone before. But our adversary system reposes judgment of the credibility of all witnesses in the jury." 406 U.S. at 611.

215. See *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (hearing requirements prior to revocation of parole); *Groppi v. Leslie*, 404 U.S. 496, 502-03 (1971) (state assembly contempt resolution and confinement without notice or opportunity to respond); *Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934) (dictum); *Holden v. Hardy*, 169 U.S. 366, 391 (1898) (dictum); *Hovey v. Elliott*, 167 U.S. 409, 417-19 (1897) (dictum); *Fowle v. United States*, 410 F.2d 48, 53 (9th Cir. 1969); *People v. Mosqueda*, 5 Cal. App. 3d 540, 545, 85 Cal. Rptr. 346, 349 (1970). The right of allocution (the right to address the court on the issue of punishment) can be considered part of the right to testify in one's own defense. See *McGautha v. California*, 402 U.S. 183, 217-20 (1971). But cf. *United States v. Ives*, 504 F.2d 935, 938-40 (9th Cir. 1974).

216. See, e.g., *Ferguson v. Georgia*, 365 U.S. 570, 602 (Clark, J., concurring).

217. See, e.g., *Pigg v. State*, 253 Ind. 329, 331, 253 N.E.2d 266, 267 (1969). One court has even supported the right by quoting the fifth amendment privilege against self-incrimination. *Poe v. United States*, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd.*, 352 F.2d 639 (D.C. Cir. 1965) (alternative holding).

in *Washington* the Court made it clear that the compulsory process clause does not codify the common law of 1789 in all of its detail, but rather stands for the general principle that—absent good reasons to the contrary—the defendant in a criminal proceeding should be permitted to present a case in his favor.²¹⁸ Accordingly, the right of the defendant to testify in his own behalf depends not on whether he could have done so historically, but on whether the state presently has a compelling interest in keeping him off the stand. In analyzing the rule that prohibits the defendant from testifying for the defense one must conclude (as have the federal government and all of the states) that the rule is arbitrary by contemporary constitutional standards.²¹⁹ No legitimate interest is served by denying the defendant the benefit of his own testimony that is not served by permitting him to testify and leaving his credibility to the jury. The language and purpose of the compulsory process clause are clear: The defendant has a constitutional right to call any material “witness,” including himself.

The Court, despite its lapse in *Brooks*, has been generally faithful to the promise of *Washington* since it was decided. The Court referred once to compulsory process by way of dictum;²²⁰ during the 1972-1973 term it reversed four separate convictions by reference to *Washington* and on grounds consistent with a broad view of compulsory process;²²¹ and a few months ago, in the landmark case *United States v. Nixon*,²²² it accepted and enlarged upon principles of presidential responsibility to the accused first announced by John Marshall in *United States v. Burr*.²²³ Although still vacillating between compulsory process and due process as a ground for its decisions, the Court has said and done enough to support the conclusion that it recognizes a comprehensive right of the accused to present a defense through witnesses. As explored below, the right entitles a defendant to discover the existence of potential witnesses;²²⁴ to put them on the stand;²²⁵ to have their testimony believed;²²⁶ to have

218. See note 193 and text at notes 194-95 *supra*.

219. Georgia in 1962 became the last state to abolish the disqualification. 2 J. WIGMORE, EVIDENCE § 579 (Supp. 1972).

220. *United States v. Augenblick*, 393 U.S. 348, 356 (1968).

221. *Wardius v. Oregon*, 412 U.S. 470 (1973); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Cool v. United States*, 409 U.S. 100 (1972); *Webb v. Texas*, 409 U.S. 95 (1972).

222. 42 U.S.L.W. 5237 (U.S. July 23, 1974).

223. See text at notes 123-62 *supra*.

224. See section IIIA *infra*.

225. See section IIIB *infra*.

226. See section IIIC *infra*.

their testimony admitted into evidence;²²⁷ to compel witnesses to testify over claims of privilege;²²⁸ and to enjoy an over-all fair balance of advantage with the prosecution with respect to the presentation of witnesses.²²⁹

A. *The Right To Discover Exculpatory Witnesses*

*Brady v. Maryland*²³⁰ clearly established the defendant's constitutional right to discover exculpatory evidence in the government's possession. Yet, despite the considerable attention given this right by both courts and commentators, there has been little inquiry into its constitutional source.²³¹ Despite the strong precedent of the *Burr* opinions, the general assumption has been that the defendant's right of discovery rests on the general fairness requirement of due process. A sound argument can be made, however, that reliance on due process derives from a failure to distinguish the pre-*Brady* cases, dealing with the prosecution's suppression of evidence favorable to the accused, from the post-*Brady* discovery cases. *United States v. Nixon*²³² and other recent cases suggest that the Court is beginning to recognize that certain kinds of discovery have a sounder conceptual basis in the compulsory process clause.²³³

1. *The Basis of Constitutional Discovery*

The original suppression cases, starting with *Mooney v. Holohan*,²³⁴ correctly relied upon due process. They did not purport to create affirmative rights in the accused, but to condemn deliberate misconduct by the prosecution. The defendant in *Mooney* challenged his conviction for murder by alleging that the prosecution had systematically manufactured false evidence against him and deliberately suppressed exculpatory evidence. The state responded by arguing that even if his allegations were true, they did not present a federal question. It argued that unless the prosecutor denies the defendant notice of the charges against him, or a hearing in which to present

227. See section IIID *infra*.

228. See section IIIE *infra*.

229. See section IIIF *infra*.

230. 373 U.S. 83 (1963).

231. A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES-II § 270 (2d ed. 1971), is probably the best survey of the constitutional sources of discovery.

232. 42 U.S.L.W. 5237 (U.S. July 23, 1974).

233. Cf. *State v. Lerner*, — R.I. —, 308 A.2d 324 (1973) (state compulsory process provision).

234. 294 U.S. 103 (1935).

his case, his other actions "*in and by themselves*"²³⁵ can never violate due process. The Supreme Court rejected that "narrow view,"²³⁶ and went on to say, while remitting the petitioner to his unexhausted state remedies, that due process prohibits the prosecution from taking any action that offends "fundamental conceptions of justice."²³⁷

The suppression principle has since been applied to other kinds of misconduct. No longer must the defendant show that the prosecutor manufactured or suborned perjury: It violates due process for the prosecutor to exploit false testimony bearing on the defendant's innocence, whether he suppresses its falsity or permits it to go uncorrected.²³⁸ The rationale in both circumstances is the same, namely, that prosecutorial abuse produces "tainted" convictions,²³⁹ and that reversal is a necessary sanction to deter future "prosecutorial misconduct."²⁴⁰

The *Brady* rationale is completely different: The difference is between punishing suppression by the prosecutor and permitting discovery by the accused. The defendant Brady, unlike Mooney, made an affirmative pretrial request to examine certain statements in the government's possession. The prosecution gave Brady some of the material but failed to disclose an extrajudicial statement by his co-defendant that tended to exonerate Brady.²⁴¹ Although there was no evidence of prosecutorial misconduct, the Court said: "[I]rrespective of the good faith or bad faith of the prosecution," due process is denied when material evidence "favorable to an accused" is withheld from a defendant who requests it from the prosecution.²⁴²

235. 294 U.S. at 111-12 (emphasis original).

236. 294 U.S. at 112.

237. 294 U.S. at 112. "[I]f a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured . . . [such a contrivance] is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." 294 U.S. at 112.

238. See *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957).

239. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

240. "[The due process] standard is well calculated to prevent the kinds of prosecutorial misconduct which vitiate the very basis of our adversary system, and yet provide a firm line which halts short of broad, constitutionally required, discovery rules *Mooney* simply imposes sanctions upon specified forms of prosecutorial misconduct." *Giles v. Maryland*, 386 U.S. 66, 117-18 (1967) (Harlan, J., dissenting).

241. 373 U.S. at 84. In his statement to the police the co-defendant took responsibility for the actual killing. The statement, if believed, would not have affected Brady's conviction of first-degree murder, but might have persuaded the jury not to impose the death penalty.

242. 373 U.S. at 87. Justice White, concurring, argued persuasively that the Court's discussion of discovery was pure dictum. 373 U.S. at 91-92. The Court has since

While *Brady* represented a major departure from earlier cases, the Court tried to trace its roots to the due process clause by reinterpreting the earlier cases to conform to the new result. The due process principle of *Mooney*, it explained, was "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused."²⁴³ *Brady*, the Court implied, was not a new step, but simply an explicit application of what the suppression cases had meant all along.²⁴⁴ The Court would have done better, however, to acknowledge that it was dealing with two separate principles.²⁴⁵ By obscuring the fact that *Mooney* involved deliberate prosecutorial misconduct the Court disparaged the theme of deterrence that proved useful in the past and would prove useful again in the future.²⁴⁶ Moreover, by straining to derive *Brady* from the suppression cases the Court overlooked the separate constitutional interests that underlie discovery.

Compulsory process provides a more appropriate constitutional rationale for the principles of criminal discovery than does due process. Compulsory process was intended to permit the defendant to request governmental assistance ("process") to obtain exculpatory evidence ("witnesses in his favor"). *Brady* contains both elements: First, the defendant made an affirmative pretrial request for the information.²⁴⁷ The suppression cases, by contrast, involve passive defendants whose rights are measured solely by the propriety of the

resolved any doubt on that score by unanimously reaffirming the *Brady* rule. See *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

²⁴³ 373 U.S. at 87.

²⁴⁴ 373 U.S. at 87.

²⁴⁵ For a discussion of the difference between the suppression cases based on punishing misconduct by the prosecutor and the *Brady* cases based on giving affirmative discovery to the accused, see A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 231, § 317, at 2-247-48; Comment, *Brady v. Maryland and the Prosecutor's Duty To Disclose*, 40 U. CHI. L. REV. 112, 113-15 (1972); Comment, *The Prosecutor's Constitutional Duty To Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 142-43 (1964).

²⁴⁶ See, e.g., *Miller v. Pate*, 386 U.S. 1 (1967).

²⁴⁷ *Brady* emphasized that the defendant had "requested" the exculpatory statement. 373 U.S. at 87. The Court recently reaffirmed the relevance of a defense "request." *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). Although some lower courts have held that the prosecution has a duty to disclose exculpatory information without request, *United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 137 (2d Cir. 1964), it is generally assumed that, absent a request, the defendant must make a greater showing of materiality. See *United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968). The difference in materiality is the difference between compulsory process discovery (request) and due process disclosure (no request). Compulsory process provides affirmative rights that the defendant can invoke only by making a proper request. See *Calvert v. United States*, 323 F. Supp. 112, 114 (W.D. Ky. 1971) (no denial of compulsory process for the government to fail to subpoena defense witnesses on its own initiative, absent a defense request).

government's conduct.²⁴⁸ Second, the requested information in *Brady* was favorable to the defense, because it tended to prove that the defendant had no part in firing the fatal shot.²⁴⁹ The key to the suppression cases, on the other hand, is not the exculpatory nature of the suppressed evidence but the prosecutor's knowledge of the false or misleading impression created in its absence.²⁵⁰ Third, the defendant in *Brady* could not obtain the favorable information—a statement obtained by the police during interrogation—except by compelling the government to disclose it. Unless forced to light it would have remained in the unique possession of the prosecution.²⁵¹ In sum, the discoverable information in *Brady* was precisely the kind of evidence that is subject to subpoena under the compulsory process clause.

The courts, since *Brady*, have begun to recognize the controlling effect of the compulsory process clause. The shift from due process to compulsory process is perhaps most noticeable in the so-called "*Jencks*" cases. The original case, *Jencks v. United States*,²⁵² like *United States v. Burr*, involved a defendant's request that the government produce the recorded statements of its witnesses for possible use in impeaching their testimony. The Supreme Court held that the defendant had a right to obtain the statements in order "to decide whether to use them in his defense."²⁵³ Although the defendant's right to discovery in *Jencks* turned on nonconstitutional grounds, the commands of compulsory process were "close to the surface."²⁵⁴

248. It is irrelevant in the suppression cases whether there has been a defense request: The focus there is not the defendant's affirmative rights, but the prosecution's unilateral obligations. See *United States v. Keogh*, 391 F.2d 138, 147-48 (2d Cir. 1968).

249. It is an essential element of discovery under *Brady* that the evidence be "favorable." *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972).

250. In the suppression cases, the defendant must show only that the prosecutor's conduct was willful, not that the suppressed information would have helped him. See *Nash v. Illinois*, 389 U.S. 906, 906-07 (1967) (Fortas, J., dissenting), *denying cert. to* 36 Ill. 2d 275, 222 N.E.2d 473 (1966). Cf. *Kyle v. United States*, 297 F.2d 507, 513-14 (2d Cir. 1961) (only necessary to show willful misconduct that went uncorrected at trial).

251. The defendant's right of discovery is said to be particularly strong with respect to evidence that is peculiarly within the control of the prosecution and not otherwise available to the defense. Cf. *Xydas v. United States*, 445 F.2d 660 (D.C. Cir.), *cert. denied*, 404 U.S. 826 (1971); *Levin v. Katzenbach*, 363 F.2d 287, 293-94 (D.C. Cir. 1966) (Burger, J., dissenting). In *Evans v. Superior Court*, 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974), the court imposed an active duty on the prosecution to utilize tools not available to the defendant to obtain evidence for him.

252. 353 U.S. 657 (1957). Congress subsequently modified the decision. See 18 U.S.C. § 3500 (1970).

253. 353 U.S. at 668.

254. *Palermo v. United States*, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring).

Since then, following the path of several lower court opinions,²⁵⁵ the Court has explicitly acknowledged that "[i]t may be that in some situations, denial of production of a Jencks Act type of statement might be a denial of a Sixth Amendment right . . . , for example . . . , that criminal defendants have compulsory process to obtain witnesses for their defense."²⁵⁶ Any remaining doubts were dispelled by the unanimous Court in *United States v. Nixon*,²⁵⁷ holding that the President's duty to disclose tapes of his personal conversations with the Watergate defendants derived in part from their correlative right of compulsory process.²⁵⁸

The "*Jencks*" cases not only help distinguish the compulsory process clause from the due process clause, but also from the sixth amendment's confrontation clause. Some commentators and at least one Justice have suggested that the defendant's right to discover impeaching evidence in the government's possession may rest on his right of confrontation.²⁵⁹ The defendant's right "to be confronted with the Witnesses against him"²⁶⁰ is said to include the right not only to cross-examine the witnesses who testify against him, but also to discover and introduce evidence that may impeach them.

This view of the right of confrontation, although tenable, has been rejected by the courts. The right of confrontation is exclusively a "trial right."²⁶¹ It requires the government to bring the defendant face-to-face at trial with the witnesses who testify against him, thus affording an opportunity to cross-examine and impeach them through

255. In *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952), the court held that compulsory process entitled the defendant to discover the pretrial statements of a prosecution witness. The Supreme Court cited *Schneiderman* with approval in *Jencks v. United States*, 353 U.S. 657, 668 n.13 (1957). See also *Sosa v. State*, 215 S.2d 736, 740-41 (Fla. 1968).

256. *United States v. Augenblick*, 393 U.S. 348, 356 (1969).

257. 42 U.S.L.W. 5237 (U.S. July 23, 1974). Justice Rehnquist participated in neither the consideration nor the decision of the case.

258. "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." 42 U.S.L.W. at 5245. The subpoena for the White House tapes and documents had been requested by the special prosecutor, rather than by the defendants, but the Court made it clear that compulsory process would govern any comparable request by the defendants. See 42 U.S.L.W. at 5246 (dictum); *Johnson v. Johnson*, 375 F. Supp. 872, 875 (W.D. Mich. 1974) (the principles of *Brady* are "clearly within the sphere of influence of the Sixth Amendment's compulsory process guarantee").

259. See *Palermo v. United States*, 360 U.S. 343, 362 (1959) (Brennan, J., concurring); *Mascarenas v. State*, 80 N.M. 537, 458 P.2d 789 (1969); A. AMSTERDAM, B. SEGAL & M. MILLER, *supra* note 231, § 317, at 2-246-47; Note, *A Defendant's Right To Inspect Pretrial Congressional Testimony of Government Witnesses*, 80 YALE L.J. 1388, 1396-98 (1971); 58 MICH. L. REV. 888, 893-98 (1960).

260. U.S. CONST. amend. VI.

261. *Barber v. Page*, 390 U.S. 719, 725 (1968).

direct questioning. It does not, however, require the government to produce witnesses whose statements are not used at trial,²⁶² or to produce the underlying information on which its witnesses base their testimony,²⁶³ or to produce their prior statements.²⁶⁴ In so far as the defendant seeks impeaching evidence by means other than examining prosecution witnesses, he seeks to produce evidence in his favor.²⁶⁵ Therefore, in so far as he wishes to impeach them by producing their prior statements²⁶⁶ or by subpoenaing independent witnesses,²⁶⁷ he must rely on his right of compulsory process.²⁶⁸

2. *The Importance of Relying on Compulsory Process*

The rights of compulsory process and confrontation are designed to serve separate and distinct interests, and can therefore be exercised simultaneously without overlapping. The right to due process, on the other hand, is comprehensive; it is broadly framed to include many

262. See *Cooper v. California*, 386 U.S. 58, 62 n.2 (1967).

263. See *McCray v. Illinois*, 386 U.S. 300, 313-14 (1967); *United States v. Williams*, 447 F.2d 1285, 1287-89 (5th Cir. 1971) (en banc), cert. denied, 405 U.S. 954 (1972).

264. Courts finding a sixth amendment right to obtain the prior statements of prosecution witnesses have grounded that right in the compulsory process clause rather than the confrontation clause. See cases cited note 266 *infra*.

265. See Comment, *The Right to Production for Inspection of Documents in Possession of the Government; Guaranteed by the Due Process Clause?*, 31 S. CAL. L. REV. 78, 82-83 (1957). In *Giglio v. United States*, 405 U.S. 150 (1972), the Court held that the defendant's constitutional right to produce evidence that would impeach a principal witness against him rests on his right to discover evidence in his favor under *Brady v. Maryland*, 373 U.S. 83 (1963). Cf. *Levin v. Clark*, 408 F.2d 1209, 1212 (D.C. Cir. 1967) (evidence that impeaches a prosecution witness is "favorable" to the defendant within the meaning of *Brady*).

266. See, e.g., *United States v. Augenblick*, 393 U.S. 348, 356 (1969) (dictum); *United States v. Burr*, 25 F. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807); *United States v. Burr*, 25 F. Cas. 187 (No. 14,694) (C.C.D. Va. 1807); *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952). Cf. *Calley v. Callaway*, 382 F. Supp. 650, 699-703 (M.D. Ga. 1974).

267. Cf. *Dutton v. Evans*, 400 U.S. 74, 87-89 & n.19 (1970) (opinion of Stewart, J.); *Calley v. Callaway*, 382 F. Supp. 650, 698-99 (M.D. Ga. 1974). But see *Dutton*, 400 U.S. at 109-10 (Marshall, J., dissenting).

268. *Davis v. Alaska*, 415 U.S. 308 (1974), nicely illustrates the difference between confrontation and compulsory process. The key witness for the prosecution was a juvenile with a prior criminal record. When the defendant tried to impeach the witness by questioning him about his criminal record the trial court barred the questions on the ground that the juvenile records were privileged information. The Supreme Court reversed the conviction, holding, quite properly, that prohibiting the defendant from asking the witness material questions about his credibility abridged the defendant's right to confront the witness. If, on the other hand, the defendant had been allowed to ask the question and had received a negative response, his right of confrontation would have been fully satisfied. At that point, he would have been forced to impeach the witness not by questioning him but by subpoenaing the juvenile records and introducing them as part of his defense. In producing the records the defendant would clearly be relying not on his right of confrontation but on his affirmative right of compulsory process.

of the same interests protected by specific provisions in the Bill of Rights. The right to counsel, for example, while specifically protected by the sixth amendment, is also part of a defendant's general right to due process.²⁶⁹ The same is true of his right to discovery. While the Supreme Court could have decided *Brady v. Maryland*²⁷⁰ on compulsory process grounds, it did not act irrationally in deciding the case on due process grounds.

It is entirely proper, therefore, to ask whether a choice between compulsory process and due process in the area of discovery—or in the other areas where they overlap—is of any consequence. Does it really make much difference which clause one relies upon, so long as the result and rationale are clearly understood? Perhaps not. Nonetheless, there are supporting reasons, both practical and theoretical, for the proposition that wherever a court can decide an issue on one of two alternative provisions—one general, the other specific—its analysis should start with the more specific.

First, the choice between a general and a specific clause may affect the outcome of a case. A court may be reluctant to reverse a conviction where the defendant complains in general that he was denied a "fair trial" under the due process clause,²⁷¹ and probably will apply a more lenient standard of review in cases in which the defendant complains of a more specific violation.²⁷²

*Brooks*²⁷³ and *Ferguson*²⁷⁴ are instructive examples. The Court was closely divided in *Brooks*; the dissenters were unpersuaded by the majority opinion, believing that the majority had decided the case on personal preferences rather than on specific provisions in the

269. See *Betts v. Brady*, 316 U.S. 455, 461-62 (1942); Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 630 (4th ed. 1974).

270. See text at notes 230-33, 241-51 *supra*.

271. See *Spencer v. Texas*, 385 U.S. 554, 565 (1967): "In the procedures before us . . . , no specific federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures."

272. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974):

This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark . . . by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process.

See also *United States v. Augenblick*, 393 U.S. 348, 356 (1969) (citations omitted): "[A]part from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest." Cf. *Ashe v. Swenson*, 397 U.S. 436, 442-43 (1970).

273. See text at notes 207-19 *supra*.

274. See text at notes 171-80 *supra*.

Constitution.²⁷⁵ Perhaps the dissenters and Justice Stewart, who refused to join the portion of the majority opinion concerning self-incrimination, would have been persuaded by an opinion based squarely on the compulsory process clause.²⁷⁶ In *Ferguson*, Justices Clark and Frankfurter would have dismissed the challenge to the statute prohibiting the defendant from making sworn statements on the ground that it failed to present a "substantial federal question."²⁷⁷ They might have felt differently had the defendant relied specifically on the compulsory process clause and shown that the clause was intended to permit defense witnesses to testify under oath on an equal basis with prosecution witnesses.

A specific provision with definite standards may also answer questions left unresolved by a more general provision. An example is the question whether defendants have a constitutional right to depose witnesses before trial. Such an opportunity, presently granted by only a few states,²⁷⁸ can be extremely important to the accused. It provides the only method by which he can compel reluctant witnesses to talk about a case before trial, or compel third persons to produce documents and tangible objects in their possession.²⁷⁹ By freezing testimony into a fixed form at an early stage of the proceedings it probably also reduces the incidence of perjury.²⁸⁰ Moreover, it is a device that the prosecution already fully enjoys, either directly through the subpoena power or indirectly through grand jury and police interrogation.

The compulsory process clause provides no easy escape from the unavoidable task of constitutional analysis in this area. The validity of denying the defendant the opportunity to depose uncooperative

275. See 406 U.S. at 613 (Burger, C.J., dissenting).

276. See 406 U.S. at 618 (Rehnquist, J., dissenting).

277. 365 U.S. at 600.

278. See FLA. R. CRIM. P. 1.220(f) (requires demonstration of materiality and uncooperativeness); OHIO REV. CODE ANN. § 2945.50 (Page Supp. 1972); TEX. CODE CRIM. P. arts. 39.04-.06 (1966), .02-.03, .07 (Supp. 1973); VT. R. CRIM. P. 15. The Federal Rules of Criminal Procedure permit the defendant to take pretrial depositions only for the purpose of preserving testimony, and not for discovery. FED. R. CRIM. P. 15. See *United States v. Bronston*, 321 F. Supp. 1269 (S.D.N.Y. 1971). The Organized Crime Control Act of 1970, 18 U.S.C. § 3503, while broad enough to permit discovery depositions, has been construed to apply only in "organized crime cases." See *United States v. Podell*, 369 F. Supp. 151 (S.D.N.Y.), modified, 493 F.2d 704, 708 (2d Cir. 1974).

279. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1180-83 (1960). Subpoenas for documents under rule 17 of the Federal Rules of Criminal Procedure, for example, are not available for general discovery purposes. See *United States v. Ferguson*, 37 F.R.D. 6, 7 (D.D.C. 1965).

280. See Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 311-12 (1960). For a description of the operation of defense depositions in one state see Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A.J. 732 (1967).

witnesses in advance of trial will depend in each case on whether pretrial interrogation or inspection of evidence is essential to the defendant's case, and whether there are adequate alternatives to deposing witnesses, such as interrogating them at the preliminary hearing or obtaining transcripts of their grand jury testimony.²⁸¹ Although the right to compulsory process does not avoid these problems, it represents a considerable advance over the use of the due process clause. It more clearly identifies not only the particular interests being weighed, but the appropriate ("compelling interest") standard for weighing them.²⁸²

Second, sound jurisprudence justifies reliance on the more specific provision even where it does not produce different results. So much of the law of discovery has already developed under the due process rubric of *Brady* that a nominal shift to compulsory process at this point would probably not change the outcome of many cases. Nonetheless, deciding discovery cases on the narrower ground would help advance the desirable process of construing the specific words in the sixth amendment. The words reflect underlying purposes; if those purposes are served in a particular case they should be applied rather than ignored. Indeed, to rely exclusively on the due process clause in the face of other applicable and more specific provisions in the Bill of Rights is to render the specific provisions mere surplusage.

To give meaning to compulsory process in the discovery area would affect its meaning in other areas, perhaps contributing to improved understanding of the purposes and intended operation of the

281. Several courts have considered and rejected the compulsory process argument for pretrial depositions. See *State v. Lampp*, 155 S.2d 10 (Fla. Dist. Ct. App. 1963), *appeal dismissed*, 166 S.2d 891 (Fla. 1964); *Kardy v. Shook*, 237 Md. 524, 541-42, 207 A.2d 83, 93 (1965); *State v. Tate*, 47 N.J. 352, 221 A.2d 12 (1966). Cf. *State v. McDevitt*, 297 A.2d 58 (Del. Super. 1972) (requiring a witness to submit to pretrial interview with the defendant on nonconstitutional grounds). Some jurisdictions compel witnesses to submit to a mental examination when the defendant demonstrates its need. See, e.g., *United States v. Butler*, 481 F.2d 531, 533-35 (D.C. Cir. 1973); *State v. Falcatano*, 107 N.J. Super. 375, 258 A.2d 391 (L. Div. 1969). See also Annot., 18 A.L.R.3d 1433 (1968).

282. See notes 200-01 *supra* and accompanying text. The same analysis can be applied to requests for grand jury transcripts. By compelling testimony and producing tangible evidence the grand jury gives the prosecution great advantages over the defendant in preparing for trial. See *United States v. Dionisio*, 410 U.S. 1, 47 (1973) (Marshall, J., dissenting). Although it would defeat the operation of the grand jury to allow the defendant to participate in its proceedings, he can be allowed to share the fruit of its work by being given the transcript. Some courts have already suggested that the defendant has a due process right to discover grand jury testimony. See *United States v. LaVallee*, 344 F.2d 313, 315 (2d Cir. 1965) (dictum); *United States v. Eley*, 335 F. Supp. 353, 358 n.4 (N.D. Ga. 1972). Cf. *McMahon v. Office of City & County of Honolulu*, 51 Hawaii 589, 591 n.3, 465 P.2d 549, 550 n.3 (1970) (dictum). If there is such a right, compulsory process seems the more appropriate basis. See *State ex rel. Brown v. Dewell*, 123 Fla. 785, 794, 167 S. 687, 690 (1936) (defendant entitled to any grand jury testimony "material to the administration of justice").

constitutional command in all stages of the defendant's presentation of his case. One reason why courts have been slow to recognize the relevance of the compulsory process clause to the admissibility of evidence²⁸³ and to the compelling of privileged testimony²⁸⁴ is their failure to apply it in other appropriate areas. The best way to discover the meaning of the clause is to begin applying it where it fits. As a by-product, that would also help define the meaning of "due process." So long as the due process clause carries responsibility for other provisions it will not be free to develop its own individual standards or recognize its own particular purposes.²⁸⁵

Third, a decision grounded specifically in the Bill of Rights is likely to have greater precedential value than a due process decision. Although not always the case,²⁸⁶ the prevailing due process test is whether the defendant was denied a fair trial under the "totality of the circumstances."²⁸⁷ This test encourages courts to decide cases by lumping all of the facts together without identifying issues of particular importance or giving particular weight to the interests involved. It encourages decisions limited explicitly to their facts, rather than opinions containing useful guidelines for future cases.²⁸⁸

283. See section IIID *infra*.

284. See section IIIE *infra*.

285. Due process relief should perhaps be reserved for cases in which the government proceeds in bad faith. A good example is the series of cases holding that the accused is entitled to be tried by an impartial judge. Although there is no specific right in the Constitution to an impartial judge, the Court has invalidated proceedings in which the judge "give[s] vent to personal spleen or respond[s] to a personal grievance," *Offutt v. United States*, 348 U.S. 11, 14 (1954); in which he acts from financial self-interest, *Tumey v. Ohio*, 273 U.S. 510 (1927); in which he acts from a prosecutorial interest, *In re Murchison*, 349 U.S. 133, 136 (1955); in which he retaliates against the accused for challenging the verdict, *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969); and in which he maliciously harasses the accused. *Younger v. Harris*, 401 U.S. 37, 54 (1971) (dictum).

286. Compare, e.g., the broad prophylactic rule in *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

287. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). See also *Simmons v. United States*, 390 U.S. 377, 383 (1968).

288. See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973), and its precedential effect in *United States v. Walling*, 486 F.2d 229, 238 (9th Cir. 1973), *cert. denied*, 415 U.S. 923 (1974).

It is probably no coincidence that some of the judges who advocate deciding criminal procedure cases on the totality of their facts by relying on ad hoc notions of "fairness" also advocate upholding criminal convictions generally by deferring to the lower courts. See, e.g., *Malinski v. New York*, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring) (emphasis added): "The fact that judges among themselves may differ whether in a particular case a trial offenses accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review." Justice Rehnquist is another example. He prefers to decide criminal procedure cases on the due process clause, rather than on more specific provisions of the sixth amendment. See, e.g., *Ham v. South Carolina*, 409 U.S. 524

Finally, reliance on specific provisions in the Bill of Rights in lieu of reliance on the due process clause is more consistent with recent trends in the "incorporation" debate. Whether to apply the Bill of Rights directly to the states through the fourteenth amendment or to measure state conduct by the more general standard of due process has been a major constitutional issue of our time. While the debate is more complex than the present issue—involving as it does the relationship between the federal and state governments—it is relevant here for what it says about the relationship between the specifics of the Bill of Rights and the due process clause. The prevailing view, best represented by the late Justice Black, holds that judges should decide cases whenever possible on specific provisions in the Bill of Rights; that the specific provisions contain objective "boundaries"²⁸⁹ and are therefore less "nebulous"²⁹⁰ than due process; and that due process, because it has "no permanent meaning,"²⁹¹ permits judges to make "subjective" decisions based on their own "predilections and understandings of what is best for the country."²⁹²

It is unnecessary here to restate the various arguments regarding incorporation. Nor is it necessary to decide whether due process indeed denotes simply a "watered-down" version of the Bill of Rights or whether the specific provisions actually constrain a court's "predilections" any more than the due process clause.²⁹³ The important point is that, for the present, Justice Black's view prevails. Until the emphasis shifts back to general due process analysis—and perhaps even then—courts should look first for guidance to the specific provisions of the Bill of Rights.

(1973) (finding error in a voir dire not on the basis of the right to trial by jury, but on the basis of the right to due process). He also believes that in reviewing criminal convictions under the due process clause the Court should apply a looser standard of review than when reviewing specific violations. See *Donnelly v. DeChristoforo*, 42 U.S.L.W. 4682, 4684 (U.S. May 13, 1974). It is not surprising, therefore, that during his two-and-a-half years on the bench he has not cast a single recorded vote in favor of reviewing a criminal conviction, and that in the forty criminal cases in which he has written opinions he has voted only three times to reverse the conviction below. See *Jenkins v. Georgia*, 42 U.S.L.W. 5055 (U.S. June 25, 1974) (reversing conviction for showing the movie "Carnal Knowledge"); *United States v. Maze*, 414 U.S. 395 (1974); *Ham v. South Carolina*, 409 U.S. 524 (1973).

289. *Duncan v. Louisiana*, 391 U.S. 145, 168-69 (1968) (Black, J., concurring).

290. *Rochin v. California*, 342 U.S. 165, 174-77 (1952) (Black, J., concurring).

291. *Duncan v. Louisiana*, 391 U.S. 145, 168 (1968) (Black, J., concurring).

292. *Duncan v. Louisiana*, 391 U.S. 145, 168 (1968) (Black, J., concurring). See also *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

293. Cf. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 335-40 (1957).

B. *The Right To Put Defense Witnesses on the Stand*

The defendant who has discovered his witnesses and produced them in court²⁹⁴ will seek to put them on the stand. Some courts have implied that compulsory process refers only to the means for securing the attendance of witnesses at trial and that it does not deal with their competence to testify.²⁹⁵ That approach, however, is inconsistent with the historical evidence that the framers intended to guarantee a broad right to present a defense.²⁹⁶ The narrow view, in any event, was firmly put to rest by *Washington v. Texas*,²⁹⁷ holding that the right to produce witnesses includes the right to have them heard. The competence of witnesses in criminal cases to testify for the defense is now clearly a constitutional question, to be resolved in every case by compulsory process standards.

Courts have been slow, however, to recognize the extent to which compulsory process "constitutionalizes" the law of evidence. The Supreme Court in *Washington* invalidated a state rule of evidence because it had the effect of denying the accused the benefit of material testimony in his favor. There remain, however, numerous other state and federal rules that preclude witnesses from testifying for the defense. They take various forms. Some are rules of competence that explicitly disqualify certain witnesses. Others are rules of practice that effectively discourage witnesses from testifying. Each of them raises serious sixth amendment questions.

294. The right of the defendant to compel the attendance of witnesses is a combination of his constitutional right of compulsory process and various state and federal laws governing the issuance of subpoenas. The case law on the subpoena power is both extensive and technical, and exceeds the practical limits of this article. Since the purpose here is to map the broad implications of compulsory process, the specific issues surrounding the issuance of subpoenas are not developed here. Such issues, which deserve treatment in a separate article, include: whether indigent defendants can be required to pay the costs of issuing subpoenas for their witnesses; whether the state can set numerical limits on the number of defense subpoenas; whether the state can require an advance showing of good cause before issuing defense subpoenas; whether the defendant can insist that the state also execute his subpoenas; and whether there are territorial limits to the issuance of subpoenas to witnesses outside the forum.

295. *E.g.*, *Gajewski v. United States*, 321 F.2d 261, 268 (8th Cir. 1963), *cert. denied*, 375 U.S. 968 (1964); *United States v. Maloney*, 241 F. Supp. 49, 50 (W.D. Pa. 1965). *Cf.* *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974), *quoted note* 206 *supra*.

296. *See* text at notes 117-27 *supra*.

297. 388 U.S. 14 (1967). *See* Part II *supra*. *Washington* thus implicitly rejects Wigmore's view that the compulsory process clause guarantees the defendant only the means for compelling the attendance of witnesses in his favor, and has no bearing on their legal competence to testify. *See* 8 J. WIGMORE, EVIDENCE § 2191, at 69 (J. McNaughton rev. 1961).

1. *Rules of Competence that Disqualify
Witnesses from Taking the Stand*

The general rule of competence allows nonexpert witnesses to testify only as to matters about which they have personal knowledge.²⁹⁸ An exception is made for "experts." No constitutional problem arises under the general rule unless "experts" or "personal knowledge" is defined so narrowly as to exclude reliable, relevant testimony concerning the defendant's innocence. In addition to the general rule, however, a variety of specific limitations disqualify witnesses who are fully able and willing to testify from personal knowledge. For present purposes, the specific disabilities may be divided into two groups: those designed to avoid untrustworthy testimony and those designed to further independent public interests (*e.g.*, the confidentiality of jury deliberations).

The disabilities apply in civil and criminal cases, both to witnesses for the plaintiff and to witnesses for the defendant. They present no problems under the compulsory process clause when applied to witnesses in civil cases or to prosecution witnesses in criminal cases. The question, however, is whether they are constitutional when applied in criminal cases to disqualify witnesses for the defense. The answer, as proposed in the following discussion, is that a rule of competency that disqualifies a material witness from testifying for the defense is invalid unless the testimony is so untrustworthy as to be a waste of the jury's time, or its exclusion is necessary to further an important state interest that cannot be adequately satisfied by alternative means.

a. *Rules that disqualify witnesses to avoid untrustworthy testimony.* Rules in the first group declare witnesses incompetent on the ground that they are inherently untrustworthy. During the eighteenth and nineteenth centuries many such categorical disabilities were developed, based on irrebuttable presumptions that the testimony of certain witnesses was unreliable. Thus, witnesses were deemed incompetent if they were "interested" in the outcome of the case (*e.g.*, the defendant in a criminal case); "biased" in favor of one of the parties (*e.g.*, co-defendants in a criminal case); related to one of the parties; children under certain ages; physically disabled; mentally deficient; or morally defective (*e.g.*, convicted felons).²⁹⁹ Most such disabilities have been abolished or superseded by rules providing for

298. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 10 (2d ed. E. Cleary 1972) [hereinafter MCCORMICK].

299. See 2 J. WIGMORE, *supra* note 56, §§ 475-620.

individual determination of the testimonial capacity of particular witnesses.³⁰⁰ Children, for example, are no longer automatically disqualified because they are below a certain age; a particular child is incompetent only if an examination indicates that he is incapable of recollecting and communicating what he has observed.³⁰¹

Some categorical disabilities, however, survived until recently, and others still remain. The "accomplice rule" invalidated in *Washington*, for example, declared accomplices incompetent to testify for one another on the assumption that they would falsify their testimony to exonerate one another.³⁰² An analogous rule, disqualifying persons convicted of perjury, has devolved from the larger disqualification of persons convicted of infamous crimes.³⁰³ The assumption that convicted felons are too corrupt to be believed parallels the assumption that accomplices are too "interested" to be truthful. Although all states have now abolished the general disability for felons,³⁰⁴ several still retain the disqualification for persons convicted of perjury,³⁰⁵ on the ground that regardless of moral fitness experience has shown such persons to be unreliable precisely as to their sworn testimony.

The disqualification of perjurers is clearly invalid under the compulsory process clause if applied to preclude perjurers from testifying on behalf of criminal defendants.³⁰⁶ The similar ban on accomplices was invalidated in *Washington* as one of a group of "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."³⁰⁷ Both rules operate in the same categorical fashion by attempting to reduce the risk of untrustworthy testimony by disqualifying whole groups of witnesses who may or may not be unreliable.

300. See *id.* §§ 492-501.

301. In *Litzkuhn v. Clark*, 85 Ariz. 355, 339 P.2d 389 (1959), for example, a statute created a presumption against the competence of children under ten, but the court held that a child of five could testify if she were determined capable of observing facts and relating them accurately. For the current rules for insane persons see 2 J. WIGMORE, *supra* note 56, § 492, at 584.

302. 388 U.S. at 21. See 2 J. WIGMORE, *supra* note 56, § 580; text at notes 198-99 *supra*.

303. MCCORMICK, *supra* note 298, § 64.

304. *Id.*

305. See, e.g., ALA. CODE tit. 7, § 434 (Recomp. 1960); KY. REV. STAT. § 421.090 (1970); MD. ANN. CODE art. 35, § 1 (Supp. 1973); MISS. CODE ANN. § 13-1-11 (1972); N.D. CENT. CODE § 31-01-08 (1960); OKLA. STAT. ANN. tit. 21, § 505 (1958); PA. STAT. ANN. tit. 19, § 682 (1964); S.D. COMP. LAWS tit. 19, § 1-4 (1967); VT. STAT. ANN. tit. 12, § 1608 (1958); WASH. REV. CODE § 5.60.040 (1956).

306. Cf. MCCORMICK, *supra* note 298, § 64. In *Holman v. Lawhon*, 362 F.2d 1 (5th Cir. 1966), the compulsory process issue was stated but not decided because the error was deemed harmless.

307. 388 U.S. at 22. See text at notes 198-201 *supra*.

Each is "arbitrary," because the state can adequately satisfy its interests by a less burdensome alternative, namely, by permitting the witness to testify under oath subject to cross-examination, leaving the weight and credibility of his testimony to the jury.³⁰⁸

Washington's importance lies not in disposing of the few categorical disabilities that remain, but in determining the *standard* to apply in deciding whether an individual witness is capable of testifying in a particular case.³⁰⁹ Unfortunately, given the general satisfaction with the prevailing procedure of examining each witness individually, too little attention has been given the standard that courts should apply in determining individual competence. The leading authority goes so far as to state that the courts have "very properly" declined to lay down any more than generalized rules of competence, and suggests leaving the standard to the unreviewable discretion of the trial court.³¹⁰ Such a conclusion, however, ignores the clear implication of *Washington*: If disqualification of whole groups of defense witnesses by means of arbitrary categories is unconstitutional, then disqualification of individual witnesses by means of arbitrary standards is equally impermissible. It would be unconstitutional, for example, to disqualify a child from testifying for the defense on the ground that he lacked a perfect memory, or that he lacked the ability to express himself as well as an English professor. To disqualify the child under such a standard would be unconstitutional for the same reason that it was improper to disqualify the accomplice in *Washington*: It prevents the jury from hearing a material witness for the defense whose testimony may well be reliable. The present task, therefore, is to define a standard of competence for individual witnesses that is consistent with the purpose of the compulsory process clause.

As with many guarantees, the standard is not explicitly stated in the Constitution. Nor was it clearly set forth in *Washington*: The Court there dealt with a categorical rather than an individual disqualification. But the standard is implicit in the *Washington* analysis.

308. See notes 200-01 *supra* and accompanying text.

309. The Court in *Washington* distinguished the Texas accomplice rule from "nonarbitrary" rules that disqualify witnesses "who, because of infirmity or infancy, are incapable of observing events or testifying about them." 388 U.S. at 23 n.21. This approving reference was presumably to those rules of competence that disqualify witnesses only after individual examination shows them to be unreliable. By 1967, when *Washington* was decided, the categorical rules concerning infants and the insane had been replaced by rules of individualized competence. See 2 J. WIGMORE, *supra* note 56, § 488, at 525 n.2.

310. 2 J. WIGMORE, *supra* note 56, § 496, at 588. See also Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 56 (1965).

The Court held the accomplice rule invalid because it imposed an unnecessary burden on the defendant's right to present a defense—unnecessary because the state could have protected itself from unreliable testimony without disqualifying the accomplice, simply by leaving the credibility of his testimony to the jury. Such a result implicitly assumes that perjury penalties, vigorous cross-examination, and cautionary instructions are adequate, by constitutional standards, to safeguard the state's interests.

That the jury is deemed an adequate measurer of credibility bears directly on the standard for determining the competence of defense witnesses. It means that the defendant has a right to present any witness whose credibility is genuinely at issue, and that witnesses cannot be barred from testifying on his behalf unless they are so untrustworthy as to provide no basis short of pure speculation for evaluating their testimony.

b. *Rules that disqualify witnesses to further independent state interests.* Rules in the second group declare witnesses incompetent for reasons unrelated to their reliability. Included are rules that disqualify spouses from testifying against one another,³¹¹ jurors from testifying about their deliberations,³¹² judges from testifying in trials over which they preside,³¹³ and lawyers from testifying in cases in which they serve as counsel.³¹⁴ These rules do not assume that the witnesses are unreliable. Indeed, that the witnesses are inherently believable, and therefore sought after, partly explains the perceived necessity to protect them from being called.

The reasons for such disqualifications vary. Spouses are declared

311. See, e.g., IOWA CODE ANN. § 622.7 (1946). The defendant under such statutes would be unable to call the wife of another man to give exculpatory testimony in his case if her testimony would incriminate her husband. See, e.g., *State v. Smith*, 24 N.C. (2 Ired.) 284 (1842); *State v. Bradley*, 9 Rich. 168 (S.C. Ct. App. 1855). These incompetency statutes should be distinguished from the rule, now everywhere abolished, that once prevented wives from testifying for their husbands. See *Funk v. United States*, 290 U.S. 371 (1933). They should also be distinguished from statutes giving spouses a privilege not to testify against one another, or a privilege to conceal their marital communications. For a discussion of the impact of compulsory process on testimonial privileges see section III E *infra*.

312. See, e.g., Rules of Evidence for United States Courts and Magistrates, rule 606, 56 F.R.D. 183, 264 (1972) [hereinafter Proposed Fed. R. Evid.]. The Rules were promulgated by the Supreme Court on November 20, 1972, pursuant to the Rules Enabling Act, 28 U.S.C. § 2072 (1970), but Congress passed a statute requiring express congressional approval before they take effect. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. The House, after extensive hearings, has passed such a bill, H.R. 5463, 93d Cong., 1st Sess. (1973), which now awaits passage by the Senate. For a recent discussion see Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9 (1974).

313. Proposed Fed. R. Evid. 605, *supra* note 312.

314. See Annot., 54 A.L.R.3d 100 (1973); Annot., 52 A.L.R.3d 887 (1973).

incompetent to testify adversely about one another (even if their testimony would exculpate the defendant) in order to preserve the harmony of their marriage; jurors are incompetent to testify about their deliberations to spare them the harassment of unhappy litigants; lawyers and judges are incompetent to testify in trials in which they appear professionally to spare them inconvenience and possible conflicts of interest. In each case, the disqualification, like a testimonial privilege, is designed to protect independent relationships that have no direct bearing on the integrity of the fact-finding process.

To decide whether the rules can validly preclude material witnesses from testifying for the defense one must determine whether the disqualification is necessary to achieve its particular goal.³¹⁵ The prevailing standard, again, derives from *Washington*: The state may not use disqualification to further its independent interests if less drastic means are available.³¹⁶

This is not the place to analyze each rule separately to determine whether other means, short of disqualification, would adequately serve the same purpose. The purposes and the alternatives vary from rule to rule. Some problems are more easily solved than others. When the defendant wishes to call a presiding judge or a lawyer as a witness, for example, a more appropriate alternative than disqualification would be to declare a mistrial and begin the proceedings with a new judge or new counsel, thus permitting the defendant to call the witness.

A more difficult question is whether disqualification is a proper instrument to use to force defendants to comply with rules of criminal discovery. The Supreme Court has twice refused to decide whether a state may punish disregard of a notice-of-alibi statute by prohibiting the defendant from calling an alibi witness whose identity he has concealed from the prosecution.³¹⁷ The question raised

315. See, e.g., *People v. Smith*, 13 Cal. App. 3d 897, 91 Cal. Rptr. 786 (1970); *Commonwealth v. Gatewood*, 221 Pa. Super. 399, 293 A.2d 80 (1972); *State v. Lee*, 203 S.C. 536, 28 S.E.2d 402 (1943); *State v. Stiltner*, 61 Wash. 2d 102, 377 P.2d 252 (1962), cert. denied, 380 U.S. 924 (1965).

316. Cf. text at notes 200-01 *supra*.

317. *Wardius v. Oregon*, 412 U.S. 470, 472 n.4 (1973); *Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970). Notice is intended to permit the state adequate time to guard against fabricated alibis. An example of a typical notice-of-alibi statute, requiring the defendant to disclose the nature of his alibi and his intended alibi witnesses, is Proposed Rule 12.1 of the Federal Rules of Criminal Procedure, adopted by the Supreme Court on August 1, 1974, 62 F.R.D. 271, 292-93, postponed by Congress until August 1, 1975. See Act of July 30, 1974, Pub. L. No. 93-361 — Stat. —, in 15 CRIM. L. REP. 2460 (Aug. 28, 1974). Some of the state provisions give the trial judge discretion to exclude the alibi witnesses, e.g., FLA. R. CRIM. P. 1.200 (1967); others require the judge to do so, e.g., KAN. STAT. ANN. § 22-3218(4) (Supp. 1971);

by such a sanction is whether adequate alternatives exist to encourage pretrial disclosure of the alibi without precluding alibi witnesses from being heard.³¹⁸ The less drastic alternative need not be equally efficient, so long as it is *adequate*. *Washington* did not suggest that a jury determination of the accomplice's credibility was as efficient in avoiding perjury as disqualifying the witness; the state would obviously prefer disqualification because it is fool-proof. By requiring the accomplice to be heard, however, the Court implicitly held that screening by the jury was an adequate alternative, and that the added effectiveness, if any, of disqualification did not justify the additional burden it imposes on the defendant.³¹⁹

Washington's standard applies to the use of disqualification to enforce the alibi rule. Where the defense fails to disclose its alibi witnesses because of excusable neglect, or because the witnesses were unknown at the time, a short continuance should be enough for the prosecution; since the essential purpose of the notice-of-alibi statutes is to give the prosecution a short time to prepare its rebuttal, a continuance should avoid any prejudice. Where the failure is due to deliberate misconduct by the defense attorney, a contempt citation³²⁰ or a grievance complaint before his bar association would be a sufficient sanction.³²¹ Where the defendant's own deliberate misconduct is the cause, a contempt citation or comment on the credibility of the concealed witness would provide adequate safeguards.³²² In some

still others limit the judge to the granting of continuances. *E.g.*, OKLA. STAT. ANN. tit. 22, § 585 (1969). Disqualification, when applied, is used not to eliminate unreliable witnesses but as a sanction to punish the defendant (and to deter future defendants) for violating the rule.

318. For an excellent analysis of the problem in light of *Washington v. Texas* see Comment, *supra* note 181.

319. See generally Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 467-68 (1969).

320. See Comment, *supra* note 181, at 1359-60.

321. Cf. *Braswell v. Florida*, 400 U.S. 873 (1970) (Black, J., dissenting), *denying cert.* to 230 S.2d 192 (Fla. Dist. Ct. App. 1970); *Braswell v. Wainwright*, 463 F.2d 1148, 1154-56 (5th Cir. 1972).

322. Cf. *State v. Leong*, 51 Hawaii 581, 465 P.2d 560 (1970) (The witness remained in the courtroom after the judge announced that "any person who may be a witness in this case must leave the courtroom . . ." Held: "[T]he proper recourse against a witness who violates an order excluding witnesses should be by contempt proceeding for such conduct." 51 Hawaii at 586, 465 P.2d at 563.). For a survey of "exclusion of witness" rules see Annot., 14 A.L.R.3d 16 (1967).

It is not enough to say that a defendant who deliberately violates his disclosure obligations thereby "waives" his right to present evidence. The defendant is not making a free choice between concealing the witness' identity and putting the witness on the stand: The choice is imposed by the state, without regard to his personal preferences. The question, therefore, is whether a mandatory choice is "necessary" to further a legitimate state interest. It would appear that the choice is unnecessary

cases a combination of sanctions may be appropriate. Whatever the particular sanction or combination of sanctions utilized to deter non-compliance with the rule, total preclusion of exculpatory evidence is unnecessarily harsh.

2. *Rules of Practice that Discourage Witnesses from Taking the Stand*

The right to present a defense can be frustrated not only by rules of competence, but by rules of procedure that effectively keep defense witnesses off the stand. The injury to the accused is the same whether his witnesses are disqualified or effectively intimidated into silence. Compulsory process thus prohibits deliberate harassment,³²³ incarceration,³²⁴ and removal³²⁵ of defense witnesses when done to prevent them from testifying. There are legitimate practices, however, such as penalties for perjury and vigorous cross-examination, that probably also discourage witnesses from testifying for the defendant. The task, therefore, is to find a constitutional standard to distinguish illegal intimidation from legitimate dissuasion.

a. *The prevailing standard.* The standard for evaluating procedural rules is not different from the standard for rules of competence. The question in each case is whether the state has a good reason to deny the defendant the benefit of exculpatory testimony. One could probably derive the standard indirectly from the competency cases, but the Supreme Court has made that unnecessary by its decision in *Webb v. Texas*.³²⁶ The Court in *Webb* reversed a state conviction because the trial judge had used such "unnecessarily strong terms" in warning a defense witness about the consequences of perjury that he "effectively drove that witness off the stand."³²⁷

The only witness who was prepared to testify for the defense had a prior criminal record and was currently serving a prison sentence. The judge implied that he did not trust the witness to tell the truth; he advised the witness of his right to remain silent, and warned him

if sanctions less than disqualification would adequately induce defendants to comply with their disclosure obligations. The state has no legitimate interest in imposing the sanction of disqualification on possibly innocent defendants if lesser sanctions (e.g., contempt) would serve its purposes without preventing the innocent from exculpating themselves.

323. See, e.g., *People v. Pena*, 383 Mich. 402, 175 N.W.2d 767 (1970); *State v. Kearney*, 11 Wash. App. 394, 523 P.2d 443 (1974).

324. See, e.g., *Bray v. Peyton*, 429 F.2d 500 (4th Cir. 1970).

325. See, e.g., *United States v. Mendez-Rodriguez*, 450 F.2d 1, 4-5 (9th Cir. 1971).

326. 409 U.S. 95 (1972).

327. 409 U.S. at 98. The Court reversed the judgment below per curiam without hearing oral argument. Justices Blackmun and Rehnquist dissented.

that if he insisted on testifying and committed perjury the judge would personally ensure that he was prosecuted and punished. The witness, after hearing the judge's remarks, changed his mind and refused to testify. The Supreme Court, quoting from *Washington* without explicitly mentioning compulsory process,³²⁸ reversed the defendant's conviction because "[i]n the circumstances of this case" the judge's remarks deprived the defendant of due process.³²⁹ The threats were harsher than necessary to advise the witness of his obligation to tell the truth.

While the Court quoted the judge's warning, it did not examine the particular words to determine whether less coercive terms might have adequately served the state's purpose; nor did it compare the warning with admonitions administered in other jurisdictions. Instead, the Court concluded that the warning was "unnecessarily" harsh from the fact that it was administered solely to the one witness for the defense, while "none of the witnesses for the state had been so admonished."³³⁰ The warning discriminated against the defendant by imposing special burdens on his witnesses not imposed equally on witnesses for the prosecution. This discrimination was sufficient to shift to the state the burden of justifying the "necessity" for the warning. Absent an explanation, the Court concluded that the state itself did not consider the warning very important, much less "necessary" to accomplish its purposes.³³¹

The standard to be derived from *Webb* is that a practice that effectively deters a material witness from testifying is invalid unless "necessary" to accomplish a legitimate state interest. Some rules of practice would undoubtedly pass the "necessary" test: Promising a defendant lenient treatment in return for a guilty plea, for example, discourages the defendant from going to trial with his defense; yet it is constitutional because it is "necessary" to avoid overloading trial courts with criminal cases.³³²

328. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . ." 409 U.S. at 98, quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967).

329. 409 U.S. at 98.

330. 409 U.S. at 96.

331. The compulsory process clause was designed in part to equalize the "balance of advantage" between the state and the defense with respect to the presentation of their cases through witnesses. See section III F *infra*. Where a rule discriminates against the accused with respect to witnesses, it thus carries a presumption of invalidity that the state has the burden of rebutting.

332. See *Brady v. United States*, 397 U.S. 742, 748, 750-53 (1970). The same standard also permits the state to follow rules of practice that discourage the defendant from testifying as a witness in his own behalf. In *McGautha v. California*, 402 U.S. 183,

The more important part of *Webb*, however, is the test it used in deciding whether the admonition actually *caused* the witness to withdraw. While a rule of competence directly prevents the witness from testifying, a rule of practice may or may not be the real cause of his silence. The lower court in *Webb* held that the defendant failed to sustain his burden of "showing that the witness had been intimidated by the admonition or had refused to testify because of it."³³³ The Supreme Court reversed that finding by shifting the burden of proof on the issue of causation. It was enough to show that the witness appeared willing to testify until receiving the warning and then withdrew.³³⁴ Once the defendant demonstrated that "the unnecessarily strong terms by the judge *could well have* exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify,"³³⁵ the burden shifted to the state to demonstrate the contrary.

b. *The problem of joinder.* The most pervasive rules for driving prospective defense witnesses from the stand are rules of joinder. Most jurisdictions provide that defendants charged with offenses arising from the same transaction can be tried together.³³⁶ Joinder is a rule of convenience designed to expedite trials, reduce congested criminal dockets, conserve judicial and prosecutorial time, lessen the number of jurors called, and spare witnesses multiple appearances.³³⁷ Indeed, because of the public interest in having joint trials the defendant usually bears the burden of demonstrating prejudice resulting from a joint trial.³³⁸

As a procedural convenience, however, the state's interest in joinder must yield when it conflicts with the defendant's constitutional rights. Conflict can arise in several ways. For instance, a defendant may challenge joinder as denying his right of confrontation when an out-of-court statement, otherwise properly used against his co-defendant, also incriminates him without affording an opportunity

208-20 (1971), the Court held that the state's legitimate interest in having a unitary jury trial on the separate issues of guilt and sentence made it necessary to put the defendant to a choice that, in some cases, would discourage him from testifying on the issue of sentence for fear of incriminating himself on the issue of guilt.

333. 409 U.S. at 97.

334. 409 U.S. at 97.

335. 409 U.S. at 98 (emphasis added).

336. See generally Note, *Joinder of Defendants in Criminal Prosecutions*, 42 N.Y.U. L. REV. 513, 513-14 (1967).

337. See *Parker v. United States*, 404 F.2d 1193, 1196 (9th Cir. 1969).

338. See 1 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 223 (1969).

for cross-examination.³³⁹ Conversely, joinder may conflict with the defendant's right of compulsory process when witnesses who would otherwise testify become unwilling or unable to testify for him at a joint trial. The defendant in that case can challenge the joinder for driving his witnesses from the stand.³⁴⁰

Joinder is also improper when it deprives the defendant of exculpatory evidence that, although admissible with respect to him alone, is kept out of the joint trial because its admission would improperly prejudice his co-defendants. *Byrd v. Wainwright*³⁴¹ involved a defendant tried with co-defendants who had given pretrial confessions that tended to exculpate him. Although the confessions were voluntary and probative, the co-defendants were able to exclude them from the joint trial on *Miranda* grounds. The Fifth Circuit court of appeals reversed the defendant's conviction, holding that joinder had violated his constitutional right to present a defense by depriving him of exculpatory testimony that would have been admissible in his behalf at a separate trial.³⁴²

More typically, joinder may deprive a defendant of testimony by co-defendants who, while willing to testify for him at a separate proceeding, refuse to take the stand at a joint trial. Thus, in *United States v. Shuford*,³⁴³ a co-defendant admitted that, although he could exculpate the defendant, he would not testify at his own trial for fear that impeaching evidence would prejudice the jury against him. The court held that the joinder was improper because it effectively discouraged a willing and material witness from testifying for the defense.³⁴⁴

The principal difficulty in such cases is deciding whether joinder is the real cause of the co-defendant's silence: Would he remain silent

339. See *Bruton v. United States*, 391 U.S. 123 (1968).

340. *Talavera v. State*, 243 S.2d 595 (Fla. 1971); *People v. Owens*, 22 N.Y.2d 93, 97-98, 291 N.Y.S.2d 313, 316-17, 238 N.E.2d 715, 718 (1968); *People v. Wells*, 272 N.Y. 215, 5 N.E.2d 206 (1936). Cf. *People v. Sher*, 69 Misc. 2d 847, 851, 331 N.Y.S.2d 166, 170-71 (1972); *Commonwealth v. Greene*, 445 Pa. 228, 232-33, 285 A.2d 865, 867 (1971) (Roberts, J., dissenting). But see *People v. Isenor*, 17 Cal. App. 3d 324, 334-36, 94 Cal. Rptr. 746, 753-54 (4th Dist. 1971).

341. 428 F.2d 1017 (5th Cir. 1970).

342. 428 F.2d at 1021. Cf. *United States v. Martinez*, 486 F.2d 15, 22-23 (5th Cir. 1973) (nonconstitutional grounds).

343. 454 F.2d 772 (4th Cir. 1971).

344. "We think that the denial of the severance, resulting in withholding this witness' testimony on such a critical point, so tipped the scales against [the defendant] that he failed to receive a fair trial." 454 F.2d at 777. Joinder of offenses can also deprive the defendant of a witness if it deters him from testifying in his own behalf on one offense for fear of prejudicing himself on the other. See *Cross v. United States*, 335 F.2d 987 (D.C. Cir. 1964).

even at a separate proceeding? Courts have thus far treated such claims for severance with considerable skepticism.³⁴⁵ To require the defendant to demonstrate to a certainty that joinder silenced his co-defendant, however, would seem to conflict with the *Webb* standard. *Webb* held that a warning that "could" intimidate would be presumed to intimidate, absent a showing to the contrary. Accordingly, once the defendant shows that his co-defendant may be able to exculpate him—either by showing that the co-defendant has already exculpated him out of court³⁴⁶ or by reference to the nature of the offense³⁴⁷—and that joinder "could" tend to silence the witness, the burden should shift to the government to demonstrate that joinder would have no such effect. The defendant is entitled to severance whenever it is "more likely than not,"³⁴⁸ or there is a "substantially greater likelihood,"³⁴⁹ that his co-defendant would testify for him at a separate proceeding.

Finally, joinder may deny the accused the benefit of a favorable inference from his co-defendant's invocation of the privilege against self-incrimination. A co-defendant cannot be compelled at his own trial to take the stand or to testify against himself. Nor can any inference be drawn at his own trial from his refusal to testify.³⁵⁰ Accordingly, in a joint trial a defendant may lose the benefit of any natural inference that might otherwise arise from a co-defendant's refusal to testify. Tried separately, on the other hand, the defendant is free to comment on his witness' refusal to testify, for the inference does not violate the witness' privilege unless the witness himself is on trial.³⁵¹ In short, in so far as joinder deprives the defendant of

345. 1 C. WRIGHT, *supra* note 338, § 225, at 458 & nn.82-83.

346. *See, e.g.*, *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965).

347. *See, e.g.*, *de Luna v. United States*, 308 F.2d 140 (5th Cir. 1962) (only one of two co-defendants was likely to be guilty, and each was the only witness able to exculpate the other).

348. *United States v. Echeles*, 352 F.2d 892, 898 (7th Cir. 1965): "Speculation about what [the co-defendant] might do at a later Echeles trial undoubtedly would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that [the co-defendant] would testify in his behalf merely because that eventuality was not a certainty."

349. *United States v. Gleason*, 259 F. Supp. 282, 285 (S.D.N.Y. 1966).

350. *See Griffin v. California*, 380 U.S. 609 (1965).

351. It can be argued that just as the prosecution cannot draw an inference against the accused because a witness who should favor him remains silent, the defendant should not be able to draw an inference in his favor when a witness who should favor the state remains silent. *See Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970). The situations, however, are not comparable. An inference drawn against the accused because of a witness' silence would deprive the defendant of his constitutional right to cross-examine the witness about the inference. *See Cota v. Eyman*, 453 F.2d 691, 696-97 & n.5 (9th Cir. 1971) (Browning, J., dissenting). An inference may be

favorable inferences, it may abridge his right of compulsory process.³⁵²

The favorable inference problem arises where two co-defendants present mutually inconsistent defenses and only one is willing to testify in support of his defense.³⁵³ *De Luna v. United States*³⁵⁴ is an example. Defendants de Luna and Gomez were jointly tried for possessing narcotics. Although each claimed that his co-defendant was the culprit, only Gomez was willing to testify in his own defense. In doing so, he urged the jury to draw an inference against de Luna and in his own favor from de Luna's refusal to testify. The Fifth Circuit court of appeals reversed de Luna's conviction on the ground that comment on his silence violated his privilege against self-incrimination. Yet it observed that Gomez had a constitutional right to benefit from any favorable inference that might be drawn from de Luna's silence:

These were not casual or isolated references; they were integral to Gomez's defense. And considering the case from Gomez's point of view, his attorneys should be free to draw all rational inferences from the failure of a co-defendant to testify, just as an attorney is free to comment on the effect of any interested party's failure to produce any material evidence in his possession or to call witnesses who have knowledge of pertinent facts. Gomez has rights as well as de Luna, and they should be no less than if he were prosecuted singly. His right to confrontation allows him to invoke every inference from de Luna's absence from the stand.³⁵⁵

The court was correct in holding that the right to a favorable inference has a constitutional basis, but mistaken in concluding that it derives from the "right of confrontation."³⁵⁶ Confrontation gives the accused the right to be brought face to face with the witnesses whose testimony is used against him. The defendant Gomez did not suggest that de Luna was a witness "against him" whom the prosecution had to produce for cross-examination. On the contrary, he argued

drawn in favor of the accused because the prosecution has no right of confrontation to cross-examine the witness to test the inference. See *Bowles v. United States*, 439 F.2d 536, 545 (D.C. Cir. 1970) (Bazelon, J., dissenting).

352. Cf. *United States v. Beye*, 445 F.2d 1037, 1040 (9th Cir. 1971) (Ely, J., dissenting); *Talavera v. State*, 243 S.2d 595 (Fla. 1971); *Commonwealth v. Greene*, 445 Pa. 228, 232-33, 285 A.2d 865, 867 (Roberts, J., dissenting).

353. See *United States v. Nakaladski*, 481 F.2d 289, 302 (5th Cir. 1973). *Contra*, *United States v. Marques*, 319 F. Supp. 1016 (S.D.N.Y. 1970) (Weinfeld, J.) (assertion of privilege against self-incrimination never carries an implication of guilt).

354. 308 F.2d 140 (5th Cir. 1962).

355. 308 F.2d at 143.

356. See *United States v. Beye*, 445 F.2d 1037, 1044 n.8 (9th Cir. 1971) (Ely, J., dissenting).

that he had an affirmative right to produce de Luna as a witness for the defense; he argued that he had a right to present de Luna's testimonial silence as evidence "in his favor." Accordingly, it was his right to compulsory process for witnesses in his favor, rather than his right to confront the witnesses against him, that supported his right to present the favorable inference and to claim a separate trial for that purpose.³⁵⁷

c. *The problem of trial order.* Another practice that discourages witnesses from testifying for the defense is the scheduling of trials. A defendant may argue that if his case were severed and he were tried *after* his co-defendants, they would testify in his favor. The argument assumes that the co-defendants would exculpate the defendant were they not fearful of incriminating themselves; that once acquitted or convicted, their privilege of remaining silent disappears; and that once their privilege disappears, they can be compelled to testify for the defense.

The argument raises several problems. Whether the co-defendants are likely to exculpate the accused may be difficult to determine in advance; the claim may simply be a ruse for delay. Furthermore, delay of the defendant's trial may be indefinite. Even if the co-defendant's privilege against self-incrimination does not survive a plea of guilty or an acquittal, it survives a mistrial and probably survives a conviction, so long as appeals and collateral relief are available. Consequently, even were the court prepared to postpone the defendant's trial until after his co-defendants had been tried, it could not assume that they would then be available to testify.

Nonetheless, where a certain sequence of trials is demonstrably likely to deny the accused an exculpatory witness, the court's ordinary discretion over trial order must yield to the commands of the compulsory process clause. For that reason some states specifically provide that where the state's evidence against one of two co-defendants in a joint trial is insufficient, the trial judge may acquit him at the close of the state's case, thus making him "competent" to testify for the defense.³⁵⁸

Since the state's interest in trial sequence is largely tactical, a lesser showing of need should suffice to obtain a later trial than to obtain a severance. A showing that the co-defendant has already

357. Cf. text at note 340 *supra*. If the analysis above is correct, it casts doubt on the constitutionality of Proposed Federal Rule of Evidence 513, *supra* note 312, which would prohibit a criminal defendant from commenting upon or seeking an inference from a witness' assertion of privilege.

358. See, e.g., ALA. CODE tit. 15, § 309 (Recomp. 1959).

made out-of-court statements exculpating the defendant, for example,³⁵⁹ or that the co-defendant is about to plead guilty³⁶⁰ (particularly where there is additional exculpatory evidence) should justify the delay. The circumstances of the offense may also justify proceeding first against the co-defendant. Thus, where the defendants are minor figures in a conspiracy who are relying on the principal figure to exculpate them, the trial court may order the principal defendant tried first and further supervise the trial sequence in order to minimize the likelihood of prejudice to any defendant.³⁶¹ Judicial discretion over trial sequence, as with all discretion, should be exercised wherever possible to afford defendants an opportunity to obtain witnesses in their favor.³⁶²

C. *The Right To Have Defense Witnesses Believed*

The ability to put defense witnesses on the stand is important only if their testimony can be properly received by the jury. Rules of competence that once disqualified witnesses have increasingly given way to the general rule that all persons are competent, and that their particular infirmities instead affect the weight and credibility of their testimony. Accordingly, comments and cautionary instructions on credibility have come to have a greater impact on the defendant's case than questions of competence.³⁶³

Rules of credibility can have an impact similar to rules that discourage defense witnesses from taking the stand.³⁶⁴ Consider the threatening remarks of the judge in *Webb*, who implied that he expected the witness to commit perjury.³⁶⁵ Such remarks can have one of two effects: They either wrongfully keep the witness off the

359. See *United States v. Echeles*, 352 F.2d 892, 898 (7th Cir. 1965): "[W]e do not feel it would have been egregious had the trial judge, after granting the motion for separate trial, also directed the Government to proceed first with the case against [the co-defendant]."

360. See *Byrd v. Wainwright*, 428 F.2d 1017, 1022 (5th Cir. 1970).

361. See, e.g., *United States v. Sanders*, 266 F. Supp. 615, 622 (W.D. La. 1967). In *Feehery v. State*, 480 S.W.2d 649 (Tex. Crim. App. 1972), the court considered ordering a more favorable sequence of trials but concluded that even if the co-defendant had testified for the defense his testimony would not have been material.

362. *Flint v. Mullen*, 499 F.2d 100, 105-06 (1st Cir. 1974) (Coffin, J., dissenting) (hearing on revocation of defendant's probation should have been scheduled after his pending criminal trial to enable him to testify in his own behalf at the revocation hearing without fear of incriminating himself). Cf. *United States v. Kordel*, 397 U.S. 1, 8-9 (1970) ("appropriate" to delay a civil proceeding until termination of a related criminal proceeding, if delay would enable the civil parties to obtain testimony from witnesses who might otherwise invoke their privilege against self-incrimination).

363. *Weihsfen*, *supra* note 310, at 90.

364. See text at notes 323-35 *supra*.

365. See text at notes 327-28 *supra*.

stand by discouraging him from testifying,³⁶⁶ or, if he does testify and the jury hears the remarks, wrongfully diminish the credibility of his testimony.³⁶⁷

Compulsory process is unquestionably concerned with the credibility of defense witnesses. One of its principal purposes was to eliminate the imbalance in credibility resulting from the former practice of prohibiting defense witnesses from giving sworn testimony.³⁶⁸ It guarantees the defendant the right to place his witnesses under oath so that their testimony might carry the same weight and credibility as sworn testimony for the state. The question, therefore, is not whether the compulsory process clause applies to rules governing the credibility of defense witnesses, but what its standards are for evaluating such rules.

The Supreme Court set at least a minimum standard in *Cool v. United States*³⁶⁹ by invalidating two jury instructions on the credibility of a defense witness. The defendant's sole witness, an alleged accomplice, testified that the defendant was innocent of any responsibility for the crime. The trial court instructed the jury that it should disbelieve the accomplice unless it found his testimony true beyond a reasonable doubt.³⁷⁰ The court instructed further that the uncorroborated testimony of an accomplice is enough to support conviction, without revealing that such uncorroborated testimony will also support acquittal. The Supreme Court reversed the defendant's conviction, holding that the first instruction violated the defendant's "Sixth Amendment right . . . to present exculpatory testimony,"³⁷¹ and that the second instruction was "fundamentally unfair."³⁷²

While the Court did not articulate a governing standard in *Cool*, the two instructions were presumably invalid under the compulsory process clause because they arbitrarily discriminated against a defense witness with respect to his credibility. The first instruction, requiring the jury to disregard the exculpatory testimony unless the jury found it true beyond a reasonable doubt, was invalid because it required the defense witness to satisfy a higher threshold of credibility than that required of prosecution witnesses. The second in-

366. Cf. *Commonwealth v. Jennings*, 225 Pa. Super. 489, 311 A.2d 720 (1973).

367. Cf. *United States v. Hoker*, 483 F.2d 359 (5th Cir. 1973).

368. See text at notes 52-61, 117-27 *supra*.

369. 409 U.S. 100 (1972), decided the same day as *Webb*. As in *Webb*, the Court reversed the judgment below per curiam, without hearing argument, and the Chief Justice and Justices Blackmun and Rehnquist dissented.

370. 409 U.S. at 102-03 & n.3.

371. 409 U.S. at 104.

372. 409 U.S. at 103 n.4.

struction, implying that uncorroborated testimony was sufficient to convict but insufficient to acquit, was invalid because it suggested that the same testimony counted for more when offered for the prosecution than when offered for the defense. In either event the jury was denied the discretion to weigh credibility. The instructions made it more difficult, as a matter of law, for the defendant than for the prosecution to prevail. Both instructions unjustifiably rendered a witness for the defense less credible than one for the prosecution.

The discriminatory instructions in *Cool* were obviously invalid, because of their similarity to the former discrimination against the defendant with respect to sworn testimony and because the state made no effort to justify the discrimination.³⁷³ It is more difficult, however, to evaluate rules that, although applicable to prosecution and defense witnesses alike, unnecessarily discredit defense witnesses in individual cases. A good example is the rule allowing impeachment with evidence of prior crimes. This practice can drastically affect the defendant's case: It may deter him from calling witnesses, including himself, who have committed prior crimes,³⁷⁴ and may discredit the prior offenders who do testify in his favor.³⁷⁵ On the other hand, the fact that a rule of evidence may operate to discredit a defense witness is not enough to invalidate it, for the same thing occurs when a defense witness is impeached with prior inconsistent statements—a practice the Supreme Court has approved.³⁷⁶ Perhaps because some rules that discredit testimony are valid, some courts have concluded that as long as they are nondiscriminatory and leave some discretion to the jury, matters of credibility cannot be challenged on compulsory process grounds.³⁷⁷ That standard, however, produces the unacceptable result of permitting the jury in some cases to draw wholly arbitrary inferences against witnesses for the defense. The task, therefore, is to define the standard that distinguishes the proper impeachment of witnesses from their improper discrediting.

One standard would be to presume that impeaching evidence and cautionary instructions that effectively discredit defense witnesses

373. For a discussion of the state's burden to justify rules that discriminate against witnesses for the defense see text at notes 496-502 *infra*.

374. See *United States v. McCord*, 420 F.2d 255, 257 (D.C. Cir. 1969) (Bazelon, J.) (dictum).

375. See Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 774-78 (1961).

376. *Harris v. New York*, 401 U.S. 222, 226 (1971).

377. See, e.g., *United States v. Nolte*, 440 F.2d 1124, 1126-27 (5th Cir. 1971); *State v. Cartagena*, 40 Wis. 2d 213, 161 N.W.2d 392 (1968).

are invalid unless the state can demonstrate that they serve a significant probative purpose. Such a standard would permit impeachment of the defendant's witnesses with prior inconsistent statements, for that form of impeachment has been demonstrated to be the most effective way to show that a witness is lying or mistaken.³⁷⁸ However, it would not permit a defense witness to be impeached with evidence of prior crimes unless the state could demonstrate a significant link between the prior criminal conduct of a witness and his propensity to falsify testimony in an unrelated trial.³⁷⁹

The above standard is consistent with compulsory process analysis. The "alternative means" analysis implicit in *Washington* prohibits the state from furthering its interests by burdening constitutional rights where less drastic alternatives adequately serve its interests. A less drastic alternative is *adequate* by that analysis, even if less effective, if the added effectiveness of the more drastic alternative is insufficient to justify the latter's burden on constitutional rights. The analysis assumes, in other words, that constitutional rights cannot be burdened in the name of insignificant or incremental state interests. Unless the state can demonstrate a *significant* interest in using impeachment evidence and cautionary instructions to discredit a defendant's case, the incremental interest served by those devices must yield to the defendant's right to present a defense.³⁸⁰

D. *The Right To Introduce Exculpatory Evidence*

The defendant who has qualified his witnesses under an appropriate standard of credibility must next introduce their testimony into the record. While the accused has an admitted constitutional

378. See 3A J. WIGMORE, EVIDENCE § 1017, at 994-95 (J. Chadbourn rev. 1970).

379. See *People v. Jackson*, 391 Mich. 323, 343, 217 N.W.2d 22, 29 (1974) (Swainson, J., concurring). At least one court has held that impeaching a defendant with prior crimes abridges his constitutional right to testify in his own favor. *State v. Santiago*, 53 Hawaii 254, 492 P.2d 657 (1971). But cf. *Spencer v. Texas*, 385 U.S. 554 (1967), permitting introduction of evidence as to defendant's prior crimes for purposes of recidivism statute where jury was instructed that it should not consider the prior crimes as any evidence of the defendant's guilt on the charge on which he was being tried. The Court in *Spencer*, however, explicitly emphasized that it was not deciding whether such evidence is valid if it conflicts with one of the defendant's specific rights under the Bill of Rights. 385 U.S. at 565. The argument here is that the use of such evidence conflicts with his specific right to testify in his own favor and to call witnesses to testify in his behalf. Cf. *United States v. Henson*, 486 F.2d 1292, 1308 (D.C. Cir. 1973) (en banc) (dictum); *People v. Wilson*, 75 Misc. 2d 471, 474-76, 347 N.Y.S.2d 336, 340-42 (1973).

380. The incremental interest served by using the more drastic alternative comes at "too high a price." *Brooks v. Tennessee*, 406 U.S. 605, 620 (1972) (Rehnquist, J., dissenting) (discussing the effect of the order of proof, see text at notes 207-08 *supra*, on the defendant's right to testify in his own behalf). Cf. text at note 319 *supra*.

right to present evidence in his favor,³⁸¹ some confusion exists concerning both the source and scope of the right.

The right to offer evidence is usually held to be grounded in the due process clause, either because the controlling cases were decided before *Washington v. Texas* or because of faulty advocacy. The more precise source of the right is the compulsory process clause—the opportunity to place defense witnesses on the stand and have them heard includes a right to admit their testimony into evidence. Indeed, this conclusion follows directly from *Washington*. Since the state cannot apply an arbitrary rule of competence to exclude material witnesses from taking the stand, it may not apply a rule of evidence that places them on the stand but arbitrarily excludes material portions of their testimony. The effect is the same whether the exclusion nominally operates as a rule of “competence” or as a rule of “evidence.” The controlling issue in each case is whether the rule improperly precludes the trier of fact from considering material testimony in the defendant’s favor.

The more difficult problem is to define the scope of the defendant’s constitutional right to present evidence in the light of existing rules of evidence. For the purpose of analysis exclusionary rules of evidence fall into two (somewhat overlapping) categories: rules that exclude evidence because it is not probative and rules that exclude otherwise probative evidence because it is not sufficiently reliable. Rules in the first category, including standards of relevance and materiality, do not appear to raise compulsory process problems so long as the existing standards remain broadly defined.³⁸² The defendant has a constitutional right to present “witnesses in his favor.” Testimony that is irrelevant in the sense that it does not logically tend to exculpate him is not testimony “in his favor”; testimony that is immaterial in the sense that it—or the issue to which it relates—cannot effect the outcome of the case is testimony of no constitutional significance.

The serious constitutional problems arise with rules in the second group, which exclude otherwise probative evidence on the ground that it is unreliable. Included are the opinion rule, which excludes

381. See *Wolff v. McDonnell*, 42 U.S.L.W. 5190, 5198 (U.S. June 25, 1974); *Hamling v. United States*, 42 U.S.L.W. 5035, 5046 (U.S. June 25, 1974); *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) (opinion of Marshall, J.); *Specht v. Patterson*, 386 U.S. 605, 610 (1967); *In re Oliver*, 333 U.S. 257, 273 (1948). See also *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (“opportunity . . . to present witnesses and documentary evidence”).

382. State (and federal) standards of materiality and relevance could conflict with compulsory process if redefined so narrowly as to prevent the defendant from introducing probative evidence “in his favor” that might influence the outcome of the trial.

testimony not based on personal observation or first-hand knowledge; the best evidence rule, which excludes copies of writings offered as proof of their material terms; and, most importantly, the hearsay rule, which excludes out-of-court statements offered to support the truth of the statements made.

The controlling case in the area is *Chambers v. Mississippi*,³⁸³ in which the Supreme Court invalidated a state hearsay rule on the ground that it abridged the defendant's right "to present witnesses in his own defense."³⁸⁴ Chambers was tried for a murder to which a third person, McDonald, had repeatedly confessed out of court. When Chambers offered McDonald's confessions to prove his own innocence the trial court excluded them as hearsay. They did not fall within the *res gestae* exception because they were made a few hours after the murder; and they did not fall within the exception for declarations against interest because they were against McDonald's *penal* (rather than pecuniary) interest.³⁸⁵ Accordingly, by majority rule among the states, and by conventional hearsay standards, the confessions were unreliable and thus inadmissible.

The Supreme Court reversed Chambers' conviction, reasoning that when a state rule of evidence conflicts with the constitutional right of the accused "to present witnesses in his own defense," the rule must be measured by federal standards.³⁸⁶ Applying federal standards of reliability to the confessions, the Court concluded that they bore "persuasive assurances of trustworthiness"³⁸⁷ and must be admitted. For a variety of reasons developed below, it is difficult to derive a clear standard from *Chambers*, but it has been called potentially "the most important constitutional law case in the field of criminal evidence that has come down in the last few years."³⁸⁸ Broadly construed, it appears to recognize that the accused in a criminal proceeding has a constitutional right to introduce *any*

383. 410 U.S. 284 (1973). Justice White concurred separately. Justice Rehnquist dissented. This author argued the case for the petitioner in the Supreme Court.

384. 410 U.S. at 302. The Court cited *Washington* as the source of the defendant's right to present a defense, but spoke of it in terms of "due process" rather than compulsory process. There are several explanations: First, the author of the *Chambers* opinion, Justice Powell, opposes incorporating the specifics of the Bill of Rights into the due process clause of the fourteenth amendment. See *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (opinion of Powell, J.). Second, the defendant had not mentioned the compulsory process clause as the basis of the right in the court below.

385. 410 U.S. at 299.

386. 410 U.S. at 302.

387. 410 U.S. at 302 ("... and thus [were] well within the basic rationale of the exception for declarations against interest").

388. Proceedings of the 1973 Sentencing Institute for Superior Court Judges, 112 Cal. Rptr. app. 97 (1973) (remarks of Judge Otto M. Kaus).

exculpatory evidence, unless the state can demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth.

The first problem with *Chambers* is reconciling the significance of the holding with the self-effacing tone of the opinion: The decision that the defendant had a constitutional right to introduce evidence deemed inadmissible under state hearsay rules was unprecedented. Yet the opinion explicitly emphasizes that "we establish no new principles of constitutional law."³⁸⁹ If the contradiction between the decision and the opinion is indeed genuine, the legal profession will have to choose whether to follow what the Court did or what the Court said it was doing.

There are several ways to resolve the contradiction. Whether *Chambers* announces a "new" constitutional principle depends on whether the case is narrowly or broadly stated. While no state had previously been prohibited from applying hearsay rules to exclude evidence in the defendant's favor, the broad principle that prohibits a state from suppressing exculpatory evidence was not "new"; indeed, that was the precise holding in *Brady v. Maryland*.³⁹⁰ In that sense the Court could conclude that the result in *Chambers*, however unique, was the product of "old" and accepted doctrine.

Furthermore, in disavowing new "constitutional principles," the Court may simply have meant that it was deciding the case on its facts.³⁹¹ The Court, when it enters uncertain and unexplored territory, frequently limits its judgment to the particular facts under consideration.³⁹² This permits it to indicate what it believes to be the correct result without committing itself to a definitive rule for unforeseen variants of the immediate case, and allows lower courts and commentators to assist in refining the underlying "principles." In that sense, while making new law in the *Chambers* case itself, the Court did not use the case as a vehicle to announce new "principles." It left to others the task of defining the general principles underlying the law of that case.

The second question raised by *Chambers* is whether the discussion of exculpatory evidence, standing alone, is constitutionally supported. The case involved two separate errors: a refusal to permit the defendant to introduce exculpatory hearsay and a refusal to

389. 410 U.S. at 302.

390. See text at notes 241-51 *supra*.

391. "[W]e hold quite simply that under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial." 410 U.S. at 303.

392. See, e.g., *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969).

permit him to cross-examine the adverse testimony of one of his witnesses.³⁹³ The errors were essentially the converse of each other: The first was a denial of the defendant's sixth amendment right to present "witnesses in his favor" and the second a denial of his companion sixth amendment right to confront the "witnesses against him." Although the Court discussed the errors in those terms, it did not have to decide whether either error alone justified reversal; it simply held that the two errors combined to deprive the defendant of a "fair trial" under the due process clause.

To accept the consolidated decision too quickly, however, would be a mistake. The Court apparently blended the two constitutional arguments into a single "fair trial" decision for a procedural reason that had nothing to do with the independent nature of the arguments. The major weakness in the defendant's case was his delay in raising his constitutional objections in the state courts.³⁹⁴ Instead of making separate constitutional objections to the errors at the time they occurred, he waited until after the jury verdict, and then argued that the exclusion of exculpatory evidence and the denial of cross-examination combined to deprive him of a fair trial under the fourteenth amendment. Accordingly, without denying the dual bases of his contention, the Court evidently believed that the manner in which they had been raised required that they be treated as a single "fair trial" issue.³⁹⁵

393. Cross-examination was precluded by the state's "voucher" rule, a common law rule denying to a party the right to impeach his own witness. "The rule rests on the presumption—without regard to the circumstances of the particular case—that a party who calls a witness 'vouches for his credibility.'" 410 U.S. at 295.

394. The defendant made timely objections at trial to the various rulings on hearsay and cross-examination, but based his objections on state law. 410 U.S. at 304, 310. He asserted the federal constitutional ground only after the jury returned its verdict. Justices White and Rehnquist, each of whom filed a separate opinion on the issue, differed as to whether the defendant had properly raised his federal claims. Both assumed that the defendant had failed to make a "contemporaneous objection," but they differed as to whether such an objection was required by state law. Justice White, concurring, decided that state law did not require a contemporaneous objection. 410 U.S. at 307. Justice Rehnquist, dissenting, decided that state law did require such an objection. Both, however, were mistaken in their initial assumption that the defendant's failure to cite the Constitution during the trial was the failure to make a "contemporaneous objection." They confused the Mississippi requirement that an objection be *contemporaneous*—which the objections in *Chambers* surely were—with the additional requirement in some jurisdictions that the grounds for an objection be stated *specifically*. Whatever the scope of the contemporaneous-objection rule in Mississippi, it was fully satisfied by the defendant's general objections during trial. In short, the failure to cite the Constitution has no bearing on whether the federal claims were properly raised at trial unless it is shown that general objections are insufficient under Mississippi law, and that state law requires that objections be not only contemporaneous but specific.

395. 410 U.S. at 290 n.3.

The Court in fact implied that either constitutional error alone, if properly raised, would justify reversal. The Court divided its discussion of the "fair trial" issue into two distinct and self-contained sections—one dealing with the defendant's right to confront and cross-examine the witnesses against him, the other with the defendant's affirmative right to introduce evidence in his favor—and emphasized that each had independent support in the Constitution. Not surprisingly courts have concluded that the two bases of the opinion are independent.³⁹⁶

The third and final problem is to define the standard for testing the admissibility of evidence in the defendant's favor. Over the objection of the dissent to the "further constitutionalization of the intricacies of the common law of evidence,"³⁹⁷ the majority held that the defendant had a federal right—despite state hearsay rules to the contrary—to introduce hearsay statements deemed trustworthy by federal standards. Unfortunately the overwhelming reliability of the particular hearsay in *Chambers* makes it difficult to determine what the Court would do in cases involving more questionable evidence.

The out-of-court confessions by McDonald were inherently reliable for a variety of reasons: McDonald made his confessions spontaneously within a few hours of the murder; he made them to close acquaintances whom he had no reason to mislead; he gave the same confession to three different persons; he gave the confessions knowing that they were self-incriminating and likely to lead to criminal prosecution; his confessions were corroborated by eye-witness testimony that placed him at the scene of the crime, armed with what could have been the murder weapon; and he was present at trial and therefore available for cross-examination under oath about the truth of his extrajudicial statements.

McDonald's out-of-court confessions were so inherently reliable that, had they incriminated rather than exculpated Chambers, they could have been used against Chambers without violating his right of confrontation. The confrontation clause, in that sense, is the converse of the compulsory process clause: The latter guarantees the accused a basis for introducing evidence "in his favor," and the former guarantees the accused a basis for challenging the evidence

396. See, e.g., *United States v. Torres*, 477 F.2d 922 (9th Cir. 1973) (constitutional right to cross-examine adverse witness); *Kreisher v. State*, 303 A.2d 651 (Del. Super. 1973) (right to introduce hearsay); *Commonwealth v. Nash*, — Pa. —, 324 A.2d 344 (1974) (constitutional right to introduce exculpatory hearsay); *Commonwealth v. Hackett*, 225 Pa. Super. 22, 307 A.2d 334 (1973) (right to introduce hearsay).

397. 410 U.S. at 308 (Rehnquist, J., dissenting).

"against him."³⁹⁸ The confrontation clause creates a presumption in favor of cross-examination, and allows exceptions only where the unexamined statement against the accused carries such "indicia of reliability" that cross-examination would serve no additional purpose.³⁹⁹

In its confrontation cases the Court had already permitted use of the *Chambers* variety of hearsay against the accused. In *California v. Green*⁴⁰⁰ it approved use of out-of-court statements against the accused where the declarant is available for "full and effective cross-examination at the time of trial."⁴⁰¹ Similarly, a plurality in *Dutton v. Evans*⁴⁰² held that a spontaneous declaration against penal interest, corroborated by independent evidence and made without any apparent motive to mislead, could be used against the accused, because its inherent reliability made cross-examination unnecessary.⁴⁰³ The *Chambers* Court specifically referred to those earlier cases in rejecting the contention that McDonald's confessions were too unreliable to be admitted in favor of the accused.⁴⁰⁴

At the very least, therefore, *Chambers* stands for the proposition that evidence that is sufficiently reliable by constitutional standards to be introduced "against" the accused is sufficiently reliable to be introduced "in his favor." Read together with *Green* and *Dutton*, *Chambers* might also support a principle of mutuality, namely, that the measure of reliability is the same, whether viewed under the confrontation clause or the compulsory process clause: Evidence reliable enough to incriminate is also reliable enough to exculpate, and *only* that evidence reliable enough to incriminate is reliable enough to exculpate.⁴⁰⁵

398. "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (opinion of Stewart, J.), quoting *California v. Green*, 399 U.S. 149, 161 (1970).

399. "It is inconceivable that cross-examination could have shown that Williams was not in a position to know whether or not Evans was involved in the murder." *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970). See generally Davenport, *The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972).

400. 399 U.S. 149 (1970).

401. 399 U.S. at 158-59 (alternative holding). See also *Nelson v. O'Neil*, 402 U.S. 622, 626-27 (1971).

402. 400 U.S. 74 (1970).

403. See generally Comment, *The Uncertain Relationship Between the Hearsay Rule and the Confrontation Clause*, 52 TEXAS L. REV. 1167 (1974).

404. 410 U.S. at 300-01.

405. *United States v. Glenn*, 473 F.2d 191, 195 (D.C. Cir. 1972), and *Bowles*

Although mutuality has superficial charm, it ignores the differences between the right of confrontation and the right of compulsory process, and confuses their standards of reliability. The confrontation clause is a guarantee that the accused will be able to cross-examine the witnesses against him or, if not, that he will have a satisfactory substitute for testing the accuracy of their statements. Accordingly, when the state offers incriminating evidence against the accused that cannot be cross-examined, it must demonstrate that the evidence has such independent indicia of reliability that cross-examination would serve no real purpose.

The situation under the compulsory process clause is the converse. When the defendant offers critical evidence in his favor as part of his sixth amendment right to present a defense, he has no constitutional obligation to demonstrate its reliability. Nor has the prosecution a constitutional right to "confront" the defendant's evidence. To the contrary, the prosecution has a constitutional obligation to present some good reason for excluding exculpatory evidence. The prosecutor must show more than that the exculpatory evidence is inadmissible under a local rule; he must demonstrate that exclusion is necessary to further a compelling state interest.

The state undoubtedly has a legitimate interest in the reliability of criminal evidence. The question, however, is whether it may insist on using the rigorous standards of "confrontation" to test the reliability of the defendant's evidence. The high standard required by the confrontation clause for incriminating hearsay arises from a specific right of the accused. When the issue is the admissibility of exculpatory evidence the prosecution can assert no analogous right to offset the defendant's compulsory process guarantee. The test for exculpatory hearsay, therefore, should be whether an alternative to actual confrontation of the declarant will adequately serve the state's purposes without excluding the defendant's material evidence.

The prosecution has several alternatives. When a witness relates the hearsay in court he can be placed under oath and questioned before the jury about the accuracy of what he heard. To that extent, the prosecution can "confront" the witness to test the reliability of

v. United States, 439 F.2d 536 (D.C. Cir. 1970), illustrate the desire to create mutuality between the prosecution and the defense with respect to criminal evidence. *But see* Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 385 (1967): "During this period of change there may well be instances where hearsay offered by the government will be excluded while like hearsay offered by the defendant will be admitted. Mutuality is not a doctrine usefully applied since the investigative resources of government and defendant are often disparate. Moreover, the confrontation doctrine, insofar as it is applicable, is available to the defendant only."

his recollections. Although the declarant of the out-of-court statement itself cannot be confronted, the prosecutor can comment and the judge can instruct on the weight the jury should give the evidence. The weaker the hearsay, the stronger the permissible comment and the less the likelihood that the jury will be misled.⁴⁰⁶

There is only one point at which the jury should not be allowed to consider the evidence—where the evidence is so inherently unreliable that it cannot rationally be evaluated. At that point, as with the testimony of children and the insane,⁴⁰⁷ the prosecution can exclude the evidence because it leaves the jury no basis short of speculation for determining its truth. Exclusion here is based not on the standards of confrontation but on the more fundamental notion that a criminal trial—indeed, any trial—ceases to be a judicial proceeding when the outcome rests on evidence that cannot be rationally considered.⁴⁰⁸

The scope of the defendant's right to present exculpatory evidence can be measured by its implications for two established rules of evidence. The first is the rule that a party may introduce presumptively reliable hearsay statements only if the declarant is unavailable to testify directly.⁴⁰⁹ The rule is designed to further the state's legitimate preference for oral testimony given openly in court by requiring that, whenever possible, the evidence come directly from a live witness.⁴¹⁰

The validity of such rules under the compulsory process clause depends on how broadly the "unavailability" requirement is defined. Some jurisdictions prohibit the defendant from using hearsay as substantive evidence whenever the declarant can testify in person, whether or not the declarant is willing to include and affirm the exculpatory statement in his direct testimony.⁴¹¹ Accordingly, if the

406. Compare the plurality's statement in *Dutton*: "[T]he statement contained no express assertion about past fact, and consequently it carried on its face a warning to the jury against giving the statement undue weight." 400 U.S. at 88.

407. See text following note 310 *supra*.

408. Cf. *Simmons v. United States*, 390 U.S. 377, 384 (1968) (a denial of due process may occur where eyewitness identification at trial follows a pretrial "photographic identification procedure [that] was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"); *Thompson v. Louisville*, 362 U.S. 199 (1960) (denial of due process to convict on the basis of evidence from which court could not rationally infer guilt). Rule 45(b) of the Uniform Rules of Evidence would permit the trial judge to exclude otherwise probative evidence only if he determines that it may "create substantial danger of . . . confusing the issues or of misleading the jury"

409. *McCORMICK*, *supra* note 298, § 253.

410. Cf. *FED. R. CRIM. P.* 26; *FED. R. CIV. P.* 43(a). See *McCORMICK*, *supra* note 298, § 253.

411. See, e.g., *Ruhala v. Roby*, 379 Mich. 102, 150 N.W.2d 146 (1967).

declarant repudiates his out-of-court statement, the defendant may not introduce the statement to establish its truth.⁴¹² The rule in those jurisdictions is invalid: It results in disallowing exculpatory evidence that, given the declarant's presence, can be verified by cross-examination.⁴¹³ In other jurisdictions the declarant is deemed "unavailable" to testify to the statement if he repudiates it in his courtroom testimony;⁴¹⁴ having given the witness an opportunity to affirm the out-of-court statement the defendant is then free to introduce the statement to prove its truth.⁴¹⁵ The rule in those jurisdictions is valid because it serves the state's legitimate preference for direct testimony without abridging the defendant's right to present evidence; the rule regulates the manner and timing of defense testimony without excluding it altogether.

A second rule deems third-party confessions and other declarations against penal interest generally admissible as an exception to the hearsay rule, but requires that such confessions be corroborated when offered by the defendant to show that he is innocent.⁴¹⁶ The rule attempts to accommodate two conflicting assumptions: On the one hand, declarations against penal interest are likely to be true, and on the other, friends of the accused may confess falsely out of court to exonerate him.⁴¹⁷ Unfortunately, the resulting balance conflicts with the defendant's constitutional right to present evidence.

First, the corroboration requirement improperly discriminates against the accused. It makes declarations against penal interest

412. In such jurisdictions prior statements may be introduced to prove that the witness' testimony is inconsistent, but not to prove the truth of what is asserted. See McCORMICK, *supra* note 298, §§ 34, 251, 253.

413. If a hearsay statement is sufficiently reliable to be admitted in the declarant's absence, then, necessarily, it must be sufficiently reliable to be admitted in his presence; the availability of the declarant for cross-examination greatly enhances the basis for testing the statement's truth. Cf. *Thomas v. State*, 186 Md. 446, 47 A.2d 43 (1946). Indeed, the defendant should have a right, even under the strict principle of mutuality, to introduce any prior inconsistent statement for its truth—regardless of its reliability—if it can be tested by cross-examining the declarant in court, cf. *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973), for such statements are now considered sufficiently reliable under the confrontation clause to be introduced against the accused. *California v. Green*, 399 U.S. 149, 153-64 (1970). But see *People v. Gant*, — Ill. 3d —, —, 317 N.E.2d 564, 568 (1974) (dictum).

414. See, e.g., CAL. EVID. CODE § 1235 (1966).

415. The Proposed Federal Rules of Evidence, *supra* note 312, for example, exclude certain presumptively reliable hearsay statements so long as the declarant is "available" to testify directly (rule 804), but permit introduction of such statements for their truth as prior inconsistent statements once the declarant repudiates them in his direct testimony (rule 801(d)(1)).

416. See, e.g., *Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923); Prop. Fed. R. Evid. 804(b)(4), *supra* note 312.

417. See Advisory Comm. Note to Prop. Fed. R. Evid. 804(b)(4), *supra* note 312.

generally admissible without corroboration, but places an extra burden on confessions that exculpate the accused. It imposes a higher threshold standard of reliability on evidence when offered in the defendant's favor than on the same kind of evidence when offered against him.⁴¹⁸ Such discrimination is presumptively invalid until the state sustains the burden of demonstrating that third-party confessions favoring the defendant are more likely to be false than third-party confessions against him.⁴¹⁹

Furthermore, even a nondiscriminatory corroboration requirement would invalidly restrict the defendant's right to present evidence. The corroboration requirement assumes that uncorroborated confessions are not only inherently unreliable, but that the only way to avoid misleading the jury is to exclude them. The second assumption is constitutionally suspect. While some uncorroborated confessions may be so questionable as to leave the jury with no rational basis for evaluating their truth, an unqualified assumption that all uncorroborated confessions are beyond the capacity of the jury to evaluate is improper. A defendant has a right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to ensure the integrity of the trial is to exclude the evidence altogether.

E. *The Right To Compel Witnesses To Disclose Privileged Information*

Rules of privilege that permit witnesses to withhold certain evidence from the court present a final obstacle to the full presentation of the defendant's case. Until the middle of the seventeenth century the power to produce witnesses included the power to compel them to testify,⁴²⁰ for there were few, if any, testimonial privileges entitling them to remain silent once in court.⁴²¹ Today, however, the defendant's desire to compel testimony may conflict with a variety of state and federal privileges, both constitutional

418. Some hearsay may be inadmissible against the accused for reasons having nothing to do with whether it is corroborated, because it violates his right of confrontation. However, where the right of confrontation has been satisfied, confessions implicating the accused may be introduced even though uncorroborated. *See, e.g., Dutton v. Evans*, 400 U.S. 74 (1970) (co-conspirator exception to the hearsay rule).

419. *See* discussion of *Cool v. United States*, *supra* notes 369-72; text at notes 496-502 *infra*.

420. *See* 8 J. WIGMORE, *supra* note 297, at 64-68.

421. The first privileges—the privilege against self-incrimination and the lawyer-client privilege—did not exist before the sixteenth and seventeenth centuries, respectively. *See* 9 W. HOLDSWORTH, *supra* note 22, at 185, 197-203.

and statutory. Thus, the defendant's right of compulsory process may conflict with the privilege against self-incrimination,⁴²² the lawyer-client privilege,⁴²³ the privilege for government informers,⁴²⁴ the confidentiality of presidential communications,⁴²⁵ the confidentiality of investigative governmental reports,⁴²⁶ the confidentiality of government personnel files and personal information submitted to the government,⁴²⁷ the confidentiality of grand jury proceedings,⁴²⁸ the confidentiality of legislative deliberations,⁴²⁹ the privilege of foreign diplomats to decline to respond to subpoenas,⁴³⁰ and the privilege of newsmen to withhold the identity of their sources.⁴³¹

The compulsory process clause is directly concerned with any rule that effectively denies the defendant the benefit of exculpatory evidence—whether it operates as a rule of competence, a rule of evidence, or a privilege. Privileges, however, are sufficiently different from other rules to deserve separate analysis. Indeed, the Court in *Washington*, while striking down a rule of competence on the ground that it abridged the defendant's right to present a defense, specifically reserved rules of privilege for future analysis on the ground that they are "based on entirely different considerations from those underlying the common-law disqualifications for interest."⁴³²

Privileges differ from most rules of evidence and competence in terms of their purposes. Rules of competence, and exclusionary rules such as the hearsay rule in *Chambers*, are designed to promote

422. See, e.g., *Walden v. State*, 284 S.2d 440, 441 (Fla. Dist. Ct. App. 1973); *State v. Robbins*, 318 A.2d 51, 55 (Me. 1974) (based on state equivalent of compulsory process clause).

423. In *Myers v. Frye*, 401 F.2d 18, 20-21 (5th Cir. 1968), however, the court held that the action of the trial court in allowing an attorney to refuse to produce letters left in his possession was neither so "broad nor arbitrary" as to violate the right to compulsory process.

424. See, e.g., *People v. Jones*, 76 Misc. 2d 547, 350 N.Y.S.2d 539 (Sup. Ct. 1973).

425. See, e.g., *United States v. Nixon*, 42 U.S.L.W. 5237, 5246 (U.S. July 23, 1974) (dictum); *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807).

426. See, e.g., *United States v. Schneiderman*, 106 F. Supp. 731 (S.D. Cal. 1952); *State v. Cooper*, 2 N.J. 540, 553-57, 67 A.2d 298, 304-06 (1949).

427. See, e.g., *People v. Sumpter*, 75 Misc. 2d 55, 347 N.Y.S.2d 670 (Sup. Ct. 1973). Cf. *People v. Bridgeforth*, 51 Ill. 2d 52, 59-62, 281 N.E.2d 617, 621-22 (1972).

428. See, e.g., *State v. Dewell*, 123 Fla. 785, 167 S. 687 (1936).

429. *Calley v. Callaway*, 382 F. Supp. 650, 699-703 (M.D. Ga. 1974); *Christoffel v. United States*, 200 F.2d 734, 738-39 (D.C. Cir. 1952).

430. See, e.g., *In re Dillon*, 7 F. Cas. 710 (No. 3914) (N.D. Cal. 1854).

431. Cf. *Brown v. Commonwealth*, 214 Va. 775, 204 S.E.2d 429 (1974). For an exhaustive analysis of the factual and legal underpinnings of the newsman's privilege, including its relation to compulsory process, see V. BLASI, *PRESS SUBPOENAS: AN EMPIRICAL AND LEGAL ANALYSIS* (n.d.); Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEXAS L. REV. 829, 892-98 (1974).

432. 388 U.S. at 23 n.21.

the integrity of the fact-finding process by excluding potentially unreliable or misleading evidence. Privileges, on the other hand, are designed to promote relationships and interests outside the courtroom by permitting witnesses to keep even reliable evidence secret. The extrajudicial interests they serve, such as the relationship between a husband and wife and between a client and attorney, are deemed more important than the unfettered determination of truth in judicial proceedings.⁴³³

The question under the compulsory process clause is how to resolve the conflict between the extrajudicial interest in preserving confidentiality and the defendant's interest in disclosure. For the following analysis the various privileges are placed in three categories: privileges possessed by the government; the privilege against self-incrimination, which is possessed by individuals but controlled by the government's power to grant them immunity from prosecution for their testimony; and private privileges, which are neither possessed nor controlled by the prosecution. Although each will be analyzed separately, the conclusion herein applies to all three categories: No interest protected by a privilege is sufficiently important to outweigh the defendant's right to establish his innocence through the presentation of clearly exculpatory evidence.

1. *Government Privileges*

The government possesses a number of testimonial privileges that permit it to keep confidential such matters as advice and opinion delivered in the course of decision-making, materials relating to national defense or international relations, investigatory material compiled for the purpose of law enforcement, sources of information about criminal activity ("informers"), and information routinely submitted under a promise of confidentiality.⁴³⁴ The interests served by these privileges are important, even compelling. Indeed, in so far as secrecy is necessary to the proper functioning of the national executive—for example, in military and diplomatic affairs—it may be constitutionally protected.⁴³⁵

433. Privileges are quite similar in purpose to some rules of competence. See text at notes 311-22 *supra*. The principal difference is that privileges can be waived by the party possessing them, while rules of competence may not.

434. See the specific exemptions from government disclosure in the Freedom of Information Act, 5 U.S.C. § 552(b) (1970). See also Prop. Fed. R. Evid. 509-10, *supra* note 312.

435. For the constitutional underpinning of privileges essential to the operation of the executive branch see *United States v. Nixon*, 42 U.S.L.W. 5237, 5244-46 (U.S. July 23, 1974); *United States v. Reynolds*, 345 U.S. 1, 6 n.9 (1953); *Nixon v. Sirica*, 487 F.2d 700, 712-16 (D.C. Cir. 1973) (en banc).

Conflict between the need for secrecy and the right of a defendant to compel disclosure may arise in several ways. The defendant who alleges entrapment may move to disclose the identity of government informers.⁴³⁶ The defendant who believes he is the victim of discriminatory prosecution may move to disclose the confidential contents of the investigative file in his case.⁴³⁷ The defendant who wishes to impeach government witnesses at trial may move to disclose their confidential communications with government personnel.⁴³⁸ The defendant who believes he was the victim of an unlawful surveillance may move to disclose the existence of electronic devices whose placement is a state secret.⁴³⁹

In some cases the conflict can be avoided by a narrow construction of the privilege. In *Jencks v. United States*,⁴⁴⁰ for example, the defendant requested to be given the prior statements of government witnesses in order to impeach their credibility at trial. The Court held that the government's privilege to conceal pretrial statements of prosecution witnesses terminates when they testify. The privileges of state governments can be narrowly construed as well. In so far as federal courts recognize state government privileges,⁴⁴¹ they can narrow them to avoid conflict with the defendant's interest in disclosure. Similarly, the state courts can minimize conflict with the defendant by construing their own government privileges narrowly.⁴⁴²

Where the conflict is unavoidable, however, the government must choose between its interests in prosecuting the defendant and preserving the privilege. Thus, if the government prefers to prosecute

Presumably there are comparable "legislative" and "judicial" privileges wherever secrecy is essential to the operation of the other branches of government. See *Nixon v. Sirica*, 487 F.2d 700, 716-17 (D.C. Cir. 1973) (en banc).

436. See, e.g., *Roviaro v. United States*, 353 U.S. 53, 61-64 (1957).

437. See, e.g., *United States v. Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973).

438. See, e.g., *Calley v. Callaway*, 382 F. Supp. 650, 692-95 (M.D. Ga. 1974); *United States v. Mitchell*, reported in N.Y.L.J., Oct. 19, 1973, at 3, col. 3 (S.D.N.Y.).

439. See, e.g., *Alderman v. United States*, 394 U.S. 165, 180-84 (1969).

440. 353 U.S. 657 (1957).

441. See *McCray v. Illinois*, 386 U.S. 300, 309 (1967); *United States v. Woodall*, 438 F.2d 1317, 1327 (5th Cir. 1970) (en banc); *United States v. Krol*, 374 F.2d 776, 778 (7th Cir. 1967). Cf. FED. R. CRIM. P. 26. State government privileges applied in federal prosecutions are "private" rather than "government" privileges (as those terms are used here), because they are neither possessed nor controlled by parties to the prosecution.

442. See, e.g., *People v. Bridgeforth*, 51 Ill. 2d 50, 67, 281 N.E.2d 617, 625 (1972) (Schaefer, J., dissenting).

it must waive its privilege regarding the exculpatory evidence.⁴⁴³ If the government prefers to assert its privilege it must proceed without the testimony of witnesses impeachable by the privileged evidence, or, if the government withholds evidence forming an essential element of either the prosecution's or the defendant's case, it must waive the prosecution.⁴⁴⁴ Compulsory process does not deny the government's interest in secrecy, but prohibits the government from invoking secrecy at the defendant's expense.⁴⁴⁵

The principle that requires the government to choose between

443. "The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." *Reynolds v. United States*, 345 U.S. 1, 12 (1953).

While we must accept it as lawful for a department of the government to suppress documents . . . we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal proceedings, the prosecution necessarily ends any confidential character the documents may possess

United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944) (L. Hand, J.). Cf. *United States v. Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) ("the prosecution must decide whether the public prejudice of allowing the crime to go unpunished [is] greater than the disclosure of such 'state secrets' as might be relevant to the defence") (L. Hand, J., restating the holding in *Andolschek*); *McCORMICK*, *supra* note 298, § 109, at 234.

444. The defendant's remedy depends on the prejudice he suffers from the assertion of privilege. If the assertion prevents the defendant from introducing evidence to impeach a witness against him the court should strike the witness' adverse testimony, or (if the prejudice is incurable) declare a mistrial. The Jencks Act, for example, provides for striking a government witness' testimony from the record "[i]f the United States elects not to comply with an order of the court" to produce a "statement or report" in its possession "which was made by a Government witness (other than the defendant)." 18 U.S.C. § 3500 (1970). Alternatively, the court may "in its discretion . . . determine that the interests of justice require that a mistrial be declared." 18 U.S.C. § 3500(d) (1970). If the assertion of privilege prevents the defendant from challenging the government's entire case or from establishing an affirmative defense of his own, the court must dismiss the prosecution. See *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957).

445. *United States v. Nixon*, 42 U.S.L.W. 5237 (U.S. July 23, 1974), is no authority for the proposition that a court will order the executive branch to disclose evidence that it prefers to withhold at a cost to the prosecution. The executive branch for the purpose of that prosecution was not President Nixon, who preferred to withhold the evidence, but special prosecutor Jaworski, who preferred to produce it. The privilege was not a "government" privilege (as that term is used here) because it was asserted not by the prosecution but by the President as a third party to the suit with no control over the case. The Court ordered the evidence produced only because that was Jaworski's choice. The case would have been entirely different had Jaworski himself withheld the evidence by asserting some government privilege, or even the President's privilege to protect his confidential communications. In that event, having determined that the defendant was entitled to the evidence, the Court would probably have issued a conditional order that *unless* the evidence were produced, the case would be dismissed. By doing so the Court would have left the ultimate choice between production and prosecution to the executive branch, where the choice effectively and properly belongs.

privilege and prosecution is inherent in the defendant's right of compulsory process. It is well reflected in the resolution of Aaron Burr's subpoena for the Wilkinson letters.⁴⁴⁶ Probably the best illustration, however, is the line of cases involving the defendant's right to compel the government to produce its informers. In *Roviaro v. United States*⁴⁴⁷ the Court held that the informer was an important witness whom the defendant had a right to produce, and that if the government refused to reveal his identity to preserve his usefulness as an informer the case would have to be dismissed. The defendant was charged with illegally transporting narcotics, and with selling them to an unidentified government informer. The transaction between the defendant and the informer had allegedly been partly observed and overheard by two government agents. The defendant requested the prosecution to identify the informer so that the informer could be called to testify about the transaction. The government refused, asserting its privilege to conceal the identity of its informers, and the defendant was convicted.

The informer would have been a material witness because he was the only other participant in the alleged crime, and the only person, other than the government agents, who observed it. He was in a unique position to contradict the government agents about the defendant's identity and state of knowledge, and to testify to the issue of entrapment. While recognizing that the government had a legitimate interest in protecting its sources of information by preserving the anonymity of its informers, the Supreme Court held that the defendant had a superior "right to prepare his defense"⁴⁴⁸ by producing witnesses whose testimony "may be relevant and helpful to the defense."⁴⁴⁹ In language suggestive of compulsory process the Court put the government to the choice between continuing the prosecution and asserting its privilege.⁴⁵⁰ The Court has since held that a defendant has no constitutional right to discover the identity of an informer whose testimony relates only to collateral issues, such as the manner of arrest or the gathering of evidence against the

446. See notes 156-62 *supra* and accompanying text.

447. 353 U.S. 53 (1957).

448. 353 U.S. at 62.

449. 353 U.S. at 60-61.

450. "Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." 353 U.S. at 60-61. See also 353 U.S. at 65 n.15.

defendant,⁴⁵¹ because the controlling issue is whether the government's assertion of privilege would deny the defendant a material witness on the issue of "guilt or innocence."⁴⁵²

While explicitly based on the Court's supervisory jurisdiction over the lower federal courts,⁴⁵³ *Roviaro's* reasoning and language suggest that the decision was also constitutionally compelled. The Court first concluded that the government had a sufficient interest in preserving the confidentiality of its sources of information to support a federal "informer's privilege."⁴⁵⁴ It then defined the scope of the privilege, concluding that the privilege did not extend so far as to allow concealment of exculpatory testimony from the defendant in criminal cases.⁴⁵⁵ Significantly, however, the Court did not deny that a contrary result would serve the government's interest; indeed, the most frequent and acute pressure on the government to reveal its sources probably comes from criminal defendants. Rather, it held that the scope of the privilege is limited by "the fundamental requirements of fairness"⁴⁵⁶ and "the individual's right to prepare his defense."⁴⁵⁷ In short, while the Court defined the scope of the federal privilege on nonconstitutional grounds by weighing the two conflicting interests, one of those interests—giving the defendant the "right to prepare his defense"—is constitutionally based and would compel the same result on constitutional grounds.

The lower courts, and at least one member of the Supreme

451. *McCray v. Illinois*, 386 U.S. 300, 312-14 (1967). *But see Alderman v. United States*, 394 U.S. 165, 181-84 (1969). In *Alderman* the Court held, presumably as a construction of the fourth amendment (*but see Gelbard v. United States*, 408 U.S. 41, 88-91 (1972) (Rehnquist, J., dissenting)), that illegally seized evidence involving state secrets must be disclosed for the defendant's inspection when it allegedly taints the state's case. To that extent *Alderman* limits *McCray*, which refused to disclose the identity of a government informer to testify to an allegedly illegal search. The two cases are arguably distinguishable: *Alderman* involved an admittedly illegal search, while the legality of the search was the very issue in *McCray*. Nonetheless, both focus on whether the accused has a constitutional right to demand that the state disclose privileged information that relates not to his guilt or innocence but to the manner in which the evidence against him was gathered. In the face of the defendant's fourth amendment right to inspect the privileged information to show that it tainted the case against him, little may remain of the *McCray* bar of inspection of the same information to show that the underlying search was illegal.

452. *McCray v. Illinois*, 386 U.S. 300, 311 (1967). *Cf. People v. McShann*, 50 Cal. 2d 802, 808, 330 P.2d 33, 36 (1958) (Traynor, J.).

453. *McCray v. Illinois*, 386 U.S. 300, 311 (1967), characterized *Roviaro* as "formulating evidentiary rules for federal criminal trials."

454. 353 U.S. at 59.

455. 353 U.S. at 60-61.

456. 353 U.S. at 60.

457. 353 U.S. at 61-62.

Court,⁴⁵⁸ have taken the result in *Roviaro* to be constitutionally compelled. Although *Roviaro* purports to define only a federal rule of evidence, state courts have treated it as binding.⁴⁵⁹ Federal courts have reversed state convictions on the implicit assumption that the rule is constitutionally based.⁴⁶⁰ Some courts have assumed that it derives from the defendant's constitutional right to a "fair trial" under the due process clause.⁴⁶¹ Others have recognized, however, that the defendant's right to produce the informer is part of his right of compulsory process.⁴⁶² To prosecute a person while withholding material witnesses in his favor is indeed "unfair," not only in some general due process sense, but in the specific sense that it denies him access to evidence of his innocence. This is precisely the kind of unfairness the framers intended to prohibit by adopting the compulsory process clause.

2. The Privilege Against Self-Incrimination

The privilege against self-incrimination is the privilege that most frequently obstructs presentation of the defendant's case. The conflict between the defendant's interest in testimony and his witnesses' interest in silence arises so frequently because "many offenses are of

458. See *Gravel v. United States*, 408 U.S. 606, 644-46 (1972) (Douglas, J., dissenting).

459. Note, *The Privilege of Withholding the Identity of an Informer*, 28 U. PITT. L. REV. 477, 479 (1967). Some states either explicitly or implicitly read *Roviaro* as constitutionally mandated. See *State v. Bengt*, 110 Ariz. 473, 520 P.2d 843 (1974); *People v. Kiihoa*, 53 Cal. 2d 748, 752, 349 P.2d 673, 675, 3 Cal. Rptr. 1, 4 (1960); *People v. Lewis*, 57 Ill. 2d 232, 311 N.E.2d 685 (1974); *James v. State*, 493 S.W.2d 201 (Tex. Crim. App. 1973); *State v. White*, 10 Wash. App. 273, 518 P.2d 245 (1973).

460. See, e.g., *Hernandez v. Nelson*, 298 F. Supp. 682, 675-87 (N.D. Cal. 1968), *affd.*, 411 F.2d 619 (9th Cir. 1969). Cf. *United States ex rel. Drew v. Myers*, 327 F.2d 174, 180-81 (3d Cir.), *cert. denied*, 379 U.S. 847 (1964).

461. *McLawhorn v. North Carolina*, 484 F.2d 1, 4-5 (4th Cir. 1973); *Hawkins v. Robinson*, 367 F. Supp. 1025, 1029-35 (D. Conn. 1973).

462. See, e.g., *People v. Castro*, 10 Ill. App. 3d 1078, 1082-83, 295 N.E.2d 538, 541-43 (1973); *People v. Jones*, 76 Misc. 2d 547, 350 N.Y.S.2d 539 (1973); *Roberts v. State*, 489 S.W.2d 263 (Tenn. Crim. App. 1972) (based on statutory equivalent of compulsory process clause). Cf. *Commonwealth v. Ennis*, — Mass. App. —, 301 N.E.2d 589, 592 n.2 (1973); *Henry v. State*, — Ala. App. —, 282 S.2d 387, 388 (Crim. App. 1973). The compulsory process clause applies not only to the informer privilege, but to any government privilege that has the effect of concealing material evidence from the accused. See *Christoffel v. United States*, 200 F.2d 734, 738-39 (D.C. Cir. 1952) (compulsory process clause requires the government to choose between the legislative privilege of Congress to keep its executive deliberations secret and its prosecution of the accused); *United States v. Powell*, 156 F. Supp. 526, 530 (N.D. Cal. 1957) (compulsory process clause requires government to choose between its executive privilege to issue passports and its prosecution of the accused); *United States v. Schneiderman*, 106 F. Supp. 731, 734, 738 (S.D. Cal. 1952); *State v. Cooper*, 2 N.J. 540, 553-57, 67 A.2d 298, 304-06 (1949) (compulsory process clause requires state to choose between its privilege to withhold investigative files and its prosecution of the accused). Cf. text at notes 156-62, 445 *supra*.

such a character that the only persons capable of giving useful testimony are those implicated in the crime."⁴⁶³ Thus, a defendant wrongly charged with conspiracy may call the other named conspirators to testify that he had nothing to do with their scheme.⁴⁶⁴ A defendant wrongly charged with a crime that someone else committed may call the other person to testify to his innocence.⁴⁶⁵ In each case the defendant's constitutional right to obtain witnesses in his favor conflicts with the constitutional privilege of his witnesses to refrain from incriminating themselves.⁴⁶⁶

The conflict between the defendant's sixth amendment right and the witness' fifth amendment right may appear irreconcilable. In apparent response, some courts have held that the defendant's right must yield to the witness' privilege against self-incrimination, and that the defendant may be tried without the benefit of the exculpatory testimony.⁴⁶⁷

The conflict between defendant and witness, however, can be avoided. A witness can be compelled to testify so long as the government does not later use his words against him in a criminal prosecution.⁴⁶⁸ The fifth amendment is not a privilege to remain silent, but a privilege against a subsequent prosecution of the witness based on his own words. Significantly, the privilege, while possessed by the individual, is controlled by the government. It is a privilege against prosecution, which can be negated by an offer of "use immunity," or the guarantee to the witness that his testimony will not be used against him.

The government's peculiar control over potentially exculpatory witnesses imposes a constitutional obligation on it to immunize them to obtain evidence in the defendant's favor. The government's interest in withholding use immunity is insufficient to outweigh the defendant's sixth amendment interest in producing exculpatory testimony. The grant of use immunity permits the defendant to com-

463. *Kastigar v. United States*, 406 U.S. 441, 446 (1972).

464. *See, e.g., United States v. Berrigan*, 482 F.2d 171, 190 (3d Cir. 1973); *United States v. Lyon*, 397 F.2d 505, 512-13 (7th Cir. 1968). The risk that guilt will be wrongfully attributed is particularly great in conspiracy cases. *See Dennis v. United States*, 384 U.S. 855, 873 (1966).

465. *See, e.g., Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967).

466. *See Holloway v. Wolff*, 351 F. Supp. 1033, 1037-38 (D. Neb. 1972), *rev'd. on other grounds*, 482 F.2d 110 (8th Cir. 1973); *Walden v. State*, 284 S.2d 440 (Fla. Dist. Ct. App. 1973); *Thompson v. State*, 480 S.W.2d 624, 628 (Tex. Crim. App. 1972). *But see United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974).

467. *See, e.g., Holloway v. Wolff*, 351 F. Supp. 1033, 1038 (D. Neb. 1972).

468. *Kastigar v. United States*, 406 U.S. 441, 448 (1972).

pel testimony in his favor, without preventing the government from prosecuting the witness on evidence gathered from independent sources.

The constitutional right of the accused to obtain immunity for his witnesses falls squarely within the language and purpose of the compulsory process clause. The clause guarantees the accused official "process" for compelling witnesses to appear and testify in his favor. It was adopted to give the defendant at least as much access as that of the prosecution to governmental devices for obtaining testimony. The grant of immunity, like the subpoena power, is an exclusively governmental device that is routinely available to the prosecution for obtaining testimony in its favor. Unless the defendant can be distinguished from the prosecution in significant ways, the defendant has a presumptive right to obtain immunity for his witnesses on an equal basis with the prosecution.

The compulsory process argument for a defendant's right to obtain immunity for his witnesses finds some support among commentators⁴⁶⁹ and lower courts.⁴⁷⁰ It also finds recent support in the Supreme Court's language and reasoning in *Kastigar v. United States*,⁴⁷¹ a case immediately concerned not with the defendant's right to immunize his witnesses but with the prosecution's constitutional power to compel its witnesses to testify under grants of use immunity.

In *Kastigar* a prosecution witness challenged the immunity statute on the ground that use immunity was insufficient to protect him against self-incrimination. He contended that compelling him to testify would necessarily supply the prosecution with information that could be used in prosecuting him. The Court disagreed, holding that the statute prohibited the government from using the witness' words, or evidence derived therefrom, for prosecutorial advantage. "We conclude," the Court said, "that [use] immunity . . . leaves the witnesses *and the prosecutorial authorities* in substantially the same position as if the witness had claimed the Fifth Amendment privilege."⁴⁷²

469. Comment, *Right of the Criminal Defense to the Compelled Testimony of Witnesses*, 67 COLUM. L. REV. 952, 956 n.19 (1967); Comment, *A Re-Examination of Defense Witness Immunity: A New Use for Kastigar*, 10 HARV. J. LEGIS. 74, 79 (1972). Cf. McCORMICK, *supra* note 298, § 143, at 308 (the right may be based on due process).

470. See *United States v. Leonard*, 494 F.2d 955, 985 n.79 (D.C. Cir. 1974) (opinion of Bazelon, C.J.) (dictum); *Talavera v. State*, 243 S.2d 595 (Fla. 1972). But see *United States v. Lyon*, 397 F.2d 505, 512-13 (7th Cir. 1968), *cert. denied sub nom. Lysczyk v. United States*, 393 U.S. 846 (1968); *State v. Shaw*, 6 Ariz. App. 33, 429 P.2d 667 (1967).

471. 406 U.S. 441 (1972).

472. 406 U.S. at 462 (emphasis added). See also *Murphy v. Waterfront Commn.*, 378 U.S. 52, 79 (1964).

In discussing the government's interest in compelling witnesses to testify against the accused the Court recognized that the defendant has a constitutional interest under the compulsory process clause in compelling witnesses to testify in his favor.⁴⁷³ More importantly, however, the Court's reasoning demonstrates that the government's interest in avoiding the grant of immunity is insufficient to justify withholding its benefits from the accused. The government's strongest argument against immunizing defense witnesses has been that its compelling interest in prosecuting the guilty justifies withholding amnesty from potential defendants.⁴⁷⁴ *Kastigar* makes clear, however, that the fifth amendment does not require that a witness receive unqualified amnesty before being compelled to testify; it is satisfied if he receives immunity from having his words used against him:

[T]he Fifth Amendment privilege . . . has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. . . . [T]he testimony cannot lead to the infliction of criminal penalties on the witness.⁴⁷⁵

Kastigar's analysis applies with equal force to the grant of use immunity to defense witnesses. The prosecution surrenders nothing by granting it: The incriminating statements that it cannot use against the immunized witness are statements that, absent immunity, would never have been made. The prosecution can hardly complain about immunizing defense witnesses because, as the Supreme Court said, the prosecution is in *substantially the same position* with respect to a witness after granting him immunity as before.

Admittedly, the grant of use immunity may cause the prosecution some inconvenience in future proceedings against the witness because it requires the prosecution to prove that it gathered its incriminating evidence from independent sources. The inconvenience can be minimized, however, in several ways: granting the prosecution a continuance to gather independent evidence before hearing from the witness, certifying the government's evidence under seal before

473. "The power to compel testimony, and the corresponding duty to testify, are recognized in the Sixth Amendment requirements that an accused be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor." 406 U.S. at 443-44.

474. See *State v. Buchanan*, 110 Ariz. 285, 518 P.2d 108 (1974).

475. 406 U.S. at 453, quoting *Ullman v. United States*, 350 U.S. 422, 438-39 (1956), quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886).

the witness testifies, ordering the defendant to submit his proposed questions for the witness in advance, and requiring the witness to give responsive answers.

In any event, the inconvenience is no greater than when the prosecution grants immunity to its own witnesses. If convicting the guilty justifies immunity for government witnesses, exonerating the innocent should justify immunity for defense witnesses. The public interest in each case is to determine the truth, and the standard for granting use immunity in each case should be the same, namely, whether it is "necessary to the public interest."⁴⁷⁶ Once the state makes immunity available to the prosecution it should not be permitted arbitrarily to withhold it from the defense.⁴⁷⁷

3. *Private Privileges*

Most testimonial privileges are neither possessed nor controlled by parties to the prosecution. While they arise less frequently in criminal litigation than the privileges already discussed, they are perhaps more difficult to accommodate with the defendant's right to present a defense.

Private privileges vary considerably in scope and purpose. Some, such as the privileges between lawyer and client, doctor and patient, and clergyman and penitent, protect confidential communications by giving the privilege to the person imparting the information. Others, such as the newsman's privilege, protect confidential communications by giving the privilege to the person receiving the information. The privilege for husbands and wives takes a number of forms. Some states protect communications between husband and wife by giving the communicant a privilege to keep them secret; some protect the marital relationship directly (rather than protecting interspousal communication) by giving the witness a privilege not to

476. 18 U.S.C. § 6003(b)(1) (1970).

477. See *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967), suggesting that the accused may be denied due process if the prosecution grants transactional immunity to its witnesses while denying such immunity to defense witnesses in the same case. It is sometimes said that granting immunity is an executive function that is beyond the courts' power to enforce. See *Ellis v. United States*, 416 F.2d 791, 797 n.9 (D.C. Cir. 1969). The statement is misleading. Courts may force witnesses to testify by means of contempt citations, and can protect them from future prosecution by dismissal. Furthermore, even if they have no statutory power to grant immunity themselves, courts can force the prosecution to grant immunity by threatening otherwise to dismiss the case. See *United States v. Paiva*, 294 F. Supp. 742, 746 (D.D.C. 1969). Nonetheless, it remains true that the prosecution can always avoid granting immunity to the witness by accepting dismissal. In that sense, while the courts decide whether the defendant has a right to immunity, the prosecution ultimately decides whether the right is to be satisfied via immunity or dismissal.

testify against his spouse; others protect the marital relationship in the opposite way, by giving the party a privilege to prevent his spouse from testifying against him; at least one state gives the witness a privilege not to testify in favor of his spouse.⁴⁷⁸ Each of the privileges is an experiment in using secrecy in the courtroom to foster a relationship outside the courtroom.

a. *Privileges that can be constitutionally narrowed.* When a privilege conflicts with a defendant's constitutional right to present his defense, the personal or societal interest in secrecy must be measured by federal standards. A privilege that denies the defendant the benefit of exculpatory testimony for insufficient reasons is unconstitutional as applied.

The privilege for communications between physician and patient provides a good example. Its premise is that a doctor can diagnose and treat his patients only when fully informed about their condition. The privilege encourages candor by assuring the patient that disclosures to his physician will remain secret. But while the state has an interest in effective medical treatment and a rational basis for believing that confidentiality in the doctor's office will further that interest, it cannot demonstrate a compelling interest in permitting physicians to suppress exculpatory information in a criminal proceeding. Even if the privilege actually promotes patient candor by suppressing medical information in civil cases, where it is invoked most often, society's interest in such candor is not likely to be harmed by permitting the physician to testify in the exceptional criminal case.⁴⁷⁹ Some states have already narrowed the privilege to bar its use in criminal cases, whether or not the evidence is exculpatory or incriminating, much as the Supreme Court narrowed the privilege for presidential communications in *United States v. Nixon*.⁴⁸⁰ Others have barred use of the privilege whenever its

478. See, e.g., *Wyatt v. United States*, 362 U.S. 525, 528-29 (1960) (witness has a privilege not to testify against his spouse in a criminal proceeding) (dictum); *United States v. Fields*, 458 F.2d 1194 (3d Cir. 1972), cert. denied, 412 U.S. 927 (1973) (defendant has a privilege in a joint trial to prevent his wife from testifying against him, even though her testimony would exculpate his co-defendant); *Steeley v. State*, 17 Okla. Crim. 252, 187 P. 821 (1920) (defendant on trial for killing his wife's lover was barred from introducing his wife's privileged communications to him as evidence of his state of mind); GA. CODE ANN. § 38-1604 (1974) (a witness has a privilege not to testify in favor of his spouse).

479. The privilege has been criticized as misconceived. The drafters of the Proposed Federal Rules of Evidence, see note 312 *supra*, have recommended abolishing the general privilege for communications between physician and patient, on the ground that they serve no real purpose. They would retain the privilege where the physician is a psychotherapist. See Prop. Fed. R. Evid. 504, *supra*.

480. 42 U.S.L.W. 5237 (U.S. July 23, 1974). See, e.g., CAL. EVID. CODE § 998 (1966).

application would frustrate the "proper administration of justice."⁴⁸¹ Those states have defined the scope of their physician-patient privileges on nonconstitutional grounds by weighing the interest in secrecy against the interest in protecting the innocent. The same analysis, however, produces the same result on constitutional grounds, because one of the conflicting interests—the defendant's right to present a defense—is also constitutionally based. In sum, private privileges are unconstitutional as applied whenever the additional benefit derived from extending them to exculpatory information in criminal cases is insufficient to justify their burden on the defendant's right to present a defense.

b. *Privileges that can be constitutionally modified.* A constitutional exception to the physician-patient privilege for exculpatory evidence is relatively easy to justify because the issue arises so seldom. The information doctors routinely seek from patients is rarely relevant to the guilt or innocence of third persons. The infrequent testimony of a physician at a criminal trial will hardly deter the general flow of information between physicians and their patients.

In marked contrast are privileges designed in part to promote communications concerning guilt and innocence. Privileges for communications between lawyer and client and clergyman and penitent, for example, are designed to protect communications about activity that is frequently criminal. Clients and penitents involved in crime might be reluctant to consult counsel and clergy if the latter could be forced to reveal incriminating information in defense of third persons. The confidentiality that is at the core of these relationships might be destroyed if the privilege were not to apply in criminal proceedings.

A wholesale criminal-trial exception to the lawyer-client and

See also Annot., 7 A.L.R.3d 1458 (1966). Cf. *People v. Christiano*, 53 Misc. 2d 433, 278 N.Y.S.2d 696 (Westchester County Ct. 1967) (discovery of hospital records).

United States v. Nixon provides another example of a "private" privilege narrowed by the commands of compulsory process. The privilege was asserted by a person who was not a controlling party to the prosecution. See note 445 *supra*. The Court held that the "generalized interest" in the confidentiality of presidential communications must yield to the "constitutional need [reflected, in part, in the compulsory process clause] for relevant evidence to criminal cases." 42 U.S.L.W. at 5246 n.19. The Court reasoned that the interests served by the privilege would not be "vitiated by disclosure of a limited number of conversations" because "we cannot conclude that advisers [to the President] will be moved to temper the candor of their remarks . . . because of the possibility that such conversations will be called for in the context of a criminal prosecution." 42 U.S.L.W. at 5246. Cf. Henkin, *Executive Privilege: Mr. Nixon Loses But the Presidency Largely Prevails*, 22 UCLA L. REV. 40, 43-44 (1974); Kurland, *United States v. Nixon: Who Killed Cock Robin?*, 22 UCLA L. REV. 68, 73-74 (1974).

481. See, e.g., N.C. GEN. STAT. § 8-53 (1969).

priest-penitent privileges is unnecessary, however, for compulsory process purposes. The privileges are unconstitutional, if at all, only in so far as they prevent the confidential communication from being used for the defense. The privileges can be modified to permit disclosure for the defense while prohibiting the disclosed information from being used against the client or penitent in future civil or criminal proceedings.

The importance of distinguishing disclosure of a communication for the defendant from disclosure *against* the client is illustrated by *Myers v. Frye*.⁴⁸² Defending against a charge of murder, the defendant subpoenaed letters he had written his accomplice, because he believed they would establish his defense of insanity. The court refused to produce the letters on the ground that the accomplice had delivered them to his lawyer and that they were protected by his lawyer-client privilege. The court was concerned that the letters might incriminate the accomplice, and allowed that concern to outweigh the defendant's constitutional interest in producing evidence in his favor. The proper disposition would have been to order production of the letters under a protective order that they never be used against the accomplice. A modified disclosure of that kind would have satisfied the defendant's right of compulsory process without substantially interfering with the relationship between the accomplice and his lawyer.

The state's interest in encouraging candor can be substantially served by guaranteeing the client that his communications, if disclosed, will never be used against him in civil or criminal proceedings. The added benefits to the client of complete secrecy are insufficient to justify a burden on the defendant's constitutional right to present a defense. To apply the privilege that broadly is unnecessary and, therefore, unconstitutional.

c. *Privileges that cannot be accommodated.* There remains a group of privileges that cannot be narrowed or modified in light of the right of compulsory process without defeating their purpose, such as the absolute privilege in some states for newsmen to conceal their sources, the statutory privilege of witnesses in some states to remain silent in the face of incriminating questions unless granted transactional immunity, and certain federal privileges applicable in state criminal proceedings.⁴⁸³ They cannot be waived or controlled by the

482. 401 F.2d 18 (7th Cir. 1968).

483. Although the federal courts in criminal proceedings have no obligation to apply state-created privileges, *see* cases cited note 441 *supra*, the state courts are undoubtedly bound by state privileges, such as the newsman's privilege, *see* *Brown v.*

party initiating the prosecution and cannot survive even limited disclosure to the defense. Any disclosure of a federal "state secret" or a newsman's source, except perhaps *in camera*, would defeat the state's strong interest in the privilege.

Conflict between compulsory process and such absolute privileges may be resolved in two ways: Either the accused must go forward with his defense without the benefit of the privileged information or the prosecution must strike the portion of its case to which the information relates. The decision may depend on the materiality of the privileged information and the possibility of curing prejudice by permitting the jury to draw a favorable inference from the witness' silence. Ultimately, however, where the defendant can show that the information is indispensable to rebuttal or to an affirmative defense the court must dismiss the charges.

Dismissal finds support in the so-called "lost evidence" cases, in which the government fails to preserve exculpatory evidence for use at trial. Although earlier cases viewed dismissal as a penalty for official misconduct and imposed it only where the prosecutor lost or destroyed the evidence in "bad faith,"⁴⁸⁴ the recent cases recognize that dismissal also protects the defendant's affirmative right to put on a defense.⁴⁸⁵ Accordingly, dismissal may be required even where

Commonwealth, 214 Va. 775, 204 S.E.2d 429 (1974), as well as federal privileges made applicable to the states. U.S. CONST. art. VI, cl. 2. Some states provide by statute that witnesses have a right of privacy in the face of incriminating questions, which can be overcome only by grants of transactional immunity. See, e.g., *People v. Breindel*, 73 Misc. 2d 734, 342 N.Y.S.2d 428 (Sup. Ct. 1973); FLA. STAT. § 914-04 (Supp. 1973); KY. REV. STAT. ANN. § 432.070 (1966); N.Y. CRIM. PROC. LAW § 50.20 (McKinney 1971). Since such statutory privileges go beyond what is required by the fifth amendment, they may be viewed as state-created private privileges.

484. See, e.g., *United States v. Bryant*, 439 F.2d 642, 653 (D.C. Cir. 1971).

485. See *United States v. Perry*, 471 F.2d 1057, 1063 (D.C. Cir. 1972) (dictum): "[T]he Government does not necessarily exonerate itself from the penalty of the [Jencks Act] by pleading so-called 'good faith.' Instead, the trial judge's effort must be to see that the defendant has access to previous statements of a witness to the fullest extent possible under the terms of the statute, in order to further the interests of justice in the search for truth."

The defendant in *Johnson v. State*, 249 S.2d 470 (Fla. Dist. Ct. App. 1971), *dismissed*, 280 S.2d 673 (Fla. 1973), moved that the prosecution produce the fatal bullet for the purpose of cross-examining the prosecution's ballistics expert. The court held that the defendant had an absolute right under the confrontation clause to the production of the lost bullet, and that whatever the reason for its absence, the prosecution witness could not testify without it. Although the *Johnson* court discussed the defendant's right to produce the bullet as if it were part of his constitutional right to "confront" the expert witness, the court must have intended to refer to the defendant's constitutional right to produce evidence in his favor. See *Commonwealth v. Cromartie*, 222 Pa. Super. 278, 281 n.2, 294 A.2d 762, 764 n.2 (Spaulding, J., concurring), *cert. denied*, 405 U.S. 954 (1972). The defendant's right of confrontation in *Johnson* was fully satisfied by the production of the expert witness in court for face-to-face cross-examination about his report. See *United States v. Williams*, 447 F.2d 1285 (5th Cir. 1971),

the prosecutor has acted in good faith, if the defendant can show that the government's loss of the evidence frustrates his constitutional right to present witnesses in his favor.⁴⁸⁶ Thus, the defendant in one case requested the government to return his personal tax records so that he could show that his failure to file a proper return was not willful.⁴⁸⁷ Although the government had lost the records through no fault of its own, the court dismissed the indictment on the ground that the defendant could not defend himself without them:

[I]t would, in the opinion of the court, be a denial of a constitutional trial to compel the defendant to go to trial in the absence of records sought to be produced by the motion.

....

... The fact that the records were lost and were not willfully withheld from the accused may place the government in a more favorable moral light, but this is no comfort to the accused, nor does it aid him in the preparation of his defense to the charges contained in the indictment.⁴⁸⁸

The same result should follow whether the information is unavailable because of loss or unavailable because of privilege. The good faith of the prosecution is irrelevant in both cases. The controlling fact is that the defendant has been or is being deprived of information that may refute the state's case or affirmatively prove the case in his favor. Indeed, the rationale for dismissal is even greater where the exculpatory information still exists. The court in the "lost evidence" cases has the difficult task of evaluating the materiality of evidence that is no longer available for judicial inspection. In privilege cases, however, the court can view the evidence *in camera*.⁴⁸⁹ It can refrain from the extreme step of dismissal until

cert. denied, 405 U.S. 954 (1972). What was abridged by the loss of the bullet was the defendant's affirmative right to discover and produce evidence in his favor. The government's failure to preserve material evidence in the defendant's favor—including evidence to impeach the witnesses against him—violates his right of compulsory process because it precludes him from effectively producing the evidence in court. Cf. *United States v. Augenblick*, 393 U.S. 348, 356 (1969); *United States v. Mendez-Rodriguez*, 450 F.2d 1, 4-5 (9th Cir. 1971); *Application of Newbern*, 175 Cal. App. 2d 862, 864-65, 1 Cal. Rptr. 80, 82 (1959). But see *People v. Eddington*, 53 Mich. App. 200, 207-09, 218 N.W.2d 831, 835-36 (1974) (the "lost evidence" cases raise no compulsory process issues).

486. See *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974); *United States v. Carrillo-Frausto*, 500 F.2d 234, 236 (9th Cir. 1974) (Goodwin, J., dissenting).

487. *United States v. Heath*, 147 F. Supp. 877 (D. Hawaii 1957), *appeal dismissed*, 260 F.2d 623 (9th Cir. 1958).

488. 147 F. Supp. at 878-79.

489. If a newsman, or a witness who has received use immunity, wrongfully refuses to make an *in camera* disclosure, the court will have to decide whether the circumstantial evidence indicates that the evidence withheld is material and excul-

it has made a reviewable determination that the exculpatory evidence is material to the defendant's case.

Further support for dismissal in the face of absolute privilege can be found in cases under the confrontation clause, involving conflict between the defendant's right to cross-examine the witnesses against him and the testimonial privileges of the witnesses to remain silent. The defendant in *Davis v. Alaska*,⁴⁹⁰ for example, was prohibited at trial from examining a juvenile delinquent about his motives for testifying for the prosecution because of the witness' personal privilege to preserve the confidentiality of his juvenile record. The Supreme Court reversed on the ground that the assertion of privilege violated the defendant's right to confront a material witness against him. Without questioning the state's interest in creating a privilege for juvenile offenders, and without denying that cross-examination would frustrate that interest, the Court held that the defendant's right of confrontation was "paramount,"⁴⁹¹ and that if the state wished to preserve the juvenile's privilege, it could do so "by refraining from using him [as a witness] to make out its case"⁴⁹²

The same analysis applies to conflicts between claims of privilege and the "paramount" right of compulsory process. The only difference is the range of remedies. In confrontation cases, where the defendant poses his sensitive question in order to impeach a witness against him, the state can satisfy his interests while preserving the testimonial privilege by excusing the witness from testifying. In compulsory process cases that remedy is adequate only if the defendant seeks the privileged evidence in order to impeach a witness against him;⁴⁹³ if he seeks the evidence to rebut the state's case or to support an affirmative defense, the only remedy that adequately satisfies his interests while preserving the privilege is dismissal of the prosecution. In each case the state is forced to choose between preserving the private privilege and presenting an effective case. Indeed,

patory. For a good example of the compulsory process standard used to determine whether a case must be dismissed because of a missing witness see *United States v. Perlman*, 430 F.2d 22, 25-27 (7th Cir.), cert. denied, 400 U.S. 832 (1970). It can be argued, although no case has directly so held, that some privileges require such absolute secrecy that they would be defeated even by *in camera* disclosure to the judge. Cf. *EPA v. Mink*, 410 U.S. 73, 81, 84 (1973); *United States v. Reynolds*, 345 U.S. 1, 10 (1952); Prop. Fed. R. Evid. 509(c), *supra* note 312.

490. 415 U.S. 308 (1974).

491. 415 U.S. at 319.

492. 415 U.S. at 320.

493. See notes 268, 444 *supra*.

in many cases, as in *Davis* itself, the ultimate consequences are the same; the prosecution dismisses its case directly or dismisses it indirectly by eliminating a witness whose testimony is "crucial."⁴⁹⁴

Dismissal in the face of an asserted privilege also finds support in cases concerning the government's privilege to conceal the identity of its informers. The courts use the language of "waiver" in discussing the government's obligation to choose between preserving the anonymity of its informers and prosecuting the accused.⁴⁹⁵ In so far as the government prosecutes, it must waive its privilege; in so far as it asserts the privilege, it must waive the prosecution and, if necessary, dismiss its case against the accused.

In the context of compulsory process, "waiver" is really a choice exacted by the Constitution. The prosecution is not making a free choice between privilege and prosecution; indeed, it would prefer to make no choice at all. Nor is the prosecution making a necessary choice between mutually exclusive alternatives: The assertion of privilege is theoretically compatible with a simultaneous decision to prosecute. The obstacle, of course, to what would otherwise be a free choice is the constitutional judgment embodied in the compulsory process clause that the government must not convict any person who can prove that he is innocent. Whether the state suppresses such proof under a government privilege or a private privilege is immaterial. Both types of privilege are created by the state. If the crucial interests underlying government privileges must yield to the defendant's right of compulsory process, so must the interests underlying private privileges. Under the constitutional command, therefore, the state can either produce the evidence or give the defendant the equivalent of his defense by dismissing the charges. Dismissal is simply an alternative means for satisfying the commands of compulsory process.

F. *The Right to a Fair Balance of Advantage with the Prosecution with Respect to Presenting Witnesses*

One of the prevailing themes of compulsory process is that the defendant should have comparable opportunities with the prosecution to present a case through witnesses. The history of compulsory process is the story of the development of the adversary process and the demise of the inquisitional method.⁴⁹⁶ Inquisition was found

494. 415 U.S. at 317, quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965).

495. See text at note 443 *supra*.

496. See Part I *supra*.

not only unfair to the accused, but an inefficient way of determining truth. Recognizing the importance of parity, colonial New Jersey framed its compulsory process provision to give the accused an explicit right to the "same" opportunities to present witnesses enjoyed by the prosecution.⁴⁹⁷

The framers of the sixth amendment recognized the value of parity,⁴⁹⁸ but rejected New Jersey's formulation in favor of the broader design of the majority of state provisions.⁴⁹⁹ The sixth amendment makes the defendant's right to present a defense independent of the particular advantages or disadvantages of the prosecution.⁵⁰⁰ Were his rights based on a principle of parity the state could deny him witnesses whenever it was willing to deny them to the prosecution. Rather, the defendant has an unconditional right to present a defense through witnesses that cannot be limited by the state without very good reasons.

The compulsory process rights of the accused, although independent, are affected by the trial posture of the prosecution for two reasons: First, where the state gives certain opportunities to the prosecution, it is unlikely to be able to justify denying them to the defense. Illustrative is a case in which a witness was subpoenaed from France to testify for the prosecution under a statute that authorized federal courts to issue foreign subpoenas for witnesses "whose testimony in a criminal proceeding is desired by the Attorney General."⁵⁰¹ The witness challenged his subsequent contempt conviction on the ground that the statute violated the compulsory process clause by permitting only the prosecution, and not the defense, to subpoena witnesses from abroad.⁵⁰²

497. See text at note 99 *supra*.

498. See text at note 123 *supra*.

499. See text at notes 117-27 *supra*.

500. In *Washington v. Texas*, 388 U.S. 14 (1967), for example, the Court held that whether or not the accused's accomplice was competent to testify for the prosecution, it was unconstitutional to disqualify him from testifying for the defense. See text at notes 202-05 *supra*.

501. *Blackmer v. United States*, 284 U.S. 421 (1932), involving Act of June 25, 1948, ch. 117, § 1783, 62 Stat. 949, *as amended*, 28 U.S.C. § 1783 (1970). The statute was amended to its present form to permit the court to subpoena witnesses from abroad if necessary "in the interest of justice." The amendment was designed to authorize the production of witnesses "irrespective of whether the subpoena is desired by the prosecution or the accused. It thus achieves equality of treatment in accord with American traditions of fair play in regard to the accused." S. REP. NO. 1580, 88th Cong., 2d Sess. 9-10 (1964).

502. 284 U.S. at 442.

The Supreme Court did not reach the constitutional question because it concluded that the witness had no standing to assert the rights of the defendant. Had it reached the issue, however, it presumably would have declared the statute unconstitutional for arbitrarily denying the defendant the right to subpoena witnesses in his favor. The defect in the statute was not that it discriminated against the accused, for the defendant has no explicit right to be treated equally with the prosecution. Rather, the statute was defective because it denied the defendant the subpoena power for no apparent reason. The unilateral grant of subpoena power to the prosecution raises a presumption that the defendant has been denied the benefit for no valid reason, and requires the state to come forward with a justification sufficient to overcome the defendant's specific constitutional right.

Second, the compulsory process rights of the accused are affected by any allocation of advantage to the prosecution with respect to witnesses that seriously distorts the adversary nature of the criminal process. All of the various procedural rights in the Bill of Rights are implicitly designed to strengthen the adversary posture of the accused.⁵⁰³ Indeed, in pursuit of their common end they overlap and complement one another. The defendant's right of compulsory process for witnesses is thus complemented by the right to be informed of the charges against him, which is designed in part to give him a chance to marshal facts and witnesses in his defense;⁵⁰⁴ the right to be released on bail before trial, designed in part to enable the defendant to identify and consult with his witnesses;⁵⁰⁵ the right to counsel, designed in part to assist the defendant in locating and preparing his witnesses;⁵⁰⁶ and the right to a speedy trial, designed

503. See *Williams v. Florida*, 399 U.S. 78, 111-12 (1970) (opinion of Black, J.).

504. See *Wolff v. McDonnell*, 42 U.S.L.W. 5190, 5198 (U.S. June 26, 1974); *In re Gault*, 387 U.S. 1, 33-34 & n.54 (1967).

505. Cf. *United States v. Reese*, 463 F.2d 830 (D.C. Cir. 1972); *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970).

506. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932): "[The uncounseled defendant] lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one." One of the principal criticisms of the rule of *Betts v. Brady*, 316 U.S. 455 (1942), denying counsel to indigents in noncapital cases, was that it deprived the defendant of the assistance of counsel in identifying and consulting with witnesses. See Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 53-54 (1962). For a discussion of the defendant's need for counsel to assist in gathering facts see Kamisar, *supra*, at 59-65; Steinberg & Paulson, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW., May 1961, at 25, 25-27.

in part to prevent the passage of time from eliminating witnesses or erasing their memories.⁵⁰⁷

Unlike the other protections, however, which affect witnesses only incidentally, the compulsory process clause is principally designed to enhance the defendant's ability to present a case through witnesses. It rests on the premise that a major imbalance of advantage in favor of the state with respect to the presentation of its case through witnesses is likely not only to be unfair, but to frustrate the ultimate pursuit of truth. It reflects an implicit judgment by the framers that prosecution advantages concerning the presentation of evidence should not be allowed to exceed greatly those of the defense. In short, it seeks to maintain a basic equilibrium between the defendant and the state with respect to the discovery, production, and presentation of witnesses. While it does not guarantee the defendant precise equality with the prosecution, it prohibits the state from giving so much advantage to the prosecution as to frustrate the adversary assumptions implicit in the sixth amendment.⁵⁰⁸

The notion that an adversary procedure is implicitly protected by the compulsory process clause helps to explain the otherwise puzzling decision in *Wardius v. Oregon*.⁵⁰⁹ Oregon required the defendant to give the prosecution advance notice of his proposed alibi and alibi witnesses. The notice-of-alibi statute made no provision for reciprocal discovery by the defense. In fact, Oregon did not provide for any discovery by the accused and specifically did not require the prosecution to identify the witnesses it intended to call to rebut the defendant's alibi defense. The defendant in *Wardius* failed to

507. See *Barker v. Wingo*, 407 U.S. 514, 532 (1972). Cf. *Jones v. Wainwright*, 490 F.2d 1222 (5th Cir. 1974).

508. Wholly apart from their explicit meaning, constitutional provisions have implicit meanings that arise from their structural relationship to one another. See *Williams v. Florida*, 399 U.S. 78, 112-13 (1970) (opinion of Black, J.):

And when a question concerning the constitutionality of some aspect of criminal procedure arises, this Court must consider all those provisions and interpret them together. The Fifth Amendment . . . is not an isolated, distinct provision. It is part of a system of constitutionally required procedures, and its true meaning can be seen only in light of all those provisions. "Strict construction" of the words of the Constitution does not mean that the Court can look only to one phrase, clause, or sentence in the Constitution and expect to find the right answer. Each provision has a clear and definite meaning, and various provisions considered together may have an equally clear and definite meaning.

See also *Griswold v. Connecticut*, 381 U.S. 479 (1965); Blasi, Book Review, 80 YALE L.J. 176 (1970). Thus, while explicitly making the defendant's rights independent of the prosecution, the compulsory process clause (in conjunction with the other procedural protections of the sixth amendment) implicitly assumes that a minimum balance of advantage will be maintained between the prosecution and the defense, consistent with an essentially adversary process.

509. 412 U.S. 470 (1973).

give the required notice and was barred from testifying himself in support of his alibi and from calling witnesses to do so.

The Supreme Court was urged to invalidate the statute on the grounds that it violated the defendant's privilege against self-incrimination and the presumption of innocence by requiring him to disclose his defense before hearing the state's case; that disqualifying witnesses from testifying for the defense was an excessive sanction for failure to comply with the statute; and that the statutory scheme abridged the defendant's right to discover evidence in the government's possession. Rejecting these arguments, and approving an earlier decision that notice-of-alibi provisions serve the valid purpose of preventing the defendant from surprising the prosecution with an easily fabricated alibi,⁵¹⁰ the Court held that the defendant has a constitutional right of reciprocal discovery when the government obtains substantial discovery from him.⁵¹¹ Despite the rational basis for Oregon's practice,⁵¹² the Court held that "[i]t is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."⁵¹³

Although the Court based its decision on the general "fairness" required by due process, its reasoning is more consistent with the specific fairness required by the compulsory process clause. The Court emphasized that the "unfair" characteristic of the statute was the resulting "imbalance of discovery rights"⁵¹⁴ between the defen-

510. *Williams v. Florida*, 399 U.S. 78 (1970).

511. For the validity under the compulsory process clause of rules that use disqualification as a sanction see text at notes 317-22 *supra*. For the existence under the compulsory process clause of an independent right of discovery see section IIIA *supra*.

512. Oregon, in one sense, was perfectly rational to provide for discovery of the defendant's alibi witnesses without providing for reciprocal discovery of the state's rebuttal witnesses and witnesses in chief. Alibi witnesses present unique problems that make pretrial discovery more important for the prosecution than for the defense: A defendant with friends may easily fabricate a false alibi, thus making it very difficult for the prosecution to rebut such testimony without advance notice and preparation. The defendant, on the other hand, has less need to discover the identity of the state's rebuttal witnesses. Rebuttal witnesses are rarely called; when they do appear, their testimony is seldom devastating, and when their testimony is crucial, it is likely to be testimony that the defendant can predict from his knowledge of the alibi. The defendant also has less need to discover the identity of the state's witnesses in chief. By time of trial he has notice of the charges against him and can generally predict the nature of the supporting testimony. In *Wardius*, therefore, the state's discriminatory discovery procedures were not irrational.

513. 412 U.S. at 476.

514. 412 U.S. at 475 n.9.

dant and the state. Pretrial discovery is a device that "enhances the fairness of the adversary system"⁵¹⁵ and "enhance[s] the search for truth" when it gives "both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."⁵¹⁶ When available to one party and not the other it disturbs the "balance of forces between the accused and his accuser."⁵¹⁷ The statute was thus unconstitutional because "in the absence of a strong showing of state interests,"⁵¹⁸ it created unilateral benefits for the prosecution with respect to witnesses.

Wardius' ultimate impact is difficult to predict at this point. It has potential implications for much of criminal procedure. Its underlying principle is not limited to discovery but applies to every disruption of the existing balance between the state and the accused with respect to presenting a case through witnesses.⁵¹⁹ The significance of the decision will depend on how it is applied in individual cases, which depends, in turn, on the degree to which its connection with the implicit premises of compulsory process is recognized.

IV. CONCLUSION

The compulsory process clause of the sixth amendment is a companion and counterpart to the confrontation clause. The confrontation clause governs the manner by which the state presents its case against the accused, requiring the prosecution to bring the defendant face to face with the witnesses against him and make them available for cross-examination. The compulsory process clause governs the presentation of the defendant's case, empowering him to produce and examine witnesses in his favor. Together they provide a constitutional basis for the law of evidence in criminal proceedings. Together "[they] constitutionalize the right to a defense as we know it."⁵²⁰

The compulsory process clause, however, has not until recently been given the broad application it was originally intended to have. Courts have focused on its narrow wording, and have concluded that it refers only to the right of the accused to subpoena witnesses

515. 412 U.S. at 474.

516. 412 U.S. at 474, quoting *Williams v. Florida*, 399 U.S. 78, 82 (1970).

517. 412 U.S. at 474.

518. 412 U.S. at 475.

519. The classic study of the balance of advantage between the defendant and the prosecution is Goldstein, *supra* note 279.

520. *California v. Green*, 399 U.S. 149, 176 (1970) (Harlan, J., concurring).

in his favor. They are now beginning to recognize, however, that it implicitly governs the entire presentation of the defendant's case. In that respect it is broader and more important than the right of confrontation.

Compulsory process is more important to the accused than confrontation because in most cases it can substitute for confrontation, while confrontation cannot replace the functions served by compulsory process. The essential difference between the two is their allocation of the burden of producing witnesses. Confrontation allocates to the prosecution the burden of producing witnesses against the accused, while compulsory process allocates to the accused the burden (and the means) of producing witnesses in his favor. Thus, unless a prosecution witness has become unavailable, the right of confrontation only relieves the defendant of the burden of issuing subpoenas for the witnesses whose out-of-court statements are introduced against him. Abolition of the right of confrontation would not automatically result in trials by affidavit and hearsay; it would simply shift to the defendant the administrative burden of producing the adverse declarants for cross-examination, along with producing the separate witnesses in his favor.⁵²¹ Abolition of compulsory process, on the other hand, would be more drastic: It would leave the defendant face to face with the witnesses against him, but with no means to produce the witnesses in his favor.

The compulsory process clause is also broader than the confrontation clause. Confrontation is exclusively a trial right. It has nothing to do with the manner in which the defendant gathers, preserves, or produces evidence. It merely guarantees him the right to insist that evidence against him be presented at trial through direct testimony or its equivalent. Compulsory process, on the other

521. A good illustration is the preference for the right of compulsory process over the right of confrontation in the context of prison disciplinary proceedings. Since disciplinary proceedings are not "criminal" proceedings within the strict requirements of the sixth amendment, *see Morrissey v. Brewer*, 408 U.S. 471, 480 (1972), the Court has been free to fashion a constitutional law of prison procedure under the looser standards of the due process clause. Significantly, the Court has concluded that while prisoners are not constitutionally entitled to confront the witnesses against them (or receive the assistance of counsel), they are entitled in disciplinary proceedings "to call witnesses and present documentary evidence in [their] defense when permitting [them] to do so will not be unduly hazardous to institutional safety or correctional goals." *Wolff v. McDonnell*, 42 U.S.L.W. 5190, 5197 (U.S. June 26, 1974). The same line between confrontation and compulsory process has been drawn in the context of the preliminary hearing, where the sixth amendment has yet to be found fully applicable. *Cf. United States v. King*, 482 F.2d 768, 774-75 (D.C. Cir. 1973); *Coleman v. Burnett*, 477 F.2d 1187, 1202-07 (D.C. Cir. 1973).

hand, is more than a trial right. It gives the defendant the right to discover the existence of witnesses in his favor, to produce them in court, to introduce their statements into evidence, and, if necessary, to compel them to testify over claims of privilege. In sum, it constitutionalizes the defendant's right to be heard in his defense.