PUTTING COMPULSORY BACK IN CUMPULSORY PROCESS

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In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.[1]

I. Introduction

Private (PVT) Smith is accused of raping a fellow Soldier by force.[2] Defense counsel is detailed to the case and subsequently interviews numerous witnesses, including the doctor who performed the sexual assault examination on the alleged victim and the doctor who examined PVT Smith for defensive wounds the alleged victim claims she inflicted upon him.

Pursuant to Rule for Courts-Martial (RCM) 703(c)(2)(B),[3] the defense provides the prosecutor a synopsis of expected testimony of all witnesses requested for trial. In doing so, the defense is forced to reveal its theme and theory of the case. Specifically, the defense must reveal its theory as to the alleged victim's motive to fabricate and PVT Smith's

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[1] THOMAS JEFFERSON. THE PAPERS OF THOMAS JEFFERSON, VOLUME 30: 1 JANUARY 1798 TO 31 JANUARY 1799—RESOLUTIONS ADOPTED BY THE KENTUCKY GENERAL ASSEMBLY (1798), *available at* http://www.princeton.edu/~tjpapers/kyres/kyadopted.html (last visited Sept. 3, 2013).

[2] Private Smith's case is a real case, not a hypothetical. The author was detailed to represent this Soldier facing multiple charges, the most serious being rape. The name of the accused has been changed in this article to protect his privacy, but the facts are real.

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703 (2012) [hereinafter MCM].

personality traits which led him to "confess" to a crime he did not commit. The prosecution promptly denies the majority of requested witnesses, including the doctor who performed the sexual assault examination of the alleged victim and the doctor who examined PVT Smith for defensive wounds.

These denials are not based on the defense's lack of compliance with RCM 703. Rather, the prosecutor determines, in his sole discretion, that the requested witnesses are not needed for trial. Specifically, the two requested doctors and other character and fact witnesses are denied by the prosecutor because he deems these witnesses irrelevant to the rape case. The prosecutor provides no further explanation or detail as to why these witnesses are irrelevant; he simply denies each witness.

The case is then delayed while defense counsel submits a motion to compel production of these crucial witnesses under RCM 906(b)(7).[4] After the motions hearing, the military judge orders the government to produce each witness requested by the defense. After this back-and-forth, PVT Smith is finally able to present his witnesses at trial and is ultimately vindicated by the panel who finds him not guilty of all charges and specifications. This seemingly random denial of necessary witnesses prompts the question: should a military accused be forced to subject himself to this level of gamesmanship from the government who is seeking to deprive him of his liberty and property? Is it fair to the accused that he be forced to provide the prosecutor a synopsis of the witnesses' expected testimony when the government does not have to reciprocate? The Constitution says no, and so should our sense of fairness and decency.

The Compulsory Process Clause of the Sixth Amendment (Compulsory Process Clause) mandates that the accused, in a criminal trial, have the right "to have compulsory process for obtaining witnesses in his favor."[5] However, RCM 703 significantly and unconstitutionally

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[4] *Id.* R.C.M. 906(b)(7) (Motions for appropriate relief. Discovery and production of evidence and witnesses).

[5] U.S. CONST. amend VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

restricts this fundamental constitutional right. For a military accused to actually be afforded an opportunity to invoke the right of compulsory process, the President has mandated that the accused submit his witness list, along with a summary of the expected testimony, to the prosecutor. After obtaining a preview of the defense case through the synopses of every defense witness, the prosecutor is empowered to determine whether the witnesses will actually be produced for the accused at trial. If the witness is denied, the accused can litigate the matter before the trial judge, but only *after* tipping off the prosecutor to the defense's trial strategy.

Part II of this article discusses the history of compulsory process as it found its way into the adversarial process at common law and its importance to the drafters of the U.S. Constitution. It details the application of compulsory process during colonial times to help discern the intent behind the drafters' inclusion of this right in the Sixth Amendment. It addresses the notion that the Compulsory Process Clause represents the teeth behind which a criminal defendant actually exercises his "right to present a defense."[6] It also explores the Supreme Court's modern interpretation of the Compulsory Process Clause.

Part III of this article examines current procedures for implementing the Compulsory Process Clause. It analyzes the requirements set forth in the Federal Rules of Criminal Procedure (FRCP), and contrasts them with the restrictions imposed on a military accused under the Rules for Courts-Martial. It discusses RCM 703's violations of the Sixth Amendment's Compulsory Process Clause, the Fifth Amendment's Due Process Clause[7] (Due Process Clause), and Articles 36[8] and 46[9] of the

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> witnesses against him; *to have compulsory process for obtaining witnesses in his favor*, and to have the Assistance of Counsel for his defence.

Id. (emphasis added). Forty-eight states have also implemented provisions in their state constitutions that provide for compulsory process. *See* Peter Westen, *The Compulsory Clause*, 73 MICH. L. REV. 71, 73 n.1 (1974).

[6] Washington v. Texas, 388 U.S. 14, 19 (1967); *see also* Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Compulsory Process*, 2002 WIS. L. REV. 1275, 1276 (2002).

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

[8] UCMJ art. 36 (2012) provides:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military

Uniform Code of Military Justice (UCMJ). Additionally, this article will detail the unlawful encroachment on attorney work-product and attorney-client privilege, as well as the appearance of unfairness that undermines public confidence in the military justice system. Although this paper primarily focuses on the Compulsory Process Clause, it addresses each of these additional unlawful restrictions because they are all bound together in the accused's constitutional right to present an adequate defense at trial.

Finally, Part IV of this article offers several constitutionally sound solutions to protect the military accused's rights under the Compulsory Process Clause. It provides three separate approaches that satisfy the constitutional mandates of the Fifth and Sixth Amendments, the requirements of Articles 36 and 46 of the UCMJ, the sacrosanct protections afforded by the attorney-client and attorney work-product privileges, and the public policy concerns of projecting a fair system of justice, while still addressing the needs of the military justice system.

> commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
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> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

Id.

[9] *Id*. art. 46 provides:

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Commonwealths and possessions.

Id.

II. History of Compulsory Process

To appreciate the necessity of repairing the scheme in which military accused secure trial witnesses, it is important to understand the historical significance of compulsory process. The framers of the United States Constitution embarked on an unprecedented endeavor to establish a government controlled by the very people it regulated.[10] In doing so, the framers placed specific burdens and restrictions upon the government to ensure it could not trample on the freedoms of its citizenry. In particular, the framers recognized the significant power the government can wield over an accused at trial, and therefore implemented numerous provisions in the Constitution to protect the accused. One such provision is the Compulsory Process Clause. A brief historical analysis is helpful to understand why this protection was so important that the Constitution was amended to include its provisions.

A. Compulsory Process—Development at Common Law

Compulsory process was a relative late-comer to English common law. The modern notion of witnesses at trial did not exist in the 1400s, and did not become an important part of the fact-finding process until the 1500s.[11] During this time, courts began to allow independent witnesses to testify before the jury. Until then, witnesses served the dual role of providing evidence in the case as a witness and deciding the outcome as a juror.[12]

The accused's rights, however, were still in their infancy as the Inquisitional Process thrived in Tudor England (1485–1603). Most of the constitutional protections provided to today's accused did not exist. For example, the State did not provide the accused notice of the charges facing him until the day of his trial.[13] Likewise, the accused was not allowed to be represented by counsel, nor did the accused have any right

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[10] Patrick Henry stated, "The Constitution is not an instrument for the government to restrain the people, it is an instrument for the people to restrain the government—lest it come to dominate our lives and interests." FOUNDERS' QUOTES, http://foundersquotes.com/?s=The+constitution+is+not+an+instrument+for+the+government (last visited Sept. 3, 2013).

[11] 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2190 (1905).

[12] Hoeffel, *supra* note 6, at 1279.

[13] Westen, *supra* note 5, at 82.

to discovery.[14] Further, the accused did not have the ability to confront witnesses against him or offer testimony from his own witnesses. Additionally, the accused was not allowed to testify under oath in his defense.[15] The accused was allowed to make an unsworn statement to the jury, but this lacked the legal weight of sworn testimony, as it does today.[16]

"The most dominant feature of the emergent criminal trial"[17] during this period "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."[18] This disparity persisted into the seventeenth century.[19] A shift began when Parliament adopted a statute in 1606 which allowed English subjects accused of committing crimes in Scotland to present witnesses at trial.[20] The accused was allowed to present his own witnesses to testify in his defense, and the witnesses were allowed to be sworn.[21]

Although some significant restrictions were placed on the type of testimony the accused could introduce,[22] the ability to present testimony of defense witnesses began to spread beyond the confines of the 1606 statute and into the mainstream English courts.[23] However, the accused still had no formal means to compel the presence of his witnesses;[24] but his fortunes changed with the development of the Adversarial Process.

In 1695, Parliament passed a statute expanding procedural protections for an accused facing charges of treason and related crimes.[25] An accused now had the ability to obtain a copy of the indictment against him, the right to counsel, the right to produce witnesses and have them

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[14] *Id.*
[15] Hoeffel, *supra* note 6, at 1280.
[16] Westen, *supra* note 5, at 82.
[17] *Id.* at 81.
[18] *Id.*
[19] *Id.*
[20] Robert N. Clinton, *The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials*, 9 IND. L. REV. 711, 719 (1976).
[21] *Id.*
[22] Defense witnesses, unlike witnesses for the Crown, were not allowed to be sworn. Likewise, they could not directly contradict the Crown's witnesses, but rather offer testimony as to facts inconsistent with the defendant's guilt. *Id.*
[23] *Id.*
[24] *Id.* at 720.
[25] *Id.*

testify, the right of compulsory process to compel attendance of witnesses, and the right to obtain a list of the jurors prior to trial.[26] By the eighteenth century, the limited exception of the 1606 statute—allowing sworn testimony of defense witnesses—had crystallized in the law and become the rule in England in all criminal cases.[27] The only remaining imbalance between the State and the accused regarding witnesses was the refusal to allow the accused to provide sworn testimony himself.[28] This slow expansion of rights for the criminal accused in England was enjoying a similar development for the American accused.[29] However, they did not initially endeavor to improve these procedures.[30] By the eighteenth century, the colonies, in a reflection of their dissatisfaction with English colonial rule, expanded the accused's rights even further.[31] A concerted effort developed to alleviate the unfair and harsh seventeenth century criminal procedures regarding witnesses for the accused.[32] The colonies deemed these expansive rights so indispensable that many of them included the protections in their state constitutions. Thus, the underlying principles that form the Compulsory Process Clause were well-established before American independence came about.[33]

By 1700 in New York and 1750 in Maryland, Massachusetts, Pennsylvania, and Virginia, many states afforded the accused the right to subpoena witnesses and have them testify under oath.[34] After independence, eight states explicitly afforded the accused the right to produce witnesses in his favor.[35] Most of these state constitutions contained bills of rights that provided certain protections to the accused.[36] Many states followed Virginia's lead and adopted language similar to section 8 of the Virginia Bill of Rights.[37] Section 8 provides

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[26] *Id.*
[27] Westen, *supra* note 5, at 87. *See also* Clinton, *supra* note 20, at 720.
[28] Westen, *supra* note 5, at 87 n.63.
[29] Hoeffel, *supra* note 6, at 1281.
[30] Clinton, *supra* note 20, at 723.
[31] *Id.* at 725.
[32] *Id.* at 726.
[33] Westen, *supra* note 5, at 91.
[34] *Id.* at 93.
[35] *Id*. at 94; Hoeffel, *supra* note 6, at 1284–85.
[36] Clinton, *supra* note 20, at 728.
[37] *Id.* at 729 n.86.

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose

that in all criminal prosecutions, an accused has, among other rights, the right "to call for evidence in his favor."[38] Pennsylvania,[39] Delaware,[40] Maryland, [41] North Carolina,[42] and Vermont[43] adopted nearly identical

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> unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Id.

[38] *Id.*

[39] PENNSYLVANIA DECLARATION OF RIGHTS § 176 (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.87:

> IX. That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy public trial, by an impartial jury of the country, without the unanimous consent of which jury he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers.

Id.

[40] DELAWARE DECLARATION OF RIGHTS § 14 (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.88:

> SECT. 14. That in all prosecutions for criminal offences, every man hath a right to be informed of the accusation against him, to be allowed counsel, to be confronted with the accusers or witnesses, to examine evidence on oath in his favour, and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Id.

[41] MARYLAND DECLARATION OF RIGHTS art. XIX (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.89:

> XIX. That, in all criminal prosecutions, every man hath a right to bc informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defence: to be allowed counsel: to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses, for and against him, on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.

Id.

[42] NORTH CAROLINA DECLARATION OF RIGHTS arts. VII–IX (1776), *reprinted in* Clinton, *supra* note 20, at 729 n.90:

provisions.[44] Likewise, Massachusetts[45] and New Hampshire[46] adopted similar language to section 8 of the Virginia Bill of Rights in their

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> VII. That, in all criminal prosecutions, every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony, and shall not be compelled to give evidence against himself.
> VIII. That no freeman shall be put to answer any criminal charge, but by indictment, presentment, or impeachment.
> IX. That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used.

Id.

[43] VERMONT DECLARATION OF RIGHTS art. X (1777), *reprinted in* Clinton, *supra* note 20, at 729 n.91:

> X. That, in all prosecutions for criminal offences, a man hath a right to be heard, by himself and his counsel—to demand the cause and nature of his accusation—to be confronted with the witnesses—to call for evidence in his favor, and a speedy public trial, by an impartial jury of the country; without the unanimous consent of which jury, he cannot be found guilty; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty, except by the laws of the land or the judgment of his peers.

Id.

[44] Clinton, *supra* note 20, at 729.

[45] MASSACHUSETTS DECLARATION OF RIGHTS art. 12 (1780), *see* Clinton, *supra* note 20, at 730 n.93:

> XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially, and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

Id.

[46] NEW HAMPSHIRE DECLARATION OF RIGHTS art. XV (1784), *see* Clinton, *supra* note 20, at 730 n.94:

> XV. No subject shall be held to answer for any crime, or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence

respective state constitutions.[47] New Jersey adopted the language of the Pennsylvania colonial Frame of Government, which guaranteed "that all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."[48]

Though not uniform in language, these constitutions all reflected the fundamental notion that the accused must be granted "a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case."[49] This also reflects a common vision among the states that it is essential to ensure the guaranteed liberties of those at the mercy of the government—the accused. This notion was so deeply rooted in the American psyche that many states refused to ratify the U.S. Constitution without amending it to include these protections.[50]

B. Compulsory Process—A Constitutional Guarantee

Prior to the adoption of the U.S. Constitution, America was governed by the Articles of Confederation. The Articles of Confederation contained no individual liberty guarantees because the states were thought to be powerful enough to protect their citizens and the Confederation was thought too weak to actually encroach on an individual's liberties.[51] The Constitution, however, created a federal government powerful enough to cause concern.[52] Many states refused to ratify the Constitution without amending it to include a bill of rights similar to those contained in existing state constitutions.[53]

> against himself. And every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, and counsel. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land.

[47] Clinton, *supra* note 20, at 730.
[48] *Id.*
[49] Westen, *supra* note 5, at 95.
[50] *Id.* at 96.
[51] *Id.*
[52] *Id.*
[53] Clinton, *supra* note 20, at 731.

Four states—Virginia, Pennsylvania, North Carolina, and New York—specifically advocated for language guaranteeing the accused the right to present witnesses in his favor.[54] Each state recommended slightly different language, but all agreed that the inclusion of some form of guarantee in this regard was vital to the success of the new government. The slow response from Congress in addressing these concerns prompted Virginia and New York to actually call for a new constitutional convention to modify the Constitution.[55]

In 1789, James Madison, a member of the Virginia ratifying convention in 1788,[56] informed the House of Representatives of his desire to address the issue of constitutional amendments before them.[57] The House agreed, and Madison delivered a speech proposing nine changes to the language of the Constitution.[58] Many of these changes represent what became the Fifth and Sixth Amendments to the Constitution.[59] In fact, Madison would draft much of the Bill of Rights.[60] Many of his proposals, including what would become the Sixth Amendment, were adopted with little debate.[61]

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[54] Westen, *supra* note 5, at 96.
[55] Clinton, *supra* note 20, at 733.
[56] Westen, *supra* note 5, at 97.
[57] Clinton, *supra* note 20, at 733.
[58] *Id.*
[59] *Id.* at 733–34.
[60] Westen, *supra* note 5, at 96.
[61] 1 ANNALS OF CONG. 784–85 (1789), *reprinted in* Clinton, *supra* note 20, at 734–35:

> The committee then proceeded to consider the seventh proposition, in the words following:
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> Article 3, section 2. Strike out the whole of the third paragraph and insert, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."
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> MR. BURKE moved to amend this proposition in such a manner as to leave 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 witness, for whom process was granted but not served, was material to his defense.
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> MR. HARTLEY 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.

It is important to note that Madison used the term compulsory process to describe the accused's right to obtain witnesses in his favor. Madison drafted the guarantees of the Sixth Amendment following the model set forth in the Virginia Bill of Rights,[62] which were nearly identical to the amendment proposed by Virginia when ratifying the Constitution.[63] However, the language Madison used regarding witness production differed from that of the Virginia Bill of Rights and the earlier proposed amendment.[64] Instead of using the language, to call for evidence, Madison described the accused's right "to have compulsory process for obtaining witnesses in his favor."[65] Congress adopted the

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> MR. SMITH, of South Carolina, thought the regulation would come properly in, as part of the judicial system.
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> The question on MR. BURKE's motion was taken and lost; ayes 9, noes 41.
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> MR. LIVERMORE moved to alter the clause, so as to secure to the criminal the right of being tried in the State where the offence was committed.
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> MR. STONE observed that full provision was made on the subject in the subsequent clause.
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> On the question, MR. LIVERMORE's motion was adopted.
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> MR. BURKE said he was not so much discouraged by the fate of his former motions, but that he would venture upon another. He therefore proposed to add to the clause, "that no criminal prosecution should be had by way of information."
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> MR. HATLEY only requested the gentleman to look to the clause, and he would see the impropriety of inserting it in this place.
>
> A desultory conversation arose, respecting the foregoing motion, and after some time.
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> MR. BURKE withdrew it for the present.
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> The committee then rose and reported progress, after which the House adjourned.

Id.

[62] Clinton, *supra* note 20, at 735.

[63] Westen, *supra* note 5, at 97.

[64] Clinton, *supra* note 20, at 735–36; Westen, *supra* note 5, at 97.

[65] Westen, *supra* note 5, at 97.

Compulsory Process Clause as part of the Sixth Amendment without modifying Madison's language.[66]

Given the rivalries and power struggle among the states, the fact that Madison alone could draft the guarantees contained in the Compulsory Process Clause, and have them adopted without objection or modification, is a substantial feat.[67] Madison achieved this success because the language was understood to address the critical concerns of each individual state:[68] the right to call for evidence,[69] the right to compel witnesses,[70] and the right to parity with the government.[71]

C. Compulsory Process—Post-Constitutional Development

The treason trial of Aaron Burr[72] provided an early opportunity to address the meaning and significance of the Compulsory Process Clause. Presiding as circuit judge in what some call "the greatest criminal trial in American history,"[73] Chief Justice John Marshall issued a comprehensive review of the Compulsory Process Clause.[74] Marshall was a Virginia lawyer during the Constitutional Convention.[75] He was also a member of the Virginia Convention that ratified the Constitution and proposed an amendment to provide the accused "the right to call for evidence in his favor."[76] Marshall was on the front lines in the battle to ensure the

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[66] *Id*. at 98; Clinton, *supra* note 20, at 734–37.
[67] Clinton, *supra* note 20, at 736.
[68] *Id*. at 738; Hoeffel, *supra* note 6, at 1286.
[69] Hoeffel, *supra* note 6, at 1286.
[70] *Id.*
[71] *Id.*
[72] Aaron Burr was elected and served as vice president under Thomas Jefferson from 1800–1804. *See Aaron Burr—Biography*, BIOGRAPHY, http://www.biography.com/people/aaron-burr-9232241 (last visited Sept. 3, 2013). Aaron Burr was prosecuted for treason in 1807, stemming from an alleged plot between him and General James Wilkinson, Commander-in-Chief of the U.S. Army. Burr's alleged desire was to split off the western part of the United States, including the Louisiana Territory, by attacking Texas with Wilkinson's Army. When the plan appeared futile, Wilkinson informed President Jefferson of the conspiracy. Burr was eventually captured and returned to Virginia to face trial for treason and was eventually acquitted. *See The Burr Conspiracy*, PBS, http://www.pbs.org/wgbh/amex/duel/sfeature/burrconspiracy.html (last visited Sept. 3, 2013).
[73] Westen, *supra* note 5, at 101 n.128.
[74] *Id.* at 101.
[75] *Id.* at 102.
[76] *Id.*

Constitution provided the accused compulsory process for his witnesses. Chief Justice Marshall's opinion regarding the significance and power of the Compulsory Process Clause represents a rare look into the framers' intent in adopting this protection and thus should be given "special weight in construing" its meaning.[77]

Burr, on trial for treason, sought to subpoena President Thomas Jefferson to present evidence that "may be material in his defense."[78] Jefferson objected on the following grounds: the accused could not invoke the protections of the Compulsory Process Clause against the President of the United States; the Compulsory Process Clause applied only to the production of witnesses and not evidence; Burr did not make an adequate showing of how he intended to use the evidence; and the motion was premature because Burr had yet to be indicted.[79]

Chief Justice Marshall, at his own peril, decided these issues in favor of the accused, Burr, and against Jefferson.[80] Marshall construed the protections of the Compulsory Process Clause in broad terms, rejecting the literal distinction between the accused's right of process for witnesses rather than evidence[81] and held there existed "no exception whatsoever" to its protections.[82] Marshall declared that the constitutional right of the accused to obtain subpoenas vests before and after indictment[83] because the rights contained within the Compulsory Process Clause work to provide the accused a meaningful opportunity to present a defense.[84] Marshall warned that the rights contained within the Compulsory Process Clause "must be deemed sacred by courts" and they "should be so construed as to be something more than a dead letter."[85] Marshall's warning seems to have fallen on deaf ears because the Compulsory Process Clause was addressed by the Supreme Court on only five occasions between Chief Justice Marshall's opinion in the 1807 Burr trial

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[77] *Id*. at n.129 (citing Adamson v. California, 332 U.S. 46, 64 (1947) for the proposition that "the opinion of judges in the founding era is entitled to special weight in construing the Constitution").
[78] Westen, *supra* note 5, at 103.
[79] *Id*.
[80] *Id.* at 102.
[81] *Id.* at 104.
[82] *Id.* at 105.
[83] *Id.* at 104.
[84] *Id.* at 105.
[85] *Id.* at 102.

and 1967.[86] These five occasions resulted in the Court addressing this provision two times in dictum and three times in declining to interpret it.[87]

Much of the Court's focus during the nineteenth and twentieth century in the area of criminal law was on implementing rules of evidence and criminal procedure, many of which resulted in the exclusion of evidence central to the accused's defense.[88] This expansion of rules was likely not foreseen by the framers. When the states adopted the Sixth Amendment, no complicated code of evidence and criminal procedure existed as they do today.[89] Until the late 1960s, many courts and accused seemed content to address these constitutional encroachments under the more vague fundamental fairness protections of the Fifth Amendment's Due Process Clause.[90]

1. Waking a Sleeping Giant—Washington v. Texas

The Supreme Court breathed new life into the Compulsory Process Clause with its sweeping review and broad interpretation in *Washington v. Texas*.[91] While Chief Justice Marshall concluded in the *Burr* trial that the Compulsory Process Clause's protections vested pre-trial, the Supreme Court's interpretation in *Washington* makes clear that the protections ensure not just the production of the accused's witnesses, but

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[86] *Id.* at 108. *See* 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); *Ex parte* Harding, 120 U.S. 782 (1887); United States v. Reid, 53 U.S. 361, 363–65 (1851) (dictum); Rose v. United States, 245 U.S. 467 (1918) (overruled by Washington v. Texas, 388 U.S. 14, 21–22 (1967)).
[87] Westen, *supra* note 5, at 108.
[88] Clinton, *supra* note 20, at 739.
[89] Hoeffel, *supra* note 6, at 1288.
[90] Westen, *supra* note 5, at 108–09.
[91] *Washington*, 388 U.S. at 19.

> 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.

Id. See also Westen, *supra* note 5, at 112.

that they will be heard as well.[92] The Court's interpretation reflects the overall purpose of the Compulsory Process Clause: promoting fairness to the accused throughout the adversarial process.[93]

Washington presented the Court in 1967 with the opportunity to address the conflict between the ever expanding arena of evidentiary and criminal procedure rules with the constitutional protections of the Compulsory Process Clause.[94] Washington was convicted of murdering his ex-girlfriend's boyfriend and was sentenced to fifty years in prison.[95] He was prohibited at trial from presenting testimony that would have, at a minimum, lessened his culpability.[96] Washington's accomplice would have testified that he, and not Washington, had shot the victim.[97] Additionally, the accomplice would have testified that, at the last minute, Washington attempted to prevent him from firing the weapon.[98] Texas law, however, prevented individuals charged or convicted as co-participants in the same crime from testifying for one another.[99]

At the same time, Texas law did not prohibit co-participants from testifying for the state.[100] The Court noted the government's interest in preventing unreliable evidence from tainting the jury, but it directed that this rule could not be rationally defended in this manner because the co-participant would have an even greater motive to lie when testifying for the state.[101] The Supreme Court reversed Washington's conviction and held that an accused's rights under the Compulsory Process Clause are violated when an evidentiary rule is arbitrary.[102] The Court further directed that a rule is arbitrary when its application is too drastic under the circumstances[103] and objected to the over-broad nature of the evidentiary rule.[104] The Court paid close attention to the lack of parity in the Texas law and inferred that evidentiary rules must apply evenly

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[92] Westen, *supra* note 5, at 111.
[93] Hoeffel, *supra* note 6, at 1289.
[94] *Washington*, 388 U.S. at 15.
[95] *Id.*
[96] *Id*. at 15–16.
[97] *Id*. at 16.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 16–17.
[101] *Id.* at 22.
[102] *Id*. at 23. *See also* Hoeffel, *supra* note 6, at 1291–92; Westen, *supra* note 5, at 115.
[103] Westen, *supra* note 5, at 115 n.200.
[104] *Washington*, 388 U.S. at 22 (discussing Rosen v. United States, 245 U.S. 467). *See also Hoeffel*, *supra* note 6, at 1292.

between the prosecution and defense in order to survive a constitutional challenge.[105]

2. Arming the Giant

Although only a handful of cases since *Washington* have addressed this friction between the Compulsory Process Clause and evidentiary/procedural rules, courts have further refined the limits which these rules can impose on fundamental constitutional rights, such as an accused's right to compulsory process. The Supreme Court in *Chambers v. Mississippi*[106] was faced with state evidentiary rules which worked to deprive the accused of a fair trial.[107] Chambers was charged and convicted of murdering a police officer who was executing a warrant for the arrest of a local youth.[108] Before the police officer died, he fired his weapon into an alley hitting Chambers.[109] Although one of the officers on the scene testified that he witnessed Chambers shoot the officer,[110] the evidence also pointed to another suspect, McDonald.[111] McDonald, after transporting Chambers to the hospital, confided to three friends on separate occasions that he had shot the officer.[112] McDonald subsequently signed a written confession to the murder, which he later recanted.[113]

At trial, Chambers was not allowed to flesh out this exculpatory evidence. The trial court ordered the testimony of McDonald's friends inadmissible as hearsay.[114] Chambers was forced to call McDonald as a witness because the state failed to do so.[115] The court rejected Chambers's request to treat McDonald as an adverse witness to discredit the repudiation because of the state's party witness or voucher rule.[116] This voucher rule prohibited a party from impeaching his own witness.[117]

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[105] Martin A. Hewett, *A More Reliable Right to Present a Defense: The Compulsory Process Clause After Crawford v. Washington*, 96 GEO. L.J. 273, 285 (2007).
[106] Chambers v. Mississippi, 410 U.S. 284 (1973).
[107] *Id.* at 302.
[108] *Id.* at 285.
[109] *Id.* at 286.
[110] *Id.*
[111] *Id.* at 287.
[112] *Id.* at 292–93.
[113] *Id.* at 287–88.
[114] *Id.* at 292–93.
[115] *Id.* at 291.
[116] *Id.* at 294.
[117] *Id.* at 295.

The Court looked at the historical justification for implementing a voucher rule, but declared that whatever purpose it may have served in the past no longer exists.[118] This, coupled with the application of the state's hearsay rule, violated Chambers's right to a fair trial.[119]

Although *Chambers* was decided on due process grounds and not compulsory process, the Court declared that "few rights are more fundamental than that of an accused to present witnesses in his own defense."[120] The Court recognized that fundamental constitutional rights are not absolute and "may bow to accommodate other legitimate interests in the criminal trial process."[121] However, the Court warned that the denial or restriction of such a right "calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined."[122]

In *United States v. Valenzuela-Bernal*,[123] the Supreme Court further refined the limitations of compulsory process by directing that more than a "mere absence of testimony is necessary to establish a violation" of the Compulsory Process Clause.[124] The accused must show that the testimony would have been "material and favorable to the defense."[125] The federal policy in question directed that illegal aliens be deported as soon as possible, at or near the border.[126] The defense claimed that this violated the accused's constitutional rights to compulsory and due process because two potential defense witnesses were deported under this policy before the defense had an opportunity to interview them.[127]

Recognizing that the Executive Branch has a responsibility to fully execute immigration policy adopted by Congress,[128] the Court declared that this "prompt deportation" policy was justified and did not violate

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[118] *Id.* at 296.
[119] *Id.* at 302–03.
[120] *Id.* at 302.
[121] *Id.* at 295.
[122] *Id*. (quoting Berger v. California, 393 U.S. 314, 315 (1969)).
[123] United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).
[124] *Id.* at 867.
[125] *Id*. It is important to note that the Court relies on Rule 17(b) of the Federal Rules of Criminal Procedure (FRCP), which requires the defense to provide an *ex parte* application to the court establishing the necessity of the witness.
[126] *Id*. at 864.
[127] *Id.* at 861.
[128] *Id.* at 872.

Valenzuela-Bernal's due process or compulsory process rights.[129] The Court fully examined the governmental interests furthered by the policy and weighed them against the necessity of the denied testimony.[130] The Court recognized that this policy served several legitimate purposes.[131] First, a prompt deportation policy "constitutes the *most effective* method for curbing the enormous flow of illegal aliens across our southern border."[132] Second, overcrowding conditions at federal detention facilities in the Southern District of California required the government to secure many detainees in other federal or state prisons.[133] Third, the "detention of alien eyewitnesses imposes *substantial* financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are incarcerated though charged with no crime."[134] Justice O'Conner, in her concurrence, stated this interest another way: "because most of the detained aliens are never called to testify, we should be careful not to permit either needless human suffering or *excessive* burdens on the Federal Government."[135]

The Court, after detailing these significant governmental interests, noted that the accused failed to show how the testimony of these two witnesses would be material.[136] It recognized that the deportation encumbered the accused's ability to interview these witnesses, but noted that Valenzuela-Bernal should have some idea as to their testimony since he "was present throughout the commission of this crime."[137] Additionally, the Court noted that the accused was only charged with transporting the third illegal alien who remained "fully available" for questioning.[138]

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[129] *Id.* at 872–73.
[130] *Id.* at 864–67.
[131] *Id.* at 864–65.
[132] *Id.* at 864 (emphasis added).
[133] *Id.* at 865.
[134] *Id.*
[135] *Id.* at 877 (emphasis added).
[136] *Id.* at 867–74.
[137] *Id.* at 871.
[138] *Id.*

In *Rock v. Arkansas*,[139] the Supreme Court was faced with another evidentiary rule that, as in *Washington*[140]and *Chambers*,[141] prohibited the *per se* admission of certain testimony.

Vickie Rock was charged and convicted of killing her husband.[142] The couple had been engaged in an ongoing dispute involving whether to move from their apartment to a trailer outside of town.[143] That night, a fight broke out when her husband refused to let her eat, or leave the home.[144] Police arrived to find the husband shot in the chest and Rock pleading for them to save his life.[145] Rock told the police that she had tried to leave, but her husband grabbed her by the throat and began choking her and threw her against the wall.[146] After they struggled, Rock grabbed a gun and told him to leave her alone.[147] He hit her again and the gun went off.[148] One of the officers testified that Rock told him it was an accident.[149]

Rock's memory was rather vague regarding the exact details of the shooting. Thus, Rock's attorney arranged for her to be hypnotized to refresh her memory.[150] She was hypnotized twice by a licensed neuropsychologist with hypnosis training.[151] After these sessions, Rock was able to recall additional details of the shooting, which were corroborated by independent evidence.[152] However, the trial judge precluded Rock from testifying as to the portions of her memory that had been hypnotically refreshed.[153] The Arkansas Supreme Court upheld the conviction by declaring that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have."[154] The Supreme Court reversed, holding that the *per se* exclusion of this type of

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[139] Rock v. Arkansas, 483 U.S. 44 (1987).
[140] Washington v. Texas, 388 U.S. 14 (1967).
[141] Chambers v. Mississippi, 410 U.S. 284 (1973).
[142] *Rock*, 483 U.S. at 45, 48.
[143] *Id*. at 45.
[144] *Id.*
[145] *Id*. at 45–46.
[146] *Id.* at 46.
[147] *Id. See also id*. at 46 n.1.
[148] *Id*. at n.1.
[149] *Id.*
[150] *Id.* at 46.
[151] *Id.*
[152] *Id.* at 47.
[153] *Id.*
[154] *Id.* at 48.

testimony violated Rock's constitutional right to compulsory and due process.[155]

The Supreme Court struck down Arkansas's *per se* prohibition of hypnosis refreshed testimony in *Rock* because the rule was arbitrary and disproportionate to the purposes it was designed to serve.[156] The rule in *Rock* was intended to bar the admission of unreliable evidence at trial.[157] Although this is a legitimate government interest, the means in which it was affected was disproportionate to its purpose. The Court noted that other less restrictive means can be employed to serve this purpose.[158] Safeguards can be put in place to reduce the risk of unreliable evidence reaching the fact finder.[159] Additionally, the Court instructed that "traditional means of assessing accuracy of testimony," such as verifying through corroborating evidence and attacking through cross-examination, are always available.[160]

The Court recognized that the right to compulsory process is not unfettered. It may be forced to bend to other legitimate interests in the criminal justice system.[161] However, the Court further defined the line to which these rules cannot cross. The Court put further meat on the bones of *Washington's* arbitrary rule standard by mandating that the interests served by a rule must be closely examined to determine whether it justifies the limitation of compulsory process.[162] The Court declared that when a rule "conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice,' but *must* meet the fundamental standards of due process."[163] Additionally, the Court mandated that restrictions that encroach upon an accused's right of compulsory process cannot "be arbitrary or disproportionate to the purposes they are designed to serve."[164] Thus, the government must

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[155] *Id.* at 62.
[156] *Id.* at 61.
[157] *Id.*
[158] *Id.* at 60–61.
[159] The safeguards included: requiring hypnosis be performed only by specially trained individuals who are independent of the litigation to ensure established protocols are followed; recording of all interview sessions before, during, and after the hypnosis to determine if suggestive or leading questions were asked; and educating the fact finder on hypnosis through expert testimony and instructions to reduce confusion. *Id.*
[160] *Id.* at 61.
[161] *Id.* at 55 (citing *Chambers*, 410 U.S. at 302).
[162] *Id.* at 56.
[163] *Id.* at 55 (quoting *Chambers*, 410 U.S. at 302).
[164] *Id.* at 55–56.

evaluate the application of rules that encroach upon compulsory process to ensure its interests justify the restriction.[165]

III. Compulsory Process Today

A. Compulsory Process in the Federal Courts

This line of Supreme Court decisions, from *Burr* to *Rock*, as well as the framers' intent in adopting the Compulsory Process Clause, illustrates that the adversarial system only works when there is a fundamental balance between the prosecutor and the accused. The federal district courts recognized this issue decades ago and amended its rules to comply with this principle and allay public criticism in the fairness of the criminal justice system.

The Federal Rules of Criminal Procedure (FRCP) provide measures that ensure the accused's rights under the Compulsory Process Clause[166] are protected in federal court.[167] The subpoena power of the federal government extends to the accused in all cases in federal district court. Rule 17 of the FRCP directs that the clerk of court must provide the accused subpoenas for the witnesses he wishes to compel to testify.[168] When the accused lacks the financial resources to pay for witness fees,

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[165] *Id.* at 56.
[166] U.S. CONST. amend VI.
[167] FED. R. CRIM. P. 17, provides:

> (a) CONTENT. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.
>
> (b) DEFENDANT UNABLE TO PAY. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

Id.
[168] *Id*. at 17(a).

the government must fund the witnesses in the same manner in which it funds prosecution witnesses, so long as the defense shows the necessity for the witness.[169] The witness must appear at trial after being served the subpoena or face potential criminal sanctions.[170]

At first glance, this rule may appear similar to the requirements of RCM 703. In fact, FRCP 17 was nearly identical, in application, to RCM 703 until FRCP 17 was amended in 1966.[171] Prior to the 1966 amendment, FRCP 17 required the accused to establish the necessity of the witness to the prosecutor before the witnesses would be funded by the government.[172] This policy of requiring the accused to justify his witnesses to the prosecution was the subject of much criticism.[173]

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[169] *Id*. at 17(b).
[170] *Id*. at 17(g).
[171] *Id.* at 17 (Notes of Advisory Committee on Rules—1966 Amendment) detailing the changes to the language of subsection (b):

> The amendment makes several changes to the 1945 version. The references to a judge are deleted since applications must be made to the court and an ex parte application, followed by a satisfactory showing, is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Id.
[172] *Id.* at 17(b) (1945) (amended 1966) provided,

> (b) Indigent Defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of the witness subpoenaed in behalf of the government.

Id. See also Westen, *supra* note 5, at 270.
[173] FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment).

Attorney General Robert F. Kennedy led the fight to level the litigation playing field in this arena.[174] In 1966, FRCP 17 was modified to ameliorate the constitutional and public policy concerns of requiring the accused to provide the prosecutor a preview of the defense's case when the government did not have to reciprocate.[175]

The 1966 amendment to subsection (b) of FRCP 17, which remains in effect today, removes compulsory process from the adversarial process by directing that the accused's application for government-funded witnesses be made *ex parte* to the court.[176] The determination of necessity now falls to an independent arbiter—the clerk of court.[177] "The manifest purpose of requiring that the inquiry be *ex parte* is to insure that the defendant will not have to make a premature disclosure of his case."[178]

> Subdivision (b).—Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. Id. at 40–41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. *Smith v. United States*, 312 F.2d 867 (D.C.Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. *Greenwell v. United States*, 317 F.2d 108 (D.C.Cir. 1963).

Id.

[174] *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1963).

[175] FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment).

[176] *Id.* at 17.

[177] *Id*.

[178] Marshall v. United States, 423 F.2d 1315, 1318 (1970).

This procedure represents a sound and constitutional solution to the clash between the accused's rights guaranteed by the Compulsory Process Clause and the government's "legitimate interest in preserving public funds from frivolous requests for immaterial witnesses."[179] It provides the accused a means to secure the presence of witnesses at trial without infringing on the ability to prepare and present a defense. If the court determines the accused's assertions are not credible, it can deny the request, or if the court finds the defense counsel is playing fast and loose with the truth, it can sanction the attorney.[180]

B. Compulsory Process for the Military Accused

While FRCP 17 requires the defendant to establish the necessity of his witness to the court *ex parte* before the government will fund the production costs, as discussed below, RCM 703 stands in stark contrast by requiring the accused to reveal trial strategy to the trial counsel to justify the need for a particular witness. Although not all constitutional rights are fully available to service members, the right to compulsory process under the Sixth Amendment flows fully to the military accused at courts-martial.[181] Not only does the Compulsory Process Clause guarantee the military accused compulsory process for witnesses in the merits portion of a court-martial, but in presentencing as well.[182] Additionally, military case law is clear that "who these witnesses shall be is a matter for the accused and his counsel."[183]

The military rule implementing compulsory process, RCM 703, violates not only the Compulsory and Due Process Clauses of the U.S. Constitution, but also federal statutory provisions of the UCMJ. Also, RCM 703 unlawfully encroaches upon the sacred legal principles of attorney-client and attorney work-product privileges. Further, the application of RCM 703 undermines the public confidence in the military judicial system.

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[179] Westen, *supra* note 5, at 270.
[180] *See* MODEL RULES OF PROF'L CONDUCT R.8.4. *See also* Westen, *supra* note 5, at 271.
[181] United States v. Sweeney, 34 C.M.R. 379, 382 (C.M.A. 1964).
[182] United States v. Manos, 37 C.M.R. 274, 278 (C.M.A. 1967).
[183] *Sweeney*, 34 C.M.R. at 382.

1. RCM 703 Violates the Compulsory Process Clause[184]

a. Subpoena Power

The Compulsory Process Clause stands for nothing less than the accused's right to require the government to use its substantial power to compel witnesses to appear and testify for the accused.[185] The subpoena power in the military rests solely with the government.[186] The accused is forced to request the government's assistance to obtain witnesses in his favor. The accused does so only by waiving certain privileges and providing the prosecution a preview of its case.

Some may argue that the restrictions of RCM 703 merely limit the production of defense witnesses where the defense requests funding from the government. Their solution, when the defense does not wish to be burdened by the synopsis requirement, is for the defense to simply foot the bill to produce the witness.[187] This position misses two important points. First, unlike the federal rules, the military rules do not provide

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[184] Although no court has specifically ruled on the constitutionality of Rule for Courts-Martial (RCM) 703, its implications have been recognized for some time. *See* U.S. DEP'T OF ARMY, PAM. 27-22, MILITARY CRIMINAL LAW—EVIDENCE para. 33-5 (15 July 1987) [hereinafter DA PAM 27-22] (recognizing that RCM 703's requirement for the accused to provide adequate justification for his witnesses to the trial counsel presents a "potential compulsory process problem."). *See also* United States v. Carpenter, 1 M.J. 384, 386 n.8 (1976) (declaring that the process of requiring the accused to submit its request to a "partisan advocate" appears to be inconsistent with Article 46, UCMJ); United States v. Arias, 3 M.J. 436, 438 (1977) (holding that the military rule implementing compulsory process will be *applied* "in ways that leave *no* doubt that an accused's right to secure the attendance of a material witness is free from substantive control by trial counsel") and Captain Richard H. Gasperini, *Witness Production and the Right to Compulsory Process*, ARMY LAW., Sept. 1980, at 22. *But see* United States v. Breeding, 44 M.J. 345, 354–55 (1996) (Judge Sullivan, in his concurring opinion, sought to declare that RCM 703 does not violate compulsory or due process, nor that it violated Article 46, UCMJ. In reaching this conclusion, Judge Sullivan completely ignored the disparity of the rule and declared that the rule "simply allows for judicial review of denial of subpoenas on relevance and materiality grounds before they are enforced by court order." He referred to the synopsis requirement as "judicial review." Likewise, he did not address the arbitrariness or disproportionality of the rule, nor did he discuss the implications RCM 703 has on attorney work-product. However, the CAAF majority did not join in Judge Sullivan's opinion and refused to rule on the constitutionality of RCM 703.).

[185] Westen, *supra* note 5, at 265–66. *See also* Colonel Francis A. Gilligan & Major Fredric I. Lederer, *The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation*, 101 MIL. L. REV. 1, 62 (1983).

[186] MCM, *supra* note 3, R.C.M. 703(e)(2)(C).

[187] Applying compulsory process in this manner amounts to the exact practice of FRCP 17 prior to the 1966 amendment that received such resounding criticism.

two separate standards for issuing subpoenas based on who is footing the bill.[188] Thus, the accused is specifically precluded by the rules from even entertaining this notion. Second, many defense witnesses require no funding for production, but simply the power of the government to ensure their attendance. Local witnesses, servicemembers, and government civilian employees serve under the local military command. Often witnesses are servicemembers in the same command as the accused. Even where the witness wishes to appear on behalf of the accused, the witness must obtain permission from the command to be absent from duty.[189] The accused lacks the authority to direct a service member to appear as a witness at his court-martial. It is often even difficult for the defense to arrange, with the accused's command, a few hours to interview members within the command. The defense is at the mercy of the very command who has decided to prosecute the accused.

If the accused had independent subpoena power, he would still often lack the financial resources to ensure the witness' attendance at trial, be they expert or lay witnesses. Even when the expenses involve only travel and per diem, as with lay witnesses, these expenses are often prohibitively high. Recall PVT Smith who was stationed overseas. One of the critical defense witnesses resided in the United States and was needed to attack the credibility of the alleged victim's account of the alleged crime. The cost of the airline ticket alone would require PVT Smith to receive assistance from the government in presenting this vital testimony. Thus, PVT Smith's defense would be faced with the dilemma of handing over work-product to the trial counsel in the hope his compulsory process rights will be honored, or risk trial without the testimony of this crucial witness.

b. A Process of Parity

Although the Compulsory Process Clause contains within its protections the accused's right to have witnesses subpoenaed on his behalf, it goes well beyond that. If the framers simply wanted an accused to have subpoena power, they would have so directed. However, in drafting the language of the Compulsory Process Clause, Madison used

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[188] MCM, *supra* note 3, R.C.M. 703(e)(2)(C). *See also* Major Arnold I. Melnick, *The Defendant's Right to Obtain Evidence: An Examination of the Military Viewpoint*, 29 MIL. L. REV. 1, 3 (1965).

[189] United States v. Sweeney, 34 C.M.R. 379, 386 (C.M.A. 1964).

language which encompasses the protections provided by each of the ratifying state's Declaration of Rights.[190] This includes the notion "that all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to."[191] At its core, the Compulsory Process Clause stands for the proposition that the accused be entitled to the same ability to compel witnesses as the prosecutor. This parity guarantee has been stripped from the military accused by the provisions of RCM 703.

The language of RCM 703 begins by directing that the accused be placed on equal footing with the prosecution regarding witness production.[192] However, it then proceeds to effectively write out the equality of the rule.[193] While RCM 703 mandates equal footing and compulsory process regarding witness production, it establishes two vastly different rules for determining which witnesses will actually be produced for trial. When the government desires to produce a witness against the accused, such consideration is left to the sole discretion of the trial counsel.[194] There is no requirement for the trial counsel to obtain permission from defense counsel, nor does the trial counsel have to provide the accused with a synopsis of the witness's expected testimony. Rather, the trial counsel must simply provide the defense the names and contact information of those witnesses the government intends to present at trial.[195]

The analysis section to RCM 703 is devoid of any substantive discussion because the procedure makes perfect sense.[196] The trial counsel is in the best position to determine which prosecution witnesses are relevant and necessary to the prosecution. This logic, however, does not flow in similar fashion to the defense.[197] While RCM 703 emboldens

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[190] *See supra* Part II.C.
[191] Clinton, *supra* note 20, at 730.
[192] MCM, *supra* note 3, R.C.M. 703(a) (providing that "[t]he prosecution and defense and the court-martial *shall* have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process") (emphasis added).
[193] *Id*. R.C.M. 703(c) (establishing two separate standards for witness production depending on whether the witness is testifying for the government or the accused, with the more onerous standard placed on the accused).
[194] *Id*. R.C.M. 703(c)(1) (directing that "[t]he trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution").
[195] *Id*. R.C.M. 701(a)(3).
[196] *Id*. R.C.M. 703(c)(1) analysis, at A-21.
[197] *Id*. R.C.M. 703(c)(2) analysis, at A-21.

trial counsel to determine the relevance of his own witnesses, the same discretion is not entrusted to the defense. To the contrary, the relevance of the defense's witnesses is determined by the very person endeavoring to take the accused's liberty, property, and life in a capital case. [198] This practice runs counter to the very spirit and letter of the Compulsory Process Clause. The Court of Military Appeals, now the Court of Appeals for the Armed Forces (CAAF), in *Manos*, citing the Supreme Court in an analogous case, directed that although the right to compulsory process is not absolute, the system must "assure to the *greatest* degree possible . . . *equal* treatment for every litigant before the bar."[199] The rationale for the disparate treatment of witness production imposed by RCM 703, and its departure from the Federal Rules of Criminal Procedure, hinges on granting greater weight to the needs of the government to conserve fiscal resources than the accused's constitutional rights to present an adequate defense. This overly onerous restriction is unconstitutional: it is an arbitrary standard which violates the mandate set forth in *Washington* and its progeny.

c. Synopsis Requirement—An Arbitrary Standard

As evidentiary and procedural rules have proliferated since the passing of the Bill of Rights, these rules have necessarily encroached on constitutional rights. The Supreme Court has routinely declared that these rights are not absolute and can be restricted.[200] In fact, the Court has declared that "rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials."[201] To pass constitutional scrutiny, however, these rules "may not be arbitrary or

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[198] *Id*. R.C.M. 703(c)(2)(D).

> The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

Id.

[199] United States v. Manos, 37 C.M.R. 274, 279 (1967) (citing Coppedge v. United States, 369 U.S. 438, 446 (1962)).

[200] *See supra* Part II.D.2.

[201] United States v. Scheffer, 523 U.S. 303, 308 (1998).

disproportionate to the purposes they are designed to serve."[202] The Supreme Court has established a three-part test for determining whether an evidentiary or criminal procedure rule passes this scrutiny. First, the rule in question must be analyzed to determine if it implicates a constitutional right.[203] Second, knowing that constitutional rights are not absolute and can be forced to "bow to accommodate" legitimate government interests, the rule must be analyzed to determine if it serves a legitimate governmental interest.[204] Third, the rule must then be closely examined to determine if the interests served by the rule justifies the constitutional limitation.[205] When approaching a rule that implicates compulsory process, CAAF has instructed that "it is important that all concerned be impressed with the undoubted right of the accused to secure the attendance of witnesses in his behalf," and this right must be scrupulously honored "if such can be done without *manifest* injury to the service."[206]

The Supreme Court, in *Rock*, applied this three-part test to a rule which imposed a *per se* ban on admission of testimony refreshed by hypnosis.[207] The Court noted that the Arkansas rule restricted the right of the accused to compulsory process.[208] *Rock* recognized that a state has a "legitimate interest in barring unreliable evidence."[209] However, the rule was declared unconstitutional as an arbitrary rule because this legitimate interest could be served without imposing such a strict rule.[210] Thus, even when a rule furthers a legitimate governmental interest, it will be deemed arbitrary when a lesser restrictive rule can protect the same interest. As in *Rock*, RCM 703 is overbroad in its application and violates the accused's protections guaranteed by the Compulsory Process Clause because the legitimate governmental interests furthered by RCM 703 can be accomplished to the same degree without requiring the accused to reveal trial strategy to the prosecutor prior to trial.

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[202] *Id. See also* Rock v. Arkansas, 483 U.S. 44, 56 (1987); Washington v. Texas, 388 U.S. 14, 22–23 (1967).
[203] Chambers v. Mississippi, 410 U.S. 284, 294 (1973).
[204] *Id.* at 295.
[205] *Rock*, 483 U.S. at 56; *Chambers*, 410 U.S. at 295.
[206] United States v. Manos, 37 C.M.R. 274, 279 (1967).
[207] *Rock*, 483 U.S. at 55–62.
[208] *Id.* at 52.
[209] *Id.* at 61.
[210] *Id.* at 60–61.

The plain reading of RCM 703 implicates the accused's constitutional right to compulsory process because it imposes hurdles that the accused must clear before his witnesses will be produced.[211] The Executive Branch has a legitimate governmental interest to conserve its fiscal resources. Likewise, it has a "responsibility to prevent an abuse of the right of process."[212] However, the restrictions found in RCM 703 regarding the accused's compulsory process rights are overly broad, as lesser restrictive means, discussed below, are available to ensure the government's interest in preserving its resources.

2. RCM 703 Violates the Fifth Amendment's Due Process Clause

> 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 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. This right is a fundamental element of due process of law.[213]

The Fifth Amendment's Due Process Clause mandates that no person will be "deprived of life, liberty, or property without due process of law."[214] The Supreme Court has held that the Due Process Clause provides individuals *equal* protection guarantees.[215] This protection works to ensure the accused receives a fair trial and provides him "a fair opportunity to defend against" the charges.[216] A fair trial cannot exist when the procedures in place establish a framework of unfairness.

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[211] Before an accused is afforded his right of compulsory process, he *must* provide a justification for each witness to the trial counsel so that the trial counsel can determine whether the accused really needs the witness. MCM, *supra* note 3, R.C.M. 703(c).
[212] United States v. Sweeney, 34 C.M.R. 379, 386 (C.M.A. 1964).
[213] Washington v. Texas, 388 U.S. 14, 19 (1967).
[214] U.S. CONST. amend. V.
[215] Bolling v. Sharpe, 347 U.S. 497 (1954).
[216] Chambers v. Mississippi, 410 U.S. 284, 294 (1973); *Washington*, 388 U.S. at 19.

Rather, the process in which the government exercises its power to prosecute the accused must be fair and the rules cannot be arbitrary.[217]

The provisions of RCM 703 tip the scales greatly in favor of the prosecution. The synopsis requirement of RCM 703 is a glaring example of unfairness. While the accused must reveal his trial strategy to the prosecutor in order to be afforded his right of compulsory process, the government need not reciprocate. Justice Harlan, in his concurrence in *Washington*, posed that the Due Process Clause is "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[218] Justice Harlan went on to declare that a rule violates due process when it discriminates between the prosecution and the defense "in the ability to call the same person as a witness."[219]

The provisions of RCM 703 do just that. Recall again PVT Smith. The witnesses that the prosecution denied were only produced because the trial judge was satisfied by the defense's motion to compel. Had PVT Smith not provided, in open court, a justification for each witness, the judge would have denied the request and PVT Smith would have been denied the witnesses in support of his defense. However, nothing prevented the prosecutor from calling one of these denied witnesses to testify for the government.

3. RCM 703 Violates Articles 36 and 46 of the UCMJ

Beyond the constitutional violations, RCM 703 violates federal statute. Congress, through its power to raise and support armies under the United States Constitution,[220] has enacted the Uniform Code of Military Justice (UCMJ), which provides the code of military criminal laws applicable to all U.S. servicemembers.[221] Congress has further authorized

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[217] *Washington*, 388 U.S. at 22. *See also* Rock v. Arkansas, 483 U.S. 44, 55–56 (1987); United States v. Scheffer, 523 U.S. 303, 308 (1998).
[218] *Washington*, 388 U.S. at 24.
[219] *Id.* The Court agreed with Justice Harlan, but chose to rest its holding on the more specific Compulsory Process Clause. *See* Westen, *supra* note 5, at 116.
[220] U.S. CONST. art. I, sec 8. "The Congress shall have power . . . to raise and support armies" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any Department or Officer thereof." *Id*.
[221] R. CHUCK MASON, CONG. RESEARCH SERV., R 41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW (2011).

the President, under Article 36, UCMJ, to prescribe rules in order to implement the UCMJ.[222] In doing so, Congress has specifically directed that unless deemed impractical, these implementing rules must mirror those rules established for criminal trials in United States district courts.[223] Thus, the plain meaning of Article 36, UCMJ, directs that the rules codified in the RCMs must be the same as those codified in the Federal Rules of Criminal Procedure (FRCP), unless there is a determination that the application of the federal rule would be impractical in the military justice system.[224] The federal rule implementing compulsory process, FRCP 17, is not impractical for the practice of military justice, as the Department of Justice[225] is no less diverse than the respective Judge Advocate General's Corps. The Department of Justice (DOJ) employs over 9,500 attorneys at more than

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[222] *Scheffer*, 523 U.S. at 308 n.2.

[223] UCMJ art. 36 (2012). "The President may prescribe rules:

> (a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress."

Id.

[224] The court in *Manos* declared that the government must take measure to ensure full compliance with the Compulsory Process Clause if they "can be done without *manifest* injury to the service." United States v. Manos, 37 C.M.R. 274, 279 (C.M.A. 1967) (emphasis added) (defining the balancing test in *United States v. Sweeney*, 34 C.M.R. 379, 382 (C.M.A. 1964)).

[225] The Department of Justice (DOJ) is charged with the following mission:

> To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.

See About DOJ—Our Mission Statement, JUSTICE.GOV, http://www.justice.gov/about/about.html (last visited Sept. 3, 2013).

160 locations nationwide, making it the largest law firm in the world, and hires more than 750 attorneys per year.[226]

The RCM 703 analysis acknowledges that RCM 703 differs from FRCP 17.[227] However, it states that the use of such rules would not be practicable, as witnesses in federal court are produced through a process administered by the court and no such process is available in the military trial judiciary.[228] Further, the analysis goes on to declare that it would be impracticable to establish such an administrative infrastructure since military judges do not always sit in fixed locations and must be available to serve in several places.[229] In today's era of digital technology and efficient transportation, this argument makes little sense. Courts increasingly rely on digital technology to conduct business to an extraordinary degree. Federal district courts require all court filings to be made online,[230] and most courts-martial rely on this same technology to operate efficiently.[231] In fact, the Army Judge Advocate General's Corps (JAGC) continues to explore more ways to leverage technology to aid in the efficient and effective practice of law.[232] This is due, in part, to the fact that the JAGC is so widely dispersed. Often supervisors are not co-located with their subordinates, and prosecutors are often not co-located with defense counsel, especially overseas and while deployed. The contention in the analysis that the prosecutor is more readily available to the defense is simply untrue. Most communication regarding administrative details of the court-martial are accomplished via electronic mail and thus the physical location of the individual—be it the prosecutor, the defense counsel, or the judge—is largely irrelevant in

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[226] A CAREER COUNSELOR'S GUIDE TO LATERAL HIRING AT DOJ, U.S. DEP'T OF JUST. OFFICE OF ATTORNEY RECRUITMENT AND MGT., http://www.justice.gov/oarm/images/lateralhiringguideforweb.pdf (last visited Sept. 6, 2013).

[227] MCM, *supra* note 3, R.C.M. 703(c) analysis, at A-21.

[228] *Id.*

[229] *Id.*

[230] *Electronic Case Filing in the Federal Court System*, ECF RESOURCE GUIDE, http://www.uscourts.gov/FederalCourts/CMECF/AboutCMECF.aspx (last visited Sept. 6, 2013).

[231] All docketing requests are now done electronically. Additionally, most witness lists, discovery requests, and motions are submitted, at least initially, in electronic form.

[232] The author developed a SharePoint platform for the U.S. Army's Defense Counsel Assistance Program (DCAP) to serve as a central repository for all Trial Defense Service-related materials. This allowed DCAP to provide reliable and Boolean searchable material to all Army defense counsel world-wide. Defense counsel are able to watch demonstration videos, search for motions, and read information papers on a wide range of criminal procedure and litigation topics.

today's environment. However, this is not the only fundamental flaw in the MCM's analysis of RCM 703.

Most telling in the analysis is the declaration that, when the defense requests a witness, the trial counsel "stands in a position similar to a civilian clerk of court for this purpose."[233] Private Smith would disagree. When PVT Smith submitted his witness list to the trial counsel requesting the presence at trial of the doctor who examined the alleged victim, it was summarily denied. It was denied, not because the defense failed to provide a proper synopsis of expected testimony, but because that witness was deemed by this impartial "clerk of court," the trial counsel, to be irrelevant. The government's actions in post-referral, pre-trial processing are part of the adversarial process; to suggest otherwise is disingenuous.

Although the Compulsory Process Clause provides the accused with a valuable weapon to present a defense,[234] Congress has granted service members even greater access to witnesses under Article 46, UCMJ.[235] This statute provides that "the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses," subject to regulations prescribed by the President.[236] The equal opportunity mandate is in line with the broad application of the Compulsory Process Clause that Madison intended and Chief Justice Marshall directed in the Burr trial and, if anything, provides greater protection to the accused than FRCP 17. However, what Article 46, UCMJ has given, RCM 703 taketh away.

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[233] MCM, *supra* note 3, R.C.M. 703(c)(2) analysis, at A-21.
[234] Washington v. Texas, 388 U.S. 14, 19 (1967).
[235] Gasperini, *supra* note 184, at 22.
[236] UCMJ art. 46 (2012).

> The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court- martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the Unites States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Territories, Commonwealths, and possessions.

Id.

Although Article 46, UCMJ mandates *equality* between the trial counsel and the accused in the production of witnesses, RCM 703 imposes two separate rules for witness production depending on who calls the witness. As discussed above, RCM 703 entrusts the trial counsel to determine which witnesses are relevant and necessary to prosecute the accused. Likewise, the trial counsel is entrusted to determine which witnesses are relevant and necessary to defend the accused. Although no court has specifically addressed the legality of RCM 703, CAAF has spoken unfavorably of the burden it places on the accused.[237] In *United States v. Carpenter*, CAAF recognized the impropriety of the burden imposed by RCM 703, in violation of the right granted by Article 46, UCMJ.[238] The court noted:

> Some comment on the provisions of paragraph 115a, MCM (the predecessor to RCM 703), are appropriate. The paragraph requires the defense to submit his request for a defense witness to the trial counsel for approval. In case of disagreement, the issue is presented to the convening authority or the military judge, depending on the state of proceedings. To the extent that this paragraph requires the defense to submit its request to a

[237] *But see* United States v. Breeding, 44 M.J. 345, 354–55 (1996) (Sullivan, J., concurring) (asserting that RCM 703 does not violate the rights of compulsory process). The CAAF determined the propriety of the trial judge's denial of certain defense witnesses based purely upon the judge's determination that the contested witnesses were not relevant and necessary. The defense was willing to fund the witness fees of these witnesses, but CAAF reiterated that the trial judge's role as "gate keeper" requires him to ensure only relevant, necessary, and non-cumulative testimony is presented at trial. Judge Sullivan, concurring with the result but not the majority opinion, confronted the constitutionality of RCM 703. Judge Sullivan posed that RCM 703 does not violate compulsory or due process, nor does it run afoul of Article 46, UCMJ, because both government and defense requests are "evaluated in terms of relevance and necessity" and that RCM 703 "simply allows for judicial review of denial of subpoenas on relevance and materiality grounds." However, Judge Sullivan does not address the fact that, under RCM 703, the prosecutor, not the military judge, is empowered to make all judgments regarding not only prosecution witnesses, but defense witnesses as well. This requires the defense to justify to the prosecution why a witness is relevant and necessary by telling the prosecutor what the witness will testify to, without requiring the prosecutor to provide the same advance notification to the accused. While the trial judge can grant a defense motion to compel a witness previously denied by the prosecutor, the prosecution has already been tipped off as to the defense case without having to provide similar information to the accused.

[238] United States v. Carpenter, 1 M.J. 384, 386 n.8 (1976).

> *partisan advocate* for a determination, the requirement appears to be inconsistent with Article 46, U.C.M.J.[239]

A year later, when presented with a challenge to the unfair burden placed on the accused by application of paragraph 115a, MCM, CAAF declared, "While we have never approached the question directly from the standpoint of the present challenge, we have applied the paragraph in ways that leave no doubt that an accused's right to secure the attendance of a material witness is free from substantive control by trial counsel."[240] Thus, it is clear that CAAF is uncomfortable with the burden placed on the accused by RCM 703 and recognizes that it is inconsistent with Article 46, UCMJ. However, instead of trying to apply RCM 703 in a manner that is consistent with Article 46, UCMJ, RCM 703 should be amended to actually come into compliance therewith.

4. 703 Unlawfully Restricts the Attorney Work-Product Privilege

Under RCM 703, an accused and his assigned defense counsel cannot obtain the presence of crucial witnesses without revealing trial strategy and work-product[241] to the prosecution prior to trial.[242] This requirement to surrender work-product does not even guarantee the accused's rights will be honored, but rather, provides him the possibility to have them honored.[243]

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[239] *Id.*

[240] United States v. Arias, 3 M.J. 436, 438 (1977). Although the propriety of RCM 703 has not been resolved, this issue continues to be litigated at the trial level. The author received one such motion, which contributed to this argument (on file with author).

[241] The Federal Rules of Criminal Procedure defines work-product protection as the "protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial." FED. R. CRIM. PROC. P. 502(g). *See also* Hickman v. Taylor, 329 U.S. 495 (1947) (limiting inquiry into an attorney's case file). *See also* Melnick, *supra* note 188, at 31.

[242] *See* FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment) (The pre-1966 version of Rule 17 required the defendant to disclose a proffer similar to RCM 703's requirement. The committee recognized that this requirement forced the defendant to disclosure the theory of his case prior to trial.).

[243] Milton Hirsch, *The Voice of Adjuration: The Sixth Amendment Right to Compulsory Process Fifty Years After* United States *ex rel.* Toughy v. Ragen, 30 FLA. ST. U.L. REV. 81, 117 (2002). Where a regulation would "entitle a federal prosecutor to be told before the fact what testimony his adversary hoped to adduce as a condition precedent to his adversary's adducing that testimony, observed that 'it would be Valhalla for a private lawyer to be able to get a preview of an adverse witness's cross-examination.'" United States v. Feeney, 501 F. Supp. 1324, 1325 (D. Colo. 1980).

Work-product materials are divided into two categories: tangible and intangible. Tangible work-product includes "memoranda notes, witness statements, and the like."[244] Intangible work-product, often referred to as opinion work-product, "refers to an attorney's conclusions, legal theories, mental impressions, or theories."[245] The degree of protection from forced compulsion the material receives depends upon which category the material falls within.

Tangible work-product is discoverable when the opposing party "demonstrates substantial need of the materials to prepare its case and it is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[246] Intangible, or opinion work-product, receives nearly complete protection. To be discoverable, the opposing party must "demonstrate something far greater than the substantial need and undue hardship necessary to obtain tangible work product. Discovery of opinion work product may be permitted only where the attorneys' conclusions, mental impressions or opinions are at issue in the case and there is a compelling need for their discovery."[247] Where materials are bound up together, the court, when ordering discovery of tangible work-product, must ensure to protect against exposure of intangible work-product.[248] Thus, it is important to determine what type of work-product is being sought to determine whether it is actually discoverable.

The Supreme Court has acknowledged that the doctrine of work-product privilege applies in criminal trials just as it does in civil trials.[249] The Supreme Court detailed the importance of this privilege in *United States v. Nobles*[250]:

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[244] Douglas R. Richmond & William Freivogel, Remarks at the Section of Business Law American Bar Association Annual Meeting: The Attorney-Client Privilege and Work Product in the Post-Enron Era 5 (Aug. 7, 2004), *available at* http://apps.americanbar.org/buslaw/newsletter/0027/materials/11.pdf (last visited Sept. 3, 2013).
[245] *Id*. at 5.
[246] *Id.*
[247] *Id. See also* Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992).
[248] Richmond & Freivogel, *supra* note 244, at 5. *See* LaPorta v. Gloucester Cnty. Bd. of Chosen Freeholders, 774 A.2d 545, 548 (N.J. Super. Ct. App. Div. 2001) (quoting Hickman v. Taylor, 329 U.S. 495 (1947)).
[249] United States v. Nobles, 442 U.S. 225, 236 (1975). *See also* Hickman v. Taylor, 329 U.S. 495 (1947).
[250] *Nobles*, 442 U.S. at 237.

> In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.[251]

The Court went on to recognize that if this privilege were not scrupulously honored, "inefficiency, unfairness, and sharp practices would inevitably develop"[252] and "the effect on the legal profession would be *demoralizing*."[253] Thus, the role of the work-product doctrine is vital to the "proper functioning of the criminal justice system."[254]

A synopsis of expected witness testimony, as required by RCM 703, amounts to an infringement on the work-product privilege. The synopsis actually amounts to opinion, or intangible work-product, as it is the attorney's distillation of the witness's statements, verbal or written, and the attorney's interviews of the witness.[255] It amounts to the attorney's mental impressions on how the witness will testify and how that will benefit the accused. In the case of PVT Smith, each synopsis was developed based upon interviews and interactions between defense counsel and the witness. Thus, not only does the requirement to provide the trial counsel a synopsis of expected testimony violate compulsory and due process,[256] it also violates the work-product privilege.

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[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.* at 238. The Court went on to say that "the interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."
[255] *Id.* at 237–38. The Supreme Court noted that work-product "is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." It further went on to hold that "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."
[256] DA PAM. 27-22, *supra* note 184, para. 33-5a. This guide, although no longer published, represented the seminal guide for evidentiary practice in courts-martial. The drafters of this official publication recognized that the provisions of RCM 703 requiring the defense to submit adequate justification to the trial counsel with the witness request potentially violate compulsory process.

5. RCM 703 Undermines Public Confidence in the Court-Martial Process

No system of justice operates effectively unless the public perceives it to be fair.[257] Many questions regarding the propriety of the military judicial system exist; its practitioners must guard against maintaining the status quo at the expense of public perception. The United States has been at war for over a decade. Hundreds of thousands of parents have entrusted their children to their nation. It is imperative that they see the military justice system as a fair system; one which values the fundamental rights of their children.

The UCMJ has been under attack for many years regarding perceptions of unfairness and, at times, outright unfairness.[258] It has been, and continues to be, attacked for the panel selection process,[259] the command-driven charging decision,[260] the lack of unanimous verdict requirements,[261] and more recently the witness production process.[262] The military justice system is under constant scrutiny and its advocates must be proactive in ensuring it is perceived as effective, efficient, and fair. Often military justice practitioners get caught up in the effectiveness and efficiency of the system, but lose sight of the fairness. The federal criminal judicial system faced this same issue nearly half a century ago and improved its system to ensure fairness is not trumped by effectiveness or efficiency.[263]

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[257] United States v. Cruz, 20 M.J. 873, 880 (1985).

[258] Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000). *See also* Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures*, ARMY LAW., Apr./May 2003 at 17.

[259] Huestis, *supra* note 258, at 17–18.

[260] Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—And That Needs to Change*, LEGAL AFFAIRS, May/June 2002, *available at* http://legalaffairs.org/issues/May-June-2002/review_hillman_mayjun2002.msp (last visited Sept. 3, 2013).

[261] Henry B. Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455, 469–70 (1971).

[262] The Cox Commission II recommended changes be made to the military witness production process prohibiting the trial counsel from objecting to the credentials of a defense expert witness who is provided by the government as an adequate substitute to the witness actually requested. Dwight Sullivan, *The Cox Commission II Report*, CAAFLOG (Oct. 19, 2009). *See* http://www.caaflog.com/2009/10/19/the-cox-commission-ii-report/ (last visited Sept. 3, 2013).

[263] FED. R. CRIM. P. 17(b).

IV. Recommended Changes

The military justice system must be revised to comply with the constitutional mandates of compulsory and due process. The current restrictions imposed by the President in RCM 703 fly in the face of Chief Justice Marshall's warning that the rights guaranteed by the Compulsory Process Clause are "sacred" and must be not be restricted in a manner which circumvents their purpose.[264] The arbitrary nature of RCM 703, as defined by the Supreme Court in *Washington* and its progeny, prohibits the accused from exercising his rights without first disclosing a portion of his case to the prosecutor. As in *Washington* and *Rock*,[265] the restrictions imposed by RCM 703 may serve a legitimate governmental interest, but the rule is arbitrary and disproportionate to the purposes it was designed to serve. It is overbroad because the rule is too onerous on the accused as the government's interest can be satisfied in a less restrictive fashion. The following recommendations present three approaches that serve both the government's requirements to conserve resources and prevent an abuse of the process, and adhere to the constitutional mandates of the Compulsory and Due Process Clauses.

A. Level the Playing Field: Remove the Synopsis Requirement of RCM 703

The framers adopted the Compulsory Process Clause to ensure the accused had the same power to compel witnesses in his favor as the prosecutor. As discussed above, this is no longer the case for the military accused.[266] To fully comply with both the spirit and letter of the Compulsory Process Clause, the military accused must be placed on equal footing with the prosecutor in the terms of witness production. A solution to achieve this parity is to amend RCM 703 to exclude the witness synopsis requirement placed on the military accused. This would provide the military accused the broad protections of the Compulsory Process Clause envisioned by Madison and intended by Chief Justice Marshall's interpretation in the Burr treason trial.

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[264] Westen, *supra* note 5, at 102.
[265] Washington v. Texas, 388 U.S. 14, 22 (1967); Rock v. Arkansas, 483 U.S. 44, 61 (1987).
[266] MCM, *supra* note 3, R.C.M. 703.

The witness synopsis requirement of RCM 703 lies at the heart of the unconstitutional implementation of compulsory process for the military accused. Removing this requirement brings the military criminal procedure and evidentiary rules into compliance with the constitutional mandates.[267] Likewise, it would comply with Article 46, UCMJ, while also fully honoring the sacred protection of the work-product privilege and projecting a balanced and fair system of justice to the public.

To achieve this end, RCM 703(c)(2) must be amended to read as follows:

> *Witnesses for the defense*,
>
> (A) *Request.* The defense shall submit to the trial counsel a written list of witnesses whose testimony the defense considers relevant and necessary for the defense.
>
> (B) *Contents of the Request.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits, sentencing, or interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence.
>
> (C) *Determination.* The trial counsel shall arrange for the presence of any witness listed by the defense.

The provisions of RCM 703(c)(2)(C), which address the timing of witness requests, would not need to be modified. However, RCM 1001(e)(2), which places additional restrictions on government funded defense witnesses for presentencing proceedings, would need to be stricken in its entirety. These modifications would provide the accused equal access to the production of witnesses while fully satisfying the mandates of the Compulsory Process Clause, as well as the legal and policy concerns discussed above.

While completely eliminating the witness synopsis requirement represents the best result for advocates who believe procedural and evidentiary rules should not infringe upon the accused's constitutional rights in any manner, this position is likely not the most practical because

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[267] U.S. CONST. amends. V & VI.

it does not address the government's necessity to operate with constrained resources. The federal district court has squarely addressed this issue and modified its rules and procedures to provide the accused his constitutional rights of compulsory and due process while still ensuring that it guards its scarce resources from unreasonable expenditures.[268] It has done so by implementing FRCP 17.[269]

B. FRCP 17 Equivalency

As discussed above, prior to amending the Federal Rules of Criminal Procedure in 1966, a defendant in United States district court was required to prove the necessity of his requested witnesses to the government, which resulted in the accused providing the prosecutor a preview of his case prior to trial.[270] After much public criticism of this process, the rules were amended to remove this unfair advantage to the prosecution.[271] Rule for Courts-Martial 703 should be amended in a similar fashion. As noted above, since there is no compelling interest for the military to deviate from the federal rules, RCM 703 must be amended to come into compliance with Article 36 of the UCMJ.

1. Clerk of Court

The military justice system should adopt the clerk of court model of the United States district courts. This would require creating clerk of court positions at each judicial region in which a military judge is located. The clerk of court would assume the role of securing witnesses, likely for both the prosecution and defense. Under this system, as in U.S. district court, instead of the accused providing his witness request and synopsis of expected witness testimony to the prosecutor, the accused would provide the documentation to the clerk, *ex parte*. The clerk would then make any relevancy and necessity determination, which the accused could appeal by way of an *ex parte* motion to the military judge after referral.

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[268] FED. R. CRIM. P. 17.
[269] *Id.*
[270] FED. R. CRIM. P. 17(b) (1945).
[271] FED. R. CRIM. P. 17 (Notes of Advisory Committee on Rules—1966 Amendment).

This process would fully satisfy the constitutional mandates of the Compulsory and Process Clauses, as well as the statutory directives of Articles 36 and 46, UCMJ. Likewise, since the synopsis of expected testimony would be provided *ex parte* to the court, the defense counsel would no longer be forced to reveal information that would otherwise be protected by work-product privilege. Additionally, public confidence would be elevated because the prosecutor would no longer be guaranteed a preview of the defense case, while not having to reciprocate to the accused. Employing a clerk of court at the trial level would provide great efficiencies for the military justice system beyond simply witness production. This system would also provide a central repository for filing motions and scheduling court dates. Beyond these duties, the clerk of court could also assist in the panel selection process by coordinating panel questionnaires, provide budgetary and administrative oversight for the judicial region, assist in securing expert witnesses, provide training to court-reporters and bailiffs, and act as property book officer for the court.

2. Military Judge as Initial Arbiter of Relevance

Should the establishment of a clerk system prove too difficult in today's times of decreasing budgets and personnel draw-downs, RCM 703 can still comply with constitutional, statutory, and public policy concerns by eliminating the initial request from the accused to the trial counsel and instead have the accused make his initial request to the military judge *ex parte*. This satisfies the overall purpose and intent behind FRCP 17, as it levels the playing field between the prosecution and the accused while still providing a check in the system to protect against frivolous requests and abuse of process.[272]

This would involve two simple changes. First, the accused would no longer have two bites at the production apple. This is a very small trade-off as it is hard to imagine that the military judge would render a different decision as the initial arbiter under this system than he would as the appeal authority. Second, all witness requests would be made *ex parte*. This would not cause any concern for the government since the synopsis requirement satisfies only two legitimate interests: guarding against frivolous requests and preventing abuse of process.[273]

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[272] Westen, *supra* note 5, at 271.
[273] *Id.* at 271. *See also* United States v. Sweeney, 34 C.M.R. 379, 386 (C.M.A. 1964).

The unfair advantage the prosecution receives under the current system from obtaining a preview of the defense case is a byproduct of the system, not a legitimate interest. Amending RCM 703 to mirror FRCP 17, whether by establishing a clerk of court or going straight to the trial judge *ex parte*, provides another advantage: it would actually improve the efficiency of the process. Knowing that the synopsis would be provided *ex parte* to an independent arbiter, the accused would be more inclined to provide a greater detailed synopsis of expected testimony to justify his request. This would allow for greater candor and analysis of the relevance and necessity of each witness and decrease the delays that inevitably ensue with pre-trial litigation over witness production.

C. Relevancy Determination Made by Military Magistrate

The unlawful and improper restrictions imposed by RCM 703 can also be eliminated by shifting the initial arbiter of relevance from the prosecutor to the local military magistrate, *ex parte*. This scenario would mirror the clerk of court option above regarding witness production. This would allow the government to ensure the defense does not have the ability to hold the command hostage by requiring it to allocate resources for witnesses that are requested for potentially nefarious reasons. It also provides the accused an independent arbiter who does not have a vested interest in the outcome of which defense witnesses are produced for trial. This *ex parte* submission by the accused to the military magistrate also alleviates RCM 703's conflict with the statutory requirements of Article 46, UCMJ, the protection of work-product privilege, and the public's perception of the military justice system.

The military magistrate is a legally trained officer who is supervised in those duties by the servicing military judge. The military magistrate is already entrusted to make important, independent pre-trial decisions. Such decisions include: rendering probable cause determinations, approving search, seizure, and apprehension authorizations, as well as determining the propriety of pre-trial confinement of the accused.[274] The military magistrate is not beholden to the prosecutor or the accused. This would place the military magistrate in a position similar to the clerk of

[274] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 8 (3 Oct. 2011) [hereinafter AR 27-10].

court in federal court while providing the accused a means to compel the attendance of his witnesses.

Should the accused disagree with the decision of the military magistrate, he can raise the issue with the military judge. To ensure the fundamental rights of the accused are protected, the synopsis submitted to the military judge in support of the accused's motion to compel must be done *ex parte*. To accomplish this approach, RCM 703(c)(2) should be modified to read as follows:

> *Witnesses for the defense,*
>
> (A) *Request.* The defense shall submit to the military magistrate a written list of witnesses whose production by the Government the defense requests.
>
> (B) *Contents of the Request.* A list of witnesses whose testimony the defense considers relevant and necessary on the merits, sentencing, or interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of expected testimony sufficient to show its relevance and necessity.[275]
>
> (C) *Time of Request.* A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such a denial may be granted for good cause shown.[276]
>
> (D) *Determination.* The trial counsel shall arrange for the presence of any witness listed by the defense unless the military magistrate contends that the witness'

[275] MCM, *supra* note 3, R.C.M. 1001(e)(2) (detailing the limitations on the production of defense witnesses at presentencing proceedings, which should be deleted).
[276] This provision remains unchanged.

> production is not required by this rule. If the military magistrate contends that the witness' production is not required by this rule, the matter may be submitted to the military judge ex-parte. If the military judge grants a motion for the production of a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

While all three of these approaches ensure the accused receives the constitutional protections guaranteed by the Compulsory and Due Process Clauses, as well as the statutory protections of Article 46, UCMJ, the military magistrate option is likely the easiest fix. The military does not usually embrace change openly and this system presents the least amount of change while still providing the accused the full benefit of real compulsory process. Army Regulation (AR) 27-10 will need to be updated[277] and RCM 703 will need to be amended slightly, but this process accomplishes what RCM 703 is commonly understood to embrace. The intent behind RCM 703 may be noble, but its application is anything but.

V. Conclusion

The rights provided an accused in a criminal trial are not absolute and must be measured against legitimate governmental interests. The government does have a vested interest in guarding its fiscal resources. However, RCM 703's protection of this fiscal governmental interest arbitrarily restricts an accused's ability to mount an adequate defense. This interest must yield to the protections afforded by the Fifth and Sixth Amendments of the Constitution, as "our measure should be the scales of justice, not the cash register."[278]

Thomas Jefferson warned of the perils in trusting man over the virtues of the Constitution.[279] His admonition has been made manifestly clear with the edicts contained in RCM 703, which undermine the very tenets of the Compulsory Process Clause. Jefferson and Madison, with

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[277] AR 27-10, *supra* note 274, ch. 8 (proposing that AR 27-10 be amended, should the military magistrate option be implemented, to include the responsibilities and powers of the military magistrate regarding the ex parte review of defense witness requests for relevance and necessity).
[278] United States v. Scheffer, 44 M.J. 442, 448 (1996).
[279] JEFFERSON, *supra* note 1.

their fellow constitutional framers, instituted a system to guarantee individuals protection from an over-reaching government. They drafted and adopted rules to crystallize certain fundamental rights that no one may be deprived of without due process of law. Of particular concern to the drafters was the vulnerability of those facing criminal prosecution. The Bill of Rights, in particular the Fifth and Sixth Amendments, was so vital to this country's tapestry that many of the states refused to ratify the Constitution without their implementation.

Rule for Courts-Martial 703 unconstitutionally restricts one of the sacred rights[280] and must be amended. The President does not have the power to implement arbitrary evidentiary and procedural rules that impose unnecessary burdens on the accused.[281] The provisions of RCM 703 are overly broad because lesser restrictive means are available to the government to secure its interest in conserving resources. If the government does not trust the detailed military defense counsel, who is qualified, certified, and sworn in the precise manner as the prosecutor, to make good-faith witness requests, other options are available to the government besides forcing the defense to reveal a portion of its case to the prosecution prior to trial.

Although PVT Smith fully complied with RCM 703, and effectively waived work-product privilege for the information revealed to the prosecution while complying therewith, he should not have been placed in that position. Likewise, had RCM 703 complied with the solutions provided above, PVT Smith's trial would have been conducted more efficiently and timely. Had the synopsis been provided *ex parte* to an independent arbiter from the beginning, pre-trial litigation to compel the denied witnesses would have been avoided, as evidenced by the military judge ruling in favor of PVT Smith's motion to compel.

Simple modifications to RCM 703 can be made to satisfy these constitutional, statutory, and public policy concerns.[282] The modifications are neither difficult nor resource intensive. Shifting to an FRCP 17 model will significantly increase the efficiency and effectiveness of the witness production process specifically, as well as the military justice system at large. However, making these changes will take a conscious effort to move beyond the status quo, and will require a recognition that the

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[280] Westen, *supra* note 5, at 102.
[281] *Id*. at 116.
[282] *See supra* Part IV.

system must be fixed. The U.S. district courts did so nearly half a century ago; it is time for the military justice system to do the same.