Beyond United States v. Valenzuela-Bernal: Can the Defendant’s Right to Compulsory Process Survive in Prosecutions for Transporting Illegal Aliens

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BEYOND UNITED STATES v. VALENZUELA-BERNAL: CAN THE DEFENDANT'S RIGHT TO COMPULSORY PROCESS SURVIVE IN PROSECUTIONS FOR TRANSPORTING ILLEGAL ALIENS?

Over one million undocumented aliens attempt to enter the United States each year. The Immigration and Naturalization Service (INS) of the United States Department of Justice has apprehended over ten million illegal aliens since 1920. Although the apprehension rate is rising, the INS estimates that it apprehends only ten percent of all illegal entrants.

Congress has determined that the prompt deportation of these aliens constitutes the most effective means of curbing the illegal traffic. To effectuate prompt deportation, Congress has authorized Border Patrol agents to make warrantless arrests of aliens suspected of attempting to enter the United States in violation of U.S. immigration laws. Agents may examine the aliens without “unnecessary delay” to determine whether “there is prima facie evidence establish-

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1. For simplicity, this Note will use interchangeably the terms “illegal” and “undocumented” to refer to persons who are within the United States without legal authorization. Technically, “illegal” refers to an individual who has been found by an immigration judge or Immigration and Nationality Service (INS) officer to have entered the country unlawfully or to have overstayed a visa. See United States v. Martinez-Fuerte, 428 U.S. 543, 553 n.9 (1976). “Undocumented” is a catch-all phrase; it may also refer to persons holding fraudulent or misused documents.


3. THE AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESOURCES, ILLEGAL ALIENS: PROBLEMS AND POLICIES 1 (1978) [hereinafter cited as PROBLEMS AND POLICIES].

4. STATISTICAL ABSTRACT, supra note 2, at 91. In 1980 the INS located 759,400 deportable aliens. Id.

5. PROBLEMS AND POLICIES, supra note 3, at 1. The majority of apprehended illegal aliens (approximately eighty-five percent) are Mexican. STAFF OF SENATE COMM. ON THE JUDICIARY, 95th CONG., 1ST Sess., ILLEGAL ALIENS: ANALYSIS AND BACKGROUND 5 (1977). An INS study reported that at least 500,000 illegal entrants successfully eluded INS detection in 1975. U.S. DEP’T OF JUSTICE AND STATE, IMMIGRATION—NEED TO REASSESS U.S. POLICY 3 (1976) [hereinafter cited as DEP’T OF JUSTICE AND STATE].

ing" an attempted illegal entry. The agents find the requisite evidence, they may forego formal deportation proceedings and grant the aliens immediate "voluntary departure" from the United States.

When the federal government prosecutes an individual for "bringing in and harboring" an illegal alien, the transported alien is a witness to the alleged crime. The defendant may desire to have the alien detained, questioned by defense counsel, and called to testify at trial. The INS, however, wants to return the alien to his country promptly. If the government unilaterally decides to return the alien to his country prior to questioning by defense counsel, the defendant may claim that the government's action has deprived him of his Sixth Amendment right "to have compulsory process for obtaining Witnesses in his favor." Thus the government must reconcile the conflicting interests of the INS and the defendant. The

7. 8 C.F.R. § 287.3 (1982).

[R]ease of the illegal aliens directly protects substantial human values by not requiring these individuals to be incarcerated unless necessary to a just resolution of the criminal case . . . . [T]he detention of any head of a family for a period of days without any income can work a substantial hardship on the family

Id. at 17, 18.

The last two decades have been marked by a trend toward higher standards of procedural fairness for the criminal defendant. Scattered Supreme Court decisions have broached a virtually unexplored area of criminal procedure—the compulsory process and confrontation clauses of the Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining Witnesses in his favor . . .

U.S. CONST. amend. VI.

These companion clauses entitle the accused to present a defense by guaranteeing to him the right to produce and present evidence through witnesses. The confrontation clause guarantees an accused the right to elicit evidence from "witnesses against him." The compulsory process clause guarantees the defendant the right to produce and elicit evidence from "Witnesses in his favor." U.S. CONST. amend. VI. For an in-depth analysis of these principles, see Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71 (1974); Westen, Compulsory Process II, 74 Mich. L. Rev. 191 (1974); Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567 (1977-1978).

Both clauses guarantee the defendant the right to insist that the government make a good-faith effort to produce witnesses for his use at trial; neither clause requires that the government produce witnesses who are no longer available, provided the government is not responsible for their absence. See Barber v. Page, 390 U.S. 719 (1968); Fed. R. Evid. 804(a), infra note 192. Finally, the two principles ensure that the accused may examine witnesses and introduce the witnesses' testimony into evidence.
Executive must faithfully execute the immigration policy adopted by Congress, but it must also ensure that the criminal defendant receives the fundamental fairness inherent in due process.

Which responsibility takes precedence? Confronting this dilemma in *United States v. Valenzuela-Bernal*, the Supreme Court narrowed the scope of the compulsory process clause. The Court held that a unilateral determination by the government that the illegal-alien witness is immaterial to the defense of the accused, followed by the alien's deportation, does not necessarily violate the defendant's right to compulsory process. The defendant now bears the burden of making a "plausible showing that the testimony of the deported witness would have been material and favorable to his defense in ways not merely cumulative to testimony of available witnesses." If the defendant sustains this burden, he establishes a violation of the compulsory process clause and the court must dismiss the indictment.

Concurring in result in *Valenzuela-Bernal*, Justice O'Connor commented that a "governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily reconciled with the spirit of the compulsory process clause." Nevertheless, the Justice Department successfully argued before the Court that the clause must be interpreted narrowly if a "proper and reasonable" balance is to be struck between the duties of the federal government, the interests of the criminal defendant, and the concerns of the alien witness. This Note argues that the government can achieve a "proper and reasonable" balance without narrowing the scope of the compulsory process clause. First, the Note identifies the government's concerns regarding illegal immigration and presents an overview of the historical development of compulsory process. It then analyzes the Supreme Court's recent interpretation of the compulsory process clause in *United States v.*

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12. See U.S. Const. art. II, § 3; Congress assigned the President the duty to "take care that the laws be faithfully executed." The President executes the immigration laws through the INS.
As applied to a criminal trial, denial of due process is the failure to observe the fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.
15. Id. at 3449-50.
16. See infra notes 80-107 and accompanying text.
17. Valenzuela-Bernal, 102 S. Ct. at 3451.
Valenzuela-Bernal and concludes with a presentation of proposals for pretrial procedural reform that would strike a balance between the interests of the defendant, the alien witness, and the prosecution.

I

THE PROBLEM

Immigrants, both legal and illegal, are entering the United States in greater numbers than at any time since the early 1900s. The Census Bureau has estimated that between three and one-half million and six million people are in this country illegally. The smuggling of aliens has become one of the principal problems facing the Immigration and Naturalization Service. Professional smugglers significantly increase the illegal alien population by soliciting clients in the interior of Mexico and in the Central American countries, particularly Guatemala and El Salvador. The aliens usually lack the knowledge and experience necessary for a successful, unaided illegal entry. The smuggler provides entry assistance and may offer entry guarantees, credit terms, and job placement. The smuggling of aliens has become an extremely lucrative illegal venture with affordable risks; the government currently prosecutes less than half of all known smuggling violations.

The Constitution delegates to Congress the power to control the entry of aliens into the United States. In addition to the civil obligations detailed in the Immigration and Nationality Act of 1952, 

21. The INS is encountering growing numbers of aliens coming from Central and South American countries. During fiscal year 1979, Border Patrol agents apprehended 172,688 undocumented aliens who were either smuggled into the United States or transported unlawfully after entry. 1979 INS ANN. REF. 4. During fiscal year 1974, the INS Southwest Region spent approximately $1.6 million on plane fare to remove aliens from the United States. U.S. DEP'TS OF JUSTICE AND STATE, SMUGGLERS, ILLEGIT DOCUMENTS, AND SCHEMES ARE UNDERMINING U.S. CONTROLS OVER IMMIGRATION 8 (1976) [hereinafter cited as SMUGGLERS, ILLEGIT DOCUMENTS].
22. SMUGGLERS, ILLEGIT DOCUMENTS, supra note 21, at 8.
23. Id.
25. Congressional authority to control immigration is found in Article I, Section 8 of the Constitution, which empowers Congress "to regulate commerce with foreign nations" and to "establish a uniform rule of naturalization." U.S. CONST. art. I, § 8. See Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320 (1909).
26. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1976). Possession of an immigrant or non-immigrant visa does not assure entry into the United States. Upon arrival at a port of entry, an alien may be denied admittance by immigration officers, in the officers' discretion, under one or several of the Act's more than thirty exclusionary
Congress created criminal sanctions to promote effective enforcement of immigration laws.\textsuperscript{27} Immigration officers cannot impose criminal punishment. Only the courts, which operate under the procedural safeguards prescribed by the Constitution, possess the power to determine guilt and fix punishment for crime.\textsuperscript{28}

\textsuperscript{27} Section 274(a) of the 1952 Act, codified at 8 U.S.C. § 1324 (1976), defines the criminal offenses and corresponding punishments relevant to this Note's analysis:

- Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignees of any means of transportation who:
  - brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
  - knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;
  - willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or
  - willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: \textit{Provided, however,} That for the purposes of this section, \textit{employment} (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

This statute has had an interesting evolution. For a discussion, see United States v. Evans, 333 U.S. 483 (1948). Before 1917, the statute penalized only offenses related to smuggling. The Act of 1917 went one step further and proscribed harboring and concealing illegal entrants (Act of Feb. 5, 1917, § 8, 39 Stat. 874, 880), but due to an ambiguity in the appended language, the Supreme Court ruled that no sanctions had been proscribed for the harboring and concealing features of the statute. \textit{Evans}, 333 U.S. at 483. Congress remedied this omission in a 1952 enactment (Act of March 20, 1952, 66 Stat. 26), which shortly thereafter was reenacted as Section 274(a) of the Immigration and Nationality Act. Federal courts have upheld the constitutionality of the section. See \textit{Herrera v. United States}, 208 F.2d 215 (9th Cir. 1954); \textit{Martinez-Quiroz v. United States}, 210 F.2d 763 (9th Cir. 1954); \textit{Bland v. United States}, 299 F.2d 105 (5th Cir. 1962).

\textsuperscript{28} Wong Wing v. United States, 163 U.S. 228 (1896).
A. THE COMPULSORY PROCESS GUARANTEE

The specific question before the Court in United States v. Valenzuela-Bernal was whether the government had violated the defendant's Sixth Amendment right to compulsory process when it interfered with the defendant's ability to discover, prepare, or offer exculpatory evidence by deporting a witness who was an illegal alien. The government knew, or had reason to know, that the witness's testimony could conceivably have benefitted the defendant, yet it deported the alien before defense counsel had a reasonable opportunity to interview him.29

I. Historical Perspective

The authors of the Bill of Rights included the right to compulsory process in the Sixth Amendment to prevent injustices like those caused by the medieval common-law rule that in felony cases the accused could not introduce witnesses in his defense.30 Although the British parliament abolished the prohibition of witnesses for the defense prior to 1787,31 the authors of the Bill of Rights drafted the compulsory process clause to ensure that "defendants in criminal cases . . . [would] be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury."32

In 1807 Chief Justice John Marshall addressed the scope of the compulsory process clause while presiding over the circuit court trea-

29. Valenzuela-Bernal, 102 S. Ct. at 3443-44.
30. Westen, The Compulsory Process Clause, supra note 11, at 78. In England, the history of compulsory process is one segment of the country's development from an inquisitional to an adversarial trial procedure. During the late medieval period, criminal cases were tried by jurors on the basis of their own prior knowledge of the facts without hearing from witnesses for either side. Later, the jury did consider independent testimony from prosecution witnesses but still refused to hear sworn testimony from the defendant or his supporting witnesses. 11 W. Holdsworth, History of English Law 580-81 (1938). See J. Bellamy, Crime and Public Order in England in the Later Middle Ages (1973); 2 W. Holdsworth, History of English Law (4th ed. 1936); 1 J. Stephen, History of the Criminal Law of England (1883); J. Langbein, Prosecuting Crime in the Renaissance 119 (1974); H. Way, Criminal Justice and the American Constitution 97 (1980).
31. It was not until the studies of William Blackstone were accepted in Britain in the Eighteenth Century that the "defendant finally received an equal opportunity with the prosecution to present his case through witnesses." Westen, The Compulsory Process Clause, supra note 11, at 78. See 2 J. Wigmore, Evidence § 575, at 685-86 (3d ed. 1940). Blackstone stated as a matter of principle that "in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him," and further "that he shall have the same compulsory process to bring in his witnesses for him, as was usual to compel their appearance against him." 4 W. Blackstone, Commentaries on the Laws of England 345, 354 (1769).
son and misdemeanor trials of Aaron Burr. Marshall permitted Burr to subpoena President Thomas Jefferson to produce a letter written to the President by General James Wilkinson. Marshall did not require Burr to show specifically how he intended to use the letter. Rather, Burr simply had to demonstrate that the letter might prove helpful in impeaching an anticipated prosecution witness. The Chief Justice held that it would be unreasonable to require a greater showing before Burr knew what the witnesses would testify. Marshall warned: "The right given by this article [the Sixth Amendment] must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter." 

Despite Marshall's warning, the compulsory process clause effectively lay dormant for one hundred and seventy years, until the Supreme Court's decision in Washington v. Texas. The decision mandates a constitutional standard to govern the presentation of defense witnesses in criminal cases. The Washington Court identified four essential elements of a defendant's guarantee of compulsory process. The defendant has a right to compel witnesses who are competent to give testimony that is relevant, material, and favorable to the defense. Though


34. Id.

35. During this time span the Court referred to the clause in only five cases. The discussion of compulsory process was buried in dictum in two of the cases. See United States v. Reid, 53 U.S. (12 How.) 361, 363-65 (1851), overruled in, Rosen v. United States, 245 U.S. 169, 173 (1891). The remaining three cases held that compulsory process was not a relevant factor in the Court's decision. See Ex parte Harding, 120 U.S. 783, 784 (1887); Blackmer v. United States, 284 U.S. 421, 442 (1932); Pate v. Robinson, 383 U.S. 375, 378 n.1 (1966).


37. Before Washington, it was generally believed that the Sixth Amendment had no effect on the law of evidence and that the amendment simply incorporated local standards for the issuance of subpoenas. See Washington v. State, 400 S.W.2d 576, 579 (Tex. Crim. App. 1966); 8 J. WIGMORE, EVIDENCE § 2191, at 69 (J. McNaghton rev. 1961).

38. There are two separate themes of the Washington opinion with respect to competence: (1) a priori categories (based on a witness's membership in a class) are generally invalid and (2) matters of competence must usually be left to the factfinder. Thus, "the defendant has a constitutional right to produce any witness whose ability to give reliable evidence is something about which reasonable people can differ." Westen, Compulsory Process II, supra note 11, at 203. "The competency standard has constitutional implications for all rules—whether rules of competence or rules of evidence—that incapacitate witnesses from testifying . . . . Thus it casts doubts on the validity of the opinion rule and hearsay rule insofar as they would exclude evidence that may reasonably tend to exculpate the defendant." Id. at 203 n.36.

39. Applying the nonconstitutional standard, evidence is relevant if it has "any tendency to make the existence of any fact . . . . . more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. By applying the Washington test of arbitrariness, the defendant has a "constitutional right to present any evidence that may reasonably be deemed to establish the existence of facts in his favor." The first standard
Washington is not to be regarded as a comprehensive test, the holding explicitly directs the courts to recognize the special interests of the accused and to acknowledge the corresponding right to present a defense.


Until the Supreme Court's decision in United States v. Valenzuela-Bernal, the prevailing view of the relationship of the compulsory process clause to cases involving illegal-alien witnesses was rooted in the 1971 Ninth Circuit decision in United States v. ...
Mendez-Rodriguez. Mendez-Rodriguez held that the federal government violates a defendant's right to compulsory process when it unilaterally deports an alien witness. In the decade following Mendez-Rodriguez, four other circuits accepted the basic principles of compulsory process as enunciated by the Ninth Circuit.

a. United States v. Mendez-Rodriguez

In United States v. Mendez-Rodriguez, a grand jury indicted the defendant for transporting seven illegal Mexican aliens in violation of Section 1324(a)(2) of the Immigration and Nationality Act. The federal government detained three of the Mexicans and deported the remaining four prior to the defendant's indictment. The decision to deport was a unilateral act by the United States Attorney's Office. At trial the defendant testified that he was unaware that the passengers in his car were illegal aliens. The District Court convicted Mendez-Rodriguez. The Ninth Circuit, applying principles of Washington v. Texas, reversed and held that the government's decision to deport the four Mexicans violated both the defendant's due process guarantee and his compulsory process rights.

The Court of Appeals' opinion in United States v. Valenzuela-Bernal summarized the "essential elements" of Mendez-Rodriguez. The elements are: "(1) unilateral Government action denying a defendant access to a witness; and (2) prejudice, i.e., loss of a conceivable benefit to the defendant from the missing witness's testimony." The court reasoned that the presence of the two elements in a case would require dismissal of the indictment, pursuant to the Mendez-Rodriguez doctrine, because of the government's violation of a defendant's compulsory process rights.

44. 450 F.2d 1 (9th Cir. 1971).
45. Id.
46. Id.
47. 8 U.S.C. § 1324(a)(2) (1976). See supra note 27. The offense consists of five elements. The prosecution must prove that: (1) the defendant transported an alien within the United States; (2) the alien had not been lawfully admitted or was not lawfully entitled to enter the United States; (3) the defendant knew that the alien was not lawfully admitted or was not lawfully entitled to enter the United States; (4) the defendant knew that the alien's last entry was within three years of the date of the transportation; and (5) the defendant acted willfully in furtherance of the alien's violation of the law.
48. The three retained aliens testified that they were Mexican nationals who had entered the United States without inspection and that the defendant stopped his car and gave them a ride. Mendez-Rodriguez, 450 F.2d at 3.
50. Mendez-Rodriguez, 450 F.2d at 4-5.
52. 647 F.2d at 75.
of the defendant’s Fifth Amendment due process rights and Sixth Amendment right to compulsory process.

In Valenzuela-Bernal, the Ninth Circuit reported that a survey of its cases following Mendez-Rodriguez confirmed that it had “adhered to the essential elements of the original case.” For instance, in *United States v. Tsutagawa* the court had reviewed a set of facts similar to *Mendez-Rodriguez* and had explained the necessity of adhering to the essential elements of that decision. In *Tsutagawa*, Border Patrol officers arrested thirty-nine aliens. The INS returned thirty-five of the aliens to Mexico after the aliens had testified before a grand jury or had met with the prosecution. Defense counsel did not have an opportunity to conduct interviews. In affirming the district court’s dismissal of the indictments, the circuit court explained the considerations prompting the decision in *Mendez-Rodriguez*:

The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendant. The vice lies in the unfettered ability of the government to make the decision unilaterally . . . A defendant has the right to formulate his defense uninhibited by government conduct that, in effect, prevents him from interviewing witnesses who may be involved and from determining whether he will subpoena and call them in his defense.

In applying the *Mendez-Rodriguez* doctrine the Ninth Circuit has never conceded that unilateral action by the government that renders a witness unavailable may be non-prejudicial. The court construes the “conceivable benefit” test for prejudice very liberally. A defendant need not speculate as to the content of a missing witness’s testimony. A conceivable benefit stems from the deported alien having been an eyewitness to, and an active participant in, the crime charged because there is a strong possibility that he could have provided material and relevant testimony concerning the events constituting the crime. The Ninth Circuit’s sweeping construction of

53. *Id.*
54. 500 F.2d 420 (9th Cir. 1974).
55. *Id.* at 423. The *Mendez-Rodriguez* case has been cited in approximately forty later cases, the majority being Ninth Circuit decisions concerning the scope of the compulsory process doctrine as defined in *Mendez-Rodriguez*. See, e.g., *United States v. Gonzalez*, 617 F.2d 1358 (9th Cir. 1980); *United States v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980); *United States v. Hernandez-Gonzales*, 608 F.2d 1240 (9th Cir. 1979); *United States v. Carrillo-Frausto*, 500 F.2d 234 (9th Cir. 1974); *United States v. Verduzco-Macias*, 463 F.2d 105 (9th Cir. 1972).
56. *Valenzuela-Bernal*, 647 F.2d at 74. In cases in which the court held that *Mendez-Rodriguez* did not warrant the dismissal of an indictment, the court found that the government’s actions were not “unilateral actions” depriving the defendant of access to the witness. *Id.* at 74 n.1.
57. *Id.* at 74; see *United States v. McQuillan*, 507 F.2d 30, 32-33 (9th Cir. 1974).
the Mendez-Rodriguez doctrine thus protects a defendant’s right to compulsory process by requiring the government to retain all alien witnesses until defense counsel has had a reasonable opportunity to conduct interviews.

b. The Seventh Circuit—United States v. Calzada

In United States v. Calzada, the Seventh Circuit accepted the basic principles of the Mendez-Rodriguez doctrine, but emphasized that dismissal is not required in every case in which a potential alien witness “somehow escapes the subpoena power of a federal court.”

If, however, the government acts affirmatively to make an alien witness unavailable, dismissal is required. The court held that the defendant would not have to show prejudice, because such a requirement would “emasculate the defendant’s right to compulsory process.” The defendant would be unable to show “with any degree of assuredness what a witness whom he has never interviewed might say on his behalf”; thus, “a demonstration of prejudice would be

58. 579 F.2d 1358, 1361 (7th Cir. 1978). This is the only reported Seventh Circuit decision which addresses the Mendez-Rodriguez doctrine of compulsory process. Eight defendants-appellees were charged with conspiracy to transport and conceal illegal aliens in violation of 18 U.S.C. § 371 (1976) and transporting illegal aliens in violation of 8 U.S.C. § 1324(a)(2) (1976). Thirteen of the illegal aliens were arrested, detained and interviewed by the government. After five days, the government permitted two of the aliens who were juveniles to return to Mexico. Twenty-five days later the government deported three of the adult aliens. Some time later the government released two more aliens who then departed from the United States. The district court found that the government had acted affirmatively to make three of the thirteen aliens unavailable to the defendants and had permitted four to become unavailable to them. Salzada, 579 F.2d 1361.

59. Id. at 1362. For example, the Ninth Circuit has recognized that the government, with court approval, may release a juvenile illegal alien from custody in the interest of “human values.” United States v. Carrillo-Frausto, 500 F.2d 234, 235 (9th Cir. 1974). The Ninth Circuit also has held that the federal government is not obliged to detain potential witnesses as a means of preventing their flight from the country when they have not been charged with a crime. United States v. Verduzco-Macias, 463 F.2d 105, 106 (9th Cir. 1972). Finally, the Ninth Circuit has held that a defendant must show that the unavailable alien might have been an actual witness to the crime for which the defendant has been charged. United States v. McQuillian, 507 F.2d 30, 33 (9th Cir. 1974). In a case in which the illegal aliens are the subject of the crime, the McQuillian requirement is readily satisfied. Id.

60. The government acts affirmatively to make an alien witness unavailable if it officially deports the alien or if it simply facilitates the voluntary return of the alien to his home country. See United States v. Seijo, 595 F.2d 116 (2nd Cir. 1979); United States v. Gonzales, 617 F.2d 1358, 1363 (9th Cir. 1980); Patel v. United States, 449 U.S. 899 (1980). In United States v. Henao, 652 F.2d 591 (5th Cir. 1981), the court held that the government’s erroneous, but not improperly motivated, statement to defendants that an alien witness had been deported, when in fact the witness had left the country of her own volition, did not rise to the level of a constitutional violation. The government had neither deported the witness nor made her unavailable; it merely gave the defendants erroneous information which caused them to search for her.

61. Calzada, 579 F.2d at 1362.
impossible.” 62

The government had asked the Seventh Circuit to adopt the principle that defendants unable to show prejudice must prove prosecutorial bad faith before dismissal of the indictment would be in order. The court rejected this argument and stated that “willful misconduct is irrelevant to determining the appropriateness of [a] district court’s dismissal of a defendant’s indictment. The right to compulsory process is not so much a bar against governmental misconduct as it is a protection of the defendant’s ability to present his or her case.” 63

c. The Sixth Circuit—United States v. Armijo-Martinez

In United States v. Armijo-Martinez, 64 the Sixth Circuit adopted the Mendez-Rodriguez doctrine. The court stated first that a “constitutional violation occurs when the first essential element of Mendez-Rodriguez [unilateral action by the government that denies a defendant access to a witness] is found.” 65 The opinion stressed that the compulsory process guarantee includes the defendant’s right to have his defense prepared and shaped by his own attorney; thus, defense counsel must have a reasonable opportunity to interview potential material witnesses. 66 The court then addressed the prejudice requirement of Mendez-Rodriguez, noting that although the defendant must show prejudice to his case, a “very low threshold properly defines the burden” of a defendant. 67 “The inescapable fact is that no one knows what a witness may have observed or heard until he or she has been interviewed.” 68 A defendant thus makes a sufficient showing of prejudice if he is able to identify the “relevant issues about which the missing witness might reasonably be assumed to have knowledge.” 69

62. Id.
63. Id. at 1361.
64. 669 F.2d 1131 (6th Cir. 1982).
65. All courts which have considered the issue agree that a constitutional violation occurs when the first “essential element” of Mendez-Rodriguez is found. The record in the present case makes it clear that there was a violation. The government had total control over the 14 eyewitnesses. After obtaining the information it desired from them, the INS offered them voluntary departure and paid the expenses of their return to Mexico. The witnesses were in Mexico, or in the process of entering that country, when counsel for the defendants were notified of their appointments. There was absolutely no opportunity for defendants or their counsel to learn from the witnesses what testimony they might be able to give at trial.
66. Id. at 1137.
67. Id.
68. Id.
69. Id.
Summarizing, the court emphasized that "a finding that a defendant could conceivably benefit from the testimony of [missing] witnesses is not foreclosed by *ex parte* statements of such witnesses to government agents where counsel for the defendant had no opportunity to cross-examine." The court rejected the government's "implied suggestion" that it would be pointless to allow defendants' attorneys to interrogate alien witnesses if government agents turn up nothing favorable to the defendants in their interviews with the witnesses.

d. The Fifth Circuit—United States v. Avila-Dominiguez

The Fifth Circuit's construction of the *Mendez-Rodriguez* doctrine is not as sweeping as that of the Ninth, Seventh or Sixth Circuits. In *United States v. Avila-Dominiguez* the Fifth Circuit rigidified the second essential element of *Mendez-Rodriguez*—prejudice. The court held that although the federal government violates the criminal defendant's constitutional rights when an alien witness is deported before the accused is given an opportunity to interview him, dismissal is not an automatic remedy for the violation. The defendant must show more than the "loss of a conceivable benefit from the missing witness's testimony" before the court will dismiss the indictment. If the defendant does not make the "slightest suggestion" of how lost testimony would have been favorable and material to his defense, or submit "at least a plausible theory" of how the testimony of the absent witness might have affected the outcome of the trial, there is no justification for dismissal.

e. The First Circuit—United States v. Rose

A few months before the Supreme Court's decision in...
Valenzuela-Bernal, the First Circuit held in United States v. Rose⁷⁶ that a defendant claiming a violation of constitutional right due to the deportation of a potential witness “must at least show that the deported witness would have been likely to offer meaningful evidence not obtainable from other available witnesses.”⁷⁷ Although it did state that “a defendant may not be required to make a detailed offer of proof,”⁷⁸ the First Circuit’s formulation of the prejudice standard nevertheless placed a higher burden on the defendant than that mandated by Mendez-Rodriguez a decade earlier.⁷⁹ By 1982, therefore, the scope of compulsory process as delineated in Mendez-Rodriguez, although generally accepted, had been slightly narrowed by more than one circuit court. In United States v. Valenzuela-Bernal,⁸⁰ the Supreme Court continued the process.

B. Narrowing the Scope of Compulsory Process—United States v. Valenzuela-Bernal

The Department of Justice strongly opposed the circuit courts’ delineations of the scope of the compulsory process clause under the Mendez-Rodriguez doctrine. After Mendez-Rodriguez the Department contended that the Executive Branch’s responsibility to execute Congress’s immigration policy of prompt deportation of illegal aliens required deporting illegal-alien witnesses upon the Executive’s good-faith determination that the witnesses do not possess evidence favorable to the defendant in a criminal prosecution.⁸¹ In Valenzuela-Bernal, the Attorney General’s Office proposed the use of an interest analysis approach to narrow the scope of the clause.⁸²

Valenzuela-Bernal was charged with transporting a single alien in violation of Section 1324(a)(2) of the Immigration and Nationality Act. At the time of his arrest, Border Patrol agents apprehended three illegal-alien passengers from his vehicle. The agents (and not

⁷⁶ 669 F.2d 23 (1st Cir. 1982). Appellants sought reversal of their convictions for possession with intent to distribute marijuana and conspiracy to import and distribute marijuana. They asserted that by deporting an alien who was a possible co-conspirator without giving defense counsel an opportunity to determine whether he would be a useful witness, the government violated their rights to due process and compulsory process. The government had decided not to seek an indictment against the illegal alien because he was a juvenile and had turned him over to the INS for deportation proceedings. The trial court found that the deportation had not caused the appellants any prejudice because other witnesses were available who could offer similar accounts. The court of appeals affirmed the conviction.

⁷⁷ Id. at 27-28.

⁷⁸ Id. at 27.

⁷⁹ See supra notes 46-57 and accompanying text.

⁸⁰ 102 S. Ct. 3440 (1982).

⁸¹ See infra notes 85-97 and accompanying text.

⁸² See U.S. Brief, supra note 10, at 8. See also infra notes 90-97 and accompanying text.
the United States Attorney) interrogated the aliens. According to the government, none of the aliens offered any evidence that would exculpate the defendant. The government subsequently deported two of the aliens; the alien named in the indictment remained in the San Diego Metropolitan Correctional Center. Valenzuela-Bernal unsuccessfully attempted to secure the appearance of the deported eyewitnesses at his trial. He then moved to dismiss the indictment on the grounds that the deportation of the illegal-alien witnesses violated his Fifth Amendment right to due process and Sixth Amendment right to call and confront witnesses. The trial judge denied Valenzuela-Bernal's motion. The Ninth Circuit reviewed and dismissed the indictment.

On writ of certiorari to the Supreme Court, the Justice Department argued first, that the government does not violate the Fifth or Sixth Amendment when it deports illegal-alien witnesses, if it does so after making a "reasonable good faith determination that the witnesses possess no material exculpatory evidence." The Department submitted that a defendant must support his claim of a constitutional violation with a showing that the government's action was "improperly motivated" or, at the least, "unjustified in light of the circumstances."

The government maintained that there are "substantial reasons" why it does not incarcerate illegal-alien witnesses who "appear" to possess no material exculpatory evidence:

During the course of any given year, tens of thousands of illegal aliens are apprehended in circumstances that would support a prosecution for transporting or harboring them. The impact of the Ninth Circuit's rule has been to require as a condition to prosecution extended incarceration of these individuals, at considerable human cost to them and of great societal cost in terms both of substantial expenditures of money and grave impact on seriously overcrowded jail facilities. This has the further consequence of forcing prosecutors to forego otherwise valid and appropriate prosecution for lack of adequate facilities in which to incarcerate the large numbers of illegal alien witnesses whose deportation might result in dismissal of any prosecution.
The Department alleged that these costs are "intolerable." Aliens retained in accordance with Mendez-Rodriguez instruction are seldom called as defense witnesses at trial. The Justice Department contended that in most cases the undocumented alien becomes useful to the defense only after he has been expelled from the United States, in which event he provides a "predicate for windfall relief" if the court dismisses the indictment.

The Department of Justice's alternate position was that an alleged denial of compulsory process must be supported by the defendant's "concrete showing" that the deported witness "could" provide material evidence in his favor. The government contended that there is no constitutional violation unless the defendant makes a reasonable proffer of materiality—a showing that the otherwise unavailable witness could "actually benefit" the defense—because the defendant is "uniquely situated to know what the witness's testimony is likely to be."

The government further argued that dismissal of the indictment is a wholly inappropriate remedy for a Sixth Amendment viola-

Any discussion of the issues presented... must begin with a recognition that it is by no means extraordinary—let alone unconstitutional—for defendants in criminal cases to be unable to present all the evidence they might wish to. Evidence may be unavailable because privileged, potential defense witnesses may die or be too ill to testify, documents may have been destroyed, or witnesses or documents may be located beyond the reach of the court's process. Ordinarily, the court would not choose the broad remedy of dismissal. Id. at 14. Cf. Brady v. Maryland, 373 U.S. 83, 87 (1963) (suppression of evidence favorable to defendant and not material to guilt or punishment does not violate Fourteenth Amendment due process guarantee). But cf. Mincey v. Arizona, 437 U.S. 385 (1979) (administrative burdens do not authorize a deprivation or narrowing of constitutional rights).

88. U.S. Brief, supra note 10, at 8.
89. Id.
90. In U.S. Brief, supra note 10, at 8, the government claimed that it "acts at its peril in deporting illegal aliens who could conceivably be witnesses at the defendant's trial..."
91. Id. at 9. There are analogous situations in which defendants are unable to have a particular witness available to testify because they have not supplied the court with an adequate explanation of how the witness might significantly advance the defense. "For instance, in order for a defendant to receive a continuance of his trial to allow him to obtain the presence of a missing witness, he is required to make a clear showing that the witness's testimony would be favorable and material." United States v. Haldeman, 559 F.2d 31, 83 n.125 (D.C. Cir. 1976).
92. U.S. Brief, supra note 10, at 9. The government asserted that the Supreme Court has adopted similar materiality requirements in decisions involving evidence unavailable to the defendant because of pre-indictment delay or nondisclosure by the prosecution. See洛夫斯科, 431 U.S. 783; United States v. Agurs, 427 U.S. 97 (1976).
93. U.S. Brief, supra note 10, at 9. The Department stated that placing the burden on the defendant is not an unreasonable requirement because the defendant in these cases is in the company of the unavailable witnesses at all times relevant to the prosecution.
"The public interest in having the guilty brought to book" must not be disregarded. Accordingly, the remedy must not be broader than is necessary to ensure that the defendant is not deprived of "truly material evidence relating to the issue of guilt." The government concluded that if specific testimony has been lost, the most the accused should be entitled to is a stipulation as to what the missing witness would say.

The Department of Justice prevailed in its second argument. The Supreme Court reversed the Ninth Circuit's decision applying the compulsory process clause. Justice Rehnquist, writing for the Court, stated that:

The mere fact that the Government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense.

In holding that the defendant must make some showing that the evidence lost is material to an adequate defense, the Court strictly applied language from Washington v. Texas. "In Washington, the Court found a violation of [the compulsory process clause of] the Sixth Amendment when the defendant was arbitrarily deprived of 'testimony [that] would have been both relevant and material,—and . . . vital to the defense.'" Analyzing Washington's progeny, Justice Rehnquist concluded that "Washington's intimation of a materiality requirement [was] more than borne out."

In the wake of Valenzuela-Bernal, the burden rests upon the defendant to assert his right to compulsory process. "Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to

94. Id. at 10. The Supreme Court requires the remedy to be "tailored to neutralize the taint created by the particular violation." United States v. Morrison, 449 U.S. 361, 365 (1981). But see Respondent's Brief, supra note 86, at 46:

The result in Morrison is easily distinguishable because all the persons involved were available when the Court looked for prejudice . . . . Morrison alleged no adverse effect. This reasoning in Morrison is applicable because a showing of "demonstrable prejudice, or substantial threat thereof" is sufficient to result in dismissal of an indictment when constitutional rights are violated.


96. U.S. Brief, supra note 10, at 37.

97. Id. at 10.

98. Valenzuela-Bernal, 102 S. Ct. at 3449.


his defense." Concurring in result only, Justice O'Connor noted the practical impact of the majority's reasoning:

The Court's approach thus permits the Government to make a practice of deporting alien witnesses immediately, taking only the risk that the defendant will be able to show that the deported witnesses, whom the defendant's counsel will never be able to interview, would have provided useful testimony. In effect, to the extent that the Government has conflicting obligations, the defendant is selected to carry the burden of their resolution.

Justice Brennan, joined by Justice Marshall, dissented. He wrote that the majority's opinion made a "mockery" of the compulsory process clause. He noted the Court's opinion in Jencks v. United States which quoted from United States v. Reynolds: "[I]n criminal cases, the government can invoke its evidentiary privileges only at the price of letting the defendant go free. . . . [I]t is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense." Brennan added: "If the Government wishes to pursue criminal remedies against the accused, then its other 'responsibilities' must yield before the rights to which an accused is constitutionally entitled."

II.

A CALL FOR CHANGE

One of the prevailing themes of compulsory process is that the defense and the prosecution must have comparable opportunities to present a case through witnesses. This requirement, however, should not foreclose the reasonable and proper balancing of the alien witness's interest in avoiding extended detention, the defendant's interest in presenting a complete defense, and the duty of the government to police the influx of illegal aliens. At present, the federal districts are not following procedural practices that will attain this balance.

A. CURRENT FEDERAL DISTRICT PROCEDURE

Congress passed the Speedy Trial Act in 1974. Although the

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101. Id. at 3449-50 (emphasis added).
102. Id. at 3451 (O'Connor, J., concurring).
103. Id. at 3453 (Brennan, J., dissenting).
105. 345 U.S. 1 (1953).
106. 102 S. Ct. at 3454 (Brennan, J., dissenting) (quoting Jencks v. United States, 353 U.S. 657, 671 (1957)).
The Act establishes specific time limits within which the trial and certain other procedures must commence in a federal prosecution. 18 U.S.C. § 3161 provides in pertinent part:
Act made the criminal process somewhat more efficient,\textsuperscript{109} it generally fails to shorten the length of incarceration for the alien material witness.\textsuperscript{110} Public outcry often prompts reform, but the public has shown little concern for the plight of the illegal-alien witness. Society has classified the alien as a criminal without considering that he has not been, and never will be, prosecuted. The government foregoes prosecution of the alien for illegal entry in exchange for his testimony on behalf of either the defendant or the United States.\textsuperscript{111}

The federal districts that have reported *Mendez-Rodriguez* progeny have not yet adopted consistent procedural practices that concurrently respect the defendant’s compulsory process rights while minimizing the alien witness’s incarceration period.\textsuperscript{112} As crowded
court dockets compel judges to approach speedy-trial cases on an *ad hoc* priority basis,\textsuperscript{113} the plight of the alien witness is often ignored when the defendant is in no hurry to proceed to trial and the local correctional center has an empty bed. Delays in grand jury indictment and the accused's arraignment frequently have extended alien witness incarceration periods beyond thirty days.\textsuperscript{114} Loss of time can work to the defendant's advantage, however, especially if he calls no witnesses at trial. The prosecution's case may weaken as the memories of witnesses fade with the passage of time.

### B. Criminal Procedure In The Southern District Of California

In the early 1970s the Southern District of California designed a procedural format that focused on safeguarding defendants' right to compulsory process.\textsuperscript{115} Unfortunately, the combination of a backlog of cases and a United States Attorney's office unwilling to take advantage of liberal pretrial procedures has minimized severely the safeguarding of Sixth Amendment rights.

Following the arrest of an individual for transporting or harboring illegal aliens, the government must file a complaint alleging that all persons transported or harbored by the accused are potential material witnesses to the offense.\textsuperscript{116} A United States magistrate subsequently addresses the witnesses, appoints an attorney to represent them,\textsuperscript{117} and orders their detention pending presentation of the defendant's case to a federal grand jury.

The court expects defense counsel to interview the incarcerated aliens prior to the defendant's arraignment and determine the extent

\textsuperscript{113} See Barker v. Wingo, 407 U.S. 514 (1972) (defendant's right to a speedy trial must be determined on an *ad hoc* balancing basis in which overcrowded dockets may be considered as a reason for delay).

\textsuperscript{114} The defendant-smuggler is often an indigent, illegal alien himself. 18 U.S.C. § 3146 (1976) governs the defendant's pretrial release. See infra note 130.

\textsuperscript{115} The *Mendez-Rodriguez* holding ostensibly requires the detention of all eyewitness aliens, whether the transportation vehicle carries one or fifty individuals. See United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974) ("The thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to determine which witnesses will not help either side and then to release those witnesses, for all practical purposes, beyond the reach of the defendants.").

\textsuperscript{116} The number of witnesses held pursuant to the *Mendez-Rodriguez* doctrine at the government's request is not known. See U.S. Brief, supra note 10, at 19-20.

\textsuperscript{117} The illegal alien usually qualifies as an indigent and is entitled to the appointment of counsel under the Criminal Justice Act, 18 U.S.C.A. § 3006A (West Supp. 1982 and West June 1982 Supp.). The attorney secures informal immunity from prosecution for illegal entry for the alien witness in exchange for the alien's testimony. See supra note 111. As the witness presumptively has entered illegally, he could be sentenced to six months in custody if prosecuted and/or fined $500. An alien previously convicted for illegal entry or previously deported faces up to two years imprisonment and/or a fine of $1,000. 8 U.S.C. §§ 1325, 1326 (1976).
of each alien's materiality to the defendant's case. The aliens then may spend several weeks in jail waiting for the post arraignment, combined materiality hearing/material witness bail review. Although the court attempts to prioritize the case and thus minimize the length of alien witness incarceration, crowded dockets often make the advancement of the hearing impossible.

At the materiality hearing both the government and the defendant are required to establish the materiality of the witnesses they have chosen to have testify for their respective sides. The court will release those witnesses whose materiality cannot be supported. The retained aliens are eligible for bail if they are able to post bond. This, however, is the rare case. Consequently, most aliens are returned to their cells.

United States taxpayers also suffer as a result of the above system; they must pay the high costs of alien witness incarceration. The national emphasis on halting the flow of illegal aliens has resulted in the detention of approximately one million undocumented aliens in the past three years. During fiscal year 1979 more than five thousand illegal-alien material witnesses were committed to the custody of the United States Marshall in the Southern District of California. The government attributes correctional facility overcrowding to the Mendez-Rodriguez line of cases; federal detainees often must be housed in federal prisons outside the district.

118. The defendant's attorney must first give notice to the material witness's attorney. "In some cases, defense counsel is not permitted to speak with material witnesses. Some witnesses have used false names or made false statements or are more deeply involved in the criminal venture and do not wish to be exposed by making any further statement prior to trial." Respondent's Brief, supra note 86, at 5.

119. Within the Southern District of California all male witnesses are detained in the San Diego Metropolitan Correctional Center. The court houses women and children in local Salvation Army facilities.

120. Ideally, arraignment is held ten days after the defendant's initial appearance before a magistrate. Telephone interview with Mr. Larry Zoglin, Assistant U.S. Attorney, U.S. Attorney's Office, San Diego, Calif., Feb. 12, 1982 [hereinafter cited as Interview with Zoglin].

121. See Respondent's Brief, supra note 86, at 25 n.34.

122. See infra note 146 and accompanying text.

123. Pursuant to 18 U.S.C. §§ 3146, 3149 (1976), any individual detained as a material witness is entitled to be admitted to bail. "Under the liberal bail policies initiated by the magistrates of the Southern District of California, any material witness who can show that he has a citizen or legal resident alien relative or friend with whom he can stay pending the outcome of the prosecution, will generally be admitted to bail under a personal surety bond." Respondent's Brief, supra note 86, at 5 n.5. Because the typical alien material witness cannot meet the above criteria due to his indigent status, the material witness sits in jail until trial unless the defendant agrees to stipulate to his testimony. See infra note 130.


126. Id.
or in state-operated jails. The United States Attorney's Office emphasizes that overcrowding increases when prospective alien material witnesses are retained for periods exceeding the ideal arrest to arraignment time span of ten days. Detention for "considerably longer periods" is not uncommon.

Government attorneys in the Southern District of California remain opposed to the use of pretrial procedures designed to prevent the needless detention of witnesses. On the other hand, public defenders in Southern California advocate greater use of the Bail Reform Act, which is aimed at protecting the constitutional rights

127. In 1979, almost half of all federal inmates in the district were incarcerated as material witnesses. U.S. Brief, supra note 10, at 19.

128. Id. at 18. Two to three months may elapse before trial. Interview with Zoglin, supra note 120. The question to be asked is whether the lengthy detention times are due solely to the procedures mandated by application of the Mendez-Rodriguez doctrine. The answer to this question seems to be no. See infra notes 129-34 and accompanying text.

129. The United States Attorney's Office in Southern California strongly opposes the use of depositions. Respondent's Brief, supra note 86, at 7 n.11. See infra note 134 and accompanying text.

130. 18 U.S.C. §§ 3146-3152 (1976). Section 3146 provides in pertinent part:

(a) Any person charged with an offense, other than an offense punishable by death, shall at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial, or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

Section 3149 provides:

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146 [18 U.S.C. § 3146]. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.
of criminal defendants while adequately securing the interests of the government and preventing extended incarceration of material witnesses.\textsuperscript{131} If the release of an alien witness is not available under the Bail Reform Act due to a narrow interpretation of its provisions, a court may order a deposition and the subsequent release of the alien.\textsuperscript{132} The deposition serves as an evidentiary substitute for live testimony at trial.\textsuperscript{133}

The United States Attorney's Office in the Southern District of California regularly refuses to depose an alien material witness. The Office will agree, however, to stipulate to the testimony that the witness was expected to give at trial. If the defendant agrees to the use of a written stipulation at trial, the court releases the alien.\textsuperscript{134}

The stipulation is not a pretrial procedure which will concurrently safeguard the defendant's right to compulsory process and minimize the incarceration period of the illegal-alien witness. If the stipulation of a favorable defense witness provides exculpatory evidence and the truth of the testimony is not conceded by the government, the prosecutor may contradict and impeach the absent witness.\textsuperscript{135}

\textsuperscript{131} Respondents Brief, \textit{supra} note 86, at 4-7.

\textsuperscript{132} \textit{FED. R. CRIM. P.} 15 provides in pertinent part:

\textit{When taken.} Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition, and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness . . . .

\textit{Use.} At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

\textsuperscript{133} See id. In 1966 the Southern District of California designed an alternative to the bail reform provisions. The court issued an order which permitted the "farming out" of an illegal entrant. The alien was given the opportunity to work on private farms in Southern California at the minimum wage while waiting to testify at trial. He was required to post a $2,000 appearance bond and fifty percent of his wages was assigned to the court as security for the performance of the conditions of the bond. \textit{General Order No. 48, United States District Court, Southern District of California,} Aug. 8, 1966. In the mid-seventies the Ninth Circuit ordered the discontinuance of the program. Telephone interview with Court Clerk, \textit{United States District Court, Southern District of California,} Feb., 1982. It is possible that the farm out program was viewed as a continuation of the "Bracero" program of labor importation which was terminated by an Act of Congress in 1964.

\textsuperscript{134} Interview with Zoglin, \textit{supra} note 120.
at trial as if the witness were present. The government is unlikely to stipulate to the truth of the facts underlying the witness's testimony because it then would be difficult for the prosecution to support the complaint. The government does not have the option to impeach if a deposition is used in lieu of a stipulation. Logically, defense counsel will favor the use of a deposition if the defendant has a strong case.

Besides favoring the use of stipulation as an alternative to the live testimony of alien witnesses, the government claimed in Valenzuela-Bernal that the Assistant United States Attorney's decision to return potential alien witnesses to Mexico after his unilateral determination that the aliens possessed no material evidence "represented a proper and reasonable balancing of the interests of respondent and of the aliens and the duties of the government." The federal attorneys in the Southern District warned that should the Supreme Court reject their balancing, their only recourse would be to forego a large number of felony prosecutions for transporting and harboring illegal aliens. They emphasized that the judicial system would be unable physically to accommodate the detention of all prospective alien witnesses thenceforth required for a "successful" prosecution.

III. PROPOSALS

In Washington v. Texas, the Supreme Court directed the federal courts to formulate "an independent constitutional standard to govern the presentation of defense witnesses in criminal cases." The courts then struck a balance that greatly favored the accused. That balance tipped back in favor of the prosecution with the Court's narrowing of the compulsory process clause in United States v. Valenzuela-Bernal. This Note offers the following proposals in search of an equilibrium that will respect the Washington holding

135. Westen, Compulsory Process II, supra note 11, at 300. The question raised by such procedure is whether convincing a defendant to use this substitute form of evidence in place of live testimony violates the right to produce witnesses. See Orfield, Subpoena in Federal Criminal Procedure, 13 ALA. L. REV. 1, 26 n.116 (1960).

136. The Assistant United States Attorney based this determination solely upon information he received during a ten to fifteen minute telephone conversation with the Border Patrol agent who interviewed the aliens. Respondents Brief, supra note 86, at 3.

137. U.S. Brief, supra note 10, at 8.

138. Id. at 21-22.

139. 388 U.S. 14 (1967).

140. See Westen, Compulsory Process II, supra note 11, at 306. See also supra notes 38-43 and accompanying text.
while accommodating the interests of the government and the material witness.

A. A Framework For Pretrial Procedure

An examination of the procedural concerns inherent in safeguarding the defendant’s Fifth and Sixth Amendment rights, minimizing the incarceration period of the alien witness, and respecting society’s interests in avoiding aborted criminal prosecutions and reducing the influx of illegal aliens must focus on two time frames: (1) the alien incarceration period prior to a materiality determination and (2) the detention period of material witnesses subsequent to a finding of materiality. This Note proposes the adoption of a federal pretrial procedural framework that would balance the aforementioned interests and alleviate the procedural concerns. The federal districts should adopt the following practice: The government would notify defense counsel at the time of appointment of the INS’s intent to deport or grant voluntary departure, after a ten day period, to detained illegal aliens who are potential material witnesses. The court would inform counsel that the aliens would be retained and available for questioning for ten days. If defense counsel failed to act diligently to question the witnesses, the court could rule that the defendant had waived his compulsory process rights.

Upon completion of the interview process, defense counsel would be required to petition the court to detain the aliens it deemed necessary for a defense. If the government opposed counsel’s selection, the court would append a hearing for the determination of witness materiality to a preliminary examination. A federal magistrate would preside over the preliminary hearing at the close of the ten day period.

If the prosecution agreed with the selection of material witnesses, the pretrial procedure would bypass the preliminary examination and advance directly to grand jury indictment. Pursuant to the Federal Rules of Criminal Procedure, a judicial officer would

143. The Sixth Circuit has suggested that defense counsel be notified by telephone immediately after attorney appointments are made so that they will be able to move quickly. Presently the Western District of Michigan employs the practice of notifying counsel by mail. Armijo-Martinez, 669 F.2d at 1139.
144. See, e.g., United States v. Avila-Dominguez, 610 F.2d 1266 (5th Cir. 1980) (The Fifth Circuit notes that the defendant’s case is “flavored with an element of waiver” where defense counsel fails to make more than an informal inquiry of potential material witnesses within ten days of notification that witnesses are being held.).
145. The terms “preliminary hearing” and “preliminary examination” are used interchangeably throughout this Note.
impose conditions of release on the selected material witnesses; the court would depose and subsequently release those witnesses able to comply with the conditions. The court would not, however, detain material witnesses because of their inability to comply with a condition of release if the testimony of the witnesses could be secured adequately by deposition and the witnesses' further detention would not be necessary to "prevent a failure of justice." The court would transfer these aliens to an INS detention center for deportation hearings or voluntary departure proceedings. This transfer would be a necessary procedure because an alien temporarily released without court monitoring could either return to his home country, beyond the federal government's subpoena power, or disappear into the United States, thereby avoiding immigration officials.

I. Incarceration of the Prospective Material Witness

For humanitarian reasons, the federal districts must not secure defendants' compulsory process rights by incarcerating prospective material witnesses through the time of arraignment. Neither is it in the interest of society for the federal districts to turn to the other extreme and forego otherwise valid and appropriate prosecutions. The proposed pretrial preliminary hearing offers a comfortable middle ground.

The primary purpose of a preliminary hearing is to safeguard the defendant from unfounded charges. The procedure's primary

146. 18 U.S.C. §§ 3146, 3149 (1976). See supra note 130. The current criminal system was not designed in contemplation of the alien material witness. The alien material witness, if released on bond, may return to his home country beyond the subpoena power of the United States. It is therefore in the "interest of justice" that the court depose an illegal-alien witness, released on bond, and thus preserve his testimony for use at trial. See Fed. R. Crim. P. 15, supra note 132.


148. An alien witness released on bond would not be subject to deportation. The INS does not regain jurisdiction until after the trial. The alien may personally decide to leave the United States if he is unable to gain employment for the interim.

149. See infra notes 231-32 and accompanying text.

150. See supra note 10.

151. See supra note 138 and accompanying text.

152. The preliminary hearing should be distinguished from the initial appearance, Fed. R. Crim. P. 5, in which immediately after the arrest a federal magistrate sets bail and, in cases of warrantless arrests, issues a complaint based on probable cause. The hearing's adversarial procedures promote a more reliable determination of probable cause than the speedy ex parte review at the initial appearance. "Arraignment," Fed. R. Crim. P. 10, refers to the proceeding in which the accused is read the indictment before the trial court and asked to enter a plea. The federal system and each of the states provide for the use of the preliminary hearing in felony cases. See Note, The Function of the Preliminary Hearing in Federal Pretrial Practice, 83 Yale L.J. 771 (1974).

function is to test the legality of a defendant’s custody; that is, to determine whether there is sufficient evidence to proceed to trial.\footnote{154} The often ignored collateral functions of the preliminary hearing include permitting the defendant to discover the prosecution's case, offering an opportunity to initiate plea bargaining, and preserving the testimony of witnesses who may not be available at a later date.\footnote{155}

Courts concerned with the detention of illegal-alien witnesses should take notice of the last collateral function. Many jurisdictions honor this function and allow the accused to introduce evidence in his favor during the preliminary hearing.\footnote{156} Clearly, if the right of the defendant to introduce and preserve evidence “in his favor” is to have any meaning, the determination of probable cause must be based on all the evidence adduced at the preliminary hearing by either the government or the defendant. In a prosecution for the transportation and harboring of illegal aliens, the parties introduce evidence through the testimony of illegal-alien material witnesses. It is, therefore, only logical to append the materiality hearing to the preliminary examination.

In practice, federal courts conduct relatively few preliminary hearings. Unlike most state courts, district courts hold preliminary examinations in only about twenty percent of all prosecutions.\footnote{157} District courts often assert that because the preliminary hearing “asses only the validity of a defendant’s custody pending action by the grand jury, its purpose is vitiated by the grand jury’s indictment, which itself establishes probable cause to hold the defendant for trial.”\footnote{158}

\footnotetext[155]{154. See, e.g., Model Code of Pre-Arraignment Procedure § 330.1(1) (1975).}
\footnotetext[156]{155. Barber v. Page, 390 U.S. 719, 724 (1968).}
\footnotetext[157]{156. New York, for example, permits the accused to call witnesses and present evidence during the preliminary hearing at the discretion of the magistrate. N.Y. CODE CRIM. P. § 180.60 (McKinney 1971).}
\footnotetext[158]{157. In fiscal year 1976, 24,991 criminal prosecutions were commenced by indictment. 12,278 were commenced by information where indictment was waived, and 11,543 were commenced by information. ANN. REP. OF THE ADMIN. OFFICE OF THE UNITED STATES COURTS, Table 37,254 (1977). Preliminary examinations were conducted in only 5,502 cases. Id. at 122. (An information is an accusation in the nature of an indictment. It differs from an indictment only in that it is presented by a competent public official on his oath of office instead of by a grand jury.)}
\footnotetext[158]{158. Arenella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction without Adjudication, 78 Mich L. Rev. 463, 484 (1979-1980). The Fifth Amendment requires most federal prosecutions (prosecutions of offenses punishable by imprisonment for a term exceeding one year) to proceed by indictment, unless indictment is waived by defendant. U.S. CONST. amend. V. There is no corresponding right to a preliminary hearing.}
By taking this view, federal courts mask the functions of the preliminary examination. Contrary to the implications of current federal criminal practice, discovery is an important collateral function of the preliminary hearing.\textsuperscript{159} In civil litigation, depositions can preserve testimony at an early stage; in criminal litigation, the preliminary examination is the only available counterpart.\textsuperscript{160} The Federal Rules of Criminal Procedure provide for taking depositions in "exceptional circumstances," but only from a prospective witness whose testimony is material and must be preserved to prevent a "failure of justice."\textsuperscript{161} Under current federal criminal practice, the illegal alien does not become a prospective material witness until after the post-arraignment materiality hearing.\textsuperscript{162} If it is not possible for the court to arraign the defendant within a two week period, it is in the alien's interest for the court to conduct a combined preliminary/materiality hearing. If the court determines that the alien is a material witness, the court should order that the alien's deposition be taken prior to his release.

As a tactical matter, the defendant may not wish to introduce evidence at the preliminary examination; he may fear that to do so would be to disclose his case to the prosecution. Furthermore, thorough questioning of a prospective witness by defense counsel may amount to gratis discovery for the government.\textsuperscript{163} The Supreme Court addressed this concern in \textit{California v. Green},\textsuperscript{164} quoting the California Supreme Court's opinion in \textit{People v. Green}.\textsuperscript{165}

\textit{[The purpose of a preliminary hearing is not a full exploration of the merits of a cause or of the testimony of the witnesses... Even given the opportunity... neither prosecution nor defense is generally willing or able to fire...}\textsuperscript{165}

\begin{footnotesize}
\begin{itemize}
  \item[160.] Because the preliminary hearing may serve as a valuable device for discovering the prosecution's case, particularly in the absence of other effective means of discovery, the prosecution logically seeks to avoid such hearings. 8 J. MOORE, \textit{FEDERAL PRACTICE} \S 5.04[1], at 5-28 (2d ed. 1970). Defense counsel's opportunity for pre-trial cross-examination may also be valuable, as it may be difficult at trial to develop inconsistencies in testimony never heard. Though defense counsel is given ten days in which to interview all potential alien witnesses originally secured by the government as the prosecution's witnesses, counsel cannot compel a witness to speak. Furthermore, witness testimony need not come out in full at the materiality hearing.
  \item[161.] \textit{See supra} note 132.
  \item[162.] \textit{See supra} notes 118-22 and accompanying text. \textit{See also} Respondent's Brief, \textit{supra} note 86, at 7 n.10.
  \item[163.] \textit{See} California v. Green, 399 U.S. 149, 197 (1970). The Court upheld the constitutionality of admitting preliminary hearing testimony over a defense objection that it should not be admissible, where the prosecution witness was not available and the proceeding was conducted before a judicial tribunal equipped to provide a record of the hearing.
  \item[164.] 399 U.S. 149 (1970).
  \item[165.] 70 Cal.2d 654 (1969).
\end{itemize}
\end{footnotesize}
At the combined preliminary/materiality hearing, the current federal practice would not require parties to present evidence beyond the quantum necessary to prove witness materiality. Thus, counsel would not need to conduct in-depth examinations of the witnesses. The magistrate would determine the materiality of witnesses in accordance with standards adopted by the district court. Although the Supreme Court has not articulated a federal standard of materiality, guiding principles are available.\(^6\)

The compulsory process clause restricts the defendant to the production of "witnesses in his favor."\(^6\) The defendant's burden of proving that a witness's testimony is of a favorable nature should be a "very slight one."\(^7\) Courts have required only that the defendant demonstrate that the witness he seeks is "potentially useful"\(^8\) to his case. His right to compulsory process is not qualified by the fact that a witness's testimony is not entirely favorable.\(^9\) A witness favors the defendant if his testimony refutes an element of the prosecution's case, whether this is accomplished by testifying directly to the underlying events at issue or by testifying to the reliability of the prosecution's witnesses.\(^10\)

In *United States v. Armijo-Martinez*,\(^11\) the Sixth Circuit proposed that the district courts be required to hold the materiality hearing on the record and issue appropriate orders.\(^12\) This procedure would ensure that the need for the witnesses could be assessed on appeal.\(^13\)

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166. 399 U.S. at 195 n.7 (quoting People v. Green, 70 Cal.2d 652, 663 (1969)).
167. See supra note 40. See also Westen, *Compulsory Process II*, supra note 11, at 214 (the federal nature of materiality is implicit in the Supreme Court's treatment of prejudicial error).
168. U.S. CONST. AMEND. VI (emphasis added).
171. See Chambers v. Mississippi, 410 U.S. 283 (1973). See also *Fed. R. Evid.* 607 ("The credibility of a witness may be attacked by any party, including the party calling him.").
172. Courts also may consider the nature of the defendant's evidence in determining whether it is material. Character evidence may be an essential consideration in some cases provided it is not peripheral to the main issue in dispute. See 6 J. WIGMORE, *Evidence* § 1908, at 580 (3d ed. 1940). *Contra* Westen, *Compulsory Process II*, supra note 11, at 234.
173. 669 F.2d 1131 (6th Cir. 1982).
174. *Id.* at 1140.
175. See Note, *The Preliminary Examination in the Federal System*, supra note 159, at 1419. (In addition, the information obtained at a preliminary hearing may provide a
A federal court's supervisory jurisdiction over the evidentiary rules applied in criminal cases involves an exercise of discretion. Principles of common law govern the rules of evidence. The federal courts interpret these principles in the "light of reason and experience." If the defendant is concerned that he will disclose his case to the prosecution during an adversarial materiality hearing, the court should order separate inquisitional proceedings to determine the bases and validity of the testimony of potential government and defense witnesses. Because the magistrate must also establish the reliability of a witness's testimony, it can be argued that an adversarial hearing, as opposed to a separate inquisitional hearing, may infringe upon the due process rights of the defendant. It is conceivable that an illegal alien selected by the defense as a material witness may feel intimidated by the government's presence at an adversarial hearing. The alien may be aware that he presumptively has committed a crime against the United States. He may, therefore, decide to alter his testimony to ensure that he will not be prosecuted. As the guilt or innocence of the defendant is not in issue at this time, counsel should have no objection to separate proceedings.

It is unlikely that a court could hold a materiality hearing prior to indictment without simultaneously holding a preliminary examination. Without such an examination, defense counsel would not be informed sufficiently of the essential facts constituting the offense charged. The prosecutor's power to bypass the preliminary hearing increases the importance to the defendant of the grand jury's screening function. The function of this group of laymen is to check the prosecution by eliminating charges where the evidence does not establish probable cause for arrest.

A materiality hearing held prior to indictment thus would require the consent of both parties. If the case is not complicated with facts and defense counsel has a full understanding of the criminal offense charged, the court may agree to convene the materiality hearing. Basis for avoiding trial altogether, a contingency which benefits the prosecution, the defense, and the public.

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178. McCray, 386 U.S. at 311. The Court has been unwilling to formulate a "federal evidentiary rule of compulsory disclosure where the issue is a preliminary one of probable cause, and guilt or innocence is not at stake." Cf. United States v. Rawlinson, 487 F.2d 5 (9th Cir. 1973) (use of in camera hearing to determine whether informant's testimony would be of sufficient help to defendant so as to require disclosure of identity of informant was appropriate).
181. The decision to hold the hearing lies within the discretion of the court.
2. Release of the Material Witness—The Use of Substitute Evidence in Place of Live Testimony

Congress passed the Bail Reform Act of 1966 to ensure that all persons, regardless of their financial status, would not be detained pending their appearance to answer charges or to testify where detention serves neither the ends of justice nor the public interest. Section 3149 of the Act addresses the material witness’s eligibility for release. A federal court shall not detain an individual due to his inability to comply with any condition of release if his testimony can adequately be secured by deposition and further detention is not necessary to prevent a failure of justice.

Case law and congressional legislation require that aliens present within the United States be given the same fundamental procedural rights as United States citizens. Thus, if the detention of an alien witness is not necessary to prevent a failure of justice, the court should secure the alien’s testimony by deposition. Unfortunately, not all United States Attorneys recognize this development in the law. The United States Attorney’s Office for the Southern District of California opposes the practice of deposing alien material witnesses as a matter of policy in nearly every criminal case in the district. If United States Attorneys are willing to compromise and initially detain all material witnesses for a ten day period, the defendant

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182. See Westen, Compulsory Process II, supra note 11, at 191.


186. FED. R. CRIM. P. 46 governs the administration of bail for witnesses and defendants. Congress amended the rule in 1972 to bring it into general conformity with the Bail Reform Act of 1966. Subdivision (b) of the rule deals with an issue not dealt with by the Act—release during trial.


188. See Wong Wing v. United States, 163 U.S. 228 (1895). Aliens are entitled to a jury trial and procedural due process:

\[\text{[A]ll persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments, and . . . even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law. . . .} \]

\text{Id. at 238. The detention of an alien material witness is not per se unconstitutional. The Supreme Court has held that statutes which permit a material witness to be jailed if his presence at trial cannot be otherwise secured are constitutional. See Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929).} \]

189. See Respondent’s Brief, supra note 86, at 7 n.10. See also U.S. Brief, supra note 10, at 20-21 n.9:

\[\text{[D]epositions are at best of marginal value in cases like this one. When the witness . . . [is able to provide little evidence], a deposition is basically a waste of time and money. In cases where the witness has genuinely material evidence, it} \]
must also be willing to compromise. In most circumstances, contemporary application of the confrontation and compulsory process clauses compels the defendant's acceptance of deposition testimony of witnesses both for and against him when the witnesses' detention serves neither the ends of justice nor the public interest.

a. Confrontation

A defendant's right to confront witnesses against him\(^{190}\) is not absolute. Rule 15 of the Federal Rules of Criminal Procedure, permitting the use of depositions,\(^{191}\) and the recognized exceptions to the hearsay rule\(^{192}\) limit the scope of the confrontation clause. Traditionally the courts have recognized an exception to the confrontation requirement when the prosecution's witness is unavailable and "has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant."\(^{193}\) The right of cross-examination initially afforded to defense counsel at pretrial proceedings provides substantial compliance with the purposes behind the confrontation clause.\(^{194}\) The prosecution, however, must show that it has made a good-faith effort to produce the witness to enable the trier of fact to evaluate the credibility of the witness's testimony in light of demeanor on the witness

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is likely that, absent exigent circumstances, both the defendant and the government would prefer to have the witness available for trial.

\textit{Id. See also supra note 129.}

190. U.S. Const. amend. VI.


192. Fed. R. Evid. 804(a) provides:

- **Definition of unavailability.** 'Unavailability as a witness' includes situations in which the declarant:
  - (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;
  - (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;
  - (3) testifies to a lack of memory of the subject matter of his statement;
  - (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
  - (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under sub-division (b)(2), (3), or (4), his attendance of testimony) by process of other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

This section is the standard for admissibility of deposition testimony in Fed. R. Crim. P. 15(e). See 5 J. Wigmore, Evidence § 1420 (Chadbourn rev. 1974).


194. Barber, 390 U.S. at 722.
In sanctioning the government’s use of an out-of-court statement of its own witness, the controlling question for courts under the confrontation clause is whether the trier of fact has “a satisfactory basis for evaluating the truth of the . . . prior statement.” This standard implies that even evidence submitted in its best available form may be inadmissible if it does not have the essential “indicia of reliability.”

The issue of confrontation seldom arises in criminal prosecutions for the illegal transportation or harboring of illegal aliens. In the Southern District of California the United States Attorney’s Office either incarcerates government witnesses through trial, stipulates to their testimony, or foregoes criminal prosecution. Certainly, if the court released material witnesses pursuant to the Bail Reform Act and the witnesses did not appear at trial, the court would accept the deposition testimony of government witnesses. The subsequent disappearance of prosecution witnesses beyond the federal subpoena power also should comply with the witness “unavailability” requirement of Federal Rule of Evidence 804(a). The defendant’s right of confrontation would have been satisfied at the earlier preliminary hearing or deposition proceeding.

(b) Compulsory Process

Whether requiring a defendant to use a substitute form of evidence in lieu of favorable live witness testimony violates his right to compulsory process is an issue that must be decided in relation to federal constitutional standards. Although depositions may, on occasion, be an acceptable substitute for live testimony, the use of

195. Id. at 724-25. “In short, a witness is not ‘unavailable’ for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” Id. See generally Phillips, The Confrontation Clause and the Scope of the Unavailability Requirement, 6 Mich. J. L. Rev. 327 (1973). See also Virgin Islands v. Aquino, 378 F.2d 540, 548 (3d Cir. 1967).
198. See Seijo, 595 F.2d 116 (where deported aliens had become unavailable, but not for the purpose of preventing them from testifying against the defendant, and where the prosecution had done everything in its power to hold the aliens and produce them at trial, but had been unsuccessful in persuading the INS to retain them in custody, depositions taken from those aliens in sessions where defense counsel was present were admissible at trial).
199. See U.S. Brief, supra note 10, at 20-21 n.9.
200. See supra note 130.
201. See supra note 192.
depositions often deprives the defendant of "the opportunity to present evidence of his witness's demeanor and credibility." The accused does have the right to produce all material evidence, "all evidence in his favor that could reasonably affect the judgment of the jury." Whether evidence of a witness's demeanor is material "will depend upon the nature of the case." Thus, in instances in which a defendant is not entitled to produce a witness in person, he cannot object to the use of deposition evidence on the ground that it deprives him of material demeanor evidence. Whether the defendant is in fact entitled to produce the witness is the crucial question in cases where the INS deports a potential alien witness.

In a prosecution for the transportation and harboring of illegal aliens, evidence of an illegal-alien witness's demeanor and credibility usually will not be material. This conclusion follows from the Supreme Court's discussion of materiality in Washington. In that case, the Court implied that the federal definition of materiality is implicit in the Court's treatment of the concept of prejudicial error. Thus, evidence is material to a defendant's case if its exclusion would be prejudicial by federal standards.

Rarely will the defendant's case suffer prejudice if the accused is unable to present evidence of the demeanor and credibility of an illegal-alien witness. This evidence is more likely to lessen the burden of proof on the prosecution than to benefit the defense. The prosecution must prove that the defendant was aware of the illegal status of the alien at the time of the alleged felony. When an illegal-alien witness takes the stand, the jury often evaluates the demeanor and credibility of an illiterate, poorly dressed individual who speaks little or no English. If the witness appears reasonably "illegal" to the jury, they naturally will wonder why the defendant did not question the legality of his act. It is reasonable, therefore, to expect that the defendant will accept the testimony of pretrial hearings as an adequate version of the substance of his witness's testimony.

The most difficult compulsory process issue is whether a defendant has a constitutional right to introduce testimony in the form of substitute evidence. If the jurisdiction's evidentiary rules permit

203. Westen, Compulsory Process II, supra note 11, at 300-01.
204. Id.
205. Id. "In the rare case in which the weight of evidence depends entirely on its content, the loss of demeanor evidence may be immaterial in that it could not reasonably affect the judgment of the jury." Id.
206. See supra note 40.
207. Id.
208. Id.
209. See, e.g., Braswell v. Wainwright, 463 F.2d 1148, 1157 (5th Cir. 1972).
the use of depositions when a witness is unavailable, the constitutional issue will not arise. Within the context of federal prosecutions for transporting or harboring illegal aliens, federal courts should read the word “unavailable” in Federal Rule of Evidence 804(a) so as to coincide with the subsequent disappearance of an alien defense witness who was released on bond pending trial or who was deported because of his inability to meet conditions of release when his further detention was not necessary to prevent a failure of justice.

The ultimate decision to release an alien material witness lies within the discretion of the court. The judge decides whether “further detention is not necessary to prevent a failure of justice.”210 If the court believes that the jury is entitled to judge witness credibility on the basis of personal observation of appearance and demeanor, the parties should consider the alternative of video-taped depositions under oath.211 When the interests of all parties are weighed, the manifest “failure of justice” is the continued detention of the alien witness.

B. A PROPOSAL FOR INTERDEPARTMENTAL COORDINATION

Section 1252 of the Immigration and Nationality Act212 grants the Attorney General wide discretion to parole any alien into the United States temporarily and under such conditions as he may prescribe for reasons deemed strictly in the public interest. This status permits the individual to work during the duration of his parole.

Section 1252 appears to solve the dilemma created by the desire to release the incarcerated alien witness prior to trial and the conflicting need to secure his presence within the court's jurisdiction. The Act, however, only conveys authority for the parole of an alien pending an appearance “before an administrative tribunal.”213 The INS has no authority to parole or detain an individual solely for appearance as a material witness in a federal criminal prosecution.214 Although the INS desires to assist the United States Attorney's Office, it may not parole or detain an alien in excess of the time

211. "It remains to be seen whether videotaped depositions taken under oath and recorded in advance of trial can, constitutionally, be substituted for the production of available witnesses." Westen, Compulsory Process II, supra note 11, at 301-02 n.418. "With respect to the right of compulsory process, the answer depends on whether the difference between viewing the witness’s demeanor in person and viewing it on videotape is a difference that could reasonably affect the judgment of the jury.” Id.
213. INS, Internal Memo from Regional Commissioner, Eastern Region, to District Directors and Officers, January 14, 1977.
214. Id.
necessary to effect removal under administrative proceedings unless there is a judicial or administrative order or compelling circumstance dictating the contrary.$^{215}$

No precedent exists finding a "compelling circumstance" in a situation where the retention of an illegal alien is required solely as a material witness in a criminal proceeding. Such a finding, which would necessitate greater cooperation and coordination between the United States Attorney's Office and the Immigration and Naturalization Service, is desirable. It would transfer the authority for monitoring the parole of an illegal alien witness from the courts to the Immigration and Naturalization Service and would alleviate inmate overcrowding in metropolitan correctional centers.$^{216}$ The government could no longer choose to forego immigration felony prosecutions due to the judicial inconveniences and financial burdens associated with incarcerating material witnesses.$^{217}$

It is logical for the INS to continue to monitor the alien witness throughout the judicial proceedings. The Service is ultimately responsible for the alien's departure from the United States.$^{218}$ Under current procedure, the district court returns the alien to the Service after he has testified at trial. If the alien chooses to return to his homeland voluntarily, the Service does not initiate deportation proceedings.$^{219}$

A problem associated with alien witness parole has been the courts' inability to secure the witness's presence at trial. The alien often returns home before the trial date if he is unable to obtain employment. Legislation before the House of Representatives and Senate judiciary committees in 1981 offered a solution to this problem.$^{220}$

The Omnibus Immigration and Control Act$^{221}$ was the Reagan Administration's immigration reform bill. Title VI of this bill, the Temporary Mexican Workers Act, proposed temporary legislation and therefore would not have amended provisions of the existing Immigration and Nationality Act.$^{222}$ The title would have established a two-year program for the interim admission of Mexican nationals to work in jobs, skilled or unskilled, in any field for which

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215. ***Id.***

216. ***See supra*** notes 125-28 and accompanying text.

217. ***See supra*** note 138 and accompanying text.


219. Interview with Zoglin, *supra* note 120.


221. ***Id.***

there is a shortage of American workers. During the two-year test period, the program was to be limited to 50,000 workers a year. If the paroled alien witnesses were included in a similar program, the INS would not incur additional expenses by accepting responsibility for the detention and welfare of alien witnesses.

The Omnibus Immigration and Control Act died in Committee; however, the Senate and House subsequently introduced, in identical bills, the Immigration Reform and Control Act of 1982. The Act would permit United States employers to petition for temporary nonimmigrant workers to work in jobs if "there are not enough local U.S. workers for the job . . . and . . . similarly employed U.S. workers' wages will not be adversely affected." The Act would limit temporary workers to a maximum eight-month stay per year, except for agricultural workers who may stay for more than one year if previously so allowed.

The Senate passed the reform bill on August 17, 1982. The House Judiciary Committee sent the bill to the floor, but it did not pass before the close of the second session of the 97th Congress. Both the Senate and the House reintroduced the Act in the 98th Congress.

Illegal-alien witnesses detained in the United States should be granted "temporary nonimmigrant worker" status until trial. An employed alien witness has a financial incentive to comply with his conditions of release. Furthermore, granting an alien witness "temporary nonimmigrant worker" status reduces the government's financial burden, as the witness need not be detained at government expense. The "temporary nonimmigrant worker" status also provides the defendant a guarantee that his right to compulsory process will be respected by the presence of the illegal-alien witness at trial.

C. EXTRADITION—A PROPOSAL FOR THE FUTURE

Once an alien witness is released from custody and either deported or voluntarily returned to his country, the individual lies beyond the subpoena power of the United States Marshall Serv-
The Service can neither send officers to arrest and return the witness nor prosecute the witness for contempt of court as long as the witness is physically absent from the court's jurisdiction. Accordingly, the federal government may only "request that the foreign country arrest and extradite the witness for criminal proceedings." 232

The Departments of State and Justice have recommended that the federal government seek greater cooperation from Mexico in efforts to prevent illegal migration. 233 While Mexico may be willing to lend limited assistance due to its interest in preventing the mistreatment of its citizens by professional smuggling rings, 234 it would be unrealistic to forecast a broadening of the scope of the United States-Mexico extradition treaty 235 to include material witnesses to foreign crimes. Bilateral relations have not reached the point where extradition will become routine for offenses such as contempt. The current treaty limits extradition to offenders of specified, relatively severe crimes. 236

The illegal migration of aliens into the United States benefits Mexico economically. The Special Study Group on Illegal Immigrants from Mexico 237 reported that Mexico realizes valuable economic benefits through earnings sent by employed illegal aliens to relatives at home. Furthermore, the transfer of willing workers to the United States alleviates the country's critical unemployment problem. Mexican officials have commented that the elimination of the illegal migration "safety valve" could have serious social and economic consequences for Mexico. 238

Mexico has little to gain from aiding federal district courts in punishing the smugglers who bring the Mexican unemployed one step closer to employment, except for providing its citizens a certain

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233. DEPTS OF JUSTICE AND STATE, supra note 5, at 24.

234. Mexico enacted laws in 1974 that provide penalties of up to ten years imprisonment and/or fines of up to $4,000 for aiding the illegal migration of Mexican workers. See id. at 25.


237. The study group was comprised of Representatives from the Departments of Agriculture, Health and Human Services, Justice, Labor, and State. President Nixon established the group in August 1972 to explore the problems relating to illegal immigration from Mexico. DEPTS OF JUSTICE AND STATE, supra note 5, at 25 n.1.

238. Id. at 25.
degree of protection from inscrupulous professional smugglers. 239 Thus, at the present time, the criminal defendant’s right to compulsory process cannot be secured by an attempt to extradite an “unavailable” 240 alien witness.

CONCLUSION

The Executive Branch has the responsibility to execute the immigration policy of Congress. The Executive also has a duty to ensure that criminal defendants receive the fundamental fairness inherent in the due process and compulsory process clauses. In United States v. Valenzuela-Bernal these two obligations conflicted. The Supreme Court chose to require defendants “to carry the burden of their resolution.” 241 Specifically, for a defendant’s compulsory process right to prevail, he must make a plausible showing of how the unavailable alien witness’s testimony would have been both material and favorable to his defense.

The irony of the situation is that even if a defendant can show that a deported alien witness’s testimony would have been both material and favorable, he never has the opportunity to exercise his Sixth Amendment right to compulsory process. Instead, the court simply dismisses the indictment; the defendant smuggler goes free. This solution does not benefit society at large. Alone, the government’s prompt deportation of an illegal alien does not solve the problem of illegal immigration. The government also has a duty to prosecute smugglers, some of whom may go unpunished if the INS continues to deport potential material alien witnesses.

The Supreme Court should exercise its supervisory power 242 over the federal courts and encourage the adoption of a pretrial procedure that will guarantee the defendant’s exercise of compulsory process, reduce the incarceration time of potential material alien witnesses, and respect the government’s responsibility to combat illegal immigration. Congress should amend the Immigration Reform and Control Act of 1982 to include illegal-alien witnesses in the temporary nonimmigrant worker program. If paroled alien witnesses were included in the program, the INS would not incur additional expense by accepting responsibility for the detention and welfare of alien witnesses. A new pretrial procedure working in unison with a

239. See supra note 234 and accompanying text.
240. See supra note 192. In the future the costs of extraditing witnesses from the interior of Mexico may make extradition impractical.
242. “This Court has not hesitated to use its supervisory power over federal courts to set standards to ensure the fair administration of justice.” Id. at 3452 n.2 (O’Connor, J., concurring).
nonimmigrant worker program would achieve a reasonable balance of the duties of the federal government, the rights of the criminal defendant, and the concerns of the alien witness.

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