Note

Compulsory Process and the War on Terror: A Proposed Framework

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On December 11, 2001, Attorney General John Ashcroft announced the indictment of Zacarias Moussaoui, a self-confessed member of al Qaeda, on six counts of conspiracy relating to the 9/11 attacks.[1] Moussaoui remains the only person charged in connection with the 9/11 attacks.[2] Though the indictment contained grave accusations,[3] the prosecution soon hit a constitutional roadblock. Moussaoui invoked his constitutional right to compulsory process, requesting access to al Qaeda members in U.S. custody to obtain exculpatory evidence.[4] The government refused the request, citing national security concerns.[5] This clash between the defendant's constitu-

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1. *See* Press Release, U.S. Dep't of Justice, Department of Justice Indicts Moussaoui for September 11 Attacks (Dec. 11, 2001), http://www.usdoj.gov/opa/pr/2001/December/01_ag_641.htm. Four of the charges carry the penalty of death, while two qualify for a maximum of life in prison. *Id.*

2. Viveca Novak, *How the Moussaoui Case Crumbled*, TIME, Oct. 27, 2003, at 32, 32.

3. *See* Press Release, *supra* note 1.

4. Susan Schmidt, *Prosecution of Moussaoui Nears a Crossroad: Facing Demands for Witness Testimony, Government May Turn Suspect Over to U.S. Military*, WASH. POST, Jan. 21, 2003, at A8; Philip Shenon, *Court Papers Show Moussaoui Seeks Access to Captured Al Qaeda Members*, N.Y. TIMES, Nov. 1, 2002, at A20.

5. Jerry Markon, *U.S. Admonished in Terror Case: Government Must Give Moussaoui Relevant Material, Judge Says*, WASH. POST, Apr. 23, 2003, at A9.

tional right to compulsory process and the government's national security interests emerged as the focal point of the case.

The Sixth Amendment guarantees all criminal defendants the right to compulsory process, stating that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[6] Compulsory process grants "criminal defendants the subpoena power [of the court] for obtaining witnesses in their favor."[7] This right implicitly embodies the right to discover exculpatory evidence in the possession of the government.[8] Unlike other Sixth Amendment rights, compulsory process does not require the government to adhere to certain standards by which criminal trials must proceed, but rather functions wholly upon the defendant's initiative and affords him affirmative aid to present his defense.[9]

The Fourth Circuit's ruling in *United States v. Moussaoui*[10] marked the first time that a federal appellate court addressed the issue of protecting a terrorism defendant's right to compulsory process since the 9/11 attacks and the advent of the War on Terror. The Fourth Circuit employed a balancing test in an attempt to protect both Moussaoui's right to compulsory process and the government's asserted national security interest.[11] Because the ultimate resolution of this case came from a guilty plea, the Supreme Court has not articulated a framework dictating how to effectuate the compulsory process rights of terrorism defendants in the civilian criminal justice system.

This Note analyzes the Supreme Court's compulsory process jurisprudence and proposes a constitutional framework for fulfilling a defendant's right to compulsory process in the context of the War on Terror. Part I describes the evolution of compulsory process jurisprudence in the United States. Part II

6. U.S. CONST. amend. VI.

7. BLACK'S LAW DICTIONARY 306 (8th ed. 2004).

8. *See* Jencks v. United States, 353 U.S. 657, 671 (1957) ("'So far as [lawfully suppressed documents] directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess . . . .'" (quoting United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944) (Hand, J.))); United States v. Burr, 25 F. Cas. 30, 34 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d) ("In the provisions of the constitution . . . which give to the accused a right to the compulsory process of the court, there is no exception whatever.").

9. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73, 74 (1974).

10. 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

11. *See id.* at 469–76.

details the Fourth Circuit's holding in *Moussaoui*. Three sections compose the framework proposed in Part III: Part III.A calls for a rejection of the current balancing test in favor of a per se rule as the constitutional standard for all compulsory process cases; Part III.B incorporates the current constitutional standard of materiality with respect to compulsory process in terrorism cases; and Part III.C outlines remedies for violations of the right to compulsory process appropriate to the context of the War on Terror. Finally, Part III.D applies this new framework to *Moussaoui*. This Note concludes that the government cannot circumscribe a criminal defendant's constitutional right to compulsory process in the civilian criminal justice system by pleading national security: once a defendant meets the materiality threshold, the government must produce the requested exculpatory evidence or accept the consequences of violating the defendant's right to compulsory process.[12]

I. THE LAW OF COMPULSORY PROCESS

Any discussion of compulsory process must begin with an overview of its jurisprudential development. This examination recounts the development of the compulsory process doctrine from its inception at common law through its incorporation into the U.S. Constitution. It then discusses judicial interpretation of the clause and details the scope and limitations of compulsory process. Finally, it analyzes the constitutional tests that have emerged from Confrontation Clause jurisprudence, a sister clause to compulsory process. Part I reveals that, until recently, the Supreme Court advanced a robust compulsory process doctrine, holding this and other Sixth Amendment rights paramount in ensuring a fair trial.

A. HISTORICAL ORIGINS OF COMPULSORY PROCESS

The emergence of compulsory process paralleled the transformation of the justice system from an inquisitional to an adversarial process.[13] By the early 1400s, the jury trial had assumed its modern function, with jurors deciding guilt or

12. This Note addresses the prosecution of terrorism defendants in the civilian criminal justice system. It does not preclude the possibility of prosecuting terrorism defendants in a military tribunal established under the President's war powers. While there may be serious constitutional issues inherent in such a prosecution, this Note focuses instead on the constitutional issues presented by a prosecution in an Article III court.

13. Westen, *supra* note 9, at 78.

innocence based on the testimony of independent witnesses produced by the Crown.[14] However, the defendant possessed few rights to guard against prosecutorial abuse and to rebut the accusations against him.[15] The system forbade defendants from producing witnesses, either voluntarily or through a summons, to testify on their behalf.[16] This system left criminal trials during the 16th century "primarily one-sided inquests into the truth of the prosecution's charges."[17]

While the common law rule regarding defense witnesses gradually evolved, affording the defendant more procedural rights,[18] not until the 1600s did the accused receive limited power to subpoena witnesses and have them sworn before the courts.[19] Throughout the 1600s, the right to compulsory process developed rapidly, driven by the famous treason trial of Sir Walter Raleigh and a backlash against governmental abuses.[20] Completing the transition from an inquisitional to an adversarial system, Parliament passed the Bill of Rights in 1689, codifying many criminal-procedure rights later embodied in the American Bill of Rights—including the right to compulsory process.[21]

B. THE ESTABLISHMENT OF COMPULSORY PROCESS IN THE U.S. CONSTITUTION

The right to compulsory process followed the colonists from England to the American colonies and developed contemporaneously with English common law.[22] The fact that nine of the thirteen colonies explicitly included the right to compulsory process when drafting their constitutions following independ-

14. *Id.* at 80–81.

15. As Peter Westen notes, the Crown denied defendants knowledge of the charges against them until the day of the trial, the right to counsel, the right to confront witnesses, and the right to present either voluntary or compelled witnesses in their favor. *See id.* at 82. The Sixth Amendment embodies these criminal procedure rights. *See* U.S. CONST. amend VI.

16. Westen, *supra* note 9, at 83–85.

17. *Id.* at 82.

18. *See id.* at 82–87.

19. *See id.* at 85–87.

20. *See id.* at 87–90.

21. *See* 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 230–36 (2d ed. 1938); Westen, *supra* note 9, at 89.

22. *See* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 13–30 (1951).

ence demonstrates the pervasive presence of compulsory process in the common law.[23] By the time the Framers set out to draft the Constitution, the evolution of common law had "firmly entrenched" the right to compulsory process in the American criminal-procedure scheme,[24] representing the "culmination of a long-evolving principle that the defendant should have a meaningful opportunity, at least on par with that of the prosecution, to present a case in his favor through witnesses."[25]

As such, the Framers codified criminal-procedure safeguards in the Constitution[26] to protect those rights which they believed England had violated.[27] However, some feared that including only a trial-by-jury clause[28] would insufficiently protect an accused rights as they existed at common law and thus demanded that these rights be more clearly articulated in an amendment to the Constitution.[29] To quell these fears as to the right to compulsory process, James Madison, the architect of the Sixth Amendment,[30] incorporated the following text: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[31]

C. EARLY INTERPRETATION OF COMPULSORY PROCESS

While documents from the founding era do not explain Madison's reasons for phrasing this clause as he did,[32] contem-

23. *See generally* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 179–379 (1971) (providing an exposition into American colonies' postindependence constitutions).

24. ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 115 (2002).

25. Westen, *supra* note 9, at 78.

26. *See* U.S. CONST. art. III, § 2, cl. 3.

27. *See* THE DECLARATION OF INDEPENDENCE paras. 20–21 (U.S. 1776) (listing denial of criminal procedural rights among the grievances justifying the colonies' split from England).

28. *See* U.S. CONST. amend. VI.

29. *See* Westen, *supra* note 9, at 96–97.

30. *See* GARCIA, *supra* note 24, at 115.

31. U.S. CONST. amend. VI. Professor Westen notes that records do not contain Madison's reasons for drafting the Compulsory Process Clause with this particular wording. While the rest of the Sixth Amendment language closely paralleled the language of state constitutions, this clause is loosely comparable only to Blackstone's Commentaries. *See* Westen, *supra* note 9, at 97. On the other hand, Francis Heller suggests that, in composing the Sixth Amendment, Madison considered the compulsory process clauses of each state constitution and formulated a hybrid to satisfy all states and offend none. *See* HELLER, *supra* note 22, at 21–30.

32. *See* Westen, *supra* note 9, at 97.

porary reactions to the clause shed light on its original meaning. Congress and the states adopted the Compulsory Process Clause practically without comment or substantive change.[33] The paucity of debate regarding the narrow construction of the text leaves the impression that Madison's contemporaries did "not appear to have attached any significance to the narrow wording of the compulsory process clause."[34] These observations support the theory that the U.S. Constitution codified the meaning of the right at common law.

In addition to gleaning the original meaning of the right from historical documents, an early judicial interpretation offers insight as to how courts understood the right at that time. Chief Justice Marshall's "sweeping construction" of compulsory process in the trial of Aaron Burr shows that the original understanding of the right was not limited to the literal text of the amendment, but also considered contextual factors.[35] In 1807, allegations regarding Burr's loyalty arose in letters from General James Wilkinson to President Thomas Jefferson.[36] Jefferson informed Congress that Burr intended to take over the Western states, invade Mexico to provoke a war with Spain, and establish a new state.[37] During his trials for treason and a misdemeanor, Burr moved to compel Jefferson and the U.S. attorney to produce the letters,[38] alleging that the information contained therein "'[m]ay be material to his defence.'"[39] Jefferson refused to produce the letters, citing executive privilege.[40]

Chief Justice Marshall, sitting as the trial judge, held that no witness, even the President, could claim an exemption from the provisions of the Sixth Amendment.[41] Additionally, Marshall construed the text of the clause, which referred only to

33. *Id.* at 98.

34. *Id.* at 98–100.

35. *See id.* at 101 & n.128 (referencing United States v. Burr, 25 F. Cas. 187 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,694); United States v. Burr, 25 F. Cas. 30 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d)).

36. *See id.* at 102.

37. *Id.*

38. *See id.* at 103. At least two subpoenas were issued, one to Jefferson on June 13 for an October 21 letter and one to the U.S. attorney on September 4 for the November 12 letter. *Id.*

39. *Id.* (quoting 1 DAVID ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 132, 136–43, 149–50 (Philadelphia, Hopkins & Earle 1808)) (alterations in original) (emphasis omitted).

40. *Burr*, 25 F. Cas. at 31.

41. *Id.* at 33–34 (noting that every criminal defendant has a right, as a matter of course, to the use of compulsory process).

process for "witnesses," to encompass the right to compel a witness to produce documents.[42] He also interpreted the right to compulsory process to include a standard of materiality, requiring a defendant to make a credible showing that the information or witnesses sought will provide material assistance to his defense before invoking the right to compulsory process.[43]

D. REVIVAL OF COMPULSORY PROCESS JURISPRUDENCE: THE MODERN INTERPRETATION

Marshall's broad interpretation of compulsory process stood largely untouched for more than 150 years until the Supreme Court resurrected the Compulsory Process Clause as the foundation for its decision in *Washington v. Texas*.[44] *Washington* characterized compulsory process as a "fundamental element of due process law" and likened it to the right to present a defense.[45] This characterization—recognition of compulsory process as a fundamental right—set off a revival of compulsory process jurisprudence.

A Texas jury convicted Jackie Washington of murder.[46] He argued that he did not shoot the victim and that he tried to dissuade his codefendant, Fuller, from shooting him.[47] Fuller's testimony would have corroborated Washington's testimony, exculpating Washington.[48] However, to prevent fabricated testimony by codefendants, Texas state law forbade Fuller from testifying.[49] As a result, the court convicted Washington of murder.[50]

Upon review, the Supreme Court first held that the right to compulsory process was incorporated by the Fourteenth Amendment's Due Process Clause.[51] In strong terms, the Court placed the defendant's right to compulsory process on an equal

42. *Id.* at 35 ("The literal distinction which exists between the cases is too much attenuated to be countenanced in the tribunals of a just and humane nation.").

43. *Id.* at 35–36 (requiring a special affidavit showing the materiality of the testimony before the access would be granted).

44. 388 U.S. 14 (1967).

45. *Id.* at 19.

46. *Id.* at 15.

47. *Id.* at 16.

48. *Id.*

49. *Id.* at 16–17, 20–21.

50. *Id.*

51. *Id.* at 17–19.

level with other Sixth Amendment rights.[52] The *Washington* Court explained that a court's interest in preventing perjury yields to the defendant's right to present "relevant, probative evidence," and that evidentiary rules preventing the jury from hearing such evidence violate the defendant's right to compulsory process.[53] The Court found that the trial court "arbitrarily" denied Washington his right to compulsory process by refusing to allow him to present a witness who was "physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense."[54] *Washington* established that the fact finder must hear testimony material to the defense despite the possibility of presenting unreliable or perjured testimony.[55] Implicit in this ruling is that the jury, not the judge, must weigh the credibility of the witnesses produced by the defendant to support his defense.[56]

Throughout the 1970s, Supreme Court decisions established a robust compulsory process doctrine based on the interpretation promulgated in *Washington*. *Webb v. Texas*[57] affirmed the central tenet of *Washington* that the "defendant has a right to present a defense coextensive with the prosecution's right to present its case,"[58] and that it is up to the jury to decide "where the truth lies."[59] In *Chambers v. Mississippi*, the Court determined that the defendant's right to present witnesses in his defense trumped the procedural hearsay rule, effectively ruling that substantive justice via compulsory process overrides procedure.[60] Other cases upheld a defendant's right to compulsory process over a conflicting state evidentiary rule, finding that the substantive right of compulsory process trumped the state's

52. *Id.* at 18.

53. GARCIA, *supra* note 24, at 128.

54. 388 U.S. at 23.

55. *Id.* at 21.

56. *See* GARCIA, *supra* note 24, at 119; *cf.* Cool v. United States, 409 U.S. 100, 104 (1972) (per curiam) (holding that instructing a jury to consider evidence from a defense witness only if extremely reliable violates the Sixth Amendment right to present to the jury exculpatory testimony of an accomplice per *Washington v. Texas*).

57. 409 U.S. 95 (1972) (per curiam).

58. GARCIA, *supra* note 24, at 119.

59. *Webb*, 409 U.S. at 98.

60. 410 U.S. 284, 292–93 (1972); *see also* GARCIA, *supra* note 24, at 120 (noting that the effect of *Chambers* was to allow "the right to present a defense [to triumph] over strict fealty to procedure").

interest in procedural regularity.[61]

The most high-profile case in this line of cases, *United States v. Nixon*, reaffirmed the central holding of the *Burr* cases.[62] The Court held that compulsory process trumps claims of executive privilege: "To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense."[63]

E. DEFINING THE SCOPE OF COMPULSORY PROCESS

Like other Sixth Amendment guarantees, the right to compulsory process is a fundamental, though not absolute, right.[64] Although the Supreme Court gave a sweeping construction to the clause in *Washington v. Texas*, it has imposed limits on the right for a variety of reasons. For the purposes of this Note, the limitations regarding materiality, unavailable witnesses, and the balancing of interests provide particular insight.

1. Standard of Materiality

A materiality standard prevents defendants from gaming the system by demanding irrelevant information and placing a substantial burden on prosecutorial resources. Since *United States v. Burr*, courts have required a defendant to show that the information sought via compulsory process is material to his defense.[65]

The Court laid down the roots of the modern constitutional standard of materiality in *Brady v. Maryland*, a due process case.[66] Under *Brady*, the defendant may discover information when the evidence is both "favorable to an accused" and "material."[67] Evidence is "material" under the *Brady* line of cases when there is "a reasonable probability that its disclosure

61. *See, e.g.*, Rock v. Arkansas, 483 U.S. 44, 55 (1987); Crane v. Kentucky, 476 U.S. 683, 690–91 (1986).

62. 418 U.S. 683, 713, 715–16 (1974).

63. *Id.* at 709.

64. *See, e.g.*, *Rock*, 483 U.S. at 52–55.

65. United States v. Burr, 25 F. Cas. 30, 36 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d) (requiring a special affidavit showing the materiality of the testimony before granting access to the evidence); *see also* FED. R. CRIM. P. 16(a)(1)(C) (permitting the defendant to inspect and copy evidence in the possession of the government that is "material to the preparation of his defense").

66. 373 U.S. 83, 87 (1963).

67. *Id.*

would have produced a different result."[68] In *United States v. Bagley*, the Court unified the case law to form the current constitutional standard of materiality, which requires that evidence sought through compulsory process be "favorable to the accused," "material," and that a "reasonable probability" exists that a different outcome would have resulted from its disclosure.[69] In the Sixth Amendment context, the Court defined such reasonable probability as "a probability sufficient to undermine confidence in the outcome."[70] In formulating this standard, the Court rejected a sliding scale of materiality.[71] The *Brady* standard requires a reviewing court to examine the totality of the circumstances to ascertain if the evidence would have been material to the defense, keeping in mind the effect of the nondisclosure of material evidence on the defense's trial strategy.[72]

The Court has not developed a specific test of materiality in the compulsory process context. Rather, the Court relies on the due process standard that has evolved from *Brady* and its progeny. In *Washington v. Texas*, the Court determined that it was "undisputed" that exculpatory testimony by Washington's codefendant was "relevant," "material," and "vital" to the defense and that its exclusion violated Washington's constitutional rights.[73]

In the context of classified information, courts consistently have held that "[i]n appraising materiality, the court is not to consider the classified nature of the evidence."[74] In one such case, the Court determined that the government's privilege in classified information must give way to a defendant's right to such information upon a showing that the evidence sought "is relevant and helpful to the defense . . . or is essential to a fair determination of a cause."[75] Once a defendant satisfies this

68. Kyles v. Whitley, 514 U.S. 419, 422 (1995); *see also* United States v. Bagley, 473 U.S. 667, 682 (1985) (articulating an identical formulation of materiality).

69. *Bagley*, 473 U.S. at 682.

70. Strickland v. Washington, 466 U.S. 668, 694 (1984) (examining an ineffective assistance of counsel claim under the Sixth Amendment).

71. *See Bagley*, 473 U.S. at 682–83.

72. *Id.*

73. 388 U.S. 14, 16 (1967).

74. United States v. Juan, 776 F.3d 256, 258 (11th Cir. 1985) (per curiam) (citing United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983)).

75. Roviaro v. United States, 353 U.S. 53, 60–61 (1957).

standard, the government must disclose the information.[76]

2. Unavailable Witnesses

The court's process power will reach an unavailable witness if that person's location is known—even if the witness is in another state[77]—or if the government holds the person in custody.[78] Compulsory process does not require the State to produce a witness if the witness's unavailability is not the result of a state action, such as the witness's death, disability, sickness, or disappearance.[79]

Prior to 1982, if the State made a witness unavailable the Court required the State to produce the witness. However, in 1982 the Court decided *United States v. Valenzuela-Bernal*.[80] In this case, the government deported two witnesses before the defense had an opportunity to speak with them, knowing that both deportees had witnessed the defendant allegedly commit the crime.[81] An assistant U.S. attorney determined that neither witness was "material" to the defense.[82] The Court held that the deportation of witnesses who may provide relevant evidence for the defense did not violate the Compulsory Process Clause per se.[83] Absent a showing that the lost testimony con-

76. *See* United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990).

77. *See* Unif. Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings § 2, 11 U.L.A. 10–11 (2003); *see also, e.g.*, Maryland v. Breeden, 634 A.2d 464, 469 (Md. 1993) (discussing briefly the history and purpose of the Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings).

78. *See* 28 U.S.C. § 2241(c)(5) (2000); United States v. Cruz-Jiminez, 977 F.2d 95, 99–100 (3d Cir. 1992) (finding that when a defendant asserts his Sixth Amendment right to compulsory process to obtain the testimony of an incarcerated witness, the witness's testimony may be obtained by the issuance of a testimonial writ).

79. *See* Taylor v. Minnesota, 466 F.2d 1119, 1122 (8th Cir. 1972) (holding that the trial court is not required to grant a continuance when, despite the State's serving officer's due diligence, the witnesses cannot be found); United States v. Rhodes, 398 F.2d 655, 657 (7th Cir. 1968) (deceased witness); United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060, 1073–74 (D. Del. 1972) (dictum) (witness with amnesia); *see also* Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 575–79 (1978) (discussing the limits of the Confrontation Clause and the extent to which any given witness is "available").

80. 458 U.S. 858 (1982).

81. *Id.* at 861.

82. *Id.*

83. *See id.* at 872. This ruling was a shift from earlier case law that applied a per se rule to similar fact situations. *See, e.g.*, United States v. Tsutagawa, 500 F.2d 420, 423 (9th Cir. 1974) (finding a violation of the defendant's

stitutes evidence "material and favorable" to the defense, the Court held that no compulsory process violation occurred.[84]

3. Compulsory Process Versus Governmental Interests: The Implementation of a Balancing Test

In addition to modifying the unavailable witness rule, the *Valenzuela-Bernal* Court implemented a balancing test that significantly altered the constitutional standard for determining when the government must afford compulsory process to the defendant. For the first time, the Court manifested a willingness to weigh a defendant's right to compulsory process against governmental interests.[85] Specifically, the Court weighed the government's interest in not holding aliens who "possess no material evidence relevant to a criminal trial" against the defendant's constitutional right to compulsory process.[86]

The Court found that, as a matter of prosecutorial discretion, the government, rather than the defendant, could ascertain whether or not the witness could provide evidence material to the defense before ordering the witness's deportation.[87] To challenge the prosecution's decision, the defendant must make a showing of materiality without access to the witness.[88] The Court recognized the significant burden involved in making this showing but found that the "task is not an impossible one."[89] The Court found that the government's bureaucratic interest in not holding aliens until the defendant could assess the materiality of their testimony outweighed the defendant's right to compulsory process.[90]

In 1988, the Court decided *Taylor v. Illinois*, in which defense counsel violated a discovery rule that required the defendant to disclose the names and addresses of the witnesses he intended to call at trial.[91] Employing a balancing test, the

right to compulsory process when the government deported a prospective defense witness without considering the defendant's interest in the witness's presence at trial).

84. *Valenzuela-Bernal*, 458 U.S. at 872–73.
85. *Id.* at 864–65.
86. *Id.* at 865.
87. *Id.* at 872–73.
88. *Id.* at 873.
89. *Id.* at 871.
90. *See id.* at 872–73.
91. 484 U.S. 400, 403 (1988).

Court determined that the countervailing public interests in the integrity and reliability of the judicial process outweighed the defendant's constitutional right to compulsory process.[92] In effect, the Court decided that the defense counsel's procedural error effectively forfeited the defendant's right to compulsory process. In reaching its decision, the Court noted that the public has an "interest in a full and truthful disclosure of critical facts."[93] The Court also held that the discovery violation justified the preclusion of otherwise admissible evidence, even though this remedy resulted in a denial of the defendant's constitutional right.[94]

F. THE SISTER CLAUSE: THE CONFRONTATION CLAUSE

The Compulsory Process Clause goes hand-in-hand with the Confrontation Clause: one provides access to witnesses that will exculpate a defendant, and the other requires the State to produce witnesses that inculpate the defendant.[95] Both rights developed through common law, accompanying the transition from an inquisitorial to an accusatorial criminal justice system.[96] Though excellent legal scholarship has fully vetted the relationship between, and concurrent development of, these clauses,[97] a brief overview of the Court's approach to resolving confrontation cases lends insight into what constitutional tests the Court may impose to resolve future compulsory process cases.

In the seminal case on the Confrontation Clause, *Mattox v. United States*,[98] the Supreme Court formulated a per se rule by relying on the original meaning and scope of the clause.[99] The Court held that, absent an exception recognized at common law, direct confrontation of the accuser alone satisfied the de-

92. *See id.* at 412–14.

93. *Id.* at 412.

94. *Id.* at 402.

95. *See* U.S. CONST. amend. VI.

96. *See generally* Crawford v. Washington, 541 U.S. 36, 42–50 (discussing the history and purpose of the Confrontation Clause).

97. *See, e.g.*, Westen, *supra* note 79 *passim* (discussing the relationship between the Compulsory Process Clause and the Confrontation Clause).

98. 156 U.S. 237 (1895).

99. *See id.* at 243–44; *see also* Margaret M. O'Neil, Comment, Crawford v. Washington*: Implications for the War on Terrorism*, 54 CATH. U. L. REV. 1077, 1082 (2005) (discussing the impact of *Mattox* on the balance between respecting a defendant's confrontation right and the admittance of reliable hearsay evidence to facilitate the court's truth finding function).

fendant's right to confrontation.[100] In this case, the Court allowed stenographic notes of prior testimony from an unavailable witness.[101] Because the defendant previously had the opportunity to cross-examine the witness, the Court admitted the notes into evidence, drawing an analogy to the common law exception for dying declarations.[102]

The Court shifted directions in *Ohio v. Roberts*, abandoning the constitutional requirement of direct confrontation.[103] The Court moved further from the requirement of direct confrontation in *Maryland v. Craig* when Justice O'Connor, writing for the Court, found that direct confrontation was "not the sine qua non of the . . . right."[104] Justice O'Connor implemented a balancing test to determine whether foregoing direct confrontation served public interest sufficiently to justify abrogating the right to confrontation.[105]

Recently, however, the Court made an about-face with respect to testimonial evidence in *Crawford v. Washington*.[106] Justice Scalia's majority opinion abandoned the balancing test from the *Roberts-Craig* line of reasoning.[107] Instead, the Court returned to the original meaning of the Confrontation Clause by recognizing that the only constitutionally sufficient means of assessing reliability was to afford the defendant an opportunity to directly confront his accuser.[108] To effectuate this standard, the Court held that prior testimonial evidence is inadmissible, unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination.[109] In so holding, the Court rejected the balancing test and re-embraced a per se rule requiring the government to produce witnesses to directly confront the accused.[110]

100. *Mattox*, 156 U.S. at 243–44.

101. *Id.* at 244.

102. *Id.* at 243–44.

103. 448 U.S. 56, 62–65 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 56 (2004).

104. 497 U.S. 836, 847 (1990).

105. *Id.* at 855.

106. 541 U.S. 36 (2004).

107. *Id.* at 63 (calling the previous framework so "unpredictable" that it fails to "provide meaningful protection from even core confrontation violations").

108. *Id.* at 68–69.

109. *Id.* at 68.

110. *Id.* This ruling did not overrule the common law exceptions to direct confrontation. *Id.*

From its inception at common law through its incorporation into the U.S. Constitution, the right to compulsory process emerged as a key element in the adversarial process. Judicial interpretations adopted a broad interpretation of compulsory process while refining its constitutional contours. Despite the implementation of a balancing test in *Valenzuela-Bernal* allowing courts to weigh governmental interests against the defendant's constitutional right,[111] compulsory process has remained a vital right for criminal defendants. By September 11, 2001, the right to compel the production of witnesses in the defendant's favor had served as a vital tool for criminal defendants in the civilian criminal justice system for 200 years.

II. COMPULSORY PROCESS VERSUS NATIONAL SECURITY: *UNITED STATES V. MOUSSAOUI*

On August 16, 2001, the FBI arrested Zacarias Moussaoui on immigration charges[112] following a tip by an alert flight instructor in Eagan, Minnesota.[113] Worried that Moussaoui intended to use this flight training for a violent purpose, the FBI branch in Minnesota attempted to secure a warrant to search his laptop and belongings, but the Washington office denied the request, citing lack of evidence.[114] The 9/11 attacks gave new significance to Moussaoui's arrest and provided the evidence needed to obtain a search warrant.[115]

A. THE PROSECUTION HITS A SNAG: THE CONSTITUTION AND THE WAR OVER WITNESSES

From the beginning, Moussaoui disclaimed any involvement in, or knowledge of, the 9/11 attacks. To prove these assertions, he sought access to the architects of those attacks in

111. United States v. Valenzuela-Bernal, 458 U.S. 858, 864–65 (1982).

112. Novak, *supra* note 2, at 34.

113. Press Release, Pan Am Int'l Flight Acad., Pan Am International Flight Academy Statement to the News Media, http://www.panamacademy.com/template_press.asp?id=119 (last visited Apr. 24, 2006). The Minneapolis *Star Tribune* quoted the flight instructor as telling the FBI, "Do you realize how serious this is? . . . This man wants training on a 747. A 747 fully loaded with fuel could be used as a weapon!" Greg Gordon, *A Persistent Suspicion: Eagan Flight Trainer Wouldn't Let Unease About Suspect Rest*, STAR TRIBUNE (Minneapolis), Dec. 21, 2001, at A1 (internal quotation marks omitted).

114. Romesh Ratnesar & Michael Weisskopf, *How the FBI Blew the Case*, TIME, June 3, 2002, at 24, 26, 29 (referencing a memorandum from Special Agent Colleen Rowley to FBI Director Robert Mueller).

115. *See id.* at 29.

U.S. custody.[116] On September 11, 2002, U.S. forces captured Ramzi bin al-Shibh, an alleged coordinator of the 9/11 attacks.[117] Moussaoui immediately sought to depose bin al-Shibh, but the government refused to provide access to bin al-Shibh, citing national security concerns.[118]

On January 30, 2003, relying on the guidelines set forth in the Classified Information Procedures Act (CIPA),[119] the district court ordered the government to produce the requested witness in the form of a videotaped deposition pursuant to Rule 15 of the Federal Rules of Criminal Procedure.[120] The government objected, but the district court concluded that Moussaoui's Sixth Amendment right to compel witnesses outweighed the government's asserted national security interest.[121] While the government pursued an interlocutory appeal of this order,[122] coalition forces captured the mastermind of the 9/11 attacks, Khalid Sheikh Mohammed,[123] and Moussaoui quickly moved to depose him.[124] Mohammed reportedly informed his interrogators that Moussaoui played no role in the 9/11 plan.[125]

The Fourth Circuit remanded the case to allow the government to propose substitutions that would both ensure Moussaoui's right to a fair trial and protect the government's national security interests.[126] However, the district court rejected the government's offer to produce heavily redacted reports of interrogations conducted by U.S. interrogators, finding them inaccurate, incomplete, and unreliable.[127] On July 14,

116. *See* Philip Shenon, *U.S. Will Defy Court's Order in Terror Case*, N.Y. TIMES, July 15, 2003, at A17.

117. Novak, *supra* note 2, at 34.

118. *Id.*

119. 18 U.S.C. app. 3 (2000 & Supp. 2004).

120. United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699, at *5–6 (E.D. Va. Mar. 10, 2003), *appeal dismissed*, 333 F.3d 509 (4th Cir. 2003); United States v. Moussaoui, No. 01-455-A (E.D. Va. Jan. 31, 2003) (order denying in part and granting in part defense motions to compel discovery) (under seal) (discussing FED. R. CRIM. P. 15).

121. *Moussaoui*, 2003 WL 21263699, at *5–6.

122. *See* Jerry Markon, *Moussaoui Trial Postponed for Third Time*, WASH. POST, Feb. 13, 2003, at A8.

123. *See* Novak, *supra* note 2, at 34–35.

124. *Id.*

125. *See* Susan Schmidt & Ellen Nakashima, *Moussaoui Said Not To Be Part of 9/11 Plot*, WASH. POST, Mar. 28, 2003, at A4.

126. United States v. Moussaoui, No. 03-4162, 2003 WL 1889018, at *1 (4th Cir. Apr. 14, 2003).

127. *See* United States v. Moussaoui, No. CRIM. 01-455-A, 2003 WL

2003, the government filed an affidavit stating that it planned to defy the court's order to produce bin al-Shibh for deposition.[128] The government argued that producing a confessed 9/11 conspirator, "'would necessarily result in the unauthorized disclosure of classified information' and that 'such a scenario is unacceptable.'"[129]

Both the United States and Moussaoui argued for dismissal to expedite an appeal to the Fourth Circuit.[130] However, the district court, analogizing the situation to cases under CIPA, found dismissal inappropriate[131] and imposed sanctions on the government for defying the court's orders.[132] The court removed the death penalty[133] and prohibited evidence referring to the 9/11 attacks.[134] The government appealed to the Fourth Circuit.[135]

B. THE FOURTH CIRCUIT'S RULING

The Fourth Circuit held that the Sixth Amendment's Compulsory Process Clause applies to enemy combatant witnesses in the custody of the U.S. government outside the United States' territorial boundaries.[136] The Fourth Circuit held, for the first time, that the testimonial writ reaches a foreign national in U.S. custody outside the territory of the United States

21277161, at *2 (E.D. Va. May 15, 2003).

128. *See* Shenon, *supra* note 116. The affidavit was filed by Attorney General John Ashcroft. *Id.*

129. *Id.* (quoting Attorney General John Ashcroft).

130. United States v. Moussaoui, 282 F. Supp. 2d 480, 482 (E.D. Va. 2003) (referencing Standby Counsel's September 20, 2003 Motion for Sanctions and Other Relief), *vacated in part*, 365 F.3d 292 (4th Cir. 2004), *amended*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

131. *Id.* at 482–83 (explaining that the presumption for dismissal under CIPA was not appropriate here because it was impractical for the court to make a ruling on the admissibility of testimony, as contemplated by CIPA, when that testimony had not been obtained).

132. *See id. at* 486–87.

133. *Id.* at 482, 487 (finding that, because the government had deprived Moussaoui of the chance to present testimony that could defend his life, imposition of the death penalty would constitute a violation of due process).

134. *Id.* at 487 (finding that the government's refusal to produce the witnesses would result in an unfair trial because the defendant would be "denied the ability to present testimony from witnesses who could assist him in contradicting [the] accusations").

135. *See* Brief for the United States at 1–2, United States v. Moussaoui, 365 F.3d 292 (4th Cir. 2003) (No. 03-4792).

136. *See* United States v. Moussaoui, 382 F.3d 453, 464–65 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

so long as the ultimate custodian, in this case Secretary of Defense Donald Rumsfeld, was subject to the process power of the district court.[137] The court rejected the government's arguments that the orders mandating production violated separation of powers principles by invading the Executive's war powers.[138]

The court then held that the issuance of orders requiring production of witnesses involved "the resolution of questions properly—indeed, exclusively—reserved to the judiciary."[139] If any separation of powers concerns arose from the orders, they would stem from an impermissible burden placed on the government, the finding of which requires the court to balance the competing interests.[140] In conducting this balancing test, the court found the framework provided by CIPA informative.[141] It held that, although the production of these witnesses imposed substantial burdens on the government,[142] such burdens could not outweigh the finding that the witnesses possessed information material to the defense.[143] Therefore, the court concluded, the "choice is the Government's whether to comply with those orders or suffer a sanction."[144]

The Fourth Circuit noted that dismissal of an indictment generally constitutes the appropriate remedy when the government refuses to produce material evidence pursuant to a court order.[145] However, the court held that where "the Government has rightfully exercised its prerogative to protect national security," no punitive sanction will apply.[146] Rather, a

137. *Id.* at 463–66. A few months earlier, the Supreme Court in *Rasul v. Bush* determined that the district court only needed jurisdiction over the detainee's custodian to reach the detainee, regardless of the detainee's citizenship. 542 U.S. 466, 478–79 (2004). Unlike the majority in *Moussaoui*, the *Rasul* Court did not draw the distinction between the testimonial writ, the prosecutorial writ, and the writ of habeas corpus. *See Moussaoui*, 382 F.3d at 483 n.1 (Williams, J., concurring).

138. *Moussaoui*, 382 F.3d at 466.

139. *Id.* at 469.

140. *See id.*

141. *See id.* at 471 n.20 (noting that while CIPA did not apply to the January 30 and August 29, 2003 rulings, CIPA nonetheless provided a "useful framework" for examining the issue).

142. *See id.* at 470–71.

143. *See id.* at 476.

144. *See id.*

145. *See id.*

146. *See id.*

"more measured approach" that takes into consideration national security interests is required.[147]

To frame this approach, the Fourth Circuit borrowed a standard from CIPA.[148] This standard allows the government to prevent the disclosure of sensitive national security information "by proposing a substitute for the information, which the district court must accept if it 'will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.'"[149] The court concluded that the district court erred in finding any substitution for actual statements inherently inadequate,[150] but agreed that the substitutions as proposed by the government insufficiently satisfied Moussaoui's right.[151] To remedy the substitutions so as to fulfill Moussaoui's constitutional right, the court found that summaries of classified information compiled from interrogations of the witnesses "provide an adequate basis for the creation of written statements that may be submitted to the jury in lieu of the witnesses' deposition testimony."[152]

The court required that the statements follow the exact language of the summaries as closely as possible.[153] It ordered Moussaoui to designate portions of the summaries for submission and gave the government an opportunity to respond by submitting portions of the summaries the government thought the rule of completeness requires.[154] Based on this interactive process, the circuit court believed that the district court would compile a set of appropriate substitutions.[155] Additionally, because the substitutions were summaries of statements made over several months rather than actual statements, the district court must inform the jury of the nature of the substitutions.[156]

147. *See id.*

148. *See id.* at 476–77.

149. *Moussaoui*, 382 F.3d at 477 (quoting 18 U.S.C. app. 3 § 6(c)(1) (2000)).

150. *See id.* at 478. The court rejected the district court's conclusion that no substitute for depositions of the witnesses would adequately satisfy Moussaoui's right to compulsory process. *Id.*

151. *See id.*

152. *Id.* at 479.

153. *See id.* at 480.

154. *See id.* at 480 n.35.

155. *See id.* at 480.

156. *See id.* at 478. The court stated that the jury should be informed that the parties compiled substitutions "derived from reports [Redacted] of the witnesses. The instructions must account for the fact that members of the prosecution team have provided information and suggested [Redacted] The jury should also be instructed that the statements were obtained under circum-

The Fourth Circuit's ruling exposed the difficulties inherent in prosecuting a terrorism defendant in the civilian criminal justice system. While the court effectuated Moussaoui's right to compulsory process in form, it gutted that right in substance. By employing a balancing test, the Fourth Circuit allowed asserted governmental interests to emasculate the defendant's right to compulsory process. Thus, the court failed to protect both Moussaoui's constitutional rights and the government's national security interest. This failure of our justice system calls for a new approach.

III. THE PROPOSED FRAMEWORK

The challenges our legal system faces since 9/11 require the judiciary to protect constitutional rights in the most difficult of circumstances. The War on Terror presents challenges never before encountered in our constitutional jurisprudence. Although Fascism, Communism, and the Cold War brought some of these issues to the fore, the 9/11 attacks forced Americans to examine the extent of our individual freedoms under the Constitution as we have not had occasion to do since World War II. At this crucial moment, the judiciary must provide a steady voice and rely on the Constitution to keep our nation grounded.

The framework proposed in this Note provides guidance on how the courts can fulfill this role with respect to the right to compulsory process. It allows the judiciary to maintain its independence from the political branches in the face of great public pressure to bend the rules to combat terrorism. From this independent perspective, the judiciary will have the freedom to vindicate an accused terrorist's constitutional rights without the pervasive pressure of public opinion bearing down on each decision.

A. REJECTING THE BALANCING TEST: THE ARGUMENT FOR A PER SE CONSTITUTIONAL RULE

Academics and even members of the Court have long criticized the Supreme Court's reliance on balancing tests to circumscribe constitutional rights in the face of an opposing governmental interest.[157] Balancing tests open the door for public

stances that support a conclusion that the statements are reliable." *Id.*

157. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 62–68 (2004) (rejecting the use of a balancing test in the Confrontation Clause context).

opinion to exert pressure on the Court either to eviscerate or amplify constitutional rights. The implementation of such a test to curb a defendant's right to compulsory process is a recent aberration in compulsory process jurisprudence.[158] The text, history, and original and modern interpretations of compulsory process dictate that the Court should abandon the use of a balancing test in all compulsory process cases, not only in the context of the War on Terror. The Court should instead revert to a per se rule that grants a defendant access to all exculpatory evidence within courts' process power, subject only to a standard of materiality.

1. Early Interpretations of Compulsory Process Call for a Per Se Rule

Constitutional interpretations must begin with the text itself. The Sixth Amendment is an imperative.[159] The defendant "*shall* enjoy the right to . . . compulsory process for obtaining witnesses in his favor."[160] The express text of the Sixth Amendment contains no exceptions or escape hatches for governmental interests: all defendants have a constitutional right to compulsory process.[161] However, a purely textual application leaves many questions unanswered. For example, the text provides only for witnesses, not for documents or other evidence, leading to the absurd result of calling witnesses into court without access to documents or other evidence to substantiate their testimony.[162] The text also allows a defendant to compel the testimony of any witness, regardless of the relevance of the witness's testimony. Accordingly, the Court has never handed down such a literal interpretation of compulsory process. Instead, the Court has found the power to subpoena witnesses in-

158. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 414–15 (1988) (determining that the "countervailing public interests" in the integrity and reliability of the judicial process outweighed the defendant's constitutional right to compulsory process); United States v. Valenzuela-Bernal, 458 U.S. 858, 864–65 (1982) (implementing a balancing test to determine when the government must afford compulsory process to the defendant).

159. *See* U.S. CONST. amend. VI; *cf.* U.S. CONST. amend. IV (expressly incorporating a reasonableness standard allowing for the use of a balancing test).

160. U.S. CONST. amend. VI (emphasis added).

161. *See* Washington v. Texas, 388 U.S. 14, 18–19 (1967); United States v. Burr, 25 F. Cas. 30, 33–34 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d).

162. *See Burr*, 25 F. Cas. at 35.

cludes the ancillary power to compel production of evidence in their possession or control, as well as their thoughts, memories, and opinions.[163]

The historical purpose of the right sheds light on the meaning of the text and clarifies these ambiguities.[164] As discussed in Part I, compulsory process emerged as a corollary of the transition from an inquisitorial to an adversarial system.[165] The idea of making the individual defendant equal to the State drove the development of compulsory process.[166] Because removing the governmental obstacles to a defendant's right to present his defense underpinned this development, an interpretation of compulsory process that allows the government to decide when and to what extent the defendant's right exists in any given case subverts the purpose of the right. Taken in context with the textual imperative, the historical purpose strongly supports the rejection of a balancing test through which governmental interests can eviscerate the right.

An examination of the original understanding of the Compulsory Process Clause commands the same conclusion as the textual and historical interpretations. As Part I discussed, the Declaration of Independence cited the denial of criminal procedural rights as a governmental abuse to strengthen its call for independence.[167] The Framers recognized the potential for governmental abuses and accordingly drafted the Constitution to prevent governmental overreach. The Framers did not intend for the rights of criminal defendants to ebb and flow with changes in the Court's membership or the political atmosphere of the day. A balancing test allows such temporary changes to lead to the dilution or denial of categorical constitutional rights. This type of unchecked discretion was one of the factors leading the Framers to declare independence from England in the first place.

One could argue, counter to this interpretation, that the Framers recognized the potential for governmental abuses, but

163. *See, e.g.*, *id.* at 34–35 (holding that the right extends to writings); *cf.* Crawford v. Washington, 541 U.S. 36, 42–43 (2004) (finding the text of the Confrontation Clause similarly insufficient to define the constitutional demands of that clause).

164. *See, e.g.*, *Washington*, 388 U.S. at 19–22; *Burr*, 25 F. Cas. at 32–34; *cf. Crawford*, 541 U.S. at 43–50 (relying extensively on the history of the Confrontation Clause to ascertain the correct demands of that clause).

165. *See* Westen, *supra* note 9, at 78.

166. *See id.* at 90.

167. *See* THE DECLARATION OF INDEPENDENCE paras. 20–21 (U.S. 1776).

intended only to guard against arbitrary abuses.[168] By choosing such narrow wording, the Framers left the interpretation open to extratextual considerations, including governmental interests.[169] However, two counterarguments undermine this premise. First, while Madison's narrow wording of the clause creates doubt as to its scope, even scholars who disagree as to the purpose of the wording do not espouse the view that the Framers intended to allow governmental interests to preempt the right to compulsory process.[170] Second, one need only look to a contemporary judicial opinion for a definitive interpretation of compulsory process during the founding era.

The earliest judicial interpretation of the Compulsory Process Clause, *United States v. Burr*, indicates that an individual defendant had the right to compulsory process for exculpatory information against the State, even when exposure of sensitive security information resulted.[171] While *Burr* involved issues of executive privilege and compulsory process, and the War on Terror involves national security concerns, in both cases the nature of the information being compelled involves sensitive state-security matters.[172]

In *Burr*, Marshall emphasized the solemnity of the constitutional right involved and gave a resounding affirmation of compulsory process as a fundamental constitutional right to

168. For instance, the constitutional documents of most founding era states, while varying in wording and detail, provided "guarantees against arbitrary practices in criminal proceedings." HELLER, *supra* note 22, at 21.

169. *See id.* at 24–32 (describing the debates regarding the scope of the amendment).

170. For example, Westen hypothesizes that Madison drafted the Compulsory Process Clause vaguely to build consensus by accommodating various states' interests. Westen, *supra* note 9, at 97–101. The Framers incorporated this amendment in response to significant state pressure to protect citizens' civil liberties, including the right to compulsory process, from abrogation by the new, more powerful, federal government. *Id.* at 96. On the other hand, Heller argues that contemporary documents offer no definitive explanation for the language of the Sixth Amendment criminal procedure requirements. HELLER, *supra* note 22, at 33. Nevertheless, Heller notes that England's denial of these inviolable rights, which guarded against arbitrary state practices in criminal proceedings, compelled the colonists to declare independence. *Id.* at 21.

171. *See* United States v. Burr, 25 F. Cas. 30, 34–35 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d).

172. *Compare id.* at 31–34 (requiring the President to supply a subpoenaed letter from General James Wilkinson containing allegations questioning Burr's loyalty), *with* United States v. Moussaoui, 382 F.3d 453, 458 (4th Cir. 2004) (concerning a subpoena to produce an al Qaeda member, an acknowledged "national security asset"), *cert. denied*, 544 U.S. 931 (2005).

which no one, not even the President of the United States, could claim an exemption.[173] Though not explicit, a reasonable reading of *Burr* shows that once the defendant makes a showing of materiality, governmental interests—even sensitive national security interests—cannot dilute the defendant's right to compulsory process.[174] This reasoning further negates the justification for the Court's current use of a balancing test to allow the government's interests to preempt a defendant's right to compulsory process.

Marshall's interpretation in *Burr*, along with the textual, historical, and original interpretations embraced by this framework, conclusively call for the rejection of the balancing test and the reinstatement of a per se rule to protect a defendant's right to compulsory process.

2. The Modern Era Exposes Problems with the Balancing Test

Just as an examination of early interpretation concluded that government interests cannot undermine a defendant's right to compulsory process, most modern interpretations of the Compulsory Process Clause hold that the defendant's right to compulsory process automatically trump any attempted governmental claim of interest.[175] The seminal modern compulsory process case, *Washington v. Texas*, equated the underpinning of the right to compulsory process with the fundamental right to present a defense. As discussed in Part I, until 1982, compulsory process cases dismissed out of hand the government's asserted interest, holding the defendant's right to compulsory process above state interests once the defendant meets the standard of materiality.

The Court's implementation of a balancing test in *Valenzuela-Bernal*,[176] and later in *Taylor*,[177] deviated from the long-standing per se rule laid down in *Burr* and its progeny. In introducing a balancing test to this jurisprudence, the Court essentially shifted compulsory process from a substantive constitutional right to a mere procedural rule that can be set aside

173. *See Burr*, 25 F. Cas. at 33–34.

174. *See id.*

175. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 707–13 (1974); Chambers v. Mississippi, 410 U.S. 284, 294–303 (1972); Washington v. Texas, 388 U.S. 14, 17–19 (1967).

176. United States v. Valenzuela-Bernal, 458 U.S. 858, 867–71 (1982).

177. Taylor v. Illinois, 484 U.S. 400, 410–16 (1988).

when the government makes a strong enough showing of interest.[178]

Such a danger is even more present in the framework of compulsory process in the War on Terror. The results in *Valenzuela-Bernal* and *Taylor* demonstrate how easily a balancing test can lead to the evisceration of categorical constitutional rights, even when challenged by secondary governmental interests.[179] The War on Terror creates significant pressure in our courts to subvert constitutional commands as a means of combating terrorism. The danger that courts will succumb to governmental claims of national security interests in a post-9/11 world by denying individual defendants their constitutional rights leads down a path from which a return to constitutional rule of law is uncertain.

Some argue that the government must have the freedom and flexibility to protect the nation in the face of terrorism.[180] However, this fails to distinguish between the power necessary to prevent a terrorist attack on the front end and the power to convict a suspected terrorist on the back end. On the front end, Congress and the President work together to pass statutes, appropriate funds, and establish specialized agencies.[181] Most importantly, they accomplish these goals within the powers the Constitution gives them.[182]

However, on the back end, the Constitution demands that the government play by a different set of rules. The Constitution protects the defendant from governmental abuses and includes no affirmative grants of power to the government.[183] Because such unprincipled tests leave far too much discretion in the judiciary, the danger of public opinion and current trends influencing courts' application of constitutional rights advocate

178. *See* GARCIA, *supra* note 24, at 142 (discussing the Court's shift to a "sporting theory" of justice).

179. *See Taylor*, 484 U.S. at 408–09 (relying on the government's asserted interest in a reliable justice system); *Valenzuela-Bernal*, 458 U.S. at 872–73 (recognizing the government's interest in deporting aliens).

180. *See, e.g.*, United States v. Moussaoui, 382 F.3d 453, 469–71 (4th Cir. 2004) (recognizing the government's interest in national security), *cert. denied*, 544 U.S. 931 (2005).

181. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Sept. 18th Authorization"); Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

182. *See* U.S. CONST. art. I, § 8, art. II, § 2.

183. *See id.* amends. IV, V, VI.

against the use of a balancing test.[184] Even in the short time since the implementation of a balancing test,[185] courts have begun to chip away at the compulsory process right.[186] A per se rule requires courts to comply with the Constitution's categorical commands, diminishing the potential for outside influences to undermine constitutional guarantees.

Since 9/11 and the ensuing War on Terror, the pressure to dismiss defendant's rights in the name of national security weighs heavily upon the courts. Rejecting a balancing test and reverting to a per se rule will ensure that the judiciary and the government remain mindful that though a defendant is charged with an act of terrorism, he is entitled to the same procedural safeguards and constitutional rights as any other defendant.

3. A Scaliaesque Approach

The Court's Confrontation Clause jurisprudence lends support to the proposed per se rule. As discussed in Part I, the interests involved in confrontation and compulsory process are seamlessly intertwined. The Court's approach to confrontation sends a reasonably reliable message about its probable approach to compulsory process. For many years, the constitutional test for confrontation cases aligned with the constitutional test for compulsory process with each advocating the use of a per se rule.[187]

However, in 1982 and again in 1990, the Court handed

184. *Cf.* Gerald E. Rosen, U.S. Dist. Court, Judge, The War on Terrorism in the Courts (July 24, 2004), *in* 21 T.M. COOLEY L. REV. 159, 163 (2004) ("At the risk of sounding preachy, if those of us in the Judiciary allow ourselves to be caught up in the public fervor surrounding terrorism, to view ourselves as part of the government's war on terror, and to tailor our decisions accordingly, the terrorists will have won an important battle because they will have caused us to be something less than who we are.").

185. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 867–71 (1982) (establishing the compulsory process balancing test).

186. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 415–16 (1988) (holding that compulsory process does not bar courts from precluding the testimony of defendant's witness as a sanction for a procedural violation); *Valenzuela–Bernal*, 458 U.S. at 873 (holding the Compulsory Process Clause not violated when the government deported a witness before the defendant could interview that witness to establish materiality).

187. *Compare* Mattox v. United States, 156 U.S. 237, 245–50 (1895) (employing a per se rule for Confrontation Clause cases), *with* Washington v. Texas, 388 U.S. 14, 17–19 (1967) (invoking a per se rule for compulsory process cases).

down opinions construing both clauses. In these opinions, the Court implemented a balancing test, weighing governmental interests against the defendant's rights to confrontation and compulsory process.[188] In each case, the Court determined that the public interest sufficiently justified abrogating the defendant's constitutional rights.[189] As applied to the Confrontation Clause, this dramatic shift in jurisprudence led to an increase in litigation as lower courts tried to define the parameters of the balancing test.

However, in *Crawford v. Washington*, the Court's most recent confrontation decision, the Court handed down a clear-cut, definitive confrontation rule.[190] The Court relied heavily on the historical purpose of the right to be confronted by witnesses to reach the conclusion that employing a balancing test in the confrontation context offended the text of the Constitution and the history of the right.[191] Justice Scalia noted that "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."[192] The opinion resoundingly disposed of a balancing test and reinstated a per se constitutional right to confront witnesses.[193]

Such a strong rejection of the balancing test in the confrontation context supports the call for a rejection of a balancing test in compulsory process jurisprudence. The principles underpinning these rights parallel each other.[194] The Court in *Crawford* held that the balancing test diluted constitutional guarantees by allowing public interests to interfere with categorical constitutional commands. The use of a balancing test in the compulsory process context also has led to the obfuscation

188. *Compare* Maryland v. Craig, 497 U.S. 836, 847–49 (1990) (interpreting the Confrontation Clause to only establish a preference for face-to-face testimony at trial), *with Valenzuela-Bernal*, 458 U.S. at 865–66 (justifying the deportation of witnesses on public policy grounds).

189. *See Craig*, 497 U.S. at 860 (weighing the states interest in protecting children against a defendants confrontation right); *Valenzuela-Bernal*, 458 U.S. at 872–73 (weighing the government's interest in the prompt deportation of illegal aliens against a defendants compulsory process right).

190. *See* 541 U.S. 36, 68–69 (2004).

191. *See id.* at 42–56 (extensively reviewing the development of the Confrontation Clause over several hundred years to support the Court's decision).

192. *Id.* at 67–68.

193. *See id.* at 63–68.

194. *See* Westen, *supra* note 79, at 567–68; Westen, *supra* note 9, at 73; *see also Crawford*, 541 U.S. at 47–52 (discussing the history and purpose of the Confrontation Clause).

of compulsory process rights.[195] Because the constitutional development of these rights have mirrored each other, the Court's decision in *Crawford* to reject the balancing test in favor of a per se rule strongly suggests that it would apply the same logic to compulsory process.

The text, historical purpose, original interpretation, and modern interpretation uniformly support the notion that the right to compulsory process is a categorical constitutional right that cannot be circumscribed by the state. As such, an ad hoc balancing test that allows governmental interests, such as national security, to delineate access to compulsory process is simply incorrect constitutional doctrine. Abandoning the balancing test and reinstating a per se rule vindicates the right to compulsory process and ensures that all defendants receive the constitutional rights afforded by our Constitution.

B. THE CONSTITUTIONAL STANDARD OF MATERIALITY

Through decades of decisions, the Supreme Court has developed the standard of materiality that defendants must meet to gain access to exculpatory information via the Court's process power. The Court consistently incorporates the general constitutional due process standard, determined by *Brady* and its progeny, into compulsory process jurisprudence.[196] Evidence must be "favorable to an accused," "material," and show a "reasonable probability" that a different outcome would have resulted from disclosure of the evidence.[197] A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome."[198] If the defense satisfies the *Brady* materiality test, the government must disclose the information, classified or not.[199]

One could argue that national security interests change the equation and that courts must apply a heightened standard when gauging the materiality of sensitive security informa-

195. *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 416–18 (1988); United States v. Valenzuela-Bernal, 458 U.S. 858, 872–74 (1982).

196. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682 (1985); Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Burr, 25 F. Cas. 30, 36 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d).

197. *Bagley*, 473 U.S. at 682; *Brady*, 373 U.S. at 87.

198. *Bagley*, 473 U.S. at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

199. *See* U.S. CONST. amend. VI (Compulsory Process Clause).

tion.[200] However, courts have already addressed national security challenges to this well-settled doctrine and consistently have held that "[i]n appraising materiality, the court is not to consider the classified nature of the evidence."[201] One Supreme Court decision defined materiality in the context of classified information as information that is "relevant and helpful to the defense . . . or is essential to a fair determination of a cause."[202] However, an examination of case law shows that the Court has used these terms in a variety of cases when applying the current constitutional standard.[203] Therefore, the Court's use of this phrase does not denote a special standard of materiality for classified information.

Not only does case law offer no support for a heightened standard of materiality, but Congress also codified its view on the subject in CIPA. CIPA supports the Court's constitutional standard of materiality with regards to classified information, requiring courts to make the initial determination of relevance without regard to the nature of the information.[204] Thus, Congress joined the Court in requiring courts to determine materiality without considering the nature of the evidence.

In light of the well-settled nature of the law in this area, this framework proposes adopting the constitutional standard of materiality in the context of compulsory process challenges.

C. CRAFTING AN APPROPRIATE REMEDY

Once a court rules that the defendant has met the requisite materiality standard, the court must provide a remedy to vindicate the violation of the defendant's right if the government continues to refuse to produce exculpatory information. When crafting a remedy in the context of the War on Terror, one can-

200. The government in *Moussaoui* made similar arguments. *See* Brief for the United States, *supra* note 135, at 39–45.

201. United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985); *accord* United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983); United States v. Lopez-Lima, 738 F. Supp. 1404, 1411 n.7 (S.D. Fla. 1990).

202. Roviaro v. United States, 353 U.S. 53, 60–61 (1957).

203. *See, e.g.*, United States v. Burr, 25 F. Cas. 30, 37 (Marshall, Circuit Justice, C.C.D. Va. 1807) (No. 14,692d) (stating that the court is unlikely to deny a defendant access to evidence in possession of the government in a capitol case if such evidence is truly "essential to his defence").

204. *See* Classified Information Procedures Act, Pub. L. No. 96-456, § 4, 94 Stat. 2025, 2025–26 (1980) (codified as amended at 18 U.S.C. app. 3 § 4 (2000 & Supp. 2004)); *Collins*, 720 F.2d at 1199.

not ignore the fact that the defendant will seek classified material involving national security interests.

This proposed framework shadows the CIPA framework[205] and offers three levels of remedies for compulsory process violations involving terrorism defendants. At the trial level, an alternative to physical production of the witness crafted under the CIPA framework satisfies a defendant's compulsory process rights. At the appellate level, provision for an interlocutory appeal allows the government to assert its valid interest in protecting national security without placing the defendant in a jeopardy situation. Should the government fail at both levels to provide access to exculpatory information in accordance with these provisions, the only remaining remedy is dismissal.

1. Dismissal Is Inappropriate in the First Instance

When the government refuses to provide access to exculpatory evidence in its possession, courts ordinarily will dismiss the indictment to prevent the violation of a defendant's constitutional rights.[206] Both the Supreme Court and Congress determined that the government's interest in preventing the disclosure of classified information must give way to the defendant's right to present a defense.[207] However, the disclose-or-dismiss dilemma created by such a harsh remedy punishes the government for fulfilling its duties as the protector of its citizenry and demands a more just resolution.

One could contend that the imperative text of the Sixth Amendment requires an immediate dismissal when the government refuses to comply with the court's command.[208] However, judges, not the Constitution, provide the remedies for such violations. As such, courts have a greater degree of flexi-

205. *See* 18 U.S.C. app. 3 §§ 1–16.

206. *See, e.g.*, Jencks v. United States, 353 U.S. 657, 672 (1957); *Roviaro*, 353 U.S. at 61.

207. *See* 18 U.S.C. app. 3 § 6(c)(1); United States v. Fernandez, 913 F.2d 148, 154 (4th Cir. 1990) (discussing the Supreme Court's jurisprudence of the disclosure of classified information).

208. The general remedy, as well as the remedy under CIPA, for the violation of a defendant's compulsory process rights caused by the government's refusal to produce a witness in violation of the district court's order is dismissal of the indictment. *See* 18 U.S.C. app. 3 § 6(e)(2); United States v. Moussaoui, 382 F.3d 453, 484 n.3 (4th Cir. 2004) (Gregory, J., concurring in part and dissenting in part); *see also* Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449, 479 (2005) (arguing that the Fourth Circuit should have upheld the district court's remedy, dismissing many of the charges against Moussaoui).

bility to consider governmental interests when crafting an appropriate remedy than when deciding whether the government violated a categorical constitutional right. Dismissal as a remedy for the violation of an individual's rights subverts justice if it decimates the security of the offending nation. If a less draconian remedy fully vindicates the individual's rights, a court may, in its discretion, consider an alternative remedy that does not jeopardize the government's national security interests.[209]

So long as the government's refusal to produce exculpatory evidence stems from its prerogative of protecting the nation's security, such a drastic sanction as dismissal does not serve the ends of justice.[210] Therefore, resolution of the conflict requires a more just remedy, reserving dismissal as a remedy of last resort.

2. Substitutions Under the CIPA Framework

Because dismissal in the first instance offends justice, this proposed framework suggests a substitution for actual production of the witness by analogizing to the CIPA framework. Any analogy to CIPA must recognize that CIPA applies only to public disclosure of classified information at the trial stage, not to disclosure of classified information to defense counsel at the pretrial stage.[211] However, having no binding legal precedent, an analogy to the CIPA framework for crafting a substitution for actual production of the witnesses or evidence in question proves informative.[212] Because CIPA is congressionally sanctioned and judicially tested, its procedures provide insight into appropriate methods of producing classified evidence.

A pure Sixth Amendment analysis leads to unfettered access to material exculpatory information by the defense; however, such access clearly frustrates the government's interest in national security. To address this concern at trial, CIPA implicitly requires a balancing test when crafting an appropriate substitution for admissibility as evidence.[213] In this context, after

209. *See* United States v. Moussaoui, 282 F. Supp. 2d 480, 482–83 (E.D. Va. 2003), *vacated in part*, 365 F.3d 292 (4th Cir. 2004), *amended*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

210. *See* 18 U.S.C. app. 3 § 6(e)(2); *Moussaoui*, 382 F.3d at 476.

211. *See* United States v. Moussaoui, 333 F.3d 509, 514–15 (4th Cir. 2003).

212. *See* United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699, at *3 (E.D. Va. Mar. 10, 2003), *appeal dismissed*, 333 F.3d 509 (4th Cir. 2003).

213. *See id.*

the defendant has reviewed the evidence and determined what he needs admitted for exculpatory purposes, employing a balancing test to determine the form of the evidence does not violate his right to compulsory process.[214] So long as the court admits the substance of the evidence, the Constitution does not prohibit a change in form to protect the government's interest.

In this vein, CIPA authorizes a substitution to take the place of complete access. However, such a substitution must provide the defendant with "substantially the same ability to make his defense as would disclosure of the specific classified information."[215] In the CIPA context, courts have generally accepted substitutions, such as statements or summaries, in lieu of the production of actual witnesses or documents.[216] However, courts generally cite a lack of specificity when finding substitutions inadequate to convey the evidence to the jury.[217]

If CIPA controlled the issue of compulsory process in the context of the War on Terror, the defendant must accept sufficient summaries to satisfy his compulsory process rights, absent a finding of unconstitutionality.[218] At this point, the proposed framework departs from CIPA. At trial, for which CIPA provides a remedy, the government's interest in preventing the disclosure of classified information to the public weighs heavily against a defendant's right to present a defense in determining the form of the substitution admitted into evidence. However, in pretrial discovery, the fact that public disclosure is not imminent and that defense counsel must obtain a security clearance diminishes the government's interest.[219] Likewise, at such an early stage, access to a form of evidence yielding the greatest amount of information from which a defendant can mount his defense substantially enhances his interest.[220]

Because the defendant's interest in the form of evidence is so greatly enhanced at this early stage, only a substitution that approximates actual access as nearly as possible vindicates the

214. *Cf. id.* (comparing CIPA's legal framework to a defendant's right to bring witnesses to court).

215. 18 U.S.C. app. 3 § 6(c).

216. *See, e.g.*, United States v. Fernandez, 913 F.2d 148, 157 (4th Cir. 1990).

217. *See, e.g.*, *id.* at 157–59.

218. *See* 18 U.S.C. app. 3 § 6(c).

219. *See id.* §§ 4, 5, 9.

220. *Cf.* Margulies, *supra* note 208, at 478–79 (discussing the defendant's interest in an effective defense).

defendant's right to compulsory process. The defendant must have within his reach the most accurate substitution for exculpatory evidence on which to build his case. Access to such material evidence alters defense strategy, leads to other forms of exculpatory evidence, and, at the very least, serves as a mitigating factor for the defendant to use as a bargaining chip.

That being so, in the context of access to witnesses, a deposition—such as the video deposition ordered by the district court in *Moussaoui*[221]—best satisfies the defendant's right to compulsory process, while creating a controlled environment to protect the government's national security interests. A video deposition allows the defense not only to ask questions, but also to follow up on answers as a means of uncovering additional exculpatory evidence or witnesses. This manner of deposition allows defense counsel to explore avenues of discussion left untouched by the government's interrogators. This give-and-take—akin to informal witness interviews usually conducted by defense counsel in criminal investigations—provides an essential tool in crafting a defense. While a video deposition most closely approximates actual access to the witness and provides the most compelling evidence, under the proposed framework a deposition on written questions, reserving to the defense the opportunity to follow up the answers with additional questions, also satisfies the defendant's right to compulsory process.[222]

On the other hand, summaries and substitutions, such as those advocated by the Fourth Circuit in *Moussaoui* for example,[223] fail as adequate substitutes for actual access at this early stage of the prosecution. Such substitutions are not prepared for use by a defendant to present his defense, but as records of interrogation for government intelligence purposes.[224]

221. United States v. Moussaoui, No. 01-455-A (E.D. Va. Jan. 31, 2003) (order denying in part and granting in part defense motions to compel discovery) (under seal).

222. *Cf. id.* (requiring a video deposition as the means to effectuate Moussaoui's right to compulsory process). Nevertheless, because they more accurately substitute live testimony, video depositions are preferred if available. *Cf.* Battle v. Mem'l Hosp. at Gulfport, 228 F.3d 544, 554 (5th Cir. 2000) (holding that a video deposition was an adequate substitute for live testimony when the witness was unavailable); United States v. Tunnell, 667 F.2d 1182, 1188 (5th Cir. 1982) (finding that a videotaped deposition, unlike a transcript, allows the fact finder to evaluate the witness by his motions, vocal inflections, facial expressions, and demeanor).

223. United States v. Moussaoui, 382 F.3d 453, 479–82 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

224. *Cf.* Margulies, *supra* note 208, at 459–65 (discussing prosecutorial

The interrogator's prerogative does not align with the defendant's desire to obtain exculpatory information. In pursuing governmental objectives, the interrogator may find avenues of inquiry fruitless for governmental purposes, unimportant for the defense, or advantageous for the government to avoid.[225] Additionally, without specific references to the defendant prompted by direct questioning, the impact of any exculpatory evidence is greatly diminished. The nature of the substitution also frustrates the defendant's use of such information by denying the opportunity to extract additional exculpatory information.

In *Moussaoui*, the government strenuously objected to this framework's proposed remedy by pleading national security.[226] However, when examined under the strictures of the proposed framework, this argument is not dispositive. First, the proposed framework does not require the government to disclose the location of the witness—the government must only produce him via a closed circuit link. Second, the framework quells the government's concern about the scope of the deposition by requiring defense counsel to limit the questions only to the witness's direct knowledge of the defendant. The defendant can glean all relevant ancillary information from the redacted summaries of interrogations. Additionally, under CIPA, defense counsel must prove their trustworthiness before gaining access to classified information.[227] Finally and most importantly, when the time comes to determine the form of admissible evidence, CIPA governs the form of the evidence to prevent disclosure of sensitive security information.[228] As this examination shows, at this point in the prosecution and under these strict guidelines, producing witnesses for depositions causes little, if any, actual damage to national security.

Because of the government's diminished interests and the defendant's enhanced interest at this early stage, requiring the government to produce witnesses for depositions will not frustrate the government's security interests and will fully vindi-

misconduct).

225. *See id.*

226. *See* Shenon, *supra* note 116.

227. *See* 18 U.S.C. app. 3 §§ 4, 5, 9 (2000 & Supp. 2004).

228. *See* United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699, at *3 (E.D. Va. Mar. 10, 2003) (discussing the framework of CIPA, "which governs the relevance, use and admissibility of classified information at trial"), *appeal dismissed*, 333 F.3d 509 (4th Cir. 2003).

cate the defendant's rights. This element of the proposed framework puts in place the mechanisms to accomplish both goals without failing either.

3. Interlocutory Appeal

CIPA provides for an interlocutory appeal by the United States when the district court orders disclosure of classified evidence, the government refuses to comply with the order, and the district court imposes sanctions.[229] The Fourth Circuit in *United States v. Moussaoui* analogized the CIPA framework to cover interlocutory appeals at the pretrial stage in the context of compulsory process in terrorism cases.[230] However, in recognizing the availability of the appeal, it required that the appeal come from a final order of the district court.[231] The Court determined that finality meant that the district court issued an order to disclose to which the government refused to comply and for which the government suffered a sanction.[232]

The proposed framework adopts the methodology of the Fourth Circuit and provides the government with an interlocutory appeal prior to the disclosure of any classified evidence. An appeal will prolong the defendant's receipt of exculpatory evidence, but a brief delay will not frustrate the defendant's right.[233]

4. When All Else Fails, Dismiss

Despite the serious implications of dismissing the indictment in terrorism cases, the government must accept the consequences of its refusal to provide access to exculpatory evidence as demanded by the Constitution. This framework provides ample opportunity for the government to protect its security interests, while still providing adequate disclosure of exculpatory evidence to the defendant. As the Fourth Circuit said, at this point, the choice is the government's whether to produce the evidence or to accept a sanction.[234]

229. *See* 18 U.S.C. app. 3 § 7.

230. *See* United States v. Moussaoui, 333 F.3d 509, 514–15 (4th Cir. 2003).

231. *Id.*

232. *Id.*

233. *Cf.* 18 U.S.C. app. 3 § 7(b) (requiring an expedited appeal that must be taken within ten days).

234. *See* United States v. Moussaoui, 382 F.3d 453, 476 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005).

A refusal to participate in this process by producing witnesses for depositions signals that the government refuses to prosecute defendants according to long-established constitutional rules. The Constitution does not grant Article III courts the discretion to bend the rules for the government because the defendant qualifies as a terrorist. If the government refuses to comply with the remedy for the violation of a defendant's constitutional rights by providing adequate substitutions, the court will have no choice but to dismiss the indictment.

D. APPLYING THE PROPOSED FRAMEWORK TO *MOUSSAOUI*

Finally, to exemplify how this proposed framework operates, this section applies the framework to the *Moussaoui* case. To establish the materiality of the evidence that a particular witnesses could offer, Moussaoui relied upon the heavily redacted summaries of interrogation interviews that the government made available to him.[235] Because the arguments in this case regarding materiality at the trial level occurred during a closed hearing on January 30, 2003, the position advocated by the defense on materiality is not clear.[236] The district court found that Moussaoui satisfied the constitutional materiality standard as to two of the three witnesses.[237]

The record shows that the district court applied the constitutional standard of materiality set forth by the *Brady* line of cases.[238] Because the proposed framework advocates the adoption of the same standard of materiality, Moussaoui satisfied the requisite standard of materiality under the proposed framework.

This proposed framework permits no balancing of the interests to decide whether to allow access to the requested witnesses. The defendant must meet two requirements for access: make the requisite showing of materiality of the evidence being sought and show that the evidence is within the process power

235. *Id.* at 472, 478.

236. *See* United States v. Moussaoui, No. 01-455-A (E.D. Va. Jan. 31, 2003) (order denying in part and granting in part defense motions to compel discovery) (under seal).

237. United States v. Moussaoui, No. CR. 01-455-A, 2003 WL 21263699, at *4 (E.D. Va. Mar. 10, 2003), *appeal dismissed*, 333 F.3d 509 (4th Cir. 2003).

238. *Id.* The court also cited *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), for the proposition that the evidence offered may be material for either guilt or punishment. *Id.*

of the court. Because Moussaoui met both,[239] he must receive access to the witnesses. A denial violates his right to compulsory process.

The government raised legitimate concerns regarding granting Moussaoui access to the witnesses via deposition, including the risk of undermining interrogation and enabling signaling. Regardless, in choosing to prosecute Moussaoui in the civilian criminal justice system, the government chose to abide by the constitutional rules governing that system. Therefore, the government must not obstruct Moussaoui's right to compulsory process. The proposed framework advocates a formal deposition as the only acceptable means of fulfilling Moussaoui's right to compulsory process. In this determination, the result under the proposed framework accords the district court's decision.[240]

At this juncture the proposed framework and the Fourth Circuit's decision part ways. Under the proposed framework, the Fourth Circuit should have affirmed the district court as to the form of substitution ordered and required the government to produce the witnesses for deposition. However, the Fourth Circuit performed a balancing test to determine that summaries of interrogation sufficed to effectuate Moussaoui's right to compulsory process.[241] Although the Fourth Circuit affirmed the district court's assessment that the form of summary offered was inadequate, it held that the heavily redacted summaries were a sufficient basis from which to create written statements that would serve as Moussaoui's only access to witness testimony.[242]

This substitution falls far below the standard advocated by the proposed framework. Substitutions based on summaries lack specificity to the individual and inhibit, rather than enable, a defendant's discovery of exculpatory information. The proposed framework requires that the government produce the witnesses for deposition as the only substitutionary means of vindicating the defendant's right to compulsory process. At that point, the government must make a choice either to respect the Constitution by producing the witnesses, as required in any

239. *See Moussaoui*, 382 F.3d at 456–57, 463–64, 471–74.

240. *See Moussaoui*, No. 01-455-A (E.D. Va. Jan. 31, 2003) (order denying in part and granting in part defense motions to compel discovery) (under seal).

241. *Moussaoui*, 382 F.3d at 469–76.

242. *Id.* at 479.

prosecution in an Article III court, or to allow the district court to dismiss the indictment.

Ultimately, however, no conclusive answer to this constitutional conundrum will emerge from *Moussaoui*. On April 22, 2005, Moussaoui pled guilty to the six counts with which he was charged,[243] after a denial of certiorari by the Supreme Court and after years of thwarted attempts to gain access to exculpatory information left him unable to present a full defense.[244] As Moussaoui's death penalty trial played out on the national stage, it brought closure to thousands of 9/11 victims' family members; however, it also brought to light the failure of the judiciary to protect Moussaoui's constitutional right to compulsory process.

CONCLUSION

Moussaoui is the beginning, rather than the end, of the story. The compulsory process question remains unanswered, and the ongoing War on Terror will assuredly present more constitutional crises. Vindicating the constitutional rights of suspected terrorists while protecting the government's legitimate interest in national security will challenge many courts throughout the War on Terror. The framework proposed in this Note ensures that defendants have access to a remedy for violations of their constitutional right to compulsory process, while clearly laying down the rules the government must follow when it chooses to prosecute in an Article III court. Once a defendant can demonstrate that a material need exists for evidence in the government's control and that the court has jurisdiction over that evidence, courts must effectuate that defendant's rights. If the government fails to provide the exculpatory information, or a constitutionally adequate substitution, then the court must dismiss the indictment. Put simply, the United States government faces a difficult choice: either respect the commands of the Constitution required in an Article III prosecution or accept the consequences of dismissal.

243. *See* Neil A. Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot*, N.Y. TIMES, Apr. 23, 2005, at A1.

244. Moussaoui v. United States, 544 U.S. 931, 931 (2005) (Mem.).