The Procurement and Presentation of Evidence in Courts-Martial: Compulsory Process and Confrontation

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THE PROCUREMENT AND PRESENTATION OF EVIDENCE IN COURTS-MARTIAL: COMPELLUSORY PROCESS AND CONFRONTATION*

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TABLE OF CONTENTS

I. The Burdens of Proof and Production
II. Procurement of Evidence
   A. In General
   B. The Decision to Obtain Evidence
      1. In General
         a. General Procedure
         b. Expert Witnesses
      2. Form of the Paragraph 115 Request
      3. Timeliness
      4. Materiality
      5. Cumulative Testimony
      6. Alternatives to Personal Attendance at Trial of a Witness
      7. Defense Objections to Paragraph 115
         a. The Recipient of the Request
         b. Defense Disclosure of Tactics and Strategy
         c. Lack of Reciprocity in General
      8. Revision of Paragraph 115

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C. The Power to Obtain Evidence
   1. Evidence in the Custody or Control of Military Authorities
   2. Evidence Not in Military Control
      a. Subpoenas
      b. The Warrant of Attachment
         (1). In General
         (2). Execution of the Warrant
         (3). Constitutionality of the Military Warrant of Attachment
   3. Immunity
      a. In General
      b. The Nature of the Immunity Required
         (1). In General
         (2). Threat of Prosecution in a Foreign Jurisdiction
      c. Consequences of Granting Immunity
         (1). At Trial
         (2). To the Immunized Witness
         (3). Post-trial

III. Confrontation and Compulsory Process
   A. In General
   B. The Right of Confrontation
      1. In General
      2. The Right to Compel the Government to Produce Witnesses
         Whose Statements are Used at Trial
         a. In General
         b. Available Witnesses
         c. Unavailable Witnesses
            (1). In General
            (2). Unavailability
            (3). Indicia of Reliability
               (a). Former Testimony
               (b). “Business and Public Records”
               (c). Statements Against Interest
      3. The Right to Cross-Examine the Government's Witness at Trial
         a. In General
         b. The Rape Shield Rule
            (1). In General
            (2). Potential Confrontation Problems
            c. Cross-Examination During Suppression Hearings
   C. The Right of Compulsory Process
   1. The Right to Compel the Attendance of Available Witnesses at Trial
      a. In General
b. Requiring the Government to Grant Immunity to Prospective Defense Witnesses
c. Improper Joinder
2. The Right to be Present for the Testimony of Defense Witnesses at Trial
3. The Right to Examine Defense Witnesses at Trial and to Present Defense Evidence
   a. General Constitutional Standards
   b. Competency of Witnesses
   c. Admissibility of Evidence
      (1). In General
      (2). Scientific Evidence
d. Preventing Defense Witnesses From Testifying
e. Laboratory Reports

IV. Depositions and Interrogatories
V. Conclusion

Although pretrial litigation often seems to render trial on the merits something of an anti-climax, adversarial adjudication is of course the focus of the criminal justice system, military or civilian. Once trial on the merits has begun, trial and defense counsel naturally utilize the rules of evidence in the fashion most likely to make the most of the evidence available to them. Yet, as all lawyers are aware, the period since the enactment of the Uniform Code of Military Justice has brought sweeping changes not only in military criminal law, but also in the “constitutionalization” of the law of evidence. Increasingly, considerations of compulsory process and confrontation play important roles in determining what evidence can be obtained and used at trial. Accordingly, this article undertakes to review the law applicable to the procurement and admission of evidence on the merits in the armed forces in light of the Sixth Amendment rights to compulsory process and confrontation. Such a review necessarily entails considerations of matters which are generally considered procedural, primarily the law applicable to witness procurement, as well as matters clearly evidentiary in nature.

1Ironically, the large number of guilty pleas in both civilian and military law often renders trial on the merits the rarity rather than the usual rule. Notwithstanding this, the entire criminal justice system is oriented around the contested trial, which thus supplies a normative standard.
2Although the rules of evidence do apply to sentencing proceedings in the armed forces, Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 75; Mil. R. Evid. 1101, this article will deal only with trial on the merits.
3This article will not, therefore, generally address the innumerable questions inherent in the Military Rules of Evidence.
I. THE BURDENS OF PROOF AND PRODUCTION

Because burdens of proof and production, like presumptions, are substitutes for evidence and dictate which party must address and prove an issue, no discussion of the law relating to the procurement and admission of evidence can be undertaken without consideration of the burdens of proof and production. In In re Winship, the Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship left open what facts were necessary "to constitute the crime." The Court appears to have clarified its intent in Patterson v. New York by holding that the legislature may constitutionally define a crime in whatever fashion it deems desirable and may then require a defendant proven to have committed the unlawful conduct to carry the burden of proving the application of any exception to the statute the legislation chooses to recognize. As a result, those matters, such as insanity, which excuse the offense but

4 Although the Supreme Court has clearly permitted various forms of presumptions in criminal cases, whether statutory or common law, Barnes v. United States, 412 U.S. 837 (1973), it has yet to expressly indicate the necessary relationship between the basic fact and the presumed fact. See id. (stating that the court need not choose between the different tests of "more likely than not" or beyond a reasonable doubt as possession of stolen property gave rise to the presumed fact of guilty knowledge beyond a reasonable doubt); Turner v. United States, 395 U.S. 398, 416 (1970) (suggesting need for a beyond a reasonable doubt standard); Leary v. United States, 395 U.S. 6, 36 (1969) (statutory presumption must be more likely than not given the underlying fact); Tot v. United States, 319 U.S. 463, 467 (1942) (presumption is invalid if there is no rational connection between the basic and presumed facts). See generally E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, Criminal Evidence 377-88 (1979). The topic of presumptions is complex. See generally Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321 (1980).


6 Id. at 364. See also Jackson v. Virginia, 443 U.S. 307, 318 (1979) (on appeal the question is whether the evidence of record "could reasonably support a finding of guilt beyond a reasonable doubt"). Although the Court in Winship refers to "every fact necessary to constitute the crime," it is clear that that language means that every "element of the offense must be proven beyond a reasonable doubt. See Mullaney v. Wilbur, 421 U.S. 684, 695 (1975) (use of the word, "element").


8 432 U.S. at 210. Patterson necessarily limits Mullaney v. Wilbur, 421 U.S. 684 (1974). Compare Patterson, 432 U.S. at 210-16; with Mullaney, 421 U.S. at 698-99. Although this is a reasonable synthesis of the Court's decision in this area, there may well be limits beyond which neither Congress nor any other legislature may not go. See, e.g., Allen & DeGrazia, The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts, 20 Am. Crim. L. Rev. 1, 5-7 (1982) (arguing that the Court could tie the reasonable doubt requirement to due process standards created by the common law).
which are not part of the statutory definition, need not constitutionally be proven beyond a reasonable doubt; indeed the burden of proof for these affirmative or special defenses may constitutionally be placed on the defense.\(^9\) Within the armed forces, however, the Manual for Courts-Martial\(^{10}\) declares:

The burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the Government, both with respect to those elements of the offense which must be established in every case and with respect to issues involving special defenses which are raised by the evidence.\(^{11}\)

The burden of \textit{proof}, sometimes referred to as the burden of persuasion, must be distinguished from the burden of production, sometimes referred to as the burden of going forward. The party with the burden of production has the burden of producing evidence sufficient to raise the issue. This burden may be distinct from the burden of proof. As already indicated, the Manual for Courts-Martial, for example, places the burden of production for affirmative or special defenses primarily on the defense,\(^{12}\) but, once such a defense is raised, places the burden of disproving such a defense on the government beyond a reasonable doubt. Within the military context, the difference between the burdens of proof and production can be of particular importance because the Manual for Courts-Martial appears to restrict the government from placing the burden of \textit{proof} on the defense.\(^{13}\) No such limitation exists with respect to the burden of production and, consequently, the defense may lawfully be required to assert, for example, exceptions to criminality recognized in punitive regulations. Thus, in \textit{United States v. Cuffee},\(^{14}\) the Court of Military Appeals held that, when a regulation prohibited possession of a hypodermic syringe with a hypodermic needle unless pos-

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\(^9\)\textit{Leland v. Oregon,} 343 U.S. 790 (1952) (defendant could be required to prove insanity beyond a reasonable doubt).


\(^{11}\)MCM, 1969, para. 214.

\(^{12}\)\textit{Id.} The Manual actually places the burden of proof to negate the defense on the government whenever the defense is “raised by the evidence”. Thus, the government’s evidence may itself raise a special defense.

\(^{13}\)As an executive order, the Manual is, of course, subject to revision. Its primary effect at present, given the nature of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 [hereinafter cited as U.C.M.J.] is to prohibit the armed forces from creating punitive regulations under U.C.M.J., art 92 which place the burden of proof on the defense.

sessed in the course of "official duty or pursuant to valid prescription", the defense had the burden of production in that it had to raise the exceptions via evidence. Once raised, the burden of proof or persuasion shifts to the government which must disprove the claim to the exception beyond a reasonable doubt. This division of responsibility, which the court explicitly held constitutional, appears clearly appropriate in that it is difficult if not impossible for the government to negate all possibilities of an exception while such information is peculiarly in the possession of the defense. However, once the issue is joined and specific, there is no reason not to put the government to its burden. The result of this allocation of burdens is to require the defense in such a case to obtain and present evidence sufficient to raise the issue.

II. PROCUREMENT OF EVIDENCE

A. IN GENERAL

Congress has declared:

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

In response, the President has, through the Manual for Courts-Martial, directed that process be issued by the trial counsel on behalf of both the defense and prosecution and that defense requests for witnesses be submitted to the trial counsel with any disagreements between defense and trial counsel about calling the witnesses to be resolved by the convening authority. The present system necessari-

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1510 M.J. at 381.
16Id. at 383-84 (citing at 384, Sandstrom v. Montana, 442 U.S. 510, 518 (1979)).
17This is not, incidentally, the rule for litigating suppression motions. Under Mil. R. Evid. 304 (confessions and admissions), 311 (search and seizure), and 321 (eye-witness identification), the defense is required to raise its issues by an offer of proof rather than the actual presentation of evidence. See, e.g., Analysis of the 1980 Amendments to the Manual for Courts-Martial. Analysis of Rule 304(d)(3), reprinted at MCM, 1969, A18-22.
19MCM, 1969, para. 115.
20Id. at para. 115c.
ly raises two distinct questions: when will the trial counsel attempt to obtain evidence, and what means are available to the trial counsel to do so.

**B. THE DECISION TO OBTAIN EVIDENCE**

1. In general
   a. General procedures

   Insofar as witnesses are concerned, the Manual for Court-Martial states:

   The trial counsel will take timely and appropriate action to provide for the attendance of those witnesses who have personal knowledge of the facts at issue in the case for both the prosecution and the defense. He will not of his own motion take that action with respect to a witness for the prosecution unless satisfied that the testimony of the witness is material and necessary. The trial counsel will take similar action with respect to all witnesses requested by the defense, except that when there is disagreement between the trial counsel and the defense counsel as to whether the testimony of a witness so requested would be necessary, the matter will be referred for decision to the convening authority or to the military judge or the president of a special court-martial without a military judge according to whether the question arises before or after the trial begins. A request for the personal appearance of a witness will be submitted in writing, together with a statement, signed by the counsel requesting the witness, containing (1) a synopsis of the testimony that it is expected the witness will give, (2) full reasons which necessitate the personal appearance of the witness, and (3) any other matter showing that the expected testimony is necessary to the ends of justice. The decision on request

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21Documentary and other evidence is not fully dealt with in the Manual for Courts-Martial, MCM, 1969, para. 115e deals with documentary and other evidence in control of military authorities and states that:

If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge, or the president of a special court-martial without a military judge will, upon reasonable request and without the necessity of further process, take necessary action to effect their production for use in evidence and, within any applicable limitations (see... (Military Rules of Evidence)), to make them available to the defense to examine or to use, as appropriate under the circumstances.
for a witness on the merits must be made on an individual basis in each case by weighing the materiality of the testimony and its relevance to the guilt or innocence of the parties concerned, against the equities of the situation. If the convening authority determines that the witness will not be required to attend the trial, the request may be renewed at the trial for determination by the military judge or the president of a special court-martial without a military judge, as if the question arose for the first time during the trial.

The trial counsel may consent to admit the facts expected from the testimony of a witness requested by the defense if the prosecution does not contest these facts or if they were unimportant. Under paragraph 115, the individual trial counsel's decision to obtain a witness is not subject to review. In actual practice, the prosecution's decision is subject to the review of the trial counsel's superiors, usually the staff judge advocate and convening authority, who may direct the trial counsel not to subpoena or otherwise obtain a witness for a variety of reasons, including financial ones. The defense attempt to obtain witnesses is, however, subject to definite review. Although, pragmatically, the defense may obtain its own witnesses and call them at trial, it lacks the power to subpoena them or to pay witness fees or travel costs unless it complies with paragraph 115. Consequently, if the defense desires to escape the constraints of paragraph 115, it is in practice limited in most cases to local volunteer witnesses. Even then, a failure to comply with paragraph 115 means that the trial counsel is legally blameless if the witness fails to appear, depriving the defense of a potentially useful weapon at trial.

See text accompanying notes 101-12 infra; MCM, 1969, para. 115a.

Such reasons could include a desire not to interfere with the activities of the witness, particularly likely when the witness is a highly placed civilian or military officer, a possibility of revealing classified information, or simply a desire to avoid delaying the trial.

In a highly unusual case, the defense might be able to show it has a substantial interest outweighing the government's interest in knowing the identity of the defense witnesses. Under these circumstances, the defense should make an ex parte application to the military judge with the record of the application remaining sealed until trial.

If the prosecution has failed to obtain a defense witness without cause, the military judge may take corrective action to include granting a continuance or giving special instructions to the members. Cf. United States v. Kilby, 3 M.J. 938, 944-45 (N.C.M.R. 1977). Such a result is less likely if the defense fails to comply with paragraph 115.
Subject to the potential availability of extraordinary relief, the decision of the military judge as to the materiality and procurement of a witness is not subject to interlocutory review. The Court of Military Appeals has held that "once materiality has been shown the Government must either produce the witness or abate the proceedings." Thus, military operations, expense, or inconvenience can only delay the trial rather than justifying proceeding without an otherwise material witness. A witness who cannot be located, however, obviously cannot be produced and trial need not be affected. If the witness will be unavailable for an indefinite period, presumably the same result would apply if the absence was not due to action by the government.

b. Expert witnesses

Because many trials are dependent upon the use of expert testimony, procurement of expert witnesses may clearly critical to a case. Consequently, expert witnesses are treated specially in the Manual. Presumably, because of availability and lack of cost, most counsel, defense or prosecution, utilize government-employed experts. The Manual for Courts-Martial does contemplate, however, the possible employment of other experts:

The provisions of this paragraph are applicable unless otherwise prescribed by regulations of the Secretary of a Department. When the employment of an expert is necessary during a trial by court-martial, the trial counsel, in advance of the employment, will, on the order or permission of the military judge or the president of a special court-martial without a military judge, request the convening authority to authorize the employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense.

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26 United States v. Carpenter, 1 M.J. 384, 385-86 (C.M.A. 1976). Accord United States v. Willis, 3 M.J. 94 (C.M.A. 1977). The quoted language has been disclaimed by Judge Cook as being overbroad. Id. at 96-100 (Cook, J., dissenting).
The court has, however, held that there is no right to cumulative evidence. United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977). See generally text accompanying notes 68-69 infra.
27 In limited circumstances substitutes for live testimony, such as stipulations, may be acceptable. See generally text accompanying notes 66-79 infra.
28 The prosecution will be concerned with expenditure of government funds while the defense will be limited to the funds available to the accused unless the government can be required to pay an expert's fee under MCM, 1969, para. 116.
When, in advance of trial, the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the convening authority for permission to employ the expert, stating the necessity therefor and the probable cost. In the absence of a previous authorization, only ordinary witness fees may be paid for the employment of a person as an expert witness. These requirements are in addition to the showing required by paragraph 115 of the Manual. Requests for employment of experts under paragraph 116 of the Manual are rarely successful and the denial of any specific request may raise significant questions of the rights to compulsory process and fair trial under the Constitution. It is important to note, however, that nothing in the Uniform Code of Military Justice or the Manual of Courts-Martial requires payment of special fees to obtain the testimony of an expert who happens to be a witness. Thus, a medical doctor who has previously treated the accused could be subpoenaed and paid normal witness fees if he or she were to be questioned about that treatment. The Manual would appear to require some form of expert fee if the expert were to be asked to make special preparations for testimony.

2. Form of the Paragraph 115 request

The Manual for Courts-Martial requires that a request for a defense witness be in writing and contain a synopsis of the expected testimony, justification for the personal appearance of the witness, and any other matter showing that the witness is “necessary to the ends of justice.” The request must ordinarily set forth enough information to establish the “materiality” of the expected testimony.

29Id. The fees authorized are dependent upon service regulations. In the Navy, for example: “The convening authority...will fix the limit of compensation...on the basis of the normal compensation paid by United States attorneys for attendance of a witness of such standing in the United States courts in the area involved.” Navy JAGMAN § 0138k(1).


31See text accompanying notes 229-377 infra.

32MCM, 1969, para. 116 speaks of “employment of an expert”. Accordingly, requiring the expert to perform tests in advance of trial or to make substantial pretrial preparation would seem to require an expert fee. Similarly, obtaining an expert’s testimony solely to utilize the expert’s opinion would seem to constitute “employment”.

33MCM, 1969, para. 115a.

of the witness. In certain circumstances, however, the government will be held responsible for knowledge within its possession so that an otherwise deficient paragraph 115 request will be held sufficient. Paragraph 115 necessarily presumes that the defense will be able to adequate interview the witness in order to set forth an adequate synopsis and the courts may be expected to be particularly hostile to a witness request made without any contact with the given witness. Chief Judge Everett has recognized that, in some cases, such as those in which the witness is a hostile one, the synopsis requirement cannot be met and "a rigid application of these requirements would produce a conflict with an accused's statutory and constitutional right to compulsory process." Consequently, when defense counsel cannot contact a witness who is believed to have material testimony, that fact should be set forth with an explanation. When a defense request for a witness is heard by the military judge, the judge must determine the issue on the basis of the


36 E.g., United States v. Lucas, 5 M.J. 167, 172 (C.M.A. 1978) (staff judge advocate charged with knowledge of the content of a pretrial statement made by the witness at the pretrial investigation).

37 Chief Judge Everett appears to believe that some form of contact is generally necessary, but that that contact need not be an in person interview. United States v. Vietor, 10 M.J. 69, 78 (C.M.A. 1980) (Everett, C.J., concurring in the result). The drafters of the Military Rules of Evidence, on the other hand, concluded that the defense counsel must be afforded the right to an in person interview of potential witnesses before counsel could be required to raise a suppression motion with specificity. Analysis of the 1980 Amendments to the Manual for Courts-Martial. Analysis of Rule 304(d)(3), reprinted at MCM, 1969, A18-21. Inasmuch as the procurement of a witness on the merits may be more essential to due process than the procurement of a witness for a suppression motion, the Military Rules of Evidence necessarily suggest that the defense be afforded the right to an in person interview before a request for a witness under paragraph 115 can be held insufficiently justified.


matters presented to the judge...not just that contained in the written request.41

3. Timeliness

The Manual for Courts-Martial does not prescribe time requirements for filing a request for witnesses under paragraph 115 and the courts have been surprisingly loathe to hold requests invalid as untimely. Members of the Court of Military Appeals have clearly indicated their willingness to consider the timeliness of a defense request42 and the Courts of Military Review have utilized untimeliness in holding that the defense lacked a right to witnesses.43 However, as of yet, the courts have failed to give any significant guidance as to what actually constitutes timeliness. The Courts of Military Appeals has stated in dicta, however, that "while a defense counsel, for tactical reasons, may properly delay a request for witnesses until after the charges are referred to trial, he thereby assumes the risk that...in the interval the witness may become unavailable to testify at trial."44 Thus, by awaiting referral of charges, counsel may not have an untimely submission but may be unable to obtain the requested witness. An unnecessary delay in filing a request risks having the request treated as untimely, especially when the delay results in the transfer of a witness known to the defense to be pending reassignment.45 In most cases, given the brevity of most courts-martial, a request for the procurement of a witness made at trial,


42See, e.g., United States v. Vietor, 10 M.J. 69, 72, 78 (C.M.A. 1980) (Cook, J. and Everett, C.J., individually concurring in the result with separate opinions); United States v. Stocker, 7 M.J. 373, 374 (C.M.A. 1979) (summary disposition) (Cook, J., dissenting on the grounds that defense request for witness was untimely).


untimely or otherwise, effectively constitutes a motion for a continu­
ance. When the request is untimely, the decision is discretionary
with the military judge. Nonetheless, if the defense shows that the
witness is material and necessary, the judge should, in the interests
of justice, grant the request. To do otherwise would penalize the
accused for counsel's conduct and would raise a strong probabil­
ity of ultimate reversal for inadequacy of counsel.

4. Materiality

The Manual for Courts-Martial requires that a defense request for
a witness give "full reasons which necessitate the personal appear­
ance of the witness, and...any other matter showing that the
expected testimony is necessary to the ends of justice." Perhaps,
because the prosecution is not to procure a prosecution witness on its
own motion unless "satisfied that the testimony of the witness is
material and necessary," the courts have consistently viewed para­
graph 115 as requiring that the defense demonstrate the "material­
ity" of its requested witnesses. The exact meaning of "materiality"
has been unclear. In its evidentiary sense, "materiality" requires at
least that the evidence involved be relevant. It also may mean in any

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46 See, e.g., United States v. Stocker, 7 M.J. 373, 374 (C.M.A. 1979) (summary disposi­
tion) (Cook, J., dissenting).
47 See, e.g., United States v. Jovan, 3 M.J. 136, 137 (C.M.A. 1977); United States v.
Green, 2 M.J. 823, 826 (A.C.M.R. 1976); United States v. Onead, 4 M.J. 661, 654
Wagner, 5 M.J. 461 (C.M.A. 1978); United States v. Lucas, 5 M.J. 167 (C.M.A. 1978);
United States v. Iturralde-Aponte, 1 M.J. 196 (C.M.A. 1975); United States v. Mar­
shall, 3 M.J. 164 (A.F.C.M.R. 177); cf. United States v. Valenzuela-Bernal, 21 Crim.
L. Rep [BNA] 3169 (U.S. July 2, 1982) (noting, however at note 9, that the Court
expressed "no opinion on the showing which a criminal defendant must make in order
to obtain compulsory process for securing the attendance...of witnesses within the
United States.").
Evid. 401 defines what is often termed, "logical relevance" or the requirement that the
evidence involved have a "tendency to make the existence of any fact that is of
consequence to the determination of the action more probable or less probable than it
would be without the evidence." Phrased differently, in the case of determining
witness availability, the evidence must tend to negate the prosecution's case or to
support the defense's. United States v. Iturralde-Aponte, 1 M.J. 196, 197-98 (C.M.A.
1975). "Relevance" has additional scope, however, inasmuch as evidentiary rules
which exclude evidence because of doubt of its probative value, prejudicial impact on
the members, or for other reasons for social policy are often termed rules of "legal
relevance". See, e.g. I. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, Criminal
Evidence 62-65 (1979), Mil. R. Evid. 403-05; 407-12 are rules of legal relevance as are
the rules of privilege, Mil. R. Evid. 501-09, and testimony which would be inadmissible.
given case that, considering all of the factors unique to the case, the evidence is important, a determination which might include the availability of substitute forms of evidence. Recently, the Court of Military Appeals has attempted to clarify the issue:

The word “material” appears misused. Obviously a witness’ testimony must be material to be admissible. However, the terms may have been confused in earlier cases, the true test is essentiality. If a witness is essential for the presentation of the prosecution’s case, he will be present or the case will fail. The defense has a similar right.

The use of the word, “essential”, can hardly be considered as resolving this question for the term is subject to ambiguity. What degree of probative value is necessary before a prospective witness’ testimony will be “essential”? In past cases, witnesses needed to establish affirmative defenses such as lack of jurisdiction or self-defense have usually been considered to be material witnesses as under them should not ordinarily be “material” for purposes of obtaining witnesses. But see Chambers v. Mississippi, 410 U.S. 284 (1973); text accompanying notes 341-72, 373-77 infra. 52


At common law, “materiality” had been given two alternative meanings: that the evidence is of consequence to the case and that the evidence is of particular probative value. The paragraph 115 standard includes this latter meaning. See note 56 infra. 53

A true materiality standard should not include this factor. To the extent that it plays a role in the question of making a witness available, see text accompanying notes 66-79 infra, it is because of the phrasing of paragraph 115a, which does not as such specify “materiality” as the prerequisite for obtaining a witness.


have been defense character witnesses when the accused's character has been in issue. While these cases may deal with "essential" evidence, it is unlikely that the defense could or should be restricted to witnesses presenting evidence of such ultimately critical value. Interestingly, in the May, 1983, Proposed Revision of the Manual for Courts-Martial, the Joint Service Committee on Military Justice has, in proposed Rule 703(b)(1), created a potentially more useful standard: "Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or an interlocutory question would be relevant and necessary." The Discussion to the proposed rule states: "Relevant testimony is necessary when it is not cumulative and when it would contribute to a party’s presentation of the case in some positive way on a matter in issue." The proposed Rule is qualified in Rule 703(b)(3), which provides that, notwithstanding Rule 703(b)(1), a party is not entitled to production of a witness who would be unavailable under Military Rule of Evidence 804(a) unless the witness' testimony "is of such central importance to an issue that it is essential to a fair trial...." The Rule’s caveat is not likely to be of importance except insofar as it incorporates, through Military Rule of Evidence 804(a)(6), Article 49(d)(2) of the Uniform Code which, in relevant part, makes a witness unavailable "by reason of... military necessity,....or other reasonable cause." Unless this exception is utilized in an improbably broad fashion, the proposed Rule appears both more useful and more likely to comply with an accused's constitutional and statutory rights to obtain and present evidence than does the court's "essentiality" standard.

5. Cumulative testimony

Inherent in the right to compulsory process is the limitation of relevancy. Military Rule of Evidence 403 allows evidence to be

57 United States v. Williams, 3 M.J. 239 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976); United States v. Giermek, 3 M.J. 1013 (C.C.M.R. 1977); United States v. Ambalada, 1 M.J. 1132 (N.C.M.R. 1977). See generally Mil. R. Evid. 404(a)(1), 405(a), (b). When the defendant's character for truthfulness is in issue, polygraph evidence may be material. Because such evidence has traditionally been viewed as being logically and legally irrelevant, however, no compulsory process right to introduce such evidence has been recognized. United States v. Helton, 10 M.J. 820 (A.F.C.M.R. 1981). A witness who is more credible and articulate is material even though another witness has already testified to the events. United States v. Jovan, 3 M.J. 1136 (C.M.A. 1977).

58 Mil. R. Evid. 404(a) strictly limits use of character evidence restricting it in most cases to "[e]vidence of a pertinent trait of the character of the accused...." Mil. R. Evid. 404(a)(1). The Analysis of Rule 404 declares that the Rule makes evidence of good general character inadmissible although it would allow "evidence of good military character when that specific trait is pertinent....for example in a prosecution for disobedience of orders." Analysis of the 1980 Amendments to the Manual for Courts-Martial, Analysis of Rule 404(a), reprinted at MCM, 1969, A18-61.

59 See note 51 supra.
excluded, even if logically relevant, "if its probative value is substantially outweighed... by considerations... of needless presentation of cumulative evidence." If evidence is cumulative under Rule 403, it is "legally irrelevant" and there is no right to introduce it.

The issue of cumulative testimony often arises when character evidence is sought to be introduced. To establish an adequate record for appeal, the defense should furnish to the judge the name and location of each character witness, how long each witness has known the defendant, the capacity in which the witness knew the defendant, and the characteristics to which the witness will testify.

The standard used in determining cumulativeness is not merely whether the evidence is repetitive. Instead, the military judge must "in his sound discretion decide whether, under the circumstances of the given case, there is anything to be gained from an additional witness saying the same thing other witnesses have said..." If testimony is declared to be cumulative, the judge should indicate how many of such witnesses will be subpoenaed at government expense. Only the defense, though, can decide which witnesses will be called to testify.

6. Alternatives to personal attendance at trial of a witness

The Court of Military Appeals has stated that, even though a witness is material, personal attendance at trial may be obviated by other effective alternatives, including depositions, interrogatories,
and stipulations to the expected testimony of the witness. If the
government is willing to stipulate to the witness' expected testimony,
there may be no need for the witness, especially inasmuch as the
defense may have obtained more through the stipulation than it
would have through live testimony because the government has lost
the chance of rebuttal. The decision to admit alternatives lies in the
discretion of the judge. The fundamental issue is whether "the
effect of the form of the testimony under the particular facts and
circumstances of the case will...diminish the fairness of the pro-
cedings." Because the circumstances of each individual case are
extremely important, the judge should explicitly state reasons for
allowing alternative forms of testimony to insure adequate review of
the decision.

Older cases allowed the judge to use a balancing test in deciding
whether to allow alternatives to the witness' personal appearance.
However, a presumption existed that the defense request was to be
granted if it would be "done without manifest injury to the service."
with military necessity or convenience often being cited as reasons
for refusing to require the personal appearance of the witness. The
Court of Military Appeals, in United States v. Carpenter and United
States v. Willis, has overruled that approach. The current standard
requires that the witness' personal appearance turn only on the
materiality of the testimony; military necessity only affects when
the witness can testify. Even though obtaining witnesses for the

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67 E.g., United States v. Snead, 45 C.M.R. 382, 386 (A.C.M.R. 1972) (listing alterna-
tives). See also Proposed Rule of Court-Martial 703(b)(3), Proposed Revision of the
68 This may be particularly true of some character witnesses. While character
evidence given by the defendant's commanding officer "occupies a unique and favored
position in military judicial proceedings," United States v. Carpenter, 1 M.J. 384, 386
(C.M.A. 1976), performance ratings, fitness reports, and efficiency reports may be
69 United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978). It should be noted that most
of the cases in which substitutes for live testimony were urged by the government were
cases in which the testimony was offered for sentencing purposes by the defense. With
the revision of the Manual for Courts-Martial to generally eliminate live testimony for
sentencing, see MCM, 1989, para. 75, the number of appellate cases involving a use of
substitutes for live testimony should diminish.
70 United States v. Scott, 5 M.J. 431, 432 (C.M.A. 1978). Thus, if a witness' credibility
is important, live testimony should be required.
72 United States v. Manos, 17 C.M.A. 10, 15, 37 C.M.R. 274, 279 (1967); United States
75 M.J. 384 (C.M.A. 1976).
76 M.J. 94 (C.M.A. 1977).
78 Id.
defense may be inconvenient and costly to the government, the defendant cannot be compelled to accept a substitute for those reasons alone.\footnote{\textit{United States v. Willis}, 3 M.J. 94, 96 (C.M.A. 1977).}

\section*{7. Defense objections to Paragraph 115}

Applying as it does to virtually all defense witnesses, paragraph 115 produces two primary complaints; that the defense must "submit its request to a partisan advocate for a determination,"\footnote{\textit{United States v. Carpenter}, 1 M.J. 384, 386 n.8 (C.M.A. 1976).} and that, in doing so, it necessarily reveals defense strategy and testimony to the government.\footnote{Disclosure results not only from notice of who the defense wishes to call, but, more importantly, from the requirement that the defense must show materiality in order to obtain the witness, a requirement which necessarily reveals defense strategy. See text accompanying notes 89-95 infra.} Inasmuch as the trial counsel is exempt from any similar situation, equal protection complaints were also raised.

\subsection*{a. The recipient of the request}

As a matter of practice, the prosecution's decision to procure a witness is subject only to the review of those who have endorsed the prosecution of the accused, i.e., the staff judge advocate and convening authority.\footnote{In most of the armed forces, the prosecutor is rated by these officers, or their equivalents, and promotion is thus contingent on the prosecutor's compliance with their wishes. See note 85 infra.} Although the law requires these officers to be neutral and experience suggests that most make great efforts to carry out their legal duty, both common sense and experience suggest that an inherent conflict of interest exists when the defense requests that a given witness be obtained.\footnote{Budgeting for courts-martial varies within the armed forces with not all services budgeting specifically for trials. When witness expenses come out of a ship's operating budget, for example, one can expect the ship's captain who is the convening authority to be particularly resistant to any expense. See, e.g., Hodson, \textit{The Manual for Courts-Martial—1984}, 57 Mil. L. Rev. 1, 15 (1972), in which General Hodson, formerly The Judge Advocate General of the Army and then Chief Judge of the Army Court of Military Review, said: "I would favor recognizing the staff judge advocate and the commander for what they are. They are the Government." Indeed, he proposed reorganizing the military criminal legal system so that the "staff judge advocates...would resemble United States Attorneys." \textit{Id.} at 8.} Any given witness potentially represents the expenditure of funds\footnote{\textit{See}, e.g., Hodson, \textit{The Manual for Courts-Martial—1984}, 57 Mil. L. Rev. 1, 15 (1972), in which General Hodson, formerly The Judge Advocate General of the Army and then Chief Judge of the Army Court of Military Review, said: "I would favor recognizing the staff judge advocate and the commander for what they are. They are the Government." Indeed, he proposed reorganizing the military criminal legal system so that the "staff judge advocates...would resemble United States Attorneys." \textit{Id.} at 8.} for a purpose contrary to what may be viewed as the best interest of the given officer or service. A number of commentators have recognized, for example, that the staff judge advocate is in effect the chief prosecutor for the convening authority\footnote{In most of the armed forces, the prosecutor is rated by these officers, or their equivalents, and promotion is thus contingent on the prosecutor's compliance with their wishes. See note 85 infra.} and paragraph 115 asks a great deal of such a person. Further-
more, as a matter of law, paragraph 115 declares that the trial
counsel will take action to provide a witness requested by the defense
"except when there is disagreement between the trial counsel and
the defense counsel [as to the necessity for the witness]." In effect, the
trial counsel has a substantial amount of leverage over the defense.\footnote{The Court of Military Appeals has said that its application of paragraph 115 leaves
"no doubt that an accused's right to secure the attendance of a material witness is free
from substantive control by trial counsel." United States v. Arias, 3 M.J. 436, 438
counsel denied the witness request). Trial counsels can and have rejected paragraph
115 requests as being procedurally deficient, however, using the rejection as a tactical
ploy to either discourage the defense from requesting the witness or the judge from
granting the request due to the lateness of the final request or to encourage the defense
counsel to plea bargain.}\footnote{United States v. Carpenter, 1 M.J. 384, 386 n.8 (C.M.A. 1976). \textit{Accord} United
States v. Williams, 3 M.J. 239, 240 n.2 (C.M.A. 1977).}
The Court of Military Appeals has noted this objection to paragraph
115 and has stated in dicta that "the requirement appears to be
inconsistent with Article 46..."\footnote{United States v. Carpenter, 1 M.J. 384, 386 n.8 (C.M.A. 1976). \textit{Accord} United
States v. Williams, 3 M.J. 239, 240 n.2 (C.M.A. 1977).} More recently, Chief Judge Eve­
rett appears to have implicitly rejected this view by stating that "the
Government is entitled to prescribe reasonable rules whereunder it
will have adequate opportunity either to arrange for the presence of
the witness or to explore any legally permissible alternative to the
presence of the witness."\footnote{United States v. Vietor, 10 M.J. 68, 77-78 (C.M.A. 1980). Chief Judge Everett
concurred in the result of Vietor only, while Judge Fletcher, also concurring in
the result alone, found Judge Everett's "analysis... unacceptable." \textit{Id.} at 78.}

The defense may be able to escape the need to advise the prosecu­
tion of its requested witnesses by directly requesting the witness
from the military judge. Under present law, this solution would
appear appropriate only when the defense has a substantial interest
in not advising the government of the identity of the witnesses, an
interest which clearly outweighs the government's interest in know­
ing their identity. Inasmuch as this procedure would of necessity
require the judge to utilize novel procedures to insure that the neces­
sary witness fees could be paid and the subpoena served in the event
of a noncooperative witness, the most probable circumstance justifying
this procedure would be a defense showing that a prosecution
member would likely tamper with the witness. In such a unique
circumstance, the military judge should seal the record of the wit­
ness request until the conclusion of the witness's testimony.

\textit{b. Defense disclosure of tactics and strategy}

The defense objection that paragraph 115 necessarily reveals
defense tactics and strategy can be divided into two components: the
disclosure itself and the lack of reciprocity. Proper compliance with paragraph 115 will result in a disclosure to the government of all defense witnesses and a synopsis of their individual testimony. Although counsel may well believe that they are required to disclose more than the law actually requires, there is no doubt but that the quantum actually required, as well as the quantum occasionally demanded by prosecutors, is enough to be very revealing. The prosecution has no equivalent requirement and the broad discovery available to the defense as a matter of practice can hardly be equated with the template of the defense case required under paragraph 115. Any Fifth Amendment objection to paragraph 115 appears to be foreclosed by the Supreme Court’s decision in Williams v. Florida. In Williams, the Court sustained Florida’s notice of alibi rule against constitutional self-incrimination objections on the grounds that the defense was only divulging information which it would have to reveal at trial. Although Williams appears to require a reciprocal duty on the party of the government, that requirement is met simply by making discovery of the prosecution case available to the defense; response in kind is not apparently required.

c. Lack of reciprocity in general

Defense counsel have contended that paragraph 115 “improperly discriminates against an accused because it imposes burdens in the procurement of a defense witness that are not imposed upon the Government.” In effect, this is a claimed violation of Article 46 and a denial of equal protection. Chief Judge Everett may have addressed

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90 Although the charge sheet, MCM, 1969, App. 5, requires the names and addresses of witness for both the defense and prosecution, that requirement is more honored in the breach. Further, a command’s information as to possible witnesses is something far different from counsel’s actual intent at trial.
91 Although the Supreme Court’s decisions may resolve the Fifth Amendment question, they leave untouched the parallel Article 31, 10 U.S.C. § 831 (1976), the military’s statutory right against self-incrimination, question.
93 The view has been, in effect, that the information gained by the prosecution is de minimis and serves the interests of justice and judicial efficiency by avoiding surprise. See generally Van Kessel, Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation, 4 Hastings Const. L.Q. 855, 882-89 (1977). Inasmuch as the information obtained from the defense may lead the government to evidence otherwise undiscoverable, at least until the defense portion of the case, it can hardly be said that the defense material is de minimis. Rather, it may practically assist the government greatly in making out its case in chief.
95 Id. See also United States v. Dixon, 8 M.J. 858, 865 (N.C.M.R. 1980) (discovery afforded defense via Article 32 proceedings more than balances government’s discovery from paragraph 115).
this when he stated that paragraph 115 not only provides the
government with an opportunity to explore any permissible alternative to the witness,97 but also insures that the defense counsel, who
might be spurred as an advocate to request witnesses in the hope that
the delay and expense would result in dismissal or an attractive plea bargain, have a good faith belief that the testimony will benefit the accused.98 The Courts of Military Review have justified paragraph 115 as permitting the trial court to avoid cumulative testimony99 and insuring “that government funds are not wasted in producing witnesses who are not absolutely necessary and material . . . .”100 Although these purposes are praiseworthy, the present procedural mechanism is not necessary to insure that they are well served.

8. Revision of Paragraph 115.

The primary defense objections to paragraph 115 could be met by
requiring counsel to submit requests to the military judge for resolution. Although this could be done in an ex parte fashion, thus shielding
the defense case from the government, the interests of justice
would best be served by requiring service of witness requests on the
opposing party with adversarial litigation before the trial judge.
This would permit the stipulations and concessions that may hasten the process. Further, it would equalize the parties’ information and permit either side to argue against a given witness request. Such a system would moot virtually all of the present objections to paragraph 115. Opponents would most likely urge that it would remove fiscal control from the convening authority and further extend the power and number of military judges. As to the former, a revised paragraph 115 could leave the government with the option of funding the witness or dismissing charges, a reasonable, although unpalatable, choice. As to the latter point, a fundamental issue is involved the resolution of which is dependent on far more than this issue.

C. THE POWER TO OBTAIN EVIDENCE

1. Evidence in the custody or control of military authorities

Although the Proposed Revision of the Manual for Courts-Martial
provides a comprehensive body of discovery rules,101 modeled in part

98 Id. at 78. See also United States v. Kilby, 3 M.J. 938, 944-45 (N.C.M.R. 1977).
101 Proposed Rule of Courts-Martial 701, Proposed Revision of the Manual for
on the Federal Rules of Criminal Procedure, the present Manual for Courts-Martial provides little in the way of procedure for obtaining evidence in military control, other than the testimony of witnesses, when it declares:

If documents or other evidentiary materials are in the custody and control of military authorities, the trial counsel, the convening authority, the military judge...will, upon reasonable request and "without the necessity of further process, take necessary action to effect their production for use in evidence and...to make them available to the defense to examine or to use, as appropriate under the circumstances."

The Manual clearly contemplates the voluntary cooperation of others when a proper officer requests evidentiary materials. It does not expressly provide a remedy when efforts at voluntary cooperation fail. However, given the defense's constitutional right to compulsory process, the situation should be analyzed from the perspective of the two parties. The government is usually viewed in a unitary fashion and, if prosecution cannot obtain needed evidence, it may be reasonable to expect it to get its house in order or suffer the consequences. Unfortunately, the Manual does not contemplate enforcement of the criminal law potentially in the hands of those who may have contrary motives. See, e.g., United States v. Nixon, 418 U.S. 683 (1974). While great deference should be paid to the government, especially within the military with its chain of command, given the potential for obstruction, and the occasional bureaucratic obstacles present when evidence must be obtained from an unrelated command, the prosecution should not be penalized as a general rule for an inability to obtain voluntary cooperation in evidence production. When the defense is unable to obtain needed evidence, a different situation results because of the accused's constitutional rights to confrontation, compulsory process, and fair trial. The question then becomes one of remedy. The law does not guarantee an accused the right to a trial to clear his or her name, but see U.C.M.J. art. 4 (dismissed officer's right to trial by court-martial), and the accused can be protected by dismissal of charges or abatement of trial rather than by an order to obtain needed evidence.

This omission is rectified by Proposed Rule of Court-Martial 701(g)(3), which provides that:

[T]he Military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence or raising a defense not disclosed; and

(D) Enter such order as is just under the circumstances.

Although the Rule further provides that it "shall not limit the right of the accused to testify in the accused's behalf," its provision permitting the judge to prohibit the defense from raising an undisclosed defense raises troubling constitutional questions which the Supreme Court expressly chose not to explore in Williams v. Florida, 399 U.S. 78, 83 n.14 (1970). Although the Court declared in Wardius v. Oregon, 412 U.S. 470, 472 (1973) that "the Due Process Clause...forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants", it did not reach
sory process, the power to obtain evidence granted by the Uniform Code of Military Justice,\textsuperscript{104} and the express powers granted by the Manual to the military judge to call witnesses\textsuperscript{105} and require additional evidence,\textsuperscript{106} it seems apparent that the power exists in at least the military judge\textsuperscript{107} to order the production of evidence in military custody. In the event of noncompliance with such an order, however, the only meaningful sanctions may be to abate the proceedings\textsuperscript{108} and perhaps prefer criminal charges against those refusing to comply.\textsuperscript{109}

When witnesses are involved, the Manual states that, customarily, the attendance of a witness stationed near enough to trial so “that travel at government expense will not be involved, will ordinarily be obtained by notification, oral or otherwise, by the trial counsel, to the person concerned . . . . In order to assure the attendance of the person, the proper commanding officer should be informally advised so that he can arrange for the timely presence of the witness.”\textsuperscript{110} The Manual continues by stating that if formal notice is required, “the trial

the question of how, if at all, Oregon’s notice of alibi rule could be enforced. 412 U.S. at 472 n.4.
\textsuperscript{102} UCMJ art. 46.
\textsuperscript{103} Mil. R. Evid. 614(a).
\textsuperscript{104} MCM, 1969, para. 54b. Paragraph 54b declares in relevant part that:
The court is not obliged to content itself with the evidence adduced by the parties. When that evidence appears to be insufficient for a proper determination of the matter before it or when not satisfied that it has received all available admissible evidence on an issue before it, the court may take appropriate action with a view to obtaining available additional evidence.

Paragraph 54b does not explicitly address how the evidence shall be obtained and continues to illustrate its point by stating: “The court may, for instance, require the trial counsel . . . to summon new witnesses . . . .” Given the express power to call witnesses granted by Mil. R. Evid. 614(a), however, it is clear that the Manual is not relying solely on the voluntary cooperation of military personnel.
\textsuperscript{107} MCM, 1969, para. 115c(1) authorizes the trial counsel to subpoena civilian witnesses. Although the provision could be read as limiting the trial counsel’s power to subpoena to civilians, it seems more likely that the Manual’s drafters took for granted government compliance with paragraph 115c and simply granted express power to deal with the case of civilians. However, to the extent that the Manual fails to grant subpoena power to compel military production of evidence, it seems clear that the Manual necessarily grants such power to the military judge. In United States v. Toledo, 15 M.J. 255, 256 (C.M.A. 1983), the court held that the trial judge erred by refusing to order the prosecution to obtain a transcript of a prosecution witness’ prior federal district court testimony for impeachment use.
\textsuperscript{108} United States v. Willis, 2 M.J. 94 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384 (C.M.A. 1976). See also n.26 supra.
\textsuperscript{109} A refusal to supply evidence pursuant to either paragraph 115c or a court order may constitute a violation of Articles 98 or 134. Cf. United States v. Perry, 2 M.J. 113, 116 (C.M.A. 1977) (Fletcher, C.J., concurring) (violation of speedy trial right); United State v. Powell, 2 M.J. 6, 8 (C.M.A. 1976) (unnecessary delay in completing Article 32 proceedings). Refusal to obey a court order may also constitute a disobedience under Articles 90 and 92.
\textsuperscript{110} MCM, 1969, para. 115b.
counsel will, through regular channels, request the proper command­
ing officer to order the witness to attend.11 Notwithstanding its 
phrasing, the Manual does not appear to intend that the command­
ing officer of the accused has any discretion to reject the request in 
general. The decisions of the Court of Military Appeals treat the 
government in a unitary fashion and when a material defense wit­
ness is not made available, trial must be abated until the witness is 
available.112 The court has implicitly recognized that witnesses may 
not be instantly available and that, in normal practice, reasonable 
needs of the individual or the service are accommodated.

2. Evidence not in military control

Although most civilian evidence is obtained through the voluntary 
cooperation of the appropriate individuals, recourse to process is 
occasionally necessary, and Congress has provided that:

Process issued in court-martial cases to compel witnesses 
to appear and testify and to compel the production of other 
evidence shall be similar to that which courts of the United 
States having criminal jurisdiction may lawfully issue 
and shall run to any part of the United States, or the 
territories, Commonwealths, and possessions.113

At the outset, it is apparent that process is unavailable if it would 
reach abroad, except for the "territories, Commonwealths, and pos­
sessions,"114 and the Manual states: "In foreign territory, the attend­
ance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence thereof, within the principles of international laws."115 Further, courts-martial lack the power to 
compel the attendance abroad of witnesses who could be compelled to 
attend courts-martial tried within the United States.116

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111Id.
112See note 108 supra. In an appropriate case, dismissal of charges may be necessary.
113U.C.M.J., art. 46.
114Presumably, a court-martial could constitutionally be given the power to sub­
poena United States citizens outside the United States to trials taking place within the 
United States. Civilian federal courts have such power. 28 U.S.C. § 1783 (1976); Fed. 
R. Crim. P. 17(e)(2).
115MCM, 1969, para. 115d(1). The Manual also states that "in occupied enemy 
territory, the appropriate commander is empowered to compel the attendance of a 
civilian witness in response to a subpoena issued by the trial counsel." Id.
116United States v. Bennett, 12 M.J. 463, 471 (C.M.A. 1982) (courts-martial lack the 
statutory power to require a United States citizen to testify abroad before a court­
(courts-martial lack power to compel testimony of U.S. citizen military dependent 
residing in the same nation in which the court-martial takes place); United States v. 
Potter, 1 M.J. 897, 899 (A.F.C.M.R. 1976) (court-martial could not compel American 
woman to testify in Germany); United States v. Boone, 49 C.M.R. 709, 711 (A.C.M.R. 
1975) (American witness could not be compelled to testify in Germany).
Compulsory process is available in two forms: subpoena and warrant of attachment. The subpoena compels the attendance of a witness by the coercion of law while a warrant of attachment results in the apprehension of the witness and his or her coerced physical transportation to trial.

a. Subpoenas

Pursuant to Article 46 of the Uniform Code of Military Justice, the Manual for Courts-Martial provides for the issuance of subpoenas by the trial counsel to compel the attendance of civilian witnesses. The Manual provides a model subpoena form and states that service should generally be made by mail. The trial counsel is required to "take appropriate action with a view to timely and economical service when formal service is necessary." According to the Manual, personal service "ordinarily will be made by persons subject to military law, but may legally be made by others." Service by United States marshals has occasionally been used in lieu of service by military personnel. In the event of noncompliance with the subpoena, the witness is subject to criminal prosecution in a United States district court under the provisions of Article 47 of the Uniform Code of Military Justice. Such a sanction is not particularly useful insofar as obtaining the testimony of the witness is concerned. Given a witness who refuses to comply, the trial counsel may request a United States district court to direct the attendance of the witness or, more directly, may issue a warrant of attachment.

117MCM, 1969, para. 115d(1). Insofar as summary courts-martial are concerned, paragraph 750 states that a summary court has the same power as a trial counsel to obtain evidence. See also Proposed Rule of Court-Martial 708(e)(2).
118MCM, 1969, Art. 7.
119The Manual also states that the witness should ordinarily be advised that voluntary compliance with the subpoena will not prejudice the rights of a witness to fees and mileage and that a voucher for such fees will be paid after completion of testimony. MCM, 1969, para. 115d(1).
120Id.
121Id.
122Article 47 penalizes an individual, not subject to court-martial jurisdiction, who having been properly subpoenaed "willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce," U.C.M.J., art. 47(a)(3), and provides a maximum punishment of "a fine of not more than $500, or imprisonment for not more than six months, or both." Id. at art. 47(b). A prerequisite condition for an Article 47 prosecution is that the witness has been "duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States." Id. at art. 47(a)(2). See also MCM, 1969, para. 115d(2). Interestingly, the Code appears to deprive the civilian prosecutor of any prosecutorial discretion as Article 47(c) states: "The United States attorney shall, upon the certification of the facts to him by the military court, file an information against and prosecute any person violating this article." This is not to say that the prosecution would necessarily comply with article 47. See, e.g., C. Lederer, The Military Warrant of Attachment 1 n.6 (1982).
b. The warrant of attachment

1. In general

The warrant of attachment, usually known as a bench warrant in civilian practice, directs the seizure of a witness who has refused to appear before a court-martial and orders the production of the witness before the tribunal the process of which has been disobeyed. The attachment prerogative has existed almost as long as the power of compulsory process and may be regarded as inherent to compulsory process. The express authority of courts-martial to attach civilian witnesses first appeared in Army general orders in 1868 and, virtually unchanged since that date, was incorporated into the modern Manual for Courts-Martial. The power to attach is not found expressly in the Uniform Code of Military Justice, but attachment is authorized by the Manual for Courts-Martial, which provides:

In order to compel the appearance of a civilian witness in an appropriate case, the trial counsel will consult the convening authority, the military judge, or the president of a special court-martial without a military judge, according to whether the question arises before or after the court has convened for trial of the case, as to the desirability of issuing a warrant of attachment under Article 46.

When it becomes necessary to issue a warrant of attachment, the trial counsel will prepare it and, when practicable, effect execution through a civil officer of the United States. Otherwise, the trial counsel will deliver or send it for execution to an officer designated for the purpose by the commander of the proper army area, naval district, air command, or other appropriate command.

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123 Much of the following text and accompanying footnotes are taken from Lederer, Warrants of Attachment—Forcibly Compelling the Attendance of Witnesses, 98 Mil. L. Rev. (1986), written by Major Calvin M. Lederer, Instructor, The Judge Advocate General's School, U.S. Army. The authors gratefully acknowledge Major Lederer's permission to utilize his outstanding article so extensively. Those interested in this general topic are urged to read his comprehensive treatment of the topic.


126 General Orders No. 93, Headquarters of the Army (Nov. 9, 1868). See also J. Winthrop, Military Law and Precedents 202 n.46 (1886, 1920 reprint); Digest of Opinions, The Judge Advocate General 490 (1880).

127 MCM, 1969, para. 115(3).
The Manual for Courts-Martial places the full discretion and responsibility for issuance of the warrant in the trial counsel, subject only to the requirement for consultation with, rather than approved by, the appropriate officer. By placing authority in the trial counsel to issue the warrant, the Manual obviously contemplates that the warrant can only issue after referral of charges. The Manual authorizes issuance any time thereafter, even before the court actually convenes.

The Manual does not state when a warrant of attachment may issue. Instead, it provides only that it is to be used in an appropriate case. In context, it is clear that a warrant of attachment should be used only to obtain a material witness who will not comply with a subpoena. Although the better practice is to attempt service of a subpoena first and to resort to a warrant of attachment only after the witness refuses to comply, nothing in the Manual for Courts-Martial necessarily suggests that the issuance of a subpoena or an actual refusal to appear is a prerequisite to issuance of a warrant. The Manual’s criterion appears to primarily be one of necessity. This raises an interesting policy question. In civilian practice, bench warrants are generally issued after witnesses fail to appear. Yet, civilian courts also utilize material witness statutes to order the arrest of witnesses likely to attempt to evade testifying. Although bench warrants are utilized for those witnesses who have not appeared, while material witness provisions are used for those who may not appear, the two procedures are obviously related in that they both provide for the procurement and preservation of witness testimony. At present, the armed forces have a bench warrant procedure which might theoretically be utilized as a material witness provision. Proposed Rule for Courts-Martial and its Discussion will condition issuance of the warrant of attachment to

129 A court-martial is convened by the officer designated as a convening authority who details the trial counsel (prosecutor) to the court-martial pursuant to U.C.M.J. art. 27. The term “convened” in MCM, 1969, para. 115d(3), is somewhat inartful because it obviously does not refer to the action of the convening authority in creating the court but rather to the point at which the court is called into session as there is no power to subpoena, much less attach, until there is a court-martial in being for which process can issue. It is not until after the court is “convened” and charges in a specific case are referred to it that process can issue.

130 Id.

131 See note 55 and accompanying text supra.

132 MCM, 1969, para. 115d(3), speaks of: “When it becomes necessary to issue a warrant of attachment.” The civilian case law relating to arrest of material witnesses makes it clear that non-compliance with a subpoena is not a condition prerequisite to issuance of an arrest warrant. See, e.g., Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).

133 See note 101 supra.
cases in which the witness neglects or refuses to appear. Although this may well be desirable both for reasons of policy related to military-civilian relations and to forestall raising serious constitutional questions, it should be clear that the proposed revision will foreclose a possible avenue for obtaining evidence before court-martial.

Procedurally, the Manual does not prescribe the form of the warrant and, although the Manual directs the trial counsel to accompany the warrant with supporting documents, that requirement is intended to support the government's position in the event of a habeas corpus petition and does not appear to be a formal condition to be met before the warrant may issue.

2. Execution of the warrant

Execution of the warrant is to be effective "when practicable... through a civil officer of the United States." The civil officer contemplated by the Manual is United States marshal. Failing service by a marshal, execution is by a military officer "designated for the purpose by the commander of the proper army area, naval district, air command, or other appropriate command." The Manual contemplates that force may be necessary for the successful execution of the warrant, although no statute or other executive order expressly allows the use of force on or permits the deprivation of a witness.

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134 The Manual prescribes no specific form for the warrant although earlier Manuals did so. See, e.g., MCM, 1921 at 655; MCM, 1928 at 88. The present form, DD Form 454, is prescribed by the Department of Defense.

135 The warrant of attachment will be accompanied by the orders convening the court-martial, or copies thereof; a copy of the charges in the case, including the order referring the charges for trial, each copy certified by the trial counsel to be a full and true copy of the original; the original subpoena, showing proof of service of a copy thereof; a certificate stating that the necessary witness fees and mileage have been duly tendered; and an affidavit of the trial counsel that the person being attached is a material witness in the case, that the person has willfully neglected or refused to appear although sufficient time has elapsed for that purpose, and that no valid excuse has been offered for the failure to appear. MCM, 1969 para. 115d(3).

136 MCM, 1969, para. 115d(3).

137 U.S. Dep't of Army, Pamphlet No. 27-2, Analysis of Contents Manual for Courts-Martial, United States 1969, Revised Edition 23-2 (1970). In 1980, the Director of the Federal Marshal Service was directed by the Department of Justice to assist the armed forces with the execution of warrants of attachment.

138 MCM, 1969, para. 115d(3).

139 In executing this process, it is lawful to use only so much force as may be necessary to bring the witness before the court. When it appears that the
of liberty of a civilian by military authority. 141

3. Constitutionality of the military warrant of attachment

Clearly, the apprehension by military authorities of a civilian witness who is not the subject of criminal charges is troubling and raises a number of constitutional questions, among the most important of which are the following:

(1) Whether any innocent citizen may be arrested to obtain testimony?
(2) Whether military authorities may apprehend a civilian to obtain testimony at a court-martial?
(3) What quantum of proof is necessary before a warrant of attachment may issue?
(4) Who may issue a warrant of attachment?

The first of these questions must be considered resolved; twenty-seven states expressly utilize variations of the warrant of attachment142 and all states subscribe to the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings.143 The fundamental concept of the arrest of material witnesses is also accepted throughout the American judicial system.144 Although it could be said that warrants of attachment directing the attachment of civilians might better be placed in the hands of civilian judicial authorities, the only court which has considered the issue to date145 has clearly rejected that position.146 The last two questions, however, raise issues of substantially greater legal import.

141 Despite the introduction of several bills over a period of years, Congress has declined to enact legislation specifically giving military personnel arrest power over civilians by statute. The most recent bill of this kind was S. 727, 97th Cong., 1st Sess. (1981) which would have authorized the Secretary of Defense "to invest officers ... of the Department of Defense ... with the power to arrest individuals on military facilities and installations."

142 Lederer, supra note 123, at 12-13, n.49.

143 The Act provides that a host state must honor an order from another state directing that a given witness be taken into custody.

144 See note 125 supra. See also Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).


146 The court in Shibley addressed the issue of whether a Marine Court of Inquiry had the same power to compel attendance as did a court-martial. In resolving that issue, it also addressed the issue of the warrant of attachment as Shibley had been apprehended and brought before the court of inquiry. The court stated:

If the only method of making this provision (authorizing the summoning of witnesses) effective were resort to prosecution under (Article 47), the result would be ineffective and illusory. Punishment as an offense cannot
Although the Supreme Court has held that "a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense," it is apparent that the actual apprehension of an individual and his or her involuntary physical removal to testify at a court-martial necessarily constitutes such a seizure. Except for a limited number of exceptions, the Fourth Amendment commands that seizures be based upon probable cause and at least one court has held that a seizure of a material witness must be based upon probable cause. This conclusion seems correct and fully applicable to the military warrant of attachment. What is less clear, however, is what probable cause must establish. In the normal attachment case, the absence of the subpoenaed witness at trial is apparent and is more than enough to support the issuance of a warrant insofar as it is necessary to procure that person's attendance. Yet, the Manual for Courts-Martial contemplates only the attachment of a witness who will give "material" testimony. Accordingly, it would seem reasonable to require that the materiality of the witness be demonstrated prior to the issuance of the warrant, although it might be argued that a subpoena need not be based on probable cause and will be considered valid until properly voided by the court. Accordingly, lack of compel disclosure to make an inquiry effective. And if boards of inquiry are to perform their functions...
materiality may only be raised by the prospective witness via a motion to quash the subpoena. Although the issue is a close one, as a matter of policy, the better course is to demonstrate materiality of the witness on a preponderance basis when seeking a warrant of attachment. It should be simple for counsel to demonstrate materiality in view of the fact that the Manual presently requires the defense to demonstrate materiality and the government to only call material witnesses and because of both the dislocation to the witness and the nature of the military intrusion into civil matters caused by the warrant. Proof of materiality should clearly be required when a warrant is to be issued for an individual who has not been subpoenaed. In such a case, the prosecution should demonstrate not only materiality but also that the witness is not likely to comply with the subpoena.

The last matter to be resolved is the question of who should grant the warrant of attachment. At present, the Manual specifies that the warrant should be issued by the trial counsel. The Supreme Court has, however, declared search warrants issued by prosecutors to be unconstitutional and declared that issuing officers must be neutral and detached. "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." As warrants of attachment result in the seizure of civilians, there is no justification for application of the argument of military necessity to their seizure. Although placing the warrant of attachment power in the hands of the trial counsel is historically understandable in view of the fairly recent advent of the military judiciary, there is no justification at present for issuing a warrant of attachment by a prosecutor.

In summary, the present procedure for the issuance of a military warrant of attachment provides an unusual tool to secure the testimony of unwilling civilian witnesses. In its present form, however, it must be viewed as flawed and almost certainly unconstitutional. Given this result, a trial counsel could likely moot any constitutional complaints by applying to a military judge for permission to issue a warrant of attachment.

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155 See text accompanying notes 22-27, 48-58 supra.
156 See Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971).
157 MCM, 1969, para. 115d(3).
158 Coolidge v. New Hampshire, 403 U.S. 443 (1971) (state attorney general could not issue search warrant notwithstanding state statute authorizing him to issue warrants as a justice of the peace).
160 Military judges were not required at special courts-martial, for example, until 1969.
warrant of attachment, proving in the process on a preponderance basis that the desired witness is a material witness and, when appropriate, that it is more probable than not that the witness will not comply with a subpoena.

3. Immunity

a. In general

The Supreme Court has long recognized that a valid claim to the privilege against self-incrimination may be overcome by a grant of immunity. Accordingly, when the prosecution seeks the testimony of a witness who will claim the constitutional or statutory privilege, it may compel the individual's testimony through a grant of immunity. Although the armed forces have claimed the power to grant immunity since at least 1917, no statute presently exists or has ever existed that authorizes the armed forces to grant immunity. Dealing with this issue in 1964 in United States v. Kirsch the Court of Military Appeals held that it perceived “a Congressional grant of power to provide immunity from prosecution in the provisions of the Uniform Code; and a valid delineation of a method by which to exercise the power in the Manual for Courts-Martial...” In Kirsch, the court reasoned that, inasmuch as the Uniform Code provides the convening authority the power to overturn a conviction, and thus through the right against double jeopardy the power to absolutely protect an accused from criminal sanction, a convening authority need not actually try an accused and overturn a conviction to grant immunity to a service member. The court also noted that Congress was well aware of the various Manuals for Courts-Martial and regulations providing for immunity and had failed to object to


162 Insofar as the ability of the defense to obtain immunity for defense witnesses is concerned, see text accompanying notes 392-99 infra.

163 U.C.M.J. art. 31. See generally, Lederer, Rights Warnings in the Armed Services, 72 Mil. L. Rev. 1 (1976). See also Mil. R. Evid. 301-05.

164 Green, supra note 161, at 17 (citing MCM, 1917); Proposed Rule for Courts-Martial 907(d)(ii).

165 See, supra note 161, at 17. But see the Organized Crime Control Act of 1970, discussed at note 173 and accompanying text, which has limited application.

166 15 C.M.A. 84, 35 C.M.R. 56 (1964).

167 Id. at 90-91, 35 C.M.R. at 62-63.

168 See U.C.M.J. art. 64 (“convening authority may approve only such findings of guilty, and the sentence... as he finds correct in law and fact and as he in his discretion determines should be approved.”)

169 15 C.M.A. at 92, 35 C.M.R. at 64.
Although expressly recognizing the power of a convening authority to grant immunity, the court made it clear that immunity could not be granted for offenses over which military courts lack jurisdiction and thus, implicitly, a convening authority cannot grant immunity to persons not subject to trial by court-martial. Although Kirsch remains the dispositive case in this area, enactment of the Organized Crime Control Act of 1970 complicated matters substantially. The Act centralized in the Attorney General the federal government's power to grant immunity and could be read to have deprived the armed forces of any general power to grant immunity due to the absence of express reference to courts-martial. Although the military departments may, as federal agencies, obtain the Attorney General's permission to grant immunity to a witness, one commentator, after a thorough examination of the legislative history of the Act, can find no reason to believe that the Act was intended to affect the armed forces in any other fashion. Notwithstanding this, Justice Rehnquist, then Assistant Attorney General, Office of Legal Counsel, having opined that courts-martial constitute "proceedings before an agency" within the meaning of the Act but that Act had not repealed the armed forces powers to grant immunity under Kirsch, stated that immunity could not be granted without the consent of the Attorney General in any case in which the Department of Justice might have an interest. Such a result, although in accord with the Act's spirit, hardly seems possible in view of the finding that the Act did not repeal the military's power to grant immunity and the absence in the legislative history of any intent to affect the armed forces.

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171 Id. at 96, 35 C.M.R. at 68.


174 Id. at 6001, 6004.

175 Green, supra note 161, at 29-31.

176 Coast Guard Law Bulletin No. 413 setting forth the 22 September 1971 memorandum of the Assistant Attorney General, Office of Legal Counsel (William H. Rehnquist), reprinted in part in VI Criminal Law Materials 32-50 (The Judge Advocate General's School, U.S. Army 1981). For the procedure to obtain such a grant, see note 217 infra.
At present, the assumption is that Congress has implicitly granted the armed forces the power to grant immunity to any service member who may be tried by court-martial for the offense about which the member will testify, but that the immunity must be obtained under the Organized Crime Control Act of 1970 whenever the case has Department of Justice interest. Given Justice Rehnquist's findings, the latter requirement albeit an excellent policy decision, appears a legal nullity. The real question is whether the armed forces in fact have power to grant immunity. Assuming that federal statute has not deprived the military of that power, one must reexamine Kirsch. Concededly, the court's holding in Kirsch is unusual and somewhat tortured and the court need not have concluded as it did. The court could easily have held that, although a convening authority could in effect grant immunity, the Code did not authorize the issuance of such a grant absent trial. The weight of legal history does support Kirsch, however, and, as the armed forces are part of the federal government, it would also appear reasonable to conclude that a grant of transactional immunity properly issued by the armed forces is binding on the remainder of the federal government and the states. Any future revision of the Uniform Code of Military Justice should resolve this matter, however, by creating express statutory authority for the armed forces to grant immunity. At present, the military system is clearly vulnerable to challenge in the federal district courts.

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177 But see United States v. Villines, 13 M.J. 46, 61 (C.M.A. 1982) (Everett, C.J., dissenting) (noting that the assumption that the 18 U.S.C. §§ 6001-05 (1976) did not preempt the military's power to grant immunity "is not indisputable.").
178 See Green, supra note 161, at 26-27.
179 Kirsch dealt with a grant of transactional immunity. Although not fully resolved, it appears that the armed forces may use grants of testimonial immunity as well as grants of transactional immunity. See text accompanying notes 18-136 infra.
180 U.C.M.J. art. 76. In relevant part, Article 76 declares that "the proceedings... of courts-martial as approved, reviewed, or affirmed as required by this chapter... are final and conclusive." This interpretation of Article 76 may be erroneous in that the Article clearly is intended to deal with the finality and effects of convictions. Given that immunity in the armed forces is ultimately based upon the effects of Articles 64, 76, and the constitutional prohibition against double jeopardy, however, Article 76 might reasonably be interpreted to reach this far. If not, a grant of immunity in the armed forces should act to bar the use of testimony, and the product thereof, by a state or the federal government. New Jersey v. Portash, 440 U.S. 450 (1979) (grand jury testimony given pursuant to a grant of immunity was involuntary and could not be used for impeachment of the declarant at his later trial); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).
b. The nature of the immunity required

(1) In general

Following civilian precedent, military grants of immunity extended transactional immunity\(^{181}\) until the Supreme Court's decision in 1972 in *Kastigar v. United States* that only testimonial immunity\(^{182}\) was necessary to overcome the Fifth Amendment privilege. The ability of the armed forces to grant testimonial immunity since *Kastigar* has been unclear. The promulgation of the Military Rules of Evidence expressly authorized the granting of use immunity,\(^ {183}\) but the President's rule making power under Article 36 of the Code\(^ {184}\) does not extend to violating congressional statute; members of the armed forces have been granted a statutory right against self-incrimination which has frequently been held to be broader than the Fifth Amendment privilege.\(^ {185}\) The legislative history of the statutory privilege suggests that, in relevant part, it was indeed intended to merely echo the Fifth Amendment privilege,\(^ {186}\) in which case the Court's holding in *Kastigar* would clearly apply to the armed forces. However, the holdings of the Court of Military Appeals create some uncertainty. Until fairly recently, the court repeatedly held that the statutory right was more protective than the constitutional one. Although the court has since either rejected or modified this position,\(^ {187}\) enough doubt exists that a reasonable argument can be mounted to the effect that the statutory right requires transactional immunity, especially since the present statutory right and all of its

\(^{181}\) Under transactional immunity, a witness is granted immunity from prosecution for any transaction or offense concerning which the witness testified.

\(^{182}\) 406 U.S. 441 (1972).

\(^{183}\) Mil. R. Evid. 301(c)(1). See also United States v. Villines, 13 M.J. 48, 60 (C.M.A. 1982) (Everett C.J., dissenting).

\(^{184}\) "Pretrial, trial, and post-trial procedures... may be prescribed by the President by regulations which shall... not be contrary to or inconsistent with this chapter." U.C.M.J. art. 36(a).

\(^{185}\) See generally, Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1, 2-9 (1976). But see United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980), in which Chief Judge Everett rejected earlier holdings, while Judges Cook and Fletcher stated that nothing in the case required the court to reexamine the "settled construction of Article 31" that the Article "has a broader sweep than the Fifth Amendment." 9 M.J. at 384 (quoting United States v. Ruiz, 23 C.M.A. 181, 182, 48 C.M.R. 797, 798 (1974)). The court has clearly narrowed the scope of Article 31, however. United States v. Armstrong, 9 M.J. 374 (C.M.A. 1980); United States v. Lloyd, 10 M.J. 172 (C.M.A. 1982).


predecessors were enacted during the period in which transactional immunity was viewed as constitutionally necessary to overcome the Fifth Amendment privilege.\textsuperscript{188} The issue seems to have been resolved in \textit{United States v. Villines},\textsuperscript{189} in which a fragmented Court of Military Appeals appears to have accepted the granting of testimonial immunity by a general court-martial convening authority.\textsuperscript{190} Proposed Rule for Court-Martial 704(a) express accepts testimonial immunity.

(2). Threat of prosecution in a foreign jurisdiction

For immunity to overcome the right against self-incrimination, it must at minimum successfully protect the witness against any use of the testimony given pursuant to the grant including any derivative use thereof.\textsuperscript{191} Even if a military grant of immunity is not binding on the states, through either Article 76 or the Supremacy Clause, the Supreme Court's decision in \textit{Murphy v. Waterfront}\textsuperscript{192} would protect the witness from use of the immunized testimony in a state court. The same result will follow, however, if the witness is potentially subject to prosecution in a foreign nation.

The Supreme Court has yet to determine whether a witness who is faced with a realistic threat of foreign prosecution may refuse to testify in a court in the United States notwithstanding a grant of immunity fully effective in the United States.\textsuperscript{193} A number of federal district courts have considered the topic, nearly all in the context of witnesses granted immunity to testify before grand juries, and have, with little exception, held that the witness must testify.\textsuperscript{194} The holdings have relied on two rationales; first, that grand jury testimony is secret and not likely to come to the attention of a foreign power and,
second, that absent extradition, the witness may avoid foreign prosecution simply by not traveling to the foreign nation. To the extent that these holdings are correct as they relate to civilian life, they hardly seem applicable to the armed forces. Testimony before military proceedings, including the functional equivalent of the grand jury, the Article 32 proceeding, is almost never secret. Furthermore, service members are subject to involuntary transfer to virtually any nation in the world. Indeed, trial may be taking place in a country with an interest in trying the accused. Consequently, the civilian law seems inapposite. The Court of Military Appeals was faced with a case involving a threat of foreign prosecution in 1956, when an accused complained that a Korean civilian witness was erroneously forced to testify at his court-martial despite his reliance on the right against self-incrimination because of possible trial in Japan. In dicta, not joined by any other member of the court, Judge Latimer stated that both the constitutional and statutory rights against self-incrimination extended only to "a reasonable fear or prosecution' under the Law of the United States."

The right against self-incrimination is a favored right under American law. Although the government does have a right to "every man's evidence", that right is contingent on the right to remain silent. Where potential foreign prosecution is possible, at least when that prosecution is a consequence of military service, the privileges against self-incrimination should apply absent immunity which is effective to prevent the use or derivative use of immunized testimony.
in a prosecution in any jurisdiction, domestic or foreign.

c. Consequences of granting immunity

(1). At trial

Pursuant to the Military Rules of Evidence:

When a prosecution witness...has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this rule, the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.202

The Rule thus insures the defense a meaningful opportunity to cross-examine the immunized prosecution witness. The Rule is taken from the decision of the Court of Military Appeals in United States v. Webster203 and its analysis states that disclosure should be made prior to arraignment.204

(2). To the immunized witness

When the witness has been granted transactional immunity,205 the witness may not be later prosecuted by the armed forces206 for any offense included within the grant.207 When the witness has been given testimonial immunity,208 the witness may later be prosecuted, but only if the prosecution can adequately show in court, by evidence,209 that the government has not relied on the immunized tes-

202Mil. R. Evid. 301(c)(2).
205See generally text accompanying notes 161-90 supra.
206It is unclear whether the accused could be prosecuted lawfully by a civilian jurisdiction. See accompanying notes 161-80 supra.
207The accused may be prosecuted for committing perjury while testifying pursuant to the immunity grant.
208Testimonial immunity protects the witness against subsequent use of the testimony and any product derivative of it with the possible exception of the discovery of a live witness as a result. Cf. United States v. Ceccolini, 435 U.S. 268 (1978). Testimonial immunity is sometimes known as “use plus fruits” immunity.
209The rules of evidence may not apply to this showing. Mil. R. Evid. 104(a). It is unclear, however, whether either Federal or Military Rule of Evidence 104(a) applies in determinations involving constitutional rights.
1983] COMPULSORY PROCESS AND CONFRONTATION

timony or any product thereof. It appears from the decision of the
Court of Military Appeals in United States v. Rivera that the Court
of Military Appeals will strictly hold the government to this
requirement and it is probable that the government cannot pro­
cure a previously immunized witness without being able to prove
that the case preparation was complete prior to the witness' testi­
money pursuant to the grant, and even then only if the trial counsel
can be shown to be unaware of the nature of the testimony given
under the grant. A subsequently prosecuted witness may raise a
prior immunity grant on a motion to dismiss. A previously immu­
nized accused may not be impeached at trial with testimony given
pursuant to the grant as such testimony is deemed coerced and
involuntary.

(3). Post-trial

Within the armed forces, immunity may only be granted by the
convening authority or by the action of a convening authority. From 1958 until 1983, the Court of Military Appeals reasoned that it
was unlikely that a convening authority would grant or obtain
immunity for a witness who was not expected to testify truthfully.
Consequently, it has consistently held that, by granting immunity,
the convening authority and staff judge advocate involved in the

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210 Mil. R. Evid. 301(c)(1). See also United States v. Rivera, 1 M.J. 107 (C.M.A. 1975).
211 M.J. 107 (C.M.A. 1975). See also United States v. Whitehead, 5 M.J. 294 (C.M.A.
1978).
212 This rule may not extend so far as to prevent use of a new witness discovered via
the immunized testimony, see United States v. Ceccolini, 435 U.S. 268 (1978), although
any logical analysis of the right against self-incrimination would result in exclusion of
such evidence.
213 Knowledge of the probable nature of a witness’ response which permits highly
useful trial preparation should be considered improper fruit of the immunized testi­
money. See United States v. Rivera, 1 M.J. 107 (C.M.A. 1975).
214 MCM, 1969, para. 68h.
216 The convening authority may grant immunity to any service member subject to
referral of charges and trial by that convening authority. See text accompanying notes
161-80 supra.
217 When a convening authority lacks the power to immunize a witness because that
person is not subject to court-martial, immunity may be obtained from the Depart­
218 See, e.g., United States v. Esplet-Betrancourt, 1 M.J. 91 (C.M.A. 1975); United
Griffin, 8 M.J. 66 (C.M.A. 1979) (disqualification is not required when a defense
witness is immunized).
219 See, e.g., United States v. Johnson, 4 M.J. 8 (C.M.A. 1977); United States v. Diaz,
22 C.M.A. 52, 46 C.M.R. 52 (1972).
grant were disqualified from taking post-trial actions. The Court repudiated this doctrine in its entirety in United States v. Newman, reasoning that the advent of testimonial immunity coupled with the adoption of Military Rule of Evidence 607, which provides that a party may impeach his or her own witnesses, had eliminated any possibility that a convening authority or staff judge advocate could be viewed as having vouched for a witness' credibility by issuing a grant of immunity. The court did not, however, determine the effect of a grant of transactional immunity declaring, however, that the "key inquiry is whether [the convening authority's] actions before or during the trial create, or appear to create, a risk that he will be unable to evaluate objectively and impartially all the evidence in the record of trial...."

III. CONFRONTATION AND COMPULSORY PROCESS

A. IN GENERAL

From the perspective of an accused, perhaps the most important constitutional protections are the Sixth Amendment rights to confrontation and compulsory process, the rights which, with the right against self-incrimination, epitomize the adversary system. Viewed in general terms, the right to confrontation gives the accused the right to be present at trial and to confront the evidence offered by the prosecution, and the right to compulsory process gives the defense the right to obtain and present evidence in its behalf. Clearly, the two rights are interdependent and must be viewed together, although Professor Westen has correctly suggested that, of the two, compulsory process is probably more important; the right to present defense evidence is likely more valuable than the ability to contest prosecution evidence inasmuch as the former may correct for mistakes in the latter. Were the Sixth Amendment rights to confrontation and compulsory process, both applicable to courts-martial,
to be interpreted in a literal and expansive fashion, it is apparent that present evidentiary and procedural standards would be greatly affected. At the very least, the confrontation right would constitutionalize the hearsay rule and render all hearsay inadmissible. Consequently, it is not surprising that most commentators have rejected such interpretation. The Supreme Court, while also rejecting such literal interpretation, has refused to fully acknowledge the dimensions of the two rights, preferring to deal with confrontation and compulsory process issues on a case by case basis. The pragmatic utility of the rights to the defense primarily stems from their unsettled nature. The adversary system that they protect has been incorporated into military criminal law by the Uniform Code of Military Justice and case law. It is in the question of how they affect specific areas of the law, areas which are still unresolved, that they are pragmatically important and present the able defense counsel with significant opportunities. Accordingly, having examined the present procedural mechanisms for procuring evidence, it is appropriate to turn to an examination of the effects of the Sixth Amendment on that procurement and on the admissibility of evidence. Given that this entire area is a developing one, the focus of this examination is necessarily on the decisions of the Supreme Court rather than the Court of Military Appeals.

B. THE RIGHT OF CONFRONTATION

1. In general

The Sixth Amendment declares: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." At a minimum, the right to confrontation gives the accused the right to be present at trial to confront the evidence.
offered by the government on the issue of guilt or innocence\textsuperscript{230} unless the accused has waived that right in some fashion.\textsuperscript{231} Presumably, the framers intended the confrontation right to have some greater import. The question then is how far, if at all, the Sixth Amendment protects the accused against admission of various forms of evidence.\textsuperscript{232}

2. The Right to Compel the Government to Produce Witnesses Whose Statements are Used at Trial

a. In general

Construed narrowly, the right to be present at trial is of use to the defendant only because the accused is thus aware of the government’s evidence; the accused is thereby enabled to prepare and present a defense. If this were the limits of the Sixth Amendment, however, the government could subject the defendant to “trial by affidavit” as long as the defendant was faced with the evidence in court. Yet it has been obvious since the earliest confrontation cases that the prohibition of trials by affidavit is a basic concept of confrontation.\textsuperscript{233} Consequently the Sixth Amendment must limit the government’s ability to present its case in hearsay form to some degree.

b. Available witnesses

Notwithstanding the large number of hearsay exceptions which do not require unavailable declarants,\textsuperscript{234} the Supreme Court has not as

military sentencing, e.g., adversarial and an independent part of trial, may require application of the right. The confrontation clause also protects the accused against ex parte proceedings which are unauthorized under the jurisdiction’s law. E.g., Parker v. Gladden, 385 U.S. 393 (1966); Lewis v. United States, 146 U.S. 370 (1892); United States v. Reynolds, 489 F.2d 4 (6th Cir. 1973) (harmless error on facts). However, the right to be present at trial does not merely incorporate the jurisdiction’s law by reference, but stands as an independent standard of the validity of local statutes that allow trial in absentia. See In re Oliver, 333 U.S. 237 (1948).

\textsuperscript{232}See Snyder v. Massachusetts, 291 U.S. 97 (1934); Dowdell v. United States, 221 U.S. 325 (1911) (interpretation of Philippine Bill of Rights).


\textsuperscript{234}For an outstanding analysis of this matter in conjunction with the compulsory process clauses, see Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 81 Harv. L. Rev. 897, 920 (1978) [hereinafter cited as Confrontation and Compulsory Process].
yet expressly held constitutional hearsay evidence against an accused who could not cross-examine the declarant\(^{235}\) when that confrontation might have been useful to the accused.\(^{236}\) Instead, although there are clear indications that the Court will recognize exceptions to this general rule, present case law appears to bar admission of hearsay evidence against the accused when the hearsay declarant is available for cross-examination.\(^{237}\) The government thus must produce the declarant in person before introducing an out-of-court statement against the accused.\(^{238}\) In determining when a witness is available,\(^{239}\) the Court has rejected the argument that the government has no obligation to produce witnesses from beyond its territorial boundaries.\(^{240}\) Similarly, the government cannot rely merely on its regular procedures for producing witnesses and must make a good faith effort to use all practical methods to produce the witness in person.\(^{241}\) The government is not required to attempt to produce a witness in person if it can show the likely failure of its efforts.\(^{242}\) The question of whether the government has met its obligation to produce a witness is a constitutional one, however, and the standard is strict.\(^{243}\)

\(^{235}\)Given the general definition of hearsay, see, e.g., Mil. R. Evid. 801(c), a statement made out of court offered for its truth remains hearsay notwithstanding the fact that its declarant is present in court subject to cross-examination. When the declarant is so available, both the Federal and Military Rules of Evidence define as nonhearsay three types of statements, Fed. R. Evid. 801(d)(1); Mil. R. Evid. 801(d)(1), but the general rule is far more expansive than the exceptions.

\(^{236}\)Ohio v. Roberts, 448 U.S. 56, 65 n.7 (1980) stated: “A demonstration of unavailability, however, is not always required. In Dutton v. Evans, 400 U.S. 74 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.”

\(^{237}\)Id. at 65. The Court did, however, suggest that there may well be exceptions as it declared: “In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of the declarant . . . .” Id. (emphasis added). See also note 236 supra as to one such “exception”. It seems quite probable that the Court will accept the clearly established hearsay exceptions—particularly the business record exception. See note 260 and text accompanying notes 242-252 infra.

\(^{238}\)Motes v. United States, 178 U.S. 458 (1900).

\(^{239}\)See e.g., Mil. R. Evid. 804(a).


\(^{243}\)See United States v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974).
Although it could be argued that the confrontation clause would allow the government to try a defendant by affidavit as long as the witness was present at trial for defense cross-examination, the Court has repeatedly implied that, before the government will be permitted to use out-of-court statements of an available witness, the government must first call the witness during its case-in-chief and attempt to obtain the testimony directly from the witness under oath and in the presence of the jury. Though reliability would exist if the government presented its case in hearsay form while allowing the defendant to call the declarant as witness, there are sound reasons for requiring the government to present its evidence via direct examination. If hearsay were used as part of the government’s presentation, for example, the jury could be left with an initial impression not easily erasable by defense examination of the declarant after the prosecution rested. In addition, the defendant would be placed in the difficult position of having to call a defense witness a person whose testimony is likely to be adverse.

c. Unavailable witnesses

(1). In general

The confrontation right necessarily asks whether the government is estopped from introducing out-of-court statements by witnesses who are unavailable for courtroom examination. If confrontation includes such a rule, it would presuppose “that evidence in any form other than direct testimony is too unreliable ever to be used against the accused in a criminal proceeding.” Not only would confrontation contain procedural guarantees, but the concept would imply that a substantive constitutional standard governs admissibility of evidence. Rejecting this approach, the Supreme Court has suggested that the state may use out-of-court statements as long as the prosecution cannot produce the evidence in a more reliable form. In Mattox v. United States, the Court allowed various statements, prior...

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246 See United States v. Oates, 560 F.2d 45, 82 n.39 (2d Cir. 1977); Westen, supra note 232, at 578-79.
248 Confrontation and Compulsory Process, supra note 232, at 553.
249 159 U.S. 237 (1896).
recorded testimony and a dying declaration, to be used against the defendant after the prosecution showed that the declarant was dead and that the evidence was unavailable in a more reliable form. Similarly, in California v. Green, the Court held that the state could use testimony given at a preliminary hearing once the prosecution had attempted and failed to obtain the testimony from the witness on direct examination. In Ohio v. Roberts, testimony given by the witness at a preliminary hearing was held admissible after the state had shown that the witness was unavailable. When the evidence in the out-of-court statement has been available and producible in the more reliable form of in-court testimony, the confrontation clause has barred use of the out-of-court statement. One series of cases precludes use of an out-of-court statement when the declarant could not be cross-examined because of physical absence from the courtroom. However, examination of these cases reveal that prosecutorial neglect or misconduct caused the witness’ unavailability, suggesting an underlying due process violation. In a second series of decisions, out-of-court statements have been excluded when the declarant, though physically present, asserted the right against

252 448 U.S. 56 (1980).
253 The standard to be applied in determining availability is unclear. In Ohio v. Roberts, 448 U.S. 56, 74 (1980), the Court quoted Barber v. Page, 390 U.S. 719, 724, 725 (1968), for the proposition that a “witness is not ‘unavailable’ for purposes of...the exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.” (emphasis added in Ohio v. Roberts). Having declared that no effort to obtain a witness need be made when there is clearly no possibility of doing so successfully, such as in the event of death of the witness, the Court stated:

        But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. “The lengths to which the prosecution must go to produce a witness...is a question of reasonableness.” California v. Green 299 U.S. at 159, n. 22 (concurring opinion citing Barber v. Page, supra).

448 U.S. at 74 (emphasis in the original). Given that Justice Brennan dissented in Ohio v. Roberts on the ground that the government failed to make a bona fide search to find the missing hearsay declarant, 448 U.S. at 79-82, it is apparent that the mere possibility of obtaining the declarant is not enough to prevent use of the hearsay declaration authored by the missing witness. On the other hand, the dissent seems to necessarily conclude that the government did not in fact make a good faith effort to find the witness. Given this view of the facts, the proper interpretation of the majority’s opinion is at best uncertain.

self-incrimination. Again, these cases suggest that prosecutorial conduct played a role and that the prosecution could have made the declarant available. When the challenged statements were made by co-defendants on trial with the accused, for example, severance of the trials might have obviated the self-incrimination issue. Alternatively, the government could have tried the declarants before trying the defendant against whom the statements were to be used. Finally, if the declarants continued to claim their self-incrimination privilege, they could have been made available by a grant of testimonial immunity.

The Court has, however, never declared that the confrontation clause is satisfied merely by offering evidence in its best available form. Instead, the clause contains a two-part standard controlling admissibility, regardless of whether the evidence exists in a better form. Initially, the confrontation clause establishes a rule of necessity: "in the usual case...the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." Once the declarant is shown to be unavailable, the out-of-court statement is admissible only if it bears adequate "indicia of reliability" which "serve as adequate substitutes for the right of cross-examination."

(2) Unavailability

A declarant can be unavailable because of death, disappearance, illness, amnesia, or insanity, exercise of a testimonial privilege, or because of "imprisonment, military necessity, nonamenability to

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256 Confrontation and Compulsory Process, supra note 232, at 585 n.43. See generally text accompanying notes 400-10 infra.

257 Confrontation and Compulsory Process, supra note 232, at 585 n.43.

258 Id. at 581-82 n.38.


261 Hoover v. Beto, 467 F.2d 518, 533 (5th Cir. 1972).


263 Mil. R. Evid. 804(a)(1), (2).
process, or other reasonable cause."264

As the Supreme Court has stated, "a witness is not 'unavailable' for purposes of... the exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."266 While the prosecution is not required to perform "a futile act" to locate the witness,265 the good faith standard might be met even if the prosecution fails to take steps that offer a remote possibility of producing the witness.267 The essential standard is one of reasonableness.268 Thus, a witness is unavailable when for some reason, the witness is beyond the reach of the court-martial.269 However, actual unavailability must be established and the prosecution must produce independent evidence of the witness' actual departure.270 Unless the prosecution has made a good faith effort to secure the witness, imprisonment does not make the witness unavailable.271

When a witness with relevant information properly invokes a...
privilege against testifying, the witness is unavailable. Such a situation can present either a confrontation or compulsory process issue. If the government can remedy the reason for the exercise of the privilege, as by granting immunity to a defense witness who has exercised the right against self-incrimination, a compulsory process is presented. When the government offers the hearsay statement of a witness who will not be subject to cross-examination, a confrontation issue is posed. It is, however, almost always the exercise of a witness' privilege against self-incrimination which results in litigation. The conflict could be obviated by giving the witness testimonial immunity. However, the courts have been extremely reluctant to compel the government to provide use immunity to a witness not yet tried. The grant of immunity has been required only when the prosecution intentionally disrupts the fact-finding process, when there is a violation of due process, when the prosecution acts on the basis of religion, race, or other discriminatory criteria, or when the potential testimony is clearly necessary and exculpatory. In some situations, though, the government’s interest in withholding immunity is minimal compared to the defendant’s interest in obtaining the testimony. If the prosecution has already prepared its case against the witness, there is, at most, a slight burden on the prosecution of having to trace its evidence to independent sources. Thus, the prosecution cannot claim that its ability to prosecute would be hindered by granting immunity, and the prosecution should be forced to choose between granting immunity or striking the witness' testimony.

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272 The usual situation involves the privilege against self-incrimination, though assertion of any testimonial privilege makes the witness unavailable, see Mil. R. Evid. 804(a)(1), and may require any direct testimony to be struck should the privilege be exercised on cross. See note 333 infra. A persistent wrongful refusal to testify on the grounds of privilege will also make the declarant unavailable. Mil. R. Evid. 804(a)(2). See Confrontation and Compulsory Process, supra note 232, at 584 n.43. If joinder is the problem, severance can be ordered. See MCM, 1969, para. 26d.

273 See text accompanying notes 181-201 infra.


275 Even if there is no violation of the defendant's confrontation rights, his or her rights under Article 47 may be violated.
(3). Indicia of reliability

Before the prosecution may offer a hearsay statement made by an unavailable declarant against the accused at trial on the merits, it must demonstrate that the statement has sufficient "indicia of reliability" to effectively substitute for defense cross-examination of the witness. Although the Supreme Court has failed to delineate with great precision what constitutes adequate indicia of reliability, it has stated: "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." The Court has failed to indicate which of the numerous hearsay exceptions are "firmly rooted" in its judgment except to note with approval dying declarations, former testimony which was subject to cross-examination, and business and public records. Because of their potential importance to military practice, closer examination of a number of hearsay exceptions are appropriate.

(a). Former testimony

Under Military Rule of Evidence 804(b)(1), former or prior recorded testimony is admissible as an exception to the hearsay rule. The basic prerequisite for this exception is that the party against whom the testimony is offered has "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." This requirement is the "indicia of reliability" that satisfies the confrontation clause. In California v. Green, the declarant's

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278 Id. at 66 (footnote omitted). The utility of the "residual" hearsay exceptions, Mil. R. Evid. 803(24) and 804(b)(5), is unclear under this test. Neither exception is a "firmly rooted exception," yet both are contingent upon the proffered hearsay being material, probative and "having equivalent circumstantial guarantees of trustworthiness" as the enumerated exceptions. See United States v. Ruffin, 12 M.J. 952 (A.F.C.M.R. 1982) (hearsay statements by minors held admissible under Mil. R. Evid. 804(b)(5)).
279 Id. at n.8.
280 Mil. R. Evid. 804(b)(1). The record of the previous proceeding or hearing must be verbatim. Id. See also United States v. Norris, 16 C.M.A. 574, 37 C.M.R. 184 (1967). When the former testimony is offered against the defendant, the adequacy of the accused's representation by counsel should be considered as an element of the "opportunity and similar motive" requirement. Analysis of the 1980 Amendment to the Manual for Courts-Martial Analysis of Mil. R. Evid. 804, reprinted in Manual for Courts-Martial Analysis of Mil. R. Evid. 804, reprinted at MCM, 1969, A18-109. Direct and redirect examination of one's own witness may very often be equivalent to cross-examination. See Ohio v. Roberts, 448 U.S. at 70-71 & n.11; Mil. R. Evid. 607; Fed. R. Evid. 804(b)(1); Adv. Comm. Notes, 56 F.R.D. 183, 324.
statement had been made at a preliminary hearing "under circumstances closely approximating those that surround the typical trial," and the Supreme Court suggested that an opportunity to cross-examine would have been sufficient under the circumstances. The Court expanded this into a functional analysis in Ohio v. Roberts. The declarant in Roberts had testified as a defense witness at the preliminary hearing and then disappeared. At the preliminary hearing, defense counsel had questioned the declarant in a fashion very similar to that of cross-examination. Because the questioning "comported with the principal purpose of the cross-examination" by challenging the declarant's veracity, the testimony was held sufficiently reliable for confrontation purposes.

As the drafters of the Military Rules of Evidence noted, the unique nature of Article 32 investigations raises the question of how this hearsay exception applies to Article 32 hearings. Article 32 hearings are designed "to function as discovery devices for the defense as well to recommend an appropriate disposition of charges...." Merely having an opportunity to develop the witness' testimony is not enough; there must be a similar motive in each proceeding to do so. Thus, if a defense counsel only uses the Article 32 hearing for discovery purposes, the Rule prohibits use of Article 32 testimony under this exception unless the requisite similar motive existed. While defense counsel's expression of intent during the Article 32 hearing is not subsequently binding on the military judge at trial, the prosecution has the burden of establishing admissibility and the

285 Id. at 70 n.11. Reliability depends on the particular facts of each case instead of whether the witness was technically on cross-examination. See id. at 7.
286 Id. at 71 (emphasis in original).
287 Id. at 71, 73.
288 U.C.M.J. art. 32.
292 See note 289 supra.
burden may be impossible to meet if defense counsel adequately raises the issue at trial. To obviate this problem, the better practice is for a defense counsel who is using the Article 32 hearing primarily for discovery purposes to announce that strategy during the hearing.

While the typical scenario involves an attempt by the prosecution to introduce prior recorded testimony against the defendant, the reverse is also possible. Assuming the prior record is verbatim and properly authenticated, the accused may want to use favorable testimony given at the earlier Article 32 hearing. If the government had an opportunity and similar motive to develop the witness' testimony at the Article 32 hearing, the testimony should be admitted. It should be noted that these requirements are inapplicable if counsel merely wishes to do is to impeach the in-court testimony of a witness with testimony given at the Article 32 hearing. In such a case, the evidence is not being offered for its truth and no hearsay objection applies.

(b). Business and public records

Under Military Rules of Evidence 803(6) and (8), records of regularly conducted activity and public records and reports are admissible as exceptions to the hearsay rule. The essential requirement for the "business records" exception is that the record be made and kept "in the course of a regularly conducted business activity."

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292 Mil. R. Evid. 804(b)(1), 902(4).
292 Mil. R. Evid. 801(c).
cation for the public records exception lies in "the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record." These assumptions constitute the "indicia of reliability" satisfying the confrontation clause in this instance. It is primarily the application of these exceptions to laboratory reports and the effect of the confrontation clause which has plagued the military courts; the Court of Military Appeals has held that such reports are properly admitted under the business record exception. In the view of the court, a chemical analysis is inherently neutral; the chemist's job is to analyze the substance, not exercise prosecutorial discretion, and there is no reason to suspect the chemist of bias. The court's conclusions are subject to dispute, particularly where, as is the usual case in the Army, the laboratory report is the product of a forensic laboratory operated by a law enforcement agency. Recognizing that such reports are subject to attack on an individual basis, the court has allowed the defendant to attack the report's accuracy, both in terms of the analyst's competence and the regularity of the test procedures. Later cases have accepted this doctrine and the Military Rules of Evidence expressly declare laboratory reports to be a hearsay exception. A question not yet addressed, however, is


304 United States v. Evans, 21 C.M.A. at 582, 45 C.M.R. at 356. See United States v. Hernandez-Rojas, 617 F.2d 529 (9th Cir. 1980); United States v. Orozco, 590 F.2d 789 (9th Cir. 1979); United States v. Grady, 544 F.2d 696 (2d Cir. 1977); Saltzburg & Redden, supra note 291, at 612; English, Should Laboratory Reports Be Admitted at Courts-Martial to Identify Illegal Drugs?, The Army Lawyer, May 1978, at 26, 30.


306 As one writer has noted, the analyst's testimony will be of little use in most instances. English, supra note 304, at 31. See Dutton v. Evans, 400 U.S. 74, 95-96 (1970) (Harlan, J., concurring).

307 See, e.g., United States v. Vietor, 10 M.J. 69 (C.M.A. 1980); United States v. Strangstallen, 7 M.J. 225 (C.M.A. 1979). The prosecution can avoid the laboratory report issue by stipulating to the identity of the substance tested or to the analyst's testimony or by deposing the chemist. In addition, the prosecution should inform the defense as soon as possible that the lab report will be offered into evidence and inquire if the defense desires the analyst's presence at trial. English, supra note 304, at 33.
the degree to which a laboratory report may be used to present in summary form an expert opinion susceptible to disagreement. Although Military Rule of Evidence 803(6) expressly permits “business records” to contain “opinions”, it is by no means clear that the Rule is intended to permit circumvention of the expert testimony rules, liberal though they are. Although current civilian law is sparse and confused, there may be a trend to admit records of regularly conducted activity containing expert opinion and to leave to the trial judge the discretion to rule the evidence inadmissible when, pursuant to Rule 803(6), “the course of information or the method or circumstances of preparation indicate lack of trustworthiness.”

Inasmuch as Rule 803(6) states that laboratory reports are “normally” admissible under the Rule, this approach, for example, would clearly permit the military judge to exclude a report which utilized a controversial scientific test.

Assuming that the laboratory exception is sufficiently “reliable” to satisfy the confrontation clause, the remaining problem is what showing must be made to obtain the testimony of the chemist.310

(c). Statements against interest

Statements against interest, notably confessions in criminal cases, are admissible as an exception to the hearsay rule.311 Admissibility is premised on the fact that the statement would tend “to subject [the declarant] to civil or criminal liability” in such a fashion that a reasonable person would not make the statement unless he or she thought it to be true.312 The assumption that people do not make disserving statements unless they are true underlies the exception313 and this assumption appears to ordinarily establish “indicia of reliability” for confrontation purposes.314 Particular concern for reliability accompanies the offer of a third party's confession to exculpate the defendant. To obviate the danger of fabrication, the Federal and

309 See, e.g., United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979); United States v. Oates, 562 F.2d 45 (2d Cir. 1977); but see Clark v. City of Los Angeles, 650 F.2d 1038 (9th Cir. 1981). Some courts have required expert opinions expressed in business records to conform to the expert testimony rules generally, see, e.g., id., while others do not address this issue. See, e.g., Gardner v. Chevron U.S.A. Inc., 675 F.2d 698 (5th Cir. 1982).

310 See text accompanying notes 469-92 infra.

311 Mil. R. Evid. 804(b)(3). This assumes that Military Rules of Evidence 306 is not applicable.

312 Mil. R. Evid. 804(b)(3).


314 See also United States v. Alvarez, 584 F.2d (5th Cir. 1978).
Military Rules of Evidence require corroborating evidence to “clearly indicate the trustworthiness of the statement.” If the confession includes statements implicating the accused, under general principles, the statements may be admissible as contextual statements. Yet, there is some uneasiness in “identifying all third-party confessions implicating a defendant as legitimate declarations against penal interest.” A declarant’s inculpatory statement made to the authorities which implicates the accused may be the result of a desire to improve the declarant’s position in plea bargaining or a similar motive. While the statement implicating the accused would then be self-serving and should be excluded as not against the declarant’s interest, a similar statement made to an accomplice could easily qualify as one falling under the hearsay exception. Thus, any confrontation issue depends directly on the circumstances surrounding the declarant’s confession.

Arguably, the use of a co-defendant’s confession violates the rationale of Bruton v. United States, which held that use at a joint trial of co-defendant A’s confession which implicates co-defendant B,
but which is not admissible against B, violates B's confrontation right and that limiting instructions are inadequate to protect B.\textsuperscript{323} The confession strengthens the government's case by evidence that the co-defendant B cannot test by cross-examination, and the evidence is equally damaging whether it proves the fact of the commission of the crime or the identity of the defendant as perpetrator.\textsuperscript{324} The declarant's confession will often be as inconsistent with the defense, even if it does not explicitly refer to the defendant or of anyone else, as if it clearly named the defendant; the confession can factually contradict the defense's theory, or the facts can be such that both the declarant and the defendant are probably guilty if either is.\textsuperscript{325} The Court of Military Appeals has avoided the issue in light of the differing opinions of the Supreme Court, preferring to decide the question by assuming a violation of the confrontation clause and then deciding the error war harmless.\textsuperscript{326}

3. The Right to Cross-Examine the Government's Witnesses at Trial

a. In General

While the Sixth Amendment constitutionalizes the state's duty to disclose its evidence to the accused at trial and, to some degree, a duty to present its evidence in the best available form,\textsuperscript{327} it also protects the accused's interest in cross-examining opposing witnesses. In \textit{Smith v. Illinois},\textsuperscript{328} the defendant was prevented from cross-examining a prosecution witness about his real name and address, apparently because the information was deemed irrelevant and thus beyond the scope of cross-examination. Reversing the conviction, the Supreme Court held that the permissible scope of defense cross-examination of a prosecution witness is measured by independent constitutional standards.\textsuperscript{329} \textit{Smith} reflects the concept that, when applicable, the right to confrontation pre-empts the normal rules of evidence.\textsuperscript{330}

\textsuperscript{323}But see Parker v. Randolph, 442 U.S. 62 (1979) (Bruton not applicable to interlocking confessions of multiple defendants with proper limiting instructions).
\textsuperscript{326}United States v. McConnico, 7 M.J. at 309-10.
\textsuperscript{327}See text accompanying notes 248-326 supra.
\textsuperscript{328}490 U.S. 129 (1989).
\textsuperscript{329}Id. at 132-33.
The Court has demonstrated that the constitutional standard in this context is strict. In *Davis v. Alaska*, an important state witness was a juvenile on juvenile court probation. Relying on a state law designed to protect the confidentiality of juvenile court records, the trial judge precluded defense cross-examination relating to the witness' juvenile record and his possible bias. Even though the state had an "important interest" in creating a privilege for juvenile records, the Court held that the defendant's right of confrontation outweighed the state's interest. *Davis* suggests that the defendant's right of cross-examination can be defeated, if at all, only for the most compelling reasons. Although the Court's opinions in this area, strictly construed, indicate only that the defense must be permitted to show the bias of a hostile witness, it is apparent that they stand for the proposition that the accused must be permitted a meaningful cross-examination of a witness despite local rules of evidence.

Cross-examination serves three main functions: it sheds light on the credibility of the direct testimony; it brings out additional facts related to those elicited on direct examination; and in jurisdictions allowing "wide open" cross-examination, it brings out any additional facts tending to elucidate any issue in the case. While the standard of relevancy applied to direct testimony can be logically

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332 *Id.* at 319.

333 *Confrontation and Compulsory Process,* supra note 232, at 581. *Davis* also implies that cross-examination for impeachment purposes is more favored in confrontation analysis. See United States v. Saylor, 6 M.J. 647 (N.C.M.R. 1978); United States v. Streeter, 22 C.M.R. 363 (A.B.R. 1955); Fed. R. Evid. 611(b); Mil. R. Evid. 611(b); McCormick, *supra* note 315, at § 29, at 58 (2d ed. 1972). When the witness refuses to answer on cross-examination, then "the accused's usual remedy for this denial of his right to confront an adverse witness is to have that witness' direct testimony stricken from the record." United States v. Rivas, 3 M.J. 282, 285 (C.M.A. 1977) (footnote omitted). See also Mil. R. Evid. 301(f)(2); United States v. Demehak, 545 F.2d 1029 (5th Cir. 1977); United States v. Vandermark, 14 M.J. 690 (N.M.C.M.R. 1982). The remedy must be requested by the defense and is invariably granted unless the refusal applies only to "collateral" matters. United States v. Hornbrook, 14 M.J. 668 (A.C.M.R. 1982); United States v. Lawless, 13 M.J. 948 (A.F.C.M.R. 1982). However, the military judge has no duty to strike, *sua sponte*, the direct testimony in order to insure the basic fairness of the court-martial when the direct testimony is not per se inadmissible. *Rivas*, 3 M.J. at 286.


335 See, e.g., *Davis v. Alaska*, 415 U.S. at 320, in which the Court states that the state's policy in protecting juvenile offenders' records "cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."


337 *Id.* at § 29, at 57. See also E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, *Criminal Evidence* 11-12 (1979). The armed forces is not a "wide open" jurisdiction, as cross-examination is restricted to the scope of the direct. Mil. R. Evid. 611(b).
applied to facts elicited on cross-examination for use on the merits, the standard is markedly different for facts obtained to evaluate the credibility of evidence given during direct examination. In that instance, the test is "whether it will to a useful extent aid the court or jury in appraising the credibility of the witness and assessing the probative value of the direct testimony." Questioning for this purpose takes various forms, and the criteria of relevancy are vague. Close adherence to a fixed standard may limit the usefulness of the cross-examination, but the dangers of undue prejudice and excessive consumption of time clearly lurk in the background. Clearly, evidence which is irrelevant cannot invoke the confrontation clause. However, it is probable that evidence which is technically relevant to impeachment might not have the degree of probative value of importance necessary to make the clause applicable.

b. The rape shield rule

(1). In general

In one situation in particular, that of sexual assault cases, potentially relevant cross-examination has been restricted by the Military Rules of Evidence. When the issue of consent is raised in a forcible rape case, evidence of the character trait of the victim has generally been considered relevant. In reaction to political pressure from women's rights organizations and law enforcement agencies, however, the overwhelming majority of jurisdictions now limit the relevance of the past sexual behavior of a victim of a forcible sexual offense. The military approach, codified in Military Rule of Evidence 412, substantially follows Federal Rule of Evidence 412. Subdivision (a) expressly declares that, in any case in which the defendant is charged with a "nonconsensual sexual offense," the court-martial cannot admit into evidence reputation or opinion evi-

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338 McCormick, supra note 315, at § 29, at 58.
339 Id.
340 Thus, the trial judge has the power to control the extent of cross-examination. Fed. R. Evid. 611(a); Mil. R. Evid. 611(a).
341 McCormick, supra note 315, at § 193, at 59.
343 Almost every jurisdiction in this country has enacted some sort of rape shield law." R. Lempert & S. Saltzburg, A Modern Approach to Evidence 636 (2d. ed. 1982).
345 Illustrations of included offenses are listed in Mil. R. Evid. 412(e).
dence concerning the past sexual behavior of an alleged victim. Subdivision (b) precludes admission of the victim's past sexual behavior unless the evidence is constitutionally required or offered to show:

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the course of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which the nonconsensual sexual offense is alleged.

Noteably, Rule 412(a), unlike Rule 412(b), does not provide in its text for admission of evidence that is constitutionally required by otherwise prohibited by the Rule. The drafters of the Rule, however, declared in their Analysis that "evidence that is constitutionally required to be admitted on behalf of the defense remains admissible notwithstanding the absence of express authorization in Rule 412(a)."

(2). Potential confrontation problems

Rape shield laws, including Military Rule of Evidence 412, have generally been upheld against claims that they violate the right of confrontation. Nevertheless, the rule's application in a particular case may violate the defendant's right to cross-examine a prosecution witness.

Rule 412(a)'s seemingly absolute prohibition on reputation or opinion evidence may run afoul of the confrontation clause in a number of circumstances. The accused might, for example, wish to offer evidence of the victim's reputation for certain sexual practices in order

346 "Past sexual behavior" is defined in Mil. R. Evid. 412(d). See Wright & Graham, supra note 342, at § 5384, at 538-48.
347 Mil. R. Evid. 412(a). Compare Mil. R. Evid. 405(a) (when character evidence is used circumstantially, only reputation or opinion evidence is admissible). Rule 412 takes the opposite view, admitting only specific acts and limiting the circumstances in which that evidence is admissible. See Saltzburg & Redden, supra note 291, at 222.
348 See note 344, supra.
349 Mil. R. Evid. 412(b).
to show that he acted in good faith and in accord with that reputation and thus did not intentionally use force or acted under a reasonable mistake of fact.\textsuperscript{352} Professors Saltzburg and Redden suggest that the peculiar transient status of the armed forces\textsuperscript{353} presents another problem as defense witnesses may be unavailable and opinion or reputation evidence may be the only form of evidence available.\textsuperscript{354}

The remainder of subdivision (b) of Rule 412 expressly provides that evidence constitutionally requires to be admitted shall be admitted despite the general prohibition on evidence of the sexual history of the victim. The problem is in determining when the confrontation clause will require such evidence. One possible situation may occur when the victim's sexual history is proffered to show a motive for fabricating a rape charge;\textsuperscript{355} the rape charge might be used by the victim to explain her pregnancy\textsuperscript{356} or, in the case of a minor, her all-night absence from home.\textsuperscript{357} Applying the Rule becomes more problematic in other contexts, such as impeachment by showing bias or specific contradiction. In a group rape case, the accused might claim, for example, that the victim's testimony has been influenced because she had previously had sexual relations with one of the rapists. Conversely, a witness who corroborates part of the victim's story might be biased because he or she is her lover or, at the least, has previously had sexual relations with the victim.\textsuperscript{358} "Davis v. Alaska"\textsuperscript{359} may be little help in such a case as "Davis" could be read as allowing cross-examination to establish that the witness has a reason to accuse someone, but without showing that the witness has a particular bias for accusing the defendant.\textsuperscript{360}

\textsuperscript{352}See Saltzburg & Redden, supra note 291, at 222.
\textsuperscript{354}Saltzburg & Redden, supra note 291, at 222. See also United States v. Elvine, 16 M.J. 14, 18 (C.M.A. 1983).
\textsuperscript{355}United States v. Dorsey, 15 M.J. 1 (C.M.A. 1983); United States v. Colon-Anguelia, 16 M.J. 20 (C.M.A. 1983); United States v. Ferguson, 14 M.J. 840 (A.C.M.R. 1982); State v. DeLawder, 29 Md. App. 212, 344 A.2d 446 (1976); State v. Jalo, 27 Or. App. 845, 557 P.2d 1359 (1976). In Ferguson, the Court of Review held that evidence of the victim's past sexual history, coupled with the testimony of a psychiatrist, should have been admitted to establish a motive for a false accusation of rape. The court's opinion reviews a number of cases dealing with the effect of the confrontation clause on rape shield rules and represents a useful resource to counsel faced with this issue. See also United States v. Elvine, 16 M.J. 14 (C.M.A. 1983) (inadequate offer of proof).
\textsuperscript{357}Wright & Graham, supra note 342, at § 5387, at 574 n.73.
\textsuperscript{358}Wright & Graham, supra note 342, at § 5387, at 577.
It has been assumed that the accused has the right to contradict evidence of sexual behavior elicited by the prosecution, such as evidence that, prior to the incident, the victim was a virgin. This view assumes too much; Rule 412 bars such evidence whoever introduces it and ordinarily the accused has no right to compound the error. On the other hand, evidence of prior sexual behavior may be relevant to rebut testimony not inadmissible itself under Rule 412.

The victim's credibility is also challengeable by showing some defect in her ability to perceive, recall, or narrate. Such defects may implicitly involve proof of prior sexual behavior, such as mental defects caused by tertiary syphilis. In some cases, admission of the evidence may be required under the confrontation clause.

Impeaching the victim by introducing evidence by false accusations has not received much attention. Under the terms of Rule 412, this is not "past sexual behavior." Admission would seem to be limited by Military Rule of Evidence 608, which limits impeachment by specific acts to inquiry on cross-examination and subjects it to the court's discretion. Notwithstanding the strictures of Rule 608, an accused's constitutional right to cross-examine in this instance includes the right to introduce evidence of previous false accusations.

361 Wright & Graham, supra note 342, at § 5387, at 577.
362 Id. at 581. The commentators contradict themselves at this point, saying first that admission of impeachment or rebuttal evidence may be constitutionally required, and then that impeachment by specific contradiction need not be permitted under Rule 412(b)(1). Compare Wright & Graham, supra note 342, at § 5386, at 562-63 with id. at § 5387, at 576-77. Impeachment through bias appears to be allowed, however. Waiver may be inapplicable here because the Rule is intended in part to protect the victim who is not a party to the case. Doe v. United States, 666 F.2d 43, 46 (4th Cir. 1981).
363 For example, to counter a claim that the rape has left the victim debilitated, evidence that she later engaged in strenuous sexual activity might be proffered. When the victim denies a bias against the accused, episodes of lesbian activities might be submitted as contradiction. Wright & Graham, supra note 342, at § 5387, at 577 n.90. See id. at 581. Clearly, the exception suggestion here should be narrowly construed to prevent the exception from overwhelming the rule.
364 McCormick, supra note 315, at § 45, at 93.
365 Evidence of disease or physical condition, per se, are not rendered inadmissible by Mil. R. Evid. 412.
366 Wright & Graham, supra note 342, at § 5387, at 577. But see People v. Nemie, 87 Cal. App. 3d 926, 151 Cal. Rptr. 32 (1978) (evidence of victim's prior sexual history excluded on issue of her ability to perceive penetration).
367 Mil. R. Evid. 412(d). See also Wright & Graham, supra note 342, at § 5384, at 546-47.
368 Mil. R. Evid. 609(b).
369 Wright & Graham, supra note 342, at § 5387, at 580. A distinction should be made between accusations which are factually unfounded and cases which are dismissed.
Finally, the accused might wish to impeach the victim with evidence of past convictions. While Rule 609 would appear to control the situation, admitting the conviction into evidence, the harder case arises when the impeachment is by convictions for past sex-related crimes, such as prostitution or obscenity. Rule 412 does not by its express language exclude such evidence for it is the fact of criminal conduct, the conviction, which is important. However, such evidence indirectly includes evidence of past sexual conduct. Though Davis v. Alaska may appear to require admission of the convictions, it may not be controlling; some courts have concluded that Davis only allows use of juvenile convictions for bias rather than for general impeachment. Thus, a prostitution conviction might be used to show that the victim had a reason to accuse the defendant of rape, but not to merely impeach the victim's veracity. This issue is not likely to arise as these sexually related convictions are not likely to be probative of untruthfulness and thus neither admissible under Military Rules of Evidence 609(a) or 608(b) or Davis.

c. Cross-examination during suppression hearings

Though the accused's right to cross-examine is generally protected and can be abridged only for compelling reasons, a less stringent standard is used in suppression hearings, as suggested by McCray v. Illinois. The Supreme Court in McCray held that the confrontation clause was not violated when the judge hearing the suppression motion refused to allow defense cross-examination directed toward obtaining the name and address of the informant alleged to have provided probable cause for the arrest. Lower courts have extended McCray to situations in which valid security interests necessitate receiving in camera government evidence proffered at the suppression hearing. In such instances, however, a "least restrictive alternative" approach is used; confrontation is limited only to the extent

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370 Mil. R. Evid. 609(a). The military judge's discretion to exclude the evidence is not applicable since exclusion is warranted only if the probative value of the conviction is less than "its prejudicial effect to the accused." Mil. R. Evid. 609(a)(1). Such evidence is hardly prejudicial to the accused but is only of concern to the victim.
373 See text accompanying notes 18-340 supra.
374 386 U.S. 300 (1967).
375 E.g., United States v. Bell, 464 F.2d 867 (2d Cir. 1972) (when government introduced hijacker detection profile, the defendant was excluded, but defense counsel was allowed to cross-examine). Cf. Gannett Co. v. DePasquale, 443 U.S. 368, 439 (1979)
necessary to protect the valid government interest. 376 While the court may restrict cross-examination to avoid “backdoor” discovery by the defense, it may not limit questioning that is clearly relevant to the defense claim. 377

C. THE RIGHT OF COMPULSORY PROCESS

1. The right to compel the attendance of available witnesses at trial
   a. In general

Under the Uniform Code of Military Justice, the accused has the same ability as the prosecution to secure “witnesses and other evidence.” 378 The statutory provision implements the defendant’s right of compulsory process under the Sixth Amendment. 379 Compulsory process, at the least, means that the defendant is entitled to use the government’s subpoena power in order to compel the attendance of witnesses on behalf of the defense. In addition, the clause stands as an independent standard, doing more than incorporating by reference whatever subpoena rights the defendant has under statute. 380 As such, the defendant’s right of compulsory process goes beyond the subpoena power and includes not only writs of attachment and writs of habeas corpus ad testificandum, 381 but noncoercive devices for requesting and inducing the appearance of witnesses, such as the good faith power of the prosecution and the convening authority to

(Blackmun, J., concurring in part, dissenting in part) (exclusion of public); United States v. Grunden, 2 M.J. 116 (C.M.A. 1977) (same); United States v. Arroyo-Angulo, 580 F.2d 1137 (2d Cir. 1978) (some defendants and counsel excused from selected pretrial proceedings upon request of other defendants who were informants). These incidents can also be analyzed in terms of the government’s privilege to withhold classified or sensitive information or the identity of an informant. See Mil. R. Evid. 505(i), 506(i), 507(d) (in camera hearings to determine extent of disclosure). See also Wellington, In Camera Hearings and the Informant Identity Privilege Under Military Rule of Evidence 507, The Army Lawyer, Feb. 1983, at 9.

374 United States v. Clark, 475 F.2d 240 (2d Cir. 1973).
376 U.C.M.J. art. 46.
378 Wigmore believed otherwise, 8 J. Wigmore, Evidence § 2191 (rev. ed. J. McNaughton 1961), but the courts have been reluctant to construe the clause so narrowly. See State ex rel. Rudolph v. Ryan, 327 Mo. 728, 38 S.W. 2d 717 (1931); State ex rel. Gladden v. Lonergan, 201 Or. 153, 269 P.2d 491 (1954).
ask a person to return as a witness. Witnesses within and outside the jurisdiction are encompassed by the right.

Though the compulsory process right is extensive, it is not absolute. The government has no duty to search for witnesses whom it has no reasonable probability of discovering or producing. Instead, as with the government's obligation to confront the accused with witnesses against him, the government need only make a good faith effort to locate and produce defense witnesses. The similarity should not be surprising in light of the common purpose of the confrontation clause and the compulsory process clause to secure "the attendance of witnesses in order to enhance the ability of a defendant to elicit and present testimony in his defense." Within the armed forces, the determination of materiality "is not susceptible to gradation. The testimony of a given witness either is or is not material to the proceeding at hand," and "once materiality has been shown the Government must either produce the witness or abate the proceedings." Given the state of military criminal law,

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382 Compare Barber v. Page, 390 U.S. 719 (1968), with Mancusi v. Stubbs, 408 U.S. 204 (1972). The results of the two cases can be seen as requiring the prosecution to use established procedures making it reasonably likely that the witness would be produced, but not requiring use of futile or improbable procedures. Westen, Compulsory Process II, 74 Mich. L. Rev. 191, 226-28 (1976) [hereinafter cited as Compulsory Process II]. See also United States v. Davison, 4 M.J. 702, 705 (A.C.M.R. 1977) (Jones, S.J., concurring).

383 Compulsory Process II, supra note 382, at 251-58. This is not to say, however, that a court will necessarily have the statutory or inherent power to compel the attendance of a witness. See note 116 for the limitations on court-martial subpoena power when trial takes place in a foreign nation.


385 See text accompanying notes 324-37.


the only significant compulsory process problem is the requirement found in paragraph 115 of the Manual for Courts-Martial that a request for defense witnesses be submitted to the trial counsel with adequate justification previously discussed. The compulsory process clause, has, however, importance beyond its basic ambit for it would appear to not only provide the defense with its fundamental right to obtain defense witnesses but also to provide the defense with the authority to obtain and present important defense evidence notwithstanding usual procedural and evidentiary rules.391

b. Requiring the government to grant immunity to prospective defense witnesses

Under current law, the defense has a constitutional right to obtain available material defense witnesses. A particular problem is posed when the only reason that a witness will be unavailable is because the testimony of the witness would be self-incriminatory. Most such witnesses would refuse to testify against their interests voluntarily, of course, and the Fifth Amendment and Article 31 privileges against self-incrimination would prohibit the defense from calling them involuntarily. When the prosecution has a similar problem, it has the power to grant immunity to the witness392 which grant deprives the witness of any valid constitutional objection to testifying.393 Although the prosecution could grant immunity to defense witnesses in order to enable them to testify, it almost without fail will refuse to do so voluntarily. Prosecutors will point out that bestowal of immunity complicates or makes impossible subsequent prosecution of the witness,394 that there is no way in which to adequately insure in advance that the witness's testimony is material, and that immunizing defense witnesses would interfere with prosecutorial discretion and run the risk of immunizing large "fish" in order to prosecute "small fry". All of these concerns are valid. It may be, however, that the defense may be able to make an adequate offer of proof as to the

391 Insofar as the potential conflict between the defense's need for evidence and the shielding effect of evidentiary privileges, see Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 159-77 (1974). See also text accompanying notes 161-221 supra.
393 The prosecution could grant the accused use immunity, Kastigar v. United States, 406 U.S. 441 (1972); Mil. R. Evid. 501(c)(1), under which nothing the witness said, or any product thereof, could later be used against the witness. However, military law takes an unusually expansive view of the derivative evidence rule and it would be very difficult for the prosecution to adequately prove in court that a case against an immunized witness was actually prepared and tried without use of the immunized testimony. United States v. Rivera, 23 C.M.A. 430, 50 C.M.R. 389, 1 M.J. 50 (1975).
anticipated testimony of the witness. Further, prosecutorial discretion is in the control of the government. If the prospective defense witness is a more culpable offender than the accused, the government should not be heard to complain that its own election of how to proceed has caused it eventual difficulties. In short, in an appropriate case, the defense's right to the testimony of a material witness should outweigh the government's interest in not bestowing use immunity on the witness. Thus far, however, the courts have been extremely reluctant to compel the government to grant immunity to defense witnesses. Within the armed forces, the ultimate resolution of this issue is unclear. With a majority of the three member
court sustaining a conviction in which a defense request that a defense witness be granted immunity was denied, the Court of Military Appeals was badly divided on this issue in United States v. Villines, a decision consisting of an opinion by Judge Fletcher, with Judge Cook concurring in the result, and Chief Judge Everett dissenting. A synthesis of the three opinion suggests that a majority of the present court believes that immunity can be granted to enable defense witnesses to testify “when clearly exculpatory evidence is involved”. Furthermore, the decision on such a defense request must be made without utilizing “an unjustifiable standard [or improper consideration] such as race, religion, or other arbitrary classification . . .” and without the intent of making such a decision “with the deliberate intention of distorting the judicial fact finding process.”

Rejecting the view of Chief Judge Everett that both the general court-martial convening authority and the military judge may grant immunity, Judges Fletcher and Cook appear to hold that only the convening authority has that power. Given the divided nature of the court in Villines, further litigation can be expected in this area.

c. Improper joinder

Joinder of accuseds is allowed under paragraph 26d and 33d of the Manual for Courts-Martial. The procedure creates several savings, notably time, expense, and prosecutorial effort. The Manual counsels, however, that if “the testimony of an accomplice is necessary, he should not be tried jointly with those against whom he is expected to testify.” From the accused’s perspective, joinder may deny the defense the benefit of favorable testimony from a co-accused, either because the testimony would improperly prejudice the co-accused.


Though there may be no constitutional obligation on the prosecution to grant immunity to defense witnesses, but see Confrontation and Compulsory Process, supra note 332, at 531 n.38, arguably, an obligation under Article 46 exists in order to effectuate the article’s mandate of equal access to witnesses. But of, United States v. Davison, 4 M.J. 702, (A.C.M.R. 1977) (Art. 46 only implements Sixth Amendment rights).

13 M.J. 46 (C.M.A. 1982).

399 Id. at 55. In United States v. Jones, 13 M.J. 407 (C.M.A. 1982), the court rejected a defense claim that it was entitled to have a defense witness immunized, stating that there was no “reasonably foreseeable testimony” beneficial to the defense.


401 E.g., Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970).
or because the co-accused refuses to testify. The principal problem in such a case is determining if joinder is the real cause of the co-accused's silence. Such claims for severance are usually treated with skepticism, especially in civilian courts. The Manual for Courts-Martial, however, declares: "In a common trial, a motion to sever will be liberally considered" and states that one of the "more common grounds for this motion are that the mover desires to use at his trial the testimony of one or more of his co-accused...." In light of the prosecution's obligation to avoid harassing or discouraging defense witnesses from testifying and the Manual's liberal standard, the accused should not be required to show to a certainty that joinder silenced the co-accused and, for example, if the accused shows that the co-accused has already given exculpatory testimony out-of-court and that joinder could silence the witness, the government should be required to show that joinder would have no such effect. Severance should certainly be ordered whenever it is more probable than not that the co-accused will testify for the accused at a separate trial.

2. The Right to be Present for the Testimony of Defense Witnesses at Trial.

There is little, if any, discussion in the case law on the extent of the accused's constitutional right to be present when defense witnesses testify as the government is "not in the habit of requiring defense witnesses to testify outside the defendant's presence." The issue
could arise nonetheless in the context of the presentation of classified information. In this instance, the accused's analogous right under the confrontation clause is relevant. The accused has the right to be present when government witnesses testify and the right can be defeated only when the accused voluntarily leaves the jurisdiction after arraignment or disrupts trial. The principle established under the confrontation clause applies with equal force in the context of the compulsory process clause. In each case, the accused's interests in being present are the same. During the prosecution's case-in-chief, the accused needs to know exactly what the government witnesses are saying in order to prepare the defense. When presenting the defense, the accused needs to know exactly what the defense witnesses are saying so that he or she can better elicit testimony. As a result, the accused's interests should be infringed only when the accused forfeits the right or for a compelling government interest.

It is not immediately apparent why the accused should be present to hear his or her own witnesses; preparation for trial should show in advance what defense witnesses will say. But preparation does not eliminate the possibility of surprise testimony; at best, preparation only gives an approximation of what a witness will say and turncoat witnesses are not unknown. To evaluate the impact of a witness, the accused needs to the exact substance of each witness' testimony. Furthermore, though counsel is usually appointed now so as to have enough time to prepare, preparation assumes that a witness is friendly and can be located. Instead, not all witnesses are on friendly terms with the accused—the accomplice who turns state's evidence is the common example—and not all witness can be located in advance of trial. Defense witnesses then could be hostile in whole or part and might need to be impeached.

3. The Right to Examine Defense Witnesses at Trial and to Present Defense Evidence

a. General constitutional standards

The "most important question" under the compulsory process
clause is whether the defendant’s right to compel attendance of witnesses at trial includes the right to introduce their testimony into evidence.\footnote{See generally Imwinkelried, Recent Developments: Chambers v. Mississippi—The Constitutional Right to Present Defense Evidence, 62 Mil. L. Rev. 225 (1978).} Two theoretical possibilities exist: the Sixth Amendment merely incorporates by reference the government’s definition of “witness” as contained in rules on competency, relevancy, materiality, and privilege or the Sixth Amendment establishes an independent definition of “witness” based on its own standards on admission of defensive evidence. Obviously, arguments for both approaches exist and there is always a risk of making every evidence question in criminal cases a constitutional question. Wigmore’s view was that the constitutional rule overrode state law only to guarantee the right to compel attendance of witnesses, but that the states could establish rules to govern admissibility of the evidence.\footnote{See generally Imwinkelried, Recent Developments: Chambers v. Mississippi—The Constitutional Right to Present Defense Evidence, 62 Mil. L. Rev. 225 (1978).} On the other hand, if the government is free to determine who is a witness in the context of compulsory process, the purpose of the clause could be easily and completely frustrated.\footnote{Confrontation and Compulsory Process, supra note 232, at 591.} In \textit{Washington v. Texas},\footnote{388 U.S. 14 (1967).} the Supreme Court resolved the fundamental question by holding that compulsory process includes both the right to compel attendance of defense witnesses and the right to introduce their testimony into evidence. The Court’s decision consisted of two parts. First, the witnesses the defendant may subpoena must be congruent with those allowed to testify for the defendant. Otherwise, the defendant would only have the right to subpoena witnesses who could not be put on the stand or the right to call witnesses whom could not be subpoenaed; either right alone would be an empty one.\footnote{Id. at 23.} Second, and of more significance, it is constitutional law alone that ultimately determines whether testimony is admissible on behalf of the defendant. The framers were not content to rely on rules of evidence governing admissibility but intended to create a constitutional standard with which to judge those rules.\footnote{Id. at 16, 17 n.4. (Texas law made accomplices incompetent to testify for one another.)} \textit{Washington} also established the content of the constitutional standard. The state rule of evidence at issue\footnote{But cf. id. at 22-23 (rule disqualifying alleged accomplice from testifying for defendant is absurd in light of exceptions to rule and sheer common sense).} was invalid, not because it was discriminatory or irrational,\footnote{See also Chambers v. Mississippi, 410 U.S. 284 (1973).} but because the government interest was inadequate to justify restricting the defendant’s right to present evidence in his defense.\footnote{See also Chambers v. Mississippi, 410 U.S. 284 (1973).}
tedly, the state had an interest in excluding evidence which probably
was false and self-serving. The Court instead weighed the relative
interests of the state and the defendant and determined that, since
the trier of fact could be trusted to adequately consider the evidence,
the only course was to admit the evidence.

There is some congruence between the Court's view of compulsory
process expressed in Washington and its view of confrontation, as
stated in Smith v. Illinois and Davis v. Alaska. In both Washington
and Smith, the defendant was prevented by a state rule of evi-
dence from obtaining testimony from a witness who was present and
ready to testify. Holding that the Sixth Amendment requires the
trier of fact be allowed to give the evidence whatever weight and
credibility may be appropriate, the Court in both instances over-
turned the evidentiary rule. Similarly, the presence of a legitimate
state interest was raised to justify exclusion of evidence in Wash­
ington and Davis. Neither denying the importance of the asserted state
interests nor challenging the value of the rules used to further those
interests, the Court held in both cases that the defendant had a
superior interest in presenting defense evidence. Implicit in Wash­
ington and Davis is that the defendant's rights under the Sixth
Amendment are not absolute, but that questions of admissibility due
to competence, materiality, or privilege concerns ultimately consti-
tute a federal question determined by strict constitutional stand­
ards.

b. Competency of witnesses

As both Washington v. Texas and Chambers v. Mississippi indicate,
rules on competency of evidence may raise constitutional
issues. Generally, though, the constitutional questions about compen-
tency have been reduced by the broad competency standard con­
tained in Military Rule of Evidence 601; unless provided otherwise,
any person is competent to testify. Other traditional competency ques-
tions were also rendered obsolete by the Manual revision. Hearsay, for example, is no longer incompetent. Mil. R. Evid. 801.
from testifying as witnesses.\textsuperscript{433}

Under the military rule, a court member "may testify on the question whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence."\textsuperscript{434} The Rule does not draw the line at the jury room door but between the mental processes of court members and the presence of conditions or events designed to improperly influence court members in or out of the jury room. The Rule thus distinguishes between subjective and objective events and prohibits testimony about conduct which has no verifiable objective manifestations.\textsuperscript{435} While the Rule correctly states existing law,\textsuperscript{436} there is some suggestion that actual practice need not be so rigid.\textsuperscript{437} Going beyond the Rule requires consideration of the interests protected by the Rule, when and how the issue is raised, and the type of impropriety involved. There are two basic interests being furthered by the Rule. One is the protection of court members from probing by the defense to see if there was misconduct or improper procedure.\textsuperscript{438} The other interest involved is the need for finality in criminal convictions. If this type of inquiry were allowed, the verdict would be subject to constant attack.

The issue of impropriety can be raised by "affidavit or evidence or any statement by the member" when the member could testify to the same effect.\textsuperscript{439} The issue of impropriety should be raised before the court adjourns, if possible, and will usually be suggested in this situation by a member's statement to the judge, counsel, or bailiff.\textsuperscript{440} In addition, the problems that the Rule is designed to prevent "disappear in large part if such investigation . . . is made by the judge and takes place before the juror's discharge and separation."\textsuperscript{441}

The type of impropriety and its effect will also be important. A
juror cannot testify about improper quotient verdicts or about compromise verdicts. Court members may testify about prejudicial information brought to their attention or outside influence on the family, or to irregularities as intoxication, bribery, and possession of information not obtained through trial.

c. Admissibility of evidence

(1). In general

Even though a witness is competent to testify, his or her testimony may be excluded on evidentiary grounds. Chambers v. Mississippi, a case susceptible to multiple interpretations, suggests that evidence rules cannot be applied to infringe the defendant's right to present a defense. In Chambers, the Supreme Court overturned a conviction because the defendant was not permitted to solicit declarations against penal interest—confessions to the crime made by a third party—because of state evidentiary law. The import of Chambers was, and remains, unclear. Some commentators have interpreted it as a unique case growing out of unusual facts and an unusual combination of state evidentiary principles. Others have interpreted it as a major, if not seminal, case providing the defense with a constitutional right to present important probative evidence notwithstanding normal evidentiary rules. Under this latter view, Chambers is both a confrontation and compulsory process case and thus one of great potential value. Although the Court of Military Appeals has followed Chambers, it has not clearly indicated which interpretation of Chambers it has accepted. Recently, however, the court has emphasized the need for the proffered evidence to at least be "reliable" for Chambers to apply. Furthermore, the court appears to have placed some emphasis on the fact that the hearsay declarant in

442McDonald v. Pless, 238 U.S. 264 (1915).
444Mattox v. United States, 146 U.S. 140 (1892); Bulger v. McCray, 575 F.2d 407 (2d Cir. 1978).
447410 U.S. 284 (1973). Chambers is an unusual case. Justice Powell, its author, expressly limited its holding to "the facts and circumstances of this case..." Id. at 303. However, it is impossible to ignore the broader import of the case which seems clearly to be that the defense may present relevant and critical defense evidence notwithstanding state evidentiary rules to the contrary. See Imwinkelried, supra note 418, for an outstanding examination of the case. Insofar as the effect of evidentiary privileges are concerned, see note 391 supra.
Chambers was available at trial, suggesting that the court will limit Chambers to circumstances in which the declarant is present at trial although not subject to full cross-examination.

(2). Scientific evidence

Although Chambers has great potential scope, mainly in the hearsay area, it may have particular value in the area of scientific evidence, particularly in circumstances in which the defense desires to offer evidence of an exculpatory polygraph examination. Before scientific evidence is admitted, it must be shown to be relevant, i.e., to make the existence of any fact "more probable or less probable than it would be without the evidence." Traditionally, this meant for scientific evidence that the proponent had to establish that:

(1) the underlying scientific principle is valid;
(2) the technique properly applies the principle;
(3) the instruments used were in proper working order;
(4) proper procedures were used; and
(5) the people conducting the test and interpreting the results were qualified.

This foundation met the authentication and relevancy requirements and was known as the Frye test. Pursuant to this test, if the idea behind a scientific technique is invalid, evidence obtained through that technique is irrelevant. It is unclear, however, whether the Frye test was adopted by either the Federal or Military Rules of Evidence. The expansive nature of the expert witness rules found in the Federal and Military Rules of Evidence, coupled with the simple definition of relevancy in Rule 401 and the lack of any reference to the Frye test suggest strongly that the test has been aban-
d. Preventing defense witnesses from testifying

The defendant's right to present evidence may be frustrated not only by evidentiary rules, but also by the actions of the prosecutor or the judge. The effect on the accused is the same whether a witness is prevented from testifying because of evidentiary rules or because of coercion. The compulsory process clause prohibits the government from deliberately harassing or removing witnesses. Legitimate procedures may be employed, e.g., advising a witness of the penalty for perjury or of the privilege against self-incrimination, thus suggesting that there is a fine line between proper and improper conduct. Some conduct, though, may be so flagrant as to violate the compulsory process clause.

The constitutional principle was recognized by the Supreme Court in a due process decision Webb v. Texas. While acknowledging the state's interest in preventing perjury, the Court overturned the conviction on due process grounds because the trial judge had used "unnecessarily strong terms" to warn the only defense witness about perjury and "effectively drove that witness off the stand." Webb thus establishes that a practice that effectively deters a material defense witness from testifying is invalid unless necessary to

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459 U.C.M.J., art. 46.
460 Mil. R. Evid. 301(b)(2).
463 409 U.S. at 98.
accomplish a legitimate state interest. Webb only addressed the situation of judicial interference with the defendant's right to present evidence.464 Other cases hold that harassment or other efforts designed to discourage defense witnesses also violate the defendant's rights. Such efforts have included perjury warnings and threats of prosecution or arrest.465 Although military cases support the proposition that negligent discharge of a defense witness violates the government's duty to insure the attendance of the witness at trial,466 the Supreme Court's 1982 decision in United States v. Valenzuela467 places that general statement in doubt. Concerned with the deportation of a potential witness, the Court held in Valenzuela that the statutory policy of rapid deportation of illegal aliens requires that the defendant make "a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses."468 Although the Court expressly stated, in what may soon be an oft-quoted footnote 9, that it expressed no opinion "on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance...of witnesses within the United States" and the holding may be limited to cases in which the desired witness has been deported, the case may be persuasive when the armed forces have properly discharged a service member, albeit with negligent timing. One can reasonably argue that the elimination of unfit members of the armed forces is necessary to an effective armed force and that Congress has clearly recognized this via its knowledge and recognition of the discharge system. If this should prove accurate, no sanction would be assessed against the government unless the lost testimony fit the test pronounced in Valenzuela.


466 See United States v. Potter, 1 M.J. 897 (A.F.C.M.R. 1976) (negligent discharge of defense witness violates government's duty to ensure witness' presence at trial). See also Singleton v. Lefkowitz, 583 F.2d 618 (2d Cir. 1978). The defendant must show that the alleged conduct did in fact cause the witness not to testify or to change his or her testimony. Once the defendant has made a prima facie case of harassment, the prosecution has the burden of demonstrating the contrary. United States v. Morrison, 335 F.2d 223 (3d Cir. 1965); United States v. Thompson, 5 M.J. 28 (C.M.A. 1978); United States v. Kennedy, 3 M.J. 251, 254 (C.M.A. 1976).
**e. Laboratory reports**

In the military, one of the most troublesome issues raised in a compulsory process analysis is the right to challenge admission of laboratory reports. The reports are clearly admissible under the hearsay exception for records of regularly conducted activity, but, assuming the report is admitted under a hearsay exception, the question then becomes whether the defense can present evidence to impeach the report. Commonly, this impeachment is directed toward the competency of the analyst involved and the procedures used in the test. The Court of Military Appeals has concluded that the defendant has the right "to call the analyst under appropriate circumstances" for this purpose. While the right is uncontested, the mechanics involved cause considerable problems.

Generally, a defense request for the analyst must comply with the procedures established under paragraph 115a of the Manual, including the implied prerequisites of timeliness and materiality. There is no consensus, however, on the exact standards required in this situation. The problem stems from the peculiar nature of the testimony involved. The analyst's statements are used against the defendant at trial and the analyst actually is a witness for the government even if he or she does not personally appear. Thus, when the defense calls the analyst, defense counsel may have difficulties interviewing this witness. If a pretrial interview cannot be

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472 See text accompanying notes 42-47, 48-58 supra.


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accomplished, the defense may not have enough information with which to establish the materiality and necessity of the analyst's personal testimony. At this point, the judges on the Court of Military Appeals apply different standards of materiality, and implicitly, standards of compliance with paragraph 115. Judge Fletcher.

Apparently, no formal request would be needed, and the defense would not be required to expressly show materiality or necessity. This view assumes that cross-examination of the analyst is always material and necessary because it detracts from the weight given to the evidence of the laboratory report.

Judge Cook, on the other hand, believes that compliance with the usual standards is appropriate. The government must produce a witness only upon the defendant's showing of materiality and necessity and this standard is no different for laboratory reports. To hold that a mere unsupported request triggers the obligation to obtain the witness would nullify the purpose of the hearsay exception. The accused's right to call the chemist is thus qualified by the normal standards of materiality and it would appear that, in Judge Cook's view, the defense counsel must attempt to contact the analyst before trial and submit a request as for any other witness. Chief Judge Everett appears to take the middle ground. Recognizing that paragraph 115a serves legitimate government interests, he would require the defense to follow the paragraph's procedure, but "rigid application

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477 See id. at 80.
478 See id. at 82. (C.M.A. 1980) (citing Confrontation and Compulsory Process, supra note 232, at 619 n.143); Imwinkelreid, supra note 470.
479 E.g., United States v. Williams, 3 M.J. 239, 243 (C.M.A. 1977); United States v. Carpenter, 1 M.J. 384, 385-86 (C.M.A. 1976). In United States v. Davis, 14 M.J. 847 (A.C.M.R. 1982), the court held that failure to order a chemist produced was reversible error. In Davis, the court interpreted Vietor as requiring the defense "to make some plausible showing of how the requested witness would be material and favorable to the defense." 14 M.J. at 847 (footnote omitted).
482 See United States v. Vietor, 10 M.J. 69, 71-72 (C.M.A. 1980) (Cook, J.) (counsel was "remiss" in not contacting the witness); United States v. Strangstalien, 7 M.J. 225, 229 (C.M.A. 1979) (Cook, J., concurring in part, dissenting in part).
of these requirements would produce a conflict with an accused’s
strategy and constitutional right to compulsory process" in some
cases. Interviewing the analyst may be impossible in some instan­
ces and strict compliance with paragraph 115 should not be required.
As under Judge Fletcher’s approach, this assumes that the analyst’s
personal testimony is inherently material on the weight given to the
laboratory report.

While the views of each judge have merit, there is another
approach that better reflects the issues involved. Instead of combi­
ing the questions of the analyst’s qualifications and the test proce­
dures actually used, the two questions should be considered separ­
ately. In the abstract, the analyst’s qualifications should seldom be at
issue initially when the test involved is simple, as in the cases of
counting sperm cells, blood typing, or drug analysis. If the test is
complicated, such as neutron activation analysis or human leukocyte
antigen testing, then the analyst’s ability to perform the test and
interpret the results becomes important. Depending on the com­
plexity of the test, the requisite showing of materiality and necessity
in support of a defense request for the analyst should vary. If the test
is a simple one, the defense should be required to interview the
analyst before trial about his or qualifications and to show that the
analyst’s qualifications are inadequate to perform the test. The
underlying presumption is that any analyst is capable of performing
simple tests. When the test is more complex, the analyst’s ability
becomes more important; not everyone can do neutron activation
analysis. Because the test results then depend more on the analyst’s
ability to do the test and read the results, the presumption of compe­
tency is weaker and the court should recognize that the analyst’s
qualifications are inherently material. As a result, though the
defense request for the analyst should be as detailed as possible, the
standard used in determining compliance with paragraph 115a
should be lower.

6 M.J. 624, 627 (A.C.M.R. 1978) (DeFord, J., concurring); United States v. Kilby, 3
481United States v. Vietor, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in
result).
482United States v. Vietor, 10 M.J. 69, 77 (C.M.A. 1980) (Everett, C.J., concurring in
result). (Everett, C.J., concurring in result), 82 (Fletcher, J., concurring in
result) (citing Confrontation and Compulsory Process, supra note 232 at 619 n.145).
483Qualification as an expert requires only that his or her testimony will help "the
trier of fact to understand the evidence or to determine a fact in issue." Mil. R. Evid.
702. The witness need not be the most expert or proficient in his field. United States v.
Barker, 553 F.2d 1013, 1024 (9th Cir. 1977) (Fed. R. Evid. 702). Competency in this
situation only involves the ability to perform the test.
484See Imwinkelried, supra note 470, at 278-83.
485See Mil. R. Evid. 702.
A different standard should be applied when the defense wants to examine the analyst about the test procedures actually used. Because the test procedures can affect the test results, the defense should only have to meet a standard similar to that applied when the analyst's competency to perform or interpret a complex test is involved. Obviously, the defense should always try to determine before trial what the proper procedures are and whether they were used on that particular sample. But, in light of increasing evidence that forensic laboratories are incapable of accurately performing any but the simplest tests, a court should not be too eager to presume the test procedures are proper per se or that the proper procedures were actually used. If in the paragraph 115a request, the defense offers any evidence that the actual procedures were improper, the analyst should be required to testify.

Like many rules of evidence, this approach is based on assumptions about how various scientific tests are performed and who performs them. The armed forces utilize "on the job training" to prepare many personnel to function within the armed forces. If a significant expansion in personnel forced hasty training of otherwise unqualified personnel, it would be appropriate for military judges to assume that the qualifications of a forensic chemist, for example, should be in doubt until shown otherwise by the government. In effect, this would nullify the "presumption" that any normal analyst is capable of performing routine tests.

**IV. DEPOSITIONS AND INTERROGATORIES**

Article 49 of the Uniform Code of Military Justice expressly authorizes any party to take "oral or written depositions" unless prohi-
bited from doing so by the military judge or other proper officer and Military Rule of Evidence 804 permits the use in evidence of depositions under certain conditions. It is apparent that the intent of Article 49 was to utilize depositions in lieu of live testimony. According to the terms of Article 49(d) a deposition may be used only when “the witness resides or is beyond the State, Territory Common­wealth, or District of Columbia in which the court...is ordered to sit, or beyond 100 miles from the place of trial or hearing” or when the witness is actually unavailable or cannot be located.

The Court of Military Appeals has held that the geographic justifications for depositions are invalid insofar as they relate to service members and has strongly suggested that constitutional standards dictate the same result insofar as civilians are concerned. Thus, actual unavailability is necessary. Whatever the Article’s original intent, the primary use of depositions is now clearly limited to pres-

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495 It is probable that depositions were initially used to obtain the testimony of military witnesses stationed far from the situs of trial, see, e.g., J. Winthrop Military Law and Precedents 352-53 (2d ed. 1896, 1920 reprint), and to obtain the testimony of civilians who were not subject to compulsory process as no general statute providing for such process existed. Id. at 352 n.55, 353 n.58. The accused apparently had not right to attend the deposition, at least not at government expense. Id. at 355-57.

496 U.C.M.J. art. 49(d)(1). See note 502 supra.

497 U.C.M.J. art. 49(d)(2) (permits depositions when the witness “by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamendability to process, or other reasonable cause is unable or refuses to appear ...”). The current approach of the Court of Military Appeals to “military necessity” in the general area of witness procurement suggests that, absent declared war, it is improbable that depositions will be justified by military necessity.

498 U.C.M.J. art. 46(d)(3).

499 See note 299 supra.

500 Id. Although Mil. R. Evid. 804(a) is illustrative rather than limiting, its express enumeration of U.C.M.J. art. 49(d)(2) and silence as to Article 49(d)(2), suggests that a deposition obtained under Article 49(d)(1) may be inadmissible under the Military Rules of Evidence.
1983] COMPULSORY PROCESS AND CONFRONTATION

ervation of testimony.501 It was the intent of Congress that no deposi-
tion take place unless the accused is given the opportunity to attend502
and military law gives the accused the right to attend the deposition
with counsel.503 Under these circumstances, the accused's confronta-
tion right is protected as the accused is both present at a prosecution
deposition and has the right through counsel to cross-examine the
witness to be deposed. What the accused loses is the ability to conduct
the cross-examination before the court-members. In a particular
case, this loss of demeanor evidence may be harmful, but if the
witness is actually unavailable for trial, the accused would seem to
have no cognizable constitutional complaint. A similar result follows
from a compulsory process examination. Of course, should the wit-
ess not be actually unavailable, as when the witness has been ren-
dered unavailable due to reassignment to a military duty that
another service member could perform as well, substantial confron-
tation and compulsory process problems may result. These matters
should not arise under present law if only because the government
pays an economic penalty for any attempt to use depositions in lieu of
live testimony even if such use were acceptable under the confronta-
tion and compulsory process clauses. Acute problems may result in
wartime, however, given the need for rapid mobility.

Procedurally, the Code requires that reasonable written notice of
the time and place of the deposition be given to those parties who
have not requested the deposition504 and that “depositions may be
taken before and authenticated by any military or civil officer autho-
rized...to administer oaths.”505 The Manual for Courts-Martial
requires that oral depositions be recorded verbatim and normally be
certified by the officer taking the deposition.506 Appropriate objec-
tions should be made during the deposition, but the deposing officer
is not to rule upon them; they are merely to be recorded for later
resolution.507 Although, absent actual unavailability, the defense

501 See, e.g., MCM, 1969, para. 117a (“Depositions normally are taken to preserve
testimony of witnesses whose availability at the time of trial appears uncertain.”) It is
possible to use the coercive nature of depositions as a discovery device except that it is
not likely that such a deposition would be approved.
502 Uniform Code of Military Justice, Hearings Before a Subcomm. of the House
Comm. on Armed Services on H.R. 2498, 81st Cong., 1st Sess. 696 (1949) (statement of
has been codified in MCM, 1969, para. 117(2), which declares that the right to counsel
held by an accused at a deposition is the same as that prescribed for trial by the type of
court-martial before which the deposition is to be used.
504 U.C.M.J. art. 49(b); MCM, 1969, para. 117(4) permits service of notice on counsel.
505 Id. at para. 117d.
506 Id. at para. 117b(7).
generally has the right to prohibit the receipt into evidence of a deposition, trial tactics are often such that the defense has no particular reason to object to the use of depositions provided that the testimony of the witness can carry sufficient persuasive effect. Given the widespread availability of videotape recorders in the modern society and the armed forces, both trial and defense counsel should make increasing use of videotaped depositions. Such depositions can save substantial amounts of trial time, may be edited following the military judge’s ruling on objections, and will convey the demeanor of the witness to the fact finder. Indeed, given mutual consent, whole portions of trial can be presented in this fashion.

V. CONCLUSION

Like the civilian legal system, the military criminal legal system is a complex amalgam of statute, executive order, rule, and custom. Descended from a disciplinary system perhaps more concerned with certainty and rapid disposition than due process, contemporary military justice provides the accused with protections equal to or superior to that afforded by civilian justice. Yet, like the civilian legal system, further constitutional change is in the wind as the confrontation and compulsory process clauses of the Constitution not only weigh in the balance the military’s unique procedures for obtaining defense evidence, but also delimit what the ordinary rules of evidence may prescribe.

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509 One entire civilian criminal trial has been conducted in this fashion by Judge McCrystal in Ohio. Numerous civil cases have also been so conducted. Because of the ability to present edited videotapes to juries, substantial amounts of juror and trial time have been saved.