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WHERE'S THE REMOTE CONTROL ? IT'S TIME FOR VIRTUAL JUSTICE: A PROPOSAL TO AMEND THE RULES OF COURT-MARTIAL TO ALLOW FOR TESTIMONY BY VIDEO TELECONFERENCE

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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WHERE'S THE REMOTE CONTROL? IT'S TIME FOR VIRTUAL JUSTICE: A PROPOSAL TO AMEND THE RULES OF COURT-MARTIAL TO ALLOW FOR TESTIMONY BY VIDEO TELECONFERENCE

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ABSTRACT

This thesis reviews the history and evolution of the Confrontation Clause, including its purpose and the rights it affords an accused. It specifically focuses on the evolution of the Clause as it changed over time to ensure the defendant's right to confront his accusers at trial.

This thesis argues that video teleconferencing is a permissible exception to the Confrontation Clause where necessity requires its use for an essential witness. This thesis advocates the use of video teleconferencing after a showing that the witness would otherwise be unavailable to testify at trial. It argues that VTC is a permissible exception under these circumstances because it provides substantial compliance with the essential elements of the Confrontation Clause. Moreover, it argues that VTC procedures are inherently reliable because the witness is being presented live during the court-martial to all the court room participants, who can assess the witness' credibility virtually the same way as for witnesses physically present in the courtroom.

This thesis also shows how the Sixth Amendment Compulsory Process Clause supports the use of video teleconferencing for any witness that is essential to the defense.

Finally, this thesis recommends specific amendments to the rules for conducting courts-martial to allow for testimony by video teleconference.

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I. **Introduction.**

The Sixth Amendment Confrontation Clause has evolved and undergone significant change since its inception in early Roman history.[1] This evolution continues today as a result of technological advances in communications that have improved our ability to electronically access remote witnesses that were traditionally beyond the court's jurisdiction. Consequently, courts today are in a position to enhance an accused's opportunity to "confront" witnesses against them in criminal trials.[2]

One of the technological advances that offer the greatest potential to impact the fundamental right of confrontation is video teleconferencing. This thesis discusses this new technology and its current and potential impact on the accused constitutional right of confrontation. To place this subject in the proper context, this thesis reviews the history of the Confrontation Clause, its purpose, and the confrontation rights afforded an accused, beginning with the Roman Empire. It reviews the evolution of the confrontation right through civilian and military courts.

Ultimately, this thesis advocates video teleconferencing as a permissible exception to the Confrontation Clause where necessity requires its use for an essential witness. Furthermore, this thesis argues that the Sixth Amendment Compulsory Process Clause also supports the use of video teleconferencing for any witness that is essential to

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[1] Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959) [hereinafter *Modern Dress*].

[2] Frederic I. Lederer, *Trial Advocacy: The Road to the Virtual Courtroom? A Consideration of Today's – and Tomorrow's – High-Technology Courtroom*, 50 S.C. L. REV. 799 (1999).

the defense. Finally, the thesis posits that video teleconferencing is the best alternative to face-to-face confrontation at trial. In the end, the author recommends a change to the Manual for Courts-martial to allow for video teleconferencing as an exception to the right of confrontation for those cases involving witnesses whose whereabouts are known, but who cannot be subpoenaed, or cannot appear due to physical infirmity or military necessity.

II. History of the Right of Confrontation

A thesis on the Confrontation Clause would be deficient without a review of the origins of the clause. Its beginnings reveal that video teleconferencing is a natural progression in the evolution of this constitutional right. In fact, video teleconferencing provides a remedy that the colonists would likely have embraced because of its capability to reach witnesses who reside far from the place of trial, including those out participating in their seafaring occupations.[3]

A. Roman and British Origins of the Right of Confrontation

Some of the earliest evidence of the right of confrontation can be found in the Bible. Over two thousand years ago, the Roman government bestowed this

[3] Pollitt, *supra* note 1, at 395. In the Carolinas, the central complaint was the inadequate number of circuit and county courts. Persons living in "back countries could not afford the expense of traveling to the courts of Charleston and as a result, "many rogues have been acquitted at court for want of evidence...."

right to accused persons.[4] Even in its infancy, this right protected an accused from convictions based on erroneous charges made by anonymous accusers.

This right was deeply entrenched in early Roman society as evidenced by a Biblical account involving the Apostle Paul. On three different occasions, Paul was brought before his accusers who presented their charges against him. In Jerusalem, the chief priests and all the Sanhedrins were ordered to assemble before the commander of the Roman troops so that he could hear the charges against Paul.[5] The commander heard the charges and Paul's defense but transferred Paul to Jerusalem when he discovered that the Jews were plotting to kill Paul.[6] After arriving in Caesarea from Jerusalem, the Roman Governor Felix waited for Paul's accusers to arrive before hearing his case.[7] Five days later, the high priest, Ananias, some church elders and a lawyer named Tertullus confronted Paul.[8] Although his case was never adjudicated, Felix confined Paul for two years before transferring him to the new governor, Porcius Festus.[9] The chief priests and Jewish leaders immediately besieged Festus with accusations against Paul.[10] When urged by them to send Paul to Jerusalem, Festus requested that some of these

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[4] *Id.* at 384.

[5] Acts 22:30.

[6] *Id.* at 23:20-24. A Roman citizen was not chained or flogged before being found guilty of a crime. *Id.* at 23:25, 29.

[7] *Id.* at 23:35.

[8] *Id.* at 24:1. (accusing Paul of stirring up riots among the Jews all over the world, being the ringleader of the Nazarene sect and with trying to desecrate the temple.

[9] *Id.* at 24:27.

[10] *Id.* at 25:1-3.

accusers accompany him to Caesarea to press charges against Paul.[11] At Caesarea, Paul's accusers made serious charges against him that they could not prove.[12] While discussing this case with King Agrippa, Festus remarked that he refused the Jews' request to condemn Paul based on the accusations they made to Festus in Paul's absence.[13] In fact, Felix responded to the Jews that "it is not the manner of the Romans to deliver any man up to die before the accused has met his accusers face to face, and has been given a chance to defend himself against the charges."[14]

There is also secular evidence that the confrontation right existed in early Roman law.[15] When asked how to treat the new sect known as Christians, the Roman Emperor Trajan instructed Pliny, the Governor of Bithynia, to prosecute Christian offenders in the same manner as other offenders.[16] He specifically advised Pliny that "anonymous accusations must not be admitted in evidence as against any one, as it is introducing a dangerous precedent, and out of accord with the spirit of our times."[17]

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[11] *Id.* at 25:4-5.

[12] *Id.* at 25:7.

[13] *Id.* at 25:15-16.

[14] Coy v. Iowa, 487 U.S. at 1015-16 (quoting *Acts* 25:16).

[15] Anne Rowley, *The Sixth Amendment Right of Defendants to Confront Adverse Witnesses*, 26 AM. CRIM. L. REV. 1547, 1548 (1989).

[16] Pollitt, *supra* note 1, at 384.

[17] *Id.* (quoting O'BRIAN, NATIONAL SECURITY AND INDIVIDUAL FREEDOM, 62 (1955); (tracing history of Confrontation Clause to Roman times).

The right of confrontation in British history appears to have originated in the early 1200s. During this period, the accused was not tried unless his accuser presented at least two complaining witnesses.[18] The accused was permitted to cross-examine these witnesses and won his case if these witnesses disagreed among themselves.[19]

Confrontation and cross-examination also existed in the early trials by ordeal and oath.[20] When the Normans introduced trial by combat into England, these trials contained a modified form of confrontation.[21] In each of these types of trial, the accused could challenge the complaining witnesses proffered by his accusers regarding the veracity of their charges against him.[22]

Later on with the demise of these types of trial came the development of trials by jury.[23] In the twelfth century, trial by jury had no resemblance to modern trials.[24] These early jurors were called from the area of the dispute and "presumably" had first-hand

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[18] Pollitt, *supra* note 1, at 385.

[19] *Id.* at 385-6.

[20] *Id.* at 384-6.

[21] *Id.* at 386 (noting that as these methods of trial ceased, the precursor to trial by jury started with jurors who were witnesses that "knew of the incident first hand."). In trial by oath, the accuser had to prove his injury by reciting an oath, without faltering and supported by complaint witnesses who attested to his "good reputation" or by "helpers' who attested to his "good character.'" *Id.* at 385. As these methods of trial ceased, the precursor to trial by jury started with jurors who were witnesses that "knew of the incident first hand." *Id.*

[22] *Id.* at 384-6 (noting that in a typical trial account declared that there were "lawful witness 'ready to prove [the charge] by oath and battle.'").

[23] *Id.* at 386 (explaining that by 1215, trial by battle and trial by ordeal were no longer supported by the Church, which had greatest influence over criminal matters).

[24] *Id.*

knowledge of the incident.[25] They did not "determine disputed questions of fact" based on evidence presented to them but instead provided their own evidence of the incident based on personal knowledge.[26] Since there were no actual witnesses, the trial was void of any confrontation or cross-examination.[27] The court was still concerned with ensuring a fair and an impartial verdict, and as such, the accused could challenge the jurors based on bias, prior convictions or bad reputations.[28] By 1343, the accused could "attack" up to two juries or "an adverse judgment by attacking the honesty of the jurors."[29]

Modern day juries did not evolve until 1562.[30] During this time, the jury's role changed from first-hand witnesses to "judges of the facts."[31] This new role became necessary when the jury began to call in witnesses in an attempt to get a "disinterested accounts of the facts."[32]

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[25] *Id.* (illustrating by example that if the dispute concerned a deed, the witnesses to the deed were members of the jury).

[26] *Id.* (noting that if the jury had no first hand knowledge, it was 'afforced' or augmented by others who did").

[27] *Id.*

[28] *Id.*

[29] *Id.* at 386-7 (explaining that jurors could be punished for arriving at a false verdict, which was an early form of perjury. If the verdict was questionable, the losing party could "petition the King or Chancellor to summon a second jury to determine whether or not the first jury had arrived at a false verdict.").

[30] *Id.* at 387.

[31] *Id.*

[32] *Id.* (noting that these juries were unable to get a disinterested account from these witnesses resulting in "evidence that was wholly deliberate perjury").

Around the sixteenth century, the Anglican Church's influence in England had declined.[33] With this decline, England began rejecting the former "canonical rule" requiring two witnesses to convict an accused of a crime.[34] Generally, the testimony of one witness became sufficient evidence for a conviction.[35] As a result, the right to confront and cross-examine witnesses developed to ensure that "credible" evidence was offered by "credible" witnesses.[36]

Originally, the right of confrontation and cross-examination was not provided to every accused. This right existed in an "ordinary trial in the assizes;" however, persons charged with treason against the state were not entitled to this right.[37] Anyone charged with treason was consistently convicted on the "confessions exacted" by torture from his alleged coconspirator.[38] A defendant's demands for "face to face" confrontation were consistently ignored.[39]

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[33] Peter N. Williams, *England, A Narrative History by, Part 6: From Reformation to Restoration,* Britannica, *at* http://www.britannia.com/history/narrefhist2.html. (last visited Mar. 15, 2001).

[34] Pollitt, *supra* note 1, at 387.

[35] *Id.* (explaining that some statutes specifically required two witnesses).

[36] *Id.*

[37] *Id.* at 388.

[38] *Id.*

[39] *Id.*

Sir Walter Raleigh was a victim of this system. He was tried and convicted for treason based on the confession of Lord Cobham, his alleged coconspirator.[40] The court denied Raleigh's request to confront his "accuser."[41] The court admitted Cobham's confession knowing Lord Cobham had later repudiated the confession in a letter to Raleigh. Cobham alleged that the confession was obtained by torture.[42] In a dialogue with Raleigh, the court refused his request stating that they feared that criminals would escape if they could not be condemned without witnesses.[43]

> Lord Chief Justice [stated,] 'This thing cannot be granted, for then a number of treasons shall flourish....' Justice Warburton [added,] 'I marvel, Sir Walter, that you, being of such experience and wit, should stand on this point: for so many horse-stealers may escape, if they may not be condemned without witnesses....My Lord Cobham hath perhaps been laboured in that, and to save you, his old friend, it may be that he will deny all that he hath said?'

Raleigh was executed fifteen years later without ever having the opportunity to confront Cobham.[44]

Prisoners in England charged with treason finally received a confrontation right around the mid 1600s.[45] "In 1552, Parliament enacted a law providing that no person

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[40] *Id. See* California v. Green, 399 U.S. 149, 157 n.10 (1970) (noting that at least one author believes the colonist wanted the Confrontation Clause because of the abuses from Raleigh's trial).

[41] Pollitt, *supra* note 1, at 388 (remarking that Lord Cobham was allegedly conspiring with Raleigh to make Arabella Stuart the Queen of England).

[42] *Id.* at 383, 388.

[43] *Id.* at 388 (citing STEPHEN, CRIMINAL PROCEDURE FROM THE THIRTEENTH TO THE EIGHTEENTH CENTURY, in 2 SELECT ESSAYS in ANGLO-AMERICAN LEGAL HISTORY 443, 511 (1908)).

[44] *Id.* at 388. *See* Luminarium, *Sir Walter Raleigh, at* http://www.luminarium.org/renlit/ralegh.htm. (last visited Mar. 16, 2001) (receiving a reprieve, Raleigh's sentence was changed to life in tower where he was imprisoned. He was released in 1616 and set out on an expedition to Guiana. Two years later, he was executed on his original charges due to the insistence of the Spanish ambassador).

shall be convicted of treason unless 'accused by two lawful Accusers; which said Accusers at the Time of the Arraignment of the Party accused, if they be then living, shall be brought in Person before the Party so accused.'" In 1554, this right attached at arraignment if the accused requested confrontation.[46]

These laws received full recognition by all British courts after Parliament admonished the Star Chamber for their illegal treatment of John Lilburne.[47] In 1637, the Church of England accused John Lilburne, a Quaker preacher, of illegally importing books into the country that attacked the Crown's Bishop.[48] Lilburne was a leader of a group of religious and political dissenters that opposed Charles I and the Anglican Church.[49] Lilburne's alleged crime violated the method employed by the Church and state to prevent heresy.[50] Lilburne answered all questions posed by the Attorney General concerning his involvement with the crime, denying any guilt.[51] When questioned about the activities of others, Lilburne refused to answer until he was confronted "face to face" with those that accused him.[52] In response, the Attorney General presented Lilburne to

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[45] Cathleen J. Cinella, Note: *Compromising the Sixth Amendment Right to Confrontation – United States v. Gigante*, 32 SUFFOLK U. L. REV. 135, 140 (1998). *See also* Pollitt, *supra* note 1, at 389.

[46] Pollitt, *supra* note 1, at 390 n.26.

[47] *Id.* at 390.

[48] *Id.* at 389. His "alleged crime violated the system whereby the Church and state prevented heresy by making the bishops of the Church of England the sole arbiters of what the public might read."

[49] *Id.* at 389.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 389-90 (quoting Lilburne, "I know it is warrantable by the law of God, and I think by the law of the land, that I may stand on my just defence, and not answer your interrogatories, and that my accusers ought to be brought face to face, to justify what they accuse me of.").

the Star Chamber charging him with contempt.[53] The Star Chamber "sentenced Lilburne to a fine, to stand in pillory, to be whipped and to stay in jail until he was willing to answer questions.[54] "In 1640, Charles summoned a [new] Parliament to raise funds."[55] This Parliament immediately freed John Lilburne and denounced the Star Chamber for the sentence they rendered against him.[56] After this, there were no disputes over an accused's right of confrontation.[57] In fact, nine years later Lilburne again was brought before the court for treason against "Cromwell's new government."[58] This time, Lilburne "confront[ed], cross-examine[d] and comment[ed] on the testimony of [the] adverse witnesses."[59]

In the sixteenth and early seventeenth centuries in England, it was common for a person to be accused by deposition.[60] At these depositions, justices of the peace, the Privy Council, or a trial judge examined witnesses that were under oath, but the defendant was usually absent.[61] Hearsay objections became common. In 1696, a British

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[53] *Id.* at 390. *See* Rowley, *supra* note 15, at 1550 n.21. ("The Court of the Star Chamber [was] England's primary criminal court during the fifteenth and sixteenth centuries.")

[54] Pollitt, *supra* note 1, at 390 (explaining that the Star Chamber did not "recognize [any] right to silence for an accused").

[55] *Id.*

[56] *Id.* (explaining that Parliament found Lilburne's sentence was not only "illegal and against the liberty of the subject [but] also bloody, cruel, barbarous, and tyrannical").

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] H. Jere Armstrong, The Right of Confrontation – Then and Now 7 (1973) (unpublished thesis, The Judge Advocate General's School) (on file with the Judge Advocate General's School Library.)

[61] *Id.* at 7.

court in *Regina v. Paine* applied the rule against hearsay to statements made under oath.[62] The court explained that the unrestricted use of depositions had deprived the defendant of the benefit of cross-examination.[63] After the Restoration, the courts began acknowledging "the impropriety of using hearsay statements, usually in the form of depositions, made by persons not called as witnesses."[64] About the same time, proposals were made to limit the use of depositions to only when the witness could not be produced.[65] This proposal gained support and led to a restriction on the admissibility of depositions, limiting their use only to cases involving unavailable witnesses.[66] In the nineteenth century, this limited rule was expanded into "a legislature exclusion of all depositions taken by justices of the peace except when the witness was deceased or too ill to travel and the accused had ... [received] an opportunity for cross-examination.[67]

B. The Confrontation Right in Early America

Although the right was present in British law, its adoption in the American colonies was not immediate.[68] Originally, the colonial leaders adopted rules that insured "stringent and swift" executions of judgments in this "distant land inhabited by

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[62] *Id.* at 7 (citing Regina v. Paine, 5 Mod. 163 (1696);

[63] *Id.*

[64] Pollitt *supra* note 1, at 390.

[65] Armstrong, *supra* note 68, at 7.

[66] *Id.*

[67] *Id.* at 7-8. (remarking that this nineteenth century right was mainly for cross-examination limited only by necessity).

[68] Pollitt, *supra* note 1, at 390.

unfriendly people."[69] "[C]ruel laws were mercilessly executed, often times without trial or judgment."[70] This was due in great part to the absence of "trained lawyers" in the colonies that causing the concept of due process to be instituted slowly.[71]

In many colonies, there were demands for "court procedure ... regulated by statute." The Virginia Colony exemplifies some of the changes that resulted. In 1631, after reports of the atrocities occurring in the Virginia colony, the "commissioners of the courts" and the Governor were instructed to make changes in the law "as near as may be after the laws of the realm of England."[72] Despite these instructions, many royal governors still abused their authority. For example, in 1702, the Virginia Council complained against Governor Nicholson's administration because:

> II. He encourages all sorts of sycophants, tattlers, and talebearers, takes their stories in writing, and if he can persuade or threaten them to swear to them, without giving the accused person any opportunity of knowing his accusation or accuser.
>
> III. He has privately issued several commissions to examine witnesses against particular men *ex parte*; he has forced men upon oath to turn informers, and if witnesses do not swear up to what is expected, they are tampered with and additional depositions are taken, but all this while the person accused is not admitted to be confronted with, or defend himself against his defamers.[73]

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[69] *Id.*

[70] *Id.* at 391 ("One colonist, who stole oatmeal, 'had a bodkin thrust through his tongue and was tied with a chain to a tree until he starved.").

[71] *Id.*

[72] *Id.* (It appears that these instructions came from England but there is no indication whether they originated in the Courts, Parliament or from the Crown.).

[73] *Id.* (remarking that the Governor was removed from office).

Similar abuses were occurring in all other colonies and few accused received a right to confront their accusers.[74]

The right of confrontation and cross-examination was finally incorporated into law around the time of the American Revolution.[75] By this time, the colonists believed the confrontation right was so fundamental that their juries dismissed cases wherever they found a "gross denial of the right by the British Crown."[76] "Gross denials" where found in the practice of allowing the testimony of anonymous informants. This was the practice for cases brought under the Navigation and Molasses Acts.[77]

Interestingly, the British Crown had reasserted its authority to deny the confrontation right by removing cases from the authority of the colonial juries to admiralty courts. In admiralty courts, the evidence from absent "seafaring witnesses was regularly admitted through depositions."[78] Furthermore, when the witness was available, the judge examined them privately and tried the cases

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[74] *Id.* at 391-92.

[75] *Id.* at 395. *See* Rowley, *supra* note 15, at 1552.

[76] Rowley, *supra* note 15, at 1552.

[77] *Id.*

[78] Pollitt, *supra* note 1, at 397.

without a jury.[79] These types of trials caused the colonists to again demand "the inalienable rights of Englishmen."[80]

In 1774, the First Continental Congress endowed the colonists with the rights available in English common law.[81] In a published address to the inhabitants of Quebec, the Congress enumerated these common law rights to include the right to a "fair trial, and full enquiry, face to face, in open court, before as many people as chuse to attend."[82]

On July 4, 1776, the thirteen colonies declared their independence from Britain.[83] Soon thereafter, each state adopted individual constitutions that included inherent rights like the right of an accused to be confronted at criminal prosecutions with the "accusers and witnesses."[84]

C. Adoption of the Sixth Amendment Right of Confrontation

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[79] Rowley, *supra* note 15, at 1552. Accused persons consistently lost their goods in these cases. If the accused did not claim their goods or contest the allegations, they forfeited their goods. Few accused appeared at vice-admiralty courts "presumably because of the widespread belief that a fair trial could not be obtained. (The Rhode Island Vice-Admiralty Court has only one recorded case "where the advocates carried on a sort of cross-examination. Pollitt, *supra* note 1, at 397).

[80] Pollitt, *supra* note 1, at 397 (explaining that the Stamp Act Congress of 1765 encapsulated the "most essential rights and liberties of the colonists, including trial by jury").

[81] *Id.* at 397-98.

[82] *Id.* at 398.

[83] Declaration of Independence.

[84] Pollitt, *supra* note 1, at 398 (stating that Virginia was the first to adopt a Bill of Rights with this provision, followed by Pennsylvania, Delaware, Maryland, North Carolina, Vermont, Massachusetts and New Hampshire with similar clauses).

Despite its existence in each state, the colonists still saw a need to codify this right of confrontation in the Constitution.[85] During the Constitutional Convention in 1778, several states specifically addressed the propriety of including these rights in the Constitution.[86] Abraham Holmes of Plymouth, Massachusetts arguing for inclusion, commented on the absence of these rights from the Constitution: "The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantages of cross-examination, we are not yet told."[87] In fact, most states refused to ratify the Constitution until they were assured that the First Congress would propose a Bill of Rights that contained judicial safeguards similar to those contained in their state versions.[88] In 1785, the Bill of Rights was added which includes a confrontation right in its Sixth Amendment.[89] It reads: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor...."[90]

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[85] *Id.* at 398-99. (British statesmen "vigorously" enforced all existing laws of trade and navigation and "new laws, known collectively as the Sugar Act, in an attempt to reduce the public debt that resulted from the French and Indian War. Enforcement of the customs laws were accomplished by levying heavy taxes and restricted maritime trade and, the courts encouraged anonymous informants and rewarded them for the information they provided. When a ship was seized for customs violations, if the action was unsuccessfully disputed, "the ship or its cargo was sold and the proceeds divided, one half to the crown, the other half equally between the informer and those making the seizure. *Id.* at 396-97.)

[86] *Id.* at 399.

[87] Rowley, *supra* note 15, at 1553.

[88] Pollitt, *supra* note 1, at 398-99.

[89] *Id.* at 399.

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

As most scholars and the Supreme Court have asserted, the reason behind the Framer's codification of the Sixth Amendment was to:

> prevent depositions or *ex parte* affidavits ... being used against the prisoner in lieu of personal examination and cross-examination of the witness [where] the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[91]

Confrontation at trial provides the defendant this opportunity. "[T]he former colonies sought to put the right of confrontation 'beyond the reach of the ordinary political processes and even beyond that of the angry populace."[92] As such, an accused would not be deprived of the right so easily.

Confrontation provided exactly the safeguard for which it was adopted.[93] An accused could challenge his accuser, which many times resulted in false evidence being revealed. "Sir Thomas Smith, Secretary of State to Queen Elizabeth, pointed out in the sixteenth century that witnesses were required to testify before the adverse parties and that '[t]he adverse party or his advocates ... interrogateth sometimes the witnesses and driveth them out of countenance.'"[94] As the cases in the civilian courts illustrate, the confrontation right developed into a powerful, adversary tool, ferreting out unreliable witnesses and decreasing the chances that untrustworthy evidence will be relied upon by the trier of fact.

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[91] Mattox v. United States, 156 U.S. 237 (1895).

[92] Rowley, *supra* note 15, at 1553.

[93] Pollitt, *supra* note 1, at 387.

[94] *Id.* (citing 1 Holdsworth, *A History of English Law* 334 (7th ed., 1956)).

III. Development of the Right of Confrontation through the Civilian Courts

Confrontation Clause cases did not reach the United States Supreme Court for over one hundred years after the adoption of the Bill of Rights.[95] *Mattox v. United States*, the seminal case was decided in 1895.[96] Starting with *Mattox* the Court began to examine and define the parameters of the confrontation right.[97] For the most part, the Supreme Court adhered to a "case-by-case approach" in resolving the scope of the right and its relationship to other common law rules or rules of evidence.[98]

From the initial case on confrontation to the present, the Supreme Court has provided significant guidance in this area. Through case law it was determined that ideally, "[t]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. This guarantee derives not only from the literal text of the Clause, but also from our understanding of its historical roots."[99] Through further case law, the confrontation right was translated by the Court into a mere "preference for face-to-face confrontation" at trial, with an attendant right of cross-examination.[100] This means that when possible, the witness appears at trial, in the

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[95] Rowley, *supra* note 15, at 1554.

[96] Mattox v. United States, 156 U.S. 237 (1895).

[97] *Id.*

[98] Rowley, *supra* note 15, at 1555.

[99] Maryland v. Craig, 497, U.S. 836, 844 (1990).

[100] Ohio v. Roberts, 448 U.S. 56, 63 (citing Douglas v. Alabama, 380 U.S. 415, 418 (1965)).

presence of the defendant, and the defendant has an "opportunity to challenge his accusers in a direct encounter before the trier of fact."[101] In this way, the purpose of the Sixth Amendment is furthered through the testing and sifting of the evidence by the accused and the fact finder.[102]

IV. Elements of the Confrontation Clause

Most importantly, the Supreme Court has determined that the essential elements of the Confrontation Clause are physical presence, oath, cross-examination, and opportunity for observation of witness demeanor by the fact finder.[103] These elements give the defendant more than just a face-to-face meeting. His meeting becomes a personal examination that tests the evidence, which is being presented by a witness whose entire testimony is presented under oath and subject to cross-examination. The oath is thought to impress upon the witness "the seriousness of the matter" and to help guard against the lie because the witness is aware of "the possibility of a penalty for perjury."[104] With the opportunity for cross-examination, the defendant has an opportunity "to draw out discrediting demeanor to be viewed by the factfinder."[105]

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[101] *Id.* at 77 (Brennan J., concurring).

[102] *Id.* at 63-64.

[103] *Id.* at 69 (California v. Green, 399 U.S. 149, 166 (1970)).

[104] *Roberts*, 448 U.S. at 69 (quoting *Green*, 399 U.S. at 158).

[105] Ohio v. Roberts, 448 U.S. 56, 69 (1980).

Finally, the meeting occurs before the fact finder who can observe the witness and assess credibility.[106]

The Court has discussed the Clause's physical confrontation aspect in the majority of its cases.[107] *Mattox v. United States* illustrates that the constitutional protection is preserved only when the prisoner has seen the witness face to face and subjected him to cross-examination.[108] *Kirby v. United States* reasserts that the accused must be able to "look upon" the witness while being tried and cross-examine that witness."[109] *Barber v. Page* and *Dowdell v. United States* each emphasized the importance of physical confrontation at trial.[110] While *Coy v. Iowa* reaffirmed physical confrontation as a adversary tool "that promotes reliability and ensures fairness."[111]

The Court has also placed a high value on of the cross-examination element. As a part of the defendant's confrontation right, cross-examination has the "potential for "exposing falsehood and bringing out the truth."[112]

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full

[106] Maryland v. Craig, 497 U.S. 836, 845-46 (1990).

[107] Coy v. Iowa, 487 U.S. 1012, 1016 (1988).

[108] Mattox v. United States, 156 U.S. 237, 244 (1895).

[109] Kirby v. United States, 174 U.S. 47.

[110] Cinella, *supra* note 45, at 143 n.56 (citing Barber v. Page, 390 U.S. 719, 725 (1968. Dowdell v. United States, 221 U.S. 325, 330 (1911)).

[111] *Coy*, 487 U.S. at 1019.

[112] Pointer v. Texas, 380 U.S. 400, 403-4 (1965).

> judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.[113]

The Court has explained that the defendant has an opportunity for cross-examination but is not guaranteed effective cross-examination.[114] The Court has also praised the right of confrontation and cross-examination as "an essential and fundamental requirement for the kind of fair trial, which is this "country's constitutional goal."[115]

Confrontation also allows the fact finder to observe the witness' demeanor on the stand and thereby judge his credibility.[116] At the same time, the witness is under oath and faced with the "seriousness of the matter" for which they are testifying, thereby increasing the chances that the testimony will be truthful.[117]

Most importantly, the Court has found that the combined effects of the essential elements of confrontation "serves the purposes of the Confrontation clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."[118]

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[113] *Id.* at 405 ("This Court has been zealous to protect these rights from erosion.").

[114] Delaware v. Fensterer, 474 U.S. 15, 20 (1985).

[115] *Pointer,* 380 U.S. at 405 (citing California v. Green, 399 U.S. 149, 158 (1970) (remarking that cross-examination is the "greatest legal engine ever invented for the discovery of truth").

[116] Maryland v. Craig, 497 U.S. 836, 845-46 (1990).

[117] *Id.*

[118] *Id.* at 846.

V. Development of Exceptions

Despite the previously enunciated benefits of confrontation, the defendant is not guaranteed an "absolute right" to a "face-to-face meeting at trial."[119] The court has given considerable guidance relating to this physical confrontation right.

Physical confrontation or the right to a face-to-face meeting is derived from a literal interpretation of the Confrontation Clause. This literal interpretation would bar all evidence except that presented by the declarant at trial.[120] The Supreme Court rejected a literal application of the Clause as "unintended and too extreme" because it "would abrogate virtually every hearsay exception."[121] While emphasizing that the face-to-face confrontation requirement will not be easily dispensed with, the Court has not ruled that the physical confrontation element is "indispensable."[122] The Court has, however, placed limitations on when this right will be compromised or sacrificed, ruling that it will be sacrificed "only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[123] Accordingly with this in mind, the Court has allowed certain hearsay to be routinely

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[119] *Id.* at 844.

[120] Ohio v. Roberts, 448 U.S. 56, 63 (1980).

[121] Mattox v. United States, 156 U.S. 237, 242-243 (1895) (noting that traditional hearsay exceptions existed at the time the Bill of Rights was enacted).

[122] Maryland v. Craig, 497 U.S. 836, 849-50 (1990).

[123] *Id.* at 850.

admitted with the admonishment that, "the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."[124]

Recognizing again a literal application of the Clause would exclude all out-of-court statements from unavailable witnesses, including any evidence recognized before the ratification of the Constitution, the Supreme Court has "attempted to harmonize the goal of the Clause – placing limits on the kind of evidence that may be received against a defendant."[125] The Court has emphasized that exceptions to the confrontation right are unavoidable for there is a "societal interest in accurate factfinding" that requires courts to acknowledge that there is "a possibility that such statements might have to be considered as evidence."[126]

Mattox v. United States is the first case handled by the Supreme Court after the passage of the Sixth Amendment. In *Mattox*, the Court found no Confrontation Clause violation resulted when the trial court admitted a copy of the stenographic report of the former testimony of a deceased witness that the stenographer verified under oath was accurate.[127]

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[124] *Mattox*, 156 U.S. at 243.

[125] 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 811 (1991) (citing Bourjaily v. United States, 483 U.S. 171 (1987)).

[126] GILLIGAN, *supra* note 125, at 811-12.

[127] Mattox v. United States, 156 U.S. 237, 240 (1895).

The Court observed that this report was competent evidence of the witness' testimony, especially since the defendant had the opportunity at the first trial to cross-examine the witness.[128] The defendant's confrontation right was "preserved" by his initial face-to-face encounter at trial. The Court also resolved that the evidence was competent by analogizing it to dying declarations. Comparing the deceased witnesses' prior testimonies to dying declarations, the Court commented that the latter have been recognized from "time immemorial" as "competent testimony;" although, dying declarations are rarely made under the circumstances countenanced by the Clause.[129] The Court argued that prior testimony is as trustworthy, if not more than dying declarations, because prior testimony is made under oath.[130] The Court explained that the Confrontation Clause was never intended to be a windfall for an accused that allowed him to go "scot free simply because death ha[d] closed the mouth of that witness" whose previous testimony triggered his conviction.[131]

Finding no error, *Mattox* marks the court's initial acceptance of prior testimony as an exception to the Confrontation Clause. The Court explained that courts must accept these well-established hearsay exceptions and attempt to align them with the interests of

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[128] *Id.* at 243-44. "[T]he right of cross-examination having once been exercised, it was no hardship upon the defendant to allow the testimony of the deceased witness to be read" at a second trial. *Id.* at 242.

[129] *Id.* at 243. ("They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury.").

[130] *Id.* at 244 ("[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted because made by a person then dead, under circumstances which give his statements the same weight as if made under oath, there is equal if not greater reason for admitting testimony of his statements which were made under oath.").

[131] *Id.* at 243.

society.[132] The Court stated that, "[a] technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."[133] "[G]eneral rules of law ... however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."[134]

In *Coy v. Iowa*, the Supreme Court emphasized the importance of the defendant's physical confrontation right, reversing the defendant's conviction where the government used a screening device to separate the accused from the alleged child victims.[135] In his majority opinion, Justice Scalia stressed that "confrontation is essential to fairness" and ensures the integrity of the factfinding process through its cross-examination component.[136] Significantly, in a concurring opinion, Justice O'Connor agreed that under the circumstances of the case, the screening procedure violated *Coy*'s confrontation rights.[137] Justice O'Connor, however, remarked that the right to confrontation is not absolute and may give way to other "competing interests." After a case-specific finding of necessity, these "competing interests" or important public policy reasons may in the

[132] Mattox v. United States, 156 U.S. 237, 243 (1895).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1019-20.

[137] *Id.* at 1022 (O'Connor, J., concurring).

future support the use of child shield devices.[138] She remarked that protection of child abuse victims from trauma constitutes an important public policy.[139]

In *Maryland v. Craig,* the Court allowed the defendant's confrontation rights to be denied for a substantial state policy.[140] In Craig, the policy was "the state's interest in protecting the psychological and physical well-being of child abuse victims."[141] Maryland's state interest justified the use of closed circuit television procedures. The Supreme Court, agreeing with the trial court, found the procedure "necessary to further the important state interest [of] preventing trauma to child witnesses in child abuse cases."[142] The Court specifically held that the procedure "adequately ensure[d] the accuracy of the testimony and preserve[d] the adversary nature of the trial."[143]

A. Admissible Hearsay

The Supreme Court has consistently held that the Confrontation Clause is not a complete bar to other reliable evidence at trial despite the Clause's preference for face-to-

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[138] *Id.* at 1022.

[139] *Id.* at 1025. *See* Cinella, *supra* note 45, at 146-48.

[140] Maryland v. Craig, 497 U.S. 836 (1990).

[141] *Id.* at 853.

[142] *Id.* at 856-57.

[143] *Id.* ("Indeed, where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact *disserve* the Confrontation Clause's truth-seeking goal." *Id.* at 851-52).

face confrontation.[144] The Court has pronounced that hearsay is "constitutionally admissible against the defendant, [as an exception,] when the witness is unavailable and the hearsay either 'falls within a firmly rooted hearsay exception' or has 'particularized guarantees of trustworthiness.'"[145] Courts also have the option of allowing evidence in contravention of the defendant's confrontation right under the residual hearsay exception. Only hearsay evidence that provides "equivalent circumstantial guarantees of trustworthiness" is constitutionally admissible under the residual hearsay exception.[146]

The Court has interjected that the Confrontation Clause is not a codification of the hearsay rules and its exceptions.[147] Instead, the Court remonstrates that both rules "protect similar values," but the Confrontation Clause has its own independent purpose.[148] We will now explore this separate rule and its recognized exceptions and their relationship to the Clause. One category of hearsay exceptions is permitted only after the witness' unavailability to appear at trial is established.

B. Unavailable Witness

In a normal case, the prosecution can only overcome the Framer's preference for face-to-face confrontation by producing the witness at trial or "demonstrat[ing] the

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[144] Davis v. Alaska, 415 U.S.308, 315 (1974).

[145] GILLIGAN, *supra* note 125, at 812.

[146] *Id.* at 829.

[147] California v. Green, 399 U.S. 149, 151-53, 158 (1970).

[148] *Id.* at 151-53, 158.

impossibility of that endeavor."[149] Any argument that it is impossible to produce the witness is tested under the Confrontation Clause's definition of "unavailability."[150]

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."[151] Futile acts are not required. [152] If it is impossible for the prosecution to obtain the witness, "good faith demands nothing of the prosecution."[153] "[I]f 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.'"[154]

Where the witness is unavailable under the Clause, the Court has allowed an exception to the defendant's confrontation right when the evidence being introduced is reliable. The exception is illustrated in several cases that permit the use of prior testimony of the "unavailable witness at the trial under certain circumstances.[155] The Supreme

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[149] Ohio v. Roberts, 448 U.S. 56, 65, 78-79 (1980).

[150] *Id.* at 74 (quoting, Barber v. Page, 390 U.S. 719, 724-725 (1968).

[151] *Roberts*, 448 US at 74.

[152] *Id.* (referencing specifically "the witness' intervening death).

[153] *Id.* at 74-75.

[154] California v. Green, 399 U.S. 149, 189 n.22 (1970).

[155] Ohio v. Roberts, 448 U.S. 56, 78(1980).

Court has also explored the "lengths" that the prosecution had to go to show good faith effort.[156]

In *Kirby v. United States*, the defendant's confrontation rights were violated when the government introduced the convictions of three other felons prosecuted for stealing U.S. government property. Kirby was charged with receiving the same stolen property.[157] This evidence was introduced at Kirby's trial even though he was not connected with nor represented at these other trials.[158] The prosecution introduced these convictions without presenting the three convicted criminals at Kirby's trial. As a result, Kirby was deprived of any opportunity to face his accusers by the introduction of the convictions.[159]

Barber v. Page is a case where the Court again declared that the prosecution had not met its burden to show constitutional unavailability.[160] In *Barber*, the Government introduced the prior testimony of a witness, Woods, who was absent from the state at the time of trial. Woods, a co-defendant was incarcerated in a Texas federal prison at the time of trial. Assuming that the witness' mere absence from the jurisdiction was sufficient grounds for dispensing with confrontation, the State of Oklahoma made no

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[156] Barber v. Page, 390 U.S. 719, 723 (1968).

[157] Kirby v. United States, 174 U.S. 47, 50 (1899).

[158] *Id.* at 68.

[159] *Id.* at 54-56. (noting that Kirby was also deprived of his "presumption of innocence" by the evidence).

[160] Barber, 390 U.S. at 723.

attempt to secure Woods' presence at trial.[161] The Court remarked that it was untenable to continue to allow a court to "dispense with confrontation" based solely on the fact that the witness was outside the trial court's jurisdiction.[162] This was especially true, the Court stated, because of the increased cooperation between States and between the States and the Federal Government, which had made witnesses outside a jurisdiction more accessible.[163] The Court held that under the circumstances, Woods was not "unavailable" and a court could not dispense with the defendant's right of confrontation "so lightly."[164]

Barber established the "good-faith" efforts test for future "unavailable" witnesses cases. This test is based on the premise that "a witness is not unavailable for purposes of the former testimony exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."[165] In *Barber*, the court held that the prosecution failed to make a "good-faith effort to obtain Woods' for trial."[166] The State's failure was "the sole reason why Woods was not present at the trial.[167]

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[161] *Id.* at 720, 723.

[162] *Id.* at 723.

[163] *Id.* at 723 ("For example, in the case of a prospective witness currently in federal custody, 28 U. S. C. § 2241 (c)(5) gives federal courts the power to issue writs of habeas corpus *ad testificandum* at the request of state prosecutorial authorities.")

[164] *Id.* at 725.

[165] *Id.* at 724-25.

[166] *Id.* at 724-25. (remarking that their only efforts were to "ascertain that he was in a federal prison outside Oklahoma).

[167] *Id.* at 725.

In *Pointer v. Texas,* after deciding that the Sixth Amendment's Confrontation Clause is applicable to the States through the Fourteenth Amendment, the Court refused to allow the preliminary hearing testimony of a victim that had moved to California.[168] During the preliminary hearing, the witness was not cross-examined. Allowing this testimony deprived the accused of his "Sixth Amendment guarantee of confrontation and cross-examination and was a denial of his guarantee of due process of law.[169]

In *Mancusi v. Stubbs*, the defendant kidnapped the witness and his wife, and shot them both, killing the wife.[170] Nine years after the first trial, the court could not compel the witness, a naturalized American citizen, to return from Sweden where he had taken up permanent residence.[171] The Supreme Court recognized that the State of Tennessee was "powerless to compel" the witness' attendance, "either through its own process or through established procedures depending upon the voluntary assistance of another government."[172] Consequently, the Court ruled that the witness was unavailable for purposes of the Confrontation Clause.[173]

Where unavailability is established, the Supreme Court has allowed a limited exception to the defendant's confrontation right for the admission of hearsay in the form

[168] Pointer v. Texas, 380 U.S. 400, 407-8 (1965).

[169] *Id.* at 405, 406.

[170] *Id.* at 208.

[171] *Id.* at 209 (explaining that Stubbs was appointed counsel four days before trial. Nine years later he successfully challenged the trial and the State of Tennessee retried him).

[172] *Id.* at 212.

[173] Mancusi v. Stubbs, 408 U.S. 204 (1972).

of prior testimony.[174] *Ohio v. Roberts* provides a two-part test that courts use to determine whether this exception is applicable.[175] First there must be a showing of unavailability; and, second, the witnesses' statement must bear adequate indicia of reliability.

In *Roberts*, the Court agreed with the trial court and Ohio Supreme Court's conclusion that the witness was "unavailable" in the constitutional sense.[176] After the unsuccessful delivery of five subpoenas, the witness could not be located and her family did not know her "whereabouts."[177] Based on these facts, the Court found that the prosecution had made a good faith effort because even with further attempts, there was a "great improbability" that the witness would have been located and produced at trial."[178] Futile acts are unnecessary.[179]

C. Indicia of Reliability

Again, hearsay evidence is inadmissible against an accused unless it bears adequate "indicia of reliability."[180] The Supreme Court has enunciated a category of

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[174] Ohio v. Roberts, 448 U.S. 5, 65 (1980).

[175] *Id.* at 65.

[176] *Id.* at 75.

[177] *Id.* at 76.

[178] *Id.* at 75.

[179] *Id.* at 76. ("We accept as a general rule, of course, the proposition that 'the possibility of a refusal is not the equivalent of asking and receiving a rebuff.").

[180] GILLIGAN, *supra* note 125, at 820.

hearsay exceptions that is described as "firmly rooted."[181] This hearsay is described as "rest[ing] upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'"[182] In this category, the evidence is admissible despite the witness' "unavailability" because reliability is inferred.[183] Currently, the Supreme Court has pronounced that only two hearsay exceptions constitute "firmly rooted" hearsay: former testimony and co-conspirator testimony.[184]

When the hearsay statement is not "firmly rooted, and the declarant is unavailable, the hearsay statement is excluded "absent a showing of particularized guarantees of trustworthiness."[185] Without this "indicia of reliability," the statement cannot "effectively substitute for defense's opportunity for cross-examination of the witness."[186] The statement's "inherent trustworthiness" must be evident can not be proven by "reference to other [corroborating] evidence at trial."[187] The statements

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[181] Bourjaily v. United States, 483 U.S. 171, 183 (1987) ("We think that these cases demonstrate that co-conspirator hearsay, when made in the course and in furtherance of the conspiracy, have a long tradition of being outside the compass of the general hearsay exclusion. Accordingly, we hold that the Confrontation Clause does not require a court to embark on an independent inquiry into the reliability of statements that satisfy the requirements of Rule 801(d)(2)(E)).")

[182] Ohio v. Roberts, 448 U.S. 56, 66 (1980) (citing Mattox v. United States, 156 U.S. 237, 244 (1895)).

[183] *Roberts,* 448 U.S at 66.

[184] GILLIGAN, *supra* note 125, at 820. ("The Court has indicated in dicta that business records and dying declarations are 'firmly rooted.'").

[185] *Roberts,* 448 U.S. at 66.

[186] GILLIGAN, *supra* note 125, §20-32.25.

[187] *Id.* at 825.

trustworthiness may be established by utilizing the "totality of the circumstances" surrounding its making "that render the declarant particularly worthy of belief."[188]

Lastly, the residual hearsay exception describes admissible hearsay as:

> A statement is not specifically covered by any ... [other] exception[ ] but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[189]

Illustrating their position on hearsay, the Supreme Court in *California v. Green*, considered the propriety of admitting a witness's prior inconsistent statement at trial in contravention of the defendant's physical confrontation right.[190] In *Green*, an adverse witness from Green's preliminary hearing became uncooperative at the trial claiming memory loss for the events he had previously described in his preliminary hearing testimony.[191] "The government introduced ... the witness's preliminary hearing testimony to prove the truth of the matter asserted and the Court held the evidence admissible as prior inconsistent statements."[192] The Court held that the defendant's confrontation rights were not violated "because the essential elements of confrontation:

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[188] *Id.* at 825.

[189] *Id.* at §20-32.25(c). M.C.M., *supra* note 226, at M.R.E. 807. These provisions were formerly contained in M.R.E. 803(24) and 804(b)(5).

[190] California v. Green, 399 U.S. 149 (1970).

[191] *Id.* at 151-52.

[192] *Id.* at 152. Check to see if quote.

oath, cross-examination, and observation of the witness's demeanor, adequately preserved the defendant's constitutional rights."[193]

In *Ohio v. Roberts*, the Court also clarified the relationship between the hearsay exception and the Confrontation Clause. As explained in the previous section on unavailable witnesses, the Court developed a two-part test for the admissibility of hearsay that complies with the Confrontation Clause. The test first requires a showing of necessity based on witness "unavailability" before the court can dispense with the face-to-face meeting at trial. [194] After the prosecution demonstrates the declarant's unavailability, the test requires the prosecution to show that the evidence contains an adequate "indicia of reliability."[195] This indicia of reliability provides the accuracy envisioned by the rule and "afford[s] the trier of fact a satisfactory basis for evaluating the truth" of the evidence even though there is no confrontation with the declarant.[196] The Court in *Roberts* found the witness' "prior testimony at a preliminary hearing bore sufficient 'indicia of reliability.'"[197] The defendant, through counsel, thoroughly used his opportunity to cross-examine the witness, and "the transcript ... bore sufficient 'indicia

[193] *Id.* at 165.

[194] Ohio v. Roberts, 448 U.S. 56, 65 (1980).

[195] *Id.* at 65.

[196] *Id.* at 65.

[197] *Id.* at 73.

of reliability' and afforded 'the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'"[198]

VI. Development of the Right of Confrontation in the Military

Although confrontation in the military also originates in Roman history, this thesis begins its review after the Constitution's ratification, a point where American military history had its official beginning.[199]

> Historically, ... our military law is very considerably older than our Constitution. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument therefore [is] in general referred to as the source of the military as well as the other law of the United States.[200]

From 1776 on, Congress provided the rights and protections for military defendants, even before they were available to their civilian counterparts.[201] The military accused received appointed counsel in 1920,[202] while civilian accused waited until 1938.[203] In 1920,[204] the Army provided "automatic appellate review at public expense"

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[198] *Id.*

[199] JAMES SNEDEKER, A BRIEF HISTORY OF COURTS-MARTIAL 1954.

[200] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 15 (reprint 1886) (2d ed. 1920).

[201] Frederick B. Weiner, Court-Martial and the Bill of Rights: The Original Practice, 72 HARV. L. REV. 266, 300 (1958).

[202] *Id.* at 300 (citing Act of June 4, 1920, ch. 227, § II, art. II, 41 Stat. 797).

[203] *Id.* at 300 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

[204] *Id.* at 300 (citing Act of June 4, 1920, ch. 227, § I, art. 50 ½, 41 Stat. 797).

followed by the same right in all services by 1951.[205] Such reviews are still not automatic in civilian courts today.[206]

Until the trial of General Hull, "over half a century after the adoption of the Bill of Rights in 1789, its provisions were never invoked in a military situation."[207] On this occasion, President James Madison, the father of the Bill of Rights, approved the court-martial's denial of Hull's asserted Sixth Amendment right to counsel.[208]

The individual Armed Forces began claiming the protections of the Constitution long before the Supreme Court ruled that the Constitution had any applicability.[209]

> In 1920, the Judge Advocate General of the Navy declared that 'all the amendments are applicable to persons in the land and naval forces in letter as well as in spirit, except the sixth amendment, and so much of the fifth amendment as relates to presentment or indictment by grand jury.[210]

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[205] *Id.* at 300 (citing UCMJ arts. 65-70, 10 U.S.C. §§ 865-70 (Supp. V, 1958)).

[206] *Id.* at 300.

[207] *Id.* at 29-31 ("There are no complete proceedings of trials by American Army courts-martial prior to 1801 now in existence, inasmuch as all of the War Department files were destroyed by fire on the night of November 8, 1800.). ????

[208] Frederick B. Weiner, Court-Martial and the Bill of Rights: The Original Practice, 72 HARV. L. REV. 1, 30-31 (1958).

[209] *Id.* at 33 (noting that Navy trials as early as 1808 granted requests by accused for counsel and allowed these counsel to participate.)

[210] *Id.* at 300-301 (citing Court-Martial Order 48 of 1920, at 10, 13, in I NAVY DEPARTMENT, COMPILATION OF COURT-MARTIAL ORDERS FOR THE YEARS 1916-1937, at 595, 597 (1940)) (noting that the Navy TJAG found the sixth amendment protections of a public trial applicable to the military).

In 1945, the Board of Review and the Assistant Judge Advocate General for the European Theater applied the Fifth Amendment double jeopardy clause to court-martials.[211]

Originally, the right of confrontation originated from the requirement that every prosecution witness testify in person.[212] The only exceptions to in-court testimony existed for the prior testimony of deceased or unavailable witnesses.[213] Since the late 1800s, the Army and Navy have each allowed some former testimony hearsay to be introduced at trial.[214] The Army in 1786 and the Navy in 1800 allowed "the prosecution to use the records of courts of inquiry as evidence in noncapital courts-martial when oral testimony was not available."[215]

Hearsay was inadmissible with a few exceptions prior to 1920.[216]

> "This kind of testimony is uniformly held inadmissible, not only on account of its intrinsic uncertainty growing out of the fact that it consists of matter repeated at second hand at least,...but especially because it introduces into the case statements not made under oath, and the truth of which cannot be tested by criterion of cross-examination."[217]

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[211] *Id.* at 301 (citing Wade v. Hunter, 3365 U.S. 684 (1949).

[212] Wiener, *supra* note 201, at 282.

[213] *Id.*

[214] *Id.*

[215] *Id.* at 283 (the Army did not allow these records to be used in dismissal cases).

[216] WINTHROP, *supra* note 200, at 325. This included dying declarations and some types of confessions.

[217] *Id.* at 325 (citing Chief Justice Marshall from Queen v. Hepburn, 7 Cranch 295, reaffirmed in Hopt v. Utah, 110 U.S. 574).

Courts believed the best way to prevent hearsay was to call in the witness with knowledge of the information.[218] Reviewing officers of court-martials "repeatedly disapproved" any introduction of hearsay evidence.[219] In *Merritt v. Mayor*, the court stated, "the declarations and conversations of military officers are not exempted from the common rules of evidence, but are mere hearsay and excluded as those of ordinary citizens.[220] In another case, the court disapproved the proceedings because the judge advocate discussed statements made to him by witnesses not examined at trial.[221] The court declared that his remarks were inadmissible and should be presented by a witness that was called and sworn before the court.[222]

Prosecutors at Army courts-martial have "been permitted to use depositions in noncapital cases since 1779.[223] As a result, the majority of confrontation issues have evolved in the context of depositions, since the Sixth Amendment was not found to be applicable to the military until 1960.[224] Any discussion of the deposition practice and confrontation must address the issue of the "unavailable" witnesses.[225] Although today,

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[218] *Id.* at 325 n.78.

[219] *Id.*

[220] *Id.*

[221] *Id.* (citing Merrit v. Mayor, 5 Cold. 95).

[222] *Id.* (citing a case before G.C.M.O. 14, Dept. of the East, 1894).

[223] Wiener, *supra* note 200, at 282 (noting that depositions provisions were re-enacted by Congress in 1786 and 1806 and has been the law since that time)

[224] United States v. Jacoby, 29 C.M.R. 244, 247 (C.M.A. 1960).

[225] Weiner, *supra* note 201, at 283 (remarking that depositions were not "questioned on constitutional grounds until after the ... Civil War, at which time it was sustained on the ground of inapplicability of the Sixth Amendment to military trials").

there is very little difference between a military court's analysis of unavailability and that of federal courts.

Unavailability and Depositions in the Military.

Early deposition hearings bore little resemblance to the depositions that are common today.[226] The earliest Army rules for depositions gave little guidance regarding their use in court-martials. These rules indicated that "in cases not capital in trials by court-martial, depositions may be given in evidence."[227] Initially, the prosecution could present a deposition for the testimony of any witness.[228]

However, beginning with Article 74 of the American Articles of War of 1806, the right of confrontation was addressed by limitations placed on the use of depositions in noncapital cases.[229]

> "On the trial of cases not capital, before courts-martial, the depositions of witnesses, not in the line or staff of the army, may be taken before some justice of the peace, and read in evidence; provided the prosecutor and *person accused are present* at the taking of the same or duly notified thereof."[230]

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[226] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 702 (2000) [hereinafter MCM]. *See* UCMJ art. 49 (2000).

[227] WINTHROP, *supra* note 200, at 352 n.55 (citing a Resolution of Congress of Nov. 16, 1779).

[228] *Id.*

[229] *Id.* at 983.

[230] *Id.* (citing Art. 74, American Articles of War of 1806). [emphasis added]

The rule actually only allowed civilian witnesses to be deposed.[231] Article 74 is the only rule that specifically required that the accused attend the deposition; however, the accused had no right to have counsel present.[232]

Later versions of the rules placed greater restrictions upon the witnesses that could be deposed and omitted any requirement that the accused be present at the hearing. Article 91 of the American Articles of War of 1863 again authorized the taking of depositions from military and civilian witnesses.[233] It read: "The depositions of witnesses residing beyond the limits of the State, Territory, or district in which any military court may be ordered to sit, if taken on reasonable notice to the opposite party and duly authenticated, may be read in evidence before such court in cases not capital."[234] Even if the parties consented, a deposition could not be taken for a witness that lived inside the state.[235] Depositions were intended as a substitute for the personal testimony

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[231] *Id.* at 352. "Civilians could not (then) legally be required, ... to attend as witnesses before courts-martial." *Id.* citing Gen. Pillow's Court of Inquiry, p. 375.

[232] Armstrong, *supra* note 60, at 10.

[233] WINTHROP, *supra* note 200, at 352 (citing American Articles of War of 1863) (explaining the progress for a deposition: The proponent of the distant witness gives written notice to the opponent that a deposition of a certain witness will be taken with the time, place and specified commissioner. This notice was appended by the interrogatories. The opponent could respond with cross-interrogatories and any objections to the interrogatories. The entire packet is forwarded by the judge advocate to the official taking the deposition that was required to expeditiously contact the witness. In some instances, the written interrogatories were forwarded directly to the witness who responded in writing and under oath. The oath was made either before or after the answers were given. The deposition also had to be authenticated. Once completed, the interrogatories and answers were returned to the president of the court. The judge advocate was disqualified from receiving them because he was "commonly a party to the proceeding." *Id.* at 355-57).

[234] *Id.* at 352.

[235] *Id.* at 352-53.

of distant witnesses and were admissible if it was "in proper form" because under the rules, the court was obligated to "receive and consider" these depositions.[236]

Article 91 had other guidelines that allowed the accused to prevent usage of the deposition at trial. It was very rare for both parties to appear or be represented by counsel before the designated deposition commissioner.[237] "Reasonable notice" of the intent to take a deposition had to be given to the "opposite party" to give them an opportunity to review the interrogatories, note objections to them and prepare cross-interrogatories.[238] The deposition was opened in court first since the judge advocate was not considered an impartial party.[239] Depositions were also subject to the same objection as oral testimony during the court-martial.[240] They were admissible, however, when they contained the complete testimony of the witness, were taken under oath or affirmation and in response to all material interrogatories, and were duly authenticated.[241]

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[236] *Id.* at 352.

[237] *Id.* at 357. Army officers were preferred as commissioner because fees were charged for civil commissioner.

[238] *Id.* at 353. Although reasonable notice is not defined, the rule initially envisioned calculating the distance between the witness and the accused to give him an opportunity to be present or represented at the deposition. It was noted that neither party was represented under the existing practice.

[239] *Id.* at 357.

[240] *Id.* at 356.

[241] *Id.* at 354. "[I]t is to be read and received subject to the same exceptions as would be the oral testimony for which it is a substitute."

Paragraph 1008 (1882) of the Army Regulations is another version of the deposition rules that required the convening authority to decide whether a distant witness would be "summoned to appear in person" or deposed.[242]

> It is directed by par. 1008 of the Army Regulations that the judge advocate 'summon the necessary witnesses for trial;' .... Where any witnesses are so distant, or otherwise situated or occupied, that their personal attendance cannot probably be procured without extraordinary expense, or embarrassment to the service, he will properly submit to the convening authority the question whether they shall be summoned to appear in person or required to give their depositions.[243]

The Navy's first provision allowing depositions was not enacted until 1909.[244]

Congress passed the Uniform Code of Military Justice in 1950 and began a short period where the Court of Military Appeals severely limited the accused's confrontation rights through a literal interpretation of Article 49, U.C.M.J. Article 49(d)(1) of the 1951 Manual stated that "a deposition could be read in evidence, if it appears that 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."[245] A literal

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[242] *Id.* at 188 (citing G.C.M.O. 135, Dept. of Dakota, 1882; Do. 45, Id., 1884. "In Circ. No. 9 (H.A.), 1886, the point is noticed that the judge advocate can only subpoena a witness to attend the court. He cannot issue a subpoena to a witness to appear before himself for examination. This must be effected by an *order* emanating from the proper superior, as the post commander.").

[243] *Id.* at 188. "G.C.M.O. 4, Div. Of Atlantic, 1886. No persons (except perhaps foreign ministers) can be said to be legally exempt from being summoned as witnesses on military trials. High public officials, however, will not properly be summoned where their attendance can be dispensed with without serious prejudice to the administration of justice."

[244] Weiner, *supra* note 201, at 282 (citing Act of Feb. 16, 1909, ch. 131, § 16, 35 Stat. 622). (The Department of the Air Force was created by the National Security Act of 1947 on July 26, 1947. From 1907 to 1947, Aeronautical Divisions were a part of the Army. Organization and Lineage at Http://www.au.af.mil/au/afhra/org6.htm (March 28, 2001)).

[245] John J. Tiedemann, The Standards of Unavailability for the Admission of Depositions and Former Testimony 27 (1975) (unpublished thesis, The Judge Advocate General's School) (on file with the Judge Advocate General's School Library) (citing 1950 Manual).

interpretation of the rule usually resulted in a finding of unavailability if the witness met any of the above factors.

In 1951, the court finally articulated that the military accused had judicial protections like those in the Bill of Rights. More Specifically in *United States v. Clay*, the court gave the military accused equivalent rights to those "accorded defendants in civilian courts under the Bill of Rights," including the right of confrontation.[246]

> There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trial of the military offenses.... We conceive these rights to mold into a patter similar to that developed in the Federal Civilian Practice. For the lack of a more descriptive phase, we label the pattern "Military Due Process."[247]

Judge Latimer writing for the court stated, "we believe Congress intended in so far as reasonably possible, to place military justice on the same plane as civilian justice."[248] The court decided that these rights were vested in the accused not from the Constitution but from Congress: "[w]e do not bottom these rights and privileges on the Constitution but on laws enacted by Congress – the UCMJ is the source and strength of Military Due Process."[249] The court stated further that the "military due process rights" enumerated in the Code included the right of the accused to be informed of the charges against him, to be confronted by adverse witnesses and to cross-examine Government witnesses.[250]

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[246] United States v. Clay, 1 C.M.R. 74 (C.M.A. 1951).

[247] Tiedemann, *supra* note 245, at 19 (citing *Clay*, 1 C.M.R. at 77).

[248] Armstrong, *supra* note 68, at 11 (citing Clay, 1 C.M.R. 74).

[249] Tiedemann, *supra* note 245, at 19.

[250] Homer E. Moyer, Jr., Justice and the Military §2-105 (1972) (citing *Clay*, 1 C.M.R. at 77-78).

In *United States v. Young*, Judge Brosman explained that the use of depositions is a statutory exception to the confrontation right under "Military Due Process."[251]

In the mid-1950s, the Supreme Court finally addressed the issue of whether an accused had a "constitutional" confrontation right in the mid-1950s. In *Burns v. Wilson*, the Court explained that the Bill of Rights was applicable to court-martials, and it instructed federal civilian courts "to consider all constitutional issues not fully and fairly considered by military tribunals."[252]

In 1953, the same year *Burns* was decided, the Court of Military Appeals in *United States v. Sutton*, approved the admissibility of written depositions where the accused was not present at the taking.[253] The court stated that there was no Congressional limitation to admitting these depositions under the UCMJ.[254] The court noted that the UCMJ provides guidelines for written interrogatories and "implicit in this procedure is the contemplation that an accused will not be present."[255]

In *United States v. Stringer*,[256] the Court of Military Appeals determined that Article 49(d)(1), UCMJ, is applicable only to witnesses in the United States and its

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[251] Tiedemann, *supra* note 245, at 20 (citing United States v. Young, 9 C.M.R. 100 (C.M.A. 1953)).

[252] Moyer, *supra* note 250, at §2-103 (1972) (citing Burns v. Wilson, 346 U.S. 137 (1953)).

[253] United States v. Sutton, 11 C.M.R. 220 (C.M.A. 1953).

[254] *Id.*

[255] *Id.*

[256] 17 C.M.R. 122 (C.M.A. 1954).

territories. The Court determined that the witness, Mrs. Ecale, who lived within 100 miles of the trial, was not subject to the court's subpoena power.[257] Despite this fact, there was insufficient evidence of unavailability without showing that the witness was not amenable to process, was unable to travel or had refused to testify.[258] There was no evidence to indicate that any of this was true. In fact, there was no indication that "Mrs. Ecale would not have come to La Rochelle to testify in person," had trial counsel asked that she do so.[259] Emphasizing their point, the court stated, "[w]e consider it no undue burden to require that the prosecution – when it seeks to use a deposition – communicate with a nearby foreign witness, notify him of the expected date of trial, request his attendance, and advise him of any departmental regulations authorizing a fee for such attendance."[260]

To protect the accused's confrontation rights, the court began developing "standards of unavailability" to curb the use of depositions as a statutory exception by the prosecution.[261] In *United States v. Miller*, the Court of Military Appeals refused to allow the government to introduce a deposition for a witness where the government failed to take any steps to locate the witness until the "eve of the trial."[262] The court explained that

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[257] United States v. Stringer, 17 C.M.R. 122 (C.M.A. 1954).

[258] *Id.*

[259] *Id.* at 136.

[260] *Id.*

[261] Tiedmann, *supra* not 245, at 26.

[262] United States v. Miller, 21 C.M.R. 149 (C.M.A. 1956).

there was insufficient proof the witness was unavailable as defined by Article 49(d).[263] The court also refused to accept hearsay evidence to show that the witness was more than 100 miles from the court-martial.[264] The government also failed to show that they made diligent, timely and thorough efforts to locate the witness.[265]

In *United States v. Valli*, the court asserted a preference for obtaining the witness for trial over the use of deposition.[266] "As a general proposition, if the cost of having a witness testify in court are substantially the same as, or less than, the expense of taking a deposition, and the witness is amenable to process, it would be much better practice to have him present at the trial."[267]

In *United States v. Ciarletta*, the court indicated that proof that the witness' home address was more than 100 miles from the court-martial was "sufficient to render his deposition admissible."[268] Contrary to its instructions in *Stringer*, the court did not require the government to subpoena the witness, find out whether the witness would be amenable to voluntarily appear, or even determine the witness' whereabouts.[269] The court noted, however, for the first time that a service member could be considered

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[263] John E. Grant, Jr., Confrontation vs. Deposition 19-20 (1972) (unpublished thesis, The Judge Advocate General's School) (on file with the Judge Advocate General's School Library).

[264] *Id.* at 19 (citing Miller, 21 C.M.R. 149).

[265] *Id.*

[266] United States v. Valid, 21 C.M.R. 186, 190 (C.M.A. 1956).

[267] Grant, *supra* note 262, at 21.

[268] *Id.* at 70 (citing United States v. Ciarletta, 23 C.M.R. 70, 78 (C.M.A. 1957)).

[269] Tiedemann, *supra* note 245, at 70 (citing *Ciarletta*, 23 C.M.R. at 78).

available for trial at any location where servicemen are stationed, if the witness is at least on station somewhere.[270]

In *Reid v. Covert*,[271] in *dictum*, the Supreme Court continued to assert that it was not "clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to Military trials."[272] Nevertheless, three years later, in 1960, the Court of Military Appeals adopted its own rule of qualified constitutional applicability in 1960.

In its decision in *United States v. Jacoby*,[273] the court expressly overruled its holding in *United States v. Sutton*[274], finding that a military accused's confrontation rights are protected by the Constitution.[275] In *Jacoby*, the court found evidence in congressional hearings that Congress intended to provide confrontation rights to an accused under Article 49.[276] Thus began the court's application of the Sixth Amendment to the military accused.[277] The court now construed Article 49, UCMJ as requiring that the accused be

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[270] Grant, *supra* note 262, at 23.

[271] Reid v. Covert, 354 U.S. 1 (1957)

[272] Moyer, *supra* note 250, at §2-103 (1972). (citing Reid v. Covert, 354 U.S. 1 (1957)).

[273] United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960).

[274] United States v. Sutton, 11 C.M.R. 220 (C.M.A. 1953).

[275] *Id.* at 247.

[276] Tiedemann, *supra* note 245, at 22 (declaring that the Bill of Rights is available to members of our armed forces, except those, which are "expressly or by necessary implication inapplicable").

[277] *Jacoby*, 29 C.M.R. at 247.

present during the taking of written depositions.[278] As a result, the practice of taking written depositions soon ended and was replaced by oral depositions where confrontation was now the norm.[279]

In *United States v. Obligacion*,[280] the court found the 100-mile rule in Article 49, UCMJ, did not apply to Article 32 testimony. The court explained that actual unavailability of a witness must be shown before Article 32 testimony can be introduced.[281] Here, the court noted that the parties knew that a deposition could be used as evidence at trial. The parties, however, do not have the same expectations for the pretrial investigation, for it is used principally as a tool of discovery by the defense.[282] An Article 32 investigation does not resemble a deposition and should not be admitted under Article 49 as a substitute for testimony at trial.[283]

The Supreme Court's decision in *Barber v. Page*[284] gave military courts the impetus needed to cease a literal interpretation of the 100-mile rule of Article 49. In *United States v. Davis*,[285] the Court of Military Appeals refused to accept the single factor

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[278] United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960).

[279] Tiedemann, *supra* note 245, at 22.

[280] 37 C.M.R. 300 (1967).

[281] *Id.* at 301.

[282] United States v. Obligacion, 37 C.M.R. 300, 302 (C.M.A. 1967).

[283] *Id.*

[284] Barber v. Page, 390 U.S. 719 (1968).

[285] United States v. Davis, 41 C.M.R. 217 (C.M.A. 1970).

that the military witness was 900 miles away from trial as sufficient evidence for permitting the introduction of his deposition at trial.[286] In this case, the witness was incarcerated at Fort Riley Kansas, and the trial was scheduled in Indiana. The government did not even attempt to obtain the witness' presence at trial because he had been deposed and met the Art. 49 test.[287] The court instituted a requirement for a showing of "actual unavailability" before a deposition for a service member could be entered as evidence.[288] The court found that to admit these depositions because they met the over 100-miles clause of Article 49 "might result in their routine admission in many courts-martial in derogation of the principle that depositions are exceptions to the normal rule of live testimony."[289] The 1969 Manual for Courts-martial later deleted the 100-mile provision in Article 49.[290]

With the Supreme Court's decision in *Barber v. Page*, military courts began applying the good faith efforts test to determine witness availability.[291] In *United States v. Burns*,[292] the Court of Military Appeals stated that the "ultimate question is whether the witness [is] unavailable despite good-faith efforts undertaken prior to trial to locate and

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[286] Armstrong, *supra* note 60, at 41 (citing United States v. Davis, 41 C.M.R. 217 (1970).

[287] Armstrong, *supra* note 60, at 41.

[288] *Id.*

[289] United States v. Davis, 41 C.M.R. 217 (1970). *See* Grant, *supra* note 262, at 28.

[290] Tiedemann, *supra* note 245, at 27.

[291] Barber v. Page, 390 U.S. 719 (1968).

[292] United States v. Burns, 27 M.J. 92 (C.M.A. 1988).

present that witness."[293] To determine unavailability, the court should ask whether "the Government has exhausted every reasonable means to secure live testimony."[294] If the answer is "yes," and there is no way to secure the witness' live testimony, alternative evidence could be offered. If, however, the witness is available, the witness must be obtained as a matter of due process.[295]

Again emphasizing that the standard for unavailability is good faith efforts, the Court of Military Appeals, in *United States v. Cokeley*, detailed factors for courts to consider in determining if unavailability exists in a particular case.[296] Noting that there is no "bright-line rule, the court explained that the military judge should weigh the facts.[297] As an aid, the court listed some factors, that the trial court should consider, such as "the importance of the testimony, the amount of delay necessary to obtain the in-court testimony, the trustworthiness of the alternative to live testimony, the nature and extent of earlier cross-examination, the prompt administration of justice, and any special circumstances militating for or against delay."[298]

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[293] *Id.* at 97.

[294] *Id. See* United States v. Baker, 33 M.J. 788, 791 (A.F.C.M.R. 1991.) (The court remarked that this was not a new standard (citing United States v. Bieniek, 3 C.M.R. 954 (A.F.C.M.R. 1971), the court said twenty years ago the rule was that "the prosecution must show that "all available means, compulsory or voluntary, for obtaining the presence of a witness were tried and proved fruitless."))

[295] United States v. Seek, 13 M.J. 946 (A.F.C.M.R. 1982)

[296] United States v. Cokeley, 22 M.J. 225, 228 (C.M.A. 1986).

[297] *Id.* at 229.

[298] *Id.*

Specifically addressing the amount of delay required, the court remarked that there is no need to find unavailability when the witness' health is expected to improve.[299] Furthermore, a delay is not necessary in all cases when the witness' physical recovery may be prolonged.[300] In every case, the court said that the military judge has "substantial discretion" to grant a continuance to "perhaps enable the witness to recover sufficiently to appear in court."[301]

In *Cokeley*, "[t]he military judge failed to show that he weighed the relevant considerations" before finding a material witness unavailable.[302] The court decided that the witness' testimony "was not merely cumulative or of a minor nature but was absolutely necessary to prove that a crime had been committed and to describe the assailant."[303]

In *United States v. Ferdinand*, the Court of Military Appeals remarked that the military judge has a role in establishing witness availability.[304] The "military judge is not merely a passive observer in determining a witness' unavailability."[305] In cases where

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[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] *Id.* The court stated that the military judge could have issued a warrant of attachment. Furthermore, even though the witness was cross-examined at the deposition, the deposition occurred before the investigation of the crime was completed.

[303] *Id.* at 227.

[304] United States v. Ferdinand, 29 M.J. 164, 167 (C.M.A. 1989).

[305] *Id.* at 166-67.

the witness' whereabouts are known and the government has issued a subpoena, it may be necessary for the military judge to also issue a warrant of attachment.[306] The court was surprised that after being told by the witness' mother that the witness would disobey any order the judge gave her to produce the witness, the judge ruled that further efforts would be futile and did not issue a warrant of attachment.[307]

In these previous cases, the government offered transcripts from oral depositions. Today, the parties often choose to offer a videotaped deposition.[308] Video taped depositions are not specifically permitted by statute but may be ordered by the court.[309] Counsel prefer videotaped depositions because it provides them with an inexpensive means of presenting the witness' demeanor to the fact finder.[310]

VII. Compulsory Process in the Military

The Sixth Amendment guarantees a defendant, the right "to have compulsory process for obtaining witnesses in his favor."[311] However, compulsory process power

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[306] *Id.* at 166.

[307] *Id.* at 165-66

[308] Stoner v. Sowders, 997 F.2d 209 (6th Cir. 1993) (videotaped deposition of two elderly witnesses offered after witnesses found unavailable because of poor physical health). *See* United States v. Salim, 855 F.2d 944, 949-50 (2d Cir. 1988) (permitting use of videotaped deposition for foreign national witness not subject to compulsory process).

[309] Lederer, *supra* note 469, at 1110.

[310] *Id.*

[311] U.S. Const. amend. VI. United States v. Ferdinand, 29 M.J. 164, 165-66 (C.M.A. 1989).

was not provided to federal courts until 1846.[312] Congress took even longer to provide the military accused with a right to compel witnesses to attend court-martials on his behalf.[313] As stated in *Harrell*, the law is now "well-settled" regarding a defendant's constitutional, compulsory process right "to have brought into the trial court any material evidence shown to be available and capable of being used by him in aid of his defense...." This right gives the defendant the right to have the government subpoena his witnesses and "includes the judicial enforcement of that process and the essential benefits of it by the trial court."[314]

This right to compel witnesses must also be differentiated between civilian and military witnesses. The judge advocate can summon military witnesses for the prosecution and defense.[315] Military witnesses are obtained simply by contacting the commander to request that the commander issue the necessary orders.[316] On the other hand, civilian witnesses that are subject to U.S. jurisdiction are generally obtained by subpoena.[317] This is authority is limited, of course, because "the United States courts can only subpoena American citizen witnesses, and not witnesses from foreign countries.[318] Civilian witnesses cannot be compelled to appear at a court-martial outside the U.S. and

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[312] Wiener, *supra* note 221, at 283.

[313] *Id.*

[314] Harrell v. State, 709 So.2d 1364, 1370 (Fla. 1998).

[315] Weiner, *supra* note 230, at 283.

[316] MCM, *supra* note 226, at R.C.M. 703(e)(1) (2000).

[317] *Id.* at 703(e)(2)(A). ("Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident to their employment." *Id. See* discussion).

[318] *Harrell,* 709 So.2d at 1370.

its territories.[319] Foreign nationals in a foreign country may be obtained by requesting the assistance of the host nation.[320]

VIII. Rules for Courts-Martial and Uniform Code of Military Justice

Currently, the military accused is afforded specific protections under the Uniform Code of Military Justice and the Manual for Courts-Martial. The trial counsel is tasked with obtaining "relevant and necessary" witnesses for both parties.[321] "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."[322]

Under RCM 703, "a party is not entitled to the presence of a witness who is unavailable," unless, the witness' testimony "is of such "central importance to an issue that it is essential to a fair trial."[323] Then, if there is no adequate substitute for such testimony, attempts are made to secure the witness' presence or the proceedings are abated."[324]

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[319] MCM, *supra* note 226, at R.C.M. 703(e)(2)(A) discussion.

[320] *Id.* If there is a Status of Forces of Agreement in the country, it may provide assistance for obtaining witnesses at trial.

[321] *Id.* at R.C.M. 703(c)(1).

[322] *Id.* at R.C.M. 703(b)(1) discussion. The witness must not be unavailable under M.R.E. 804(a).

[323] *Id.* at R.C.M. 703(f)(2).

[324] *Id.* ("The military judge shall grant a continuance or other relief [in this instance], ... unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.").

The provisions of RCM 703 go even further than the Constitution and the Uniform Code in providing a safeguard for military personnel."[325] Under this provision, the defendant's right to confrontation is enhanced because it requires the prosecution or the military judge to ensure the fairness of the trial is not jeopardized by the "unavailability" of a "relevant and necessary" witness.[326] "Relevant evidence 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."[327]

When a "material" witness is "unavailable," the military judge decides the remedy or whether an adequate substitute exists for the witness' presence at trial.[328] One remedy is for the parties to enter into a stipulation of testimony.[329] "An accused cannot be forced to present the testimony of a material witness on his behalf by way of stipulation or deposition. That restriction, however, is not absolute."[330] A stipulation may be the only

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[325] United States v. Manual, 43 M.J. 282, 288 (1995) (discussing MCM, *supra* note 226, at R.C.M. 703(f), which gives defense a right to abate court proceedings for essential but unavailable evidence).

[326] MCM, *supra* note 226, at R.C.M. 703(c)(1); (c)(2)(D).

[327] *Id.* at R.C.M. 703(b)(1) discussion. *See Id.* at M.R.E. 401.

[328] *Id.* at R.C.M. 703(b)(3) (explaining that "a party is not entitled to the presence an unavailable witness" unless they can show it is "essential to a fair trial" and no "adequate substitute.").

[329] United States v. Eiland, 39 M.J. 566, 568 n.5 (N-M.C.M.R. 1993) ("A stipulation, whether of fact or testimony, seems to be among the least acceptable of the possible substitutes for live testimony. Unlike a deposition or former testimony, there is no opportunity for cross-examination or even complete questioning. The substance of a stipulation is often the result of negotiation rather than the actual words of the potential witness and, as a result, often becomes a compromise derived from the strengths or weaknesses in the bargaining positions of the parties. That negotiation process often takes place with neither party knowing much about the background and experience of the witness or what the witness might actually say in response to a particular question.").

[330] *Id.* at 568. *See* United States v. Sweeney, 14 C.M.A. 599, 34 C.M.R. 379 (1964).

method of presenting a potential witness' testimony to the court.[331]

United States v. Daniels illustrates the issues that arise under RCM 703(b)(3).[332] "In *Daniels*, "the accused was convicted of attempted carnal knowledge," even though the court was unable to compel the victim's attendance at the court-martial as a defense witness.[333]

> The Court of Military Appeals held that Daniels' right to a fair trial was "gravely impaired" when the military judge allowed the trial to continue and stated: "In the absence of specific statutory or regulatory authority to compel . . . the victim's testimony as a defense witness, and so long as her voluntary presence could not be secured, we believe the military judge had no constitutional alternative except to abate the proceedings.[334]

Where the military judge finds that an unavailable witness' presence is essential to the fairness of the trial and no other adequate substitute exists, an accused cannot be forced to choose between stipulating the testimony or no evidence.[335] In every case, after the proponent establishes witness' materiality, the military judge decides whether some alternative form of testimony will suffice to preserve the fairness of the trial.[336]

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[331] *Eiland*, 39 M.J. at 568 (citing *United States v. Tangpuz*, 5 M.J. 426 (C.M.A. 1978)) ("[This] case[ ] suggest[s] a stipulation as a possible alternative to live testimony of a material witness when the military judge has properly determined that the witness is unavailable and the testimony is cumulative.").

[332] United States v. Daniels, 48 C.M.R. 655 (1974) (citing MCM *supra* note 226, at R.C.M. 703, analysis, app. 21, at A21-32).

[333] 48 C.M.R. at 656-57. (stating that even through the exercise of U.S. process and that of the Belgian Government, the U.S. military-dependent female in Belgium could not be compelled to appear.)

[334] *Id.* at 657.

[335] *Id.*

[336] *Id.* (citing *Scott*, 5 M.J. at 432.)

Courts have readily proclaimed that "nonamenability" to subpoena does not necessarily establish unavailability of a witness.[337] Although, subpoenas have not provided military courts with the authority needed to ensure a witness' physical presence at an overseas trial, courts still looked to see what other steps were taken to obtain the witness' presence.[338] Often witnesses who could not be compelled to appear could nonetheless be persuaded to do so."[339]

IX. Acceptance of Video Teleconferencing by Civilian Courts

In *Maryland v. Craig*, the defendant was charged with sexually abusing a six-year-old girl.[340] Prior to trial, the State asked the court to allow them to use one-way closed circuit television, which was authorized by a Maryland statute. The statute authorized the use of the television procedure to present the testimony of a child that was a victim of abuse, after the court determined that the child would "suffer serious emotional distress" and be unable to "reasonably communicate" if forced to testify in the defense's presence in the courtroom.[341] The trial court found that the proponent met the requirements of the statute and allowed the procedure.[342] At trial, the child witness' testimony was presented as follows: the child witness, prosecutor and defense counsel

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[337] United States v. Crockett, 21 M.J. 423, 427 (C.M.A. 1986).

[338] R.C.M. 703(e)(2)(E)(ii).

[339] *Crockett*, 21 M.J. at 427.

[340] Maryland v. Craig, 497 U.S. 836, 840(1990). Cinella, *supra* note 45, at 148-49.

[341] *Craig,* 497 U.S. at 840.

[342] *Id.* at 840.

withdrew to a separate room, while the judge, jury, and defendant remained in the courtroom.[343] "[A] video monitor record[ed] and display[ed] the witness' testimony to those in the courtroom."[344] The court found that the defendant lost his face-to-face right, but retained the essence of the confrontation right – cross-examination and jury assessment of the witness' demeanor.[345]

The Supreme Court sustained the use of the one-way remote procedures.[346] The Court decided that although face-to-face confrontation with a witness is important, "such confrontation is [not] an indispensable element of the Sixth Amendment's guarantee."[347] It found that Maryland's "special procedure," in this instance, "adequately ensure[d] the accuracy of the testimony and preserve[d] the adversary nature of the trial."[348] The Court, however, emphasized that trial courts must make a case-specific finding of necessity before dispensing with the defendant's right to face-to-face confrontation.[349]

Presumably, in part, the Court required a finding that its decision in *Craig* involving one-way closed circuit television provides some support for alternative methods of presenting witness testimony. *Craig* certainly establishes that the accused's

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[343] *Id.* at 841.

[344] *Id.* at 841.

[345] *Id* at 842.

[346] *Id.* at 857.

[347] *Id.* at 849-50.

[348] *Id.* at 857.

[349] *Id.* at 858. Cinella, *supra* note 45, at 148-49.

confrontation right may be denied when it is in "furtherance of an important public policy."[350] Remember the remote procedure used in *Craig* involved one-way closed circuit, which totally eliminated any visual confrontation by the accused.[351] Video teleconferencing at least provides for visual confrontation.[352]

While the Supreme Court has not directly addressed the use of video teleconferencing, several state and appellate courts have ventured into this area with two-way remote transmissions.[353] Liberally interpreting the Supreme Court's decision in these courts found no per se constitutional prohibition against the use of two-way remote procedures.[354] In all three cases, discussed in this thesis, the state courts found the satellite procedures complied with the defendant's Sixth Amendment right. The courts found that the procedures employed preserved the essential elements of confrontation, "oath, cross-examination, and observation of witness' demeanor.[355]

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[350] *Id.* at 850-51.

[351] *Id.* at 842 ("[T]he witness cannot see the defendant. The defendant remains in electronic communication with defense counsel, and objections may be made and ruled on as if the witness were testifying in the courtroom.") *See* United States v. Gigante, 166 F.2d 75, 81 (2nd. Cir. 1999).

[352] Frederic I. Lederer, *The New Courtroom: The Intersection of Evidence and Technology: Some Thoughts on the Evidentiary Aspects of Technologically Presented or Produced Evidence.*

[353] Michael D. Roth, Article: *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. Rev. 185 (October 2000) (citing *Craig*, 497 U.S. at 842.)

[354] Roth, *supra* note 353.

[355] Harrell v. State, 709 So.2d 1364, 1371 (Fla. 1998).

Harrell v. State presents an optimal situation where remote testimony was not a violation of the Confrontation Clause.[356] In *Harrell*, the defendant was charged with robbery and burglary of an Argentinean couple that was vacationing in Florida.[357] Prior to trial, the court granted the State's request to present the testimony of the couple by satellite transmission from Argentina.[358] The victims were unable to be physically present because of the distance, and one victim was suffering with health problems at the time of trial.[359] The witnesses' testimony was transmitted[360] during trial using the following setup: in Miami, the courtroom was equipped with two cameras with one showing the jury and another showing the attorneys and the defendant.[361] The courtroom also had a screen showing the witnesses in Argentina.[362] The Argentinean courtroom contained a camera that filmed the witnesses and a screen that showed the courtroom in Miami.[363] The witnesses and defendant were able to observe each other during the transmission.[364] A deputy clerk administered the oath to each witness while the jury and

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[356] *Harrell*, 709 So.2d 1364.

[357] *Id.* at 1367.

[358] *Id.*

[359] *Id.* (Perla Scandrojlio was experiencing health problems, however no other details are given regarding her illness).

[360] *Id.* ("Some problems occurred during the satellite transmission. The visual transmission for the victims' testimony was not simultaneous with the audio, causing a split-second delay between what was said and what was seen. Further, while Scandrojlio was testifying, she repeatedly looked at an individual off the screen. The individual off the screen was Marial Alvarez, who was the manager of the broadcast studio in Argentina. Initially, the camera focused only on Scandrojlio and not on Alvarez. This problem was corrected and the camera focused on both individuals.").

[361] *Id.*

[362] *Id.*

[363] *Id.*

[364] *Id.*

judge watched.[365] Finally, the court used an interpreter because the witnesses did not speak English.[366]

The Florida Supreme Court found the procedure acceptable and justified based on three factors.[367] First, the Argentinean couple was "absolutely essential to the case, making their testimonies a "necessity."[368] Second, the court had important state interests resulting from the court's inability to compel the witnesses to appear by subpoena.[369] Third, the court found that an important consideration in its ruling was one witness' poor health that made her unable to travel to the United States.[370] All three factors contributed to a finding that failure to allow testimony by remote transmission would prevent the court from obtaining the witnesses' testimony at trial, and thereby, hinder the state's "interest in resolving criminal matters in a manner both expeditious and just."[371] The court determined that these procedures taken together justified denying the defendant his face-to-face confrontation right.[372]

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[365] *Id.*

[366] *Id.*

[367] *Id.* at 1369-70. (The issues the Court dealt with were "whether or not testimony via satellite in a criminal case violates the Confrontation Clause and, if so, whether the satellite procedure constitutes a permissible exception." *Id.* at 1367).

[368] *Id.* at 1370.

[369] *Id.*

[370] *Id.* at 1369-70 (referencing § 27.04, Fla. Stat. (1995) and the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings § 1-9, 11 U.L.A. 1-53 (1995). (Every state in the union has adopted this Uniform Act but "the United States courts lack power to subpoena witnesses from foreign countries.")

[371] *Id.*

[372] *Id.* at 1370.

The *Harrell* court also held that the procedure satisfied the "other three elements of confrontation – oath, cross-examination, and observation of the witness's demeanor."[373] Analogizing the procedure to a deposition, the court remarked that satellite procedures provide more Confrontation Clause safeguards than depositions.[374] With a satellite, the defendant obtains the benefits of face-to-face confrontation because he "is afforded a live, contemporaneous opportunity to cross-examine and the jury can observe the witness' demeanor during this exchange."[375] The critical need for this satellite procedure, the important public policy reasons involved, and substantial compliance with the essential elements of the Clause, all led to the court's finding that "the witness[es]' testimony was sufficiently reliable [under the circumstances]."[376] Finally, the court urged other courts in the state not to ignore the "technological advancements" that are available today.[377]

> We recognize that there are generally costs associated with change. Nevertheless, technological changes in the courtroom cannot come at the expense of the basic individual rights and freedoms secured by our constitutions. We are confident that the procedure approved today, when properly administered, will advance both the access to and the efficiency of the justice system, without compromising the expectations of the safeguards that are secured to criminal defendants.[378]

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[373] *Id.* at 1369.

[374] *Id.* at 1370.

[375] *Id.*

[376] *Id.* at 1371.

[377] *Id.* at 1372.

[378] *Id.* (noting that although the Constitution does not specifically address this issue, "our courts, however, must integrate procedural rules with the technoevolutionary reality beyond the insulated stone walls of the courthouse. We wholeheartedly embrace the concept of satellite testimony, because it enhances the efficiency of our courts.").

Significantly, the court remarked that satellite procedure could be used for any "unavailable" witness in or out of State, but the "strong presumption in favor of face-to-face testimony"[379] requires that the proponent provide "substantial justification" for using satellite procedures for a witness that could be subpoenaed to physically appear.[380]

To prevent the overuse of satellite procedures, the court established guidelines that a court could use to determine "when the satellite procedure is appropriate."[381] These procedures require that proponents analyze the facts of the case by considering the same factors used when seeking a deposition.[382] The proponent must prove that the witness lives beyond the court's jurisdiction; is unable to attend or is prevented from attending a trial or hearing; the witness's testimony is material; and the procedure is necessary to prevent a "failure of justice."[383] The court found that the satellite procedure gives the defendant more confrontation guarantees than a deposition. Unlike a deposition, with the satellite procedure, the defendant gets "a live, contemporaneous opportunity" for cross-examination and jury assessment of the witness' demeanor.[384]

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[379] *Id.* at 1370.

[380] *Id.*

[381] *Id.*

[382] *Id.* (citing Fla. R. Crim. P. 3.190(j)).

[383] *Id.* at 1370.

[384] *Id.* at 1370.

United States v. Gigante is a second case where the court ruled that the use of remote testimony procedures satisfied the defendant's Confrontation Clause rights.[385] Vincent Gigante was charged and convicted of several crimes relating to his criminal activity as a Mafia boss.[386] Peter Savino, a crucial witness in the case, was in the final stages of fatal, inoperable cancer.[387] Based on the evidence, the trial court found "that Savino, could not appear in court" and allowed the government to present his testimony by two-way closed circuit television.[388] The trial judge considered deposing Savino, but "due to the joint exigencies of Savino's secret location[389] and Gigante's own ill health and inability to travel," the trial court found that "deposing the witness [was] not appropriate."[390] Instead, the judge ordered "contemporaneous testimony via closed circuit televisi[on]."[391] "Savino was visible on video screen" to every participant in the courtroom and he could be see and hear them also from his remote location.[392]

The Court of Appeals for the Second Circuit allowed the remote procedure under Rule 15 of the Federal Rules of Criminal Procedure, which authorizes deposition taking.

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[385] United States v. Gigante, 166 F.3d 75 (2d Cir. 1999). *See* Cinella, *supra* note 53 (citing Defendant's Brief at 10, United States v. Gigante, 1997 WL 413699 (E.D.N.Y. July 21, 1997) (suggesting lack of precedent involving adult witnesses indicates the necessity of physical confrontation).

[386] *Id.* at 78.

[387] *Id.* at 79 (There was conflicting evidence from the government and defense regarding Savino's ability to travel to the trial. The government expert testified that "it would be medically unsafe...." *Id.*)

[388] *Id.* at 79-80.

[389] *Id.* Savino was in the Federal Witness Protection Program.

[390] *Id.* at 81.

[391] *Id.*

[392] *Id.* at 80.

As a result of the witness' "poor health," the witness was determined to be unavailable to appear at trial.[393] "Exceptional circumstances" existed that justified taking a deposition, but closed-circuit television afforded Gigante more protection.[394] The court decided that the procedure preserved many of the "characteristics of in-court testimony but should not be used as a "commonplace substitute."[395] Savino was forced to testify under oath before the jury where they could observe his demeanor on the stand and judge his credibility.[396] Savino testified "under the eye of Gigante himself," while, Gigante's attorney watched and "weighed the impact of Savino's direct testimony on the jury as he crafted a cross-examination."[397] The court rejected Gigante's argument that his Sixth Amendment right could only be preserved by a "face-to-face confrontation with Savino in the same room."[398]

Distinguishing *Maryland v. Craig*, the *Gigante* court declined to adopt a stricter standard for the use of remote procedures or to articulate an important public policy reason for allowing the remote testimony.[399] The court believed such findings are only necessary in cases where "one-way closed circuit television" is used, as in *Craig*, which

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[393] *Id.* at 81 (citing Fed.R.Crim.P.15(e)) ("That testimony may then be used at trial 'as substantive evidence if the witness is unavailable."). Rule 804(a) defines unavailability.

[394] *Id.*

[395] *Id.* at 80.

[396] *Id.* at 81.

[397] *Id.* at 80, 81.

[398] *Id.*

[399] *Id.* at 80-81

prevents the witness from viewing the defendant.[400] The *Gigante* court believed that when the court "employ[s] a two-way system that preserved the face-to-face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case."[401] The court adopted the same standard for two-way remote testimony as used with depositions – "exceptional circumstances.[402]

Ryan v. State is a third case where the court found that remote testimony was constitutionally permissible.[403] The Wyoming trial court allowed Jeanette Hopkins' testimony to be presented via video teleconference.[404] Hopkins lived in Georgia and was not allowed to travel because of "a high risk pregnancy."[405] The jury viewed Hopkins' testimony at Western Wyoming Community College.[406] At the end of the testimony, defense counsel asked that the testimony be stricken because he could not view Hopkins' demeanor.[407] Although, the trial judge agreed that the image of the witness was of lesser quality than the two other images of the Green River audience and the attorneys, he disagreed with the defense counsel, finding no Confrontation Clause violation.[408]

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[400] *Id.* at 80.

[401] *Id.* at 80-81.

[402] *Id.* at 81.

[403] Ryan v. State, 988 P.2d 46, 58 (Wyo. 1999).

[404] *Id.* at 58.

[405] *Id.*

[406] 988 P.2d 46 (1999).

[407] *Id.* at 58.

[408] *Id.* He also stated that the witness had a delayed image.

On appeal, the Wyoming Supreme Court reviewed the issue of whether "poor picture quality can and did eviscerate the face-to-face character of the teleconference technology" used in the case.[409] The court agreed that poor picture quality could present confrontation violations. However, deferring to the trial court's finding, the *Ryan* court found no violation of the defendant's confrontation right.[410]

In all three cases, the court used different technology to present the witness from a satellite transmission to video teleconferencing to two-way closed circuit television. All three procedures provided interaction between the witness and the courtroom participants. The closed circuit system provides the most protection to prevent signal interception, however, the other systems also provide some measures of security.

Federal System Seizing the Remote?

An advisory committee for the Federal Rules of Criminal Procedure has also recognized the benefits of VTC and is recommending a change to the Rules to allow for VTC.[411] This rule would promote the use of video teleconferencing as a means of

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[409] *Id.*

[410] *Id.* at 60.

[411] Cinella, *supra* note 45, at 151-52. Advisory Committee on Rules of Criminal Procedure, (Jan. 10-11, 2000 and Apr. 25-26, 2000), *at* http://www.uscourts.gove/rules/Minutes/cr4-97.htm. [hereinafter Advisory Committee].

transmitting testimony for unavailable witnesses.[412] The pending change to the Rule 26, paragraph (b) reads:

> Transmitting Testimony from Different Location. In the interest of justice, the court may authorize contemporaneous video presentation in court of testimony from a witness who is at a different location if:
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> (a) The requesting party establishes compelling circumstances for such transmissions.[413]
>
> (b) Appropriate safeguards for the transmission are used; and[414]
>
> (c) The witness is unavailable within the meaning of Rule 804(a)(4)-(5) of the Federal Rules of Evidence.[415]

The Advisory Committee that is proposing the change stated paragraph (c) is included to ensure the defendant's Confrontation Clause rights are not infringed.[416] This provision also expresses a preference for remote live testimony over depositions.[417]

X. VTC in Military Courts-Martial

United States v. Shabazz[418] addresses the use of live, remote testimony for

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[412] Advisory Committee, *supra* note 411.

[413] *Id.*

[414] *Id. In re San Juan Dupont Hotel Fire Litigation*, 129 F.R.D. 424 (1990).

[415] Advisory Committee, *supra* note 411.

[416] *Id.* (Committee Notes to proposed change to Rule 26.)

[417] *Id.*

[418] United States v. Shabazz, 52 M.J. 585 (N-M Ct.Crim.App. 1999).

witnesses that could not be subpoenaed to appear before a military trial court.[419] In *Shabazz*, Mrs. White, the Government's key witness to an aggravated assault charge, was in the United States, and the court-martial was in Okinawa, Japan.[420] The government had no power to subpoena Mrs. White back to Okinawa to testify.[421] They took numerous steps to get her to voluntarily return, but were unsuccessful.[422] Believing that Mrs. White had agreed to return, the Government secured the presence of three other witnesses from the United States and … two Japanese civilians.[423] The government was later told by Mrs. White's husband that she would not be returning but would agree to a deposition.[424] "Faced with the loss of a key witness, the Government requested permission to take Mrs. White's testimony by means of video teleconference."[425]

Before "allowing the VTC testimony, however, the military judge heard the testimony of … two VTC technicians who explained how the VTC technology worked, its level of reliability, its capability to zoom in on documents and photographs, and how it

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[419] *Id.* at 591.

[420] *Id.*

[421] *Id.*

[422] *Id.*

[423] *Id.*

[424] *Id.* at 590.

[425] *Id.* at 591.

would allow viewers to observe facial expressions.[426] It was also established that the witness's reaction could be seen at the same time she was being shown documents."[427]

After rejecting a motion to relocate the trial to California or another location where the Government could subpoena Mrs. White, the military judge approved the request to present the witness by VTC, finding the procedure was "necessary."[428] Since Mrs. White never testified at the Article 32 hearing, there was no prior testimony for the court to admit.[429] Furthermore, the court explained that VTC "was preferable to ... former testimony and 'far better than a deposition,' for unavailable witnesses.[430] The military judge stated that the purpose for the accused's confrontation right could be accomplished by this procedure.[431]

The court used three cameras to present Mrs. White's testimony.[432] "One was focused on Mrs. White, the second provided her with a 'full table shot' of the court, and the third was a document camera."[433] The link was lost on three different occasions,

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[426] *Id.*

[427] *Id.*

[428] *Id.* (The parties asked that the court move the trial to California so they could subpoena Mrs. White. The military judge declared their request was "drastic remedies.").

[429] *Id.* n.6.

[430] *Id.* at 591 ("The military judge ... indicat[ed] that, in his view, the use of VTC was more advantageous to an accused than, for example that exception to the hearsay rule.").

[431] *Id.*

[432] *Id.*

[433] *Id.* The military judge gave the trial defense counsel the option of what Mrs. White could see and he chose "a full table shot.... The record does not otherwise describe what Mrs. White could see." *Id.* n.9. *But see* Roth, *supra* note 353, at 202 (describing shot size but "full table shot" is not included in the types).

causing the proceedings to be cancelled until the link was established over three consecutive days.[434] At the conclusion of the video teleconference, the defense counsel asserted that, someone was coaching Mrs. White.[435] The judge agreed, noted the matter for the record, and continued with the trial.[436]

At the conclusion of the trial, the accused, at a post-trial Article 39(a) session, asked that Mrs. White's testimony be stricken because of the coaching and that the finding of guilty to maiming be reconsidered.[437] He substantiated the coaching with an audiotape of the VTC and a statement from the VTC technician at the remote location.[438] Based on this evidence, and argument by counsel, the military judge ruled that the communications at the remote location were error but amounted to "harmless" error.[439]

On appeal, the Navy court ruled that the defendant's confrontation rights were violated. The court stated that "the military judge failed to ensure the reliability of Mrs. White's testimony at any one of three crucial points in the trial."[440] The judge should have gained control of the VTC site, immediately inquired about the voice he heard

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[434] *Id.*

[435] *Id.* at 592 n.10 (illustrating the coaching by an unidentified voice which was repeating the questions at the remote location).

[436] *Id.*

[437] *Id.*

[438] *Id*

[439] *Id.*

[440] *Id.* at 594. (The military judge later acknowledged that he "should have established and enforced a clear protocol which established control over the VTC site used by Mrs. White.).

coaching Mrs. White, and should have made a fully inquiry into the impact caused to Mrs. White's testimony by the third party.[441]

Most importantly, the *Shabazz* court encouraged VTC usage, and the adoption of a Rule for Courts-Martial that establishing procedures for taking remote testimony.[442]

XI. Arguments Against VTC[443]

> At its essence, a trial in 1791, the year the Sixth Amendment was ratified, involved attorneys and parties, witnesses, and a jury, and a judge, all of who physically appeared in the courtroom. The same holds true for a trial today. We are unwilling to develop a per se rule that would allow the vital fabric of physical presence in the trial process to be replaced at any time by an image on a screen.[444]

There are many arguments against using VTC in criminal trials. We can begin with a review of the potential problems that result from the technology. First, audio and visual problems can possibly develop with satellite transmission.[445] Short audio delays prevent immediate interruptions of conversations with the witness.[446] Video resolution and quality are good but may not reproduce extremely rapid movement.[447] "Absent new

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[441] *Id.* at 594. (A stipulation illustrates the coaching that occurred from an unidentified voice at the remote location. *Id.* at 592 n.10).

[442] *Id.* at 594 n.13.

[443] Roth, *supra* note 353.

[444] *Id.* at 1368-69.

[445] Harrell v. State, 709 So.2d 1364, 1372 (Fla. 1998).

[446] Lederer, *supra* note 2, at 820.

[447] Lederer, *supra* note 2, at 820.

high definition television, the courtroom image [displaying a remote witness testimony] may not contain as much information as in-court testimony – although a large screen display might make the witness even more visible than when physically present."[448]

While insufficient VTC and picture quality could threaten the accused's confrontation right, these problems are fairly easily addressed. The best way to do this is for the military judge and the parties to the court-martial to ensure the satellite feed is of sufficient quality to allow all parties to see and hear the proceedings well.[449] The technology is available to provide high-resolution pictures that are large enough to convey a high quality picture of the witness.[450]

Although depositions are frequently used, "recorded testimony lacks the immediacy of live testimony and deprives us of the ability to use testimony from witnesses who are not in the courtroom."[451] Videotaped deposition also does not allow a military panel to participate in the proceedings by presenting questions they might have.

Some courts and scholars argue that the use remote transmission measures like video teleconferencing and "closed circuit television conflict with the defendant's right to

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[448] Lederer, *supra* note 456, at 402 ("Numerous judges and lawyers visiting the Courtroom 21 project have been troubled by remote testimony, complaining that their self-proclaimed ability to tell the truth from falsity depends upon the witness' actual presence in the courtroom.")

[449] *See* Ryan v. State, 988 P.2d 46, 59 (Wyo. 1999).

[450] Lederer, *supra* note 352, at 400 (describing the Courtroom 21 technology which includes a life-size image of the remote witness and ability for the witness to see everything in the courtroom).

[451] Lederer, *supra* note 2, at 819.

due process [by] ... erod[ing] the constitutional right to a presumption of innocence."[452] The argument is that the procedure impacts the defendant's presumption of innocence because the jury sees the use as indicative of guilt or that the witness needs protection from the accused.[453] It is also argued that the use of remote procedures may reduce the witness's credibility due to the witness physically separation from the courtroom.[454]

This problem could be corrected by the military judge explaining and instructing court members appearing by remote means are not doing so because of fear, but because, the witness cannot be or should not forced to physically appear in court.[455] Jury instructions given prior to the remote transmission explaining the necessity for the procedure should be sufficient to prevent the court members from assuming that the defendant is guilty since the witness will not appear in court. Of course, the witness' testimony may also assist in eviscerating the risk as the witness can be asked why they are not present in court. Finally, at any time, the military judge can explain the reasons that remote procedures are being used.[456]

Of course, the argument can be made that testimony by VTC is unreliable. Any such argument, however, is specious because testimony by VTC is subject to the same

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[452] Cinella, *supra* note 45, at 150-51.

[453] Cinella, *supra* note 45, at 150-51 n.107-113. *See* Maryland v. Craig, 497 U.S. 836 (1990) (Scalia J., dissenting.)

[454] Cinella, *supra* note 45, at 156-57 (She states an argument opposing VTC because the witness' credibility could be enhanced by the remote procedures that cast her like an actress on television. *Id.* at 158-60).

[455] MCM, *supra* note 226, M.R.E. 804(a).

[456] Cinella, *supra* note 45, at 150-51.

tests of reliability that are used on witnesses that are physically present in court.[457] Like witnesses physically present in court, witnesses testifying by VTC present their testimony live before the defendant and fact finder, while under oath and subject to cross-examination.[458] The Courts have long accepted that these elements of the clause are the best tools for testing and sifting evidence and evaluating credibility and reliability.[459]

There is some argument that video teleconferencing will become another method of manipulation by skilled advocates. One scholar argues that both parties will use the camera to enhance their case.[460] The judge is the best regulator of such behavior in the courtroom.[461] A rule that allows remote testimony can also address this issue and ensure consistency and fairness so that the court members evaluate the witness and not the camera's depiction of the witness in a light most favorable to the side conducting cross-examination that is questioning them at the time.[462]

Some legal scholars are concerned that VTC provides them with a reduced ability to use demeanor evidence to assess credibility.[463] Several scholars criticize VTC for removing the witness from the courtroom and hindering the fact finder from determining

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[457] John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay,* 67 Geo. Wash. L. Rev. 191, 230 (1999).

[458] Ohio v. Roberts, 448 U.S. 56 (1980).

[459] Mattox v. United States, 156 U.S. 237, 242-243 (1895).

[460] Roth, *supra* note 352, at 205-6.

[461] United States v. Shabazz, 52 M.J. 585, 594 (N-M Ct.Crim.App. 1999).

[462] *Id.* at 207.

[463] *Id.* at 199.

truthfulness.[464] Yet one scholar remarked that, "[social] scientists have amassed substantial evidence" that disproves the belief that a person can "identify whether a witness is lying from the witness' demeanor."[465] In fact, the studies show that the best indicator of truth or falsity results from changes in a person's voice and not - shifty eyes, shifty bodies, the inability to look someone in the eye. These are stereotypes that do not "indicate actual deception."[466] If you accept these studies as true, then VTC provides very little interference with the court's ability to listen to the witness' voice as it is transmitted to the courtroom for them to judge.[467]

The court in *Harrell v. State*, posed a final argument when it cautioned against the potential abuses that can result from VTC.[468] Remote procedures like any other adversarial procedure can be manipulated and abused.[469] The answer to this argument is that the rule allowing VTC should be drafted so as to assist courts in maintaining control of this procedure so that the defendant's confrontation right is protected and is not made meaningless.[470]

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[464] *Id.* (arguing also that lawyer involvement in the process skews reality through the lawyer's assistance of a favorable witness to remove behavior that distracts from their testimony, or through cross-examination of an adverse witness, both prevent the court from determining "truth").

[465] *Id.*

[466] *Id.*

[467] *Id.*

[468] *Harrell*, 709 So.2d 1364, 1370 (Fla. 1998) (cautioning against potential abuses).

[469] *Id.*

[470] United States v. Shabazz, 52 M.J. 585, 594 n.13 (N-M Ct.Crim.App. 1999).

XII. Arguments for Video Teleconferencing

With the advent of remote transmission procedures, almost any witness is now accessible, no matter where the witness is located.[471] Where video teleconferencing technology capability is available, arrangements can be made to present the witness' live testimony during the court-martial from a transmission from the remote location.[472] In a video teleconference, the remote witness and other courtroom participants can see and hear each other simultaneously.[473] VTC provides substantial compliance with the purpose of the confrontation clause by providing a "live" witness that is under oath, subject to cross-examination and the view of the fact finder for a credibility assessment.[474]

A. VTC is Available and Accessible

Video teleconferencing is increasingly available in the courtroom and remote testimony is now permitted in federal civil cases.[475] Video teleconferencing procedures are also being used in many states, and several states have statutes allowing for remote appearances.[476] Some states have also equipped their courtrooms with remote

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[471] Lederer, *supra* note 2, at 802.

[472] *Id.*

[473] *Id.* at 819.

[474] Maryland v. Craig, 497 U.S. 836 (1990). Cinella, *supra* note 45, at 143-44.

[475] *Id.* (citing Fed. R. Civ. P. 43(a)).

[476] Frederic I. Lederer, *The Randolph W. Thrower Symposium: Changing Litigation with Science and Technology: Technology Comes to the Courtroom, and ...*, 43 Emory L.J. 1095, 1102 (1994). For example, the Virginia Code allows appearance by two-way electronic video and audio systems. The statute

transmission equipment for videoconferencing.[477] In April 1998, there were eight states with high-technology courtrooms and about thirty-two federal ones allowing them to "present evidence electronically," for transmission to anywhere in the world.[478] In April 1998, there are thirty-four federal district courts serving sixty separate locations with courtrooms that can provide remote, two-way testimony via teleconferencing.[479]

Courts are using the technology for remote first appearances and arraignments and various other proceedings allowing either counsel or the accused to appear remotely.[480] "[A]ppellate courts are using videoconferencing[,] [including] the Second, Tenth, and District of Columbia circuits[,] [which] use video conferencing for oral arguments."[481] Police have used videoconferencing to obtain arrest warrants.[482]

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requires that the system used allow the persons communicating with each other to see and speak to one another simultaneously. It also requires that the "signal transmission be secure from interception." *Id.* n.34.

[477] Lederer, supra note 2, at 802.

[478] *Id.*

[479] *Id.* (citing data from the Administrative Office of the United States Courts). The following twenty-nine states allow some VTC proceedings: Arizona, California, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and Wisconsin. *Id.* n.10.

[480] Lederer, *supra* note 476, at 1101-2 (1994) (suggesting there are between 160 and 200 systems in civilian courts in the U.S.). *See also* Roth, *supra* note 352, at 191 (stating that less than 150 courts in 17 states have VTC).

[481] Lederer, *supra* note 2, at 802. (The Second Circuit is located in Manhattan and has video links with New York and Connecticut and covers cases in these states and Vermont. Remote oral argument is favored by the court and has provided "significant" benefit to attorneys traveling from outside Manhattan.)

[482] *Id.* at 823.

Video teleconferencing devices are available and accessible for use in courts-martial.[483] All four Armed Services are using video teleconferencing with increasing frequency.[484] Video teleconferencing in some form is available in almost every theatre, camp, post, and station and even aboard several ships.[485] Many remotely deployed military units are connected by VTC to other stateside military headquarters or Department of Defense agencies and vice versa.[486] Two of the five judges on the United States Court of Appeals for the Armed Forces have appeared by videoconference.[487] The Armed Services use VTC to connect families to deployed service members.[488] Under

[483] Desktop and room-based videoconferencing are both available. Desktop conferencing occurs on a personal computer and accommodates small groups or individuals, while the room-based system is more sophisticated and used for large groups. *See* Pacific Bell Knowledge Network Explorer, *Videoconferencing*, at http://www.kn.pacbell.com/wired/vidconf/description.html (July 14, 1999) [hereinafter Pacific Bell].

[484] PERSCOM, *Video Teleconferencing,* at http://www.perscom.army.mil/PERSINSD/vtc1.htm. (Last visited Mar. 7, 2001). PERSCOM's VTC facility can accommodate up to thirty persons and is located in Virginia. The website lists fifty-one VTC locations that PERSCOM has connected with, including twenty-eight Army installations from the east coast to Alaska; seven Air Force installations, three Naval installations, and one Marine Corps installation and ten "other" locations in major cities.

[485] E-mail from Carla R. Goings, VTC administrator, Wright-Patterson Air Force Base, to Fred Edwards, The Judge Advocate General's School (Feb. 5, 2001) (on file with author) (indicating sixty-four pages of commercial and military VTC locations).

[486] *Id. See* HQ, U.S. Army Europe Pam. 25-1 (Jul. 11, 2000), at http://www.dcsim.hqusareur.army.mil/programs/VTC/vtcpolicy.htm) (describing the standard equipment used in Army installations and showing that VTC technology is also available at overseas Army installations). The author also participated in a VTC in Korea in 1999.

[487] Lederer, *supra* note 2, at 801. ("In United States v. Salazar, the court heard a case in the Courtroom 21 Project's McGlothlin Courtroom with two judges ... appearing via videoteleconferencing from different states.")

[488] Air Force News, *Videoteleconferencing especially popular over holidays* (Nov. 25 1998), at http://www.af.mil/news/Nov 1998/n19981125_981842.html. There are remote VTC sites in the Air Force that have connected with stateside locations, including locations like Croatia; Istres Air Base, France, Royal Air Force Mildenhall, England, Sarejevo, Tuzla AB, Bosnia-Herzegona, Incirlik AB, Turkey, Ramstein AB, Germany, and Osan AB, Korea.

MRE 611(d),[489] remote testimony is now authorized in court-martials, for child victims of sexual abuse after a showing of necessity.[490]

Courtrooms can temporarily or permanently install technology for video teleconferencing.[491] Initial start-up costs from wiring are the most costly part of courtroom implementation.[492] Maintenance will be a constant expense[493] for the technology includes cameras, computers, large television screens, jury monitors, projection screens and desktop units.[494] "Satellite based videoconferencing supplies near-perfect audio and video, but ... access[ing] satellite uplinks" can be expensive.[495] "ISDN 'dial up' videoconferencing" is more affordable and proves high-quality two way remote ability from anywhere in the world.[496] A New Jersey federal court used video conferencing to arraign the Unabomber, Theodore J. Kaczynski who was confined in California at the time.[497] The estimated costs of transporting Kaczynski were $30,000, and the videoconference was conducted for about $45.[498]

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[489] MCM, *supra* note 226, at M.R.E. 611(d). *See also Id.* at R.C.M. 914A.

[490] MCM, *supra* note 226, at M.R.E. 611(d). *See* Major Edward J. O'Brien, *Are Courts-Martial Ready for Prime Time? Televised Testimony and Other Developments in the Law of Confrontation,* Army Law., May 2000, 63, 66 (suggesting necessity showing under this rule may be less than that required by *Craig*).

[491] Lederer, *supra* note 2, at 813.

[492] *Id.*

[493] *Id.*

[494] *Id.*

[495] *Id.* at 819.

[496] *Id.*

[497] Roth, *supra* note 353, at 190-91.

[498] *Id.*

Once you have the equipment, VTC systems are easy to operate. According to one of the leading scholars in technology for the courtroom, most equipment can be operated without technical training after about a three to five minute explanation.[499] One videoconference system needs a monitor, camera, microphone, and speaker.[500] It also needs a method of transmitting information between locations, such as a broadband satellite connection, Internet system or telephone network.[501] The connections may occur on a closed network, i.e., a LAN or Integrated Services Digital Network (ISDN) line that works on regular telephone lines.[502] Satellite connection provides the best picture while Internet connections have more audio disruptions and jerky videos.[503]

These facts reveal that VTC is available and accessible for use in courtrooms to present the testimony of an otherwise unavailable witness that is available by VTC for their testimony to be presented "live" during the court-martial.[504] The good faith efforts' test of reasonableness for VTC usage should depend on its availability and accessibility for the court to use it to present an otherwise "unavailable" witness.[505] With the

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[499] Lederer, *supra* note 476, at 1101-2. Professor Frederic I. Lederer "is the director of William & Mary's Courtroom 21, the world most technologically advanced courtroom." *Id.* at 1095.

[500] Pacific Bell, *supra* note 483.

[501] Lederer, *supra* note 2, at 802.

[502] *Id.*

[503] *Id.*

[504] *See* Massey v. Kim, 455 S.E.2d 306 (Ga.Ct.App 1995) (rejecting request for a stay, the Court indicated that improvements in modern communications since the passage of the Soldier's and Sailor's Civil Relief Act provided the court with the option of proceeding with the case, although the witness was overseas).

[505] Ohio v. Roberts, 448 U.S. 56, 74-75 (1980) (If there is a possibility that affirmative measure may produce the witness, "good faith may demand their effectuation.)

availability of VTC in civilian courts and military installations, it would be reasonable for the government to determine if VTC is available for use by the court and the witness. The government could request to use any facility in civilian and military locations, subject to the owner's convenience and cost negotiations.[506] The only issue should be whether the technology is compatible.[507]

B. VTC Makes Unavailable Witnesses Available

Although in the past courts have been hampered by their inability to subpoena American citizens to overseas locations and foreign citizens to U.S. locations, those problems may be significantly reduced with VTC.[508] As a result, the witness that was "unavailable" under the Rules of Evidence is now "available" and must be produced for confrontation at trial.[509] With a rule encouraging the use of VTC, the prosecution cannot attempt to rely on traditional exceptions without attempting to investigate whether VTC is available.[510] The fact that there is a possibility that the procedure may not be available

[506] *See* Ryan v. State, 988 P.2d 46, 58 (Wyo. 1999) (explaining that the jury received the remote testimony at Western Wyoming Community College).

[507] Lederer, *supra* note 2, at 806.

[508] *Id.* at 801.

[509] MCM, *supra* note 226; M.R.E. 804(b) defines unavailability for purposes of this thesis when a witness is unable to appear at the hearing because of death, existing physical or mental illness; cannot be compelled to attend by process or other means; is unavailable because of mission necessity or other reasons specified in UCMJ, art. 49(d)(2) (2000).

[510] Ohio v. Roberts, 448 U.S. 65, 81-82 (1980) (quoting Barber v. Page, 390 U.S. 719, 724 (1968) ("[T]he possibility of a refusal is not the equivalent of asking and receiving a rebuff.).

does not prevent the prosecution from making good faith efforts to determine if VTC is accessible.[511]

Where VTC is available, the government may not be able to establish that they have made good faith efforts to obtain the witness' presence at trial.[512] Of course, unavailability is an issue only for evidence offered under Mil. R. Evid. 804.[513] Where a civilian witness can be subpoenaed to present their testimony by VTC or in the case of a military witness ordered to a VTC location when mission needs demand, VTC appears to be a reasonable step in these instances and may prevent the witness from qualifying as an unavailable witness.[514] The Supreme Court has indicated that when a witness is available to testify and prior testimony evidence is also available, the Confrontation Clause favors 'live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant.'"[515]

C. VTC Enhances the Accused's Opportunity for Cross-Examination

Consistently throughout the history and evolution of the Confrontation Clause and case law, there has been emphasis on "cross-examination" as an integral part of a

[511] *Id.* at 81-82 ("[P]ossibility of a defeat is not the equivalent of pursuing all obvious leads and returning emptyhanded."). *See* United States v. Cordero, 22 M.J. 216, 221 (C.M.A. 1986) (Court of Military Appeals, in *dictum,* extended the good faith efforts test to potentially providing a foreign witness with testimonial immunity as "other reasonable means" under M.R.E. 804(a)(5) and the Confrontation Clause).

[512] *Roberts*, 448 U.S. at 74-75 (If there is a possibility that affirmative measure may produce the witness, "good faith may demand their effectuation.)

[513] MCM, *supra* note 226, at MRE 804. *See* United States v. Inadi, 475 U.S. 387 (1986).

[514] *Roberts*, 448 U.S. at 74-75.

[515] Ohio v. Roberts, 448 U.S. 56, 65 (1980).

defendant's Sixth Amendment right. Professor Wigmore believed that the purpose of the confrontation right was to enable the defense to cross-examine adverse witnesses.[516] In Douglas v. Alabama, the Supreme Court stated that "an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation."[517]

Cross-examination provides defense counsel with a tool to challenge a witness' veracity. The defense "is also given a full and fair opportunity to probe and expose [testimonial] infirmities."[518] By presenting the accused with this effective opportunity to cross-examine, otherwise unavailable witnesses at trial, any questionable demeanor that arises can be addressed by the accused and the fact finder and evaluated based on credibility factors.[519]

VTC provides what the Court has described when discussing the element of confrontation. It provides an opportunity to cross-examine the witnesses, while testing their recollection, and sifting the witness conscience.[520] VTC can provide defense with the same opportunity to cross-examine a witness as is provided during in-court examinations of adverse witnesses.[521]

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[516] Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

[517] Douglas v. Alabama, 380 U.S. 415, 419 (1965).

[518] *Id.*

[519] Maryland v. Craig, 497 U.S. 836, 845-46 (1990).

[520] Mattox v. United States, 156 U.S. 237, 241-2 (1895).

[521] United States v. Gigante, 166 F.2d 75, 80 (2d Cir. 1999).

D. VTC will be to Situations Where It Enhances the Truth-Finding Process

Although an argument can be made for unlimited use of VTC, remote testimony should be limited by statute to cases involving unavailable witnesses and extraordinary circumstances.[522] The Supreme Court has ruled that physical confrontation will not be easily dispensed with. The trial judge should allow remote testimony only after the proponent shows that a material witness cannot be compelled to physically appear in court, is "unavailable" under Rule of Evidence 804, and the witness' attendance is "necessary to prevent a failure of justice."[523] By limiting the rule for VTC to cases of necessity, the Clause's concern with enhancing the "accuracy of the truth-determining process" is furthered because VTC provides the fact finder with "a satisfactory basis for evaluating the truth of the witness' testimony."[524]

As an aid in truth finding, VTC also opens up the judicial process to greater numbers of participants. "By opening up the courthouse doors to the general public through the use of remote testimony procedures, greater access to the judicial system is provided, "which in turn increases public trust and awareness.[525]

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[522] *Id.* at 81.

[523] *Id*

[524] California v. Green, 399 U.S. 149, 161 (1970).

[525] *Green,* 399 U.S. at 161.

XIII. Recommendations

This rules governing military courts-martials should be revised to allow for VTC testimony for otherwise unavailable witnesses in exceptional circumstances.[526] The revision should specify the guidelines for taking VTC testimony and should express a strong preference for its use over depositions.[527] These guidelines should be codified into a rule that: (1) amends MRE 804(a) and Article 49 to allow for VTC when the witness is unavailable; (2) encourages the trial counsel to offer this procedure to material witnesses who cannot be present in court under R.C.M. 703; and (3) provides the specific procedures for presenting VTC testimony as an alternative means of presenting an otherwise absent witness' testimony at trial.

Amend Military Rules to Allow Video Teleconferencing[528]

Video teleconferencing should be considered a permissible exception to a defendant's confrontation rights; however, reliability in the testimony at the remote location must be ensured.[529] To prevent the problems that arose in *Shabazz*, Art. 49, UCMJ should be amended to authorize video teleconferencing for cases where a material witness' unavailability necessitates confrontation at trial.

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[526] United States v. Gigante, 166 F.2d 75, 81 (2d Cir. 1999).

[527] *See infra* (Appendix). *See* proposed amendment to Fed. R. Evid. 26.

[528] *In re San Juan Dupont Hotel Fire Litigation*, 129 F.R.D. 424 (1990) (Specific guidance for remote testimony of witnesses.).

[529] United States v. Shabazz, 52 M.J. 585, 594 (N-M Ct.Crim.App. 1999).

RCM 702 will also be amended to reflect these changes.[530] At 702(j) the rule would specify a preference for the use of VTC instead of depositions for material witnesses that are nonamenable to process. The rule would allow use of video teleconferencing after a showing of extraordinary circumstances as follows:

1. The witness' testimony is relevant, material and necessary.
2. The witness is unavailable under Rule 804.
4. There is no adequate substitute.
5. The witness testimony is of central importance and their appearance is essential to a fair trial; and
6. Good faith efforts indicate that the witness' live testimony can be presented by video teleconference.

R.C.M. 703(e)(3) should also be amended to state that the military judge shall grant a continuance or other relief in order for the prosecution to attempt to secure the witness' *presence, including determining whether the circumstances of the case necessitate using video teleconferencing and whether the procedure is available.*[531] This includes determining if the witness can be subpoenaed or will voluntarily appear for VTC.

The amended R.C.M. 703 would provide further guidance for VTC usage. It would explain that a witness is not "unavailable" under the Rules of Evidence until the prosecutor determines whether testimony by VTC is available.[532] It would also require the proponent of the testimony to make a motion for VTC when the proponent discovers

[530] *Id.*

[531] *Id.* Proposed change would include this language. [Emphasis added].

[532] The rule would allow video teleconferencing where witness is unavailable under rules in MCM, M.R.E. 804(a)(4), (5) and (6).

that a material witness cannot be physically present at trial but is available by video teleconference.[533]

As suggested in *Shabazz,* the procedures for video teleconferencing should resemble those delineated in the case of *In re San Juan Dupont Plaza Hotel Fire Litigation.*[534]

XIV. Conclusion

Just as the court found in *Barber v. Page*, we have reached another milestone in the evolution of the Confrontation Clause.[535] This evolution is caused by development and rapid spread of video teleconference technology.[536] This technology provides courts with a mechanism to ensure that defendants receive the best opportunity for face-to-face confrontation with an accuser that would be otherwise unavailable.[537] This evolution in the accused's confrontation rights arises from advanced technology that arm courts with the capability to connect with virtually any person around the world to communicate and interact by remote transmission.[538] With this remote procedure, a previously

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[533] These procedures will be equally applicable to defense requested witnesses also.

[534] United States v. Shabazz, 52 M.J. 585 (N-M Ct.Crim.App 1999) (citing *In re San Juan Dupont Plaza Hotel Fire Litigation,* 129 F.R.D. 424 (1990).

[535] Barber v. Page, 390 U.S. 719, 723 (1968).

[536] Lederer, *supra* note 2, at 800.

[537] *Id.* at 819.

[538] Lederer, *supra* note 2.

"unavailable" witness for confrontation can become "available."[539] By using remote procedures, this witness' testimony can be transmitted into the courtroom during the court-martial for live interaction with the courtroom participants.[540] With VTC at its disposal, the court's jurisdiction can be expanded to subpoena witnesses to appear by video teleconference at a remote location in certain circumstances.[541] VTC also provides the court with an alternative to travel for witnesses that have serious health problems or for the service member that should not travel because of mission requirements.[542]

Approximately 50 years ago, Congress began providing service members with the protections in the Bill of Rights through certain guarantees under the Uniform Code of Military Justice. As a result, the military accused was sometimes placed in a better position than his civilian counterparts.[543] With a rules allowing for VTC, the military can again lead the way in providing the military accused with procedures that enhance the accused's ability to not only confront the witnesses against him but also compel witnesses to appear on his or her behalf.

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[539] Harrell v. State, 709 So.2d 1364 (Fla. 1999).

[540] United States v. Gigante, 166 F.3d 75 (2nd Cir. 1999).

[541] *Harrell*, 709 So.2d at 1367.

[542] *Gigante*, 166 F.3d at 79.

[543] Weiner, *supra* note 201, at 300.

Although there is some skepticism toward the use of VTC in courts-martials, most of it stems from a hesitancy to alter the "traditional" way of conducting criminal trials.[544] Even skeptics must admit that current trial procedures provide inadequate options where a material witness is "unavailable." The current rules address this problem by allowing for the introduction of prior testimony or hearsay evidence in lieu of live testimony from the witness. Unfortunately, these rules do not assist when a witness cannot be subpoenaed but is so central to the trial that fairness is jeopardized without them.[545] VTC is a best solution to the problem for it can provide live, in-court testimony of these witnesses that were previously inaccessible.

Video teleconferencing is a permissible exception to the confrontation clause because it provides substantial compliance with the purposes of the rule by supplying all of the elements of the rule: (1) face-to-face confrontation at trial (without the physical component); (2) oath; (3) cross-examination; and (4) the ability of the fact finder to view demeanor and judge credibility.[546] As long as the remote procedure is supported by necessity, there is support for allowing a minor departure from the rule where the only deviation is that the witness is not physically in the same room as the defendant but the remaining elements are in place.[547]

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[544] Lederer, *supra* note 468, at 1096 (remarking that the courtroom is the only place in the law that is not using technology).

[545] MCM, *supra* note 226, at R.C.M. 702. *See* United States v. Eiland, 39 M.J. 566, 568 n.5 (N-M.C.M.R. 1993).

[546] Harrell, 709 So.2d at 1369.

[547] *Id.*

Congress vested our military system with protections for the military accused that paralleled the rights of civilians even before the Supreme Court recognized our right to any constitutional protections. Now, as our mission take us farther and farther from home, the military needs rules that continually provide the best protections for the military accused to insure fairness and especially witness accessibility to our soldiers who have unselfishly left their homes to serve our country all over the world. VTC also allows these service members to accomplish their mission without disruption in those instances where the mission might be jeopardized by the loss of even one participant.

APPENDIX

Rule 703(e)(3) Depositions and Testimony by Video teleconferencing

(3) *Video Teleconference*[530]

(A) *In general.* Testimony of a military or civilian witness to be taken by video teleconference, during the court-martial, may be ordered whenever, after referral of charges, due to exceptional circumstances of the case, necessity[531] provides that it is in the interest of justice that the testimony of a prospective witness is taken in this manner.

(B) *Who may order.* A convening authority who has the charges for disposition or, after referral, the convening authority (if both parties agree) or the military judge may order that video teleconference testimony be taken on request of a party.

(C) *Request to take deposition.*

Submission of request. At any time after charges have been referred, any party may request in writing that a video teleconference occur for the transmission of the testimony of a witness that meets the requirements listed in paragraph (D) below.

(D) *Contents of the request.*

(i) The name and address of the person whose testimony is requested by video teleconference, or, if the name of the person is unknown, a description of the office or position of the person;

(ii) A statement of the matters on which the person is to be examined;

(iii) A statement of the reasons for taking the testimony in this manner including the reasons for the witness' unavailability under Mil. R. Evid. 804(a)(4), (5) or (6). If the unavailability is based on 804(a)(5), the witness' location is known but compulsory process is not available to procure the witness' physical appearance because the witness resides beyond the territorial jurisdiction of the court. If the reason for the unavailability falls under Mil. R. Evid. 804(a)(4) or (6), the reason the witness is unable to attend or is prevented from attending.

(iv) A statement of the relevance and necessity of the witness' testimony;

(v) Specify the reasons why the witness' personal appearance will be necessary, including why the witness is of such central importance to an issue that the fairness of the trial will be at risk and whether there is no adequate substitute for such testimony.

The request should include the location where the video teleconference testimony shall be conducted -- a location near the city and state of the witness' residence and the time zone. This location will be called the studio. The location of the military judge, counsel and accused will be called the courtroom.

The request should be presented to the convening authority or military judge in a time reasonable to allow production of each witness on the date when the witness' presence will be necessary, and to allow the implementation of the procedures necessary for the video teleconference testimony, unless the court finds on the record that the need for such an order was not reasonably foreseeable.

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[530] This rule incorporates the guidelines set forth in In re San Juan Dupont Plaza Hotel Fire Litigation, 129 F.R.D. 424 (1990).

[531] Necessity is defined as:

(E) *Notification of decision.* The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for the request.

(F) *Instructions.* The convening authority or military judge may give instructions not inconsistent with this rule to government to ensure that the procedures outlined in this rule are executed.

(i) *Two-way audio/visual transmissions.* Two-way audio and visual transmissions shall be provided for each witness.

(ii) *Color transmissions.* Transmissions both to and from the place where the witness testifies shall be in color.

(iii) *Persons present in the courtroom* – Military judge, trial counsel(s), trial defense counsel(s), accused and panel (if trial by members).[532]

(iv) Persons present with witness(es) in studio. Spectators will not be allowed in the room where the witness testifies. Present with the witness shall be a studio clerk and/or Judge Advocate with no prior connection to court-martial, designated by the Staff Judge Advocate from the military installation nearest the video teleconferencing location from where the transmission originates, a studio court reporter, if necessary, and any technical staff needed for the satellite transmission.

(v) The studio clerk will administer the oath to the witness, hand him any documents which the witness is asked to refer to during his/her testimony and perform such other duties and functions as a courtroom clerk would normally perform.

(vi) Additional Equipment. In addition to the technical equipment needed for the transmission to be carried out, the government shall also provide the following, at its own expense.

a. *Courtroom.*

(1) In addition to the existing monitors, an IN monitor and an OUT monitor from and to the location where the witness is present.

(2) A screen to be placed on the witness stand where the witness would sit or other location visible to all parties. A full torso frontal image of the witness will appear on the witness screen at all times.

(3) In addition to the existing cameras and monitors, one remote control camera will be placed on the witness stand focusing on the questioning attorney and another focusing on the presiding judge, each one with its corresponding monitor.

(4) Witness will be seen on all monitor screens (including jury area and public area) during testimony to ensure all present can view the witness.

(5) Questioning attorney in the courtroom:

(a) Will address screen as if witness were on the stand.

(b) The witness hears all objections unless instructed by the Court, pursuant to a request, to use headphones. (The witness will remain on the witness screen and studio clerk will advise the witness when to take off the headphones.)

(c) During questioning, the witness will have a full view of the questioning attorney.

(d) The accused will always full view of the witness during the witness' testimony.

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[532] The accused and counsel shall not be prohibited from electing to appear at the remote location, when the absence of either person does not prevent the court-martial from proceeding after the VTC.

(6) Switcher(s) for the additional cameras.

b. *Studio where witness is present.*

(1) Monitor for the witness to see the pertinent persons(s), documents and/or exhibits in the courtroom.

(2) Adequate sound for the witness to hear any matters originating in the studio, including headphones if necessary.

(3) Witness will sit facing the camera and a monitor will be placed in front of the witness where he will see the courtroom proceedings as if he were sitting in the witness stand.

(vii) *Documents to be shown to the witness.* The party calling the witness shall furnish to the courtroom court reporter any exhibits to which the witness will be asked in direct examination at least *ten* (10) *working days* prior to the transmission. The courtroom court reporter will provide the studio clerk at the district where the witness will appear a copy of all such documents with sufficient time in advance for these to be available when the testimony is scheduled to commence. Any documents needed for cross-examination or redirect, which are not available at the site of the testimony when cross-examination commences, shall be shown to the witness via satellite or copy thereof transmitted by telecopier.

A complete record of the examination of the witness, including the image and voices of all persons who in any way participate in the examination, shall be made and preserved on videotape, in addition to being stenographically recorded. The videotape shall be appended as an appellate exhibit to the record of trial.

(viii) *Telephone and telecopier.* There shall be available in the courtroom, for coordinating any necessary technologic aspects or any other matters that may arise during the satellite transmission, a designated telephone number. The courtroom shall also contain a headset/headphones compatible with the existing telephone equipment. A telecopier capable of using the same telephone number shall also be placed in the courtroom. There shall also be available in the studio, a telephone with a headset/headphones compatible with the equipment and a telecopier. The Court shall be advised of the number(s) of the telephone and telecopier (if different) to be used in the district where the witness is to appear. This shall be done no later than *fifteen (15) calendar days* before the satellite transmission is scheduled to commence.

(ix) *Coordinating technical matters in this district.* Any coordination on technical matters needed for the courtroom shall be made a designated technician(s). The military judge will be notified of the names of all technicians for audio and video purposes.

(x) *Coordinating with other district(s).* The Court shall be advised, at least *fifteen (15) calendar days* prior to commencing each satellite transmission, the address in each district where the transmission will be originated.

The government shall have responsibility for coordinating in the studio district(s) all necessary personnel and logistical matters to allow for a timely and smooth transmission. This includes securing the attendance of the studio clerk, Judge Advocate, studio court reporter if necessary and ensuring all equipment is in place and in working condition prior to the transmission.

(xi) *Safeguarding transmission.* No person shall make or allow to be made any recording/videotape or copy of a recording/videotape of the satellite transmission except by written order of this Court in which case such recording/videotape made shall be the

sole property of the Court. Necessary measures (encoding or scrambling) shall be taken by the party calling the witness to ensure that persons other than those in the courtroom are not able to watch, hear, or otherwise monitor the satellite transmission. Implementation of effective prophylactic measures to ensure this is a condition for allowing the satellite transmissions.

(xii) *Subpoena and option to testify in the Courtroom.* Any party seeking to compel the testimony of any witness pursuant to the procedures set forth herein shall serve upon the witness a subpoena at least *fifteen (15) calendar days* in advance of the intended transmission.

A witness subpoenaed to testify by way of a satellite transmission may elect to testify instead at trial situs. This option, however, must be notified to the calling party at least *seven (7) calendar days* in advance of the date for the transmission in which case the calling party may decline the option of calling the witness.

(xiii) Miscellaneous

a. The witness' testimony via camera and monitor at the studio will be broadcast during the court-martial.

b. The persons that are present with the witness before testimony begins will be identified for the record. (The video technician will scan the studio.)

c. The video technician will show the location of the studio clerk vis-à-vis camera and monitor.

d. The military judge will advise the parties, the jury and the witness that there is slight delay of seconds between questions and answers. Witnesses must wait for objections.

(xiv) *Recalling of witnesses.* A witness who testifies via satellite will not be allowed to subsequently appear in person at trial. His/her subsequent testimony will be either by way of satellite transmission or deposition. In the event it is by way of satellite transmission, the calling party shall bear all associated expenses.