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## The Effect of 8 U. S. C. 1324(d) in Transporting Prosecutions: Does the Confrontation Clause Still Apply to Alien Defendants

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# ARTICLES

## THE EFFECT OF 8 U.S.C. § 1324(d) IN TRANSPORTING PROSECUTIONS: DOES THE CONFRONTATION CLAUSE STILL APPLY TO ALIEN DEFENDANTS?

DONNA F. COLTHARP\*

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## I. INTRODUCTION

Title 8 U.S.C. § 1324 makes it a crime to transport or smuggle aliens into the United States or to harbor them there.<sup>1</sup> Transporting is a crime that, by its nature, always has witnesses—the aliens who seek admittance to, or safe harbor in, the United States. Like the persons who provide them assistance, these witnesses are guilty of a crime—illegal entry into the United States.<sup>2</sup> But, unlike the person accused of transporting them, the witnesses do not always face prosecution. If they are committing their first offense, they may, under the law, opt to be immediately returned to their native countries.<sup>3</sup>

Often, however, that option is not available until the Government has had the opportunity to interview the seized alien witnesses to determine which, if any, member of the group can be prosecuted as a transporter or smuggler under § 1324.<sup>4</sup> As a result of those interviews, the Government will often identify someone it believes to have been the leader and one or several aliens who can provide testimony that will assist the Government in prosecuting the alleged leader.<sup>5</sup> The Government will then detain those witnesses and return the rest of the aliens to their countries.<sup>6</sup>

The fate of the detained witnesses has been the subject of much litigation. Although the Government has the authority to keep the witnesses in custody until the defendant's trial—and has done

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1. 8 U.S.C. § 1324 (2002).

2. *See* 8 U.S.C. § 1325 (2002) (establishing a criminal offense for illegal entry by an alien).

3. Border Patrol agents may make warrantless arrests of aliens suspected of a first-time illegal entry, and these aliens may be granted immediate voluntary departure from the country. 8 U.S.C. § 1357(a)(2) (2000); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1982); 8 C.F.R. § 287.3(d) (2002); *see also* Robert J. McWhirter & Jon M. Sands, *A Primer for Defending a Criminal Immigration Case*, 8 GEO. IMMIGR. L.J. 23, 24 (1994) (noting that the majority of first-time illegal entries are not prosecuted).

4. *See Valenzuela-Bernal*, 458 U.S. at 861 (describing the specific procedure followed by investigators).

5. *See* Lisa Chanow Dykstra, Note, *The Application of Material Witness Provisions: A Case Study—Are Homeless Material Witnesses Entitled to Due Process and Representation by Counsel?*, 36 VILL. L. REV. 597, 619 n.105 (1991) (noting that use of smuggled aliens as witnesses is not an uncommon practice).

6. *See Valenzuela-Bernal*, 458 U.S. at 861 (describing the incident in which one of the three passengers was selectively detained as a witness).

so<sup>7</sup>—such prolonged detentions have been successfully challenged by alien witnesses who have relied on provisions that require the Government, at the witnesses' request, to depose and release them.<sup>8</sup> Releasing the witnesses, however, raises new problems. Once released, the witnesses are often returned to their countries, beyond the subpoena power of U.S. courts.<sup>9</sup> If the witnesses do not return to testify at the defendant's trial, the right to confront adverse witnesses, secured by the Sixth Amendment to the United States Constitution, is implicated.<sup>10</sup>

Whether, and under what conditions, the absent witnesses' hearsay deposition testimony is admissible in a § 1324 defendant's trial is the issue discussed in this Article. Some defendants have claimed that, even if a witness has been deported, the use of the witness's deposition testimony violates the defendant's Sixth Amendment right to confront adverse witnesses.<sup>11</sup> The courts have been divided in their response to these claims. Some have agreed

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7. See *id.* (noting that the Government detained an illegal alien witness "to provide a nonhearsay basis for establishing that" a defendant had violated 8 U.S.C. § 1324(a)(2)); *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 412 (5th Cir. 1992) (describing Government's practice of detaining witnesses); *United States v. Mendez-Rodriguez*, 450 F.2d 1, 3 (9th Cir. 1971) (describing the Government practice of interviewing alien witnesses and returning them to their country of origin), *abrogated on other grounds by United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); see also *Torres-Ruiz v. United States Dist. Court*, 120 F.3d 933, 934 (9th Cir. 1997) (per curiam) (deciding a case in which witnesses had been incarcerated pending trial); *United States v. Lin*, 143 F. Supp. 2d 783, 784-85 (E.D. Ky. 2001) (noting that in an unlawful employment of aliens case, the Government deported some witnesses and detained others); *United States v. Huang*, 827 F. Supp. 945, 946 (S.D.N.Y. 1993) (observing that detained witnesses were deposed and released).

8. See *Aguilar-Ayala*, 973 F.2d at 412 (describing a successful district court challenge); *United States v. Rivera*, 859 F.2d 1204, 1207-08 (4th Cir. 1988) (upholding a challenge to detention).

9. See *United States v. Aguilar-Tamayo*, 300 F.3d 562, 564 (5th Cir. 2002) (noting that after being deposed, witnesses returned to Mexico); *Rivera*, 859 F.2d at 1206 (describing witnesses' election to return voluntarily to Mexico after depositions were completed).

10. See *Huang*, 827 F. Supp. at 948 (stating that use of deposition testimony often conflicts with the Sixth Amendment).

11. See, e.g., *United States v. Allie*, 978 F.2d 1401, 1406 (5th Cir. 1992) (noting defendant's argument that use of deposition testimony as evidence, violated the Confrontation Clause); *United States v. Lopez-Cervantes*, 918 F.2d 111, 114 (10th Cir. 1990) (referring to procedures to be used in order to avoid violation of the Sixth Amendment in such cases); *United States v. Eufracio-Torres*, 890 F.2d 266, 269 (10th Cir. 1989) (stating defendant's claim that Government did not establish a good faith effort to have witnesses present at trial); *Huang*, 827 F. Supp. at 946 (granting defendant's motion for a conditioned release of witnesses on the ground that deportation would lead to violation of the Sixth Amendment right).

that the Government is required to at least attempt to bring the witness to trial; others have held that any attempt, in light of the witness's deportation, would be futile.<sup>12</sup>

In 1996, Congress attempted to address the issue. It added Subsection (d) to 8 U.S.C. § 1324, providing in prosecutions brought under the statute that the videotaped depositions of alien material witnesses are admissible at trial "[n]otwithstanding any provision of the Federal Rules of Evidence."<sup>13</sup> But Congress's explicit attempt to circumvent the evidentiary hearsay rule has done little to clarify matters. Both the federal evidentiary rules and the United States Constitution require the Government to make reasonable efforts to present a witness's live testimony at trial before the witness's prior testimony is admissible.<sup>14</sup> The requirements are not coextensive, however, and no matter what effect Congress intended to have on the evidentiary rules, it cannot relieve the Government of duties imposed by the Constitution.<sup>15</sup> For that reason, the courts addressing the constitutionality of the provision have refused to hold that Congress intended to absolve the Government of its constitutional obligation to make efforts to present live testimony.<sup>16</sup> Instead, they have held, with no explanation, that the constitutional requirement remains intact.<sup>17</sup> Thus construed, the provision adds little, if anything, to the law in existence at the time of its passage.

This Article argues that because of the obligations placed on the Government by the Confrontation Clause, § 1324(d) cannot, by it-

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12. Compare *United States v. Martinez-Perez*, 916 F.2d 1020, 1021-22 (5th Cir. 1990) (holding that before depositions are admitted, Government must show unavailability), with *United States v. Terrazas-Montano*, 747 F.2d 467, 469 (8th Cir. 1984) (concluding that a deported witness is unavailable).

13. 8 U.S.C. § 1324(d) (2002).

14. See FED. R. EVID. 804(a)(5), (b)(1) (requiring the finding of unavailability before prior deposition testimony is admissible); *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (pointing to the Sixth Amendment requirement for a finding of unavailability).

15. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (stating that Congress cannot authorize a constitutional violation).

16. See *United States v. Aguilar-Tamayo*, 300 F.3d 562, 562 (5th Cir. 2002) (holding that the statute admitting a videotaped deposition did not violate the Confrontation Clause); *United States v. Santos-Pinon*, 146 F.3d 734, 734 (9th Cir. 1998) (affirming the lower court's holding that admission of videotaped testimony was not unconstitutional).

17. See *Aguilar-Tamayo*, 300 F.3d at 565 (requiring the Government to establish the unavailability of a witness before deposition testimony can be admitted); *Santos-Pinon*, 146 F.3d at 736 (noting the Government must establish unavailability).

self, resolve the tension between an alien defendant's right to confrontation and the need to address both the logistical and human rights implications of detaining material witnesses. First, the Article discusses the current state of Confrontation Clause law and its relationship to the rules of evidence, demonstrating that the two remain distinct, at least insofar as prior judicial testimony is concerned. Next, the Article discusses the problem Congress sought to address in passing § 1324(d)—the unnecessary and burdensome detention of alien material witnesses—and whether Congress effectively addressed that problem. Finally, the Article proposes that any real solution must begin with a judicial clarification of the confrontation right in § 1324 cases. Such clarification, and any legislation based on it, should not authorize a wholesale abandonment of the right, but it should instead accommodate both the significant interests of alien defendants in confronting witnesses brought to testify against them and the interests of those witnesses in avoiding unnecessarily prolonged detentions.

## II. THE CONFRONTATION CLAUSE, THE HEARSAY RULE, AND PRIOR TESTIMONY

The Sixth Amendment's Confrontation Clause requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>18</sup> This clause, as interpreted by the Supreme Court, protects many of the same interests as the rule prohibiting the admission of hearsay evidence.<sup>19</sup> Like the hearsay rule, for example, the clause secures the right to cross-examine adverse witnesses, thus promoting the reliability of factfinding.<sup>20</sup> The Court has stated that the Confrontation Clause envisions:

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18. U.S. CONST. amend. VI.

19. See *White v. Illinois*, 502 U.S. 346, 353 (1992) (recognizing that hearsay rules and the Confrontation Clause protect similar values); *Roberts*, 448 U.S. at 63 (noting overlap between the Confrontation Clause and hearsay rules); *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (stating the Confrontation Clause and hearsay rules "stem from the same roots"); John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 199 (1999) (noting that hearsay rules and the Confrontation Clause protect similar interests).

20. See *Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999) (stating the interest protected by the Confrontation Clause is reliability); *Montana v. Egelhoff*, 518 U.S. 37, 42-43 (1996) (commenting that hearsay rules exist to ensure that evidence is sufficiently reliable); see also *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (echoing that cross-examination promotes

[A] personal examination and cross-examination of the witness in which 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.<sup>21</sup>

The Court has gone even further, stating not only that a jury must be able to assess for itself whether a witness is lying, but also suggesting that a witness will be less likely to lie if he gives his testimony in person, in front of a defendant.<sup>22</sup>

Both the Confrontation Clause and the hearsay rule are subject to exceptions. Many kinds of out-of-court statements are admissible at trial, either because they are deemed not be hearsay or because they are excepted from the hearsay rule.<sup>23</sup> Some of the exceptions are designed to ensure that trials are conducted efficiently and that relevant evidence is not unfairly excluded; others respond to various public policy concerns.<sup>24</sup> The same kinds of concerns have prompted courts to carve out exceptions to the Confrontation Clause even though the clause, on its face, tolerates no

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reliability); *Roberts*, 448 U.S. at 63 (recognizing the importance of cross-examination); *California v. Green*, 399 U.S. 149, 157 (1970) (requiring witness's presence at trial); *Barber v. Page*, 390 U.S. 719, 725 (1968) (holding that failure to cross-examine a witness does not violate the Confrontation Clause); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (commenting that cross examination may satisfy the Confrontation Clause); 2 MCCORMICK ON EVIDENCE § 244 (John W. Strong ed., 4th ed. 1992) (relying on general evidentiary principles); Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 816 (2000) (stating that the purpose of hearsay rule is to ensure that evidence is reliable); Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary-Oriented Approach*, 49 HASTINGS L.J. 477, 501 (1998) (announcing that the purpose of hearsay rules is to ensure right of cross examination).

21. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

22. *See Coy v. Iowa*, 487 U.S. 1012, 1019-20 (1988) (implying that the Confrontation Clause promotes truthfulness).

23. *See Roberts*, 448 U.S. at 62 (stating that the hearsay rule is "riddled with exceptions"); 2 MCCORMICK ON EVIDENCE § 245 (John W. Strong ed., 4th ed. 1992) (noting that not all hearsay is unreliable and inadmissible).

24. *See* FED. R. EVID. 803, 804(b) (setting out exceptions and exclusions from Federal Rules of Evidence); James A. George, *Hearsay: Recognizing It and Handling the Objection*, 10 AM. J. TRIAL ADVOC. 489, 489-90 (1986) (stating hearsay exceptions developed in part because of recognition that some hearsay is reliable, or bears value because of its hearsay nature, and in part for practical considerations).

exceptions.<sup>25</sup> The Supreme Court, early in its Confrontation Clause jurisprudence, rejected a literal interpretation of the Clause.<sup>26</sup> An accepted hearsay exception, however, does not automatically satisfy the Confrontation Clause, and the Court has maintained that the hearsay rules and the Confrontation Clause are not always coextensive.<sup>27</sup> For that reason, the Court tests both traditional and newly crafted hearsay exceptions against the requirements of the Confrontation Clause.<sup>28</sup> In many cases, it has found no constitutional problem with the challenged hearsay exception. It has held, for example, that dying declarations, a traditional exception to the hearsay rule under the common law, are admissible, even over a Confrontation Clause challenge.<sup>29</sup> It has also held that coconspirator statements,<sup>30</sup> prior inconsistent statements,<sup>31</sup> and the statements of child sex-abuse victims survive the Confrontation Clause.<sup>32</sup>

But not all hearsay exceptions escape a constitutional challenge.<sup>33</sup> As the Court has recognized, the personal right to confront adverse witnesses in a criminal trial goes beyond mere

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25. See *Roberts*, 448 U.S. at 63 (observing that read literally, the Confrontation Clause would always require exclusion of hearsay). But see *Mattox*, 156 U.S. at 243 (concluding that the Confrontation Clause should not be read literally).

26. See *Mattox*, 156 U.S. at 243 (stating that the Confrontation Clause does not require exclusion of all statements made outside of trial); see also *Roberts*, 448 U.S. at 62-63 (rejecting the literal interpretation of the Confrontation Clause).

27. See *Idaho v. Wright*, 497 U.S. 805, 814 (1990) (noting that the Court has been careful not to equate the hearsay prohibition with the Confrontation Clause); *United States v. Owens*, 484 U.S. 554, 560 (1988) (noting "partial" overlap); *California v. Green*, 399 U.S. 149, 155-56 (1970) (noting that while the Confrontation Clause and hearsay rule protect similar interests, they are not identical).

28. See *United States v. Inadi*, 475 U.S. 387, 392 (1986) (commenting on the validity of hearsay exceptions); *Roberts*, 448 U.S. at 64 (recognizing the competing interests of the two articles); *Green*, 399 U.S. at 162 (noting the judicial scrutiny of the Confrontation Clause).

29. See *Mattox*, 156 U.S. at 243 (reiterating the dying declaration exception to hearsay).

30. *Inadi*, 475 U.S. at 400.

31. *Green*, 399 U.S. at 164.

32. *Maryland v. Craig*, 497 U.S. 836, 853 (1990).

33. See *Idaho v. Wright*, 497 U.S. 805, 812, 827 (1990) (holding that the child's statements made to a doctor and admitted into court under Idaho's residual hearsay exception violated the Confrontation Clause); *Green*, 399 U.S. at 155-56 (concluding the fact that the hearsay exception allows particular testimony as evidence, does not necessarily mean that the Confrontation Clause would allow it into the record); see also *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (examining the asserted exception for testimony of child sex-abuse victim and concluding that the State may not shield the child from confrontation with accused based only on generalized allegations of trauma); *Barber v. Page*, 390 U.S. 719, 723 (1968)



concerns of reliability to fundamental and deeply rooted notions of fairness.<sup>34</sup> Even though the Court acknowledges this distinction between the constitutional requirement and the evidentiary rule, a consistent framework for distinguishing permissible exceptions from impermissible exceptions has so far eluded the Court.<sup>35</sup>

In attempting to articulate such a framework, the justices have debated the intended scope of the constitutional protection. The Court has argued, for example, over the importance of an actual face-to-face confrontation,<sup>36</sup> has questioned whether confrontation must be available for all hearsay testimony,<sup>37</sup> and has disputed the role of public policy concerns in the analysis.<sup>38</sup> The long-standing

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(examining the asserted exception for prior testimony and holding that before such testimony can be admitted, the Government must show the witness is unavailable).

34. See *Coy*, 487 U.S. at 1017 (stating that confrontation right protects "something deep in human nature that regards face-to-face confrontation between accused and accuser" as basic to fair trial); *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (stating that the clause contributes to the "establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails"); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (holding that the right to confront adverse witnesses is basic to a fair trial); see also John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1810 (2001) (noting the distinction between the hearsay rule's emphasis on reliability, admissibility, and the procedural protection afforded by the Confrontation Clause of face-to-face confrontation); Richard D. Friedman & Bridget McCormack, *Dial-in Testimony*, 150 U. PA. L. REV. 1171, 1239 (2002) (stating that unlike the hearsay rule, the Confrontation Clause primarily protects the right to face-to-face confrontation).

35. See *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980) (noting that the Court has not developed a theory that resolves questions regarding all hearsay exceptions); *Green*, 399 U.S. at 162 (stating there is no theory under which to evaluate all challenged exceptions); see also Tom Patton, Comment, *Sixth Amendment's Confrontation Clause—Is a Showing of Unavailability Required?*, 17 S. ILL. U. L.J. 573, 573 (1993) (noting that the Court has "struggled" to define what hearsay does, and what hearsay does not, violate the Confrontation Clause).

36. Compare *Coy*, 487 U.S. at 1017 (announcing that the literal right to confront witnesses is at the core of the Confrontation Clause), with *id.* at 1031 (Blackmun, J., dissenting) (contending the fact that the defendant could not see the child witness who testified behind screen was a minimal violation and was justified by public policy).

37. Compare *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., concurring) (arguing for an absolute right to confront witnesses who testify against the defendant), and *Maryland v. Craig*, 497 U.S. 836, 863 (1990) (Scalia, J., dissenting) (arguing that the Sixth Amendment explicitly provides for face-to-face confrontation), with *id.* at 849 (holding that face-to-face confrontation is merely "preference," even for witnesses who appear at trial).

38. Compare *Craig*, 497 U.S. at 860-61 (Scalia, J., dissenting) (criticizing the majority for allowing policy concerns to override Confrontation Clause protections), with *id.* at 849 (concluding that in some cases, the right to confrontation must yield to policy considerations).

and complex debate has resulted in a jurisprudence that is anything but coherent.<sup>39</sup>

There have, however, been moments of clarity. One such moment came in *Ohio v. Roberts*,<sup>40</sup> perhaps the Court's clearest articulation of the relationship between the Confrontation Clause and the hearsay rule.<sup>41</sup> In *Roberts*, the State of Ohio sought to introduce prior testimony given in a preliminary hearing against a man charged with forgery and possession of stolen credit cards.<sup>42</sup> The State subpoenaed the witness to appear at trial with no success.<sup>43</sup> The State relied on an Ohio statute that excepted from its hearsay rule preliminary examination testimony when a witness who, "for any reason," could not appear at trial to argue that the former testimony was admissible.<sup>44</sup> The Supreme Court was asked to determine whether the use of the witness's prior testimony violated Roberts's right to confront, at trial, witnesses who testified against him.<sup>45</sup> The Court held that the admission of the testimony did not run afoul of the Constitution.<sup>46</sup>

In so holding, the Court implicitly rejected the argument that the Confrontation Clause protects wholly separate concerns from

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39. See Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (suggesting the Court's jurisprudence has not been coherent); Michael L. Seigel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U. L. REV. 893, 943 n.152 (1992) (calling the Court's confrontation jurisprudence "irrational").

40. 448 U.S. 56 (1980).

41. See Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 558-59 (1988) (suggesting *Roberts* clarified the Court's Confrontation Clause analysis).

42. *Ohio v. Roberts*, 448 U.S. 56, 58 (1980). The witness was called by the defendant at the preliminary hearing but contradicted the defendant's assertion that she had actually given the defendant the allegedly stolen credit cards and the allegedly forged check. *Id.* In spite of her denials, the defendant's attorney did not ask to have her declared a hostile witness and did not request permission to cross-examine her. *Id.*

43. *Id.* at 59.

44. *Id.* (indicating that the Court had granted certiorari to consider whether admission of the witness's transcript testimony at the preliminary hearing violated the respondent's right of confrontation in light of the facts that the witness was absent at trial and had not been cross-examined at the preliminary hearing).

45. See *Roberts*, 448 U.S. at 62.

46. See *id.* at 77 (stating that when a witness is not available at trial, the Confrontation Clause requires a showing that the witness is unavailable and that the prior testimony of the witness must be reliable, and concluding that the prior testimony of the witness was reliable and that the prosecution had fulfilled its duty of a good faith effort to establish the constitutional unavailability of the witness).

those protected by the hearsay prohibition. Because the right to confrontation, like the hearsay rule, protects an interest in ensuring reliable evidence through rigorous cross-examination, the right must operate to exclude some hearsay testimony.<sup>47</sup> Although, in some cases, the Court held that competing interests will weigh against providing a face-to-face confrontation and in favor of admitting hearsay, those interests alone are not sufficient to override the protections of the clause.<sup>48</sup> Even when a hearsay exception is grounded in such interests, the Government must demonstrate both the reliability of the hearsay and the necessity of relying on hearsay, instead of presenting live testimony.<sup>49</sup>

To ensure that the hearsay is reliable, the Court stated, the Government may demonstrate that it "falls within a firmly rooted hearsay exception."<sup>50</sup> If it does, then courts may infer, without more, that the evidence is reliable.<sup>51</sup> If it does not, the Government must prove that "particularized guarantees of trustworthiness" render the hearsay admissible.<sup>52</sup>

If the Government proves the hearsay's reliability, it must then demonstrate that the use of hearsay is necessary.<sup>53</sup> Here, the Court repeated the rule it had established just four years earlier in *Barber v. Page*.<sup>54</sup> That rule requires the Government to prove necessity by showing that the witness is unavailable to testify.<sup>55</sup> To prove unavailability, the Government must demonstrate that it made good faith efforts to produce live testimony in a criminal proceeding.<sup>56</sup> The Government cannot be required to perform a futile act.<sup>57</sup> However, "[I]f there is a possibility, albeit remote, that affirmative

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47. *Id.* at 63.

48. *Id.* at 64.

49. *Id.* at 65; see also John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 204 (1999) (calling reliability and necessity "twin pillars" of admissibility).

50. *Roberts*, 448 U.S. at 66.

51. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

52. *Id.*

53. See *id.* at 74 (indicating that in addition to showing the evidence is reliable, the defense contended it also had to be necessary).

54. *Id.* at 74 (citing *Barber v. Page*, 390 U.S. 719, 724-25 (1968)).

55. *Id.* at 74.

56. *Roberts*, 448 U.S. at 74; see also *Barber*, 390 U.S. at 724-25 (explaining that unavailability is not satisfied absent a showing of good faith efforts to procure availability).

57. *Roberts*, 448 U.S. at 74.

measures might produce the declarant, the obligation of good faith may demand their effectuation.”<sup>58</sup>

In a series of cases following *Roberts*, the Court backed away from the clear analysis established in that case. Acknowledging that “[i]n the course of rejecting the Confrontation Clause claim in [*Roberts*], we used language that might suggest that the Confrontation Clause generally requires that a declarant either be produced at trial or be found unavailable before his out-of-court statement may be admitted into evidence.”<sup>59</sup> The Court limited that requirement to the particular facts of *Roberts*—imposing it only when the challenged hearsay is prior judicial testimony.<sup>60</sup> The rule does not apply, the Court has held, when the challenged hearsay evidence has an “independent evidentiary significance of its own” and when there would be little to be gained from enforcing the rule.<sup>61</sup> Thus, the Court has concluded that a coconspirator’s out-of-court statements are not subject to the rule of unavailability because they can “provide evidence of the conspiracy’s context that cannot be replicated, even if the declarant testifies to the same matters in court.”<sup>62</sup> Under similar reasoning, the Court has also permitted the use of the spontaneous declarations of a child-sexual-abuse victim made in the course of seeking medical treatment.<sup>63</sup> Spontaneous declarations made “without the opportunity to reflect on the consequences of one’s exclamation—may justifiably carry more

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58. *Id.* In the end, the Court held the inquiry will be one of reasonableness. *Id.* (quoting *California v. Green*, 399 U.S. 149, 189 (1970) (Harlan, J., concurring)).

59. *White v. Illinois*, 502 U.S. 346, 353 (1992).

60. *See id.* at 354 (relating to the introduction of transcript testimony from a probable cause hearing); *United States v. Inadi*, 475 U.S. 387, 394 (1986) (stating, “*Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts”); *see generally* John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 206 (1999) (describing the Court’s “retreat” from *Roberts*’s approach); Tom Patton, *Sixth Amendment’s Confrontation Clause—Is a Showing of Unavailability Required?*, 17 S. ILL. U. L.J. 573, 586-89 (1993) (outlining the Court’s jettison from *Roberts*’s approach); Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 192 (1993) (noting the Court’s move away from *Roberts*’s unavailability requirement).

61. *See Inadi*, 475 U.S. at 394; *see also White*, 502 U.S. at 354.

62. *White*, 502 U.S. at 354 (quoting *Inadi*, 475 U.S. at 395). A statement made in furtherance of a conspiracy, the Court held, is often significant precisely because it was made during the existence of that conspiracy. *Inadi*, 475 U.S. at 395.

63. *See White*, 502 U.S. at 356 (justifying admissibility absent the opportunity to reflect on consequences of declaration).

weight with a trier of fact than a similar statement offered in the relative calm of the courtroom.”<sup>64</sup> As for statements made during medical treatment, the Court found that because the “the declarant knows that a false statement may cause misdiagnosis or mistreatment,” they carry “special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.”<sup>65</sup> The Court has also declared constitutional a statute permitting the testimony of a child-sex-abuse victim to be offered through closed-circuit television, even though the child is available to testify.<sup>66</sup> Additionally, the Court held that the State could show necessity not by proving that the witness was unavailable, but by making a case-by-case demonstration that testifying at trial would cause trauma to the child witness.<sup>67</sup>

Although the Court has abandoned *Roberts*'s unavailability requirement for many types of hearsay, the requirement remains intact in instances which the prosecution attempts to introduce prior, out-of-court testimony.<sup>68</sup> This is so because prior judicial testimony seldom has independent evidentiary value.<sup>69</sup> To the contrary, the Court has continued to recognize that with such evidence, in-court testimony is stronger than the challenged hearsay: “If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of

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64. *Id.*

65. *Id.*

66. *Maryland v. Craig*, 497 U.S. 836, 855 (1990).

67. *Id.*; see also *White*, 502 U.S. at 354-56 (stating that out-of-court statements made by child victims are not subject to *Roberts*'s unavailability requirement).

68. *United States v. Inadi*, 475 U.S. 387, 393-94 (1986). Justices Thomas and Scalia have suggested that the clause applies only to witnesses who are actually present at trial or who offer “testimony” prior to trial:

The federal constitutional right of confrontation extends to any witness who actually testifies at trial, but the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. It was this discrete category of testimonial materials that was historically abused by prosecutors as a means of depriving criminal defendants of the benefit of the adversary process.

*White*, 502 U.S. at 365 (Thomas, J., concurring); see also Akhil Reed Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman*, 86 GEO. L.J. 1045, 1045 (1998) (arguing that the Confrontation Clause applies to any witness who testifies “either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like”).

69. *Inadi*, 475 U.S. at 394.

the declarant, there is little justification for relying on the weaker version.”<sup>70</sup> Because live testimony is the stronger evidence, the Constitution prohibits reliance on former testimony, unless the Government demonstrates that the witness is actually unavailable to testify.<sup>71</sup>

A similar requirement is imposed by the Federal Rules of Evidence.<sup>72</sup> In 1974, two years after the Court reaffirmed *Barber*’s unavailability requirement in *Roberts*, the Court recommended an amendment to the rules requiring proponents of prior testimony to demonstrate that they had tried, through “process or other reasonable means,” to secure live testimony.<sup>73</sup> The Supreme Court, however, has explicitly stated that the unavailability requirement in the Rule and that embodied in the Confrontation Clause are not coextensive.<sup>74</sup>

### III. TRANSPORTING PROSECUTIONS AND § 1324(d)— CONGRESS IDENTIFIES A PROBLEM, BUT FAILS TO PROVIDE A SOLUTION

Because the requirements of the hearsay rule and the Constitution are not the same, it is difficult to see the potential effect of Congress’s provision authorizing the admission of videotaped depositions of deported witnesses pursuant to 8 U.S.C. § 1324.<sup>75</sup> Clearly, Congress was attempting to reach the unavailability requirement—it authorized the admission of the hearsay “[n]otwithstanding any provision of the Federal Rules of Evidence”<sup>76</sup> to eliminate the need to detain deportable aliens indefi-

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70. *Id.*

71. *Id.*

72. FED. R. EVID. 804 (defining unavailability in five ways). A declarant is unavailable if (1) his testimony is privileged; (2) he refuses to testify; (3) he cannot remember his prior statement; (4) he is dead or very ill; or (5) the proponent of the witness’s testimony cannot “procure the declarant’s attendance . . . by process or other reasonable means.” *Id.*

73. FED. R. EVID. 804 advisory committee’s note; see also FED. R. EVID. 804(a)(5).

74. *Inadi*, 475 U.S. at 393 n.5; see also *United States v. Martinez-Perez*, 916 F.2d 1020, 1024 (5th Cir. 1990) (finding defendant was not required to cite Rule 15 or Federal Rule of Evidence 804(a) when raising a Confrontation Clause challenge); 2 MCCORMICK ON EVIDENCE § 252 (John W. Strong ed., 4th ed. 1992) (noting that *Barber*’s unavailability requirement seems more stringent than the hearsay exception embodied in rule).

75. See 8 U.S.C. § 1324(d) (2002).

76. See *id.* (mentioning only Federal Rules of Evidence); *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998) (noting that Congress said nothing about constitutional requirements in 8 U.S.C. § 1324(d)).

nately pending trial.<sup>77</sup> Congress indicated its intent to make deposition testimony easier to admit under the rules of evidence, however, it said nothing about the requirements of the Constitution.<sup>78</sup> The failure to do so is likely an acknowledgement that Congress cannot abrogate constitutional obligations.

The few courts to confront the statute's constitutionality have recognized this impediment, noting that the provision cannot reach the constitutional duty to prove unavailability.<sup>79</sup> They have not articulated what role, if any, the law can play in § 1324 prosecutions. The courts thus leave the constitutional unavailability requirement intact, but they fail to resolve the conflict regarding the parameters of that requirement in transporting cases.

#### A. *The Problem*

Title 8 U.S.C. § 1324 makes it a crime to bring aliens into the United States or to harbor them there.<sup>80</sup> In the usual case, to prove a defendant guilty of that offense, the Government offers the testimony of agents involved in the arrest and the testimony of the aliens who were allegedly brought in or harbored.<sup>81</sup> The witnesses are chosen almost immediately after the defendant's arrest; the Government then interviews all the aliens to determine which of them have evidence that either inculcates or exculpates the defendant.<sup>82</sup> Those aliens not selected to testify are returned to their native countries; those aliens who will testify are detained.<sup>83</sup>

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77. H.R. CONF. REP. NO. 104-828, at 206 (1996).

78. *See id.* (failing to address constitutional requirements).

79. *See* United States v. Aguilar-Tamayo, 300 F.3d 562, 565 (5th Cir. 2002) (recognizing that the requirements of the Confrontation Clause must be satisfied); United States v. Santos-Pinon, 146 F.3d 734, 736 (9th Cir. 1998) (noting that the requirements of the Constitution are not abrogated).

80. 8 U.S.C. § 1324 (2002).

81. *See, e.g.,* United States v. Valenzuela-Bernal, 458 U.S. 858, 861 (1982) (noting that the Government detained an alien to testify in an illegal transporting case); Torres-Ruiz v. United States Dist. Court, 120 F.3d 933, 935-36 (9th Cir. 1997) (describing the selection and detention of witnesses for a smuggling case); Aguilar-Ayala v. Ruiz, 973 F.2d 411, 414 (5th Cir. 1992) (describing an instance of the practice).

82. *Valenzuela-Bernal*, 458 U.S. at 861. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the Government is required to produce for the defendant any evidence that tends to exculpate him. *Brady*, 373 U.S. at 87; *see also Valenzuela-Bernal*, 458 U.S. at 868 (outlining standards for determining materiality).

83. *See Valenzuela-Bernal*, 458 U.S. at 861 (explaining the procedure); James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigra-*

How to deal with these testifying witnesses has been a continuing and difficult problem. The Government has the legal authority to keep the material witnesses in U.S. custody pending the defendant's trial.<sup>84</sup> Detention is authorized by the material witness statute, 18 U.S.C. § 3144, and by federal regulations that discourage the deportation of alien material witnesses when their presence is needed to testify on behalf of the United States.<sup>85</sup> In fact, the Government has relied on this authority to justify keeping alien witnesses in custody so that they could testify in § 1324 proceedings.<sup>86</sup>

Although retaining witnesses is authorized by law, it causes logistical and human rights problems.<sup>87</sup> The Supreme Court addressed some of the burdens imposed on the Government in *United States v. Valenzuela-Bernal*,<sup>88</sup> noting that in 1979, almost one-half of the inmates incarcerated in the Southern District of California were material witnesses who had not been charged with a criminal offense.<sup>89</sup> Detaining such witnesses resulted in overcrowding in federal facilities and imposed financial and physical

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*tion Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 246 (1995), WL 1 UCDJILP 227 (noting the Government's practice of detaining material witnesses).

84. 18 U.S.C. § 3144 (2002). Title 18 U.S.C. §§ 3142 and 3144 authorize keeping material witnesses in custody when necessary. *Id.*; 18 U.S.C. § 3142 (2002). Congress did not abrogate either of these provisions when it passed 8 U.S.C. § 1324(d), which provides for the admissibility of videotaped testimony. 8 U.S.C. § 1324(d) (2002).

85. See 8 C.F.R. § 215.2(a) (2002) (prohibiting departure of aliens if deportation would prejudice the interests of the United States); 8 C.F.R. § 215.3(g) (2002) (deeming the departure of aliens who are witnesses to any pending criminal case as prejudicial).

86. *Torres-Ruiz*, 120 F.3d at 934-35; *Aguilar-Ayala*, 973 F.2d at 413-14; see also *In re Class Action Application for Habeas Corpus ex rel. All Material Witnesses*, 612 F. Supp. 940, 942-43 (W.D. Tex. 1985) (discussing claims of witnesses detained under 18 U.S.C. § 3144).

87. See *Valenzuela-Bernal*, 458 U.S. at 865 (describing difficulties in detaining witnesses); *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002) (sympathizing with difficulties of dealing with alien witnesses); *United States v. Rivera*, 859 F.2d 1204, 1207-08 (4th Cir. 1988) (noting that the burden rests on the Government in detaining witnesses).

88. *Valenzuela-Bernal*, 458 U.S. at 860 (granting certiorari to decide whether the Government violated the Fifth and Sixth Amendments by deporting two alien witnesses).

89. *Id.* at 865.



burdens on the Government.<sup>90</sup> In addition, detention conflicts with the Government's goal of speedy removal of illegal aliens.<sup>91</sup>

These detentions also take a toll on the individuals being held. Although these people are not accused of a crime, they are often detained for up to several months in federal custody, awaiting the defendant's trial, separated from their homes, their families, and their livelihoods.<sup>92</sup> Some of the witnesses have sought relief from these hardships.<sup>93</sup> These detainees argue that Federal Rule of Criminal Procedure 15 and 18 U.S.C. § 3144 empower courts, upon request, to preserve their testimony through deposition and release them from custody.<sup>94</sup> The courts have generally been sympathetic to these contentions, agreeing that indefinitely holding persons not charged with a crime is both unfair to the witnesses and burdensome on the Government.<sup>95</sup> The United States Court of Appeals for the Fourth Circuit, affirming a district court's decision to order alien witnesses deposed and released, stated the problem concisely:

If the court had denied the motion for depositions, these alien material witnesses would have been incarcerated for more than three

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90. *Id.*; see also *United States v. Mendez-Rodriguez*, 450 F.2d 1, 3 (9th Cir. 1971) (attributing the Government practice of interviewing witnesses and then returning them to their countries to a "financial burden which would otherwise fall upon the Government"), *abrogated on other grounds by* *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

91. *Valenzuela-Bernal*, 458 U.S. at 864; see also *Rivera*, 859 F.2d at 1208 (restating the Government's dual responsibility to enforce criminal laws and to comply with immigration policies).

92. See *Valenzuela-Bernal*, 458 U.S. at 865 (noting twenty-day detentions); *Torres-Ruiz v. United States Dist. Court*, 120 F.3d 933, 935 (9th Cir. 1997) (stating that witnesses had been detained for sixty days); *Mendez-Rodriguez*, 450 F.2d at 3 (noting the possibility of detentions of up to six months); James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS INT'L L. & POL'Y 227, 246 & n.109 (1995), WL 1UCDJLP 227 (noting custody can last "for weeks to months").

93. See *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 412 (5th Cir. 1992) (describing suit brought by detained witnesses); see also *In re Class Action Application for Habeas Corpus ex rel. All Material Witnesses*, 612 F. Supp. at 943 (granting aliens' request for attorneys at the hearing to determine whether they were entitled to release).

94. See *Aguilar-Ayala*, 973 F.2d at 414 (describing witnesses' claims). Rule 15(a) of the Federal Rules of Criminal Procedure permits the taking of witnesses' depositions in "exceptional circumstances," if doing so is in the interest of justice and requested by the witness. FED. R. CRIM. P. 15(a). Title 18 U.S.C. § 3144 also authorizes a material witness to request that he be released if his testimony "can adequately be secured by deposition," unless detention is necessary to prevent a "failure of justice." 18 U.S.C. § 3144 (2002); see also *Aguilar-Ayala*, 973 F.2d at 419 (explaining the process for securing witnesses' release).

95. *Rivera*, 859 F.2d at 1207-08.

months, even though they were neither indicted nor convicted of a crime. The appellant was both indicted and convicted on nine counts, and he spent less time incarcerated than did these witnesses, who were deposed and deported.<sup>96</sup>

Although releasing the alien material witnesses clearly meant that they would likely return to their native countries, causing potential Confrontation Clause concerns, most of these cases did not explicitly address those concerns. The cases dealt with requests by witnesses that their depositions be taken and they be released, and issues collateral to those requests.<sup>97</sup> They did not deal with the effect those requests would have on the defendants' right to confront those adverse witnesses at trial.<sup>98</sup> The question whether the aliens would ultimately appear at trial, or whether the Government would be required to attempt to produce them, was not at issue.<sup>99</sup>

Those questions eventually presented themselves, however, as district courts attempted to preempt the problems caused by detaining alien material witnesses in alien transporting cases. In response to complaints about the difficulties and unfairness of indefinitely detaining the witnesses, some district courts began issuing "standing orders," directing that the depositions of material witnesses be taken so that the witnesses could be released.<sup>100</sup> Those depositions were ordered, in some cases, whether the witnesses requested them or not.<sup>101</sup> Once the depositions were taken,

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96. *Id.* at 1207.

97. *See, e.g., Aguilar-Ayala*, 973 F.2d at 418-19 (deciding whether the Government was justified in resisting witnesses' request for release without finally deciding the constitutional question); *In re Class Action Application for Habeas Corpus ex rel. All Material Witnesses*, 612 F. Supp. at 942-43 (deciding whether attorneys should be provided for witnesses seeking release). *But see Rivera*, 859 F.2d at 1207 (deciding the constitutional question by holding that taking depositions does not violate the Confrontation Clause).

98. *See, e.g., Aguilar-Ayala*, 973 F.2d at 418-19 (noting that the case involved only the rights of the detained witnesses); *In re Class Action Application for Habeas Corpus, ex. rel. All Material Witnesses*, 612 F. Supp. at 940 (recognizing that the only issues involved in the case were related to the rights of the detained witness).

99. *See Aguilar-Ayala*, 973 F.2d at 418-19 (identifying that only detained witnesses' issues were before the court).

100. *United States v. Allie*, 978 F.2d 1401, 1403 (5th Cir. 1992); *Aguilar-Ayala*, 973 F.2d at 414; *United States v. Lopez-Cervantes*, 918 F.2d 111, 112 (10th Cir. 1990); *United States v. Eufracio-Torres*, 890 F.2d 266, 268 (10th Cir. 1989); *United States v. Guadian-Salazar*, 824 F.2d 344, 345-46 (5th Cir. 1987).

101. *See United States v. Fuentes-Galindo*, 929 F.2d 1507, 1509-10 (10th Cir. 1991) (finding depositions improperly ordered where no showing of exceptional circumstances was made); *Lopez-Cervantes*, 918 F.2d at 113 (noting that the witness had not requested

the material witnesses were promptly released, which often meant they were returned to their native countries.<sup>102</sup> In many cases, the defendant's right to be confronted with those witnesses appeared simply to have been forgotten. "The whole procedure," one court noted, "assumed the witnesses would not appear at trial."<sup>103</sup>

As it became increasingly plain that under these orders, witnesses would be sent out of the country before trial, § 1324 defendants began to complain that deposing and releasing alien material witnesses violated their confrontation rights. They contended that the witnesses' prior testimony was subject to the unavailability rule set forth in *Roberts*.<sup>104</sup> Regardless of the need to depose material witnesses, they argued, the Government could not be relieved of its constitutional obligation to make good faith efforts to secure their live testimony for trial.<sup>105</sup> Faced with these claims, the circuit courts attempted to delineate the parameters of the Government's confrontation obligations in cases in which material witnesses were either in Government custody or had been deported to their native

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depositions, and no party had filed an affidavit in support of depositions); *Guadian-Salazar*, 824 F.2d at 347 (noting that depositions were ordered automatically and over the objections of the Government). Whether the depositions were proper, aside from any Confrontation Clause concerns, has turned largely on whether the order called for individualized showings of the need for taking depositions. Compare *Allie*, 978 F.2d at 1405 (approving an order that called for individualized showings), with *Guadian-Salazar*, 824 F.2d at 347 (disapproving order where no exceptional circumstances were shown), and *Lopez-Cervantes*, 918 F.2d at 113 (arguing the Government did not show exceptional circumstances).

102. *Lopez-Cervantes*, 918 F.2d at 114; *Guadian-Salazar*, 824 F.2d at 346.

103. *Lopez-Cervantes*, 918 F.2d at 114.

104. See *Brumley v. Wingard*, 269 F.3d 629, 635 (6th Cir. 2001) (appealing conviction on the grounds that defendant's right to confrontation had been violated); *Whelchel v. Washington*, 232 F.3d 1197, 1209 (9th Cir. 2000) (stating that the deposition violated the Confrontation Clause because the defendant could not attend). But see John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 228 n.189 (1999) (stating that former testimony would only include ex parte depositions, not hearsay stemming from "quasi-judicial settings").

105. The Confrontation Clause requires prosecutorial authorities to make a good faith effort to obtain a witness's presence at trial. *Allie*, 978 F.2d at 1406; *Lopez-Cervantes*, 918 F.2d at 114; *Eufracio-Torres*, 890 F.2d at 269. Furthermore, in both *Lopez-Cervantes* and *Guadian-Salazar*, the Government agreed with the defendant that the standing orders were illegal, because the orders did not call for individualized showings of exceptional circumstances justifying the taking of witness depositions. *Lopez-Cervantes*, 918 F.2d at 112; *Guadian-Salazar*, 824 F.2d at 347.

countries and as a result were beyond the jurisdiction of the trial court.

The task was not easy—guidance from the Supreme Court was neither directly relevant nor consistent.<sup>106</sup> Two Supreme Court cases, *Barber v. Page*<sup>107</sup> and *Mancusi v. Stubbs*,<sup>108</sup> both appeals from habeas proceedings, dealt with witnesses who were beyond the jurisdiction of the trial court and not subject to witness subpoenas.<sup>109</sup> Neither case, however, addressed witnesses who left the country at the Government's behest.<sup>110</sup> To make matters more confusing, the Court reached different results in the cases, with little explanation for the variance. *Barber* seemed to suggest that the mere inability to compel attendance was insufficient to satisfy the Constitution; *Mancusi* seemed to suggest the opposite.<sup>111</sup>

In *Barber*, a material witness in an Oklahoma state murder trial, whose testimony had been preserved by deposition, was in federal custody in Texas, beyond Oklahoma's jurisdiction.<sup>112</sup> The State argued that because the witness was beyond Oklahoma's subpoena jurisdiction, the witness was unavailable to testify and it should be permitted to introduce his deposition testimony over the defendant's Confrontation Clause objection.<sup>113</sup> The Supreme Court disagreed. It rejected the State's assumption that "the mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation on the theory that 'it is impossible to compel

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106. See *Allie*, 978 F.2d at 1406 (stating that the effort required of Government "eludes absolute resolution"); Susan W. Crump & Elaine Carlson, *Fifth Circuit Survey: June 1992/May 1993, Evidence*, 25 TEX. TECH L. REV. 677, 687 (1994) (observing that the definition of "good faith effort" is a "matter of some question").

107. 390 U.S. 719 (1968).

108. 408 U.S. 204 (1972).

109. See *Mancusi v. Stubbs*, 408 U.S. 204, 211 (1972) (stating that the witness in this case was in Sweden); *Barber v. Page*, 390 U.S. 719, 719 (1968) (involving a trial court in Oklahoma and a witness in Texas).

110. See *Barber*, 390 U.S. at 719 (identifying that the witness in this case was in federal prison in Texas); *Mancusi*, 408 U.S. at 211 (recognizing that the witness had become a permanent resident of Sweden).

111. See *Mancusi*, 408 U.S. at 212-13 (finding no Confrontation Clause violation when the witness voluntarily returned to Sweden); *Barber*, 390 U.S. at 724-25 (finding violation when the witness was in federal custody); see also Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 199 (1993) (explaining that the Supreme Court appeared to weaken *Barber*'s good-faith effort requirement in *Mancusi*).

112. *Barber*, 390 U.S. at 720.

113. *Id.* at 722.

his attendance, because the process of the trial Court is of no force without the jurisdiction.'"<sup>114</sup> The Court pointed to increased cooperation among the states and between the states and the federal government as evidence that such a global assumption was unwarranted.<sup>115</sup> It also held that the mere fact that federal authorities might refuse to produce the witness did not excuse Oklahoma from asking.<sup>116</sup> Because the State had not done so or made any efforts to bring the witness to trial, the Court concluded that the defendant's constitutional right to confrontation had been violated.<sup>117</sup>

Just four years later, the Supreme Court reached a different conclusion in a similar case.<sup>118</sup> In *Mancusi*, a material witness to a murder voluntarily left the United States in the period between the defendant's first trial for murder and his retrial some nine years later.<sup>119</sup> The State issued a subpoena for the witness in an attempt to secure process at his last known U.S. address, but service failed.<sup>120</sup> The State then put the witness's son on the stand to testify that his father had voluntarily moved to Sweden.<sup>121</sup> Over the defendant's objection, the trial judge permitted the State to read the witness's earlier testimony to the jury.<sup>122</sup>

The Supreme Court rejected the defendant's Confrontation Clause challenge.<sup>123</sup> It held that because the district court had no authority to compel the witness to leave Sweden to testify, and because there were no avenues of cooperation between the United States and Sweden, any effort to compel attendance would have been unsuccessful.<sup>124</sup> The Court declared, without much elaboration, that the State had made a stronger showing of unavailability than was shown in *Barber* and on that showing, "[A] federal habeas court was not warranted in upsetting the determination of the state trial court."<sup>125</sup>

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114. *Id.* at 723 (quoting 5 WIGMORE, EVIDENCE § 1404 (3d ed. 1940)).

115. *Id.* at 723-24.

116. *Id.* at 724-25.

117. *Barber*, 390 U.S. at 725.

118. *Mancusi*, 408 U.S. at 212-13.

119. *Id.* at 209.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Mancusi*, 408 U.S. at 212-13.

124. *Id.* at 212.

125. *Id.* at 212-13.

*Barber* and *Mancusi* are difficult to distinguish.<sup>126</sup> The most obvious basis for doing so—that the former case involved jurisdictions within the United States and the latter involved international jurisdictions, is somewhat simplistic. A more likely distinction is the Court's different perceptions about the viability of securing the witnesses' attendance at trial. In *Barber*, the Court noted an increasing openness between state and federal jurisdictions that may have permitted some cooperation in getting the witness to the Oklahoma trial.<sup>127</sup> The *Mancusi* Court, on the other hand, concluded that no informal or formal channels existed to assist the Government in bringing the witness from Sweden to the United States.<sup>128</sup>

Arguably, *Mancusi*'s nearly per se conclusion that leaving the country renders a witness unavailable to testify is untenable after *Roberts*. In *Roberts*, the Court stated that whether the Government had satisfied its Confrontation Clause obligations depended on what efforts were reasonable.<sup>129</sup> A test grounded in reasonableness would seem to preclude global rules and instead to call for a case-by-case analysis to determine whether the Government complied with the Constitution.<sup>130</sup> Cases decided by the Supreme Court after it issued *Roberts* emphasize this need for a fact-specific inquiry.

Nonetheless, some courts have relied explicitly on *Mancusi* or have echoed its reasoning to limit the Government's duties in cases where material witnesses have been deported.<sup>131</sup> They have held that the Government has no obligation to secure the witness's presence once the witness has been deposed and deported.<sup>132</sup> Even

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126. *Id.* at 223 (Marshall, J., dissenting) (arguing that the majority distinguished *Barber* on "untenable grounds").

127. *Barber*, 390 U.S. at 723.

128. *Mancusi*, 408 U.S. at 212; see also Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 199 (1993) (noting the distinction drawn by the Court between channels available between states and the federal government and lack of channels available between nations).

129. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (quoting *California v. Green*, 399 U.S. 149, 161-62 (1970)).

130. See *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (stating that the Confrontation Clause analysis requires a case-by-case examination); see also *Maryland v. Craig*, 457 U.S. 836, 855 (1990) (stating that the Confrontation Clause analysis is case specific).

131. *United States v. Rivera*, 859 F.2d 1204, 1207 (4th Cir. 1988); *United States v. Terrazas-Montano*, 747 F.2d 467, 469 (8th Cir. 1984).

132. *Rivera*, 859 F.2d at 1207; *Terrazas-Montano*, 747 F.2d at 469.

under *Roberts*, the Government was not required to perform a futile act, and, as the United States Court of Appeals for the Eighth Circuit has stated, deportation to a country that will not assist in compelling attendance renders futile any attempt to bring witnesses to trial.<sup>133</sup>

Other courts have rejected any per se conclusions about the Government's obligations when a witness is out of the country.<sup>134</sup> They rely instead on *Roberts*'s reasonableness requirement.<sup>135</sup> These courts have insisted that the Government must attempt to bring the deported witnesses to trial, regardless of the need to release alien witness, even in cases where the witnesses' testimony was preserved in accordance with the Federal Rules of Evidence.<sup>136</sup> For those courts, then, while a witness could seek his release by asking that he be deposed, the Government could not depose him, deport him, and then rely on the deportation to demonstrate that the witness was unavailable to testify.<sup>137</sup>

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133. *United States v. Perez-Sosa*, 164 F.3d 1082, 1085 (8th Cir. 1998) (citing *Terrazas-Montano*, 747 F.2d at 469).

134. *See, e.g., Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 418-19 (5th Cir. 1992) (suggesting Government must comply with the Constitution before depositions may be admitted); *United States v. Fuentes-Galindo*, 929 F.2d 1507, 1510 (10th Cir. 1991) (pointing out that there was no showing of "exceptional circumstances" that warranted the taking of the material witnesses' deposition); *United States v. Eufracio-Torres*, 890 F.2d 266, 269 (10th Cir. 1989) (holding that Government is required to show unavailability of witnesses); *United States v. Provencio*, 554 F.2d 361, 363 (9th Cir. 1977) (finding plainly erroneous introduction of deposition testimony when the Government did not demonstrate unavailability); *see also United States v. Huang*, 827 F. Supp. 945, 949 (S.D.N.Y. 1993) (stating that the Government must demonstrate witness unavailability).

135. *See United States v. Lopez-Cervantes*, 918 F.2d 111, 114 (10th Cir. 1990); *United States v. Martinez-Perez*, 916 F.2d 1020, 1023 (5th Cir. 1990).

136. *Lopez-Cervantes*, 918 F.2d at 114; *Martinez-Perez*, 916 F.2d at 1024; *Eufracio-Torres*, 890 F.2d at 269.

137. *See Susan W. Crump & Elaine Carlson, Fifth Circuit Survey: June 1992/May 1993, Evidence*, 25 TEX. TECH. L. REV. 677, 686, 687 & n.70 (1994) (suggesting that the Fifth Circuit's "good-faith" standard is more stringent than that articulated by the Supreme Court in *Roberts*). That court has held that Government efforts which included issuing subpoenas to the material witnesses, offering to compensate them for their travel expenses and their time, and instructing them to appear at a port of entry on a given date were insufficient. *See United States v. Guadian-Salazar*, 824 F.2d 344, 346 (5th Cir. 1987). Standing alone, *Guadian-Salazar* has questionable precedential value. The Court's decision in that case was partly based on the district court's failure to find "exceptional circumstances" warranting the taking of depositions. *See id.* at 347. The Government conceded error in *Guadian-Salazar*, arguing that the district court's blanket standing order compelled it to violate defendants' confrontation rights. *Id.* at 347. However, the court accepted the Government's concession only after a careful review of the record, and it has

## B. *The Solution*

On September 30, 1996, Congress weighed in. That year, it enacted extensive amendments to the Immigration and Nationality Act (INA). Collectively referred to as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the amendments mandated sweeping changes to current immigration law.<sup>138</sup> Among these changes was the addition of subsection (d) to 8 U.S.C. § 1324. That subsection states:

Notwithstanding any provision of the Federal Rules of Evidence, the videotaped (or otherwise audiovisually preserved) deposition of a witness to a violation of subsection (a) of this section who has been deported or otherwise expelled from the United States, or is otherwise unable to testify, may be admitted into evidence in an action brought for that violation if the witness was available for cross examination and the deposition otherwise complies with the Federal Rules of Evidence.<sup>139</sup>

Subsection (d) is not a masterpiece of drafting. On its face, it appears to authorize the admission of videotaped testimony, so long as the testimony was taken in a proceeding governed by the Rules of Evidence, and the defendant was provided the opportunity to cross-examine the witnesses.<sup>140</sup> Because it explicitly authorizes the *admission* of deposition testimony, the provision is an innovation. No other law authorizes the admission of videotaped depositions without requiring that the Government demonstrate that the witness is unavailable to testify. As has been noted, Rule 15 of the Federal Rules of Criminal Procedure authorizes the *tak-*

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since reaffirmed *Guadian-Salazar's* suggestion that deportation was insufficient to show witness unavailability. See *Aguilar-Ayala*, 973 F.2d at 418 (noting the different approach taken by the Fourth and Eighth circuits).

138. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). The amendments were particularly harsh for aliens with criminal histories. Melinda Smith, Comment, *Criminal Defense Attorneys and Non-Citizen Clients: Understanding Immigrants, Basic Immigration Law, & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 AKRON L. REV. 163, 196-97 (1999). More harsh reforms to immigration law were enacted in April of 1996 as part of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. No. 104-132, 110 Stat. 1214 (1996); see also Daniel Kanstroom, *Introduction*, 28 HUM. RTS. 2 (2001), WL 28-WTR Hum. Rts. 2 (referring to IIRIRA's and AEDPA's "strenuous attacks" on noncitizens).

139. 8 U.S.C. § 1324(d) (2002).

140. *Id.*



ing of depositions,<sup>141</sup> as does the material witness statute.<sup>142</sup> Those provisions guarantee that if for some reason the Government cannot secure a witness's presence for trial, the witness's testimony will be preserved. But preserving testimony for trial is quite different from admitting it without ever requiring the Government to prove that the witness is, in fact, unavailable.<sup>143</sup>

Given the ongoing litigation over the role of the Confrontation Clause's unavailability requirement in § 1324 cases, and the differences among the circuit courts, it would seem that the unavailability requirement is precisely what subsection (d) was aimed at eliminating.<sup>144</sup> Congress's express intent in passing the subsection was to make it easier to deport alien material witnesses.<sup>145</sup> By explicitly referring to the rules of evidence, Congress suggested that some requirement in those rules required setting aside in order to accomplish its goal. The logical impediment was the unavailability requirement.

Of course, insofar as it may have sought to abrogate the *evidentiary* unavailability requirement, Congress was authorized to do so. While the rules of evidence are prescribed by the United States Supreme Court, the Court's power to create such rules exists "only

141. See FED. R. CRIM. P. 15(a) (recognizing the right to take depositions under certain circumstances).

142. See 18 U.S.C. § 3144 (2002) (authorizing detention of material witnesses when they are needed to testify for the United States).

143. See *United States v. Drogoul*, 1 F.3d 1546, 1554 (11th Cir. 1993) (stating that before hearsay is sought to be admitted, the deposition process simply seeks preservation of testimony for possible use); *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 413 (5th Cir. 1992) (stating that deposition testimony taken under 18 U.S.C. § 3144 would be admissible only if its admission was permitted by the Confrontation Clause); Susan W. Crump & Elaine Carlson, *Fifth Circuit Survey: June 1992/May 1993, Evidence*, 25 TEX. TECH L. REV. 677, 687 (1994) (arguing admissibility of alien depositions is governed by the Confrontation Clause, not by Rule 15, which governs only the taking of depositions). Thus, the practice of taking alien witness depositions raises dual inquiries—whether the depositions should have been taken in the first place and whether they are admissible. At least one court has implied that advocates truly interested in asserting the right to confrontation should object at both stages. See *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998) (noting that defendant waived his complaint regarding Government's part in aliens' absence from trial by not objecting to the aliens' release at the time their depositions were taken).

144. See 8 U.S.C. § 1324(d) (2002) (authorizing admission of evidence "notwithstanding" the Federal Rules of Evidence). Of course, the plain language of the rule would appear to prohibit the use of *any* evidentiary rule to block admission of the deposition. *Id.* But see *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002) (concluding that § 1324(d) did not abrogate Rule 804).

145. See H.R. CONF. REP. NO. 104-828, at 206 (1996).

in the absence of a relevant Act of Congress.”<sup>146</sup> Thus, Congress “retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.”<sup>147</sup> But the evidentiary rule and the rule of the Constitution are not coextensive; the interests they protect are not wholly congruent.<sup>148</sup> Congress may not reach the protections enshrined in the Constitution.<sup>149</sup> The Supreme Court is the final arbiter of that document.<sup>150</sup> Thus, Congress cannot eliminate any burdens imposed on the Government by the Confrontation Clause, as interpreted by the Court.<sup>151</sup> A statute that purports to do so would likely be unconstitutional.<sup>152</sup>

The Fifth and Ninth Circuit Courts of Appeals, the only two courts to directly address the constitutionality of § 1324(d), have avoided holding the provision unconstitutional by concluding that the statute does not alleviate the Government of its obligation, under *Roberts*, to demonstrate a witness’s unavailability.<sup>153</sup> The

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146. *Dickerson v. United States*, 530 U.S. 428, 437 (2000); *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959); *Funk v. United States*, 290 U.S. 371, 382 (1933).

147. *Dickerson*, 530 U.S. at 437 (citing *Palermo*, 360 U.S. at 345-48); see also FED. R. EVID. 802 (excepting from the hearsay rule any hearsay authorized by an act of Congress).

148. *California v. Green*, 399 U.S. 149, 155-56 (1970); see also *United States v. Inadi*, 475 U.S. 387, 393 n.5 (1986) (suggesting that although rules of evidence and the Confrontation Clause protect the same values, “the overlap is not complete”). There are good reasons for maintaining the distinction. The hearsay rules apply both to civil and criminal cases; as one commentator notes, “the stakes are somewhat higher in criminal cases,” and the Government and the defendant in such cases often have unequal resources. Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 195 (1993). The Framers likely recognized these facts in drafting a clause providing for special, facially unqualified confrontation rights in criminal cases. *Id.* at 195 n.44 (citing LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 431 (1968)).

149. See *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) (explaining Congress’s boundaries in interpretations of statutes).

150. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (stating it is “the province and duty of the judicial department to say what the law is”).

151. See *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (stating that hearsay exceptions arise when necessary to further public policy and if firmly rooted in jurisprudence).

152. See *Almeida-Sanchez*, 413 U.S. at 272 (expressing that “no act of Congress can authorize a violation of the Constitution”); *United States v. Santa Maria*, 15 F.3d 879, 881-82 (9th Cir. 1994) (announcing that no act of Congress can authorize a constitutional violation).

153. *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002); *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998). The Eighth Circuit also apparently assumes the statute’s constitutionality. See *United States v. Perez-Sosa*, 164 F.3d 1082, 1085 (8th Cir. 1998) (concluding the government could use deposition testimony because

Ninth Circuit, for example, noted that the provision "says nothing about abrogating the constitutional requirement of establishing unavailability."<sup>154</sup> Instead, the court noted, Congress merely refers to the Federal Rules of Evidence.<sup>155</sup> Because Congress does not say anything about the constitutional requirement, in that court's view, § 1324(d) can "easily be read to comport" with it.<sup>156</sup> Unavailability still must be demonstrated before deposition testimony may be admitted.<sup>157</sup> The Fifth Circuit likewise has declined to "read the statute as eliminating the requirement that the government establish the unavailability of a witness before the witness's deposition testimony can be admitted at trial."<sup>158</sup>

These courts have obeyed one principle of statutory construction—they have avoided pronouncing a congressional act unconstitutional.<sup>159</sup> But they have violated another principle—the principle that a statute should not be construed so as to render its

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the witness was deported). The *Perez-Sosa* court did not directly address the constitutionality of the provision. However, it cited *Santos-Pinon* for the proposition that, even after the passage of § 1324(d), an unavailability showing is required. *Id.* It then concluded that, because the witnesses had been deported to Mexico, and because Mexico would not "extradite an individual based on a material witness warrant," any attempt to bring the witnesses to trial would have been futile. *Id.* The Eighth Circuit has traditionally set the bar for demonstrating unavailability quite low; as a result, that court held that a mere showing of deportation will satisfy the Government's burden. See *United States v. Terrazas-Montano*, 747 F.2d 467, 469 (8th Cir. 1984) (indicating that requiring the government to show they were unable to procure a witness would be a useless act).

154. *Santos-Pinon*, 146 F.3d at 736.

155. *Id.*

156. *Id.*

157. *Id.* But see *Torres-Ruiz v. United States Dist. Court*, 120 F.3d 933, 936 (9th Cir. 1997) (per curiam) (concluding that § 1324(d) is part of a design to address detention of material witnesses without mentioning requirements of the Confrontation Clause).

158. *Aguilar-Tamayo*, 300 F.3d at 565. The Fifth Circuit's reasoning is somewhat unclear. It does not believe that § 1324(d) abrogates or alters the requirements of the Federal Rules of Evidence, and it appears to base its constitutional ruling on Rule 804's requirement that the Government attempt to secure live testimony "by process or other means." *Id.* The court does not explain why, given the plain language of the statute, Rule 804 or any other provision in the evidentiary rules still applies or what provisions in the rules of evidence it believes Congress was attempting to abrogate in amending the statute. See *id.* (explaining that Rule 804 requires procuring a witness by other reasonable means).

159. See *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) (observing that courts should construe statutes to avoid declaring them unconstitutional or even causing doubt as to their constitutionality); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (stating that statutes are to be construed so that they are consistent with the Constitution).

language superfluous.<sup>160</sup> Neither court explained what role, under its interpretation, the new provision is to play in transporting cases if it does not alleviate the Government of its constitutional burden to demonstrate unavailability. If the constitutional requirement survives § 1324(d), as the courts hold, then the provision can fully effectuate Congress's intent in only the narrowest of circumstances, such as when the defendant inadvertently fails to raise a constitutional objection.

Thus, under the interpretations of the Fifth and Ninth Circuits, neither § 1324 defendants nor the Government have any more guidance in determining how to deal with the competing rights and interests of the defendants, the witnesses, and the Government in these cases. Since the circuit courts differ on the scope of the confrontation obligation and because the Supreme Court has not satisfactorily resolved the question whether a Confrontation Clause violation has occurred, outcomes of suits will continue to depend on the circuit in which the prosecution is brought. In the circuits that follow the reasoning of *Mancusi*, the Government will satisfy its burden merely by demonstrating that the defendant has been deported and that the country to which he has been deported will not honor a witness subpoena.<sup>161</sup> Other circuits, such as the Fifth, will likely require a greater showing of necessity.<sup>162</sup> In other words, nothing has changed.

The Government and defendants charged with § 1324 offenses need clearer guidance as to their rights and obligations. The Government owes duties to both prosecute its cases within the confines

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160. See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (suggesting that courts should disfavor interpretations of statutes that find the language superfluous).

161. See *United States v. Rivera*, 859 F.2d 1204, 1207 (4th Cir. 1988) (discussing *Mancusi* where the "unavailable" exception was satisfied because the witness was out of the country and the witness could not be compelled to appear in court); *United States v. Terrazas-Montano*, 747 F.2d 467, 469 (8th Cir. 1984) (finding that witnesses were unavailable because they were out of the country and were beyond the reach of process of the court).

162. See *Aguilar-Tamayo*, 300 F.3d at 565-66 (requiring that an attempt to secure the presence of a witness must be made in order to establish unavailability as a predicate for the admission of depositions); see also *United States v. Lopez-Cervantes*, 918 F.2d 111, 114 (10th Cir. 1990) (ruling a standing order improper that did not require the Government to show good faith efforts); *United States v. Eufracio-Torres*, 890 F.2d 266, 270 (10th Cir. 1989) (requiring the Government to demonstrate a good faith effort to bring witnesses to trial).

of the Constitution and to promptly deport aliens.<sup>163</sup> Detaining alien witnesses for trial may help it meet the former obligation, but it stymies the latter.<sup>164</sup> Section 1324(d) defendants, on the other hand, face unique difficulties. The Government generally has almost exclusive control over the evidence that will be presented at their trials.<sup>165</sup> The Government interviews the alien witnesses before an attorney is even appointed to represent the defendant.<sup>166</sup> The Government then selects the witnesses from which it will take testimony to make its case.<sup>167</sup> Assuming no witness has clearly exculpatory testimony, the remaining aliens are sent back to their native country, and any helpful information they might have to offer is lost to the defendant.<sup>168</sup>

In such circumstances, the defendant who wishes to contest his guilt must do so by challenging the testimony of the alien witnesses who have been handpicked by the Government. That testimony may be ripe for a challenge—certainly, there could, in some cases, be a basis for claiming that witnesses were coerced, or felt intimidated and were testifying out of fear. Also there may be a basis for arguing that these witnesses are testifying in order to deflect their own culpability in the offense.<sup>169</sup> If the defendant elects to mount such a defense, he will likely want the jury to observe the demeanor of the witnesses as they testify face-to-face with him.<sup>170</sup>

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163. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 863-64 (1982) (recognizing the dual obligations to prosecute the accused and quickly deport aliens).

164. See *id.* at 864 (noting that dual obligations can impose conflicting requirements); see also *Rivera*, 859 F.2d at 1207 (acknowledging the dual responsibility to consider the rights of the witness while upholding the duty to deport aliens without undue delay).

165. See *Valenzuela-Bernal*, 458 U.S. at 861 (reporting that the prosecution deported two of the passengers after determining they had no material evidence).

166. See *id.* (indicating that the passengers were interviewed following arrest).

167. See *id.* (deporting two passengers, but retaining Romero-Morales because he could provide a nonhearsay basis).

168. See *id.* at 872-73 (indicating that defendants may object to the deportation, under the Sixth Amendment's Compulsory Process Clause, only if they can demonstrate that interviewing the witness would have assisted them in their defense or that the Government did not act in good faith).

169. Cf. *Whelchel v. Washington*, 232 F.3d 1197, 1205 (9th Cir. 2000) (concluding that the Confrontation Clause was violated when codefendants' taped testimony was admitted, in part because codefendants had motive to minimize their own involvement).

170. See *Coy v. Iowa*, 487 U.S. 1012, 1019 (1988) (stating that assessment of demeanor assists in truth-finding); *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 419 (5th Cir. 1992) (emphasizing that live cross-examination helps jury assess strengths or weakness of testimony).

IV. SECTION 1324(d) CANNOT ANSWER QUESTIONS RAISED BY  
THE CONSTITUTION; THE COURTS MUST ADDRESS THE  
GOVERNMENT'S CONFRONTATION OBLIGATIONS  
IN TRANSPORTING CASES

The tension between the rights of § 1324 defendants and the needs of alien witnesses and the Government should be resolved through judicial clarification of the Government's obligations under the Confrontation Clause in transporting cases. The courts should first resolve whether § 1324(d) can be construed to avoid a finding that it is unconstitutional, while at the same time giving meaningful effect to its language. In the likely event that such a construction is impossible, the courts should hew to *Roberts's* constitutional requirement of unavailability in § 1324 prosecutions.

A. *Can Subsection (d) Be Construed in Harmony with the Constitution?*

The Fifth and Ninth Circuits declared § 1324(d) constitutional, but did not articulate how the provision might function in a transporting prosecution.<sup>171</sup> Indeed, it is difficult to imagine a plausible way to give the provision its intended effect without violating the Constitution. Two of the more plausible constructions raise more problems than they resolve.

For example, the courts might have construed § 1324(d) to eliminate from the Federal Rules of Evidence the requirement that the hearsay proponent use "other reasonable means," aside from process, to secure a witness's presence.<sup>172</sup> Limiting the requisite efforts to the serving of subpoenas would validate the view of courts holding that if a witness in another country cannot be compelled to testify, then any efforts to bring him back for trial would be futile.<sup>173</sup> But such a construction would likely not solve the subsec-

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171. See *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (2000) (holding § 1324(d) constitutional because the procedures established in the statute comport with constitutional confrontation rights); *United States v. Santos-Pinon*, 146 F.3d 734, 736 (9th Cir. 1998) (finding that the statute does not abrogate the constitutional requirement of establishing unavailability).

172. See FED. R. EVID. 804(a)(5) (providing a hearsay exception when the proponent of a statement has been unable to procure the declarant's attendance or testimony by process or other reasonable means).

173. See *United States v. Perez-Sosa*, 164 F.3d 1082, 1085 (8th Cir. 1998) (noting that "it would have been futile to require the government to show it could not procure the

tion's constitutional difficulties. According to the Court in *Roberts*, the Constitution requires that the Government take "reasonable" steps to secure live testimony.<sup>174</sup> Even if Congress eliminated the "reasonableness" requirement from the evidentiary rule, the reasonableness requirement of *Roberts* would remain, and § 1324(d) would, again, have little effect.

Another possible construction—that Congress intended to declare, as a general matter, that deportation always renders a witness unavailable, or renders attempts to bring that witness to trial futile as a matter of law—raises the same constitutional problem. Subsection (d) does appear to define as "unavailable" any witness as a person who has been deported or expelled, whether or not the Government has made any efforts to secure the witness's live testimony.<sup>175</sup> But, unless the Supreme Court has endorsed such a conflation, it likely cannot be presumed by Congress.<sup>176</sup> In fact, the Supreme Court has rejected a very similar presumption in *Coy v. Iowa*.<sup>177</sup>

In *Coy*, the Court considered an Iowa statute that authorized the admission of the hearsay statements of child-sex-abuse victims.<sup>178</sup> The statute presumed that these victims would suffer trauma as a result of testifying.<sup>179</sup> Before the Supreme Court, Iowa argued that this presumed trauma established the required necessity for using hearsay rather than live testimony.<sup>180</sup> The Supreme Court dis-

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witness's attendance"); *United States v. Rivera*, 859 F.2d 1204, 1207 (4th Cir. 1988) (allowing the issuing of a subpoena to a witness out of the country and beyond the compulsory process of the court to satisfy the good faith effort requirement under the "unavailable" exception to the Confrontation Clause); *United States v. Terrazas-Montano*, 747 F.2d 467, 469 (8th Cir. 1984) (stating that to require the government to show it was unable to procure the attendance of a witness would be a useless act).

174. See *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (declaring that under the good faith obligation to procure a witness, the lengths to which "the prosecution must go . . . is a question of reasonableness").

175. See 8 U.S.C. § 1324(d) (2002) (referring to witnesses who have been deported or are "otherwise" unavailable).

176. See *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (discussing the standard used in allowing an exception to a defendant's right to confront witnesses against him); *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (refusing to recognize Iowa's statutory exception since that exception is not firmly rooted in jurisprudence).

177. *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988).

178. *Id.*

179. *Id.*

180. *Id.*

agreed.<sup>181</sup> Meeting the requirements of the Confrontation Clause means more than adhering to its “literal application.”<sup>182</sup> Exceptions even to the “normal implications” of the Confrontation Clause are impermissible unless they are based on particularized findings.<sup>183</sup> The unavailability requirement for prior testimony would appear to be a “normal implication” of the constitutional mandate. A finding of unavailability, therefore, must be made by the trial judge, on the basis of a particular case’s facts, not by the legislature, as a general matter.<sup>184</sup>

A general finding of unavailability would also belie the facts and circumstances surrounding § 1324 prosecutions.<sup>185</sup> The Government has demonstrated in a number of cases that it is able to at least attempt to secure live testimony in these cases.<sup>186</sup> Federal regulations encourage the Government to do so.<sup>187</sup> And the Government need not rely on detention in its attempts. In some instances, material witnesses can be kept in the United States with temporary work release permits.<sup>188</sup> If the aliens are not eligible for work release, or if they wish to return to their native countries, the

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181. *Id.*

182. *Coy*, 487 U.S. at 1021.

183. *Id.*

184. *See* *United States v. Lopez-Cervantes*, 918 F.2d 111, 113 (10th Cir. 1990) (stating that there should be particularized showing of unavailability before depositions can be admitted).

185. *See* *Barber v. Page*, 390 U.S. 719, 724 (1968) (rejecting a claim of unavailability in part because methods had been developed to assist in securing a witness’s presence).

186. *See* *United States v. Allie*, 978 F.2d 1401, 1407 (5th Cir. 1992) (noting that the Government asked witnesses to return, told them to whom to report, contacted them before the trial, and offered to compensate them for expenses); *United States v. Eufracio-Torres*, 890 F.2d 266, 270 (10th Cir. 1989) (explaining that the Government served process, asked witnesses to return, told them how to do so, and offered compensation for their testimony); *United States v. Huang*, 827 F. Supp. 945, 949-50 (S.D.N.Y. 1993) (noting that the Government wrote to each witness and offered to pay for travel expenses).

187. *See* 8 C.F.R. § 215.2(a) (1987) (stating no alien shall be deported if departure is deemed prejudicial to the United States); 8 C.F.R. § 215.3(g) (1987) (stating that the deportation of any alien needed to present testimony for United States is deemed prejudicial); *see also* *United States v. Guadian-Salazar*, 824 F.2d 344, 347-48 (5th Cir. 1987) (discussing regulations that apparently require alien witnesses to remain in the United States).

188. *See Allie*, 978 F.2d at 1403 (reporting that the Government offered aliens the option of staying in the United States with work permits); *see generally* Thomas Bak, *Pre-trial Detentions in the Ninth Circuit*, 35 SAN DIEGO L. REV. 993, 1020-22 (1998) (discussing the Central District of California’s efforts—including issuing work permits—to work with pretrial services and the INS to ensure material witnesses are not detained but still appear to testify at trial).



Government can make, and has made, efforts to bring them back.<sup>189</sup> The fact that a country will not honor a subpoena purporting to compel their return does not make voluntary attendance impossible, or even unlikely.<sup>190</sup> The Government can ask the witnesses to return to testify, can remain in contact with the witnesses after they have departed, can offer to compensate the witnesses for traveling to testify, and can guarantee the witnesses lawful passage into the United States for that purpose.<sup>191</sup> The law not only contemplates that the Government will make such efforts, it encourages it to do so by expressing a preference for measures that bring material witnesses to trial.<sup>192</sup> In light of this law, and the good faith efforts the Government has been willing to make in prior cases, it would be incongruous, to say the least, to declare that deportation renders all witnesses unavailable, as a matter of law, to attend trial.<sup>193</sup>

B. *The Supreme Court Should Hold the Government to Its Obligation to Demonstrate, On a Case-by-Case Basis, Unavailability in Transporting Cases*

If, as seems likely, the courts are unable to arrive at a meaningful construction of subsection (d), the Supreme Court should review the provision to determine whether Congress may, consistent with the Constitution, do what it apparently sought to do in amending the statute—abrogate the unavailability requirement enunciated in *Roberts*. Although the Court has already subjected prior testimony to a constitutional analysis in *Ohio v. Roberts*,<sup>194</sup> it may conclude

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189. See *Allie*, 978 F.2d at 1407 (describing the Government's efforts to bring witnesses to trial); *Eufracio-Torres*, 890 F.2d at 270 (discussing the obligation of government to assure the appearance of a witness).

190. See *Barber v. Page*, 390 U.S. 718, 724 (1968) (stating that absence of compulsory process does not mean there are not other ways of bringing witness to trial); *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002) (stating that even though Mexico would not honor material witness extradition, the Government should make some attempt to bring witnesses to trial).

191. *Allie*, 978 F.2d at 1207; *Eufracio-Torres*, 890 F.2d at 270.

192. See 28 U.S.C. § 3144 (2002) (discussing detention or release of witnesses); 8 C.F.R. § 215.2(a) (1987) (stating that no alien should depart or even attempt to, if such departure would be prejudicial to the United States under this section); 8 C.F.R. § 215.3(g) (1987) (deeming it prejudicial to deport an alien whose testimony is needed).

193. See *Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 419 (5th Cir. 1992) (stating that the Government is "uniquely capable" of taking reasonable steps to bring witnesses to trial).

194. *Ohio v. Roberts*, 448 U.S. 56, 64-66 (1980).

that for policy reasons, the prior testimony of deported aliens requires independent evaluation.<sup>195</sup> But that analysis should not lead to a conclusion that the Government may depose material witnesses and then rely on their hearsay statements to convict § 1324 defendants without first demonstrating unavailability.<sup>196</sup>

In other contexts, the Court has relieved the Government of its Confrontation Clause obligation to prove unavailability on the basis of two findings; the kind of hearsay at issue has particular value by virtue of its hearsay nature and there is little to be gained by retaining the unavailability requirement.<sup>197</sup> Neither basis exists in cases involving the prior testimony of alien witnesses. The statements made by aliens within days after their arrest for entering the United States do not gain value by virtue of their hearsay nature. To the contrary, the reliability of such statements is questionable. The statements are made by individuals who may be afraid of detention, criminal prosecution, and imprisonment and who may have motive for shifting the blame for their own misconduct.

For this reason, there is often much to be gained from asking these witnesses to tell their stories directly to the factfinder in the presence of the defendant. Videotaped testimony is rarely an adequate substitute for live testimony.<sup>198</sup> Prior testimony may be taken with all the protections afforded by the Constitution and the rules of evidence. Cross-examination may be thorough. And still, courts recognize that live testimony before the trier of fact is the better evidence.<sup>199</sup> This is so because, as the Supreme Court has stated, it is more difficult to lie against someone who is in the same

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195. See *id.* at 64 (holding that policy interests “may warrant dispensing with confrontation at trial”).

196. Cf. *Allie*, 978 F.2d at 1408 (stating that because confrontation right is so important, the Government must make more than perfunctory efforts to bring witnesses to trial).

197. See *United States v. Inadi*, 475 U.S. 387, 395 (1986) (identifying reasons why principles used to obtain better evidence do not apply to coconspirator statements); see also *White v. Illinois*, 502 U.S. 346, 354-58 (1992) (discussing reasons for relieving the Government of its burden to show unavailability).

198. See *Aguilar-Ayala*, 973 F.2d at 419 (stating, “[E]ven the advanced technology of our day cannot breathe life into a two-dimensional broadcast”).

199. See *Coy v. Iowa*, 487 U.S. 1012, 1019-20 (1988) (explaining reasons why face-to-face testimony is better evidence); *Aguilar-Ayala*, 973 F.2d at 419 (opining the need for the defendant to confront the witness in the court room because, “Only through live cross-examination can the jury fully appreciate the strength or weakness of the witness’ testimony”).

room with you.<sup>200</sup> And it is easier for a factfinder to assess a witness's demeanor in person, without the mitigating presence of a camera.<sup>201</sup> A jury can watch the interplay between witness and accused when the witness testifies live in the courtroom; if the testimony is videotaped, the jury will see only the portions of the proceedings that the cameraperson chooses to record.

As the United States Court of Appeals for the Fifth Circuit has stated, "[T]rial by deposition steps hard on the right of the criminal defendants to confront their accusers."<sup>202</sup> This is especially so in § 1324 prosecutions. Unlike the case of a voluntary departure from the country, such as that presented in *Mancusi*, in these cases it is the Government that is responsible for the witnesses' absence.<sup>203</sup> The Government builds its case and returns most of the witnesses to the alleged crime to their own countries. The unavailability rule can prevent the Government from pursuing "a calculated strategy of building a case by creating hearsay testimony."<sup>204</sup> Further, the unavailability rule helps ensure that Government's testimony will be responsive to the case as it develops at trial.<sup>205</sup> New issues, or

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200. *Coy*, 487 U.S. at 1019; see also Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 194 (1993) (contending that if the core of the confrontation guarantee includes opportunity to observe demeanor, the right should be disposed of only on a showing of necessity). But see John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 258-59 (1999) (arguing that importance of demeanor is overestimated, and juries are unlikely to be capable of discerning lies, even with live testimony).

201. See *Aguilar-Ayala*, 973 F.2d at 419 (discussing how videotaped deposition is only a substitute to live testimony).

202. *Id.*

203. See *United States v. Allie*, 978 F.2d 1401, 1407 (5th Cir. 1992) (asserting that part of the Government's good faith efforts should include trying to keep aliens in the United States).

204. John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 228-29 (1999); see also *United States v. Motes*, 178 U.S. 458, 472 (1900) (mentioning how the Constitution does not shield an accused person from the consequences of his own faults); *United States v. Seijo*, 595 F.2d 116, 120 (2d Cir. 1979) (noting that under Federal Rule of Evidence 804, absence of witnesses should not be due to "procurement or wrongdoing of the Government"). The United States Court of Appeals for the Fourth Circuit has rejected outright a claim that the Government rendered deported witnesses unavailable, concluding that the witnesses' choice to leave rather than face deportation proceedings rendered their departure voluntary. *United States v. Rivera*, 859 F.2d 1204, 1207 (4th Cir. 1988).

205. See *United States v. Huang*, 827 F. Supp. 945, 951 (S.D.N.Y. 1993) (warning how videotaped testimony may rebut in-court testimony).

defenses, may arise long after the witnesses have left the country. Having the witnesses present to respond to matters that arise at trial benefits both the Government and the defendant.

The courts should reject relaxing the requirement set forth in *Roberts* even though Congress has plenary power over matters relating to immigration.<sup>206</sup> A transporting prosecution is criminal in nature; the defendant faces incarceration in a federal prison.<sup>207</sup> Under the Constitution, even illegal aliens are “persons” and are thus entitled to the protections of due process and a fair trial.<sup>208</sup> Among those protections is the Sixth Amendment’s guarantee that a defendant will be able to confront, face-to-face, his accusers.

For these reasons, the Supreme Court should decide against a per se declaration that a mere showing of deportation is sufficient to show unavailability and instead continue to require a case-by-case consideration of the reasonableness of the Government’s efforts.<sup>209</sup> Although in many cases, release, which might include deportation, may be the best way to meet both the Government’s and the witnesses needs, it nonetheless intrudes on the defendant’s constitutional rights. It is reasonable, under such circumstances, to require that the Government make every possible attempt to either keep the witnesses in the country without unnecessarily burdensome detention, or to attempt to ensure that the witnesses return to testify.<sup>210</sup> Attempts will not always be successful. But, as *Barber*

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206. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 864 (1980) (noting Congress’s “plenary power” over regulating admission of aliens).

207. See Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 200 (1993) (arguing that when defendant’s “liberty [is] at stake,” the Government should make all good faith efforts to secure presence of witnesses).

208. *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *In re Class Action Application for Habeas Corpus ex rel. All Material Witnesses*, 612 F. Supp. 940, 944 (W.D. Tex. 1985).

209. See Barbara Rook Snyder, *Defining the Contours of Unavailability and Reliability for the Confrontation Clause*, 22 CAP. U. L. REV. 189, 192 (1993) (asserting that broad definition of unavailability would be insufficient protection of confrontation rights). Holding the Government to its duty under *Roberts* will not require Herculean efforts from the Government and will not lead to large numbers of reversals on “technicalities.” The Fifth Circuit demands that the Government make good faith efforts to obtain witnesses’ presence, and the Government in that circuit has demonstrated its willingness and ability to do so. *United States v. Allie*, 978 F.2d 1401, 1406-07 (5th Cir. 1992). See also *United States v. Aguilar-Tamayo*, 300 F.3d 562, 565 (5th Cir. 2002) (disapproving of the Government’s failure to make any effort).

210. Susan W. Crump & Elaine Carlson, *Fifth Circuit Survey: June 1992/May 1993, Evidence*, 25 TEX. TECH L. REV. 677, 687 (1994) (arguing that a heightened standard

holds, the possibility of failure should not prevent good faith efforts.<sup>211</sup>

C. *With Guidance from the Courts, Congress Can Draft a Better Law*

While Congress cannot abrogate the requirements of the Constitution, it can, and should, draft legislation making it easier for the Government to comply with those requirements. For example, Congress should mandate that when possible, trials requiring the use of alien witnesses be expedited so that any witness choosing to stay and give testimony is not kept in the country for an unnecessarily long period of time. It should also expand the Government's options for detaining witnesses who can be persuaded to stay, so that work release permits, or other nonpunitive means of detention, can be relied upon to keep the witnesses in the United States for the brief period leading up to the defendant's trial.<sup>212</sup>

Finally, Congress should authorize the Government to take measures to bring witnesses who choose to leave the United States back. Congress should, for example, outline what steps the Government must take in such cases. It should also require that the Government prove, in each § 1324 prosecution, that it took these steps. In the end, the Government's efforts would necessarily be subject to *Roberts's* reasonableness requirement, but a clear statutory pronouncement would provide uniform guidance for courts and litigants involved in § 1324 prosecutions as they seek to assess what is reasonable under the facts of any given case.

## V. CONCLUSION

Section 1324 functions at the nexus between the Government's power to prosecute criminal offenses and its right to control who will enter its borders. Cases prosecuted under the statute therefore present special challenges for the Government and for the defend-

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should be applied when the alternative to an unavailability showing is the detention of witnesses).

211. *Barber v. Page*, 390 U.S. 719, 724-25 (1968); *see also Aguilar-Ayala v. Ruiz*, 973 F.2d 411, 418 (5th Cir. 1992) (stating, "[T]he ultimate success or failure of those efforts is not dispositive").

212. *See Allie*, 978 F.2d at 1407 (stating that the Government should make efforts to keep witnesses in country rather than release them to their native countries).

ants. The Government should answer to its duty to bring constitutional prosecutions and its duty to promptly deport individuals who are not legally authorized to be in the country. Defendants are required to defend themselves in cases in which most witnesses to the alleged crime have been removed from the country, well beyond their reach.

These difficulties, however, do not justify reducing § 1324 prosecutions to administrative proceedings. The result of a successful § 1324 prosecution is not deportation; it is imprisonment in a federal facility. For that reason, in spite of the complexities inherent in § 1324 cases, the Government should not be relieved of its constitutional obligations. The Supreme Court should clarify that among those obligations is the duty to make good faith efforts to present adverse witnesses at trial. Congress should make it easier for the Government to make those efforts and to be successful in making them, without unduly burdening the witnesses whose testimony it seeks.

