VIDEOTAPE DEPOSITIONS: AN ALTERNATIVE TO THE INCARCERATION OF ALIEN MATERIAL WITNESSES*

On December 8, 1969, Manuel Mendez-Rodriguez and six Mexican aliens were apprehended by an agent of the Immigration and Naturalization Service (I.N.S.) for suspected violations of United States immigration laws.[1] Pursuant to its policy, the I.N.S. interviewed the six aliens, detained three as material witnesses for the trial of Mendez-Rodriguez, and returned the remaining three to Mexico.[2] Mendez-Rodriguez was indicted on one count of conspiracy to smuggle aliens into the United States[3] and three counts of illegally transporting aliens within the country.[4] One count of illegal transportation was dismissed, and Mendez-Rodriguez was convicted on the remaining three charges.[5]

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* A recent development has occurred in the material witness controversy as this article goes to press. Several material witnesses held for an alien smuggling trial moved for bail reduction and for their depositions to be taken pursuant to section 3149 of the Bail Reform Act. These motions were denied by the district court and affirmed by the Ninth Circuit. The witnesses then sought review by application to Justice Douglas. On April 4, 1975, Justice Douglas signed an order releasing the applicants from custody on their own recognizance. *In re Witnesses*, Order No. A-790, — U.S. — (Douglas, Circuit Justice, Apr. 4, 1975).

The release was conditioned upon serving the witnesses with *subpoenas* ordering their appearances at trial and taking their depositions to preserve their testimony. At the government's request, the order was amended to add a further condition allowing the district court to impose reasonable travel restrictions upon the witnesses until their testimony could be given at trial. *In re Witnesses*, Order No. A-790 — U.S. — (Douglas, Circuit Justice, Apr. 17, 1975), *modifying*, — U.S. — (Douglas, Circuit Justice, Apr. 4, 1975).

The order did not specify that the depositions were to be videotaped, however.

1. United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971).
2. *Id.* at 3.
3. Immigration and Nationality Act § 274, 8 U.S.C. § 1324 (1970). The Act makes it a crime to bring into the United States, knowingly induce the entry of, transport within the United States, or willfully conceal or harbor any illegal alien. Violations of this section constitute a felony punishable by a maximum imprisonment of 5 years or by a maximum fine of $2000 or both for each alien. The Act specifically exempts employment of an alien from the definition of harboring.
4. *Id.* § 1324(2).
5. United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971).

After the indictment was returned against Mendez-Rodriguez, his court appointed counsel made timely motions[6] to require that the government disclose the identities of the three missing witnesses and produce them at trial or, in the alternative, to dismiss the charges. The court granted only the motion to require disclosure.

In appealing his conviction, Mendez-Rodriguez asserted that the governmental action of returning three eyewitnesses to the alleged offense to Mexico, beyond the subpoena power of the court before he had an opportunity to interview them, constituted a denial of his rights under the fifth[7] and sixth[8] amendments to the United States Constitution.

The court agreed that the unilateral action of the government "deprived [Mendez-Rodriguez] of due process in preparation of his defense to the charges contained in the indictment."[9] By placing the three potential witnesses beyond the subpoena power of the court, the government had effectively denied him the opportunity to interview the witnesses and to determine for himself whether or not their testimony would be helpful to his defense. Such action, the court held, deprived the defendant of "' . . . that opportunity which . . . elemental fairness and due process [require] that he have.' "[10]

By returning the three aliens to Mexico, the defendant was also denied his sixth amendment right "to have compulsory process for obtaining witnesses in his favor. . . ."[11] While ordinarily the government is neither obligated to search for potential defense witnesses nor affirmatively compelled to ensure that such witnesses will be available at trial,[12] a unique and difficult

6. *Id.* at 2-3.

7. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

8. "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST. amend. VI.

9. United States v. Mendez-Rodriquez, 450 F.2d 1, 4 (9th Cir. 1971).

10. *Id.* at 5, quoting from Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966).

11. U.S. CONST. amend. VI.

12. United States v. Alvarez, 472 F.2d 111 (9th Cir. 1973); United States v. Romero, 469 F.2d 1078 (9th Cir. 1972). *But see*, Roviaro v. United States, 353 U.S. 53 (1957) (where an informant's identity or contents of his communication to the government is relevant to the defense, or essential to a fair trial, the government must disclose); United States v. Villa, 370 F. Supp. 515 (D.C. Conn.

problem is posed by the situation in which a potential defense witness is an apprehended foreign national illegally present in the United States.

In such a case the illegal alien defense witness is peculiarly within the control of the government by virtue of his initial arrest and detention. Depending upon the nature of his entry, he will be subject to either deportation[13] or exclusionary[14] proceedings and then returned to the country of his nationality. In doing so however, the government places the witness beyond the jurisdiction of the court with no legal requirement that he return to testify at trial.[15] The effect on a defendant is to deny him any adequate means of producing favorable witnesses to testify on his behalf.[16]

1974); Price v. Superior Court, 1 Cal. 3d 836, 842-843, 83 Cal. Rptr. 369, 372-373, 463 P.2d 721, 724-725 (1970).

13. 8 U.S.C. § 1252 (1970). An alien is subject to deportation proceedings if he is illegally within the United States where the original entry was accompanied by freedom from official restraint. Wenzell & Kolodny, *Waiver of Deportation: An Analysis of Section 241(f) of the Immigration and Nationality Act*, 4 CALIF. W. INT'L L. J. 271, 289-294 (1973-74) [hereinafter cited as Wenzell & Kolodny].

14. 8 U.S.C. § 1226 (1970). An alien is only entitled to an exclusionary hearing if he is an excludable alien and was apprehended at a port of entry. It has been indicated that ports of entry may be a considerable distance from the physical border and still be the functional equivalent of the border. *See* Wenzell & Kolodny, *supra* note 13, at 292. Aliens are granted fewer rights at exclusionary hearings than at deportation hearings.

15. There currently exists no agreement with Mexico whereby an alien witness could be returned to Mexico and his presence compelled for trial. The United States does have an extradition treaty with Mexico, but its terms encompass only serious crimes. In no event is either country required to turn over its own nationals to the other. Treaty of Extradition with the United States of Mexico, Feb. 22, 1899, arts. II, IV, 31 Stat. 1818 (1901), T.S. No. 242 (effective Apr. 22, 1899) (Article II defines extraditable crimes as, *inter alia*, murder, rape, bigamy, arson, crimes committed at sea, burglary, robbery, forgery, kidnap, and mayhem. Article IV relieves each party of the obligation to extradite its own nationals.) Supplementary Extradition Convention, June 25, 1902, T.S. No. 421 (effective Apr. 13, 1903) (Bribery was added to the list of extraditable crimes.); Supplementary Extradition Convention, Dec. 23, 1925, 44 Stat. 2409 (1927). T.S. No. 741 (effective July 11, 1926) (added crimes relating to trafficking in and use of narcotics and dangerous drugs and violations of customs laws); Supplementary Extradition Convention, Aug. 16, 1939, 55 Stat. 1133 (1942), T.S. No. 967 (effective Apr. 14, 1941) (added participation as an accessory before or after the fact in any of the crimes in the treaty).

16. It is interesting to note that one court has refused to hold that a witness' testimony had become so tainted by his incarceration that due process had been violated. They did not, however, preclude that such a situation might arise. *United States v. Martinez*, 416 F.2d 964 (5th Cir. 1969).

While it is essential that a defendant have both the means to prepare a defense and the right to present that defense at trial, *Mendez-Rodriguez* has seriously affected the rights of aliens apprehended with suspected alien smugglers. Prior to that decision, only those witnesses requested by the government were detained.[17] The ruling, however, requires that *all* witnesses be held by the government until the defendant had an opportunity to interview them. Once so interviewed, those witnesses wanted by the defense, in addition to those wanted by the government, must be held pending the resolution of the case.

The severity of the problem is aggravated by the steadily increasing influx of illegal aliens into the United States. The number of aliens apprehended by the I.N.S. rose over 90% between fiscal 1970 and 1973.[18] In 1973 alone, 655,968 aliens were located nationwide.[19] Of these, 88% were Mexican nationals.[20] In the same period, I.N.S. agents located 41,589 aliens who had been induced or assisted to enter the country illegally or who had been illegally transported within the country.[21] Also located were 6,355 alien smugglers, representing a 100% increase over 1970.[22]

17. Of course any person apprehended as an illegal alien would be detained, though possibly admitted to bail or paroled, pending the outcome of his deportation or exclusionary hearing.

18. DEPARTMENT OF JUSTICE, 1973 ANNUAL REPORT OF IMMIGRATION AND NATURALIZATION SERVICE 78 (1973).

19. *Id.*

20. *Id.* at 88.

21. *Id.* at 9.

22. *Id.* at 91.

There has been a sharp decline in the number of prosecutions for violations of immigration laws in recent years. 1973 ANN. RPT. DIR. ADMIN. OFFICE UNITED STATES COURTS 186 (1973) [hereinafter cited as COURT ANN. RPT.]. This decrease has been attributed to two factors: (1) the diversion of many immigration cases from the district courts to the magistrate's courts, COURT ANN. RPT. at 190; and (2) to the government's policy of concentrating on prosecution of the more serious violations, such as alien smuggling. Interview with Hon. Edward A. Infante, United States Magistrate, in San Diego, Oct. 10, 1974; Interview with James W. Meyers, Chief of Appellate Section, United States Attorney for the Southern District of California, in San Diego, Dec. 18, 1974. Magistrates are now handling approximately eighty-five percent of the immigration cases in the federal courts. COURT ANN. RPT. at 286. The emphasis in law enforcement is directed at the alien smuggler. The primary objective of the traffic inspection facilities is to intercept vehicles containing illegal aliens, with particular attention directed at the apprehension of persons smuggling and transporting those illegal aliens. *United States v. Baca*, 368 F. Supp. 398, 406 (1973).

Three federal districts adjacent to the Mexican border account for the great majority of immigration cases in the United States—the Southern and Western Districts of Texas in the Fifth Circuit and the Southern District of California in

The number of alien smugglers and the scope of the alien problem in general indicates that the number of illegal aliens detained as material witnesses is great. One can only expect that the problem will become worse.

The human toll in terms of the often prolonged incarceration of individuals against whom no charges have been brought[23] is repugnant to a system of justice which recognizes the concepts of due process,[24] basic fairness, and a presumption of innocence until guilt is proven.

The purpose of this comment is to examine the plight of the alien material witness and to propose the use of videotape depositions, which through proper procedures would protect the rights of the accused while providing for the early release of the alien witness. The use of videotape depositions would negate the necessity of holding witnesses until the resolution of the defendant's case as currently required by *Mendez-Rodriguez*. It is contended that the use of videotape depositions in a criminal proceeding, in lieu of live testimony, lacks the constitutional infirmity of the traditional oral deposition, which has been attacked for failing to adequately protect the defendant's right of confrontation.[25]

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the Ninth Circuit. COURT ANN. RPT. at 286. Even if the case does not go to trial, any material witnesses must be held until the case is resolved.

The median time interval from the filing of a case to the disposition of the criminal defendant can give a fair indication of the amount of time an alien material witness might expect to be detained. In the Southern District of California where violations of immigration laws constitute a substantial part of the entire caseload, the median time for all cases was 2.6 months. If the defendant pleaded guilty the median time was 1.9 months; if he went to trial before the court, the median was 3.9 months; if he went to trial before a jury, the median was only slightly longer; when the case was eventually dismissed, however, the median was a startling 7.2 months. COURT ANN. RPT. at 415.

The hardship upon the alien witnesses themselves is severe, and the cost of incarcerating them is high. Until recently, federal prisoners in the Southern District of California were housed in the San Diego County Jail at a cost of $15.76 per person per day. Interview with Lieut. M.J. Smith, Watch Commander, San Diego County Jail, in San Diego, Nov. 13, 1974. The Metropolitan Correctional Center, the new federal jail in San Diego, was officially dedicated on November 15, 1974. All federal prisoners will be held there, and the cost of detention is expected to increase substantially.

23. Aliens held as material witnesses are rarely charged with illegal entry. 8 U.S.C. § 1325 (1970); *see* text accompanying note 42, *infra*. They are formally held as material witnesses not as defendants.

24. Abel v. United States, 362 U.S. 217, 246-248 (1960) (dictum); Wong Wing v. United States, 163 U.S. 228 (1896).

25. U.S. CONST. amend. VI.

Included in this discussion will be a review of the current status of *Mendez-Rodriguez*, the statutes relating to the incarceration of material witnesses, the inadequacies of the bail statutes as they relate to the alien's unique situation, and the constitutional issue of the confrontation clause[26] as it relates to the use of depositions in criminal trials.

I. CURRENT STATUS OF *Mendez-Rodriguez*

Because of the severe hardship in terms of cost to the government,[27] the substantial hardship imposed on the alien witness,[28] and the possibility of abuse by defendants,[29] the courts have strictly limited the decision in *Mendez-Rodriguez*.[30] Three recurring themes dominate the judicial decisions where an appeal has been based on *Mendez-Rodriguez* The first is action by the government, solely on its own initiative—the ". . . unfettered ability of the government to make the decision [to release] unilater-

26. *Id.*

27. *See* United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974); Cleary, *Alien Material Witnesses*, 20 DICTA (S.D. Co. B. Assn.) 5 (Mar., 1973) [hereinafter cited as Cleary].

28. United States v. Carrillo-Frausto, 500 F.2d 234 (9th Cir. 1974); Cleary, supra note 27.

29. United States v. Romero, 469 F.2d 1078 (9th Cir. 1972).

30. There has been one significant expansion, however. In *United States v. Tsutagawa*, 500 F.2d 420 (9th Cir. 1974), the court applied *Mendez-Rodriguez* at the pre-indictment stage during a grand jury investigation. Thirty-nine illegal aliens were apprehended on three San Diego county farms during the course of a grand jury investigation. All were interviewed by the government. Thirteen aliens testified before the grand jury, but only four were held for the trial of the defendant, who was subsequently indicted on alien smuggling charges. The defendant made an unsuccessful attempt to locate the missing witnesses in Mexico. The Court of Appeals upheld the District Court in granting a motion to dismiss. The court recognized the "difficulties and soaring costs involved in retaining aliens . . ." but did not foreclose alternatives to incarceration, specifically mentioning parole and "farming out" of aliens as possible alternatives. For a discussion of the "farm out" program see Comment, *The Wetback as Material Witness: Pretrial Detention or Deposition*, 7 CALIF. WEST. L. REV. 175, 186-188 (1970-71) [hereinafter cited as *Wetback as Material Witness*].

31. United States v. Tsutagawa, 500 F.2d 420 (9th Cir. 1974); United States v. Jones, 476 F.2d 885 (Ct. App. D.C. 1973) (government granted immunity to one witness who testified against defendant but not to another witness who was prepared to testify on behalf of defendant). For cases where no unilateral government action was found, see United States v. Lomeli-Garnica, 495 F.2d 313 (9th Cir. 1974); United States v. Martin, 489 F.2d 674 (9th Cir. 1973); United States v. Romero, 469 F.2d 1078 (9th Cir. 1972) (where, after considerable time, defendant made no request for witnesses, though he could have done so, their release by the government was not error); United States v. Verduzco-Macias, 463 F.2d

ally."[31] Such action has been termed, in effect, suppression of evidence.[32] Where, however, a judicial officer has released an alien witness, the action has been upheld as being within his discretionary authority.[33] Because there was no unilateral governmental action, such release may only be attacked as being an abuse of judicial discretion.

A second theme concerns the effort of the defendant to secure the presence of witnesses he desires at trial.[34] In *Mendez-Rodriguez* the defendant moved for the disclosure of the witnesses at an early date, and made an unsuccessful attempt to locate them in Mexico.[35] Where it has appeared that the defendant made no reasonable effort to secure the presence of witnesses favorable to his defense and later seeks a reversal of his conviction based on their absence, reversal has been denied.[36]

Third, the courts have inquired into the probable testimony of a missing witness, if such information has been available.[37] They have refused to overturn a conviction when it has appeared that the witness' testimony would not have aided the defense.[38] In short, no reversible error has been found where a

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105 (9th Cir.), *cert. denied,* 409 U.S. 883 (1972) (no unilateral government action where witnesses escaped from farm camp and government had taken reasonable measures to detain them); United States v. Peyton, 454 F.2d 213 (9th Cir. 1972) (where there was no evidence on record that the government had returned witness to Mexico, the Court refused to speculate and upheld the conviction).

32. United States v. Carrillo-Frausto, 500 F.2d 234 (9th Cir. 1974).

33. United States v. Francisco-Romandia, 503 F.2d 1020 (9th Cir. 1974) (no abuse of discretion where court released several witnesses upon stipulation of codefendants where defendant was still at large); United States v. Carrillo-Frausto, 500 F.2d 234 (9th Cir. 1974) (2 to 1 decision where discretion of magistrate in releasing two juvenile alien witnesses upheld); *accord,* United States v. Martinez-Frausto, 463 F.2d 231 (9th Cir. 1972); United States v. Moreno-Flores, 461 F.2d 1001 (9th Cir. 1972).

34. United States v. Lomeli-Garnica, 495 F.2d 313 (9th Cir. 1974) (witness was arrested with defendant, and defendant's counsel had an opportunity to interview him before his release); *accord,* United States v. Martin, 489 F.2d 674 (9th Cir. 1973); United States v. Romero, 469 F.2d 1078 (9th Cir. 1972); United States v. Moran, 456 F.2d 1066 (9th Cir.), *cert. denied,* 406 U.S. 947 (1972); United States v. Neustice, 452 F.2d 123 (9th Cir. 1971).

35. United States v. Mendez-Rodriguez, 450 F.2d 1, 2 (9th Cir. 1971).

36. *See* cases cited note 34, *supra.*

37. The court in *Mendez-Rodriguez* specifically refused to speculate on the probable testimony of the missing witnesses.

38. United States v. Mosca, 355 F. Supp. 267 (E.D.N.Y. 1972), *aff'd* 475 F.2d 1052 (2d Cir. 1973) (even though there was unilateral government action, no reversal was required where the apparent contents of the missing witness' testimony would have confirmed government allegations).

"substantial interest" of the defendant has not been prejudiced.[39]

These qualifications placed on the original *Mendez-Rodriguez* holding evince an approach by the courts which seeks to protect the basic rights elucidated in that decision, while preventing frivolous appeals by defendants who were not prejudiced by acts of the government. The courts have somewhat tempered the harsh results of *Mendez-Rodriguez* by upholding the broad discretionary authority of judicial officers who have refused to detain alien witnesses where other factors have outweighed potential prejudice to the defendant.[40] In spite of the restrictive interpretation of *Mendez-Rodriguez*, a significant number of Mexican aliens are being detained in jail as material witnesses in alien smuggling cases.[41]

II. LEGAL STATUS OF THE ALIEN MATERIAL WITNESS

An alien illegally present in the United States is subject to both criminal and administrative penalties. He may be criminally prosecuted for illegal entry.[42] Whether or not he is prosecuted, he is subject to administrative penalties through an exclusionary or deportation hearing.[43]

Criminal charges are rarely brought against the illegal alien unless he is a repeated offender.[44] Since court calendars are overcrowded, the current policy is to prosecute the more serious offender, the alien smuggler rather than the illegal alien.[45] Additionally, if the illegal alien material witness were himself under indictment, he could exercise his fifth amendment privilege against self-incrimination to avoid testifying.[46]

The illegal alien assumes the legal status of a material witness when he is captured with an alleged smuggler. The fact that he is illegally present in the United States does not alter that

39. *Id.* *See also* cases cited note 34, *supra.*

40. United States v. Carillo-Frausto, 500 F.2d 234 (9th Cir. 1974).

41. *See* note 22, *supra.*

42. Immigration and Nationality Act § 275, 8 U.S.C. § 1325 (1970). A first offense is a misdemeanor and carries a maximum sentence of six months imprisonment or a fine of $500 or both. Subsequent violations are punishable as felonies, carrying a significantly harsher maximum of two years imprisonment or $1000 or both.

43. *See* authority cited notes 13-14, *supra.*

44. *See* note 22, *supra.*

45. *Id.*

46. *See* Cleary, *supra* note 27.

status.[47] While the illegal alien does not enjoy the right to appointed counsel at deportation or exclusionary proceedings,[48] he is guaranteed that right as a material witness.[49]

There is no federal statute or rule expressly authorizing the incarceration of material witnesses.[50] However, there is strong precedent for the constitutionality of their pre-trial detention.[51] Indeed, the Supreme Court has stated, "The duty to disclose knowledge of a crime . . . is so vital that one known to be innocent may be detained . . . as a material witness."[52] The United States Attorney General is specifically authorized to stay the deportation of any deportable alien whose testimony is needed on behalf of the United States in the prosecution of federal crimes.[53] Such aliens may be released under bond of not less than $500.[54] After *Mendez-Rodriguez* it would appear that the same provision is applicable to deportable aliens whose testimony is needed on behalf of the defense.

In *Bacon v. United States*[55] the Ninth Circuit Court of Appeals ruled that the power to arrest and to detain a material witness is inferable from section 3149 of the Bail Reform Act[56] and Rule 46(b) of the Federal Rules of Criminal Procedure.

A. Bail Reform Act of 1966

The Bail Reform Act was the first significant reform in the

47. *See In re* Aliens, 231 F. 335 (N.D.N.Y. 1916); 8 U.S.C. § 1227(d) (1970).

48. 8 U.S.C. §§ 1252(b)(2), 1362 (1970).

49. 18 U.S.C. § 3006A(g) (1971):

> Any person . . . in custody as a material witness . . . may be furnished representation . . . whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation. . . .

All alien material witnesses are routinely appointed counsel. Interview with Hon. Edward A. Infante, United States Magistrate, in San Diego, Oct. 10, 1974.

50. *See* Bacon v. United States, 449 F.2d 933 (9th Cir. 1971). In examining the statutory history concerning the power to arrest and detain material witnesses, the court noted that such express authority did exist until 1948.

51. Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 617-618 (1929) (power of Senate to compel attendance of witness at Senate hearing and to arrest and detain such witness when it appeared he would not otherwise attend was proper exercise of judicial function).

52. Stein v. New York, 346 U.S. 156, 184 (1953).

53. 8 U.S.C. § 1227(d) (1970).

54. *Id.*

55. 449 F.2d 933 (9th Cir. 1971).

56. 18 U.S.C. §§ 3146-3152 (1970).

administration of bail in 176 years.[57] The clear purpose of the act favors the early release of incarcerated persons by providing adequate means of securing the presence at trial of indigents who cannot meet the traditional bail requirements.[58] Indeed, fifteen years before the passage of the act, the Supreme Court held that bail is excessive if not "based upon standards relevant to the purpose of assuring the presence of that defendant."[59] The right to bail, however, is not absolute, but is conditioned upon the accused's giving adequate assurance that he will return to stand trial.[60] The Act expressly provides for the release of material witnesses,[61] and reads in part as follows:

> If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146. *No material witness shall be detained* because of inability to comply with any condition of release *if the testimony of such witness can adequately be secured by deposition,* and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.[62]

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57. Ralls, *Bail in the United States*, 74 CASE & COMM. 38, 39 (Nov.-Dec. 1969).

58. United States v. Verduzco-Macias, 463 F.2d 105, 107 (9th Cir.), *cert. denied*, 409 U.S. 883 (1972); 8A J. MOORE, FEDERAL PRACTICE, ¶ 46.02[1] (2d ed. 1968). *See generally* Bogomolny & Sonnenreich, *The Bail Reform Act of 1966: Administrative Tail Wagging and Other Legal Problems*, 11 ARIZ. L. REV. 201 (1969) [hereinafter cited as Bogomolny & Sonnenreich]; *Wetback as Material Witness, supra* note 30, at 184-186; Note, *Bail—Conditions of Pretrial Release for the Indigent Defendant*, 75 DICK. L. REV. 639 (1970) [hereinafter cited as *Conditions of Release*]; Note, *The Bail Reform Act of 1966*, 53 IOWA L. REV. 170 (1967) [hereinafter cited as 53 IOWA L. REV. 170].

59. Stack v. Boyle, 342 U.S. 1, 5 (1951). *Accord*, United States v. Bobrow, 468 F.2d 124 (D.C. Cir. 1972); United States v. Weiss, 233 F.2d 463 (7th Cir. 1956); Heikkinen v. United States, 208 F.2d 738 (7th Cir. 1953); Forest v. United States, 203 F.2d 83 (8th Cir. 1953).

60. Stack v. Boyle, 342 U.S. 1 (1951). *Accord*, United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969).

61. Because the act expressly provided for the release of material witnesses, the court in *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971), reasoned that the legislative intent could not have been to provide the means of release without recognizing a power to detain in the first place. Under this reasoning, the court held that the power to arrest and detain a material witness was inferable from § 3149 of the Act.

62. Bail Reform Act, 18 U.S.C. § 3149 (1970) (emphasis added).

Section 3146 of the Act specifically relates to criminal defendants but is equally applicable to incarcerated material witnesses.[63] It provides:

> [A]ny person charged with an offense . . . shall . . . be ordered released pending trial on his personal recognizance . . . unless the [judicial] officer determines . . . that such a release will not reasonably assure the appearance of the person as required.[64]

In accordance with section 3146, the court may impose the following conditions of release to secure the required appearance:

> (1) place the person in the custody of a designated person or organization . . .
>
> (2) place restrictions on travel, association, or place of abode of the person . . .
>
> (3) require the execution of an appearance bond . . .
>
> (4) require the execution of a bail bond . . .
>
> (5) impose any other condition deemed reasonably necessary to assure appearance. . . .[65]

In determining which conditions are reasonable, the judicial officer shall consider

> [T]he nature and circumstances of the offense charged, the weight of the evidence against the accused, . . . family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions and his record of appearance [or non-appearance] at [prior] court proceedings. . . .[66]

The Bail Reform Act clearly favors the least oppressive means of ensuring that the witness will appear to testify. However, the illegal alien is rarely, if ever, able to qualify under any of the conditions of release specified in the act.

B. Alien Inability to Qualify for Release

The right of a material witness who is, at the same time, a deportable alien, to be admitted to bail has long been recognized.[67] But the criteria which the judicial officer must consider

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63. *Id.* §§ 3146, 3149.
64. *Id.* § 3146(a).
65. *Id.*
66. *Id.* § 3146(b).
67. *See In re* Aliens, 231 F. 335 (N.D.N.Y. 1916); 8 U.S.C. § 1227(d) (1970).

when deciding what conditions of release are reasonable and appropriate, in effect, completely deny to the illegal alien any possibility of release on personal recognizance.[68] The criteria which might indicate stability in the community are inapplicable. Not only is it likely that the alien has only recently arrived in the country, but, as an illegal alien, he has no right to remain. Unless the government chooses to grant such an alien a temporary visa, he remains subject to deportation or exclusion.

Even if the alien has some familial or other tie with the local community, it is unlikely that he would reappear to testify since the certain consequence would be immediate expulsion from the country after having testified. It is unreasonable to assume that an illegal alien would voluntarily return under such circumstances.[69]

In addition, the illegal alien is almost certain to be indigent.[70] The very fact of his poverty and the expectation of a better existence "across the border" prompted his illegal entry in the first place.[71] This fact, of course, negates the possibility that he will be able to post bond and secure his release pending trial.[72] Thus the illegal alien held as a material witness remains in jail even though the Bail Reform Act, under which he is incarcerated, favors release. His very circumstance fails to satisfy the criteria for release.[73]

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68. An incarcerated person must be released on recognizance unless that would be insufficient to assure his return. *See* text accompanying note 64, *supra*.

69. It might be true, of course, that the alien would have a defense to deportation or exclusion entitling him to remain in the United States. There would then be no fear of placing himself within the reach of the law by returning to testify. However, such a possibility would probably seem too uncertain for the magistrate to consider when deciding the issue of bail.

70. United States v. Baca, 368 F. Supp. 398 at 402 (S.D. Cal. 1973); *Wetback as Material Witness, supra* note 30, at 184-186.

71. *Id.*

72. Bail is routinely set at $1000 by the magistrates. Rarely has an alien material witness been able to post the 10% bond required. Interview with Hon. Edward A. Infante, United States Magistrate, in San Diego, Oct. 10, 1974.

73. *See Wetback as Material Witness, supra* note 30.

Several commentators have advocated the wider use of release on personal recognizance for indigents, arguing that denial of such release is a flagrant violation of equal protection. They point to several interesting and innovative studies which have shown that the appearance rate for those released on personal recognizance is at least as high as the rate for those released on bond. In fact, one study indicates that, within a given crime bracket, the likelihood of non-appearance increases as the amount of bail increases. *See* Bogomolny & Sonnenreich, *supra* note 58; *see also, Conditions of Release, supra* note 58. It should be noted, how-

The "catch-22"[74] of granting material witnesses the right to bail but denying a large class of such witnesses any means to secure release, appears to be a blatant violation of the spirit of the Bail Reform Act which seeks to minimize the detention of, and the hardship imposed on, a material witness. The act states in clear language:

> No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition. . . .[75]

The irony of this situation is further aggravated when one considers that a defendant-smuggler, who may be able to satisfy the criteria for release on personal recognizance or financially able to post bond, is often admitted to bail. The person accused of a crime is often allowed freedom while the material witness, accused of no crime, remains in jail.[76] Once free, it may be in the best interest of the accused to postpone the trial date as long as possible. The inequities of such a situation are indeed startling. They are all the more disturbing when one considers that alternatives are available which would prevent such uneven-handed justice.

III. USE OF VIDEOTAPE DEPOSITIONS

The use of videotape depositions has significant merits: it adequately safeguards the procedural and constitutional rights of defendants; it provides for the quick release of material witnesses, minimizing their hardship; it allows the expeditious deportation of the alien material witnesses, decreasing the burden

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ever, that in those studies, the criteria used to determine who would make a good candidate for release on personal recognizance (and thus who became the basis of the statistics reported) were substantially similar to the criteria set forth in the Bail Reform Act, 18 U.S.C. § 3146 (1970).

74. JOSEPH HELLER, CATCH-22 (Random House 1961).

The term describes a rule or regulation which provides for the granting of some privilege on a condition which, by its implication, denies that the condition can ever be fulfilled. In the novel specifically, a military regulation specified that a bomber pilot could be relieved from duty only through a showing of insanity. In order to show insanity, the pilot was required to correctly petition. The petitioning procedure, however, was evidence of rational behavior and therefore, absolute proof of sanity.

75. 18 U.S.C. § 3149 (1970).

76. *See* text accompanying note 44, *supra*. One commentator has suggested that the conditions of pre-trial release for material witnesses should be more lenient than for defendants. 53 IOWA L. REV. 170 at 185, *supra* note 58.

on the taxpayer; and it could make possible more efficient use of court facilities.[77]

Rule 15 of the Federal Rules of Criminal Procedure provides for the taking of depositions. Under that rule, a defendant may move the court to allow the taking of testimony by deposition of a witness who may be absent at trial.[78] An incarcerated material witness may move that his own deposition be taken so that he may be released.[79] The party at whose instance the deposition is taken must give adequate notice to all parties.[80] A party upon whom notice is served may, for adequate cause, request that the court set a different time for taking the deposition.[81] Rule 15 further states that depositions shall be taken in the manner provided for in civil actions,[82] which specifically allows depositions "by other than stenographic means. . . ."[83]

The technology of videotape makes its use in the courtroom setting eminently feasible. The cost of the equipment is minor[84] when compared to the current expense of detention and court supervision. The use of the equipment would not be distracting. The machines are small and silent and require no special lighting.[85] One commentator has suggested the use of a three-camera system and stereophonic sound recordation.[86] The judge, questioning attorney, and witness could then be viewed simultaneously on a split screen. Stereophonic recordation would provide a better sound split when there is simultaneous conversation. With a specially trained person operating the videotape equipment, a technically reliable and complete reproduction of the deposition would result.

The general guidelines for taking depositions in the Federal Rules of Civil Procedure, which allows their use for purposes of

77. McCrystal, *Videotape Trials: Relief for Our Congested Courts*, 49 DENVER L. J. 463 (1973-74); Comment, *Videotape in the Courts: Its Use and Potential*, 3 RUTGERS J. COMPUTERS & L. 279 (1973-74).

78. FED. R. CRIM. P. 15(a).

79. *Id.*

80. FED. R. CRIM. P. 15(b).

81. *Id.*

82. FED. R. CRIM. P. 15(d).

83. FED. R. CIV. P. 30(b)(4).

84. Comment, *Judicial Administration—Technological Advances—Use of Videotape in the Courtroom and the Stationhouse*, 20 DE PAUL L. REV. 924, 928-930 (1970-71) [hereinafter cited as *Technological Advances*].

85. *Id.* at 938.

86. *Id.* at 930. The cost of such equipment in 1971 was $4,500.00. The tape would cost about $100.00 per hour.

both discovery and preservation of testimony, are broad.[87] Because the purpose of deposing an alien material witness is solely to present the videotape deposition in a criminal trial, the court should closely supervise the manner in which such depositions are taken. The rights of the defendant require no less.

A United States Magistrate is empowered to administer depositions,[88] and his presence would ensure essential safeguards. Unless circumstances dictate otherwise,[89] the videotape deposition should be administered in the magistrate's court. The Federal Rules of Civil Procedure requires that the deposed witness be under oath.[90] The magistrate would ensure that the tenor and nature of the examination and cross-examination remain at all times within proper bounds. He should, however, reserve rulings on technical rules of evidence for the district judge who will preside over the actual trial. By reserving such rulings, appeals based upon an adverse decision by the magistrate would be extraordinary. The deponent and the magistrate should view the tape after its making and certify that it is a true and accurate representation of the testimony given.[91]

The original copy of the videotape should at all times remain in the sole possession of the court.[92] The integrity of the videotape must not be subject to question by any party. The original tape must never be handled or altered, except to make duplicate copies, to ensure that the complete record will remain intact for verification and appellate purposes. Before trial, the district judge would review an unabridged copy of the original and edit any portions which should not be viewed by the jury. This edited copy would also be preserved for appellate purposes. With a federal magistrate supervising the entire deposition procedure and with adequate safeguards to guarantee the integrity of the tape, the rights and interests of all parties would be protected.

87. In most instances, depositions may be taken at any place to which the parties consent, and need not be judicially supervised.

88. Federal Magistrates Act, 28 U.S.C. § 636 (1971).

89. The illness or incapacity of the witness might require that the parties must travel to him. Such considerations should be addressed to the sound discretion of the court.

90. FED. R. CIV. P. 30(e).

91. FED. R. CIV. P. 30(e), (f).

92. This is not a requirement under Rule 30(f) of the Federal Rules of Civil Procedure. The person recording the deposition is responsible for providing the court with a copy.

Rule 46(h) of the Federal Rules of Criminal Procedure provides that it is the duty of the court to supervise the detention of witnesses. As long as a material witness remains incarcerated, the government is required to submit a bi-weekly report to the court stating "why such witness should not be released, with or without the taking of his deposition. . . ."[93] Furthermore, deposing such a witness is specifically allowed where "further detention is not necessary to prevent a failure of justice."[94] It would seem, therefore, that a potential failure of justice is the only rationale for disallowing the deposition procedure and detaining a witness until trial. Reading section 3149 of the Bail Reform Act and Rule 46(h) together, the most reasonable interpretation is that the court must order the release of a material witness unless it has been sufficiently demonstrated that the use of that witness' videotaped deposition at trial, in lieu of live testimony, would result in a miscarriage of justice.

A. Depositions and the Right of Confrontation

The traditional impediment to the use of depositions in criminal proceedings has been the defendant's sixth amendment right "to be confronted with witnesses against him. . . ."[95] Taken literally, this guarantee would seem to require a physical confrontation.[96] The courts have never applied the concept so rigidly.[97] The Supreme Court has advanced three reasons for the confrontation guarantee:

> (1) [It] insures that the witness will give his statement under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury;
>
> (2) [It] forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth";
>
> (3) [It] permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his

93. FED. R. CRIM. P. 46(h).

94. 18 U.S.C. § 3149 (1970).

95. U.S. CONST. amend. VI.

96. California v. Green, 399 U.S. 149, 157 (1970). The desirability of physical confrontation stems from abuses at common law. *See generally* 5 WIGMORE, EVIDENCE, §§ 1363-1365 (3d ed. 1940), for a discussion of the history of the common law hearsay rule and the right of confrontation.

97. *See* Mattox v. United States, 156 U.S. 237 (1895).

statement, thus aiding the jury in assessing his credibility.[98]

Cross-examination has been a central and recurring element of the right of confrontation.[99] Indeed, the traditional

> [V]ice that gave impetus to the confrontation claim was the practice of trying defendants on "evidence" which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.[100]

In *Pointer v. Texas*[101] the United States Supreme Court focused on the cross-examination aspect of this right. There, the testimony of a witness at a preliminary hearing was introduced at trial. Because the defendant lacked assistance of counsel at the hearing and therefore could not effectively cross-examine the witness at that time, the Court held that the introduction of such testimony at trial violated the defendant's right to confront adverse witnesses.[102] But where there was an adequate opportunity to cross-examine a witness at a prior hearing, the introduction of that testimony at trial has been allowed.[103]

The demeanor of the witness has generally been held to be of secondary importance,[104] but is by no means insignificant.[105] Demeanor has been an issue primarily when former testimony made by an unavailable declarant has been introduced at trial.[106]

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98. California v. Green, 399 U.S. 149, 158 (1970) (spacing added for emphasis and footnotes omitted).

99. California v. Green, 399 U.S. 149 (1970); Bruton v. United States, 391 U.S. 123 at 136 (1968); Barber v. Page, 390 U.S. 719, 725 (1968); Pointer v. Texas, 380 U.S. 400, 406-408 (1965); State v. Terry, 202 Kan. 599, 601, 451 P.2d 211, 214 (1969); People v. Williams, 265 Cal. App. 2d 888, 896, 71 Cal. Rptr. 773, 777-778 (1st Dist. 1968); People v. Sorrell, 39 Misc. 2d 558, 241 N.Y.S.2d 586 (County Ct. 1963), *aff'd*, 21 App. Div. 2d 954, 251 N.Y.S.2d 231 (1964).

100. California v. Green, 399 U.S. 149, 156 (1970).

101. 380 U.S. 400, 406-408 (1965).

102. *See generally* Note, *The Use of Prior Recorded Testimony and the Right of Confrontation*, 54 IOWA L. REV. 360 (1968) [hereinafter cited as *Prior Recorded Testimony*]. For a discussion of the right to counsel in the context of *Pointer*, see Note, *Ex Parte Depositions Are Not Admissible in a Criminal Trial if the Defendant Did Not Have the Assistance of Counsel at the Examining Trial*, 3 HOUSTON L. REV. 244 (1965-66).

103. Mattox v. United States, 156 U.S. 237 (1895); State v. Reynolds, 7 Ariz. App. 48, 436 P.2d 142 (1968).

104. *See* Washington v. Texas, 388 U.S. 14 (1967); United States v. Allen, 409 F.2d 611 (10th Cir. 1969); Virgin Islands v. Acquino, 378 F.2d 540 (3d Cir. 1967); Gaertner v. State, 35 Wis. 2d 159, 150 N.W.2d 370 (1967) (dictum).

105. C. MCCORMICK, EVIDENCE §§ 256-257 (2d ed. 1972).

106. California v. Green, 399 U.S. 149 (1970).

The argument that introduction of such evidence deprives the defendant of a substantial right is not without merit. Certainly the jury must evaluate the manner in which the testimony was given to determine the weight to be given to the evidence. A transcribed account of the testimony affords the jury little basis upon which to make such a judgment. While the fact that the witness was under oath indicates a certain level of truthfulness,[107] the lack of any visual (or even auditory) evidence deprives the jury of the totality of the evidence it needs to arrive at an educated and just verdict.

B. Showing of Necessity

Because of the dangers and constitutional shortcomings of this form of hearsay evidence, the courts have required a showing of necessity before the use of such testimony can be held not to violate the dictates of the confrontation clause.[108] The court has found necessity where the witness is unavailable to testify in person.[109] Indeed, in a recent analysis of the confrontation clause, the Supreme Court has suggested that unavailability of a witness may be the threshold issue in determining whether a confrontation problem exists at all.[110] In *Mattox v. United States*[111] the Court held a written transcript from a former trial admissible in the second trial of the accused where the witness had died prior to the second trial. However, use of such former testimony has been denied where the unavailability was the fault of the

107. *Id.* at 158.

108. *Id.* at 165-67; Barber v. Page, 390 U.S. 719 (1968); Motes v. United States, 178 U.S. 458 (1900); Mattox v. United States, 156 U.S. 237 (1895).

Some jurists and commentators have suggested that the confrontation clause is a mere codification of the hearsay rules as they existed historically at common law. *See Prior Recorded Testimony, supra* note 102 at 363-364. This concept was resoundingly rejected in *California v. Green*, 399 U.S. 149, 155 (1970). The Court concluded that even though similar interests are protected, the terms are not synonymous. As a constitutional guarantee, the confrontation clause sets the minimum standard. Beyond that, statutory hearsay rules may place more stringent requirements on the introduction of evidence, but exceptions to the rule may never legitimize evidence which would be violative of this constitutional guarantee.

109. *Id.*

110. California v. Green, 399 U.S. 149 (1970) (especially see the concurring opinion of Mr. Justice Harlan at 179). For an analysis of this case see Note, *Right to Confrontation—Use of Prior Recorded Testimony in the Declarant's Presence*, 2 TEX. TECH. L. REV. 299 (1970-71).

111. 156 U.S. 237 (1895).

party seeking to introduce the prior testimony.[112] In *Motes v. United States*[113] the Court held that the government could not claim necessity when it caused the witness' unavailability.

As long as there has been adequate opportunity for cross-examination, the courts have recognized different degrees and types of unavailability for purposes of admitting prior recorded testimony into evidence. A witness has been considered unavailable when he is beyond the subpoena power of the court and attendance cannot be compelled.[114] Other recognized situations include instances where the witness has invoked a valid privilege,[115] claimed his fifth amendment right against self-incrimination,[116] is unable to attend trial because of physical or mental illness,[117] or cannot be located despite diligent effort to find him.[118]

Federal Rule of Criminal Procedure 15(e),[119] specifying the circumstances under which depositions may be used in a criminal trial, limits the use of depositions in much the same manner.[120]

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112. Motes v. United States, 178 U.S. 458 (1900).

113. *Id.*

114. Iva Ikuko Toguri D'Aquino v. United States, 192 F.2d 338, 375-376 (9th Cir.), *cert. denied*, 343 U.S. 935 (1952).

115. United States v. Carella, 411 F.2d 729 (2d Cir. 1969); State v. Terry, 202 Kan. 599, 602-603, 451 P.2d 211, 214-215 (1969).

116. State v. Dixon, 107 Ariz. 415, 489 P.2d 225 (1971); State v. Solomon, 5 Wash. App. 412, 487 P.2d 643 (1st Div. 1971).

117. King v. Fitzharris, 311 F. Supp. 400 (C.D. Cal. 1970).

118. Oliver v. Rundle, 298 F. Supp. 392 (E.D. Penn. 1969). *See* Barber v. Page, 390 U.S. 719 (1968).

119. A similar provision in the Organized Crime Control Act provides for the taking of depositions for later use in a criminal trial. 18 U.S.C. § 3503 (1970). This procedure was successfully used in *United States v. Lewis*, 460 F.2d 257 (9th Cir. 1972), where a material witness in an alien smuggling case was deposed and released under this provision. The government may move to depose a witness under § 3503 upon an affidavit from the Attorney General that such deposition is to be used against a person believed to be part of an "organized criminal activity". This procedure was upheld in *United States v. Singleton*, 460 F.2d 1148 (2d Cir. 1972) and highly criticized in Comment, *Constitutional Law—Use of Pretrial Deposition not Violative of Right of Confrontation*, 19 NYLF 198 (1973-74). No such procedure allowing government depositions exists under Rule 15.

120. FED. R. CRIM. P. 15(e) provides that:

> At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party

C. *Videotape as a Solution to Deposition Inadequacies*

The use of videotape depositions satisfies the basic constitutional requirements as defined by the Supreme Court of the United States.[121] Since its use in a criminal trial lacks the vices which the confrontation clause seeks to eliminate and can be justified on the basis of necessity, there should be no bar to its use. The deponent is under oath; there is full opportunity for cross-examination, and demeanor evidence is preserved for the jury's consideration. Furthermore, the injustices inherent in the incarceration of alien material witnesses necessitates the use of videotape deposition.

The preliminary requirement that a deposition be taken under oath is easily met by administering the oath as is currently required.[122] Since the deposition would be taken before a magistrate, in court, "under circumstances closely approximating those that surround the typical trial . . . ,"[123] the solemnity of the testimony can be impressed upon the witness.

Opportunity for cross-examination is fulfilled by the requirement that both prosecution and defense counsel be given an opportunity to fully question the witness.[124] With reasonable notice,[125] the preparedness of counsel is ensured so that the testimony will be adequate for use in the subsequent trial. Because the sole purpose of this procedure is to preserve the testimony for trial, neither party would be justified in limiting the scope of questioning for tactical reasons.[126] Neither party could be deprived of an opportunity of thorough examination by a subsequent, unexpected unavailability of the witness.[127] In short,

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for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

121. California v. Green, 399 U.S. 149 (1970). *See* text accompanying note 98, *supra*.

122. FED. R. CIV. P. 30(c).

123. California v. Green, 399 U.S. 149, 165 (1970).

124. FED. R. CIV. P. 30(b)(1), (c), 43(b).

125. *See* text accompanying note 80, *supra*.

126. Barger v. Page, 390 U.S. 719, 725 (1968); Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967); *Prior Recorded Testimony*, *supra* note 102, at 374.

A common complaint where transcripts from preliminary hearings have been introduced at trial concerns the sufficiency of the questioning. Defendants argue that their questioning is purposely limited to avoid aiding the prosecution in the preparation of its case.

127. *See* Commonwealth v. Mustone, 353 Mass. 490, 233 N.E.2d 1 (1968); People v. Gibbs, 255 Cal. App. 2d 739, 63 Cal. Rptr. 471 (3d Dist. 1967).

with each party fully cognizant of the issues involved, there is no reason why such a procedure would lack any of the safeguards of an in-court examination.

Most importantly, videotape depositions would preserve demeanor evidence for the jury's consideration. Some commentators have suggested that something "intangible" is lost by the absence of the physical presence of the witness at trial.[128] Assuming *arguendo* that this is true, such an "intangible" is difficult to measure and would, in any event, be insignificant when compared to the hardship imposed on the material witness who must now remain incarcerated until his testimony is given at trial. It is doubtful, however, that any valuable demeanor evidence would be lost at all through the use of videotape.[129] In a comment upon an experimental videotape trial,[130] the judge who presided over that trial noted:

> All concerned felt that the jury in this case paid closer attention to the testimony than they would have done had the testimony been live.[131]

The use of videotape depositions at trial can be justified by necessity as well. The Bail Reform Act provides for and clearly favors the release of material witnesses.[132] The language is clear. A deposition must be taken and the witness released unless some right of the defendant would be jeopardized. Since the requirements of the confrontation clause are satisfied by videotape depositions, there can be no justification for the detention of alien material witnesses longer than is necessary to take his deposition. The court has the duty to safeguard the rights of the witness[133] as well as those of the defendant.

When one balances the hardship and deprivation of liberty

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128. *See* Comment, *Videotape Trials: Legal and Practical Implications*, 9 COLUM. J. L. SOC. PROB. 363, 381 (1973) [hereinafter cited as *Videotape Trials*].

129. For example, for those who had the opportunity to view the televised hearings of the Senate Watergate Committee during the Summer and Fall of 1973, the opportunity to judge the demeanor of the witnesses was probably much greater than for those who attended the hearings in person.

130. McCall v. Clemens, Civil No. 39301 (C.P. Erie County, Ohio, Dec. 6, 1971).

131. McCrystal, *Ohio's First Video Tape Trial, The Judge's Critique*, 45 OHIO B. 1 (1972). *See also* Murray, *Comments on Video Tape Trial from Counsel for the Plaintiff*, 45 OHIO B. 25 (1972); Watts, *Comments on a Video Tape Trial from Counsel for the Defense*, 45 OHIO B. 51 (1972).

132. 18 U.S.C. § 3149 (1970).

133. *See* text accompanying notes 93-94, *supra*.

which the alien witness currently endures with the potential harm, if any, which the defendant would suffer by virtue of his release, the scales of justice would be heavily weighted in favor of the release of the alien witness. The unjustified inequities of the current situation combined with the recent advent of videotape technology necessitates release.[134] To detain a witness beyond the time when his deposition could be adequately taken and preserved for trial is as much a failure of justice for the witness as the premature release of potential witnesses in *Mendez-Rodriguez* was for the defendant.

The fifth amendment guarantees that there shall be no deprivation of liberty without due process of law. However, the Supreme Court has stated that the duty to disclose knowledge of a crime is so great that it may justify the detention of a material witness.[135] Similarly, the duty to disclose knowledge of the defendant's innocence seems to be equally vital under the holding in *Mendez-Rodriguez*. Nevertheless, once that duty has been discharged by giving the needed testimony in a form that will be acceptable for use in a criminal trial, the rationale for further incarceration vanishes. To detain a person against his will longer than is necessary to achieve the desired goal very likely constitutes a deprivation of liberty without due process of law.

IV. CONCLUSION

The holding in *Mendez-Rodriguez* greatly expanded the rights of defendants by imposing a duty on the government to detain potential witnesses until the defendant could determine for himself whether or not such witnesses could aid in his defense. The hardship imposed upon the alien material witness and the cost to the government, however, has been great.[136] Before the advent of videotape technology, it was necessary that these witnesses testify at trial in person, under oath and subject to cross-examination, so that the jury could test the demeanor and veracity of the witnesses. Due process and the confrontation clause require no less except in cases of great necessity.

The use of videotape depositions, however, can adequately satisfy the requirements of the confrontation clause and especially

134. *See generally Technological Advances, supra* note 84; *Videotape Trials, supra* note 128.

135. Stein v. New York, 346 U.S. 156, 184 (1953).

136. *See* text accompanying note 22, *supra.*

preserve important demeanor evidence[137] which orally transcribed depositions cannot. The judicial system should adopt such technological innovations which possess so great a potential for strengthening our system of justice. The use of videotape depositions should be adopted whenever a material witness must be incarcerated for failure to comply with the terms of release in the Bail Reform Act, and extraordinary circumstances do not require his physical presence at trial.[138] The use of videotape depositions has the twofold advantage of safeguarding the rights of defendants guaranteed by the confrontation clause of the sixth amendment while minimizing the deprivation of liberty which the incarcerated alien witness must suffer. The use of videotape depositions in such circumstances should be viewed as the fairest balance between two competing constitutional safeguards: the right of the defendant to be confronted by the witnesses against him and the right of the material witness not to be deprived of liberty without due process of law. As the Ninth Circuit Court of Appeals stated in upholding the magistrate's discretionary authority to release two juvenile witnesses in the interest of justice:

> We have concluded that both sides should have equal access to alien material witnesses . . . but that premise should not dictate that the court must sacrifice human values and other relevant considerations to follow blindly such an enshrined principle.[139]

There, both sides were denied the potential testimony of the released aliens. Certainly where the testimony can be preserved by videotape deposition, the interests of justice are best served by its use and the undelayed return of the alien material witness to the country of his nationality.

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137. *See* text accompanying notes 104-107, *supra.*

138. A particular witness' testimony might be so extraordinary or forceful, such as that of a key witness, that justice might require the witness to be physically present. This should be very unusual in an alien smuggling trial, however.

139. United States v. Carrillo-Frausto, 500 F.2d 234 (9th Cir. 1974).