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# Zero-Option Defendants: United States v. McLellan and the Judiciary's Role in Protecting the Right to Compulsory Process

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# ZERO-OPTION DEFENDANTS: *UNITED STATES V. MCLELLAN* AND THE JUDICIARY'S ROLE IN PROTECTING THE RIGHT TO COMPULSORY PROCESS

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*How does one obtain evidence located outside the United States for a criminal trial? For prosecutors, the answer is an exclusive treaty process: Mutual Legal Assistance Treaties (MLATs). Defendants, on the other hand, may only use an unpredictable, ineffective, non-treaty process: letters rogatory. The result is a selective advantage for law enforcement at the expense of the defendant. Though this imbalance necessarily raises Sixth Amendment Compulsory Process Clause concerns, MLATs have remained largely undisturbed because defendants still have some form of process, albeit a lesser one. But what happens when the letters rogatory process is also closed off to the defendant? When a defendant has no option but to rely on the government to submit an MLAT request on his behalf, can a district court compel the government to do so on behalf of this "zero-option defendant"? Recently, in* United States v. McLellan, *the First Circuit sought to answer this question.*

*This Comment explores the role of federal courts in protecting the rights of zero-option defendants in the MLAT context. It examines the First Circuit's reasoning in* McLellan *and concludes that* McLellan *suffers from a fundamental misunderstanding of judicial compulsory power in the face of constitutionally-violative acts by the Executive Branch. This Comment proposes that, for zero-option defendants, judicial compulsory power is necessary to prevent the Compulsory Process Clause from becoming a dead letter.*

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## INTRODUCTION

In the United States' adversarial legal system—where evidence gathering is largely the responsibility of each party—prosecutors possess investigative tools that are inaccessible to defendants.[1] For example, while prosecutors may grant immunity to witnesses in exchange for their

[1] *See, e.g.*, Robin D. Mass, *Witness for the Defense: A Right to Immunity*, 34 VAND. L. REV. 1665, 1669–70 (1981) (discussing the denial of a defendant's right to immunize witnesses).

testimony,[2] defendants generally have no such power. Of course, the system is not entirely one-sided: prosecutors cannot withhold exculpatory evidence from defendants.[3] That said, prosecutors have no formal duty to use their investigative powers to seek out evidence, exculpatory or otherwise, on behalf of defendants.[4] Defendants, therefore, suffer from an imbalance of investigative resources.[5] As a result, defendants must lean on courts to enforce their constitutional guarantees and ensure the integrity of the criminal justice system. One such guarantee is the defendant's right to compulsory process.[6]

The Sixth Amendment's Compulsory Process Clause grants a criminal defendant the right to compel the testimony of witnesses favorable to his case.[7] In doing so, it operates as a restraint on the government's investigative power and, to some extent, attempts to level the playing field.[8] But this is no longer the case when evidence is located outside of the U.S.[9] Historically, both prosecutors and defendants were able to gather evidence abroad through

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[2] *Id.*

[3] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[4] *See* Kyles v. Whitley, 514 U.S. 419, 436–37 (1995) ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), [*Brady*] requires less of the prosecution than the ABA Standards for Criminal Justice").

[5] *See* Daniel Huff, *Witness for the Defense: The Compulsory Process Clause as a Limit on Extraterritorial Criminal Jurisdiction*, 15 TEX. REV. L. & POL. 129, 161–62 (2010) (discussing the "disparity" and "asymmetry" between prosecutorial and defense-side tools). The reality of our current criminal justice system is not as simple as Judge Learned Hand predicted in 1923. *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Under our criminal procedure the accused has every advantage."). Time has revealed that the "unreal dream" of Judge Hand's "ghost of the innocent man convicted" is, in fact, far too real. *Id.*; *see Innocence and the Death Penalty*, INNOCENCE PROJ., **https://perma.cc/9N8T-73R2**. ("Since 1973, at least 190 people have been exonerated from death row in the U.S."). Moreover, the emergence of transnational criminal activity has prompted the U.S. to equip federal prosecutors with new investigative tools. *See generally* Miranda Rutherford, *The CLOUD Act: Creating Executive Branch Monopoly Over Cross-Border Data Access*, 34 BERKELEY TECH. L.J. 1177 (2019) (providing an overview of the CLOUD Act and how the enforcement of the Act is arguably left within the control of the Department of Justice, with no judicial oversight). Similar tools, however, have not been created for defendants.

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

[7] *Id*; *see also* United States v. Beyle, 782 F.3d 159, 170 (4th Cir. 2015) ("Fifth Amendment due process and Sixth Amendment compulsory process are closely related, for the right 'to call witnesses in one's own behalf has long been recognized as essential to due process.'") (cleaned up) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973)).

[8] *See* Washington v. Texas, 388 U.S. 14, 20, 23 (1967) (recognizing the Founders' belief juries should be free to evaluate both defense and prosecution witnesses equally and the unrealistic assumptions underlying defense witness exclusions under common law).

[9] Huff, *supra* note 5, at 131.

letters rogatory, which are formal requests from one court to a foreign nation's court for some type of judicial assistance.[10] However, the extreme unreliability of the letters rogatory process, in combination with an increase in transnational criminal activity, prompted Congress to enact a faster, more efficient, method for prosecutors to gather evidence located abroad: Mutual Legal Assistance Treaties (MLATs).[11] MLATs are bilateral treaties that bind each signatory nation to assist the other in evidence gathering for criminal investigations.[12] These treaties are expressly limited to executive, and by extension, prosecutorial use.[13] And while judges must sign off on letters rogatory requests, federal prosecutors have a dedicated office which handles MLAT requests with no judicial oversight.[14] Thus, the significant imbalance: MLATs leave defendants confined to the letters rogatory process, while simultaneously empowering prosecutors with an exclusive evidence gathering mechanism.

This disparity has predictably garnered criticism.[15] Scholars and defendants alike have raised concerns that MLATs are deeply flawed—some have even argued against their constitutionality.[16] But law enforcement has consistently defended their use,[17] primarily because defendants are still able to use letters rogatory.[18] In sum, they argue that the Compulsory Process Clause survives because defendants still have a method of gathering evidence

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[10] NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 311–32 (Oxford Univ. Press, 2d ed. 2018).

[11] MLATs obligate each country to provide evidence or other assistance. By comparison, letters rogatory are executed solely as a matter of comity and are often at the sole discretion of the requested country's court. *See* Huff, *supra* note 5, at 160.

[12] *See* BOISTER, *supra* note 10, at 313–14.

[13] *See* Huff, *supra* note 5, at 160, 161 n.197.

[14] The Office of International Affairs (OIA) serves as the United States Central Authority with respect to all requests for information and evidence received from and made to foreign authorities under Mutual Legal Assistance Treaties (MLATs) and multilateral conventions regarding assistance in criminal matters. *See* OFF. INT'L AFFS., FREQUENTLY ASKED QUESTIONS REGARDING LEGAL ASSISTANCE IN CRIMINAL MATTERS 2, **https://perma.cc/7WJF-QVUE.**

[15] *E.g.*, Huff, *supra* note 5, at 160–63; Frank Tuerkheimer, *Globalization of U.S. Law Enforcement: Does the Constitution Come Along?*, 39 HOUS. L. REV. 307, 369 (2002); L. Song Richardson, *Convicting the Innocent in Transnational Criminal Cases: A Comparative Institutional Analysis Approach to the Problem*, 26 BERKELEY J. INT'L L. 62, 62(2008).

[16] Ian R. Conner, Note, *Peoples Divided: The Application of United States Constitutional Protections in International Criminal Law Enforcement*, 11 WM. & MARY BILL RTS. J. 495, 502 (2002).

[17] *See* Huff, *supra* note 5, at 160–62.

[18] *Id* at 161 n.197; *see also* S. REP. NO. 104-25, at 10 (1996) (the State Department argued that "MLATs do not deprive criminal defendants of any rights they currently possess to seek evidence abroad by letters rogatory or other means.").

abroad.[19] But what if that was not the case? What if a defendant sought to use letters rogatory and a foreign nation denied the request by claiming it recognized MLATs as the sole process for requesting foreign evidence in criminal proceedings—leaving the defendant with no options? For whom I term the "zero-option defendant,"[20] does the Compulsory Process Clause become a dead letter? This Comment offers an answer to these questions by analyzing a recent First Circuit case, *United States v. McLellan*.[21] Contrary to *McLellan*'s reasoning, this analysis shows that our government's separation of powers requires that federal courts retain the power to compel executive use of MLATs on behalf of zero-option defendants.

## *I. UNITED STATES V. MCLELLAN*

In *McLellan*, Ross McLellan, a then-executive vice president of State Street Bank ("State Street") and global head of State Street's Portfolio Solutions Group, was arrested on April 5, 2016.[22] McLellan was charged with securities fraud, wire fraud, and related charges for defrauding British, Irish, and Middle Eastern investors.[23] Notably, all victims identified in the indictment were foreign entities.[24] In preparation for his defense, McLellan

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[19] *Frequently Asked Questions Regarding Evidence Located Abroad*, OFF. INT'L AFFS, **https://perma.cc/5L3T-QPEU**.

[20] This Comment both proposes and defines the concept of "zero-option defendants" as criminal defendants who suffer from having no alternative process by which they may collect from foreign countries evidence material to their defense. While this necessarily includes what some may think of as "no alternative process" instances in a *de jure* sense (where a foreign country explicitly denies use of processes outside MLATs), this definition may also include instances of "no alternative process" in the *de facto* sense (for example, where a foreign country does not respond to a letters rogatory request despite traditionally responding to MLAT requests). This classification should be understood practically:

> Private parties and defendants are precluded from requesting foreign assistance through MLATs. In some cases, however, counsel for the defense may well argue that a vital piece of exculpatory evidence is located overseas, letters rogatory can take years to process (and even then, the outcome is typically far from certain), and the MLAT process is the only realistic way of obtaining it. And this argument, *in the right case*, may have some basic appeal.

*See* Hon. Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence*, 40 LITIG. 59, 61 (2014) (emphasis added).

[21] United States v. McLellan, 959 F.3d 442, 456 (1st Cir. 2020).

[22] *See* Order Setting Condition of Release, United States v. McLellan, No. 16 CR 10094 (D. Mass. Jan. 8, 2021); Indictment, United States v. McLellan, No. 16 CR 10094 (D. Mass. Jan. 8, 2021).

[23] *Id.*

[24] *Id.*

requested that the district court issue letters rogatory to both the United Kingdom and Ireland to obtain documents from victim-investors.[25] The district court granted McLellan's request based on a sufficient showing that "justice [could not] completely be done" without the evidence.[26] The U.K. provided some, but not all, of the requested documents, and the Irish government refused to acknowledge the letters rogatory request at all, explicitly noting that it understood MLATs, instead, to be the exclusive means for producing the requested evidence.[27] Accordingly, McLellan moved for the district court to compel the U.S. government to exercise its MLAT powers in order to obtain the missing evidence from the U.K. and any evidence at all from Ireland.[28]

The district court denied McLellan's motion, finding that it "lack[ed] authority to compel the government to exercise its rights under any of the relevant MLATs on behalf of, or for the benefit of, a private person."[29] This decision subjected McLellan to a harsh reality: despite being guaranteed the constitutional right to compulsory process, there was no process by which McLellan could gather evidence from Ireland for his defense. Comparatively, the prosecutors faced no similar setback.[30] After his conviction, McLellan appealed to the First Circuit, challenging, among other things, the district court's decision.[31]

On appeal, McLellan argued that the Compulsory Process Clause demands that courts have the authority to compel the U.S. government's exercise of its MLAT powers to request evidence from foreign countries on behalf of the defendant.[32] In doing so, he effectively asked the First Circuit to consider the novel question highlighted by this Comment: Where a single avenue exists to secure foreign evidence material to the defendant's case, does the court retain its power as a safeguard for the defendant's constitutional rights, or does the Compulsory Process Clause become a dead letter? Ultimately, the First Circuit concluded that the district court had no such authority.[33]

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[25] Defendant Ross McLellan's Motion for Relief at 2–4, United States v. McLellan, No. 16 CR 10094 (D. Mass. Jan. 8, 2021).

[26] United States v. McLellan, 959 F.3d 442, 455–56 (1st Cir. 2020).

[27] *Id.* at 456.

[28] *Id.*

[29] *Id.*; Order at 1, United States v. McLellan, No. 16 CR 10094 (D. Mass. Jan. 8, 2021), ECF No. 350.

[30] *See* Huff, *supra* note 5, at 160.

[31] *McLellan*, 959 F.3d at 457.

[32] *Id.* At 471.

[33] *Id.* at 476.

This Comment examines *McLellan*'s implications for Compulsory Process Clause challenges where zero-option defendants seek evidence abroad and argues that the *McLellan* court misinterpreted its constitutional role under the separation of powers doctrine. Section II.A. of this Comment begins by describing the doctrinal development of the Compulsory Process Clause and the Judiciary's role in protecting the defendant's right to compulsory process. Section II.B. then discusses the Compulsory Process Clause's uneven application in the MLAT context and offers a resolution to separation of powers concerns. Section III.A. discusses the First Circuit's reasoning in *McLellan* and argues that it is irreconcilable with the court's role under separation of powers. Lastly, Section III.B. draws from problems presented in *McLellan* to consider the circumstances in which an absence of evidence necessary to a defendant's case might require the use of judicial compulsory power.

## II. THE COMPULSORY PROCESS CLAUSE AND THE ROLE OF FEDERAL COURTS

### A. JUDICIAL POWER UNDER THE COMPULSORY PROCESS CLAUSE

The Sixth Amendment of the United States Constitution provides, in relevant part, that: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[34] This right sits at the heart of the constitutional guarantee of fundamental fairness.[35] Indeed, the Supreme Court has recognized compulsory process as an essential ingredient of American jurisprudence.[36] The Court's broad language in explaining the purpose of the Compulsory Process Clause extends it beyond the right to simply subpoena witnesses.[37] This clause grants criminal defendants the right to present their version of the facts to the jury so that jurors may decide where the truth lies.[38] But the Constitution does not

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

[35] *See* Huff, *supra* note 5, at 132–37 (2010) (recounting the historical development of the Compulsory Process Clause).

[36] Chambers v. Mississippi, 410 U.S. 284, 294 (1973) ("The right . . . to call witnesses in [sic] one's own behalf [has] long been recognized as essential to due process.").

[37] Washington v. Texas, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury, so it may decide where the truth lies.").

[38] State v. Hedge, 297 Conn. 621, 644 (2010) (noting in the third-party culpability context that the court should not determine for the jury what is "purely speculative and fantastic" but should "afford every opportunity" to the defendant to present their case).

leave the defendant to ensure his own protection. The right to compulsory process is an "imperative . . . function" of the judiciary,[39] and thus, fundamental to the role of the court.[40] And this has always been the case. The criminal defendant's right to fundamental fairness has traditionally fallen "within the judicial prerogative."[41] For example, in the context of the government's state secrets privilege, though courts must exercise traditional reluctance to intrude upon the authority of the Executive, "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers."[42] In other words, judicial power in the context of the defendant's right to present their case is a power not only separate and distinct from the Executive Branch, but it is also guaranteed—it does not vanish at the behest of the Executive.[43] A practical consideration informs this conclusion as well: defendants lack the right to command assistance from the Executive Branch themselves.[44] Thus, for the right to compulsory process to have any constitutional force, it must, at least in part, emanate from the Judiciary.[45] So why have defendants found themselves unable to realize their compulsory process rights in the MLAT context? As explained in the next section, it is because federal courts have fundamentally misunderstood their constitutional role in ensuring compulsory process for criminal defendants.

### B. SEPARATION OF POWERS: BALANCING EXECUTIVE AND JUDICIAL POWER IN LIGHT OF MLATS

Constitutional arguments challenging asymmetrical MLAT procedures have generally failed in light of concerns of judicial encroachment on

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[39] United States v. Nixon, 418 U.S. 683, 709 (1974).

[40] *Id.*, at 418 ("The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.").

[41] Rebecca Wexler, *The Global Cloud, the Criminally Accused, and Executive Versus Judicial Compulsory Process Powers*, 101 TEX. L. REV. 1341, 1389 (2023).

[42] United States v. Zubaydah, 595 U.S. 195, 205 (2022) (internal citation omitted).

[43] *But see* Wexler, *supra* note 41, at 1382–83 (discussed *infra* Section II.B.).

[44] *Id.* at 1389–90.

[45] Washington v. Texas, 388 U.S. 14, 17–18 (1967). That said, courts generally lack power to compel cross-border evidence disclosures because otherwise "any defendant could forestall trial simply by specifying that a certain person living where he could not be forced to come to this country was required as a witness in his favor." United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962). Hence, defendants cannot invoke their compulsory process right to subpoena a foreign witness or foreign evidentiary documents.

executive authority.[46] The Department of Justice (DOJ) has argued that separation of powers bars the Judiciary from impairing the Executive in its performance of its constitutional duties.[47] DOJ claims that compelling the government to utilize MLATs on behalf of the criminal defendant would result in judicial control of a device strictly intended for executive use; in the view of DOJ, this may negatively affect the Executive's foreign policy power.[48] Specifically, DOJ argues that MLATs, by their terms, are "reserved for use by the authorities of the parties, which include prosecutors and criminal investigators."[49]

DOJ also argues that defendants' use of MLATs may necessarily affect foreign relations because "[s]tates would not enter into MLATs if it meant making information available to criminals."[50] This is not a minor concern. MLATs specifically allow prosecutors to circumvent information-sharing laws and differences in prosecutorial regimes through non-judicial channels.[51] The purpose of this end run around is so that prosecutors in one nation can more efficiently prosecute transnational crimes without worrying about significant delays resulting from the laws, regulations, and oversights of its partner nation.[52] Put plainly, the aim of MLATs is to provide signatory nations with a tool to more efficiently prosecute transnational criminal activity. When defendants are inserted into the scheme, they may be allowed to indirectly leverage MLATs; this arguably renegotiates the treaty's bargain in a way that foreign nations neither anticipated nor intended. An ad-hoc negotiation of this kind, DOJ argues, may push foreign nations to step away from MLATs; this necessarily affects the Executive's ability to negotiate

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[46] Wexler, *supra* note 41, at 1391–92; *see also* United States v. Rosen, 240 F.R.D. 204, 214 (E.D. Va. 2007) (order denying motion for pretrial depositions of extraterritorial witnesses).

[47] United States v. McLellan, 959 F.3d 442, 473 n.12 (1st Cir. 2020). For an overview of the DOJ's arguments, see Robert Neale Lyman, *Compulsory Process in a Globalized Era: Defendant Access to Mutual Legal Assistance Treaties*, 47 VA. J. INT'L L 261, 286–93 (2006).

[48] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) ("[I]n foreign affairs the President has a degree of independent authority to act.").

[49] *Frequently Asked Questions Regarding Evidence Located Abroad*, *supra* note 19.

[50] *See, e.g.*, S. REP. NO. 104-25, at 9 (1996).

[51] S. Rep. No. 112-3, at 1 ("In the absence of an applicable international agreement, the customary method for obtaining evidence or testimony in another country is via a 'letter rogatory,' which tends to be an unreliable and time-consuming process."); *Id.* at 1 ("[T]he scope of foreign judicial assistance might also be limited by domestic information-sharing laws, such as bank and business secrecy laws, or be confined to evidence relating to pending cases rather than preliminary, administrative, or grand jury investigations conducted prior to the filing of formal charges.").

[52] *Id.*

similar treaties. Given this, DOJ claims judicial compulsion would be a step too far under separation of powers. But these arguments misinterpret both the difference and balance between executive and judicial powers as they relate to compulsory process.

On this point, Rebecca Wexler argues that because "[c]ourts have defined the underlying compulsory process power at issue in cross-border MLAT disclosures as an executive rather than a judicial power,"[53] they have fundamentally misunderstood their constitutional role: namely, to ensure that the criminal defendant is afforded "a fair trial" by preventing the "depriv[ation] of testimony that would have been relevant . . . material . . . and vital to the defense."[54] To the extent that a defendant is deprived of such testimony, the court's definitional role may require certain intrusions on executive power. And because respect for the Executive Branch does not supplant the separate constitutional duties of the court,[55] it cannot bar the court from compelling action on the part of the Executive. While tension may exist between executive and judicial powers in the MLAT context, "[o]ur system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'"[56] Put simply, conflict between government powers cannot justify the Judiciary abdicating its constitutional duties.[57]

### *1. Judicial Intrusion on Executive Power: Defense Immunity*

One clear example of the Judiciary's power to "impede on the discretion of the executive branch"[58] can be seen in the use immunity, or defense immunity, context. In *United States v. Quinn*,[59] the Third Circuit held that where the government rejects the trial court's request to immunize a defense witness, the court "has the authority to . . . dismiss the charges" on the basis of due process.[60] In that sense, the court may compel executive use of an exclusively executive power by threat of dismissal.

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[53] Wexler, *supra* note 41, at 1383.

[54] United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982) (quoting *Washington v. Texas*, 388 U.S. 14, 16 (1967)).

[55] United States v. Nixon, 418 U.S. 683, 707 (1974).

[56] *Id.* at 704 (quoting *Powell v. McCormack*, 395 U.S. 486, 549 (1969)).

[57] *Id.*

[58] United States v. Straub, 538 F.3d 1147, 1156 (9th Cir. 2008).

[59] 728 F.3d 243 (3d Cir. 2013).

[60] *Id.* at 265.

Similarly, the Ninth Circuit in *United States v. Straub*[61] held that compelling use immunity for defense witnesses was appropriate "in exceptional cases" to protect the criminal defendant's right to a fair trial,[62] even despite concerns that it may "unacceptably alter the historic role of the Executive Branch in criminal prosecutions."[63] Ultimately, the *Straub* court ordered the district court to "enter a judgment of acquittal . . . unless the prosecution . . . grant[ed] use immunity" for the defendant's witness.[64] Similar to the Third Circuit in *Quinn*, the Ninth Circuit found that the district court may compel executive use of its exclusive power through threats of acquittal.

In exceptional circumstances, then, judicial compulsory power grants courts the authority to dispense with the prosecution of criminal defendants when the government rejects the court's request for it to use its exclusive power on behalf of the defendant. This is because "whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment."[65] Indeed, the powers of the co-equal branches "were not intended to operate with absolute independence."[66] Though "high respect" must be given to the executive's representations,[67] "legitimate needs of the judicial process may outweigh [executive power]".[68] As previously noted, this is also true in the state secrets context.[69] Although courts may not *force* the Executive to use its power on behalf of a criminal defendant, what is clear is that courts may *compel* executive action by threats of acquittal. This distinction is worth clarification: this Comment distinguishes between a court *forcing* the government to act (e.g. ordering the federal prosecutor to use its power) and *compelling* the government to act (e.g. requesting that the prosecutor act by threat of dismissal or similar remedies). In the latter instance, the government may still accept the court's request, and thereby avoid a constitutional

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[61] 538 F.3d 1147 (9th Cir. 2008).

[62] *Id.* at 1166.

[63] *Id.* (quoting *United States v. Alessio*, 528 F.2d 1079, 1081–82 (9th Cir. 1976) ("[W]hatever power the government possesses may not be exercised in a manner which denies the defendant the due process.").

[64] *Id.*

[65] *Id.*

[66] United States v. Nixon, 418 U.S. 683, 707 (1974).

[67] *Id.*

[68] *Id.*

[69] *See supra* Section II.A

violation, or reject the same, which will result in the court dismissing the matter or vacating the conviction to avoid a constitutionally unsound result.

### *2. An Exceptional Circumstance for Judicial Intrusion into MLAT Requests*

At bottom, judicial intrusions are sometimes necessary because in an adversarial system of criminal justice in which "[t]he need to develop all relevant facts . . . is . . . fundamental,"[70] the court must ensure that judgments are not "founded on a partial or speculative presentation of the facts."[71] For MLATs, the same logic applies. There must be some limited circumstance where the government's exclusive use of MLATs yields to the demonstrated specific need for evidence in a pending trial.[72] And this need is no more pronounced than in the context of the zero-option defendant.[73] Where a defendant has no alternative process for evidence gathering, executive power must bend to the authority of the courts to ensure fairness. To that end, while courts may not necessarily have the power to force the government to submit an MLAT request, where the government fails to accommodate a district court's "request" on behalf of a zero-option defendant, its failure will violate the Compulsory Process Clause and lead to a reversal of the conviction.

Despite arguments to the contrary,[74] even Congress has explicitly recognized this position. The Senate Committee on Foreign Relations (Committee) has noted that:

> [C]oncern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that *nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty*.[75]

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[70] *Nixon*, 418 U.S. at 709.

[71] *Id.*

[72] *See, e.g.*, United States v. Des Marteau, 162 F.R.D. 364, 372 n.5 (M.D. Fla. 1995) (order partially granting motion for pretrial depositions of extraterritorial witnesses).

[73] *See infra* Section III.B

[74] Huff, *supra* note 5, at 161.

[75] *Extradition, Mutual Legal Assistance, and Prisoner Transfer Treaties: Hearing Before the S. Comm. on Foreign Rels.*, 115th Cong. 24 (1998) (emphasis added). In making this comment the Senate recognized that the court retains the "authority"—not just the ability—to make requests on the defendant's behalf, which avoids the unconstitutional implication that would otherwise exist, while preserving the constitutionality of MLATs in general. Key to this comment is Congress stating that no language found in MLATs "negate" the court's authority. This implies the court had and continues to have the power to protect criminal defendants by its inherent powers—including the power to compel the government to make requests on the accused's behalf. Congress decided that amending the language in MLATs is not necessary

The Committee's statement acknowledges the same concern raised by Justice O'Connor in *United States v. Valenzuela-Bernal*: "A governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily reconciled with the spirit of the Compulsory Process Clause."[76] To provide a check on such policies, the court must retain the authority to ensure "the integrity of the criminal justice system" by effectuating the defendant's express right in the Sixth Amendment to compel the testimony of witnesses in his favor.[77]

Moreover, to the extent that judicial compulsory power interferes with the Executive Branch's duties, recall that prosecutors also possess a constitutional duty to "act in accordance with the obligations imposed on them as agents of justice."[78] One such obligation is a duty to ensure that criminal defendants receive due process and that "justice is done" to the criminal defendant the prosecutor has chosen to prosecute.[79] Thus, rather than impairing the Executive, compelling prosecutorial use of MLATs on behalf of zero-option defendants arguably promotes the government's constitutional obligations.

In reaching the opposite conclusion, *McLellan* sends modern Compulsory Process Clause doctrine down a dangerous path that impermissibly strips the Judiciary of its power to ensure the promise of equal justice under law.[80] Notably, some federal district courts have expressed differing views on the Judiciary's power to compel executive use of MLATs for defendants.[81] However, *McLellan* inserts itself as the first federal

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because they recognized that courts have the authority to protect the defendant's compulsory process through indirect MLAT usage. *See* CONG. RSCH. SERV. LIBRARY OF CONG., 106TH CONG., STU. ON TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 133, n.49 (Comm. Print 2001); *see also* Colello v. SEC, 908 F. Supp. 738 (C.D. Cal. 1995) (reviewing the defendant's argument that the U.S.-Switzerland MLAT violated his due process right and determining that "the Supreme Court has left no doubt that a review of plaintiffs' claims that defendants violated their constitutional rights is *a proper exercise of judicial power*") (emphasis added).

[76] United States v. Valenzuela-Bernal, 458 U.S. 858, 876 (1982) (O'Connor, J., concurring).

[77] *Id.*

[78] United States v. Alexandre, No. 22 CR. 326 (JPC), 2022 WL 9843495, at *5 (S.D.N.Y. Oct. 17, 2022) (order granting motion for pretrial depositions of extraterritorial witnesses).

[79] *Valenzuela-Bernal*, 458 U.S. at 881 (Brennan, J., dissenting) (quoting *Jencks v. United States*, 353 U.S. 657, 671 (1957)).

[80] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803); *infra* Section III.A.

[81] *See, e.g.*, United States v. Rosen, 240 F.R.D. 204, 213 (E.D. Va. 2007) (order denying motion for pretrial depositions of extraterritorial witnesses) ("[T]he MLA Treaty process is

appellate decision to hold that district courts do not have the authority to compel the Executive to use MLATs on behalf of zero-option defendants.[82] And in doing so, *McLellan* may become the first step in rendering compulsory process a dead letter when evidence is located abroad.

## III. *MCLELLAN* AND THE JUDICIAL OBLIGATION TO PROTECT THE ZERO-OPTION DEFENDANT

On appeal from his conviction, McLellan argued that the district court erred by refusing to compel the government to send an MLAT request on his behalf. The First Circuit rejected McLellan's argument in a two-part conclusion. First, the court found that "the district court does not have the authority to compel the government to issue MLAT requests."[83] Second, judicial action was inappropriate because "the 'onus' [was not] on the government in this case to 'make it possible' for the defendant to obtain, via an MLAT request, evidence that he cannot establish is favorable to his case."[84] Significant to the second conclusion, *McLellan* may be read to conclude that even if the district court possessed the authority to compel, because McLellan could not establish that the absent evidence was favorable to his case, he could not satisfy a Compulsory Process Clause claim.[85] While,

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exclusively for the use of the two signatory governments, and not for the use of private parties."). *But see* Richardson, *supra* note 15, at 100 (recounting the prosecution of Michele Sindona, where, at the direction of the trial judge, the Department of Justice utilized the MLAT with Switzerland to obtain evidence). Similarly, in *United States v. Des Marteau*, the court granted the defendant's motion to depose a foreign national located in Canada; the prosecution agreed to utilize U.S.-Canada MLAT to facilitate the deposition, agreeing with the court that it was "appropriate to utilize the treaty in this manner". 162 F.R.D. 364, 372 n.5 (M.D. Fla. 1995) (order partially granting motion for pretrial depositions of extraterritorial witnesses). *See also* Cardenas v. Smith, 733 F.2d 909, 918 (D.C. Cir. 1984) (finding that without clear and convincing evidence that Congress intended to preclude judicial review of the defendant's constitutional claims, the U.S.-Swiss MLAT could not strip the court of its judicial authority). For a recent case, see *Alexandre*, 2022 WL 9843495, at *5 ("While the Court is not ordering the Government to employ [MLATs], their potential availability increases the possibility that the at-issue Rule 15 depositions may be able to occur in time for trial.").

[82] It is worth noting that the Ninth Circuit, in *United States v. Sedaghaty*, 728 F.3d 885 (9th Cir. 2013), addressed the extent of the court's process powers for international evidence gathering, but did not directly engage with the question of the court's authority under a separation of powers argument to act on behalf of those I refer to as "zero-option defendants."

[83] United States v. McLellan, 959 F.3d 442, 476 (1st Cir. 2020).

[84] *Id.*

[85] Read this way, it is possible that the First Circuit necessarily admits that district courts retain some constitutional power to protect a criminal defendant's Compulsory Process rights where the government violates the Constitution. If so, rather than a case of *whether* federal courts possess such power, *McLellan* may be read as a case of *when* use of compulsory power is appropriate in the MLAT context.

ultimately, the First Circuit found no reversible error,[86] this Section argues that both determinations suffer from a fundamental misunderstanding of the court's role when presented with a zero-option defendant.

Section III.A. argues that judicial power to compel MLAT requests must necessarily persist in light of the Judiciary's constitutional obligations. Section III.B. then proposes that the government's MLAT power must yield to the Judiciary where the court is presented with a zero-option defendant.

### A. *MCLELLAN*'S MISINTERPRETATION OF JUDICIAL COMPULSORY POWER IN THE MLAT CONTEXT

The First Circuit's decision that the district court had no authority to compel the Executive to submit an MLAT request on the defendant's behalf may be understood in three steps. First, the court rightly recognized McLellan's claim as one seeking relief under the Constitution rather than seeking relief under the MLAT itself.[87] Second, the court rejected McLellan's analogy between his case and the First Circuit's decision in *United States v. Trustees of Boston College* (*In re* Price) ("*Price II*").[88] Third, the court relied on the Ninth Circuit's opinion in *United States v. Sedaghaty*[89] to find that ordering government action in this manner would result in an impermissible intrusion on the government's duties. This Comment analyzes each step in turn.

#### *1. Diagnosing McLellan's Constitutional Argument*

As an initial matter, the First Circuit found that McLellan's claim was not directly tied to the language of the MLAT in question.[90] Rather than seeking to "vindicate a private treaty right" through the MLAT itself, McLellan "[sought] relief under the Constitution and only indirectly invoke[d] the MLATs."[91] And because "it is well-settled law that no agreement with a foreign nation can confer power [on any] branch of

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[86] *McLellan*, 959 F.3d at 476.

[87] *Id.*

[88] 718 F.3d 13, 17–19 (1st Cir. 2013) [hereinafter *Price II*]; *McLellan*, 959 F.3d at 472–73.

[89] *McLellan*, 959 F.3d at 473–74.

[90] *Compare id.* at 472 (defendant seeking to protect his due process rights rather than to vindicate a private treaty right based upon the language of the treaty), *with* United States v. Rosen, 240 F.R.D. 204, 214 (E.D. Va. 2007) (order denying motion for pretrial depositions of extraterritorial witnesses) (finding that "the language of the U.S.-Israel MLA Treaty cannot be fairly read to authorize the depositions defendants seek").

[91] *McLellan*, 959 F.3d at 472.

Government, which is free from the restraints of the Constitution,"[92] McLellan's constitutional argument could not be foreclosed by the language of the Irish MLAT. McLellan's claim is best understood as two questions. First, does the Judiciary possesses power over evidence gathering where the exclusive means of constitutional process available to the defendant is through MLAT requests? And if so, when is the Judiciary required to act?

### *2. McLellan's Reliance on* Price II *and the Judiciary's Traditional Role*

To address the first question, McLellan argued that *Price II*, which held that MLATs may not strip the court of its inherent judicial functions, necessarily implied that judicial compulsory power could not be divested by MLATs.[93] He reasoned that because protecting the defendant's right to compulsory process is an imperative function of the Judiciary,[94] separation of powers demands that the court possess the constitutional authority to compel the Executive to submit MLAT requests on behalf of the defendant.[95]

In *Price II*, the U.S., acting on behalf of the U.K. government pursuant to an MLAT between both countries, served Boston College with subpoenas for documents and records connected to confidential interviews concerning the conflict in Northern Ireland.[96] The district court granted the college's motion to quash in part and denied the request in part.[97] Boston College appealed, arguing that federal courts have discretion to quash a subpoena even despite the U.S.-U.K. MLAT's language.[98] The college based this claim on the fact that separation of powers demands that inherent judicial functions, such as judicial review of subpoenas, remain within the court's purview. Conversely, the government argued that, under the MLAT, the Attorney General had the exclusive power to decide whether or not to accede to an assistance request from the UK. The government contended that "the Attorney General's exclusive prerogative in initiating proceedings translate[d] into a general bar on judicial oversight of the subpoena enforcement process." [99] The court rejected the government's argument, reasoning that it is unconstitutional for a treaty, or for any branch of

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[92] *Id.* (internal quotations omitted).

[93] *Id.* at 472–73.

[94] United States v. Nixon, 418 U.S. 683, 709 (1974); *see also supra* Section II.A.

[95] *Id.*

[96] *Price II*, 718 F.3d 13, 17–19 (1st Cir. 2013).

[97] *Id.*

[98] *Id.* at 22 ("[T]he context of the issues raised by this appeal, judicial enforcement of the August 2011 subpoena implicates structural principles of the separation of powers.").

[99] *Id.* at 21–23.

government, to divest federal courts of their power over an inherent judicial function.[100] Highlighting the Ninth Circuit's reasoning in *In re 840 140th Ave. NE*, the *Price II* court stated:

> [T]he enforcement of a subpoena is an exercise of judicial power, and . . . [t]reaties, like statutes, are subject to constitutional limits, including the separation of powers. [P]rohibiting judicial discretion to quash leads to the inescapable and unacceptable conclusion that the executive branch . . . would exercise judicial power and that the government's position suggests that by ratifying an MLAT, the legislative branch could compel the judicial branch to reach a particular result—issuing orders compelling production and denying motions for protective orders—in particular cases, notwithstanding any concerns, such as violations of individual rights, that a federal court may have.[101]

To be sure, a distinction exists between *Price II* and *McLellan*: *McLellan* dealt with the court's power to compel the Executive to act, whereas in *Price II* the exercise of judicial power was aimed at limiting executive overreach into what is traditionally judicial power. At bottom, however, each case necessarily presents the same question, albeit in different contexts: where an MLAT affords the government total discretion, may the court nevertheless intervene to prevent constitutional violations?

Because treaties, like statutes, are subject to constitutional limits, courts must be able to intervene to prevent constitutional violations.[102] Notwithstanding, the First Circuit in *McLellan* found "it would offend separation of powers principles to permit the Judiciary to impair the Executive in the performance of its constitutional duties,"[103] because doing so would expand the role of the Judiciary.[104] But the court's decision was misguided. Contrary to the *McLellan* court's conclusion, *Price II* found that separation of powers demands that the Judiciary retains its traditional authority notwithstanding any language in MLATs.[105] Essential to *Price II* was the fact that the court applied traditional power to a novel issue: namely, judicial review over evidence gathering processes used in the MLAT context.

In *Price II*, two questions were presented: (1) did the U.S.-U.K. MLAT divest the district court of its traditional judicial authority; and (2) if not, did

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[100] *Id.* at 23.

[101] *Id.* at 22 (citing *In re* 840 140th Ave. NE, 634 F.3d 557, 571–72 (9th Cir. 2011) (internal citations omitted)).

[102] *Price II*, 718 F.3d at 22.

[103] *McLellan*, 959 F.3d at 473 (quoting *Price II*, 718 F.3d at 22).

[104] *Id*.

[105] *Price II*, 718 F.3d at 23 ("[P]reserving the judicial power to supervise the enforcement of subpoenas in the context of the present case guarantees the preservation of a balance of powers.").

the district court abuse that authority?[106] This is clear from the text of *Price II*: "*if we find no discretion exists*, we need go no further."[107] Moreover, to determine whether the district court abused its discretion, *Price II* first held "that . . . an inherent judicial function . . . cannot be constitutionally divested from the courts of the United States."[108] Only then did *Price II* conclude that the district court abused its discretion.

Thus, the central holding required two determinations—whether the court retained its traditional judicial power over MLATs, and, if so, whether the district court had abused that power. As to the first question, *Price II* "unequivocally established that courts have inherent judicial power over the enforcement of subpoenas issued."[109] In other words, because the court's traditional authority included power over the enforcement of subpoenas, the district court's "perform[ance of] an *in camera* review"[110] did not expand the court's power. *Price II* determined that, even in the face of novel issues, the Judiciary cannot be stripped of its traditional or Constitutional power.[111] Therefore, in the context of MLATs, judicial power must persist to fulfill the court's Constitutional duties—arguably, none more imperative than protecting the criminal defendant's right to a fair trial.

Accordingly, compelling executive use of MLATs in limited circumstances does not "expand . . . the role of the judiciary," as determined in *McLellan*.[112] Judicial oversight necessarily requires that courts possess the power to guard against constitutionally-violative government acts, whether the court's remedial action is judicial review of subpoenas,[113] independently reviewing government claims of state secrets privilege,[114] compelling use immunity for defendant witnesses,[115] or, as with *McLellan*, compelling MLAT requests on behalf of the zero-option defendant. Indeed, the Supreme Court has historically recognized "[j]udical control over evidence" to be an inherent function of the court that cannot capitulate to the other branches of government.[116] The court retains said power as a by-product of its responsibility to prevent the other branches from disregarding "any concerns,

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[106] *Id.* at 21.
[107] *Id.* (emphasis added).
[108] *Id.* at 23.
[109] *Id.*
[110] *Id.* at 21.
[111] *Id.*
[112] United States v. McLellan, 959 F.3d 442, 473 (1st Cir. 2020).
[113] *See infra* Section III.B.
[114] *See supra* Section II.A.
[115] *See supra* Section II.B.
[116] United States v. Reynolds, 345 U.S. 1, 9–10 (1953).

*such as violations of individual rights*, that a federal court may have."[117] The First Circuit's reasoning fails, therefore, because McLellan did not seek to expand the court's role; rather, McLellan's argument sought to give effect to the court's historic constitutional duty.[118]

A related point of clarification: *McLellan* found that "[t]he Constitution . . . generally does not vest criminal defendants with the power to compel the government to lodge diplomatic requests on their behalf."[119] But *Price II* did not presume to "vest *criminal defendants*" with such power.[120] Rather, it reiterated the longstanding principle that "nothing in [MLATs are] intended to negate the *authority of the Court*"[121] to ensure that the accused receives due process of law. The power of compulsion is not left to the defendant; it is "within the judicial prerogative."[122] Contrary to the First Circuit's reasoning in *McLellan*, the Judiciary—not the defendant—must retain at least some power to ensure compulsory process.[123]

### *3. The First Circuit's Faulty Reliance on* United States v. Sedaghaty

Third, the First Circuit relied on *Sedaghaty* as support for the proposition that the district court lacked the power to compel the prosecutor to submit an MLAT request on McLellan's behalf. But in doing so, the court inexcusably disregarded both its own precedent from *Price II* and factual distinctions between *McLellan*'s zero-option defendant and *Sedaghaty*'s unexceptional circumstance.

In *Sedaghaty*, the defendant was convicted of tax fraud stemming from a false declaration on a charitable organization's tax return, which claimed that a donation had been used to purchase a mosque in Missouri when it was actually sent to terrorists in Chechnya.[124] Sedaghaty appealed, arguing that he suffered from an uneven playing field because the government used its resources to obtain foreign evidence but failed to assist him in obtaining similar evidence: specifically, bank records from Saudi Arabia and depositions from Egypt.[125] The Ninth Circuit disagreed, holding that the

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[117] *Price II*, 718 F.3d 13, 22 (1st Cir. 2013) (emphasis added).

[118] *See supra* Section II.A; *supra* note 75 and accompanying text.

[119] *McLellan*, 959 F.3d at 473.

[120] *Id.*

[121] *Extradition, Mutual Legal Assistance, and Prisoner Transfer Treaties: Hearing Before the S. Comm. on Foreign Rels.*, 115th Cong. 24 (1998) (emphasis added).

[122] Wexler, *supra* note 41, at 1389.

[123] *Id.* at 1384–1396.

[124] United States v. Sedaghaty, 728 F.3d 885, 891–93 (9th Cir. 2013).

[125] *Id.* at 916.

district court had no authority to order the Executive Branch to invoke the MLAT process and obtain foreign evidence for a private citizen.[126] The First Circuit's reliance on *Sedaghaty*, however, was erroneous because—beyond the fact that it arguably cuts against the First Circuit's precedent in *Price II*—the facts of *Sedaghaty* are inconsistent with *McLellan*.

As a starting point, judicial compulsory power attaches when the defendant is left without access to a legitimate evidence gathering process such that the defendant's right to a fair trial is undermined.[127] However, the criminal defendant must first be of the sort contemplated by the Constitution for the court's authority to come into play. In other words, defendants must first fall within the "zero-option class." In line with the definition of a "zero-option defendant," this Comment proposes that—in the transnational criminal context—those who qualify as zero-option defendants necessarily belong to the class of defendants which the Constitution historically sought to protect under the Compulsory Process Clause.[128] This is the key difference between *McLellan* and *Sedaghaty*—while zero-option defendants, like McLellan, belong to this class, Sedaghaty did not. In *Sedaghaty*, "both parties conducted investigations overseas and were able to obtain some evidence from foreign countries."[129] This is unlike *McLellan*, where the Irish government refused to allow *any means* of evidence gathering aside from an MLAT request.[130] Moreover, McLellan, unlike Sedaghaty, did not have the opportunity to "[send] an investigator" to Ireland,[131] nor could he "interview witnesses" located there.[132] McLellan was left with no process by which he could gather evidence in Ireland despite the prosecutors having the ability to collect all the evidence they needed. Thus, McLellan belonged to the zero-option class, and by extension, the district court reserved the power to compel MLAT usage. Comparatively, because Sedaghaty had some alternative means of evidence gathering, he was outside the zero-option class, and the court's authority to preserve his compulsory process right could not attach.[133]

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[126] *Id.* at 917.

[127] *See supra* Section II.

[128] *See generally* Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (recounting the historical origins of the Compulsory Process Clause and its ties to medieval criminal cases in England where defendants did not have any ability to call their own witnesses).

[129] United States v. Sedaghaty, 728 F.3d 885, 916 (9th Cir. 2013).

[130] United States v. McLellan, 959 F.3d 442, 456 (1st Cir. 2020).

[131] *Sedaghaty*, 728 F.3d at 916.

[132] *Id.*

[133] *Sedaghaty* also relied on dictum from *United States v. Rosen*, 240 F.R.D. 204, 214 (E.D. Va. 2007) (order denying motion for pretrial depositions of extraterritorial witnesses).

Thus, even assuming *Sedaghaty*'s reasoning is sound, *McLellan* is irreconcilable with our constitutional expectations of the Judiciary.[134]

But one question remains: what circumstances might require the exercise of judicial compulsory power in the MLAT context? Section III.B. explains that the case of the zero-option defendant is one such circumstance, relying on current Supreme Court Compulsory Process Clause jurisprudence as support.

### B. WHEN EXERCISING JUDICIAL COMPULSORY POWER IS REQUIRED: PROTECTING THE ZERO-OPTION DEFENDANT

After arguing that the Judiciary retained its compulsory power, McLellan claimed that the district court should have exercised its discretion and compelled executive use of MLATs in his case because the absence of evidence amounted to a constitutional violation under the Sixth Amendment.[135] To satisfy a Compulsory Process Clause claim, McLellan needed to show that (1) the government caused an absence of evidence that (2) would have been both material and favorable to his defense.[136]

First, McLellan argued that because MLATs were his exclusive means of evidence gathering in Ireland,[137] the government, by denying his requested use of MLATs, stripped him of any plausible access to the evidence located in Ireland.[138] Therefore, he argued, the government caused—at least proximately, if not directly—the absence of evidence.[139]

Next, McLellan argued that because he had no access to the evidence, the burden of showing that it would be favorable was unsustainable and thus

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But, in doing so, it misrepresented *Rosen*'s determination on the issue of compulsory process. *Rosen* found that "the right of compulsory process does not *ordinarily* extend beyond the boundaries of the United States." *Rosen*, 240 F.R.D. at 214 (emphasis added). In other words, *Rosen* was simply an unextraordinary case. So too was *Sedaghaty*. *McLellan*, by comparison, presents a separate issue altogether. *McLellan* is an extraordinary case because it presents a defendant who has no alternative means to request evidence that has been deemed necessary to his defense.

[134] Patchak v. Zinke, 583 U.S. 244, 250–52 (2018); *In re* 840 140th Ave. NE, 634 F.3d 557, 571–72 (9th Cir. 2011) (finding that treaties, like statutes, are subject to constitutional limits and prohibiting the exercise of judicial power would lead to the "inescapable and unacceptable conclusion that the executive branch . . . would exercise judicial power.").

[135] *McLellan*, 959 F.3d at 474.

[136] United States v. Valenzuela-Bernal, 458 U.S. 858, 859 (1982).

[137] *McLellan*, 959 F.3d at 474–75.

[138] *Id.*

[139] *Id.*

relieved by Supreme Court precedent.[140] Consequently, McLellan's inability to make a detailed showing of favorability—though the district court arguably did recognize that the absent evidence was in fact favorable—[141]did not foreclose his constitutional argument. The First Circuit disagreed on both claims, finding that: (1) "McLellan [had] not established that the U.S. government actually or proximately caused the absence of the evidence he [sought],"[142] and (2) "McLellan failed to provide a plausible showing that the evidence would be favorable to his defense."[143] Thus, the court found that the absence of evidence in *McLellan* did not amount to a constitutional violation.[144] This Comment analyzes each of the *McLellan* court's arguments in turn.

### *1. Causation: Who Places the Roadblock for Zero-Option Defendants?*

Beginning with causation, the *McLellan* court reasoned that even if the U.S. sent an MLAT request to the Irish government, the request didn't *promise* a result.[145] The court, therefore, determined that the government could not be the cause of the absence of evidence.[146] But this reasoning, as McLellan argued, was inconsistent with the First Circuit's decision in *United States v. Theresius Filippi*.[147]

In *Theresius Filippi*, the defendant was convicted of cocaine importation offenses in Puerto Rico.[148] The defendant argued on appeal that his Sixth Amendment right to present evidence was violated because he was unable to secure the presence of a key corroborating witness located in Ecuador due to government inaction.[149] The court found that the government's subpoena power was not at issue because the witness had intended to testify in trial, but could not overcome immigration hurdles that prevented his entry into the United States.[150] The court also determined that the onus was on the government to affirmatively take the step to make the witness's attendance possible by requesting a special interest parole from the

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[140] *Id.* at 475.
[141] *Infra* Section III.B.2.
[142] *McLellan*, 959 F.3d at 475.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] United States v. Theresius Filippi, 918 F.2d 244 (1st Cir. 1990).
[148] *Id.* at 245–46.
[149] *Id.* at 246.
[150] *Id.* at 247.

Immigration and Naturalization Service.[151] Given this, the court found that the U.S. Attorney had deliberately refused to act where action was required and directly caused the defense to lose his only material witness.[152] In this case, defendant Filippi ultimately decided to proceed to trial without his witness, and in so doing waived his Sixth Amendment right.[153] Nevertheless, the court concluded that, had there been no waiver, reversal of the conviction may have occurred because "the actions of the United States Attorney did not pass muster under the Sixth and Fifth Amendments."[154]

Causation in *Theresius Filippi* turned on the government's ability to affirmatively make it possible for the witness to attend trial. There, the First Circuit did not require the "promise" of a favorable testimony—simply the opportunity for one. And frankly, the Circuit could not require such a promise. The Compulsory Process Clause grants a criminal defendant the right to "obtain witnesses," but it does not follow that the right to compulsory process *promises* a witness's testimony. For example, even if subpoenaed, a witness could exercise his Fifth Amendment right against self-incrimination.[155] In that instance, compulsory process may require the subpoena, but the witness's Fifth Amendment right may ultimately prevent the court from hearing the testimony. Put simply, compulsory process guarantees a means but not an end—the right to obtain witnesses is not a right to command cooperation from them.

Accordingly, the mere possibility that Ireland would not cooperate with a binding treaty in *McLellan* was immaterial to the defendant's compulsory process right. Just as it is difficult to know what roadblocks may exist with witness cooperation, state cooperation in the international system is not always predictable. However, in McLellan's case, the only constitutionally-violative barrier to McLellan obtaining evidence from Ireland was the U.S. government's refusal to assist him. Critical to *McLellan*, the Irish government indicated MLATs were the exclusive means for McLellan to request evidence. Because the prosecution did not submit MLAT requests on McLellan's behalf, there was no remaining process by which McLellan could

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[151] *Id.*

[152] *Id.*

[153] *Id.* at 248.

[154] *Id.*

[155] Kastigar v. United States, 406 U.S. 441, 444 (1972); Diggs v. Owens, 833 F.2d 439, 444 (3d Cir. 1987) ("[A] defendant's Sixth Amendment right of compulsory process gives way when a witness he has subpoenaed invokes his Fifth Amendment privilege against self-incrimination.").

obtain the foreign evidence.[156] Thus, the barrier to McLellan's constitutional guarantee was prosecutorial inaction. An MLAT request would have "merely . . . ma[de] it possible" to obtain the evidence.[157] That is all that *Theresius Filippi* requires.[158] But that is precisely what the government refused to do.

Moreover, underlying this reasoning is the prosecutor's "constitutional responsibility manifestly superior to its other duties: namely, the responsibility to ensure that the accused receives the due process of law."[159] Where the MLAT process is the exclusive means of evidence gathering, as with *McLellan*, prosecutors are duty-bound to aid zero-option defendants. Therefore, at least for zero-option defendants, inaction arguably demands a rebuttable presumption in favor of the defendant as to causation.

### *2. Favorability: The "Zero-Option" Exception*

The First Circuit also rejected McLellan's Compulsory Process Clause claim because he failed to show that the evidence sought would be favorable to his case.[160] But the court's reasoning is constitutionally irreconcilable with zero-option defendants. McLellan primarily argued that where the defendant has no access to the absent evidence, a showing of favorability is relieved due to practical impossibility. This argument is supported by the Supreme Court's reasoning in *United States v. Valenzuela-Bernal*.[161]

*Valenzuela-Bernal* concerned a Mexican citizen who was convicted for knowingly transporting a noncitizen into the United States illegally.[162] The defendant drove himself and five other illegal noncitizens toward Los Angeles, but they were eventually stopped and arrested by border patrol officers.[163] The defendant and passengers admitted to unlawfully entering the U.S., and an Assistant United States Attorney (AUSA) concluded that most of the passengers possessed no evidence material to a possible case: as an evidentiary matter, their continued presence in the U.S. would affect neither

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[156] To the extent that the government could have voluntarily cooperated, that was not the case in *McLellan*. Even so, the responsibility inherent in either circumstance falls on the prosecution. By not extending an olive branch, the prosecution impermissibly denied McLellan the constitutional right to present his case.

[157] United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990).

[158] *Id.*

[159] United States v. Valenzuela-Bernal, 458 U.S. 858, 880–81 (1982) (Brennan, J., dissenting); *see* STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS'N 2017).

[160] United States v. McLellan, 959 F.3d 442, 476 (1st Cir. 2020).

[161] 458 U.S. 858 (1982).

[162] *Id.* at 860–63.

[163] *Id.*

the prosecution nor the defense.[164] Consequently, all the passengers were deported to Mexico, save one who was detained to provide a non-hearsay foundation for establishing that the defendant had transported an illegal noncitizen.[165]

At trial, the defendant argued that, because his key witnesses were deported, his Sixth Amendment right to present a defense was violated.[166] To prove this, the defendant was required to "make some plausible showing of how [the testimony of the deported witness] would have been both material and favorable to his defense."[167] However, the Court acknowledged a crucial exception to this requirement in *Valenzuela-Bernal*: "[b]ecause prompt deportation deprives the defendant of an opportunity to interview the witnesses *to determine precisely what favorable evidence they possess, however,* the defendant cannot be expected to render a detailed description of their lost testimony."[168] Thus, while lack of access to the evidence "[did] not . . . relieve the defendant of the duty to make some showing of *materiality*,"[169] the defendant could not be expected "to carry the burden"[170] of proving the *favorability* of evidence to which he had no access. A practical consideration informs this as well: an alternative finding could "encourage litigation over whether the defendant has made a plausible showing that [evidence to which he has no access] would have been . . . favorable to his defense,"[171] and could create a game of roulette that a zero-option defendant is always bound to lose. Therefore, while the Court in *Valenzuela-Bernal* demanded some *materiality* in its reasoning, the Court also implied that the burden of showing *favorability* could be assuaged if the Court is presented with a defendant who has no access to evidence abroad.

The First Circuit, attempting to square *Vanlezuela-Bernal* with *McLellan*, highlighted in a footnote that while the Supreme Court may have lowered the standard for favorability, it "[did] not afford the basis for wholly dispensing with such a showing."[172] But that is precisely what *Vanlezuela-*

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164 *Id.*
165 *Id.*
166 *Id.* at 866–68.
167 *Id.* at 867.
168 *Id.* at 873 (emphasis added).
169 *Id.* (emphasis added).
170 *Id.* at 475 n.15.
171 *Valenzuela-Bernal*, 458 U.S. at 875 (O'Connor, J., concurring).
172 *McLellan*, 959 F.3d at 475 n.15.

*Bernal* implies.[173] The quoted language from *Vanlezuela-Bernal* suggested only that "a criminal defendant should be able to demonstrate either the presence or absence of the required *materiality*."[174] Regarding favorability, however, when a defendant is deprived of the opportunity to access evidence, "the defendant cannot be expected to render a detailed description of their lost testimony."[175] Therefore, *Vanlezuela-Bernal* suggested that, in limited circumstances where a defendant has no access—zero access—to the evidence, a showing of favorability may be dispensed.[176]

McLellan mirrors the defendant in *Valenzuela-Bernal* in that he did not have access to the evidence in question. Because the Irish government had denied the district court's letters rogatory request for evidentiary documents,[177] McLellan did not have the occasion to "determine precisely what favorable evidence they possess[ed]."[178] Thus, a proper application of *Valenzuela-Bernal* would have relieved McLellan of his burden of proving favorability, given his zero-option circumstance.

But, even to the extent that there needs to be some *de minimis* showing of favorability, McLellan satisfied his burden when the district court sent letters rogatory on his behalf. In *Theresius Filippi* the fact that "[t]he trial

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[173] Of the nine Justices, seven acknowledged the favorability exception. Justice Rehnquist's majority opinion first notes that Valenzuela-Bernal's case turns on *materiality*, not *favorability*:

> While a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality." *Id.* at 870 (emphasis added).

Similarly, both Justice O'Connor's and Justice Brennan's approaches focused on materiality, reflecting an implicit agreement with Justice Rehnquist's favorability exception. *See id.* at 875 (O'Connor, J., concurring) (Justice O'Connor's approach turned on the fact that "the respondent made no plausible suggestion that the deported aliens possessed *any material evidence* that was not merely cumulative of other evidence.") (emphasis added); *see also id.* at 884 (Brennan, J., dissenting) (Justice Brennan's formulation similarly focused on "testimony *material* and relevant to the defense.").

[174] *Valenzuela-Bernal*, 458 U.S. at 871 (emphasis added).

[175] *Id.* at 873.

[176] While not always determinative, one key factor in defining a "zero-option defendant" is whether the defendant had zero access to the evidence. *Valenzuela-Bernal*, 458 U.S. at 872 ("Because prompt deportation *deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess*, however, the defendant cannot be expected to render a detailed description of their lost testimony.") (emphasis added).

[177] *McLellan*, 959 F.3d at 456.

[178] *Valenzuela-Bernal*, 458 U.S. at 873.

judge was satisfied that [the defendant's witness] was a necessary witness" was enough to prove both materiality and favorability.[179] Similarly, in *McLellan*, the district court sent letters rogatory to Ireland. When the district court undertook this act, it explicitly noted that "McLellan demonstrated that justice cannot be completely done . . . without the production of the documents requested."[180] By the district court's own admission, then, the evidence was necessary to McLellan's defense. Thus, even assuming a *de minimis* showing of favorability is required for zero-option defendants, McLellan satisfied that requirement to the extent practicable.

## CONCLUSION

For decades, scholars have called attention to the imbalances in evidence gathering mechanisms available to defendants. *McLellan* presents an issue of first impression as a case where a foreign country's refusal to accept letters rogatory left the defendant with no means to collect evidence necessary to his defense.[181] In analyzing *McLellan*, this Comment sought to determine whether and when zero-option defendants could nevertheless preserve their right to compulsory process with the assistance of the court, as required by separation of powers and constitutional due process.

Taken seriously, *McLellan* stands for, among other things, an unsound proposition: Even where there is a single avenue available to satisfy compulsory process, federal courts do not have the power to enforce the criminal defendant's constitutional rights. Cutting against precedent and explicit congressional intent, *McLellan* moves dangerously close to rendering compulsory process a dead letter when evidence is located abroad. But as much as *McLellan* presents a shocking result, it also reminds us of Chief Justice Marshall's important warning to the Judiciary. In *Marbury v. Madison*, the Court defined the "very essence of judicial duty" as balancing the law and the Constitution: "[t]hose, then, who controvert the principle that the Constitution is to be considered . . . as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law."[182]

To the Court, this kind of judicial reasoning was nonsensical, and suggested a "doctrine [that] would subvert the very foundation of all written

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[179] United States v. Theresius Filippi, 918 F.2d 244, 248 (1st Cir. 1990).

[180] *McLellan*, 959 F.3d at 456.

[181] *See supra* note 81 and accompanying text.

[182] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

Constitutions."[183] By disregarding zero-option defendants like McLellan, the members of the Judiciary ignore this warning and close their eyes on the defendant's right to compulsory process.

[183] *Id.*