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“WITNESSES” IN THE CONFRONTATION CLAUSE: CRAWFORD V. WASHINGTON, NOAH WEBSTER, AND COMPULSORY PROCESS

*Randolph N. Jonakait**

*Crawford v. Washington*¹ remade the Sixth Amendment’s Confrontation Clause.² *Crawford*, in the majority opinion by Justice Scalia, indicated that the Court’s previous confrontation framework, as stated in *Ohio v. Roberts*,³ for analyzing the reliability of out-of-court statements was wrong.⁴ Instead of relying on precedent, *Crawford* examined what it said was the historical background of the Confrontation Clause,⁵ concluding that “the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. . . . The Sixth Amendment must be interpreted with this focus in mind.”⁶ According to the majority, that historical record also supports a second, related proposition: the Confrontation Clause “is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.”⁷

Crawford also analyzed the Confrontation Clause’s text, coming to the same conclusion that statements akin to those from an *ex parte* deposition or examination, which *Crawford* labeled “testimonial,” are the right’s core concern.⁸ The Court did not

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1. 541 U.S. 36 (2004).

2. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” U.S. CONST. amend. VI.

3. 448 U.S. 56 (1980).

4. According to *Crawford*, the *Roberts* framework “conditions the admissibility of all hearsay evidence on whether it falls under a ‘firmly rooted hearsay exception’ or bears ‘particularized guarantees of trustworthiness.’” *Crawford*, 541 U.S. at 60 (quoting *Roberts*, 448 U.S. at 66). *Crawford* concluded, “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Id.* at 62. *Crawford* established that the Confrontation Clause applies to all testimonial hearsay statements. *Id.* at 68. The Court stated: “[W]e once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.” *Id.* at 50-51.

5. *See id.* at 42-43 (stating: “The Constitution’s text does not alone resolve this case We must therefore turn to the historical background of the Clause to understand its meaning.”)

6. *Crawford*, 541 U.S. at 50.

7. *Id.* at 54. *But see id.* at 73 (noting that “[i]t is an odd conclusion indeed to think that the Framers created a cut-and-dried rule with respect to the admissibility of testimonial statements when the law during their own time was not fully settled”) (Rehnquist, C.J., concurring in the judgment).

8. *Id.* at 51-52.

define “testimonial,”⁹ but said that “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”¹⁰ Finally, the Court concluded that the Sixth Amendment’s Confrontation Clause prohibits the admission of “testimonial” hearsay unless the hearsay declarant is unavailable and the accused had an opportunity to cross-examine that declarant.¹¹

Crawford set off a flurry of cases and commentaries grappling with the undefined concept of “testimonial statements.”¹² The focus here is different. Whatever “testimonial statement” means, the term clearly does not apply to all hearsay but only a small subset of out-of-court statements that somehow bear a resemblance to those made at a preliminary hearing examination or a deposition.¹³

The central concern here lies not with the correctness of *Crawford*’s historical conclusions, about which much has been written and more, no doubt, will be.¹⁴

9. See *id.* at 68 (stating that “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial’”).

10. *Id.* See *infra* Part I.D for a discussion of three possible definitions for “testimonial.”

11. *Crawford*, 541 U.S. at 68 (noting that “[w]here testimonial [hearsay] evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination”).

12. See, e.g., Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. RICH. L. REV. 511, 526-77 (2005) (discussing what “testimonial” might mean in *Crawford* and how lower courts have interpreted the term). *Crawford* also left open the question of whether the old confrontation doctrine of *Roberts* still regulates the admission of non-testimonial hearsay. *Crawford* did not expressly overrule *Roberts* and some statements left the door ajar for a broader confrontation right. For example, the Court said, “the Sixth Amendment [may] not solely [be] concerned with testimonial hearsay.” *Crawford*, 541 U.S. at 53. It also indicated that prior confrontation decisions had been “largely consistent” with the principles *Crawford* enunciated, and in summarizing those decisions it referred to *Dutton v. Evans*, 400 U.S. 74 (1970), by stating that “we considered reliability factors beyond prior opportunity for cross-examination when the hearsay statement at issue was not testimonial.” *Crawford*, 541 U.S. at 57. In concluding, *Crawford* stated: “Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” *Id.* at 68. All those statements leave open the possibility that the Clause still applies to nontestimonial hearsay. See Mosteller, *supra*, at 515 (“Another issue not resolved by *Crawford* is what remains of the old system under *Roberts*.”). On the other hand, in defining “witnesses” in the Confrontation Clause as those who bear or give testimony, the Court implied that only testimonial statements are affected by the right to confrontation. See *infra* Part I.B for a complete discussion of why the definition of “witness” should include all individuals who have “personally perceived” an event. This article assumes that after *Crawford*, the Confrontation Clause places no limits on the use of nontestimonial hearsay in criminal trials.

13. See *Crawford*, 541 U.S. at 68 (declining to define in full the term “testimonial,” but noting that at a minimum, it refers to “prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations”).

14. See, e.g., Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 BROOK. L. REV. 105, 113 (2005) (maintaining that “[h]istory does not mandate the rigid cross-examination rule that Scalia articulated in *Crawford*”); Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 BROOK. L. REV. 219, 219-20, 229-32 (2005) (stating that *Crawford* relied on English common law in interpreting Confrontation Clause while other provisions of Sixth Amendment “expressly rejected English common law”); Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?* 71 BROOK. L. REV. 35, 38-39 (2005) (arguing that

Instead, the focus here first will be on an aspect of the Court's analysis that has not drawn much attention: its textual explication of the term "witnesses" in the Confrontation Clause. This is followed by analyses that *Crawford* did not undertake, but should have—whether *Crawford*'s interpretive methods were consistent with the interpretive methods for other Sixth Amendment guarantees.

Part I examines *Crawford*'s consideration of the Sixth Amendment's text. The Court centered on the meaning of "witnesses" in the Confrontation Clause. Relying on Noah Webster's 1828 dictionary, Justice Scalia stated that "witnesses" are defined as those who give or bear testimony, a definition that was used to support the conclusion that testimonial statements are the clause's chief concern.¹⁵ Webster's dictionary, however, also gives other plausible meanings for "witnesses" that were not discussed by *Crawford*, and they would include all hearsay declarants.¹⁶

The terms "witness" and "witnesses" also appear in parts of the Constitution besides the Confrontation Clause,¹⁷ most significantly in the Compulsory Process Clause,¹⁸ which is a companion provision to the right of confrontation. *Crawford* did not consider how its selected definition comports with these other uses. Part II of this Article will show that *Crawford*'s chosen meaning conflicts with the other appearances of the term, and Part III discusses the uses of "witnesses" in the state compulsory process and confrontation provisions that preceded the Sixth Amendment.

While *Crawford* assumed that the Confrontation Clause constitutionalized a common law right, Part IV concludes that that assertion is dubious since much of the Sixth Amendment clearly rejected the common law and constitutionalized new rights. *Crawford* reached its result without considering how its conclusions meshed with other Sixth Amendment rights. The Court interpreted confrontation as if it could be isolated from its context, but Part IV will discuss how confrontation is part of a bundle of rights that help to guarantee an accused the ability to present a defense and how *Crawford*'s analysis conflicts with the methods of interpreting these rights.

Part V shows that the Court has used a much different standard from *Crawford*'s for interpreting the interrelated compulsory process right, and Part VI shows that the method of interpreting the Compulsory Process Clause serves the original purposes of the Sixth Amendment. The Article concludes that the same standards of interpretation should apply to both the confrontation and compulsory process provisions. If *Crawford*'s method of analysis is correct, many well-established Sixth Amendment doctrines are in jeopardy. On the other hand, if the methods of interpreting other Sixth Amendment provisions are correct, then *Crawford*'s approach to the Confrontation Clause must be wrong.

focusing on defendant's ability to "test adverse evidence" and trier of fact's ability to evaluate a witness' credibility "provide[s] a foundation for developing confrontation limits on hearsay evidence" that comports with the "original meaning" of Confrontation Clause).

15. *Crawford*, 541 U.S. at 51.

16. For a discussion of other potentially useful definitions of "witness," see Part I.B *infra*.

17. For a discussion of the use of "witnesses" in the Treason Clause, the Fifth Amendment, and the Compulsory Process Clause of the Constitution, see *infra* Part II.A-C, particularly notes 65-67.

18. The Compulsory Process Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . ." U.S. CONST. amend. VI. For a discussion of "witnesses" in the Compulsory Process Clause see *infra* Part II.C.

I. TEXTUAL ANALYSIS

The Confrontation Clause provides, "In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him"¹⁹ These words, *Crawford* concluded, reflect the same focus found in its historical examination; confrontation makes a sharp distinction between types of out-of-court statements and is acutely concerned with only the small fragment of "testimonial" statements that are akin to ex parte depositions or examinations.²⁰ The Court stated that this text

applies to "witnesses" against the accused—in other words, those who "bear testimony." 1 N. Webster, *An American Dictionary of the English Language* (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* . . . The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.²¹

Crawford presents this as a path that inevitably leads to but one destination. If you start with the text, you must proceed to "witness," pass into "testimony," then through "a solemn declaration," leading to a "specific type of out-of-court statement," which turns out to be hearsay akin to that produced by ex parte depositions and examinations.²² An honest textual analysis, however, would concede that this is not a straight lane, but a journey that requires a number of choices to reach the Court's destination. Taking any of the other plausible, lexicographic branches would lead to a much different result from the Court's conclusion in *Crawford*.

A. Webster and "Confront"

Crawford's textual path started with "witness," but perhaps the first stepping stone should be "confronted with," for that phrase seems to limit the meaning of "witness" in the Confrontation Clause.²³ Noah Webster's 1828 dictionary provides several meanings for "confront," but the Sixth Amendment seems to use the third one: "To set face to face; to bring into the presence of; as an accused person and a witness, in court, for examination and discovery of the truth; followed by with."²⁴ Since the Clause grants the accused the right to be "confronted *with*" witnesses, this seems the appropriate definition. That conclusion is buttressed by the defined purpose for such confrontation. The Sixth Amendment concern is not just the formalistic notion of

19. U.S. CONST. amend. VI.

20. *Crawford v. Washington*, 541 U.S. 36, 50-53 (2004).

21. *Id.* at 51.

22. *Id.* at 51-52.

23. Underlying this approach is an important assumption. See Edward J. Sullivan & Nicholas Cropp, *Making it Up—"Original Intent" and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 216 (2003) (arguing that "perhaps the most important assumption that a semantic originalist makes is that it is possible for a 'person' (i.e., a judge) to engage in a thought process whereby they can apply an eighteenth century understanding of words, and of the rights that those words generate and guarantee, to modern life").

24. 1 NOAH WEBSTER, *An American Dictionary of the English Language* (1828), available at <http://www.cbtlministries.org/resources/webster1828.htm> (search "confront"). The dictionary gives three other definitions for confront: (1) "[t]o stand face to face in full view; to face; to stand in front;" (2) "[t]o stand in direct opposition; to oppose;" (3) "[t]o set together for comparison; to compare one thing with another." *Id.*

bringing witnesses within spitting distance of the accused, but also the goal of having "examination and the discovery of the truth."²⁵

B. Webster and "Witnesses"

Webster did not just give one definition, as *Crawford* implied, but five for the noun "witness."²⁶ *Crawford* selected the last of those meanings as the one incorporated into the Confrontation Clause. It states, "One who gives testimony; as, the *witnesses* in court agreed in all essential facts."²⁷

Crawford, however, simply ignored Webster's third definition of the noun "witness," which states, "A person who knows or sees any thing; one personally present; as, he was *witness*; he was an *eye-witness*."²⁸ This meaning links with Webster's first definition of a "witness" as a transitive verb: "To see or know by personal experience. I *witnessed* the ceremonies in New York, with which the ratification of the constitution was celebrated, in 1788."²⁹ This definition, as well as the one Justice Scalia selected, makes sense in criminal cases. Those who bear testimony might be the people referred to as witnesses in the Confrontation Clause, but so too might be those who know something about a relevant event from their personal presence. If, as in Webster's example, one who saw the ratification ceremonies was a witness, then one who saw a shooting is also a witness.

The difference between these two definitions is not merely semantic. They embody quite distinct epistemological concepts. Justice Scalia's selected definition limits witnesses to only those who have done a particular act, that is, given testimony. A person is not a witness unless and until he has somehow testified. Under the other definition, however, a person is a witness not because of what he does but what he has personally perceived. Under Justice Scalia's choice, a person is not a witness because he has seen the shooting, but only if he makes testimonial statements about it. The person who makes an offhanded remark to a friend, "I saw the defendant do the shooting," is not a witness because he has not made a testimonial statement.³⁰ Utilizing

25. *Id.*

26. Two of the definitions refer to information, not people. While an accused can confront those who supply information, he cannot be set face-to-face with the information. Webster's first definition of "witness" states, "[t]estimony; attestation of a fact or event." 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "witness"). This meaning was illustrated with this example: "If I bear witness of myself, my witness is not true. John v." The second definition states, "That which furnishes evidence or proof" and provides as an example: "Laban said, this heap is a witness between me and thee this day. Genesis xxxi." *Id.* The remaining three definitions for the noun "witness" do refer to people, but one clearly is not incorporated into the Sixth Amendment. It states, "One who sees the execution of an instrument, and subscribes it for the purpose of confirming its authenticity by his testimony." *Id.* If the Confrontation Clause were limited to this meaning, an accused would not even have the right to confront most in-court witnesses.

27. *Id.* Justice Scalia stated that witnesses are those who bear testimony. In doing so, Scalia was not directly quoting a Webster definition of the noun "witness," but referring to Webster's first definition of "witness" as an intransitive verb: "[t]o bear testimony." *Id.*

28. 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "witness").

29. *Id.*

30. See *Crawford*, 541 U.S. at 51 (stating that the Confrontation Clause aimed to prevent "*ex parte*

Webster's broader definition, however, the person is a witness to the shooting even if she had not made any testimonial statement. She became a witness not by the act of testifying but instead by personally perceiving the event.

Since *Crawford* does not even mention this definition, the opinion, of course, does not explain why it should not be the definition intended by the Confrontation Clause. Justice Scalia's dissent in *Maryland v. Craig*,³¹ at least at first glance, suggests a reason. Justice Scalia there did recognize that "witness" could have a different meaning from the one he ascribed to it in *Crawford*. He stated:

As applied in the Sixth Amendment's context of a prosecution, the noun "witness"—in 1791 as today—could mean either (a) one "who knows or sees any thing; one personally present" or (b) "one who gives testimony" or who "testifies," i.e., "[i]n judicial proceedings, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court." 2 N. Webster, *An American Dictionary of the English Language* (1828) (emphasis added).³²

Justice Scalia, however, quickly concluded that the Confrontation Clause could not have adopted the more expansive definition: "The former meaning (one 'who knows or sees') would cover hearsay evidence, but is excluded in the Sixth Amendment by the words following the noun: 'witnesses *against him*.' The phrase obviously refers to those who give testimony against the defendant at trial."³³

This explanation, however, fails on several grounds. Justice Scalia's dissent in *Craig* implies that the Framers adopted Webster's meaning, but in fact Justice Scalia bastardized the dictionary's definition. Justice Scalia correctly indicated that Webster defined a "witness" as one who testifies, but then Justice Scalia made it appear as if Webster clarified that phrase by limiting testimony to solemn declarations under oath in judicial proceedings.³⁴ This was, to put it charitably, misleading. Webster did state in a definition of "testimony" that it is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."³⁵ Webster's definition, however, unlike

examinations," not casual remarks). The Court stated:

This focus also suggests that not all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. On the other hand, *ex parte* examinations might sometimes be admissible under modern hearsay rules, but the Framers would not have condoned them. . . . An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Id.

31. 497 U.S. 836 (1990). The Court found that under the facts presented it did not violate the Confrontation Clause for a child witness in a child sexual abuse case to testify outside the accused's presence by one-way closed circuit television. *Craig*, 497 U.S. at 851-52.

32. *Id.* at 864 (Scalia, J., dissenting) (emphasis added).

33. *Id.* at 864-65.

34. See *id.* at 864 (defining witness as "one who gives testimony" or who "testifies," i.e., "in judicial proceedings, [one who] make[s] a solemn declaration under oath, for the purpose of establishing or making proof of some fact to a court" (quoting 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (emphasis added))).

35. 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "testimony"). See also *infra* Part I.C for a complete discussion of Webster's definitions of "testimony."

Justice Scalia's, contains no "i.e." or its equivalent. Webster's definition is not limited to judicial proceedings. Instead, after giving this definition of "testimony," Webster stated, "Such affirmation in judicial proceedings, may be verbal or written, but must be under oath."³⁶ Webster did not equate testimony with declarations in court. "Testimony" was a broad category covering declarations both in and out of court. The lexicographer only indicated that a subset of such declarations, those made in judicial proceedings, had to be under oath.³⁷

This elided, rearranged, and supplemented definition, however, allowed Justice Scalia to reject Webster's broader definition of "witness" in his dissenting opinion in *Craig*. "A person who knows or sees anything" is not the meaning in the clause, according to Justice Scalia, because the witnesses have to be *against* the accused, and the entire "phrase obviously refers to those who give testimony against the defendant at trial."³⁸ If so, this manifest meaning has the Confrontation Clause affecting no statements from out-of-court declarants; the constitutional provision only requires confrontation of those who testify at the trial. Justice Scalia, however, was not willing to restrict the provision to that "obvious" result. He stated, "We have nonetheless found implicit in the Confrontation Clause some limitation upon hearsay evidence, since otherwise the government could subvert the confrontation right by putting on witnesses who know nothing except what an absent declarant said."³⁹ Apparently if the

36. 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "testimony"). Chief Justice Rehnquist, joined by Justice O'Connor, concurred in *Crawford* and correctly quoted this definition of "testimony" to illustrate his conclusion that the Framers primarily focused on statements made under oath. Chief Justice Rehnquist stated:

[W]hile I agree that the Framers were mainly concerned about sworn affidavits and depositions, it does not follow that they were similarly concerned about the Court's broader category of testimonial statements. As far as I can tell, unsworn testimonial statements were treated no differently at common law than were nontestimonial statements, and it seems to me any classification of statements as testimonial beyond that of sworn affidavits and depositions will be somewhat arbitrary, merely a proxy for what the Framers might have intended had such evidence been liberally admitted as substantive evidence like it is today.

Crawford, 541 U.S. at 71 (Rehnquist, C.J., concurring) (internal citations omitted). Scalia responded to this portion of the Chief Justice's opinion by stating:

We find it implausible that a provision which concededly condemned trial by sworn *ex parte* affidavit thought trial by *unsworn ex parte* affidavit perfectly OK. . . . Even if, as the Chief Justice mistakenly asserts, there were no direct evidence of how the Sixth Amendment originally applied to unsworn testimony, there is no doubt what its application would have been.

Id. at 52 n.3 (majority opinion).

37. 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "testimony").

38. *Craig*, 497 U.S. at 865 (Scalia, J., dissenting).

39. *Id.* at 865. Daniel Shavero, writing about Justice Scalia's dissent in *Craig*, stated:

It is difficult to imagine a more complete and unconvincing non sequitur. Concededly, the words "against him" establish that the "witnesses" covered by the Sixth Amendment are only a subset of all persons having knowledge about the defendant's case. On what ground, however, does Justice Scalia conclude that the subset consists only of those persons appearing at the trial? Why cannot the term "witnesses against him" refer to all persons having knowledge about the case and whose statements reporting such knowledge the prosecution uses as evidence against the defendant? Under that meaning, hearsay declarants would be included. Looking at the words "witnesses against him" in isolation from a "plain meaning" perspective, that interpretation appears at least as

Clause is confined to its supposedly straightforward sense, it might have no real meaning, and so it cannot be fully accepted. The text, supposedly so clear, cannot be restricted to its clear meaning, Justice Scalia concluded. Perhaps the textual analyst who has arrived at this point should pause, reflect, and retrace his steps to see if he really took the right path because he seems to have emerged out of the thicket into a wonderland where the Framers could not have actually meant what they wrote.

Justice Scalia in *Crawford*, in fact, rejected the obvious meaning he found in *Craig*.⁴⁰ *Crawford* concluded that the clause was aimed at preventing the use of ex parte depositions and affidavits, or in other words, it primarily prohibited the use of a certain sort of evidence that had been generated outside of trial.⁴¹ If it is obvious that "witnesses against him" means those who testify at trial, then the selected wording obviously could not accomplish that goal, and of course the Framers would have been foolish to use such inapposite words. In other words, only if "witnesses against him" means something other than what Justice Scalia found so clear in *Craig* could the confrontation right do what Justice Scalia said it was intended to do in *Crawford*, which was to prohibit some out-of-court statements. Only if Justice Scalia was wrong in *Craig* could he have been right in *Crawford*.⁴²

The focus of Justice Scalia's analysis changed from *Craig* to *Crawford*. In *Craig*, Justice Scalia explicated the phrase "witnesses against him," while in the later case, *Crawford*, he concentrated on the words "witnesses," which does appear in the confrontation guarantee, and "testimony," which does not.⁴³ His conclusion in *Craig* that "witnesses against him" obviously referred to those testifying at trial⁴⁴ was abandoned in *Crawford* in favor of the conclusion that "witnesses" means those who give testimonial statements.⁴⁵ The text, which in the previous analysis only referred to people who testified at trial, now is said to include people who do not appear at trial.⁴⁶ It was that abandoned approach, however, that Justice Scalia had used to explain why Webster's broader definition of "witness" should be disregarded.⁴⁷

plausible as the one that Justice Scalia so rapidly concludes is "obvious."

Daniel Shaviro, *The Confrontation Clause Today in Light of its Common Law Background*, 26 VAL. U. L. REV. 337, 365 (1991).

40. Cf. Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845, 865-66 (1995) (stating that Scalia's "textual analysis [in *Craig*], though scientific in tone, is nevertheless unconvincing. Justice Scalia's point is that the Clause does not 'expressly' exclude hearsay evidence; . . . But the term "witnesses," thus contextualized, could just as well refer to those hearsay declarants whose statements are offered 'against the defendant' at trial").

41. *Crawford*, 541 U.S. at 50-52.

42. Cf. Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 597 (2003) ("Justice Scalia's approach [in *Craig*] depends on a rigid interpretation of the clause 'witnesses against him.' This approach selectively chooses a definition of the term 'witness,' which is neither favored nor sensible.").

43. The Confrontation Clause states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

44. *Craig*, 497 U.S. at 864-65 (Scalia, J., dissenting).

45. *Crawford*, 541 U.S. at 51.

46. Compare *Craig*, 497 U.S. at 864-65 (Scalia, J., dissenting) (defining witnesses as "those who give testimony against the defendant at trial"), with *Crawford*, 541 U.S. at 51-52 (defining witnesses as those who give ex parte testimony prior to trial).

47. *Craig*, 497 U.S. at 865.

While *Crawford* gave no explanation for rejecting the expansive meaning of "witnesses," Justice Scalia's concern in *Craig* might seem to have merit. To have the clause mean that an accused has the right to confront people who know or saw anything against him is awkward phraseology, but Webster added to this definition that a "witness" was "one personally present; as, he was witness; he was an eye-witness."⁴⁸ Stating that an accused has a right to confront eyewitnesses makes sense. Certainly, it follows common usages of language to label one who saw the fire a witness to it, and it was in Webster's day as indicated by his dictionary. If a person states to a friend, "I saw the defendant flee when the barn started blazing," clearly that person can be labeled a witness to the fire even though he is not a "witness" under *Crawford* because he has not made a testimonial statement.⁴⁹

Of course, for the confrontation right to kick in, he must not only be a "witness," he must also be "against" the accused. Surely, if that person does not testify and his assertion is not admitted into evidence, he is not a witness against the accused. Surely he is a witness against the accused if he testifies for the prosecution during the criminal trial. And surely if the prosecutor introduces his hearsay assertion without calling him, this evidence is admitted against the accused. But is he then a *witness* against the accused?

Crawford did not define the Confrontation Clause's "against," but Justice Scalia did offer a definition of that word in *Cruz v. New York*.⁵⁰ Writing for the Court, he stated, "Ordinarily, a witness is considered to be a witness 'against' a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt."⁵¹ This construction, however, assumes that a "witness" is one who gives testimony, but the broader definition of "witness" could easily be accommodated in a comparable formulation. To say that a witness is one who knows or sees something by personal presence is to say in the context of a criminal prosecution that a witness is one who has personal knowledge of a relevant event. Such a witness could be considered "against" the accused if her personal knowledge is part of the body of evidence that the jury may consider in assessing the accused's guilt.⁵²

48. 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "witness").

49. Cf. Bryan H. Wildenthal, *The Right of Confrontation, Justice Scalia, and the Power and Limits of Textualism*, 48 WASH. & LEE L. REV. 1323, 1351-52 (1991) ("Justice Scalia [in *Craig*] conceded, and then brushed aside, the first dictionary definition for 'witness'—which, I daresay, embraces the predominant common usage of the term. He was forced to acknowledge, of course, that the hearsay declarant fits *that* definition precisely. . . . Scalia's claims about the 'obvious' and 'literal' import of ['against him'] simply do not hold water and plainly violate his own rule of careful attention to what the text *literally* says. The Sixth Amendment does *not* say that the defendant shall enjoy 'the right . . . to be confronted with the witnesses *testifying at trial* against him,' although that is what Scalia's argument suggested it says and would require it to say. Why a 'witness'—in the ordinary sense of one who *witnesses* the underlying events—cannot, by every rule of common-sense interpretation known to the English language, be said to be a witness 'against' the defendant when his hearsay account of the underlying events is in fact *used against* the defendant at trial is altogether beyond my ken.).

50. 481 U.S. 186 (1987).

51. *Cruz*, 481 U.S. at 190.

52. See *State v. Houser*, 26 Mo. 431, 439 (1858) (interpreting a confrontation guarantee under a state

The text of the Confrontation Clause could be read to support *Crawford*'s interpretation of "witnesses" as those who give testimony about a relevant event, but it does not compel that result. The text could also mean "witnesses" are those with personal experience or knowledge of a relevant event, and in either the broader or narrower sense, such witnesses can plausibly be "against" the accused if the jury can rely on the witnesses' knowledge to convict. *Crawford*'s narrower definition is not driven by the text but is an unexplained choice of one possibility.

C. Webster and "Testimony"

Just as Justice Scalia selected without explanation a narrow definition of "witness" from Webster, he also selected a narrow definition of "testimony."⁵³ Webster's dictionary does define that word as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."⁵⁴ This, however, is not the only definition. "Testimony," according to Webster also means, "Affirmation; declaration."⁵⁵ In this broader definition, any declaration, not just a "solemn" one, is "testimony," and "testimony" is not limited to those declarations made for the particular purpose of proving a fact. Even if a "witness" is to be limited to someone who gives testimony, under the broader definition of "testimony" all hearsay declarants would be "witnesses."

Webster gave yet another relevant definition for "testimony": "Witness; evidence; proof of some fact."⁵⁶ Even if "witness" is merely confined to "one who gives testimony," a person giving proof of some fact is a "witness." Hearsay declarants fall within this formulation. The in-court witness is offered to prove that an out-of-court declaration was made, but the fact sought to be proved by hearsay is the truth of what the out-of-court declarant stated.⁵⁷ The hearsay declarant gives proof of some fact and, therefore, is a person who bears testimony. And when his proof is part of the body of evidence that could convict a criminal defendant, he is a witness against the accused.

constitution, concluding that the out-of-court declarant is "real witness" when court admits dying declaration or former testimony). The court further stated:

The living witness is but a conduit pipe—a mere organ, through whom this evidence is conveyed to the court and jury. So is the magistrate who takes the deposition, or the by-stander who is able to repeat what has been testified to on a former trial by a witness in the presence of the accused.

Id. *Crawford* cited *Houser*, see *infra* note 174, but did not discuss this part of *Houser*. *Crawford*, 541 U.S. at 50.

53. See *Crawford*, 541 U.S. at 51 (defining testimony as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact").

54. 2 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "testimony"). That definition continues, "Such affirmation in judicial proceedings, may be verbal or written, but must be under oath. *Testimony* differs from *evidence*; *testimony* is the declaration of a witness, and *evidence* is the effect of that declaration on the mind, or the degree of light which it affords." *Id.*

55. *Id.*

56. *Id.* (search "testimony"). Webster defined evidence: "That which elucidates and enables the mind to see truth; proof arising from our own perceptions by the senses, or from the testimony of others, or from inductions of reason." *Id.* (search "evidence").

57. See FED. R. EVID. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

Thus, while Justice Scalia's conclusion that a witness is one who gives a solemn declaration to prove some fact is a plausible interpretation of what the Framers intended,⁵⁸ a textual analysis based on Noah Webster's dictionary can just as plausibly reach other conclusions.⁵⁹ A witness can be one who has perceived an event. A witness can be someone giving proof of some fact or one who has made a declaration. An honest textual analysis can lead to the conclusion that "witnesses" in the Confrontation Clause includes all hearsay declarants as well as to a narrower definition.

D. "Testimonial Statements"

Harder, if not impossible, to derive from the text are any of the possible definitions for testimonial statements that *Crawford* discussed. The Court stated:

Various formulations for this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statement that declarants would reasonably expect to be used prosecutorially," Brief for Petitioner 23; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it.⁶⁰

The Court does not explain what that common nucleus is, but none of the three definitions restricts "testimonial" to in-court testimony at the accused's trial. Indeed, the first two formulations do not even cover in-court testimony. All three extend "witnesses" to hearsay declarants, but only to a limited class of hearsay declarants. Not surprisingly, *Crawford* did not explain how a textual analysis leads to any of these definitions of testimonial statements, for it is impossible to derive any of these possibilities from the clause's words. For example, surely no one could read the phrase "witnesses against him" and divine that those words really mean "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits . . ."⁶¹

58. *But see* Kirst, *supra* note 14, at 85 (noting that Scalia "cited Noah Webster's 1828 dictionary, not exactly a contemporary source for the meaning of language used four decades earlier"). Webster, however, started work on the dictionary in 1805. DAVID MICKLETHWAIT, *NOAH WEBSTER AND THE AMERICAN DICTIONARY* 171 (2000).

59. Compare Stanley Fish's critique of the textualist position:

Nor does [a text] mean what the dictionary tells us about the words it contains, because what the dictionary gives us is a record of the intentions previous speakers have had when using a word, a record, that is, of possible and multiple meanings absent any way of specifying which is the right (that is, intended) one; . . .

Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 644 (2005).

60. *Crawford*, 541 U.S. at 51-52.

61. *Id.* (citation omitted). The State of Washington presented the definition of "testimonial" listed first in *Crawford*, but previously the same definition had been offered by the United States as *amicus curiae* in

Even if "witness" means one who bears testimony, since the text itself contains no limitation on "testimony," all "testimony" from some definition of that word would be incorporated into "witness," not just a subset of testimony singled out in each of the proposals. If courts adopt any of these formulations as part of the Confrontation Clause, it has to be in spite of the text, not because of it. And it should be realized that, if the Framers truly intended to restrict the right of confrontation as suggested by any of the possible definitions, they drafted poorly.

II. "WITNESSES" IN THE CONSTITUTION

Any interpretation of the Confrontation Clause has to go beyond its text. An appropriate extratextual source to attempt to determine the Framers' intent, of course, is the history that led up to the Clause's adoption.⁶² While *Crawford v. Washington*⁶³ derived meaning from that history, the Court did not consider other constitutional provisions that could illuminate the meaning of "witnesses" for confrontation. Since the drafters of a text are normally assumed to have meant the same thing for the same word throughout that text,⁶⁴ seeing how the word "witness" is used in other parts of the Constitution should help in understanding what "witnesses" means in the Confrontation Clause.⁶⁵

The words "witness" or "witnesses" occur in three other places in the Constitution: the Treason Clause of Article III;⁶⁶ the Self-Incrimination Clause of the Fifth Amendment;⁶⁷ and the Compulsory Process Clause of the Sixth Amendment.⁶⁸ The definition of "witness" as one who makes "testimonial" statements, that is, statements that are akin to ex parte examinations or depositions, conflicts with all the other constitutional meanings, casting doubt on *Crawford's* selected meaning for "witnesses."

White v. Illinois, 502 U.S. 346, 352 (1992). In *White*, Thomas and Scalia said that this formulation might be difficult to apply since "[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties." *White*, 502 U.S. at 364 (Thomas, J., concurring). See also *id.* (stating: "Few types of statements could be categorically characterized as within or without the reach of a defendant's confrontation rights.").

62. See *supra* notes 5-7 and accompanying text for *Crawford's* reliance on the history of the Confrontation Clause.

63. 541 U.S. 36 (2004).

64. Montoya, *supra* note 40, at 866 n.142.

65. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) ("We adhere to 'the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990))). See also MICHAEL SINCLAIR, A GUIDE TO STATUTORY INTERPRETATION 137 (2000) ("The presumption is that the legislature meant the same thing with each use [of the same word or group of words].").

66. The Treason Clause states: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1.

67. The Self-Incrimination Clause states: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

68. The Compulsory Process Clause states: "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.

A. "Witnesses" in the Treason Clause

"Witnesses" appears in the main body of the Constitution in the Treason Clause, which states: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of Two Witnesses to the same overt Act, or on Confession in open Court."⁶⁹ The Supreme Court has interpreted this provision only once, in *Cramer v. United States*,⁷⁰ but it did not consider the meaning of "witnesses" in the provision. The text itself, however, indicates that that term in the Treason Clause means something different from *Crawford's* version. If a witness is one who gives testimony, then the provision could be reformulated to state that testimony from two people who testify is required. This produces a redundancy. If this were the meaning, the Clause could have been more succinctly phrased: no person shall be convicted of treason without two witnesses to the same overt act. Instead, by requiring *testimony* from two witnesses, the Clause indicates that there are witnesses who do not give testimony.

The Treason Clause requires witnesses *to* an act.⁷¹ This has to mean that people are required who have witnessed an act. People are required who have personal knowledge of an act. People do not become witnesses under the Treason Clause when or because they give testimony, as *Crawford* has it; instead, they are witnesses because they saw or know something by personal presence, just as Webster was a witness to ratification ceremonies.⁷² A person can only be convicted of treason if two such witnesses testify to the treasonous overt act.⁷³ If they do not testify, they are still

69. U.S. CONST. art. III, § 3, cl. 1.

70. 325 U.S. 1 (1945). The Court noted: "In the century and a half of our national existence not one execution on a federal treason conviction has taken place. Never before has this Court had occasion to review a conviction." *Cramer*, 325 U.S. at 24.

71. U.S. CONST. art. III, § 3, cl. 1. *Cramer* concluded that two witnesses have to testify to a treasonous act, stating:

The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses.

Cramer, 325 U.S. at 34-35. The Court reversed the treason conviction. *Id.* at 48. While there had been two witnesses to meetings between Cramer and German nationals who had infiltrated for the purpose of sabotage during World War II, those witnesses did not testify that anything treasonous happened in these meetings. *Id.* at 37. The Court stated:

By direct testimony of two or more [FBI] agents it was established that Cramer met Thiel and Kerling on the occasions and at the places charged and that they drank together and engaged long and earnestly in conversation. This is the sum of the two overt acts as established by the testimony of two witnesses. There is no two-witness proof of what they said nor in what language they conversed. There is no showing that Cramer gave them any information whatever of value to their mission or indeed that he had any to give. No effort at secrecy is shown, for they met in public places. Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks.

Id.

72. See *supra* Part I.B for a discussion of the definition of "witness."

73. See *supra* Part II.A for a discussion of the meaning of witness in the Treason Clause. See also *Cramer*, 325 U.S. at 34-35 (noting that "[e]very act, movement, deed, and word of the defendant charged to

witnesses to the act, but the accused cannot be convicted because their testimony has not been presented. "Witness" and "testimony" in the Treason Clause are therefore separate concepts.

Let's say a defendant is charged with treason for bombing an American installation. Imagine that moments after the blast, two people whip out their phones, calling a friend and a spouse, each frantically declaring that they just saw the defendant set off the bomb. Would a treason conviction be valid based on the testimony of the friend and spouse? The court could admit the statements of the two who saw the blast as excited utterances,⁷⁴ and the introduction of this hearsay would not violate *Crawford's* conception of confrontation rights because the hearsay declarants apparently are not within that decision's definition of "witnesses."⁷⁵ The prosecution has produced two people—two witnesses—who have given in-court testimony about the same overt act, but surely a treason conviction could not stand. The witnesses to that overt act are not those reporting the hearsay, but are the hearsay declarants themselves, and those declarants would have to testify. They are the "witnesses" within the meaning of the Treason Clause. Indeed, they are the "witnesses" within ordinary usage of that term. If you asked the prosecutors, What two witnesses to the same overt act do you have? they would clearly discuss the hearsay declarants. They are the crucial "witnesses," not because of testimonial statements they may have made, but because of their personal knowledge. The most natural reading of "witnesses" here is not *Crawford's*. A person is a "witness" for the Treason Clause because of what he has personally observed, that is, because he is an eyewitness, and two eyewitnesses must testify to the same overt act for a valid treason conviction.⁷⁶

Of course, since the Framers drafted the Treason Clause several years before the Sixth Amendment, its relevance for the Confrontation Clause might be questioned, but the effect of the testimony-from-two-witnesses rule has an important consequence for confrontation. The constitutional generation was especially concerned about treason. *Cramer* noted that "the basic law of treason in this country was framed by men who . . . were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself."⁷⁷ Consequently, the Treason Clause intertwined substantive and procedural limitations.⁷⁸ The requirement of testimony from two

constitute treason must be supported by the testimony of two witnesses").

74. See FED. R. EVID. 803(2) (defining "excited utterance" as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event of condition" and, therefore, not excluded by the hearsay rule even if the declarant is available to testify).

75. *Crawford*, 541 U.S. at 51.

76. Cf. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 692 (1996) (answering his question of whether a hearsay declarant could be a witness within the Treason Clause: "I should hope not. Indeed, it is hard to imagine a more patent (and, if permitted, potent) evasion of the words and the spirit of the Treason Clause's requirement of two witnesses. And so, here at least, 'witness' most clearly does not mean any out-of-court declarant."). Amar's logic disregards the text of the Treason Clause, which does not just require two witnesses but instead requires testimony from two witnesses to the same overt act. The hearsay declarant, of course, may have been an eyewitness to the overt act and therefore is a witness within the meaning of the Treason Clause, but if that declarant does not testify, the accused cannot be validly convicted of treason because there has not been *testimony* from two witnesses to the same overt act.

77. *Cramer*, 325 U.S. at 21.

78. See *id.* at 29 (concluding that the constitutional requirement for treason includes more than just

witnesses helped assure that the prosecution would have to have strong proof of the treasonous action, but it also guaranteed that those who claimed an accused had committed treason did so in court where the accused could confront them.⁷⁹ A treason conviction cannot rest on hearsay, not because there must be two witnesses to the overt act, but because two witnesses—people with personal knowledge—must *testify*. Because of the testimony requirement, there can be no treason conviction unless the accused has the opportunity to confront the crucial witnesses against him. Testimony is not merely a part of the definition of "witnesses" in the Treason Clause; they are distinct requirements. If "witness" has the same meaning throughout the Constitution, the Treason Clause indicates that *Crawford's* definition of that term is wrong.

B. "Witness" in the Fifth Amendment

"Witness" appears in the Fifth Amendment's Self-Incrimination Clause, which states, "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."⁸⁰ The Supreme Court has seemingly adopted a *Crawford*-like meaning for that use of "witness," by stating, "The word 'witness' in the constitutional text [of the Fifth Amendment] limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character."⁸¹

The concept of "testimonial" in the Fifth Amendment, however, is much different from *Crawford's*. It encompasses not only statements akin to those in *ex parte* depositions, but also communications that relate a factual assertion or disclose information, as the Court made clear in *Doe v. United States*.⁸² Doe, pursuant to subpoena, appeared before a grand jury and produced records of transactions with offshore banks.⁸³ When asked about other records, he invoked his privilege against self-incrimination.⁸⁴ The government then successfully sought to have the district

disloyal thoughts or speech, and the overt-act requirement furthered this substantive limitation). The overt-act requirement "repeats in procedural terms the concept that thoughts and attitudes alone cannot make a treason." *Id.*

79. CHARLES ALAN WRIGHT & KENNETH GRAHAM, JR., 30 FEDERAL PRACTICE AND PROCEDURE 666. Wright and Graham wrote:

[R]equiring the prosecution to produce two witnesses does more than make proof difficult; it also means that the defendant must be "confronted" by his accusers . . . [Treason] cannot be proved by . . . hearsay Hence, in this rather limited way, the Constitution did provide for confrontation of witnesses despite the absence of a bill of rights.

Id. at 666.

80. U.S. CONST. amend. V.

81. *United States v. Hubbell*, 530 U.S. 27, 34 (2000). The privilege against self-incrimination is not violated by the compulsion of nontestimonial evidence. See *Schmerber v. California*, 384 U.S. 757, 764 (1966) (stating that "[t]he distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it"). A person's constitutional right is not violated by requiring him to don a blouse, *Holt v. United States*, 218 U.S. 245, 252-53 (1910), give a blood sample, *Schmerber*, 384 U.S. at 760-61, or participate in a lineup, *United States v. Wade*, 388 U.S. 218, 221 (1967), for these acts are not testimonial.

82. 487 U.S. 201, 204 (1988).

83. *Doe*, 487 U.S. at 202.

84. *Id.* at 203.

court order Doe to sign forms consenting to disclosure of records from foreign bank accounts over which the government believed Doe had control.⁸⁵ When he refused based on his Fifth Amendment privilege, the court held him in contempt.⁸⁶

The Supreme Court stated that the controlling question “is whether the act of executing the form is a ‘testimonial communication.’”⁸⁷ The Court surveyed some of its earlier self-incrimination cases and concluded, “[I]n order to be testimonial, an accused’s communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a ‘witness’ against himself.”⁸⁸ The Court concluded that the consent form did not require Doe to relate a factual assertion or disclose information and, therefore, did not compel the making of a testimonial statement.⁸⁹ Responding to the claim that this holding altered the power of the Government to force people to aid in their own prosecution, the Court responded, “There are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts. The vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege.”⁹⁰ The government does not violate the defendant’s privilege against self-incrimination if the government has not compelled the making of a statement⁹¹ or if the statement does not incriminate its maker,⁹² but if the statement conveys information or asserts any fact, it is testimonial within the meaning of the Fifth Amendment, and its maker is a witness.⁹³

85. *Id.* at 205.

86. *Id.* at 205-06.

87. *Id.* at 207. The Court stated that compulsion was obvious, and it would assume that there would be incrimination. *Doe*, 487 U.S. at 207.

88. *Id.* at 210.

89. The Court concluded that “neither the form, nor its execution, communicates any factual assertion, implicit or explicit, or conveys any information to the Government.” *Id.* at 215. The Court also found:

The consent directive itself is not “testimonial.” It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence or that it is controlled by petitioner. Nor does the form indicate whether documents or any other information relating to petitioner are present at the foreign bank, assuming that such an account does exist.

Id.

90. *Id.* at 213-14.

91. See *Andresen v. Maryland*, 427 U.S. 463, 473 (1976) (holding that seizure of petitioner’s records did not violate his privilege against self-incrimination because “petitioner was not asked to say or to do anything. The records seized contained statements that petitioner had voluntarily committed to writing.”); see also *Fisher v. United States*, 425 U.S. 391, 409 (1976) (stating that “the privilege protects a person only against being incriminated by his own compelled testimonial communications”).

92. See *Hiibel v. Sixth Judicial District of Nevada*, 542 U.S. 177, 189 (2004) (“Stating one’s name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well . . . [but] in this case disclosure of his name presented no reasonable danger of incrimination.”).

93. *Pennsylvania v. Muniz*, 496 U.S. 582, 596-97 (1990). The Court in *Muniz* stated:

Whatever else it may include, . . . the definition of ‘testimonial’ evidence articulated in *Doe* [*v. United States*] must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the “cruel trilemma” [of self-accusation, perjury or contempt] Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the ‘trilemma’ of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.

The Fifth Amendment definition of "witness" does not just include those who have given the equivalent of ex parte affidavits or depositions, but anyone who has made a factual assertion.⁹⁴ Under this definition, all hearsay declarants have made testimonial statements and are witnesses. As with the Treason Clause, if "witness" has the same meaning throughout the Constitution, then the Fifth Amendment's use of that word indicates that *Crawford's* definition of "witness" is wrong.

C. "Witnesses" in the Compulsory Process Clause

Even if "witnesses" in the Treason Clause and "witness" in the Self-Incrimination Clause can somehow be simply disregarded in interpreting confrontation,⁹⁵ a compelling case exists for interpreting "witnesses" consistently with its other appearance in the Sixth Amendment, in the Compulsory Process Clause.⁹⁶ The Compulsory Process Clause provides: "The accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor" and follows the confrontation guarantee in the Sixth Amendment. "Witnesses" appears in the Compulsory Process Clause nine words after the use of that term in the Confrontation Clause, and the drafters of the Sixth Amendment no doubt intended consistent uses for the word in both places.⁹⁷

Furthermore, compulsory process and confrontation should be interpreted consistently with each other for they serve the same goals. They interrelate with the Sixth Amendment rights to counsel and notice to provide an accused an adversarial trial where the accused has a fair opportunity to defend himself.⁹⁸ While *Crawford* ignored confrontation's interrelationship with other rights, elsewhere the Supreme Court has acknowledged it. In interpreting the Right to Counsel Clause for example, the Court stated:

The Sixth Amendment includes a compact statement of the rights necessary to a full defense [T]hese rights are basic to our adversary system of criminal justice The rights to notice, confrontation, and compulsory process, when taken together, guarantee that a criminal charge may be

Id.

94. See *Doe*, 487 U.S. at 210 (stating that to act as witness against himself, the accused must provide a testimonial communication that "relate[s] a factual assertion or disclose[s] information").

95. But see WRIGHT & GRAHAM, *supra* note 79, at 781-82 (noting that "we cannot understand the meaning of 'confrontation' by looking at that clause alone; we must also look at the other provisions of the Sixth Amendment and to the Bill of Rights as a whole").

96. U.S. CONST. amend. VI.

97. See *Montoya*, *supra* note 40, at 866 n.142 (stating: "When a drafter uses the same term in another part of the same document, we ordinarily presume that he or she meant it in the same sense. This maxim of interpretation carries special weight here, since the clauses are close to one another in the same constitutional amendment."); see also Randolph N. Jonakait, *Foreword: Notes for a Consistent and Meaningful Sixth Amendment*, 82 J. CRIM. L. & CRIMINOLOGY 713, 737 (1992) (arguing: "If compulsory process and confrontation are read as part of one Sixth Amendment, it can hardly make sense for 'witnesses' to have one meaning for confrontation and a different one for compulsory process."). Cf. *United States v. Dixon*, 509 U.S. 688, 704 (1993) (stating that "it is embarrassing to assert that the single term 'same offence' . . . has two different meanings" for the multiple punishment and multiple prosecution prongs of the Fifth Amendment Double Jeopardy Clause).

98. U.S. CONST. amend. VI.

answered in a manner now considered fundamental to the fair administration of American justice—through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.⁹⁹

The rights to notice, counsel, confrontation, and compulsory process are specific components of the fundamental guarantee that an accused can defend himself through our adversary system.¹⁰⁰ The interrelationship of confrontation and compulsory process is particularly close. An accused's right to defend himself would be incomplete if he could only confront prosecution witnesses and not call his own. It would be incomplete if he could call favorable witnesses but not cross-examine adverse ones. Both rights are necessary if the accused is to have a fair opportunity to defend himself.¹⁰¹ Neither can be understood apart from the other,¹⁰² for, as Peter Westen has stated, confrontation and compulsory process "are conceptual twins. They both assist the accused in presenting a defense by enabling him to produce and examine witnesses on his behalf."¹⁰³

This conceptual consanguinity, however, is cleaved by *Crawford's* definition of "witness." Under compulsory process, the accused seeks to produce people not because they *have made* testimonial statements, but because he hopes they *will make* favorable testimonial statements at the criminal trials. He seeks to compel the presence of those who are not "witnesses" within the meaning of *Crawford*, but those who might become witnesses. If "witnesses" nine words apart means the same thing, an accused should not have compulsory process for someone he has no right to confront. Surely,

99. *Faretta v. California*, 422 U.S. 806, 818 (1975).

100. See *In re Oliver*, 333 U.S. 257, 273 (1948). The Court in *Oliver* stated:

A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

Id. See also *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

101. See *Washington v. Texas*, 388 U.S. 14, 19 (1967) (explicating Sixth Amendment rights of confrontation and compulsion). The Court in *Washington* stated:

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 Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. See also Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1119 (1999) (stating: "Both the Supreme Court itself and academic commentators have remarked, in general, upon the connection between the [Confrontation and Compulsory Process] Clause[s].").

102. Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 569 (1978) (arguing that "neither confrontation nor compulsory process can be meaningfully understood without reference to the companion provision").

103. Peter Westen, *The Future of Confrontation*, 77 MICH. L. REV. 1185, 1197 (1979).

though, the accused has the right to have people produced who do not fit *Crawford's* definition of "witness," at least based on what the Supreme Court has indicated.¹⁰⁴

Consider co-conspirator statements. They apparently are not "testimonial" within the meaning of *Crawford*,¹⁰⁵ and therefore, can be introduced against the accused without prior cross-examination and without producing the declarant. In other words, a co-conspirator declarant is not a "witness" within the meaning of the Confrontation Clause. Even so, the Court in *United States v. Inadi*¹⁰⁶ held that co-conspirator statements could be constitutionally admitted and stated that the accused could have used his compulsory process rights to have the declarant produced.¹⁰⁷ *Inadi* upheld the admission of co-conspirator statements against the accused without a showing of the declarants' unavailability.¹⁰⁸ The Court, however, went on to state that if the defendant had wanted to cross-examine the declarants, he could have produced them, explaining, "The Compulsory Process Clause would have aided respondent in obtaining the

104. See *infra* notes 105-09 for a discussion of the accused's right to produce witnesses that do not fall under *Crawford's* definition of witness.

105. In discussing hearsay exceptions at the time of the adoption of the Bill of Rights, *Crawford* stated: "Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy." *Crawford*, 541 U.S. at 56. *Crawford* concluded that Supreme Court confrontation cases have been largely consistent with *Crawford's* principles, and indicated that *Bourjaily v. United States*, 483 U.S. 171 (1987), where the admission of co-conspirator statements was held not to violate the Confrontation Clause, was correctly decided. *Id.* at 58. See Mosteller, *supra* note 12, at 533 (noting that *Crawford* "considered co-conspirator statements outside the testimonial category . . ."). See also *State v. Poll*, 8 N.C. 442 (1821) (finding co-conspirator statements inadmissible). Indeed, in *Poll*, Justice Henderson stated:

The rule has never been carried further than this, that when a common design is proven, the act of one in furtherance of that design is evidence against his associates; it is in some measure the act of all; but the *declarations* of one of the parties can received only against himself.

Id. at 246. But see *United States v. Burr* (*Burr II*), 25 F. Cas. 187 (C.C.D. Va 1807) (No. 14694). In *Burr*, the prosecution sought to introduce out-of-court statements made by the absent witness, Herman Blennerhassett, to one Neale, as declarations of a co-conspirator. *Id.* at 193. The prosecution argued that there was "a conspiracy between these two [Blennerhassett and Burr] and others; and that the declarations of one conspirator were evidence against the others; or, 2d, that they were accomplices." *Id.* at 193 n.5. Chief Justice John Marshall, who presided over the trial of Aaron Burr, relied on the right of confrontation and ruled the evidence inadmissible:

The rule of evidence which rejects mere hearsay testimony, which excludes from trials of a criminal or civil nature the declarations of any other individual than of him against whom the proceedings are instituted, has been generally deemed all essential to the correct administration of justice. I know not why a declaration in court should be unavailing, unless made upon oath, if a declaration out of court was to criminate others than him who made it; nor why a man should have a constitutional claim to be confronted with the witnesses against him, if mere verbal declarations, made in his absence, may be evidence against him. I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important.

Id. Marshall went on to indicate that co-conspirator statements could be admitted to prove the crime of conspiracy, but they could not be introduced to prove other criminal conduct of an accused. *Id.* at 193-95.

106. 475 U.S. 387 (1986).

107. *Inadi*, 475 U.S. at 399-400.

108. *Id.*

testimony of any of these declarants.”¹⁰⁹ But after *Crawford* it must be asked, if the accused has no right to confront a declarant because he is not a “witness” within the meaning of the Confrontation Clause, why does he have a constitutional right to produce him as a “witness?” Either these conceptually linked clauses employ different definitions of the same term, or *Crawford*’s definition is wrong, or compulsory process rights are more severely limited than the Court and commentators have assumed. *United States v. Valenzuela-Bernal*¹¹⁰ and its discussion of *Roviaro v. United States*,¹¹¹ however, indicate that compulsory process contains a broad definition of “witnesses.”

Albert Roviaro was convicted of illegally transporting narcotics after federal agents testified that they observed him deliver drugs to a government informer.¹¹² The government did not call the informer to testify and, relying on the “informer’s privilege,”¹¹³ refused to reveal his identity to the defense. The Court, however, held that “[w]here the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.”¹¹⁴ The Court concluded that the government should have disclosed the informer’s identity and reversed.¹¹⁵

In *Valenzuela-Bernal*, Ricardo Valenzuela-Bernal was convicted of transporting an illegal immigrant into the United States.¹¹⁶ The government quickly deported two of the three apprehended people he drove over the border, but held the third, Enrique Romero-Morales, to establish a nonhearsay basis for the prosecution.¹¹⁷ The accused

109. *Id.* at 397. The Court noted that Federal Rule of Evidence 806 would have permitted the defendant to cross-examine the declarants if he had called them as witnesses. *Id.* at 398. See also *Dutton v. Evans*, 400 U.S. 74, 80 (1970) (holding that the admission of hearsay without production of the declarant did not violate the Confrontation Clause). Justice Stewart, writing for the plurality, stated: “Of course Evans had the right to subpoena witnesses, including [the hearsay declarant] . . .” *Id.* at 88 n.19; Amar, *supra* note 76, at 693-94 (contending that “witnesses” within the meaning of the Confrontation Clause means in-court witnesses and “videotapes, transcripts, depositions, and affidavits when prepared for court use and introduced as testimony,” but B is not a witness when best-friend A recounts in court what B said out-of-court). Amar explains:

[T]he very existence of the Compulsory Process Clause . . . powerfully undercuts any possible fairness concern about our straightforward reading of ‘witness’ in the Confrontation Clause. If witness A testifies about what out-of-court friend B said, and the defendant wants to challenge B’s memory or truthfulness directly, face to face, the defendant can always use his own compulsory process right to subpoena B and interrogate him on the stand, for all to see.

Amar, *supra* note 76, at 696. Amar does not explain why if B is not a witness for confrontation purposes, the defendant has a Sixth Amendment right to produce this nonwitness.

110. 458 U.S. 858 (1982).

111. 353 U.S. 53 (1957).

112. *Roviaro*, 353 U.S. at 55-56.

113. *Id.* at 55. The Court stated:

The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of the citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Id. at 59.

114. *Id.* at 60-61.

115. *Id.* at 65.

116. *Valenzuela-Bernal*, 458 U.S. at 860.

117. *Id.* at 861.

claimed that the deportation of the two illegal immigrants denied the accused the chance to interview and call them as witnesses and, therefore, deprived him of his compulsory process rights.¹¹⁸ The Supreme Court, in an opinion by Justice Rehnquist, affirmed the conviction, concluding that under the presented circumstances,¹¹⁹ to establish a violation of the Compulsory Process Clause, the accused "must at least make some plausible showing of how [the deported persons'] testimony would have been both material and favorable to his defense."¹²⁰ In reaching this result, *Valenzuela-Bernal's* analysis accepted a much broader meaning for "witnesses" than the one selected by *Crawford*.

Justice Rehnquist stated that *Roviaro* was the "closest case in point"¹²¹ and quoted from it:

The *Roviaro* Court held that the informer's identity had to be disclosed, but only after it concluded that the informer's testimony would be highly relevant: "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that [the informer] denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure."¹²²

118. *Id.*

119. *Id.* at 859-60. *Valenzuela-Bernal* stressed that Congress had authorized prompt deportation in instances like the one before the Court and that control of immigration is a crucial component of sovereignty granted to the government's political branches:

The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government[, and] . . . Congress has determined that prompt deportation, such as occurred in this case, constitutes the most effective method for curbing the enormous flow of illegal aliens across our southern border.

Id. at 864. The Court limited its holding: "In adopting this standard, we express no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States." *Valenzuela-Bernal*, 458 U.S. at 873 n.9. The Court also concluded:

No onus, in the sense of 'hiding out' or 'concealing' witnesses, attached to the Government by reason of its discharge of the obligations imposed upon it by Congress; its exercise of these manifold responsibilities is not to be judged by the standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses.

Id. at 866.

120. *Id.* at 867. The Court concluded that the accused had failed to meet this burden and affirmed. *Id.* at 871. The Court indicated that under the circumstances this burden was not unfair and stated:

[I]t should be remembered that respondent was present throughout the commission of this crime. No one knows better than he what the deported witnesses actually said to him, or in his presence, that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years.

Id. (emphasis added).

121. *Valenzuela-Bernal*, 458 U.S. at 870.

122. *Id.* at 870-71 (quoting *Roviaro*, 353 U.S. at 64-65).

The Court in *Valenzuela-Bernal* relied on *Roviaro* for the proposition that an accused did not have an absolute right under compulsory process to have an informer's identity disclosed, and that the burden it imposed on the accused was not unfair.¹²³ Justice Rehnquist stated:

Roviaro supports the conclusion that 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.¹²⁴

In *Valenzuela-Bernal* and *Roviaro*, the Court did not use "witness" as *Crawford* had. Justice Rehnquist wrote about "events to which a witness might testify."¹²⁵ *Roviaro* referred to the informer as "the only witness in a position to amplify or contradict the testimony of government witnesses."¹²⁶ "Witness" in these uses does not make sense as one who gives testimony but only as one who has personally seen an event, as one who has personal knowledge of it.

Compulsory process, however, extends beyond even those broad definitions of "witnesses" to a guarantee that the accused has the right to produce and present relevant evidence.¹²⁷ This expansive reading of compulsory process goes at least as far back as Aaron Burr's treason trial in 1807, where Chief Justice Marshall presided.¹²⁸ Burr's main accuser was General James Wilkinson. President Thomas Jefferson had publicly referred to letters and documents Wilkinson had sent to him, and Burr sought these items to impeach Wilkinson's expected trial testimony.¹²⁹ Referring to the

123. *Valenzuela-Bernal* noted that *Roviaro* was not based on constitutional claims, but concluded that *Roviaro* "would not have been decided differently if those claims had actually been called to the Court's attention." *Id.* at 870. This phrasing is confusing. *Roviaro* reversed the conviction, and if the defendant had raised constitutional claims surely his conviction would not then have been affirmed. Presumably *Valenzuela-Bernal* was indicating that if only constitutional claims had been made in *Roviaro*, the Compulsory Process Clause would have compelled the result reached. *Roviaro*, after all, was seeking the identity of an informant not merely as an abstract exercise, but to exercise his compulsory process rights to call the informant as a witness at his trial. Without knowledge of that identity, he simply could not subpoena that witness. Certainly *Valenzuela-Bernal*, a compulsory process case, treated the earlier case as a compulsory process precedent by stating that *Roviaro* was the closest case in point and relying on it.

124. *Id.* at 871.

125. *Id.*

126. *Roviaro*, 353 U.S. at 64.

127. The Supreme Court has upheld the trial court denials of process for defense witnesses when the application came in the midst of trial and the witnesses were of little importance. See *Crumpton v. United States*, 138 U.S. 361, 364-65 (1891) (finding the trial court did not error in refusing defendant's application to subpoena witnesses as such a decision was a matter of discretion and unreviewable); see also *Issacs v. United States*, 159 U.S. 487, 489 (1895) (holding that trial court did not abuse discretion to refuse continuance to defendant to obtain witnesses when diligence to obtain the witnesses was not shown).

128. See *Valenzuela-Bernal*, 458 U.S. at 871 n.8 (noting that Chief Justice Marshall found it unreasonable to require that Burr explain the relevancy of a letter where he did not know the contents).

129. See Milton Hirsch, "The Voice of Adjuration": The Sixth Amendment Right to Compulsory Process Fifty Years after *United States ex rel. Touhy v. Ragen*, 30 FLA. ST. U. L. REV. 81, 86-88 (2002) (describing background of this dispute).

Compulsory Process Clause,¹³⁰ Chief Justice Marshall rejected the government's contention "that a general subpoena might issue to the president; but not a subpoena duces tecum"¹³¹ and granted the subpoena.¹³² *Burr* made clear that an accused's compulsory process right extends to documentary evidence in the possession of a person.¹³³

More recently, the Court has reaffirmed that the accused's right extends to "evidence." In *United States v. Nixon*,¹³⁴ the Court upheld a prosecutor's subpoena duces tecum to obtain tape recordings and documents from President Nixon.¹³⁵ In reaching that result, the Court, in an opinion by Chief Justice Burger, stressed the importance of compulsory process for the production of evidence.¹³⁶ *Nixon* stated:

We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. . . . To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

. . . .

The right to the production of all evidence at a criminal trial . . . has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." . . . It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.¹³⁷

As *Nixon* makes clear, our adversarial system depends on the ability of the accused to produce and present all relevant, admissible evidence, and the Compulsory Process Clause grants him that right. The Clause is not limited to the notion of "witnesses" that *Crawford* found in the Sixth Amendment, but includes those who have evidence or proof.

130. *United States v. Burr* (*Burr I*), 25 F. Cas. 30, 33 (C.C.D. Va. 1807).

131. *Id.* at 34.

132. *Id.* at 38. By the time of subsequent proceedings a few months later, the government had conceded the point. Marshall noted: "That the president of the United States may be subpoenaed, and examined as a witness, and required to produce any paper in his possession, is not controverted." *Burr II*, 25 F. Cas. at 191. See also *United States v. Cooper*, 25 F. Cas. 626, 626 (C.C.D. Pa. 1800) (concluding that an accused could subpoena members of Congress).

133. *Pennsylvania v. Ritchie*, 480 U.S. 39, 55 (1987). In *Ritchie*, the Court said:

This Court has had little occasion to discuss the contours of the Compulsory Process Clause. The first and most celebrated analysis came from a Virginia federal court in 1807, during the treason and misdemeanor trials of Aaron Burr. Chief Justice Marshall, who presided as trial judge, ruled that Burr's compulsory process rights entitled him to serve a subpoena on President Jefferson, requesting the production of allegedly incriminating evidence.

Id.

134. 418 U.S. 683 (1974).

135. *Nixon*, 418 U.S. at 702.

136. *Id.* at 709-12.

137. *Id.* at 709-11.

D. Interpreting "Witnesses" Consistently Throughout the Constitution

Crawford simply ignored that the Constitution employs much broader definitions for "witness" in the treason, self-incrimination, and compulsory process provisions than the definition it chose.¹³⁸ Interestingly, however, Justices Scalia and Thomas have suggested elsewhere that the meaning of "witness" in the Compulsory Process Clause should at least inform the meaning for self-incrimination. In *United States v. Hubbell*,¹³⁹ a Court decision interpreting the Fifth Amendment's Self-Incrimination Clause, Justice Thomas wrote a concurrence joined by Justice Scalia.¹⁴⁰ Justice Thomas concluded that the majority had correctly applied existing case law but suggested that Fifth Amendment doctrine may be too narrowly cast.¹⁴¹ Justice Thomas said that Court precedent "essentially defines 'witness' as a person who provides testimony," while to the Framers "'witness' meant a person who gives or furnishes evidence, a broader meaning than that which our case law currently ascribes to the term."¹⁴² This broader meaning, Justice Thomas indicated, does not require the making of a testimonial statement at all since "a person who responds to a subpoena *duces tecum* would be just as much a 'witness' as a person who responds to a subpoena *ad testificandum*."¹⁴³

Thomas turned to dictionaries. He wrote, "Dictionaries published around the time of the founding included definitions of the term 'witness' as a person who gives or furnishes evidence. Legal dictionaries of that period defined 'witness' as someone who 'gives evidence in a cause.'"¹⁴⁴ Justice Thomas also turned to Webster, but not to the definitions relied on in *Crawford*.¹⁴⁵ Without mentioning the narrow definition given by Webster, Justice Thomas concluded, "The term 'witness' apparently continued to have this meaning at least until the first edition of Noah Webster's dictionary, which defined it as 'that which furnishes evidence or proof.'"¹⁴⁶ And then to emphasize his point that a witness is not simply one who gives testimony, Justice Thomas, citing English cases, noted, "Further, it appears that the phrases 'gives evidence' and 'furnishes evidence' were not simply descriptions of the act of providing testimony."¹⁴⁷

Besides giving this textual explication, however, Justice Thomas's concurring opinion took an analytic step not found in *Crawford*; he referred to "witnesses" in the

138. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348 (2005) (noting that intra-textual consideration is a critical aspect of the textualist approach, and stating: "No 'textualist' favors isolating statutory language from its surrounding context . . .").

139. 530 U.S. 27 (2000).

140. *Hubbell*, 530 U.S. at 49 (Thomas, J., concurring).

141. *Id.*

142. *Id.* at 49-50.

143. *Id.* at 50.

144. *Id.* at 50 (citing 2 G. JACOB, A NEW LAW-DICTIONARY (8th ed. 1762); 2 T. CUNNINGHAM, NEW AND COMPLETE LAW-DICTIONARY 612 (2d ed. 1771); T. POTTS, A COMPENDIOUS LAW DICTIONARY 612 (1803); 6 G. JACOB, THE LAW-DICTIONARY 450 (T. Tomlins 1st American ed. 1811)).

145. See *supra* notes 23-52 and accompanying text for discussion of Webster's definition in *Crawford*.

146. *Hubbell*, 530 U.S. at 50 (Thomas, J., concurring).

147. *Id.* at 51 n.2.

Compulsory Process Clause. He noted that Chief Justice Marshall's opinion in *Burr* granted the accused the right to subpoena papers¹⁴⁸ and continued:

Although none of our opinions has focused upon the precise language or history of the Compulsory Process Clause, a narrow definition of the term "witness" as a person who testifies seems incompatible with *Burr*'s holding. And if the term "witnesses" in the Compulsory Process Clause has an encompassing meaning, this provides reason to believe that the term "witness" in the Self-Incrimination Clause has the same broad meaning. Yet this Court's recent Fifth Amendment act-of-production cases implicitly rest upon an assumption that this term has different meanings in adjoining provisions of the Bill of Rights.¹⁴⁹

But, of course, the same can be said even more strongly about *Crawford*, for it rests on the assumption that "witnesses" has different meanings in adjoining clauses of the same amendment, clauses that are conceptually linked.

III. "WITNESSES" IN THE STATE CONFRONTATION AND COMPULSORY PROCESS PROVISIONS BEFORE THE SIXTH AMENDMENT

One possible reason for assigning different meanings to the same term in the Confrontation and Compulsory Process Clauses, in spite of their proximity and common goal, is that the initial state guarantees of compulsory process granted broader rights than the language of the Sixth Amendment reflects. Thus, *Taylor v. Illinois*,¹⁵⁰ in rejecting that the Compulsory Process Clause was limited to granting subpoena powers, stated, "We have . . . consistently given the Clause the broader reading reflected in contemporaneous state constitutional provisions."¹⁵¹ The Court reflected that though "[p]articulars varied from state to state . . . the provisions reflected a common principle."¹⁵² Professor Janet Hoeffel has summarized these provisions:

The most popular language gave the defendant the right "to call for evidence in his favor." Other states endorsed similar language giving the defendant the right "to examine evidence on oath in his favor;" the right "to produce all proofs, that may be favorable to him;" the right "to have process for his witnesses; to examine the witnesses for and against him on oath;" or the right "to confront the accusers and witnesses with other testimony." Four states also separately provided for some version of the right of a defendant "to be heard (or 'fully heard in his defence') by himself and his council." Only one state, New Jersey, opted for language indicating that the

148. *Id.* at 55. See *supra* notes 131-33 and accompanying text explaining how Justice Marshall rejected the government's contention that a subpoena duces tecum cannot be issued to the President. Justice Thomas also noted, "This Court has subsequently expressed agreement with this view of the Sixth Amendment." *Id.* (citing *Nixon*, 418 U.S. at 711).

149. *Hubbell*, 530 U.S. at 55 (Thomas, J., concurring).

150. 484 U.S. 400 (1988).

151. *Taylor*, 484 U.S. at 407-08.

152. *Id.* at 408 n.13 (citing Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 94-95 (1974) [hereinafter, Westen, *The Compulsory Process Clause*]).

defendant's right was to be grounded in a notion of parity with the prosecution.¹⁵³

The Sixth Amendment language is narrower than these state provisions, but it is doubtful that the Compulsory Process Clause was meant to be more restrictive. James Madison, the drafter of the Confrontation Clause, was trying to build support for the Constitution. Peter Westen has noted, "Although it can be argued that he intended to confine the defendant to the right to compel his witnesses to attend trial, this narrow construction is inconsistent with Madison's goal of achieving consensus."¹⁵⁴ Though the proposed Confrontation Clause garnered almost no debate, and what Madison and the other Framers and ratifiers intended for it cannot really be known, Professor Hoeffel's comments seem as plausible as any interpretation:

In the absence of any sort of record as to the reasoning for the language of the Compulsory Process Clause, some principled speculation must suffice. Madison was from Virginia, whose state provision gave the accused the right to "call for evidence in his favour," much broader language than the Clause ultimately adopted. Indeed, the majority of states' provisions also followed this language and did not focus on the right to compel witnesses. Therefore, one interpretation is that, because no state objected to the language of the Clause, the language was intended and understood to encompass each state's concern: the right to call for evidence, the right to compel witnesses, and the right to parity with the government. Madison may have included the compulsion language to make it perfectly clear that part of calling witnesses in one's favor includes, by necessity, the right to have them compelled, especially since that was a right that was overlooked in common law England.¹⁵⁵

Thus, the state background to the Compulsory Process Clause supports the conclusion that "witnesses" for compulsory process purposes does not just mean one who gives testimony, but also "proof" or "evidence." Justice Thomas, concurring in *Hubbell*, pointed out this likelihood. He noted that James Madison, in drafting the Self-Incrimination Clause, "substituted the phrase 'to be a witness' for the proposed language 'to give evidence' and 'to furnish evidence.' But it seems likely that

153. Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1284-85 (2002) (citations omitted).

154. Westen, *The Compulsory Process Clause*, *supra* note 152, at 99.

155. Hoeffel, *supra* note 153, at 1286-87 (citations omitted). See also Westen, *The Compulsory Process Clause*, *supra* note 152, at 97-98 (arguing that "Madison's unique phrasing [for the Compulsory Process Clause] suggests that he wished to fashion a neutral version that would satisfy the various states without adopting the language of any existing statute or recommendation"). Cf. *Counselman v. Hitchcock*, 142 U.S. 547, 584-85 (1892) (describing the proper interpretive approach to the Self Incrimination Clause, in light of its aims). The Court in *Counselman* stated:

[T]he manifest purpose of the [Self-Incrimination Clause], both of the States and of the United States, is to prohibit the compelling of testimony of a self-incriminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation.

Id.

Madison's phrasing was synonymous with that of the proposals. The definitions of the word 'witness' . . . support this view."¹⁵⁶

Similar reasoning, however, can be applied to the Confrontation Clause. Every state that adopted a declaration or bill of rights prior to the Constitution included a confrontation clause, but the wording varied. While Maryland, followed by Pennsylvania and Vermont, adopted the language that later appeared in the Sixth Amendment, others granted an accused the right to be confronted with "accusers and witnesses."¹⁵⁷ New York, in ratifying the Constitution, passed a resolution that it would withdraw from the union if a bill of rights was not adopted, and suggested an amendment that said "that in all criminal prosecutions, the accused ought . . . to be confronted with his accusers and the witnesses against him."¹⁵⁸ Madison's original draft of what was to become the Sixth Amendment used this New York language.¹⁵⁹ The House of Representatives referred Madison's proposal as well as those from other states to a committee, which included Madison, consisting of one member from each state.¹⁶⁰ This committee proposed the language that would become the Confrontation Clause.¹⁶¹ What "accusers" then meant in the state provisions and proposals, or why the drafters dropped the word, cannot now be known.¹⁶² Since, however, Madison and the other Framers were "proposing amendments that had the broadest popular appeal,"¹⁶³ it is reasonable to conclude "that in dropping the phrase about 'his accusers' and limiting the witnesses to be confronted to those 'against him,' the committee thought it was capturing what was intended by 'accuser' and 'witnesses' rather than limiting the scope of the right of confrontation."¹⁶⁴

If "witness" in the Compulsory Process Clause encompasses "proof" or "evidence," then "witness" in the Confrontation Clause should encompass "accuser."

156. *Hubbell*, 530 U.S. at 53 (Thomas, J., concurring).

157. See 30 WRIGHT & GRAHAM, *supra* note 79, § 6346, at 580-611 (providing a history of the adoption of these state provisions).

158. *Id.* at 755.

159. *Id.* at 760-61.

160. *Id.* at 764.

161. *Id.*

162. WRIGHT & GRAHAM, *supra* note 79, § 6347, at 737 ("[I]t would be helpful to know what the word ['accusers'] means; however, the word is seldom used in the ratification debate or elsewhere.").

163. *Id.* at 767.

164. *Id.* at 764. However, in *Johnston v. State*, 10 Tenn. 58 (Tenn. 1821), the court concluded that the state's confrontation guarantee did not prohibit the introduction at trial of a deposition taken under oath in the presence of the accused where the declarant had died. *Id.* at 60. The court referred to a similar ruling from North Carolina and stated:

Our constitution is substantially the same, on the point on which this objection is founded, with the constitution of North Carolina. The expression in our constitution . . . is, "the accused has a right to meet the witnesses face to face." In the constitution of North Carolina, it is . . . "every man hath a right to confront the accusers and witnesses with other testimony." The expression in both means the same thing, and any implications that might be raised on the diction in the one case, with the same and equal propriety might be raised in the other.

Id. 59-60 (discussing *State v. Webb*, 1 Haywood 104 (N.C. 1794)). See also *State v. Houser*, 26 Mo. 431, 437 (Mo. 1858) ("The provision in our constitution now under consideration is also manifestly a copy, substantially, of the Virginia bill of rights, for it is not to be supposed that the substitution of the words 'face to face' for the word 'confronted' was designed to make any change in the meaning.").

As with "witness" itself, Webster's 1828 Dictionary offers a broad and narrow meaning for "accuser." Webster's definition: "One who accuses or blames; an officer who prefers an accusation against another for some offense, in the name of the government, before a tribunal that has cognizance of the offense."¹⁶⁵ Thus, an accuser can be a formal official or anyone who blames. It can be the one who formally brings a murder charge or one who simply states that the defendant killed. Indeed, one of Webster's synonyms for "accuser" gives an even broader meaning. He defined "denunciator" as: "An accuser; one who informs against another."¹⁶⁶ As with "witness," textual analysis alone does not compel a particular meaning for "accuser" in the confrontation context. A choice among possible meanings has to be made, and the text itself does not state which meaning to choose. This background certainly does not indicate that a narrow reading of "witnesses" is required. Instead, the history supports the contention that the Framers of the Confrontation Clause were broadly protecting an important right that encompassed all the concepts of confrontation that were emerging in the states.

IV. CRAWFORD'S DUBIOUS ASSUMPTION OF A MOST NATURAL READING OF THE CONFRONTATION CLAUSE

Crawford endorses a cramped reading of the confrontation right compared to the companion right of compulsory process, not because of text or history, but because of *Crawford*'s interpretive assumption that the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."¹⁶⁷ This assumption is dubious.

Nothing the Framers of the Sixth Amendment said supports *Crawford*'s interpretive assumption. The right of confrontation received little mention and no comment at all on how it should be interpreted. Justice Thomas, in a concurring opinion in which Justice Scalia joined, was correct when he stated, "There is virtually no evidence of what the drafters of the Confrontation Clause intended it to mean."¹⁶⁸

Crawford's assumption is not supported by other Sixth Amendment provisions, for that amendment, as a whole, did not constitutionalize common law rights.¹⁶⁹ Most

165. 1 NOAH WEBSTER, *An American Dictionary of the English Language*, *supra* note 24 (search "accuser").

166. *Id.* (search "denunciator").

167. *Crawford v. Washington*, 541 U.S. 36, 54 (2004). *But see* *Taylor v. Illinois*, 484 U.S. 400, 422 (1988) (Brennan, J., dissenting) (stating that he agreed with the majority's conclusion that the compulsory process right granted the accused the right to present evidence to a jury; however, he differed with the Court's statement that the plain language of that Clause supported the argument that the provision only granted a subpoena right). Justice Brennan continued, "This plain language supports the State's argument only if one assumes that the most natural reading of constitutional language is the least meaningful. For the right to subpoena defense witnesses would be a hollow protection indeed if the government could simply refuse to allow subpoenaed defense witnesses to testify." *Id.* at 422 (Brennan, J., dissenting).

168. *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring). *See also* *California v. Green*, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment."); Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 77 (1995) [hereinafter Jonakait, *Origins*] ("The origins of the Confrontation Clause are murky. Early American documents almost never mention the right, and the traditional sources for divining the Framers' intent yield almost no information about the Clause.").

169. *See infra* notes 170-73 and accompanying text.

notable is the right to counsel. English common law actually prohibited defense counsel in almost all felony prosecutions, but the Sixth Amendment guarantees an accused the right to counsel.¹⁷⁰ This portion of the Sixth Amendment was an explicit rejection of existing English common law. Similarly, the common law did not have a right of notice in most felony cases; the Sixth Amendment grants it.¹⁷¹ English common law also denied the accused compulsory process; the Sixth Amendment grants it.¹⁷² The Sixth Amendment, as a whole, did not simply adopt the common law, but in significant respects rejected it.¹⁷³ When viewing the Confrontation Clause in its context, there is little reason simply to assume that the right to confrontation constitutionalized the common law.

Not surprisingly, *Crawford* cited nothing contemporaneous with the adoption of the Bill of Rights to justify its position about the most natural reading of the Confrontation Clause. Instead its assertion was followed merely by references to the 1858 Missouri case, *State v. Houser*,¹⁷⁴ and to the 1895 Supreme Court case, *Mattox v. United States*.¹⁷⁵ Since this was the only support given for that crucial assumption, those two cases warrant a closer examination.

A. *State v. Houser*

At issue in *Houser* was Mary Henson's deposition from a preliminary examination before a committing magistrate.¹⁷⁶ Henson had disappeared by the time of trial.¹⁷⁷ The prosecution introduced her deposition into the trial, with the accused claiming that this evidence violated his confrontation rights under the Missouri Constitution.¹⁷⁸

Houser discussed the development of the constitutional right to confrontation, starting with Virginia's declaration of rights in June, 1776, and concluded that the early confrontation provisions, from which Missouri's was derived, were incorporating the common law.¹⁷⁹ *Houser* reasoned:

[I]t would hardly be expected that in the midst of a revolution . . . attempts would be made in a constitution or bill of rights to introduce new codes of procedure or new principles of evidence to govern the progress of ordinary trials in civil or criminal cases. Our forefathers were satisfied with the common law, so far as its great leading features were concerned; and they considered themselves as securing every thing that was important and valuable in relation to mere municipal rights of persons and property when

170. Jonakait, *Origins*, *supra* note 168, at 82.

171. *Id.* at 109. The Right of Notice Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. CONST. amend. VI.

172. *Id.*

173. See Jonakait, *Origins*, *supra* note 168, at 108-22, for a more complete discussion of the Sixth Amendment's rejection of common law.

174. 26 Mo. 431 (Mo. 1858).

175. 156 U.S. 237 (1895).

176. *Houser*, 26 Mo. at 433.

177. *Id.* at 431.

178. *Id.* at 432.

179. *Id.* at 437.

they solemnly and repeatedly adopted it and declared it to be their birth-right.¹⁸⁰

Houser provided no insight into what the Framers intended for the right of confrontation other than this logic, and such logic bears scrutiny. The Constitution was not adopted in the midst of the Revolution but nearly a generation later and after much had been learned and experienced about governments and rights. Independence had been secured, and the Bill of Rights was not directly concerned with British depredations but with limiting new federal powers. *Houser* did not explain why confrontation just constitutionalized English common law when other Sixth Amendment rights rejected the common law, and the Missouri court's mere assertion that it did should hardly be considered weighty authority.¹⁸¹

Houser further explained that testimony at preliminary examinations could be admitted consistently with the right of confrontation, noting that "no case is to be found in England in which the deposition of a witness, taken in the presence of the accused, has been excluded where the witness has died since the examination."¹⁸² The court's statements about the right of confrontation, however, were dicta, for the court reversed the conviction, holding that the deposition evidence should not have been admitted because the declarant was not shown to be dead.¹⁸³ The Missouri court stated, "[I]n England no authority is to be found, so far as this examination has discovered, where, in a criminal case, a deposition . . . was admitted merely because the witness was beyond seas or out of the reach of process of the court. . . . In this country the decisions have been the same way."¹⁸⁴

Thus, *Houser* concluded that the right to confrontation constitutionalized English common law, that testimony from a preliminary hearing could be admitted without violating confrontation rights, and that the common law only allowed such prior testimonial statements if the declarant were dead.¹⁸⁵ Of course, if *Houser* is to be taken

180. *Id.* at 435.

181. *Houser* concluded that Virginia's confrontation protection, from which Missouri fashioned its own provision, incorporated the common law of 1776. *Houser*, 26 Mo. at 435. *Houser* further stated:

This common law they did not understand as the common law under the Plantagenets or Tudors or Stuarts, but as it was understood *at that day*, both in England and this country, when the revolution of 1688 and the subsequent parliamentary and judicial constructions had restored it to its primitive purity, and abolished its occasional abuses in bad times and under corrupt administrations.

Id. *Crawford*, however, relied on English cases from as late as 1791. See *Crawford*, 541 U.S. at 46 ("Nevertheless, by 1791 (the year the Sixth Amendment was ratified), courts were applying the cross-examination rule even to examinations by justices of the peace in felony cases.") Inter alia, *Crawford* relied on *King v. Dingle*, (1791) 168 Eng. Rep. 383, 383-384 (P.C.), which barred the reading of testimony from a prior transcript because the defendant did not have an opportunity to cross-examine. But see *Davies*, *supra* note 14, at 153 (concluding that the 1787, 1789, and 1791 English cases cited by *Crawford* "were published too late to have informed the Framers' thinking").

182. *Houser*, 26 Mo. at 435-36. *Houser* also concluded "*none is to be found in this country.*" *Id.* at 436.

183. *Id.* at 440-41.

184. *Id.* at 439-40.

185. See, e.g., *People v. Newman*, 5 Hill 295, 296 (N.Y. Sup. Ct. 1843) (holding that it was error to admit former testimony of declarant who had left the state). The court stated, "It seems to be settled in this court, that nothing short of the witness' death can be received to let in his testimony given on a former trial." *Id.* at 296; see also *State v. Thomas*, 64 N.C. 74, 74 (1870). In this perjury trial to show that the accused received certain cotton, books of a railroad company were admitted in evidence. *Id.* The notations were

seriously in its conclusion that the confrontation right constitutionalized eighteenth century English evidentiary practices, then confrontation works a major change in modern conceptions of admissible hearsay since only the death of the declarant, and not other grounds of unavailability permitted under modern evidence law, would permit the introduction of prior testimonial statements against the accused.¹⁸⁶

B. *Mattox v. United States*

Crawford referred to the portion of *Mattox* that asserted, "The primary object of [the Confrontation Clause] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . ."¹⁸⁷ The *Mattox* Court also stated:

We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Charta.¹⁸⁸

The Court continued that the general rule had exceptions and "[s]uch exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."¹⁸⁹ The Court noted that dying declarations were an accepted exception to the confrontation right and held that the admission of former testimony from the defendant's previous trial on the same matter did not violate the Confrontation Clause.¹⁹⁰

Mattox does support *Crawford*, but how much credence should be given to *Mattox*'s conclusions? *Mattox* was written more than a century after ratification of the Sixth Amendment, and that Court did not have more knowledge of the Framers' intent than we do today. The Court presented its assertions as merely self-evident propositions. It gave its conclusions about the primary object and the proper interpretation of the Confrontation Clause without supporting references.¹⁹¹ While

written by a person who was not dead but had moved to Missouri. *Id.* The court found that the introduction of the books violated the defendant's right under the state's constitutional guarantee of confrontation. *Id.* at 76-77. The court noted that dying declarations were an exception to that right of confrontation in homicide cases because of the maxim, "no man shall take advantage of his own wrong." *Id.* at 76. The court also noted former testimony could be admitted consistently with the confrontation right when the declarant was dead. *Thomas*, 64 N.C. at 76. The court continued, however, that those exceptions to the right of confrontation did not justify the admission of the books: "We are satisfied that the entries were not admissible, on proof of [the declarant's] absence from the State." *Id.* at 77.

186. See FED. R. EVID. 804(a) (listing various grounds of unavailability in addition to the death of the declarant).

187. *Mattox*, 156 U.S. at 242.

188. *Id.* at 243.

189. *Id.*

190. *Id.* at 243-44.

191. See *id.* at 242-43 (citing no authority for bald statements of Confrontation Clause's asserted purpose or proper interpretation).

Mattox does indicate that a Court a century after the Constitution's formation had similar views to *Crawford* as to the meaning of the confrontation right, it does not shed light on the Clause's original meaning or its text.

Furthermore, *Mattox*'s other holding has now been rejected. The accused had sought to impeach one of the former-testimony declarants by presenting witnesses to show that after testifying, the declarant had made statements repudiating his inculpatory testimony.¹⁹² The Court noted the evidentiary rule "that, before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him upon the stand, a foundation must be laid by interrogating the witness himself as to whether he has ever made such statements."¹⁹³ The defendant could not do this since the declarant made the inconsistent assertions after the first trial, and the declarant was dead by the second.¹⁹⁴ The Court stated that while enforcing the evidentiary rule when the declarant is dead

may work an occasional hardship by depriving the party of the opportunity of proving the contradictory statements, a relaxation of the rule in such cases would offer a temptation to perjury, and the fabrication of testimony, which, in criminal cases especially, would be almost irresistible. . . . The fact that one party has lost the power of contradicting his adversary's witness is really no greater hardship to him than the fact that his adversary has lost the opportunity of recalling his witness and explaining his testimony There is quite as much danger of doing injustice to one party by admitting such testimony as to the other by excluding it.¹⁹⁵

Given the possibility of injustice being inflicted upon the prosecution or the accused, the accused here had to bear the unfairness and could not introduce the impeaching evidence. This branch of *Mattox* has not stood the test of time. Indeed, today the exclusion of the inconsistent statements would probably violate the accused's compulsory process rights as *Washington v. Texas*¹⁹⁶ indicates.

Washington held that Texas statutes prohibiting an accused from presenting the testimony of persons charged or convicted as coparticipants in the same crime for which the accused is being tried violated the Compulsory Process Clause.¹⁹⁷ The trial court did not allow *Washington* to present the testimony of Charles Fuller, who apparently would have given exculpatory testimony, because of Fuller's prior conviction for his role in the murder.¹⁹⁸ The rationale for this evidentiary prohibition was basically the same one presented in *Mattox* to prohibit the impeachment, that is, to reduce the temptation of perjured testimony.¹⁹⁹ *Washington* noted that the rule before it "rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even

192. *Mattox*, 156 U.S. at 244-45.

193. *Id.* at 245.

194. *Id.* at 244-45.

195. *Id.* at 250.

196. 388 U.S. 14 (1967).

197. *Washington*, 388 U.S. at 23.

198. *Id.* at 16-17.

199. *Id.* at 20-21.

if it were the only testimony available on a crucial issue."²⁰⁰ *Washington*, however, found Texas's categorical exclusion of evidence to be arbitrary and in violation of the right of compulsory process because the jury could have properly evaluated the testimony.²⁰¹ If the exclusion of the impeaching evidence offered in *Mattox* were challenged today, it, too, should be found to violate the Compulsory Process Clause as an arbitrary, categorical exclusion of defense evidence. Just as a jury can understand the bias of a co-defendant testifying for the accused,²⁰² jurors can understand the dangers of a claimed inconsistent statement from an absent declarant.

The Court has not had to grapple with the constitutionality of this impeachment issue because modern evidence law admits such evidence, a course the Supreme Court charted less than two years after *Mattox*. In *Carver v. United States*,²⁰³ the trial court admitted dying declarations against the accused, but prevented the accused from proving that the declarant made statements inconsistent with the admitted evidence.²⁰⁴ The Court stated, "Whether these statements were admissible as dying declarations or not is immaterial, since we think they were admissible as tending to impeach the declaration of the deceased . . ."²⁰⁵ *Carver* acknowledged that a party normally must lay a foundation for the introduction of prior inconsistent statements and that *Mattox* had enforced that rule.²⁰⁶ The Court, however, concluded:

We are not inclined to extend [*Mattox*] to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness, or actual hostility felt toward him, the deceased may have been mistaken. . . .

. . . .

As these [dying] declarations are necessarily *ex parte*, we think the defendant is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination.²⁰⁷

200. *Id.* at 21.

201. See *infra* notes 227-44 and accompanying text for a further discussion of *Washington*.

202. *Id.*

203. 164 U.S. 694 (1897).

204. *Carver*, 164 U.S. at 696-97.

205. *Id.* at 697.

206. *Id.* at 698.

207. *Id.* at 698. Although it did not overrule *Mattox*, *Carver*'s logic undercut it; *Carver* concluded that *Mattox* rested "upon the ground that the witness had once been examined and cross-examined upon a former trial." *Id.* at 698. But in concluding that *Carver*'s impeaching evidence should have been admitted to help make up for the lost cross-examination, doubt was cast on *Mattox*'s rationale. *Carver*, 164 U.S. at 698. The impeaching statements *Mattox* offered came after his opportunity to cross-examine the declarant. *Mattox*, 156 U.S. at 240. Without the introduction of the impeaching statements, *Mattox* lost the opportunity to present an important part of his defense, just as *Carver* did. Cf. FED. R. EVID. 806 advisory committee's note:

The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a *subsequent* one. True, the declarant is not totally deprived of cross-examination when the hearsay is former testimony or a deposition, but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shira, with two justices joining him, dissented vigorously in *Mattox*.

Evidence law has followed *Carver* and permits impeachment of hearsay declarants,²⁰⁸ and thus, the issue of whether the exclusion of such impeaching evidence violates the Compulsory Process Clause does not arise.

Evolving evidence law has rejected one of *Mattox*'s holdings, and that holding is probably unconstitutional today. Of course, this does not mean that its other holding was wrong, but since those conclusions about the Confrontation Clause were presented without analysis or foundation, it is not clear why *Mattox* should be given weight today. Instead, just as its impeachment portion can be seen as a relic of its time, so, too, can its constitutional analysis, a position buttressed by examining another Sixth Amendment interpretation from that era.

C. *Jury Size and the Common Law*

Three years after *Mattox*, the Supreme Court held that the Constitution required a twelve-person jury. In *Thompson v. Utah*,²⁰⁹ a jury of twelve in the Utah territory convicted the defendant for calf-rustling, but he won a new trial.²¹⁰ Utah gained statehood, and Thompson was retried in the state court by a jury of eight as provided for by Utah law.²¹¹ The Supreme Court concluded that the Sixth Amendment right to a jury trial applied in the territorial courts and that, whatever the normal powers of the state, any trial for a crime committed before statehood had to provide a jury consistent with the Federal Constitution.²¹² The Court then said that at the adoption of the Bill of Rights, the common law required twelve jurors, and therefore the Sixth Amendment required a jury of the same size:

[T]he next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. This question must be answered in the affirmative. . . . [T]he word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; . . . the supreme law of the land required that [Thompson] should be tried by a jury composed of not less than twelve persons

....

208. See, e.g., FED. R. EVID. 806 (permitting the impeachment of hearsay declarants). This Rule specifically rejects the ruling in *Mattox* by saying, "Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain." FED. R. EVID. 806. The advisory committee note to this Rule states: "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified." FED. R. EVID. 806 advisory committee's note. Cf. John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 261 (1999) ("The process outlined in Rule 806 is more than a rule of evidence; the process is an essential component of the defendant's Sixth Amendment right to confront hearsay.").

209. 170 U.S. 343 (1898), overruled by *Collins v. Youngblood*, 497 U.S. 37 (1990).

210. *Thompson*, 170 U.S. at 344.

211. *Id.*

212. *Id.* at 350-51.

. . . [T]he wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would be not adequately secured except through the unanimous verdict of twelve jurors.²¹³

When, however, in 1970 the Supreme Court revisited the issue of the number of jurors the Sixth Amendment required, it took a different view of the Framers' intent. *Williams v. Florida*²¹⁴ concluded that the common law at the time of the Constitution's adoption mandated twelve-person juries, but it rejected the "easy assumption" that the Sixth Amendment constitutionalized that common-law requirement: "While 'the intent of the Framers' is often an elusive quarry, the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."²¹⁵ Doubt is cast on that assumption partly because "contemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect."²¹⁶ This is illustrated by "the Seventh Amendment, providing for jury trial in civil cases, [which] explicitly added that 'no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.'"²¹⁷ *Williams* then came to what would seem to be the obvious and commonsensical conclusion—we cannot really know today what the Framers specifically intended in adopting the Sixth Amendment provision:

We do not pretend to be able to divine precisely what the word "jury" imported to the Framers, the First Congress, or the States in 1789. It may well be that the usual expectation was that the jury would consist of 12, and that hence, the most likely conclusion to be drawn is simply that little thought was actually given to the specific question we face today. But there is absolutely no indication in "the intent of the Framers" of an explicit decision to equate the constitutional and common-law characteristics of the jury.²¹⁸

Since the Framers' intent concerning jury size was unknowable, the Court concluded that a functional approach to the provision was the correct one and that "[t]he relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial."²¹⁹

Williams raises a major question about the easy assumptions of *Crawford* and its interpretive approach. The Court held that even though the common law clearly required twelve-person juries and many of the Framers might have assumed that the requirement would continue on, it could not be known that the Framers and adopters of

213. *Id.* at 349-53 (citations omitted).

214. 399 U.S. 78 (1970).

215. *Williams*, 399 U.S. at 92-93.

216. *Id.* at 97.

217. *Id.*; cf. Kirt, *supra* note 14, at 84 ("The Sixth Amendment's contrast with the Seventh Amendment is evidence that the Framers did not use language clearly intended to preserve the right of confrontation as it then existed in English common law.").

218. *Williams*, 399 U.S. at 98-99.

219. *Id.* at 99-100.

the Bill of Rights specifically intended to constitutionalize that specific jury feature.²²⁰ If that cannot be known, how can there be such certitude that the Sixth Amendment constitutionalized the much more vague common law right of confrontation, if such a right did exist?²²¹ Of course, *Crawford* pointed to nothing from the Framers that stated they intended to constitutionalize a common-law right of confrontation. *Crawford* merely asserted that the Confrontation Clause should be "most naturally read" that way.²²² However, *Williams*, in acknowledging that the Framers' specific intent cannot now be specifically divined,²²³ took another interpretive course to effectuate the Framers' broader intentions. In *Williams*, the Court looked to the Framers' goal in constitutionalizing a right to a jury trial and then asked whether today twelve jurors were necessary to further the underlying reasons for the jury trial right.²²⁴ *Crawford*, of course, not only failed to adopt this interpretive approach, it gave no explanation for why it should be rejected. It simply ignored the rest of the Sixth Amendment and interpreted confrontation as if it stood alone.²²⁵ While one could perhaps devise reasons that would explain why confrontation should be interpreted differently from the jury trial provision, such explanations are harder to fathom for different interpretive standards for the conceptual twins of confrontation and compulsory process. And the Court in interpreting the Compulsory Process Clause has clearly and consistently rejected the approach expressed in *Crawford* and used standards much like those used elsewhere in the Sixth Amendment.²²⁶

V. THE INTERPRETATIVE STANDARD FOR COMPULSORY PROCESS

As discussed above, *Washington v. Texas*²²⁷ found that a rule prohibiting co-defendants from testifying for the accused violated the Sixth Amendment right to

220. *Id.* at 102-03.

221. Jonakait, *supra* note 14, at 227 ("Justice Scalia's research into English practices shows that English courts argued over whether certain pieces of evidence could be admitted into criminal trials without cross-examination, but he presents no information that some broader principle of 'confrontation' controlled these decisions. A mind not already committed to finding a common-law right of confrontation might simply have concluded that the English cases were only concerned with the admissibility of one kind of evidence, not a general right. Today, for example, we can find many decisions about subsequent remedial measures. When we read these cases, we don't find some general 'right' but simply conclude that a certain kind of evidence is inadmissible. Justice Scalia, however, has assumed that the Confrontation Clause was incorporating a common-law right of confrontation; therefore, there has to be an English common-law right of confrontation to be discovered. The cited English cases are assumed to be the most relevant ones for determining that English right, and then a right of confrontation is found in them. Without those assumptions, that right is not apparent. If that English history is examined without a particular kind of American hindsight bias, it simply is not clear that English common law at the time of our Bill of Rights's adoption actually had a right of confrontation." (internal footnotes omitted)).

222. *Crawford*, 541 U.S. at 54.

223. *Williams*, 399 U.S. at 98.

224. *Id.* at 99-100.

225. See *supra* notes 167-75 and accompanying text for discussion of *Crawford*'s departure from interpretation of Sixth Amendment provisions other than confrontation as in derogation of the common law at framing.

226. See *supra* notes 95-103 and accompanying text for a discussion of the Compulsory Process Clause interpretation and the need for the Confrontation Clause to be construed consistently.

227. 388 U.S. 14 (1967).

compulsory process.²²⁸ The Court's interpretation of the Compulsory Process Clause not only employed a broad definition for "witnesses," it employed an interpretive approach that cannot be reconciled with *Crawford's*.²²⁹

Washington concluded that the right to compulsory process guaranteed the accused not only process for production of witnesses, but also a right to present their testimony:

We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.²³⁰

Of course, here again witnesses are not merely those who give testimony but those who have personal knowledge about events that shed light on the defendant's guilt. *Washington*, however, did not just employ a different definition of witness than *Crawford* selected; it applied a conceptually different method of interpretation.

Washington explicitly found that compulsory process was not limited to the common law rights at the time of the Sixth Amendment's adoption.²³¹ Indeed, it is quite clear that compulsory process in the framing era did not give an accused the right to present testimony from co-defendants.²³² *Washington* noted that the common law at the time of the Constitution's drafting prohibited testimony from certain people and that "[d]efendants and codefendants were among the large class of witness disqualified from testifying on the ground of interest."²³³

In the mid-nineteenth century, the Supreme Court upheld this ban on co-defendant testimony in the face of a compulsory process claim. *United States v. Reid*²³⁴ recognized that the compulsory process guarantee granted criminal defendants the right to produce witnesses, but the Court also concluded that the Sixth Amendment accepted the rules of evidence in force in the states when the Constitution was adopted.²³⁵ Since

228. *Washington*, 388 U.S. at 23; see *supra* text accompanying note 197 (stating that *Washington v. Texas* invalidated Texas statutes prohibiting one co-defendant from testifying on behalf of another).

229. 541 U.S. 36 (2004).

230. *Washington*, 388 U.S. at 23.

231. *Id.* at 18-20.

232. *Id.* at 20.

233. *Id.* at 20-21.

234. 53 U.S. 361 (1851).

235. *Reid*, 53 U.S. at 364-65. Justice Taney, writing for the Court, noted that early Americans had partially adopted and partially rejected the English common law form of trials. *Id.* at 364. Trial by jury had been protected in all the colonies, but English common law undercut this right by denying the accused compulsory process. *Id.* Although English statutes had modified some of the more oppressive trial restrictions,

the thirteen Colonies who united in the declaration of independence, as soon as they became states, placed in their respective constitutions or fundamental laws, safeguards against the restoration of proceedings which were so oppressive and odious while they remained in force. It was the people of these thirteen states which formed the Constitution of the United States, and ingrafted on it the

a criminal defendant then could not present evidence from one indicted with the defendant, the accused did not have a right under the Compulsory Process Clause to have a co-defendant testify for him.²³⁶

The Court in 1918, however, effectively overruled *Reid*. In *Rosen v. United States*,²³⁷ the Court noted that courts and legislatures had increasingly removed the rules prohibiting classes of witnesses from testifying.²³⁸ The Court further stated,

[This change is due to the] conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent

. . . .

. . . [W]e conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here"²³⁹

Washington stated that while *Rosen* was not decided on constitutional grounds, "[I]ts reasoning was required by the Sixth Amendment."²⁴⁰ The Compulsory Process Clause is not ruled by the moribund grasp of eighteenth century common law. Instead, the Court concluded that the Framers' purpose for compulsory process should control modern interpretation.²⁴¹ *Washington* noted that their goal was to have confrontation

provision which secures the trial by jury, and abolishes the old common-law proceeding which had so often been used for the purposes of oppression.

Id. Thus, in Justice Taney's view, while the Sixth Amendment did adopt the jury trial provision from England, it did not adopt the English method of conducting such trials. *Id.* The source for the procedure at trial "could not be the common law as it existed at the time of the emigration of the colonists, for the constitution had carefully abrogated one of its most important provisions in relation to testimony which the accused might offer." *Reid*, 53 U.S. at 365. Justice Taney concluded that the true source of the Sixth Amendment is found in state law: "[T]he only known rule upon the subject which can be supposed to have been in the minds of the men who framed these acts of Congress, was that which was then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts." *Id.* at 265.

If the notice, right to counsel, and compulsory provisions of the Sixth Amendment were not adopting the English common law, as Justice Taney's opinion suggests, but adopting procedures that the states were already using when the Bill of Rights was framed, the same might be true for the right of confrontation. *Id.* at 364. Interestingly, while *Crawford* referred to the 1858 Missouri case of *State v. Houser*, 26 Mo. 431 (1858), to support the proposition that the confrontation clause is most naturally read as incorporating the common law, it did not refer to *Reid*, its own case from 1851, which, of course, suggests that *Crawford's* reading is not the most natural one for the Sixth Amendment.

236. *Reid*, 53 U.S. at 365-66.

237. 245 U.S. 467 (1918).

238. *Id.* at 471-72.

239. *Rosen*, 245 U.S. at 471-72.

240. *Washington*, 388 U.S. at 19. The Court in *Washington* continued:

In light of the common-law history, and in view of the recognition in the *Reid* case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

Id.

241. *Id.* at 22-23.

and compulsory process work together to allow the accused to present a defense that the jury could judge.²⁴² *Washington* stated:

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. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.²⁴³

Under compulsory process, whether a constitutional violation has occurred is not measured by ancient rules and practices, but instead by a modern understanding of what it means to present a defense in our adversarial system.²⁴⁴

For example, it is clear that at common law an accused could not testify in his defense.²⁴⁵ Even though the common law forbade such testimony, the Compulsory Process Clause, as *Rock v. Arkansas*²⁴⁶ concluded, now grants an accused the right to testify.²⁴⁷ The accused has a modern right to testify because confrontation and compulsory process together assure that an accused has the opportunity to be heard in his own defense, and today an accused's right to testify is necessary to satisfy that constitutional purpose.²⁴⁸ Compulsory process is not limited to the rights an accused

242. *Id.* at 22.

243. *Id.* at 19; see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) ("Our cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." (footnote omitted)); Richard A. Nagareda, *Reconceiving the Right to Present Witnesses*, 97 MICH. L. REV. 1063, 1074 (1999) ("On its face, the Compulsory Process Clause does not speak specifically to the admissibility of witness testimony. But both the Supreme Court and modern commentators have correctly understood the Clause to bear upon questions of admissibility as well as the bringing of witnesses into court under the compulsion of law.").

244. See *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988), stating:

[Compulsory process] is an essential attribute of the adversary system itself The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not described in so many words.

See also Hoeftel, *supra* note 153, at 1277 ("The history of the Compulsory Process Clause . . . demonstrates that the purpose of the Clause was to allow for introduction of evidence by the accused through the adversarial process.").

245. Maine was the first of the states to abolish this common law prohibition but not until 1859, and the federal government did not permit such testimony until 1878. See *Ferguson v. Georgia*, 365 U.S. 570, 577 (1961) ("The first statute was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes. . . . A federal statute to the same effect was adopted in 1878.").

246. 483 U.S. 44 (1987).

247. See *Rock*, 483 U.S. at 52 ("[The] Compulsory Process Clause . . . grants a defendant the right to call 'witnesses in his favor' Logically included in the accused's right . . . is a right to testify himself").

248. Cf. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees 'a meaningful opportunity to present a complete defense.'" (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984) (additional internal citations omitted))).

had in 1789, but rather is controlled by the original goals and purposes for the constitutional right, viewed with modern knowledge and experience.

VI. ORIGINALISM, TEXTUALISM, AND PRINCIPLED INTERPRETATION OF CONFRONTATION AND COMPULSORY PROCESS

Confrontation and compulsory process are conceptual twins, each dealing with an accused's trial relationship with witnesses, but *Crawford*²⁴⁹ has now adopted a much different mode of interpretation for the Confrontation Clause from its companion. This is not because *Crawford's* approach is a highly principled textualist and originalist approach while the other approach is not.

As we have seen, the Confrontation Clause's text can explicate *Crawford's* definition of "witnesses" as those who give testimony, but no textual analysis can lead to the conclusion that "testimonial statements," a term that does not appear in the Sixth Amendment, is limited to the equivalent of ex parte affidavits and depositions.²⁵⁰ One has to go outside the Framers' words to reach that result. Moreover, the text supports not just *Crawford's* derivation of the term "witnesses," but also a much broader meaning that comports with all the other uses of that term in the Constitution.

Crawford seems to take an originalist approach in concluding that the common law of 1789 controls the right of confrontation, but this, too, is misleading. The contention that this is the most natural reading of the Clause is merely an unsupported assertion.²⁵¹ The Framers' intentions for the confrontation provision were not stated and are simply unknowable. Justice Scalia's conclusion simply ignored confrontation's Sixth Amendment context, for other Sixth Amendment provisions not only failed to adopt the existing common law, but in crucial ways rejected it.²⁵²

Some broader ramifications of *Crawford* should also be considered. If the same standards should govern the conceptually linked compulsory process and confrontation rights, then *Crawford's* interpretive approach to confrontation indicates that the Court's standards for compulsory process are wrong. If *Crawford's* natural reading is correct, then an accused today should not have a constitutional right under compulsory process to be able to testify or to present evidence from those charged with him.

The consequences, however, could go further. Compulsory process and confrontation are linked together, but they are also linked to the notice and right to counsel provisions, all of which cumulatively guarantee the accused the right to present a defense in our adversarial system.²⁵³ Of course, casting doubt on *Crawford's* approach, the right to counsel provision cannot be most naturally read as granting the

249. 541 U.S. 36 (2004).

250. See *supra* Part II for a discussion of "witnesses" in the Constitution.

251. See *supra* notes 167-75 and accompanying text for a discussion of the conclusory, unsupported nature of the ostensibly natural reading.

252. See *supra* notes 234-36 and accompanying text for a discussion of the historical reasoning of *Reid* as to the Sixth Amendment's rejection of common law.

253. See *supra* notes 240-44 and accompanying text for a discussion of the joint purposes of the Compulsory Process and Confrontation Clauses.

accused the common law rights of 1789' because that law did not grant that right to counsel.²⁵⁴

Still, however, *Crawford's* approach suggests that the right to counsel should be limited to the constitutional protection as it existed in 1789. In essence, this is how the Supreme Court once interpreted the right. *Betts v. Brady*²⁵⁵ held that the indigent accused was not entitled to appointed counsel, stressing that "[at the time of the founding] the matter of appointment of counsel for defendants, if dealt with at all, was dealt with by statute rather than by constitutional provision."²⁵⁶ *Gideon v. Wainwright*,²⁵⁷ of course, rejected *Betts*.²⁵⁸ *Gideon* acknowledged the historical data collected in the earlier case, but in *Gideon's* view:

Betts v. Brady made an abrupt break with [the Court's] own well-considered precedents. . . . Not only [those] precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.²⁵⁹

Thus, the dead hand of 1789 does not control the right to counsel. The goal of a fair trial in our adversary system is viewed with modern reason and reflection. *Crawford*, of course, suggests that *Gideon's* interpretive approach and outcome is wrong as it no doubt suggests the same for many other present Sixth Amendment doctrines meant to further the accused's right to present a defense in our adversary system.²⁶⁰

On the other hand, the Court's approach to compulsory process, as well as to other Sixth Amendment provisions, is not only a principled method of interpretation, it may well capture the original intent for how the right should be interpreted.²⁶¹ As Peter Westen explains, *Washington's* interpretive method for compulsory process "is neither unprincipled nor unsound."²⁶² The rules regarding the competency of witnesses were changing in the eighteenth century, and Westen concludes:

254. See *supra* notes 170-71 and accompanying text, noting that Sixth Amendment guarantee of the right to counsel was in derogation of the common law in 1789.

255. 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

256. *Betts*, 316 U.S. at 467.

257. 372 U.S. 335 (1963).

258. *Id.* at 339.

259. *Id.* at 344.

260. For example, the present right to the effective assistance of counsel is based not on eighteenth century history but on modern notions of the right to a defense in our adversary system. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

261. *United States v. Scheffer*, 523 U.S. 303 (1998), found that an evidence rule prohibiting the introduction of polygraph evidence did not violate the Compulsory Process Clause and accepted the modern interpretive approach to compulsory process by stating that categorical exclusionary "rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.* at 308 (quoting *Rock v. Arkansas*, 483 U.S. 44, 56 (1987)). *Scheffer* concluded that because there is no modern consensus about the reliability of polygraph evidence, a rule prohibiting such evidence is not arbitrary. *Id.* at 310.

262. Westen, *supra* note 152, at 114.

There is no reason to believe that the framers intended to freeze the defendant's constitutional rights forever in the form of rules already undergoing change. It is perfectly sound to conclude that they intended instead to protect the main and evolving principles of the common law without their accompanying minutiae, and to leave to future courts the task of applying those principles in specific cases.²⁶³

Confrontation presents a similar situation. Certainly the practices regarding hearsay were evolving in England, especially at the time our Constitution was adopted. T.P. Gallanis's survey of evidence treatises, case law, and newly available pamphlet accounts of civil and criminal trials concludes that while the law of hearsay in England showed little development between 1754 and 1780, "the 1780s were a period of considerable activity, and . . . by 1800 much of the modern approach to hearsay was already in place."²⁶⁴ He suggests that the impetus for the development of modern notions of hearsay was increasingly aggressive lawyering in criminal cases and concludes, "Only in the late eighteenth century, when a new spirit of adversarialism appeared in criminal and then civil trials, did those rules and their consistent application begin to mature."²⁶⁵

Others also have come to the conclusion that the hearsay rules developed in England as criminal defense attorneys, although prevented from providing full representation in most criminal trials, were increasingly allowed to cross-examine witnesses.²⁶⁶ Such research suggests that the expansion of the hearsay rule occurred as a means of empowering defense attorneys:

As effective use of cross-examination increased, its power became apparent to both judges and lawyers. Counsel naturally sought to protect and expand cross-examination opportunities. They protested denials of cross-examination and objected more to hearsay. . . . The hearsay rule . . . acted as a grant of power to defense advocates.²⁶⁷

The English hearsay rule seems to have developed as trials became more adversarial at the end of the nineteenth century.²⁶⁸ If the development of the adversary system brought about a similar evolution in evidentiary practices in America, notions

263. *Id.* at 114-15.

264. T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 551 (1999).

265. *Id.* at 551-52.

266. See, e.g., Stephen A. Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 534-36 (1990) (tracing the development of cross-examination from inception in 1717 through significant expansion during 1730s).

267. Jonakait, *Origins*, *supra* note 168, at 91.

268. See, e.g., Edmund M. Morgan, *The Hearsay Rule*, 12 WASH. L. REV. 1, 2-5 (1937) (tracing development to demonstrate hearsay rule was a product of adversary system). Cf. 30 WRIGHT & GRAHAM, *supra* notes 79, § 6346, at 564:

[A]t the time of the American revolution, the relationship between confrontation, cross-examination, and the hearsay rule was indistinct to the point of invisibility in the minds of Americans These two evidentiary doctrines were themselves in a highly inchoate state, probably because while they grew out of some of the same intellectual roots as confrontation, they are far more sophisticated applications of those ideas and one would hardly expect to find them developing ahead of the far more rudimentary concept of confrontation. Indeed, if forced to simplify, we would say that the truth is probably . . . [that] the hearsay rule and the right to cross-examine witness were themselves products of the right of confrontation rather than the other way around.

of hearsay and cross-examination would have been in flux in the Constitution-framing era. And since a strong adversarial system with vigorous defense advocacy at its core was being institutionalized in America perhaps before it was in England,²⁶⁹ hearsay law and respect for cross-examination may have been developing even more rapidly here than abroad.²⁷⁰

We cannot say what hearsay law really was in the United States in 1789.²⁷¹ We cannot really say what the connection among hearsay, cross-examination, and the Confrontation Clause was because nothing in the historical record of the framing or ratification of the Sixth Amendment indicates what it was. We can say that the provisions of the Sixth Amendment operating together constitutionalized a system where the accused had the right to present a defense by providing for notice and granting rights to counsel and confrontation.²⁷² No doubt that system, including its evidentiary rules, was strongly evolving when the Bill of Rights was adopted. Under these circumstances, as was the case for compulsory process,²⁷³ it is unlikely that the Framers were attempting to freeze into the Constitution a particular moment of the common law that related to confrontation. Instead, the task for those interpreting the Confrontation Clause should be, as it has been for the Compulsory Process Clause, to apply the Framers' goals with modern reason and experience, and there is as much reason to think that was the original intention of the Confrontation Clause as any

269. For a discussion of the emergence of a more complete adversary system in America earlier than in England, see Jonakait, *Origins*, *supra* note 168, at 94-108. The states and the Sixth Amendment granted a right to counsel then unknown in England and institutionalized a public prosecutor, also unknown in England. *Id.* at 94-95. The adversary system was another part of American government through checks and balances that also empowered individuals to act in their own self-interest. For an early example of the American adversary system, see *State v. Negro George*, 2 Del. Cas. 88, 1797 WL 403 (Del. Quart. Sess. Nov. 21, 1797), where a slave was charged with raping a white woman. Defense counsel effectively cross-examined prosecution witnesses and presented witnesses of their own to establish that the accused had been mistakenly identified, which counsel argued to the jury. *Id.* at *2. The jury acquitted. *Id.* at *3. See also *State v. Wells*, 1 N.J.L. 486, 1790 WL 349 (N.J. Sep. Term 1790) (illustrating defense counsel's unsuccessful challenge evidence, including hearsay, and failure to convince jury that homicide was excusable).

270. See, e.g., *State v. Webb*, 2 N.C. 103 (1 Hayw. 1794) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine . . ."); see also *Respublica v. Langcake*, 1 Yeates 415, 1795 WL 708, at *2 (Pa. Jan. 1795) ("The general rule was, that hearsay was inadmissible, but there were some exceptions in particular cases, and among others the declarations of the deceased person on an indictment for murder. No such necessity could be pretended here, there have been several witnesses present at the different transactions."); *United States v. Robins*, 27 F. Cas. 825 (D.S.C. 1799) (No. 16175). The court in *Robins* held:

[When the witness] knows nothing but by hearsay . . . he at once comes within that description of testimony, which the laws of England, and the best decisions of the best judges, and our laws borrowed from them, forbid either a judge or a jury to receive in any case affecting the life or limb of a subject of the one, or a citizen of the other.

Id. at 837.

271. See 30 WRIGHT & GRAHAM, *supra* note 79, § 6387, at 791 (stating that "[m]ost of those who offer theories about confrontation and hearsay rely on an unproven assumption; that is, that the hearsay rule in America was the same as the hearsay rule in England").

272. See *supra* notes 98-103 and accompanying text for discussion of the need to read Sixth Amendment as a whole in discerning scope of constitutional right of accused to present a defense.

273. See *supra* note 260 and accompanying text for a discussion of how it was unlikely that the Framers intended to embrace then-current common law entirely.

other.²⁷⁴ It may not be easy, but it is the task that the Court has set out for itself in interpreting compulsory process. Since compulsory process and confrontation should be interpreted together, either confrontation interpretation should follow that same path, or the right of compulsory process should revert to the rights of the accused under the common law when the Sixth Amendment was adopted.

CONCLUSION

A textual analysis can lead to *Crawford's* conclusion that "witnesses" in the Confrontation Clause means those who give testimony, but such an analysis does not lead to the conclusion that "testimony" only refers to statements akin to ex parte depositions and affidavits. Textual analysis, however, also leads "witnesses" to mean those who have personal knowledge of a relevant event or those who give evidence or proof, and these broader definitions include all hearsay declarants. These latter definitions, but not the former, are consistent with all the other uses of the term in the Constitution.

Crawford's analysis ignores confrontation's Sixth Amendment context. Sixth Amendment provisions reject the common law and their interpretation is fundamentally different from *Crawford's* method of interpreting confrontation. If *Crawford's* method is correct, much Sixth Amendment doctrine, especially that of the Compulsory Process Clause, is at stake. If, however, the interpretive standards for other Sixth Amendment provisions are right, then *Crawford's* approach to the Confrontation Clause is wrong.

274. See 30 WRIGHT & GRAHAM, *supra* note 79, § 6347, at 792 ("[It is a mistake to assume] that history provides a key that will open the door to the answers to the modern application of the right of confrontation. In our view, history provides not an easy answer but a challenge; can we apply the values of the Revolutionary generation in a world that is much different from the one they knew?").