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## Proposed Amendments to Fed. R. Crim. P. 26: An Exchange: Remote Testimony

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*Recently, the Supreme Court declined to pass on to Congress a proposed change to Federal Rule of Criminal Procedure 26 submitted to it by the Judicial Conference. In this Article, Professor Friedman addresses this proposal, which would allow for more extensive use of remote, video-based testimony at criminal trials. He agrees with the majority of the Court that the proposal raised serious problems under the Confrontation Clause. He also argues that a revised proposal, in addition to better protecting the confrontation rights of defendants, should include more definite quality standards, abandon its reliance on the definition of unavailability found in the Federal Rules of Evidence, and allow defendants greater flexibility in the use of remote testimony. Finally, he tentatively offers a suggested revision that addresses the concerns he raises.*

### INTRODUCTION

Usually, the Supreme Court regards itself as a mere conduit for proposed amendments to the several bodies of Federal Rules of practice and procedure that are submitted to it by the Judicial Conference of the United States after a lengthy rulemaking process.<sup>1</sup> Occasionally, though, the Court declines to pass a proposed amendment on to Congress.<sup>2</sup> Recently, in submitting to Congress an extensive set of proposed changes to the Federal Rules of Criminal Procedure, the Court held back an amendment to Rule 26 that would greatly change the manner in which witnesses may

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1. See Statement of Justice White, 507 U.S. 1091, 1095 (1993) (stating that the Court's role "is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity"); Order adopting amendments to Federal Rules of Criminal Procedure, 416 U.S. 1003 (1974) (noting the opposition of Justice Douglas "to the Court's being a mere conduit of Rules to Congress"); Statement of Douglas, J., dissenting from the submission to Congress of Rules of Evidence, 409 U.S. 1132, 1133 (1972) ("The Court concededly is a mere conduit.").

2. See, e.g., Letter of Transmittal, Apr. 30, 1991, reprinted at 500 U.S. at 964 (noting that the Court, though transmitting various proposed Rules amendments, is not transmitting amendments proposed by the Judicial Conference to seven of the Federal Rules of Civil Procedure "pending further consideration by the Court").

testify in criminal trials. The amendment would have allowed a trial witness, in a limited set of circumstances, to give her trial testimony contemporaneously from a remote location, with her image presented in the courtroom by a video connection. It appears that a majority of the Court feared that the amendment might violate the right of an accused under the Sixth Amendment “to be confronted with the witnesses against him.”<sup>3</sup>

The Court’s action does not end the matter. It is possible that Congress will restore the deleted amendment, adding it to the Rules by statute.<sup>4</sup> Even if this does not happen, the Advisory Committee for the Rules of Criminal Procedure may in time draft a revised proposal that is more likely to pass Supreme Court muster. Furthermore, some federal courts have allowed remote testimony in some circumstances even absent a sanction in the Rules, and until such time as the Court gives definitive guidance to the contrary this practice may continue—though one would certainly expect the Court’s recent action to give them pause. Finally, remote testimony is also of interest to the states.<sup>5</sup> Though the constitutionality of state rules and practices allowing such testimony would eventually be tested in the Supreme Court, they, unlike the Federal Rules, can continue to be put into place without any form of prior approval by the Court.

In this Article, I will consider the promise and dangers of remote testimony in criminal cases, with particular reference to the proposed amendment that survived most of the way through the rulemaking process before being short-circuited by the Supreme Court. I believe that the Court was right in perceiving that the pro-

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3. U.S. CONST. Amend. VI. Justice Scalia, in a statement accompanying the submission to Congress, said: “I share the majority’s view that [the proposal] is of dubious validity under the Confrontation Clause . . . .” *Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure* (April 29, 2002) 1 (statement of Scalia, J.) [hereinafter Statement of Scalia, J.], available at <http://www.supremecourtus.gov/orders/courtorders/frcr02p.pdf> (last visited June 26, 2002). Justice Breyer, in a dissenting statement joined by Justice O’Connor, similarly said: “The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause.” *Id.* at 4 [hereinafter Statement of Breyer, J.]. No other member of the Court issued a statement on the matter.

4. Such a development has occurred before. In 1994, the Supreme Court altered a proposed amendment to FED. R. EVID. 412, the “rape shield” rule, deleting a clause that would extend the Rule to civil cases. Letter of Chief Justice Rehnquist to John F. Gerry, Chair of the Executive Committee of the Judicial Conference, April 29, 1994, reprinted in 154 F.R.D. 510. But Congress passed a statute promulgating an amended Rule 412, in the form in which it had been submitted to the Court. Pub. L. No. 103-322 § 40141(b), 108 Stat. 1796, 1818 (1994). The interest of the Justice Department favoring the amendment to Rule 26 suggests that similar action in this case is not implausible.

5. See *Harrell v. State*, 709 So. 2d 1364 (Fla. 1998), cert. denied, 525 U.S. 903 (1998) (allowing remote testimony in certain circumstances and establishing guidelines for its use).

posal as presented to it was of dubious constitutionality under the Confrontation Clause.<sup>6</sup> The proposal suffered from other problems as well. But in some circumstances remote testimony has potential to improve and expedite the administration of justice. The Supreme Court's action should not cause the matter to die. Rather, rulemakers should revisit it, and develop a more cautious amendment that avoids problems of the recently rejected proposal and clearly comports with the Confrontation Clause.

## I. THE CONFRONTATION RIGHT AND THE RULES OF CRIMINAL PROCEDURE

The confrontation right has reached its fullest flower in the common law system, but it transcends that system. The King James Version of the Bible quotes the Roman governor Festus as declaring: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."<sup>7</sup> Within our system, the right reflects a profound commitment to the proposition that the testimony of a prosecution witness should be given under certain prescribed conditions. Testimony should be under oath, subject to cross-examination, in the

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6. The confrontation right is a topic that has interested me for some years, almost to the point of preoccupation. See, for example, my articles: *Confrontation Rights of Criminal Defendants*, in J. F. NIJBOER & J. M. REIJNTJES, PROCEEDINGS OF THE FIRST WORLD CONFERENCE ON NEW TRENDS IN CRIMINAL INVESTIGATION AND EVIDENCE 533-41 (1997); *Confrontation: The Search for Basic Principles*, 86 GEORGETOWN L.J. 1011 (1998); *Thoughts from Across the Water on Hearsay and Confrontation*, 1998 CRIM. L. REV. 687; *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545 (1998); *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997); *Lilly v. Virginia: Glimmers of Hope for the Confrontation Clause?*, INT'L COMMENTARY ON EVIDENCE, July 10, 2000, <http://www.law.qub.ac.uk/ice/papers/hearsay1.html> (last visited June 26, 2002); see also Richard Friedman & Bridget McCormack, *Dial-In Testimony*, 151 U. PA. L. REV. 1171 (2002).

In addition, I was one of the authors of the Amicus Brief of the American Civil Liberties Union in *Lilly v. Virginia*, 527 U.S. 116 (1999). Justice Breyer, one of the members of the plurality in that case, wrote a concurring opinion referring extensively to the brief and expressing considerable sympathy for the views advanced in it. *Id.* at 140-42. (Breyer, J. concurring). These views are in many ways compatible with those of Justices Scalia and Thomas. (Justice Breyer did not perceive a serious confrontation problem with the proposed amendment to Rule 26, but the issue presented by cases like *Lilly*, of when confrontation is required, is orthogonal to the issue presented by that proposal, of what kind of confrontation is adequate when confrontation is required.) I am hopeful, therefore, that a reconceptualization of the Confrontation Clause along the lines we suggested will occur in the not-so-distant future.

7. Acts 25:16 (King James).

presence of the accused—the time-honored phrase “face to face” is repeated in numerous English statutes beginning in the sixteenth century<sup>8</sup>—and, if reasonably possible, in the presence of the fact-finder.

The common law recognized that in some circumstances this last condition could not feasibly be satisfied; a witness might, for example, be dead by the time of trial, or too ill to testify at trial. Thus, the law allowed the possibility of taking the witness’s testimony beforehand, by a deposition that could then be presented at trial if the witness were unable to appear.<sup>9</sup> But the law sedulously protected the accused’s right to be present at the deposition and to cross-examine.<sup>10</sup>

And thus the law remains. Federal Rule of Criminal Procedure 15 preserves both the possibility of taking a deposition—where this is necessary to preserve the witness’ testimony for trial—and the right of the accused to attend the deposition and cross-examine the witness. But even given these safeguards, the deposition procedure is available only in “exceptional circumstances.” The norm for giving testimony is stated by the current Rule 26:

### **Rule 26. Taking of Testimony**

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court.<sup>11</sup>

## **II. THE JUDICIAL CONFERENCE’S PROPOSAL**

Modern technology creates a possibility not available when the modern form of trial developed or when the Confrontation Clause was written into our Constitution: A witness not actually present in the courtroom can, if the law allows, testify live by video transmission to the courtroom. Thus, the technology makes it possible for a

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8. See, e.g., An Acte whereby certayne Offences bee made Treason, 13 Eliz., ch. 1, § 9 (1571) (Eng.); see also, e.g., Duke of Somerset’s Trial, 1 Howell’s State Trials 515, 520 (1551).

9. See, e.g., R. v. Forbes, 171 Eng. Rep. 354 (1814).

10. See, e.g., *id.* (providing the defendant the right to be present at deposition of dying victim and to cross-examine).

11. FED. R. CRIM. P. 26.

witness who could not appear in the courtroom to testify under oath and cross-examination, as in a traditional deposition, but to do so contemporaneously and with her demeanor apparent to the fact-finder.

There are clear benefits for a system of criminal adjudication in allowing such remote testimony in some circumstances. Most obviously, the testimony of the witness is preserved. Of course, a deposition does that, but remote testimony has advantages over depositions as well. Video transmission is clearly preferable to the traditional means of preserving and presenting deposition testimony, by stenographically recorded transcript, but that is not the principal point. Depositions can and sometimes are recorded and presented by sound-and-visual means, and probably this should now be required whenever feasible (as it almost always would be) as a predicate for use of the deposition as evidence against an accused. There are, however, two advantages that remote testimony offers even over a deposition preserved by videotape. First (putting aside the constitutional issue for the moment), remote transmission has an *efficiency* advantage, in that counsel and the accused can see and be seen by, and hear and be heard by, the witness without traveling to where the witness is. Second, remote testimony has a *timing* advantage, in that the witness's testimony can be taken during trial, at the same time it would be taken were the witness to testify live in the courtroom, rather than in advance. A deposition also can theoretically be taken during trial, but that usually creates a significant interruption in the conduct of the trial. Accordingly, the deposition is usually held before trial, when counsel may not be as informed about the case (including the testimony of other witnesses) as they will be when the testimony is actually presented.

With these advantages in mind, the Advisory Committee drafted a proposal—approved by the Standing Committee on Rules of Practice and Procedure and by the Judicial Conference of the United States—to replace the current Rule 26 by the following:

### **Rule 26. Taking Testimony**

- (a) **In General.** In every trial the testimony of witnesses must be taken in open court, unless otherwise provided by a statute or by rules adopted under 28 U.S.C. §§ 2072–2077.
- (b) **Transmitting Testimony from a Different Location.** In the interest of justice, the court may authorize contemporaneous, two-way video presentation in

open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) appropriate safeguards for the transmission are used; and
- (3) the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)–(5).<sup>12</sup>

The Supreme Court submitted to Congress the language of part (a) of this proposal—which amounts merely to a clarifying amendment of the current Rule—but it declined to submit part (b), the provision for remote testimony.

The proposal sidetracked by the Supreme Court raises several concerns. Section III of this Article addresses the most prominent one of these, and the one that led to the Court's action. I conclude that the Court was correct in regarding the proposal in its current form as raising a serious question of constitutionality under the Confrontation Clause: At least on the present state of our knowledge, the accused should have a right to be physically present when the witness testifies from a remote location. Section IV discusses the standard of unavailability that should govern when a prosecution witness ought to be allowed to testify from a remote location. It concludes that a Rule providing for such testimony needs its own definition of unavailability, rather than one borrowed from the Federal Rules of Evidence. Section V addresses more technical issues, concluding that the proposal's proper requirement of two-way transmission is appropriate and that a revised Rule should, without delving into technological details, state additional standards of quality for the transmission. Section VI briefly analyzes the substantially different considerations that arise when it is the defense rather than the prosecution that seeks to present remote testimony. Finally, a concluding section summarizes much

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12. Proposed FED. R. CRIM. P. 26 [hereinafter Proposed Rule], available at <http://www.uscourts.gov/rules/supct1101/CRRedline.pdf> (last visited June 26, 2002), reprinted as an appendix to Statement of Breyer, J., *supra* note 3. This proposal was amended in several particulars from the one originally published by the Advisory Committee in August 2000, available at <http://www.uscourts.gov/rules/comment2001/amendments/crb.pdf> (last visited June 26, 2002) [hereinafter Advisory Committee Draft]. For example, the Judicial Conference proposal, unlike the original one, would require two-way transmission. Also, the two versions use somewhat different language to describe the circumstances in which video testimony is acceptable. See *infra* note 27.

of the analysis by presenting a tentative suggested redraft of the proposed amendment.

Allowing testimony from a remote location in some circumstances is a natural development that offers substantial benefits for the judicial system. Although remote testimony may occasionally be an acceptable substitute for in-court testimony, it is still very much a second-best procedure. Congress should not enact Rule 26(b) as proposed by the Judicial Conference. But the Advisory Committee should revisit the matter, presenting a revised proposal that would allow the procedure to be used in appropriate circumstances, avoid serious questions under the Confrontation Clause, and ensure that the procedure is as effective as it can reasonably be made.

### III. CONFRONTING THE WITNESS, FACE TO FACE

For now, I will focus on prosecution witnesses and assume that the witness is clearly unavailable to testify at trial, though available to testify from a remote location. I will also assume for now that the proposed transmission of the testimony will be by high-quality two-way video, so that the witness can both see and be seen by those in the courtroom, and will avoid the possibility that the witness is being coached from off camera.

Even such transmission lacks the immediacy of presence in the courtroom. Does this difference raise a Confrontation Clause problem?

Impairment of the fact-finder's ability to observe the demeanor of the witness is not a major constitutional concern. The traditional stenographically-recorded deposition gives the fact-finder no opportunity to observe demeanor, except as it may be apparent from the face of the transcript. This has not been thought to raise a constitutional problem, given that the witness is unavailable to testify at trial<sup>13</sup>—though perhaps it should, given that a deposition can be recorded and presented via videotape. But in any event two-way video transmission would give the fact-finder essentially the same opportunity to observe demeanor that a video-recorded deposition does. Even if this opportunity is somewhat less satisfactory than is afforded by presence in the same room with the

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13. Cf. Statement of Breyer, J., *supra* note 3, at 4 ("It is not obvious how video testimony could abridge a defendant's Confrontation Clause rights in circumstances where an absent witness' testimony could be admitted in nonvisual form via deposition regardless.").

witness, this does not raise a constitutional problem, so long as the presentation is clear and undistorted.

Nor does a significant constitutional problem arise from the possibility that the formal trappings of the courtroom may have less impact, in making apparent the solemnity of the occasion, on a witness who is testifying from a remote location than they do on a witness who is actually in the courtroom. Given that remote testimony would be presented by two-way video, the witness would have at least some view of the courtroom. Again, the comparison to deposition witnesses is useful. Whether her testimony is recorded stenographically or by video, a deposition witness does not see the courtroom.

It appears to have been considerations such as these that led the Advisory Committee to perceive electronically transmitted testimony as “in most regards superior to other means of presenting testimony in the courtroom,”<sup>14</sup> a comparison that presumably should exclude live testimony by a witness actually present in the courtroom. But testimony transmitted from a remote location still lacks an element integral both to live testimony in the courtroom and to deposition testimony—the presence of both the accused and counsel in the same room as the witness.<sup>15</sup>

There are two effects of this deficit that we cannot put aside easily. First, even with two-way transmission, would the distance and sense of insulation diminish the sense of confrontation—not an idly chosen term—that a prosecution witness faces when testifying against an accused? Second, would defense counsel be impaired to any significant degree in cross-examining such a witness by the sense of distance and by the delay in transmission that, even with up-to-date technology, is still noticeable?<sup>16</sup> Each of these effects is perfectly plausible. I do not know of any extant studies that can

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14. Committee Note to Proposed FED. R. CRIM. P. 26 [hereinafter Committee Note], *supra* note 12, at 74–75.

15. Federal courts have occasionally allowed the use at trial of depositions taken overseas that incarcerated defendants were not allowed to attend, though they were connected to the deposition room telephonically. *United States v. McKeeve*, 131 F.3d 1, 7 (1st Cir. 1997); *United States v. Kelly*, 892 F.2d 255 (3d Cir. 1989), *cert denied*, 497 U.S. 1006 (1990). Such depositions appear to violate FED. R. CRIM. P. 15. In any event, they create most of the problems of electronically transmitted testimony without the advantages of simultaneity or of the accused and witness being able to see images of each other.

16. There is a slight but perceptible lag between the time one person speaks and the time a viewer at the other end sees and hears the first person speak. Also, a technical difficulty occasionally creates a noticeable delay between what is seen and what is heard. *See Harrell v. State*, 709 So. 2d 1364, 1367 (Fla. 1998), *cert. denied*, 525 U.S. 903 (1998).

give substantial comfort on these points.<sup>17</sup> At least absent confidence on these grounds, I believe there is considerable merit to Justice Scalia's aphorism: "Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."<sup>18</sup>

Perhaps, at first, this concern appears unduly persnickety; even if electronic transmission is not the full equivalent of presence in the same room, it can provide good visual and audial reception of the witness at one end and the accused and counsel at the other. If the only alternative to remote testimony is to lose the evidence of the witness altogether, then the appeal of remote testimony is very strong.

But even assuming that the witness cannot be brought to the courtroom, another alternative usually will be available and will, in many circumstances, be more satisfactory: The accused and counsel may be brought to the witness.

Suppose, for example, that a witness is too physically infirm to be brought to the courtroom, but the witness is testifying from a hospital in the same city. The accused may well want the witness to testify "face to face," and the request should be honored in accordance with the longstanding practice.<sup>19</sup> Counsel may also want to

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17. One rather well-known study, described in Paula E. Hill & Samuel M. Hill, Note, *Videotaping Children's Testimony: An Empirical View*, 85 MICH. L. REV. 809, 813-17 (1987), asked children to recount what they had witnessed in viewing a recording of a father-daughter conflict. The researchers found that children gave more complete and accurate accounts when questioned by a single interrogator in a small room than when questioned under court-like conditions. But in the first condition, the questioner was in the room with the child, not attempting to examine her from a distant location. More fundamentally, this study did not test which style of interrogation is best suited for exposing false accounts of events that never occurred. In another well-known study, described in G.R. Miller, *The Effects of Videotaped Trial Materials on Juror Response*, in *PSYCHOLOGY AND THE LAW* 185-208 (Gordon Bermant et al. eds., 1976), and Gordon Miller et al., *Real versus reel: What's the verdict?*, 24 J. OF COMM. 99 (1974), one set of jurors viewed a live re-enactment of an auto negligence trial and another set viewed a videotape of the re-enactment. The researchers reported no significant differences between the two groups in the extent to which they attributed negligence, the mean awards where they found for the plaintiff, their ratings of attorney credibility, or their own interest. As Steve Penrod has pointed out to me, the experiment did not address whether the different conditions affected jurors' understanding, memory for, or evaluation of the testimony, or their assessments of witness credibility or their confidence in ability to assess that credibility. Further, in this experiment as in the one by Hill & Hill, the interrogators were in the same room as the witnesses.

18. Statement of Scalia, J., *supra* note 3, at 2. Justice Scalia also noted that "a purpose of the Confrontation Clause is ordinarily to compel accusers to make their accusations *in the defendant's presence*—which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image." *Id.*

19. See, e.g., *R. v. Forbes*, 171 Eng. Rep. 354 (1814) (upholding the right of defendant to be present at deposition of dying victim and to cross-examine).

cross-examine in person, believing that the differential in effectiveness is worth the journey.

As the witness becomes more distant, or even crosses boundaries, the logistics become more difficult, but this does not materially alter the principle: If the accused and counsel wish to be present, they ought to be allowed to be, as they are allowed to for a deposition, even if the defendant is in custody.<sup>20</sup> If exceptions (apart from principles of waiver and forfeiture) should be made to this principle, they should be only for unusual cases in which it is not feasible to bring the accused and counsel into the same room as the witness. Such cases may arise if both the accused and the witness are too ill to travel,<sup>21</sup> or if the witness is in a foreign nation that is willing to cooperate, but only to a degree, with American testimonial requirements and either the witness is in custody or the accused is in custody and the witness is unwilling to travel to the

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20. Committee Note, *supra* note 14, cites *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988), for the proposition that the presence of counsel and the accused with the witness is not an indispensable requirement. Committee Note, *supra* note 14, at 75. In *Salim*, the accused was in federal custody and a key witness was in custody in France. The court allowed use of a deposition of the witness that was taken under conditions according with French law but not satisfying the ordinary conditions for a deposition under Federal Rule of Criminal Procedure 15. The merits of *Salim* are dubious, especially with respect to the confrontation right. If a foreign government does not allow testimony of an accusatory witness to be taken under conditions satisfactory to our system, it does not seem that our courts should admit the deficient form of testimony that the foreign government does allow. But whatever the merits of *Salim*, it is clearly not a guide to the standards that should be applied in the domestic context, when our system is free to set its own rules. *Salim* itself explicitly distinguished that context, noting that the decision was determined by factors not usually applicable. 855 F.2d at 949.

21. See *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). A crucial witness against Gigante was Peter Savino, who participated in the Federal Witness Protection Program. At the time of trial he was in the final stages of an inoperable, ultimately fatal, cancer. The trial judge, Jack Weinstein, concluded by "clear and convincing proof" that the witness could not appear in court. *Id.* at 80. Gigante himself was in ill health and deemed unable to travel. *Id.* at 81. In these circumstances—given the apparent impossibility of placing Gigante and Savino in the same room without endangering one or the other of them—it is at least plausible that the prosecution ought to be allowed to present electronically transmitted testimony of the witness from a remote location without the defendant having been present at that location. (Even here, Gigante has a plausible argument that the testimony ought not be presented without him having the opportunity to be in the same room as Savino, and given that he could not travel without endangering his health and the prosecution was unwilling to move Savino, the testimony should not be presented.) In any event, apparently Gigante did not seek to be taken to the remote location; rather, he objected to the court's order allowing Savino to testify from that location. Indeed, Gigante's counsel explicitly waived any right to ensure that Savino and Gigante would be looking eye to eye via video transmission during Savino's testimony. *Id.* at 80 n.1. If Gigante had insisted that he or his counsel be brought to Savino, a different question would have been presented.

United States.<sup>22</sup> If it really is not feasible to bring the accused and counsel together with the witness, then the attractiveness of electronically transmitted testimony, the only way of securing the witness's testimony at all, is considerable. On the other hand, prosecutors travel to meet witnesses when they believe it is necessary to secure testimony or information from them, and contentions that it would not be feasible to bring the defendant or counsel to the witness ought not be accepted without close examination. Beyond that, even if electronic transmission is indeed the only way the testimony can be secured, if it does not satisfy our standards for testimony then it is simply not acceptable. For the reasons stated above, we do not yet have a basis for concluding that it is the equivalent of face-to-face testimony. That in itself is not necessarily dispositive, for there is a question of what the appropriate baseline is; one could argue that even if we cannot be confident that remote testimony protects the confrontation right as well as face-to-face testimony does, we at least can be confident that it is good enough, if it is the best we can do. But given that for centuries testimony in our system has with virtual uniformity been given face to face, that mode provides the most natural baseline, and we should be reluctant to accept a standard that deviates downwards from it.

In concluding that the Judicial Conference proposal did not raise a serious Confrontation Clause problem, the Advisory Committee and Justices Breyer and O'Connor, dissenting from the Supreme Court's decision not to pass the proposed amendment to Congress, relied on *Maryland v. Craig*.<sup>23</sup> But such reliance is

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22. If the witness is in foreign custody, the foreign nation may be willing to allow the witness to testify by remote, and otherwise according to ordinary American practice, but unwilling either to allow the witness to be taken to the American courtroom where the case is being tried or to allow the accused, and perhaps counsel, to be brought to where the witness is being held in custody. Similarly, if the accused is being held in custody and the witness is overseas and unwilling to come to the United States, arranging a face-to-face deposition may be difficult. The United States Marshals Service lacks jurisdiction to hold federal detainees on foreign soil and the foreign nation may be unwilling to assume even temporary custody of the accused. See *United States v. McKeeve*, 131 F.3d 1, 7 (1st Cir. 1997). On the other hand, a rule that allows remote testimony whenever a foreign government resists face-to-face confrontation gives American authorities the wrong incentive, to treat foreign objections as dispositive rather than to try to negotiate around them. If the foreign government refused to allow the witness to testify altogether, that would not justify using a statement that the witness made to the police in lieu of cross-examined testimony. Cf. *McKeeve*, *supra*, at 6 ("spare confines of the British scheme" apparently prevented video transmission). As with respect to *Salim*, *supra* note 20, if the foreign government is unwilling to allow a witness to testify according to our standards and the American authorities are unwilling or unable to persuade it to relent, there is a strong argument that is not the accused who should suffer.

23. 497 U.S. 836 (1990).

misplaced. In *Craig*, a divided Court held that, upon a showing that a child witness would be traumatized by having to testify in the courtroom, she could testify by closed-circuit television, with counsel in another room with her but not the accused, the judge, or the jury. The hookup approved by the *Craig* Court allowed the judge and accused to communicate electronically with counsel, and allowed all those in the courtroom to see the witness, but it did not allow the witness to see those in the courtroom. *Craig* was a 5-4 decision of dubious merit, and it should not be extended outside the realm of child witnesses, or beyond the circumstance in which a particularized showing is made that the specific witness would be subject to trauma by testifying in the courtroom.<sup>24</sup> Moreover, at most *Craig* enunciated a constitutional outer bound within which departures from the norm of testimony given face-to-face would be tolerated; it is not a useful guidepost for choosing good policy sensitive to the concerns underlying the Confrontation Clause. Beyond all this, the situation of the child witness who would be traumatized by presence in the courtroom and by having to testify face-to-face with the accused is fundamentally different from that of the witness who is fully able to testify but cannot be brought to the courtroom. In the former case, by hypothesis, electronically transmitted testimony creates as much confrontation as can be done without traumatizing the child. In the latter case, by contrast, if the accused and counsel are not in the same room as the witness then in most cases there is a foregone opportunity for confrontation, because presumably they could be brought together.

But if counsel and accused are with the witness at a remote location, then how should the testimony be presented in court? The accused might argue that simultaneous transmission back to the courtroom, while the accused is elsewhere with the witness, violates his right to be present at trial. Given that the witness is testifying at a location remote from the fact-finder, the whole idea of the trial having a venue tends to break down. Thus, the accused's argument, more precisely stated, would be that he has a constitutional

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24. The *Craig* majority said that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." 497 U.S. at 850. A sound conception of the Confrontation Clause does not emerge from the apparent implication of this statement, that the defendant *may* be denied "a physical, face-to-face confrontation at trial" if that *is* necessary to further an important public policy and the reliability of the testimony is otherwise assured. Putting aside that broader concern, I doubt that the Supreme Court meant mere inability to secure the trial testimony of the witness to constitute such an "important public policy."

right not only to be present with the witness when the witness gives her testimony but also to be present with the fact-finder when the fact-finder receives the testimony. The argument is not clearly right—perhaps video transmission, so that the accused and fact-finder can see and hear each other, is sufficient in this context. But at least in the usual circumstance, it seems unnecessary to reach the constitutional issue, because if the accused and counsel are with the witness at a remote location there rarely will be any substantial gain in transmitting the testimony to the fact-finder simultaneously. The trial cannot proceed further in any event until the accused and counsel have returned to the courtroom, and little time would be lost in presenting the remote witness's testimony at that time by videotape.<sup>25</sup>

Of course, if the accused and counsel are present with the witness when the witness testifies, and the testimony is later presented to the fact-finder by videotape, then what we have is an ordinary video deposition. So in a sense I am saying that the accused should have the option of having the testimony taken by video deposition rather than transmitted electronically from a remote location. I think, however, it would often be appropriate to put the accused to the choice. Suppose that before trial the prosecution indicates its desire to present the testimony of a witness from a remote location. The accused may insist that he and his counsel should be present with the witness when she testifies. But the court might determine that if this is the case, it is far more efficient to take the testimony of the witness beforehand, rather than for the trial to be disrupted while the accused and counsel travel to the remote location, take the testimony, and return. Thus, the court should be able to tell the accused:

“If you and your counsel want to be in the room with the witness when she testifies and present in the courtroom when the testimony is presented, you may do so, but if you do, the testimony must be taken before trial. If, like the prosecution, you prefer for the testimony to be taken during trial, then it will be transmitted electronically from the remote location and presented at that time in the courtroom.”

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25. One can imagine circumstances in which simultaneous transmission of testimony would entail some substantial efficiencies. If a witness's testimony is very lengthy, then there are some savings in having it transmitted to the fact-finder while it is being given, so that counsel and the accused (and the judge, if she participated in the taking of the testimony) need not sit through the testimony a second time. But these savings may be insufficient to warrant pressing the issue for now.

## IV. UNAVAILABILITY

Suppose now that the prosecution gives ample notice of its intent to present the testimony of a witness from a remote location, and that the accused and counsel have no interest in traveling to be with the witness as she testifies. But the accused contends that the witness ought to testify live in the courtroom if at all. The critical question then is: What circumstances justify remote testimony?

It seems clear that live testimony in open court should remain the norm for criminal cases, at least for prosecution witnesses. If a prosecution witness can testify live at trial in the traditional manner, then she ought to do so. There does not seem to be much disagreement on this point. Subdivision (b)(1) of the amendment proposed by the Judicial Conference would require “exceptional circumstances” for remote testimony to be allowed, and subdivision (b)(3) would require that the witness be “unavailable within the meaning of Federal Rule of Evidence 804(a)(4)–(5).”<sup>26</sup> Especially in light of the vagueness of the term “exceptional circumstances,”<sup>27</sup> I suspect that, if this proposal were to become effective, subdivision (b)(1) would have little independent force and that many courts would deem it satisfied when subdivision (b)(3) is satisfied. The

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26. Proposed Rule, *supra* note 12.

27. Use of the word “exceptional” is a change from the draft proposal published in August 2000, which used the word “compelling” instead. Advisory Committee Draft, *supra* note 12. The change, however, does not improve the proposal significantly. The Advisory Committee noted that the “exceptional circumstances” standard was used in *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999), in approving a use of testimony transmitted from a remote location. *Gigante*, which is discussed further in note 21 *supra*, adopted that standard from the one prescribed by Federal Rule of Criminal Procedure 15, which discusses when the testimony of a prospective witness should be taken by deposition and preserved for use at trial. *Id.* But the question whether a pre-trial deposition should be taken for possible use at trial is considerably different from the question of whether a witness should be allowed to testify during trial from a remote location, and there is no reason that the standards for the two questions should be congruent.

The Advisory Committee acknowledged that “it is difficult to catalog examples of circumstances considered to be ‘exceptional.’” Committee Note, *supra* note 14, at 75. The one example the Committee offered illustrates the difficulty of applying the term: “[T]he inability of the defendant and the defense counsel to be at the witness’s location would normally be an exceptional circumstance.” *Id.* This seems to get matters almost precisely backwards. The ability of the defendant and defense counsel to be present at the remote location from which the witness is testifying is a factor making remote testimony *more* acceptable (though if the defendant or counsel actually take advantage of the opportunity the testimony would, at least often, be taken before trial, by deposition); indeed, the central theme of this Article is that, at least arguably, their opportunity to be present should be a prerequisite for allowing such testimony. It is the inability of the witness to testify at trial—not the inability of the defendant and counsel to be where the witness is—that may justify testimony from a remote location.

key criterion under the proposal, then, is unavailability. This is as it should be: If testimony from a remote location is to be allowed, it should only be when the witness is unavailable to testify in the trial courtroom.

Defining when a witness should be deemed unavailable for purpose of allowing remote testimony is not a simple matter, however. In incorporating a portion of Federal Rule of Evidence 804(a) into the proposed amendment, the Advisory Committee was presumably motivated by the thought that doing so, rather than creating a new definition of unavailability, would be more simple and straightforward. This approach does not work. The consequence of a declarant being deemed unavailable under Rule 804(a) is that it makes potentially applicable a set of hearsay exceptions, including the one for testimony previously given, set out in Rule 804(b). That is a considerably different matter from the question of whether testimony from a remote location should be allowed. The incorporation of Federal Rules of Evidence 804(a)(4) and (5) would therefore breed confusion. A rule providing for remote testimony needs its own standard of unavailability.

To explore the inadequacy of the Advisory Committee's approach, I will consider Federal Rules of Evidence 804(a)(4) and (5) separately. Under Rule 804(a)(4), a declarant is deemed to be unavailable if she "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."<sup>28</sup> Incorporating this provision into a rule for remote testimony would raise three problems.

First, the reference to death does not fit. The evidence rule addresses the admissibility at trial of a statement previously made, and if the declarant is dead at the time of trial she must plainly be deemed unavailable then.<sup>29</sup> But Rule 26, as it stands and as the Advisory Committee would have amended it, is addressed to contemporaneous testimony. Wisely, the Advisory Committee did not suggest that corpses should be allowed to testify. If the reference to death would have any effect at all, it would only be to generate confusion.

Second, the "or to testify" language does not fit. By hypothesis, the witness *is* testifying, and so is able to testify. If she is unable "to testify at the hearing," then in most cases it will be because she is

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28. FED. R. EVID. 804(a)(4).

29. There could be a question, though, of whether the proponent should be able to take advantage of a hearsay exception based on unavailability if, before the declarant died, the proponent had a satisfactory opportunity to take her testimony under suitable conditions.

unable to *be* at the hearing. But the Rule separately covers inability “to be present . . . at the hearing.” What additional scope is there, then, for the “or to testify” language? That is, when would a witness be able to testify at the time of the trial, and be able to be in the courtroom, but not be able to testify in the courtroom at trial? The possibilities that are apparent suggest that the problem raised by this language is a very substantial concern. Suppose an adult witness claimed a mental infirmity that, although not making it impractical for her to travel to the courtroom, made it very uncomfortable for her to testify there and yet allowed her to testify from a remote location. The proposed amendment seems, at least arguably, to allow remote testimony in that setting. Moreover, at least arguably it leaves room for the contention that stress from testifying in the same room as the accused would constitute a sufficient claim of infirmity for this purpose. The prosecutor could contend, in other words, that although the witness is able to be present at the hearing, and although she is able to testify somewhere, she is “unable to . . . testify at the hearing,” and that this inability is “because of . . . then existing . . . mental . . . infirmity.”<sup>30</sup> In my view, it would be very unfortunate if adult witnesses were able to avoid the traditional method of giving testimony—confrontationally, face to face, in a method *intended* to create some stress for a prosecution witness—on such a basis. At least we should not adopt such a substantial alteration in our traditional method of giving testimony without giving the matter considerable thought and study.

Third, as a corollary matter, great care must be exercised in referring to mental infirmity. Mental infirmity at the time of trial may well effectively preclude a person from giving testimony at that time and so weigh in favor of admitting her prior statement. But again, by hypothesis, the witness *is* giving testimony as of the time of trial, for only then does a rule allowing remote testimony come into play. It is highly unlikely that mental infirmity will prevent a person who is able to testify from being present at trial. Occasionally, there may be some difficulty that will do this—such as an overwhelming fear of flying, in a case in which ground transportation is not a feasible alternative—but I believe this is rare. A witness might contend that, though she could travel to the courtroom, she would be unable to testify there not because of fear of confronting the defendant as such but because of a form of agoraphobia that makes it difficult for her to be in such a formal, public place. But this contention, it seems to me, would hardly ever be sound in fact,

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30. FED. R. EVID. 804(a)(4).

and it runs too close to that of the witness who contends that she cannot testify in front of the accused.

Now consider Federal Rule of Evidence 804(a)(5), which provides that a declarant is deemed unavailable if she "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means."<sup>31</sup>

In the context of the evidentiary rule, the parenthetical clause means that if a proponent wants to invoke one of the enumerated exceptions (for dying declarations, statements against interest, and statements of personal or family history, respectively), it is not sufficient for proof of unavailability that the proponent could not secure the attendance of the declarant at trial; the proponent must also show that he could not have deposed the declarant before trial. In the context of a rule providing for remote testimony, this language can have no effect, because by hypothesis the proponent is not seeking to invoke any of the enumerated hearsay exceptions. So again, if the language were to have any effect at all, it would be to confuse matters, and that it would have potential to do.<sup>32</sup>

In short, the Judicial Conference's proposal took an unfortunate approach by incorporating portions of Federal Rule of Evidence 804(a) whole. It is perfectly appropriate to use suitable language from Rule 804, but a rule of criminal procedure allowing remote testimony needs its own standard of unavailability. Inability of the prosecution to procure the witness's live testimony in court is the key to that standard. Illness or infirmity of the witness may lead to a conclusion that her in-court testimony cannot be procured, but care should be taken in allowing the prosecution to present remote testimony rather than in-court testimony on the basis of mental infirmity.

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31. FED. R. EVID. 804(a)(5).

32. In connection with a prior draft, the Advisory Committee expressed the view that the proposed amendment might have an impact on the operation of Federal Rule of Evidence 804 because the possibility of testimony by video transmission would limit the circumstances in which a proponent could rely on Rule 804(a)(5). Advisory Committee Note, at 189, available at <http://www.uscourts.gov/rules/comment2001/amendments/crb.pdf> (last visited June 26, 2002). This would be true, however, only to the extent that remote testimony under the proposal would be permissible in circumstances in which the proponent could not take a deposition, and it is not clear to me that there would be such circumstances or how significant they would be.

## V. TWO-WAY TRANSMISSION AND OTHER QUALITY STANDARDS

Now let us assume that the witness is genuinely unavailable to testify at trial, that the prosecution wishes to transmit her testimony from a remote location, and that the accused and counsel have declined the opportunity to transform the testimony into a deposition by traveling to be with the witness when she testifies. This appears to be a good case for presentation of remote testimony. But the transmission must be conducted in a satisfactory manner.

In drafting the proposed amendment, the Advisory Committee declined, appropriately, to specify technical standards for the transmission of testimony. But, I shall now argue, a rule governing remote testimony should articulate quality standards of three types. The proposed amendment articulated only one, leaving the rest to be protected by a vague requirement that “appropriate safeguards for the transmission [be] used.”<sup>33</sup>

*Two-way transmission*

The one standard that the proposal did state is that transmission must be two-way video. This is entirely appropriate: One-way transmission, under which the witness can be seen by the others but cannot see them, should not be deemed adequate. In *Maryland v. Craig*,<sup>34</sup> the Supreme Court did allow one-way transmission of a child’s testimony in certain instances. But for reasons I have stated above, *Craig* is not a useful guide outside its limited context—not even to what the minimum constitutional demands are and certainly not to what good policy is.

The requirement underlying the Confrontation Clause is that an accused is entitled to have an accusing witness give testimony “face to face.” Two-way transmission arguably satisfies that concern when actual presence in the same room is not feasible, but one-way transmission, in which the witness is insulated from viewing the accused, does not. Confrontation, in which the witness is *made to feel* the presence of the accused, not insulated from that presence, may inhibit some testimony, but that is precisely the point. If the confrontation inhibits even an occasional false accusation for every true one, the trade-off is worthwhile, given our commitment to the

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33. Proposed Rule, *supra* note 12.

34. 497 U.S. 836 (1990).

idea that convicting where the defendant is innocent is many times worse than failure to convict when he is guilty.<sup>35</sup>

If one-way transmission is practicable, then by hypothesis two-way transmission almost certainly is as well, and it ought to be required.<sup>36</sup>

#### *Clarity of transmission and presentation*

To be satisfactory, the transmission must be clear. The participants in the courtroom must be able to see and hear the witness clearly, and the witness must be able to see and hear the judge, the jury, counsel, and the accused clearly. The Advisory Committee indicated some of these requirements in its Note,<sup>37</sup> but the text of the amendment that it proposed did not. A newly drafted amendment should articulate these requirements. This can be done by speaking in general terms of clarity of transmission, without descending to an inappropriate level of technical or technological detail.

#### *Coaching*

Given that those in the courtroom do not have an image of the full room in which the witness is testifying, coaching from off-camera is a concern. In some circumstances, coaching is appropriate. It is often proper, for example, if the witness is a child or a person who needs an interpreter or has difficulties with the

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35. See *Schlup v. Delo*, 513 U.S. 298, 325 (1995) (quoting THOMAS STARKIE, EVIDENCE 751 (1824) (endorsing 99-1 ratio)); Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545 (1998) (discussing the trade-off of errors in fact-finding created and avoided by the choice of evidentiary rules).

36. An argument in favor of one-way transmission might run that, if the accused wanted the witness to see him when she testified, he could have done so (according to the argument of this Article) by choosing to attend the giving of the testimony. Weighing against this argument is the fact that if one-way transmission is practical then usually so too is two-way transmission. Suppose that attending the testimony is difficult for the accused, and that he is not concerned about the diminution of confrontation created by two-way transmission as compared to presence in the room with the witness. Given that two-way transmission is feasible, the accused should not be told that his choice is between attending a deposition and having the testimony transmitted electronically from a remote location via one-way hookup.

37. Committee Note, *supra* note 14, at 76:

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and the witness to hear and understand each other during questioning.

See, e.g., *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

language. Therefore, the Rule ought to provide that any coaching must be revealed by the transmission, so that the court can rule on whether it is appropriate in the particular context and, if it is appropriate, so that the jury will be fully aware of it.<sup>38</sup>

## VI. DEFENSE WITNESSES

My principal focus has been on the use of video transmission for the presentation of prosecution testimony. This appears rather clearly also to have been the principal focus of the Advisory Committee and the other bodies that have considered the proposal it drafted, and it would presumably be the most common use of remote testimony. But video transmission may also be useful for the presentation of defense witnesses. The two situations are not symmetrical. Indeed, the criminal justice system is rife with asymmetries.<sup>39</sup> Most obviously, in this context, only the accused has the confrontation right.<sup>40</sup> Furthermore, unless the prosecution proves guilt beyond a reasonable doubt, the accused must be acquitted. And the prosecution usually has means and resources for producing witnesses that are superior to those of the accused. Accordingly, it is not appropriate to assume that the same standards should apply in both settings.

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38. See *Harrell v. Butterworth*, 251 F.3d 926, 928-29 (11th Cir. 2001), cert. denied, 122 S.Ct. 1367 (2002) (while testifying from remote location, witness looked at individual off the screen; to remedy the problem, the trial court ordered that the camera focus on both persons).

39. My essay, *An Asymmetrical Approach to the Problem of Peremptories?*, 28 CRIM. L. BULL. 507 (1992), provides some examples, as does H. RICHARD UVILLER, *THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR?* 6 (1999) (summarizing the thesis of the book that “the whole idea that fairness in a criminal trial depends upon a literal balance of advantage is an unfortunate metaphorical transposition”). See also *id.* at 18 (stating that “the fairness of the criminal justice system [cannot] be appraised in terms of a clash of well-matched forces on a level playing field. For one thing, we can’t ignore the indisputable fact that there are one-sided advantages—perhaps many and substantial—that are not only tolerable but valued components of a fair system of adjudication.”); *id.* at 306 (noting that “each challenged item, every facet of the process in which one or the other party enjoys—or is said to enjoy—an advantage or suffer a disadvantage, must be examined in terms of the function it serves in the overall enterprise, and criticized according to how well or ill it serves that function”). On the general issue of asymmetry in the law, see Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments Across Indian Reservation Boundaries*, 27 CONN. L. REV. 979 (1995).

40. Justice Breyer emphasized this point in arguing for submission of the proposed amendment. Statement of Breyer, J., *supra* note 3, at 4 (stating that “where the defendant seeks the witness’ video testimony to help secure exoneration, the Clause simply does not apply”).

In two respects, a rule providing for remote testimony should be more receptive to such testimony when the witness is presented by the defense than when it is presented by the prosecution. First, though it is still desirable for transmission to be two-way, this is not clearly imperative.

Second, there is no need for a rigorous standard of unavailability. If testimony of a witness for the accused in the courtroom would be admissible, which requires that it be more probative than prejudicial, then testimony of that witness by video transmission is likely still to be more probative than prejudicial, but less effective for the accused. A lenient attitude therefore appears presumptively optimal, and no constitutional requirement makes it inappropriate. Ordinarily, then, if the accused finds video transmission his most satisfactory alternative—given the importance of the witness's testimony and whatever costs and difficulties there may be in presenting the witness in the courtroom—the court should not second-guess that judgment.

#### CONCLUSION: A SUGGESTED REDRAFT

Perhaps presumptuously, I present here a proposal for a new Rule 26(b). I do this very tentatively, in part, because the whole matter requires further thought. Nevertheless, I believe this may be useful to crystallize my comments and to show how a rule reflecting them might operate. *Italicized material* is an addition to the amendment proposed by the Judicial Conference, and would replace subdivisions (b)(2) and (b)(3) of that draft, which are reproduced in Section II of this Article but not here; the one clause in brackets is one that might be incorporated if otherwise that portion of the draft seemed too rigorous:

**(b) Transmitting Testimony from a Different Location.**

In the interest of justice, the court may authorize contemporaneous, two-way video presentation in open court of testimony from a witness who is at a different location if:

- (1) the requesting party establishes exceptional circumstances for such transmission;
- (2) *the transmission allows the witness, and anybody else visible or audible to the witness, to be heard and*

*seen clearly by persons participating in the trial in the courtroom; and*

- (3) *in the case of a witness testifying for the prosecution,*
- (A) *the transmission allows the witness to see and hear clearly persons participating in the trial in the courtroom;*
  - (B) (i) *the witness is unable to be present in the courtroom because of then-existing physical or mental illness or infirmity, such illness or infirmity to be assessed without respect to the presence of other persons in the courtroom; or*  
(ii) *the prosecution has been unable to procure the witness's presence in the courtroom by process or other reasonable means; and*
  - (C) *[absent compelling circumstances making it unfeasible to do so,] the accused and counsel for the accused have been given an opportunity to be present and to participate at the location at which the witness testifies, and they have not given prompt notice of intent to exercise that opportunity; provided that, if the accused or counsel do exercise such opportunity, then the testimony shall be taken at a time and place determined by the court in the manner of a deposition recorded by sound-and-visual means.*<sup>41</sup>

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41. Given that subdivision (b)(3)(C) of this draft allows the accused to opt for a deposition rather than electronically transmitted testimony, it might be wondered what purpose this proposal would serve. If either the prosecutor or the accused preferred a deposition to remote testimony, then the deposition would be held; thus testimony could be transmitted from a remote location only if both parties agreed. What need, then, is there for a Rule? First, Justice Breyer has raised doubts as to whether remote testimony could be allowed, even given consent of the parties, without a change in the Rules, given the prescription in Rule 26 that unless otherwise provided by statute or Rule testimony must be taken orally in open court. Statement of Breyer, J., *supra* note 3, at 6. *But see* Statement of Scalia, J., *supra* note 3, at 3 & n (arguing that Rule 26 “does not prohibit the use of video transmission by consent”). Second, the existence of a Rule may encourage use of the practice and provide a template for its implementation. Third, the Rule would shift a subtle burden. A prosecutor seeking to transmit testimony from a remote location would not have to ask for a deposition and then hope to secure the accused’s agreement to the remote testimony. Instead, the prosecutor could ask for the remote testimony, and it would be held unless the accused promptly demanded the deposition. Fourth, if the language in brackets is adopted (and held constitutional), then occasionally the prosecutor could insist on transmitted testimony even

The importance of the Supreme Court's decision not to submit the Judicial Conference's proposal to Congress should not be under-emphasized. If adopted, that proposal would work a very significant alteration in the way that trial testimony is given and presented. The criminal justice system should embrace the possibilities of new technology. Accordingly, I believe the rulemakers should continue to consider amending the Federal Rules of Criminal Procedure, perhaps along the lines I have suggested above, to provide for remote testimony in limited circumstances. At the same time, we should hesitate long and hard before reducing the scope of rights that have stood within our system for half a millennium, and within other systems for much longer. The confrontation right reflects the deep-seated nature of human psychology, a matter that is far more stable than technology. How the impact of that right is affected by interposing video screens and monitors and great distance between witness and accused is an interesting issue. I do not believe we yet have a good understanding of that issue, and so we should not cut back on the right of the accused to confront the witnesses against him "face to face."

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over the objection of an accused who did not waive his right to be physically present with the witness. Fifth, the proposal also provides for remote testimony in favor of the accused; in the interests of clarity, it would be odd if it did not say anything about remote testimony for prosecutors, who would most often wish to present it.