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## Proposed Amendments to Fed. R. Crim. P. 26: An Exchange: Remote Testimony - A Prosecutor's Perspective

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Although the Supreme Court has declined,<sup>1</sup> for now, to endorse the Judicial Conference proposal to add a Rule 26(b) of the Federal Rules of Criminal Procedure to permit live video testimony under limited circumstances, I agree with Professor Friedman<sup>2</sup> that the matter is far from over.<sup>3</sup> This is both because the potential benefits to be realized from the use of remote video testimony are too large to ignore and because, on closer inspection, any Confrontation Clause concerns that might underlie the Court's hesitation to adopt the proposal are not warranted. My purpose in writing is to summarize some of the benefits of remote video testimony, to address the constitutionality of the proposal (including the issues that apparently caused a majority of the Court and cause Professor Friedman to hesitate before endorsing it), to discuss some particulars of the Judicial Conference proposal and Professor Friedman's suggested alternative, and to take a quick look at potential future use of live two-way video testimony.

## I. THE BENEFITS

The proposed amendment to Rule 26 would have authorized the use of remote video testimony in exceptional circumstances when a witness cannot be brought to court to testify in person.<sup>4</sup>

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1. *Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure (April 29, 2002)* 1 (statement of Scalia, J.) [hereinafter, Statement of Justice Scalia].

2. Many thanks to Professor Friedman for suggesting that the *Journal of Law Reform* include a prosecutor's perspective on the proposed amendment to Rule 26, and to Professor Friedman and the *Journal* both for giving me the chance to participate.

3. Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 2 (2002).

4. The proposal provided:

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:

The first question is whether the proposed change is worth the bother.

I believe it is. The existing Rule 26 gives us the American norm for testimony in federal criminal trials—witnesses testify in court in front of judge, jury, defendant, attorneys and spectators, unless excused from personal appearance by some other federal law. The existing rule is based on the Sixth Amendment, which expresses a constitutional “preference” that witnesses in criminal cases testify live and in-person.<sup>5</sup>

The norm is not an absolute, though. Broadly speaking, there are two situations in which other federal laws excuse the witness’s personal appearance. One is governed by Rule 15, Fed. R. Crim. P., which permits a witness’s deposition to be substituted for live testimony when “exceptional circumstances” make it in the interests of justice to do so. Admissible hearsay and its close cousins, taken as a class, create the other exception to mandatory personal appearance by a “witness.”<sup>6</sup> Because I cannot imagine a plausible way in which two-way video testimony would bear on any of the usual hearsay situations, the hearsay exception to in-court testimony will not be further discussed in this section.<sup>7</sup>

As just noted, Rule 15 only authorizes the taking of depositions under “exceptional circumstances.” The deposition is only admis-

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the requesting party establishes exceptional circumstances for such transmission;

appropriate safeguards for the transmission are used; and

the witness is unavailable within the meaning of Federal Rule of Evidence 804(a)(4)–(5).

Proposed FED. R. CRIM. P. 26(b).

5. See, for example, *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), and *California v. Green*, 399 U.S. 149, 157 (1970), both of which acknowledged that “preference” before holding that testimony of a witness from an earlier proceeding is admissible even if the witness is no longer available to testify in person at trial.

6. For example, Federal Rule of Evidence 804 admits certain types of “testimony,” e.g. out of court statements against the witness’s interest, if the witness is unavailable for one of several reasons, e.g. death or poor memory. Federal Rule of Evidence 803 admits several other types of “testimony,” e.g. out of court excited utterances, whether or not the witness is available to testify in person. In addition, Federal Rule of Evidence 801(d)(2)(E) characterizes as non-hearsay the out of court statements of co-conspirators made in furtherance of a conspiracy.

7. Technically speaking, Rule 15 depositions are themselves a part of the hearsay class. While it is Rule 15 that authorizes taking a deposition in a criminal case, the deposition is admitted, if at all, under Federal Rule of Evidence 804(b)(1). But, unlike other forms of hearsay, depositions are created for the purpose of taking the place of trial testimony, subject to their own rules, and are therefore distinct for purposes of this analysis.

sible if the witness is then unavailable at trial.<sup>8</sup> Compare Rule 26(b), which would have authorized the use of remote video testimony if three conditions were met: The circumstances were exceptional, the witness was unavailable, and appropriate safeguards were in place to guarantee adequate transmission.<sup>9</sup> It is readily apparent that remote video testimony would be authorized under Rule 26(b) in about, if not exactly, the same circumstances in which Rule 15 already authorizes the substitution of a deposition for a live witness. Indeed, that was the apparent goal of the Judicial Conference.<sup>10</sup>

The Advisory Committee believed that two-way video testimony is, in most respects, superior to other ways of presenting the testimony of unavailable witnesses, so would be an improvement on Rule 15 in many instances.<sup>11</sup> The Committee was clearly correct. A deposition is either a stenographic or videographic record of the testimony of the unavailable witness. If it is stenographic, then when it is introduced into evidence it is simply read to the jury. The usual method is to have the attorney for the examining party read the questions that were asked during the deposition while someone standing in for the witness, often a support staff employee of one of the parties, reads the witness's answers verbatim. The jury has no opportunity to assess the witness's demeanor. Further, the proceeding is devoid of spontaneity—in fact, if the person who plays the part of the witness makes *any* effort to vary her tone of voice to reflect emotion, the trial judge will sustain an objection that the reader is improperly interpreting what the witness actually said, rather than simply reading it.

The situation is better with video depositions. There, at least, the witness's own inflection is allowed to come through and the jury has a chance to observe his demeanor. However, like a stenographic deposition, a videotaped deposition is likely taken weeks,

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8. FED. R. CRIM. P. 15(c).

9. Professor Friedman suggests that the question whether a pretrial deposition should be taken under Rule 15 is considerably different from the question whether a witness should be able to testify from a remote location, so there is no reason for both rules to be triggered by "exceptional circumstances." Friedman, *supra* note 4, at 14 n.27. Although there are certainly some differences between the two rules, both create departures from the preferred procedure of in-court testimony in order to make available to the jury the testimony of an otherwise unavailable witness. It is not at all clear that there is any significant difference between the rules in this most important regard, and accordingly, it is not at all clear why the two should be triggered by different standards.

10. *Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure (April 29, 2002)* 8 (Appendix to Statement of Breyer, J.) [hereinafter Appendix].

11. *Id.*

months, or sometimes years before the trial.<sup>12</sup> Often that is because the circumstances that make the witness unavailable at trial also dictate that the testimony be obtained well in advance of the trial. But even if the witness is available at the time, if not the place, of trial, few courts are willing to interrupt the flow of the trial to take a deposition. The only solution is to take the deposition before trial.

So Professor Friedman is quite correct that even a video deposition denies the parties the opportunity to question the witness in the context of other witnesses and trial proceedings.<sup>13</sup> An attorney who does not mold his examination of witnesses in light of trial developments is less than effective, but with most depositions that opportunity to adapt simply does not exist. Remote two-way video of the sort proposed by the Advisory Committee would eliminate all of these drawbacks to the current Rule 15.

Live two-way video offers significant advantages in another circumstance as well. In the normal case the defendant would be present at a pretrial deposition. However, in rare cases she might not.<sup>14</sup> For example, it may not be possible for her to be present for depositions that take place in other countries, if she is in custody and the foreign government is unwilling to assume responsibility for her.<sup>15</sup> When this situation has arisen the defendant has typically participated by open telephone line—in all other respects the end product is the same as for any other Rule 15 deposition. Rule 26(b) would permit the use of two-way video instead of the telephone in these cases, an obvious improvement.

An example of how this might play out is *United States v. Gigante*.<sup>16</sup> In *Gigante* an important witness was unable to be present in court due to physical disability. The defendant was also infirm,

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12. For example, I am currently involved in a case which is scheduled to go to trial in the latter part of this year, and in which the first trial depositions were taken more than two years ago.

13. Friedman, *supra* note 3, at 5.

14. Rule 15 specifies that the defendant must be given the opportunity to be present during a deposition, and Professor Friedman suggests that if she is not afforded that opportunity, even if it is impossible to do so, the result appears to violate Rule 15. Friedman, *supra* note 3, at 8 n.15. However, Rule 15 appears not to have contemplated the possibility that it might prove impossible in particular cases to both obtain the testimony and permit the defendant to be present. In situations such as this, that are outside the scope of existing rules, courts retain the power to fashion orders that are necessary and appropriate to the administration of justice. FED. R. CRIM. P. 2, 57(b); *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir. 1999).

15. See cases cited in note 42, *infra*.

16. *Gigante*, 166 F.3d 75.

though, so he could not be brought to the witness.<sup>17</sup> The *Gigante* trial court could presumably have permitted the government to take the witness's deposition.<sup>18</sup> The defendant could have participated by speakerphone and the jury would have either viewed a video of the deposition or would have had the deposition transcript read to it.

Rather than follow this course the *Gigante* trial court anticipated Rule 26(b) and opted to have the witness testify live via two-way video. The procedure the *Gigante* court adopted much more nearly approximated a normal trial than would a Rule 15 deposition. It was live, the defendant and jury could see the witness, and the witness could see the defendant and the jury while he testified.

If Rule 26(b) were useful *only* to improve on existing deposition practice in the situations just described it would be a worthwhile improvement. My guess, though, is that the greatest benefits of live video testimony in federal criminal cases will be realized in a circumstance that until recently has been relatively uncommon—the foreign witness. To fully appreciate why it is necessary to start with an overused word—globalization.

While “globalization” is frequently bandied about it is far from well understood, and it is beyond my ambition or ability to advance the broad understanding much. What is clear, even to me, is that “globalization” has significant implications for the practice of federal criminal law. The reasons are straightforward. As it has become easier to travel and communicate between countries it has become correspondingly easier to engage in international commerce of all types. This is largely a great economic benefit. Unfortunately but inevitably, the same forces that make the benefit possible have made it correspondingly easier to engage in that subset of international commerce that facilitates or is based on fraud and other crimes. Equally unfortunate, the ability of nations to work together to prevent or prosecute international crime has lagged far behind the ability of the criminally inclined to exploit their new economic opportunities.<sup>19</sup>

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17. *Id.* at 81.

18. See cases cited at note 42, *infra*.

19. The ability of one country to obtain evidence from another depends on the particulars of whatever treaty or other agreement is in effect between them. Generally, a prosecutor in one makes application to the government of the other to procure the desired evidence. The process typically takes months, even for routine requests, and sometimes years, even when dealing with a close ally such as Canada. By contrast, with the increased ease of commerce brought by a world economy striving to reduce international barriers, an entrepreneurial criminal intent on fraud can freely travel among a variety of countries, rapidly establishing bank accounts or nominee companies and engaging necessary services in

As a result, it is becoming increasingly likely that in order to prove to a jury that a federal criminal defendant has committed fraud, the prosecutor will need evidence from any of a number of countries in which the defendant may have obtained services that furthered the fraud. Unless the defendant was thoughtful enough to use the services only of United States citizens in those foreign countries, the prosecutor will be unable to subpoena any of those witnesses to testify at trial.<sup>20</sup> That's not necessarily the end of the day, because there may be a treaty or other agreement between the United States and the foreign country which enables the prosecutor to use the power of that government to compel those present in that country to give evidence. But the important point for present purposes is not that the evidence is impossible to get. It is that whatever process does exist will not suffice to bring the live witness before the jury. It will only permit the United States to avail itself of the normal mechanism used in that other country to obtain evidence.

If that other country's legal system is based on the common law, the "normal mechanism" will likely satisfy our Confrontation Clause as it will probably contemplate the presence of defendant and defense attorney, the use of direct and cross examination by the parties, and stenographic recording of the proceedings. But, the testimony will be obtained in the form of a Rule 15 deposition, with all the corresponding infirmities discussed above. If, however, the foreign witness is in a country such as France, Switzerland, or any of numerous others with legal traditions different than our own, none of these givens of American criminal jurisprudence may be available.<sup>21</sup> As Professor Friedman's comments about *United States v. Salim* demonstrate, the evidence that is available under the particular local procedure may or may not satisfy the Confronta-

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each, and thereby stay well ahead of government efforts to halt the fraud or bring her to justice.

20. United States citizens are subject to the subpoena power of the court no matter where in the world they happen to be. 28 U.S.C. § 1783(a). On the other hand, citizens of foreign countries may not be compelled to testify in United States courts unless they can be served with a subpoena while on United States soil. *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984).

21. In France, for instance, the questioning is normally by the court, not by the parties. Defendant and defense attorney are not normally permitted to be present. The proceedings are recorded in a *proces verbal*, a form of official (but not verbatim) summary of the witness's responses. *United States v. Salim*, 855 F.2d at 947-48. However, in December 2001 the United States entered into a new Mutual Legal Assistance Treaty with France that should make it easier to use procedures with which we are more familiar.

tion Clause when offered in a criminal trial in this country.<sup>22</sup> Even if the evidence is admitted, it will still be a pale version of what one could present through live two-way video testimony.

To be sure, under present international law the prosecutor could not usually *force* a foreign witness to submit to video testimony any more than he could force the witness to come to the United States to testify in person. But I've now had the opportunity to interact with a substantial number of foreign witnesses, and my experience suggests strongly that while many citizens of other countries adamantly refuse to travel to the United States to testify, they are willing to accommodate less burdensome requests—a willingness to testify via video from their home country would fit within the comfort zone of many.

The upshot is that because of the increasingly global nature of the economy we are likely to see a significant increase in the need for foreign witnesses in federal criminal trials in the years to come. However, we are not likely to see much change in our ability to produce those witnesses in court any time in the foreseeable future. Live video testimony therefore offers the opportunity to obtain foreign evidence in a form that much more nearly satisfies the Confrontation Clause than the process currently available. As noted above, permitting remote video testimony would be worthwhile even if it only sanctified the action by the *Gigante* court and improved on Rule 15 for witnesses located within the United States. However, the likelihood that remote video would facilitate the presentation of testimony of otherwise problematic foreign witnesses, in a climate where those witnesses will become increasingly important in criminal cases, makes the argument for Rule 26(b) compelling.

## II. THE CONSTITUTIONALITY

Even a great idea for improving the administration of justice still has to pass constitutional muster, though. In this section I contend that the Judicial Conference proposal to permit use of live two-way video testimony in exceptional circumstances satisfies the Confrontation Clause. That is, Justices Breyer and O'Connor have it right,

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22. Friedman, *supra* note 3, at 10 n.20. It is interesting to one steeped in our own tradition to note that to a significant part of the world, our practice of exposing witnesses to questioning by the parties is considered barbaric, a conflict between traditions that even decades of future globalization may not resolve.



and when the Supreme Court ultimately considers the question in the context of a criminal case it should hold the use of live two-way video is constitutional in the limited circumstances for which it is intended. The argument is divided into two parts. The first shows how live two-way video testimony is consistent with existing Confrontation Clause precedents. The second takes a look at Justice Scalia's statement opposing the proposed amendment and concludes that his reservations are unfounded.

As a preliminary matter, not all video testimony is equal as far as the Confrontation Clause is concerned. The calculus is very different depending on whether or not the defendant has the opportunity to be present with the witness during the testimony.<sup>23</sup> On its face Rule 26(b) does not specify whether or not the defendant may be in the presence of the witness. It merely states that two way video testimony is admissible if exceptional circumstances make its use appropriate and if the witness is otherwise unavailable.

There appears to be no significant constitutional issue if the defendant is given the chance to be present with the witness.<sup>24</sup> For the purpose of this section, therefore, I will assume that the defendant wants to be present but it is not feasible to secure her presence, and discuss whether that can be permissible under the Confrontation Clause and if so, when.

More than 100 years ago, in *Mattox v. United States*, the Supreme Court summarized the goals of the Confrontation Clause:

The primary object of [the Clause] was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.<sup>25</sup>

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23. Friedman, *supra* note 3, at 12–13.

24. *Id.*

25. *Mattox v. United States*, 156 U.S. 237, 242–43 (1895). The Court held that the testimony of a witness given at one trial, who was no longer available to testify at a retrial, was properly admissible against the defendant over a Confrontation Clause objection.

Less than twenty years ago the Court addressed the purpose of the Clause again: "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."<sup>26</sup>

As it concerns the proposal to authorize two-way video testimony the most noteworthy aspect of the Court's early litany of Confrontation Clause objectives is that it did *not* include ensuring that the defendant has the opportunity to be physically present while these other purposes are accomplished. While *Mattox*, at least, was written well before the invention of two-way video, it is nonetheless significant that two-way video fulfills each of the purposes the Court did identify - it provides for personal examination and cross-examination in view of the jury so the jury can assess the witness's demeanor and credibility.

More recently Justice Scalia, writing for a plurality of the Court in *Coy v. Iowa*, made a statement which, if applied to remote video testimony, could be construed to mean that such testimony would *not* be acceptable under the Confrontation Clause. He went so far as to state: "[T]he Confrontation Clause *guarantees* the defendant a face-to-face meeting with witnesses appearing before the trier of fact." (emphasis added)<sup>27</sup>

On the surface Justice Scalia's statement would seem to leave little room for witnesses to testify by remote video where that testimony is outside the presence of the defendant.<sup>28</sup> However, even at the time Justice Scalia wrote it, his assertion was accurate only if the "guarantee" was interpreted so narrowly as to be trivial. For example, he certainly could not have meant that the only admissible testimony was that of witnesses who faced the defendant in front of the jury. As the *Coy* concurrence<sup>29</sup> and dissent<sup>30</sup> both noted, the Clause *cannot* literally require such a confrontation in all cases because that would be inconsistent with the admission of evidence that falls within a firmly rooted hearsay exception, such as a state-

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26. *Delaware v. Fensterer*, 474 U.S. 15, 19–20 (1985) (per curiam) (emphasis in original). The question before the Court was whether the prosecutor's use of an expert witness violated the Confrontation Clause, where the expert was no longer able to recall the basis for his opinion. The Court held that the Clause was not violated.

27. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). The issue in *Coy* was whether a state could have a rule that routinely allowed child witnesses in sexual molestation cases to be screened so as not to see the defendant against whom they were testifying. The Court held that this blanket procedure violates the Confrontation Clause.

28. Even under Justice Scalia's language, though, one could still argue that two-way video testimony, in which the witness and defendant see each other clearly, is "face-to-face" within the meaning of the Confrontation Clause. As will be seen, subsequent developments have made that argument unnecessary.

29. 487 U.S. at 1024.

30. 487 U.S. at 1028.

ment by a co-conspirator, dying declarations and statements against the witness's interest.<sup>31</sup> Although the defendant never has the opportunity for any face-to-face confrontation in these situations (much less confrontation before the jury) the Court has nonetheless ruled the evidence admissible, reasoning that the Framers never intended the Clause to preclude accepted hearsay from criminal trials.<sup>32</sup> Therefore, Justice Scalia's guarantee was only valid if quite literally restricted to witnesses who testified in person in court, which made it almost circular and largely insignificant.

Not long after *Coy* the Court made clear that whatever the merits of Justice Scalia's guarantee when he first articulated it, it is no longer even literally correct. *Maryland v. Craig* held that under some circumstances the testimony of child witnesses could be received while the child is screened so as not to see the defendant, thereby establishing an exception to literal face-to-face confrontation even for witnesses who do testify live.<sup>33</sup> Justice O'Connor, writing for the majority, noted that "[the Court has] never held . . . that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial."<sup>34</sup>

The fact that defendants do not have an *absolute* right to confront the witnesses against them in person in court is only a start, though. While the right may not be absolute it is certainly broad, and the real problem is to identify its boundaries. For the reasons next stated, use of two-way video to present the testimony of a witness who is not reasonably available to testify in person (the only circumstance where Rule 26(b) would come into play) is within those boundaries—it is supported by the same Confrontation Clause principles on which the federal courts have relied for many years to admit hearsay and other testimony despite the absence of face-to-face confrontation before the jury.

As noted above, the Supreme Court has long recognized that the Confrontation Clause was never intended to preclude the ad-

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31. See, for example, the discussion in *Maryland v. Craig*, 497 U.S. 836, 847–850 (1990).

32. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 63 (1980).

33. *Craig*, 497 U.S. 836. The Court held that where a trial court makes a finding, supported by evidence in the record, that the child witness may suffer so much distress that he is likely to be unable to communicate if required to testify in the presence of the defendant, the jury may receive the testimony even though the child testifies via one way, closed circuit television, and therefore cannot see the defendant or the jury. Under the procedure approved by the Court, the witness remains subject to cross-examination by defense counsel, who the witness *can* see, and the jury and defendant are both able to view the witness.

34. *Id.* at 844 (emphasis in original).

mission of those forms of hearsay that were firmly entrenched at the time of the Constitutional Convention. The reason is that this firmly established hearsay possesses "indicia of reliability" that adequately substitute for the guarantee of trustworthiness thought to be provided by face-to-face confrontation, and therefore its admission is consistent with the Clause.<sup>35</sup> By similar reasoning the Court has also approved the admission of less firmly rooted hearsay so long as it possesses comparable "particularized guarantees of trustworthiness," such as the prior testimony of a witness who is unavailable at trial, a hearsay exception that did not exist in 1787 but which is codified in Fed. R. Evid. 804(b)(1).<sup>36</sup>

In reaching these results the Court has balanced the interests the Clause protects with the need to ensure accurate truth seeking by occasionally admitting evidence despite the absence of literal confrontation. As the Court stated in *Craig*:

[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.<sup>37</sup>

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[O]ur precedents confirm 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.<sup>38</sup>

When faced with the choice between testimony which does not fulfill Justice Scalia's "in-person" guarantee but fulfills most of the purposes of the Confrontation Clause on the one hand, and no testimony at all on the other, the federal courts have consistently relied on the principles articulated in *Ohio v. Roberts* and *Craig* and have held that public policy excuses the normal requirement for

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35. 448 U.S. at 66.

36. *Id.*; see also *Mattox v. United States*, 156 U.S. 237 (1895).

37. *Craig*, 497 U.S. at 847, quoting *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).

38. 497 U.S. at 850.

live, in-person confrontation.<sup>39</sup> That is, the courts routinely weigh the objectives served by the Clause against the need for juries to have all relevant evidence and invariably strike the balance in favor of admitting the testimony so long as Confrontation Clause values are otherwise protected.<sup>40</sup>

For example, courts have admitted the depositions of otherwise unavailable witnesses even though (because the deposition was taken in another country) the cross-examination was done by a magistrate rather than by defense counsel (albeit based on questions submitted by the defense),<sup>41</sup> and even though the defendant (and in one case the defense attorney as well) was not physically present during questioning.<sup>42</sup> Indeed, federal courts of appeals have found the values served by the Clause satisfied where an otherwise unavailable witness "testified" only through admission of a transcript from an earlier trial in which neither defendant nor defense counsel even participated, and accordingly where the witness was cross-examined only by counsel representing co-defendants, so long as the defendant could not show how her *personal* participation would have made a material difference to the testimony.<sup>43</sup> In only one of these cases did the defendant have any opportunity to confront the witness face-to-face, and that was not in front of the jury.<sup>44</sup> The alternative in each case was to lose the evidence entirely.

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39. See, e.g., *Ohio v. Roberts*, 448 U.S. 56 (1995), and cases discussed at footnote 42, *infra*.

40. *Id.*

41. See, e.g., *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991).

42. Each of the following cases affirmed a district court decision to permit the government to introduce the deposition of a foreign witness, over the objection of the defendant, where the defendant was denied the opportunity to confront the witness(es) face-to-face: *United States v. McKeeve*, 131 F.3d 1 (1st Cir. 1997); *United States v. Walker*, 1 F.3d 423 (6th Cir. 1993); *United States v. Gifford*, 892 F.2d 263 (3d Cir. 1989); *United States v. Kelly*, 892 F.2d 255 (3d Cir. 1989); *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988) (defense attorney was also not present); and *United States v. Sines*, 761 F.2d 1434 (9th Cir. 1985). It should be noted, though, that both *Walker* and *Sines* involved defendants who deliberately chose not to attend the depositions, because they would have subjected themselves to the risk of arrest by foreign authorities had they done so.

The typical procedure followed in such cases to protect the defendant's Confrontation Clause rights to the extent feasible is for the defendant's attorney to attend the deposition in person while the defendant participates via an open telephone line, with a second line available to permit her to consult with counsel in private.

43. *United States v. Shaw*, 69 F.3d 1249, 1251-54 (4th Cir. 1995) (testimony of two co-conspirators, taken at trial of codefendant at which defendant not present because a fugitive, admitted against defendant in his later trial); *United States v. Deeb*, 13 F.3d 1532, 1536-41 (11th Cir. 1994) (testimony of codefendant, taken at trial of other codefendants, at which defendant was not present because a fugitive, admitted against defendant in his later trial).

44. *Sturman*, 951 F.2d 1466.

And, in each case that was a cost the court was unwilling to impose on the accuracy of the fact-finding process where the defendant retained the opportunity to have the witness's testimony tested by cross-examination. In other words, in accord with the Supreme Court's statements in *Craig* and other recent cases, it is always the opportunity for cross-examination, not face-to-face confrontation, which proves decisive to the Confrontation Clause analysis when the alternative is to lose the testimony entirely.

These departures from the trial norm are all consistent with the Supreme Court's recognition that while "face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause' . . . it is not the *sine qua non* of the confrontation right."<sup>45</sup> Rather, the Court has "attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate fact-finding, which may require consideration of out-of-court statements."<sup>46</sup>

The point is not that face-to-face confrontation can or should be dispensed with in criminal trials. Plainly it can not and should not, at least as a matter of routine. Rather, the important point for present purposes is that even as applied to cases in which the defendant cannot be present when the witness testifies, Rule 26(b) does not break significant new ground.

Indeed, the proposal to permit live two-way video in exceptional circumstances is not only consistent with the current practice, it is a *small* departure from the norm relative to several of the cases just cited. That is, each of the cases discussed above dispensed with one or more of the following elements of classical confrontation: personal cross-examination by counsel, presence or participation (even virtual presence or participation) by defendant or defense attorney, jury ability to view the witness and witness ability to view the defendant. Live two-way video dispenses with none of them.

It is also important that Rule 26(b) is not *leading* a charge to introduce remote video testimony. Technology and the common law have already taken us there. Technology is forcing the way because it is now economically feasible to present high quality live two-way video in court. The common law is forcing the way because courts have already considered and been receptive to arguments that ex-

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45. *Maryland v. Craig*, 497 U.S. 836, 847 (1990).

46. *Id.* at 849.

ceptional circumstances warrant the use of remote testimony in criminal trials.<sup>47</sup>

For these reasons, it should be understood that the proposed amendment would not open a floodgate or signal a new departure from our trial norm. It would merely regulate and sanctify a practice which is consistent with our Sixth Amendment tradition and which is already, to some extent, in place.<sup>48</sup>

What, then, of the Supreme Court's refusal to adopt the proposed amendment? All we know of the Court's decision is what we can glean from Justice Scalia's statement. As to Justice Scalia, at least, we know he was concerned that the use of live two-way video in place of in-person testimony would not satisfy the Confrontation Clause. He expressed his concerns in a catchy turn of phrase—"[v]irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones."<sup>49</sup>

While the phrase has a certain ring to it, it turns out to lack substance. As I understand Justice Scalia's argument, stripped to the essentials it is this:

The use of one-way video to admit child testimony approved by *Maryland v. Craig* satisfied the Confrontation Clause only because two factors were present—1) the video furthered the important public policy of preventing trauma to the witness, and 2) there was a case-specific finding that it was necessary to follow the procedure. Rule 26(b) is not so limited, so is not acceptable under *Craig*. It would allow video testimony whenever a Rule 15 deposition is used, and even when Rule 15 is not available. However, Rule 26(b) is not a satisfactory substitute for Rule 15 because 1) two-way video (apparently unlike Rule 15 depositions) is subject to the standard for live testimony articulated in *Craig*, which is more stringent with respect to the defendant's presence than is the standard for

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47. See, e.g., *Harrell v. Butterworth*, 251 F.3d 926 (11th Cir. 2001); *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999); *United States v. Nippon Paper*, 17 F.Supp.2d 38 (D. Mass. 1998).

48. Professor Friedman contends that Rule 26(b) would have "greatly change[d]" the manner in which witnesses may testify in criminal trials. Friedman, *supra* note 3, at 1. Inasmuch as the rule would be limited in its application to some of the situations where a witness is not available to testify in court and which are currently covered by Rule 15, and when applicable would preserve all the rights currently available to defendants under Rule 15, the change may not be so dramatic as appears.

49. Statement of Justice Scalia at 2.

out of court testimony, and 2) Rule 15 spells out a defendant's right to be present but Rule 26(b) does not.<sup>50</sup>

It is useful to examine the different parts of Justice Scalia's argument in isolation. We can start with his assumption about the scope of the proposed amendment. Justice Scalia states that the Rule authorizes the use of video transmission whenever the parties cannot take a Rule 15 deposition, suggesting that the proposal has almost unlimited scope. There is certainly nothing in the proposed rule itself which suggests that. Justice Scalia rests this statement on the Advisory Committee Notes on Fed. Rule Crim. Proc. 26. Those notes are an appendix to the dissent of Justice Breyer. I am unable to find anything in the notes which even hints that live two-way video was intended by the Judicial Conference to broaden the circumstances where a substitute for live trial testimony may already be used under existing law. As noted at the beginning of this article, it appears that Rule 26(b) would never be broader than Rule 15.<sup>51</sup> So, to the extent Justice Scalia is concerned that the proposed amendment would significantly enlarge the present practice, his concern appears unfounded.

What about Justice Scalia's point that the proposed use of two-way video is less acceptable than a Rule 15 deposition because Rule 15 spells out a defendant's right to be present, while Rule 26(b) does not? As I discuss in Section 3, although the proposed amendment does not *explicitly* state that the defendant is entitled to be present at the location of the witness if possible, that right is already embodied in the Confrontation Clause itself. Nothing in Rule 26(b) is inconsistent with a defendant asserting that right in a particular case. The absence of explicit language does not raise a constitutional concern so long as the rule is consistent with the Constitution, as it is.

What, then, of the argument that Rule 26(b) is subject to a more stringent constitutional standard than a Rule 15 deposition because, unlike Rule 15, it applies to "live" testimony? Justice Scalia relies on *White v. Illinois* for the proposition that the Court applies a different test to live testimony than to out-of-court statements.<sup>52</sup>

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50. Summarized from Statement of Justice Scalia at 1-3.

51. In fact, it would sometimes be less broad, inasmuch as it could only substitute for Rule 15 if the witness is available at the time of trial.

52. Statement of Justice Scalia at 2; see *White v. Illinois*, 502 U.S. 346, 358 (1992) (holding that the Confrontation Clause does not prohibit the admission in a criminal trial of excited utterances and statements made in furtherance of seeking medical treatment, even if the declarant does not testify at the trial).



However, the cited portion of *White* only stands for the proposition that before a prosecutor can dispense with in-person confrontation for trial witnesses there must be a suitable showing that it is necessary to do so, while there is no need to make a similar showing of necessity before hearsay is admitted. That principle plainly does not serve to draw a meaningful distinction between a Rule 15 deposition and live two-way video under Rule 26(b). A Rule 15 deposition is taken for the very purpose of obtaining testimony to be introduced at a criminal trial. In this critical respect it is identical to two-way video and differs from the “firmly rooted hearsay” as to which no showing of necessity need be made. There is thus no reason to treat Rule 15 depositions any differently than live testimony or live video in this respect. The fact is that one must indeed show that a Rule 15 deposition is necessary as a pre-condition to taking the deposition and admitting the testimony.

The comparison with Rule 15 is largely beside the point, though. The real question is whether Rule 26(b) satisfies the Constitution, whether or not it is the equivalent of Rule 15. As to that question, Justice Scalia faulted the proposal because it did not require a case-specific finding that meets the standard of *Craig*, and because it contained no requirement that the use of two-way video further an important public policy. Justice Scalia is simply wrong on both counts.

Rule 26(b) only authorized two-way video as a substitute for live testimony if the proponent established case-specific “exceptional” circumstances and if the witness was unavailable to testify at trial. The rule did not spell out the circumstances that would count as “exceptional,” but here a comparison with Rule 15 *is* useful. As noted above, Rule 15 is also limited to “exceptional” circumstances, and in practice it has been used almost exclusively when the witness is unavailable to testify at trial.<sup>53</sup>

Rule 26(b) plainly would require that the findings of witness unavailability and exceptional circumstances be case specific. The question raised by Justice Scalia’s statement, then, is why a case-specific finding of exceptional circumstances is not sufficient to meet the *Craig* requirement that video testimony is only an acceptable substitute for the in-court version if the video version furthers an important public policy.

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53. See FED. R. CRIM. P. 15(e). It is for this reason that Professor Friedman and I agree that any rule which authorizes two-way video should not condition its use on *both* exceptional circumstances and witness unavailability. See text accompanying note 64, *infra*.

One possibility is that the Judicial Conference simply chose the wrong language. If, instead of requiring a finding of "exceptional circumstances" it had required a finding that two-way video "further an important public policy" it might be that Justice Scalia would have been satisfied. As a practical matter, though, it is hard to imagine that an exceptional interest would not further an important public policy. This is especially true in the context of two-way video, as for the reasons next stated the only circumstance that is likely to count as "exceptional," the government's inability to produce the witness in court, is exactly the circumstance that gives rise to the "important public policy" that underlies *Craig* and other Confrontation Clause precedents.

The important public policy articulated in *Craig*, and repeated by Justice Scalia, which warranted use of one-way video was "protecting a child witness from trauma."<sup>54</sup> Not explicitly stated in the Court's analysis, but clearly implicit in its decision, was an overriding goal - preserving the integrity of the trial by ensuring that important and relevant evidence was made available to the jury. That this is so is shown by the fact that the child in *Craig* would have been fully protected from trauma simply by not testifying at all, a result that would have had the added benefit of avoiding any tension with the Confrontation Clause. However, denying the jury this evidence would have corrupted its fact-finding process and substantially impeded the State of Maryland's ability to enforce its law against child abuse. The Court has long recognized that the government's interest in accurate fact-finding and in enforcement of its criminal laws is an important public policy.<sup>55</sup> Only if the Court in *Craig* accepted as a premise that it was more important for the child's evidence to come before the jury than for the defendant to receive the full panoply of Confrontation Clause protection did it become necessary for the Court to balance the Clause against the need to protect the witness.

Viewed in that light *Craig* is completely consistent with the now long line of precedent discussed above, both from the Supreme Court and the federal appellate courts, which have struck exactly the same balance in other Confrontation Clause contexts. The courts have uniformly recognized that presenting reliable evidence

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54. *Maryland v. Craig*, 497 U.S. 836, 852-55 (1990); Statement of Justice Scalia at 1.

55. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 64 (1990), where, in explaining circumstances when the Confrontation Clause might need to give way to some extent, the Court stated "[s]ignificantly, every jurisdiction has a strong interest in effective law enforcement." See also *Bourjaily v. United States*, 483 U.S. 171, 182 (1987) (the Confrontation Clause must be balanced against the societal interest in accurate factfinding).

to a criminal jury is an important public policy interest. In each case where the courts have been willing to tolerate a deviation from the in-court norm it has been because the alternative was to lose the testimony.<sup>56</sup> *Craig* is best understood as the application of that principle in the context of child sexual abuse cases.

Now consider Rule 26(b). I have already noted that one requirement for its use is a case-specific finding that the witness is unavailable. In other words, the alternative to using the two-way video (or an admittedly inferior Rule 15 deposition) is to lose the evidence completely.<sup>57</sup> Once that finding is made the use of Rule 26(b) to make the evidence available cannot be distinguished from *Craig* in any significant way.

Professor Friedman asserts that the situation of the traumatized child that justified use of one-way video in *Craig* is “fundamentally different” than that of an adult witness who is able to testify but cannot come to court.<sup>58</sup> The difference, he writes, is that it is impossible for the child to be confronted by the defendant and still testify, while the adult witness could be confronted by the defendant, presumably by bringing the defendant to him. The difference is not so fundamental as it appears, though. If, in fact, the defendant *can* be brought to the witness, then, as I argue elsewhere in this article, the Confrontation Clause demands that her desire be accommodated and nothing in Rule 26(b) prevents doing so. That is not a basis for finding Rule 26(b) unconstitutional. The only interesting constitutional question arises when the defendant *cannot* be brought to the witness. But in that case, the fundamental difference between the child in *Craig* and the adult in the hypothetical case disappears completely. In fact, it follows from Professor Friedman’s statement that when the defendant cannot be brought to the witness, the use of two-way video to present the testimony of the adult witness to the jury is at least as satisfactory under the Confrontation Clause as was the one-way video approved in *Craig*.<sup>59</sup>

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56. Professor Friedman writes that he doubts that mere inability to procure testimony is enough to be an important public policy. Friedman, *Remote Testimony*, *supra* note 3, at 12 n.24. He does not explain his doubt. For my part, I am not aware of any *other* satisfactory justification for *Craig*, while the fact that this justification is consistent with Confrontation Clause precedents makes it very satisfying.

57. Or, as discussed at text accompanying note 11, *supra*, to preserve the testimony through some lesser alternative like a Rule 15 deposition.

58. Friedman, *supra* note 3, at 12.

59. It should actually be more acceptable, since with two-way video the witness is confronted by the virtual defendant.

But, Professor Friedman also objects to any reliance on *Craig* to support the use of two-way video on the basis that *Craig* is of dubious legitimacy itself and should therefore not be “extended.”<sup>60</sup> I disagree for two reasons. First, if *Craig* is properly viewed as just one application of a long-standing rule that almost complete compliance with the Confrontation Clause will suffice if the alternative is to lose relevant evidence, then applying that same general rule to any other situation in which the witness is unavailable is not an “extension” at all. Indeed, to the extent two-way video better protects Confrontation Clause interests than the one-way video found acceptable in *Craig*, it is closer to the constitutional core.

Second, I do not agree that *Craig* is of dubious legitimacy. The general principle that supports *Craig* is consistent with the Court's precedents holding that the Confrontation Clause is not absolute, and which appear to stand for the proposition that deviating from full compliance with the Clause is acceptable if the alternative is to lose relevant evidence entirely and the deviation is minor.

To appreciate this position it is helpful to repeat what is not at stake. The Confrontation Clause protects several values.<sup>61</sup> Two-way video does not implicate most of them. In particular, it does not implicate the witness's oath to tell the truth, the defendant's ability to cross-examine, the ability of the jury to observe the witness, the ability of the witness to see the judge, jury or defendant, or the defendant's ability to see the witness. It is not even clear that it diminishes in the least whatever benefits accrue to the defendant by having the witness testify in her presence, since we do not yet know whether real in-person testimony and virtual in-person testimony differ in this regard. In any event, if two-way video has *any* impact on the values served by the Clause, the impact is at the margin of just one of those values. That is, even if virtual presence is not the same as real presence, it is much closer to real presence than it is to no presence at all. The question, then comes down to whether the balance should be struck in favor of literal compliance with full confrontation at the expense of losing relevant evidence, or in favor of almost full confrontation in order to preserve rele-

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60. Friedman, *supra* note 3, at 11–12.

61. We should also not lose sight of the fact that we do not know what values the Framers *intended* the Clause to protect. Long after the Constitutional Convention the Supreme Court began to identify various values that strict in-person in-court confrontation could protect. Those became the values that the Clause is assumed to be intended to protect. It is not at all clear that, if given the choice of individual values the Court has since identified, the Framers would find all to be equally necessary. By the same token, *we* should not be locked into assuming that all are equally important to protecting the essence of confrontation.

vant evidence. The courts have been correct to strike the balance in favor of the latter. Rule 26(b) would not have altered by one iota the balance which has already been struck. For these reasons any constitutional concerns about the proposed use of two-way video are unfounded.

### III. THE JUDICIAL CONFERENCE PROPOSAL AND PROFESSOR FRIEDMAN'S ALTERNATIVE

For the reasons stated above, it is constitutionally acceptable and desirable to permit remote video testimony in appropriate cases. What, then, of the particular proposal rejected by the Supreme Court?

The first prerequisite to introducing live video testimony under the proposed amendment is that the proponent establishes "exceptional circumstances."<sup>62</sup> Professor Friedman believes this requirement is swallowed by the third prerequisite, that the witness be "unavailable" as defined by Federal Rule of Evidence 804(a).<sup>63</sup> If one assumes that the desired testimony is material, Professor Friedman is probably correct. As he notes, any time the witness has material testimony and is unavailable a court is likely to find the circumstances "exceptional."<sup>64</sup>

The resulting confusion may not be benign. Courts are obligated to give effect to all parts of a rule if they can, so can be expected to try to give separate meaning to "unavailable" and "exceptional circumstances." The result could well be that courts looking for circumstances more exceptional than a witness who cannot be produced for trial will unduly restrict Rule 26(b) in the process. The *best* that can be hoped for, if the phrase is not simply ignored, is that it will be construed to mean that testimony which is otherwise unavailable must be material, as this is not elsewhere explicit in the proposed amendment. Rule 26 does not need a materiality provision, however, as the Federal Rules of Evidence already impose that requirement.<sup>65</sup>

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62. The Advisory Committee commentary notes that the "exceptional circumstances" requirement is also found in Rule 15, which requires proof of such circumstances before a deposition can be taken in a criminal case. Appendix at 8.

63. Friedman, *supra* note 3, at 14.

64. *Id.*

65. A trial court already has the power to exclude evidence that is not material under Rules 401 and 403 of the Federal Rules of Evidence.

Having strongly made his point that it adds nothing to require a showing of both exceptional circumstances and unavailability, Professor Friedman nonetheless keeps the requirement for exceptional circumstances in his proposed substitute rule, and with respect to prosecution witnesses he keeps the requirement of unavailability as well.<sup>66</sup> The rule would be better if it were only conditioned on the witness's unavailability.

If "unavailability" is to remain in the rule, the next question is how it should be defined. As noted above, the proposed amendment incorporates the definition of unavailability in Fed. R. Evid. 804(a)(4)–(5). Professor Friedman cautions that because Rule 804 and Rule 26 have different purposes, this wholesale incorporation might cause confusion or lead to bad results.

I agree that incorporating the Rule 804 definition in this way is less than desirable, but not out of concern for bad results. It is enough that it would be more aesthetically pleasing to have a rule that did *not* lead to the theoretical possibility that a corpse could give live video testimony, as is permitted under a literal reading of the current language. But, aesthetics aside, it is not clear that incorporating the Rule 804 definitions in Rule 26 presents any substantive problem.

As I understand the motive for Professor Friedman's proposed definition, it is a reaction to the Judicial Conference's proposal to incorporate the Rule 804 definition, including its provision defining a witness as unavailable because of mental infirmity. Professor Friedman's concern is that this language might permit a prosecutor to argue for admission of remote video testimony of a witness whose only "infirmity" is that he is uncomfortable testifying in person at court.<sup>67</sup> To prevent this perceived potential abuse, Professor Friedman would include a clause requiring any purported mental infirmity to be assessed without respect to the presence of other persons in the courtroom.<sup>68</sup>

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66. Friedman, *supra* note 3, at 21–22 (referring to sections b(1) and b(3)(B) of proposed revision to Rule 26(b)).

67. Friedman, *supra* note 3, at 16. Professor Friedman also notes that incorporating the Rule 804(a)(5) definition of unavailability will incorporate its parenthetical clause as well. *Id.* at 17. But that clause is, by its own terms, inapplicable, coming into play only where a statement is sought to be admitted because it was made under belief of impending death, or was against the declarant's interest, or concerns the declarant's personal or family history. As with the case of the witness who cannot attend because of death the courts should be capable of ignoring this patently inapplicable provision without difficulty. Again, only the aesthetic aspect is really troubling.

68. Friedman, *supra* note 3, at 22 (referring to section b(3)(B)(i) of suggested redraft of the proposed amendment).

Professor Friedman's concern seems unfounded. One reason is that were the prosecutor able successfully to rely on Rule 26 to make the argument Professor Friedman fears, his success would do nothing to get him past any Confrontation Clause problems.<sup>69</sup> So, even if Professor Friedman is correct that the argument is specious, there is no need to draft Rule 26 to prevent it.

More fundamentally, one would hope that before any prosecutor would advance such an argument and any court accept it, there would be substantial evidence that this previously unheard of mental infirmity really existed, independent of the witness's reluctance to confront a particular defendant. In the absence of such evidence the argument would plainly be for the purpose of shielding a witness who is simply reluctant to face the defendant, and would be frivolous. Courts will undoubtedly reject it and should be trusted to do so, without any explicit provision in the rule.

My concern, and the reason this is worth the trouble to discuss, is that drafting rules to anticipate and neutralize all potential frivolous applications may cause other unintended mischief. The effect of anticipating too many problems might be to squelch a position that either was not anticipated at the time of drafting or seems implausible in the abstract but turns out to have merit when it really arises. For example, if it turned out that evidence of a mental infirmity which is triggered by testifying in court really did exist in a particular case (maybe an adult variant of *Craig*), perhaps the argument in favor of using remote testimony would be stronger than now appears. The possibility should not be precluded by the rule before it can be raised in an actual case. For these reasons I think that if a definition of unavailability is included in Rule 26, it should not preclude any particular mental infirmity.

Another change Professor Friedman would make is to require that the jury be able to see not only the witness but also anyone present with the witness, to prevent hidden coaching. This is worthwhile. Although one would hope that courts would protect against the possibility of coaching on their own initiative, there is no sense leaving open the possibility that some court will fail to do so. I also agree with Professor Friedman's suggestion that the rule should articulate in a general way the required clarity of transmis-

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69. Indeed, *Maryland v. Craig* itself might make it hard to prevail with such an argument. The Court defined its holding as approving the denial of face-to-face confrontation only where the physical presence of the defendant (not the courtroom setting generally) would make it impossible for the witness to communicate, and cited with apparent approval that part of the Maryland court of appeals opinion which stated that the witness's inability to testify in an ordinary courtroom setting would not be sufficient. 497 U.S. at 857-58.

sion, and that the proposed amendment is correct to *require* two-way video transmission.

Professor Friedman would make another very substantive change to the amended Rule 26, one with which I strongly *disagree*. He would treat the defense much more favorably than the prosecution in three ways:<sup>70</sup> 1) the prerequisite that the witness be unavailable before video testimony is permitted would only apply to prosecution witnesses; 2) only prosecution witnesses would be required to testify via two-way (rather than one-way) video; and 3) the defense (but only the defense) would have spelled out in the rule the right to be present at the witness's location.<sup>71</sup>

At first blush one might reasonably think this is an issue that requires no discussion at all, because the rules ought to be the same for both prosecution and defense as a matter of simple fairness. While that is certainly true when the prosecution and defense are similarly situated, Professor Friedman is correct that in some instances they are not.<sup>72</sup> When they are not, some asymmetry in the treatment of the government and defense is necessary to the fair and efficient administration of justice.

It follows, as Professor Friedman also notes, that asymmetric treatment of the prosecution and defense is neither wholly good nor wholly bad.<sup>73</sup> Rather, each asymmetry must be considered on its own merits, in light of the policies it implicates. On this basis the Federal Rules of Criminal Procedure and Federal Rules of Evidence contain several justifiable asymmetries.<sup>74</sup>

One of the oft-cited bases for asymmetries that favor the defense is that our criminal justice system would rather free ten guilty persons than convict one innocent. If that were the only principle at

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70. Friedman, *supra* note 3, at 21-22 (referring to the suggested redraft at section b(3)).

71. In making this argument Professor Friedman notes that asymmetries in the criminal law are not inherently undesirable. Friedman, *supra* note 3, at 20 n.39 and accompanying text. That is certainly true, as is the point that each potential asymmetry should be judged with respect to the interests it serves, not simply with respect to whether it creates an imbalance between prosecution and defense. *Id.* However, it is equally true that the fact that some existing asymmetries may be acceptable does not demonstrate that a particular new asymmetry is also desirable.

72. Friedman, *supra* note 3, at 20.

73. *Id.* at 20 n.39.

74. For example, Rule 21 of the Federal Rules of Criminal Procedure, gives defendants (but only defendants) the right to request a change of venue, while Rule 29 authorizes only the defendant to move for a "directed verdict" (actually a judgment of acquittal). Similarly, Rule 104(d) of the Federal Rules of Evidence, protects only a criminal defendant from wide ranging cross examination when she testifies as to a preliminary matter, and Rule 404(a)(1) excludes pertinent character traits only of the accused from evidence, unless she first offers evidence concerning such a trait.



work, it would justify skewing every rule in favor of the defense. But it is not - there are many other policies that underlie the criminal justice system, not the least of which is to ensure the accuracy of the trial process. For the reasons that follow I believe that in light of the several principles at work, none of the asymmetries suggested by Professor Friedman for Rule 26(b) is justified.

Let's consider first the right of the opposite party to be physically present when the witness testifies. Noting that the concept of "confrontation" may lose something if the witness is not in the immediate presence of the defendant, Professor Friedman appears to prefer that Rule 26 confer on the defendant an unqualified right to be present at the witness's location, but he would have the rule be silent as to the prosecutor's right to attend.<sup>75</sup> This asymmetry raises several questions—should either party have an *absolute* right to attend? Should the parties have *differing* rights to attend? And, whatever the parties' rights ought to be, is Rule 26 the appropriate vehicle through which to address them?

What about an absolute right in either party to attend? As noted in Section 2, above, the Confrontation Clause does not give defendants that right. Professor Friedman's proposal would therefore expand the defendant's right beyond its current boundaries.

That would be counter-productive.<sup>76</sup> It would, for example, have precluded the testimony of the ill witness in *Gigante*—Gigante was apparently too ill himself to be present with the witness, and a court would not and should not find that Gigante's unintentional illness acted as a waiver of any right he had to attend.<sup>77</sup>

The greater mischief, though, would be with respect to foreign witnesses. If, for instance, the defendant is in custody, the foreign country in which the witness is present may be unwilling to guaran-

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75. Friedman, *supra* note 3, at 21–22 (referring to suggested redraft at section (b)(3)(C)).

76. Although it would be counterproductive in a perfect world, as things now stand the world is not perfect. The Supreme Court has rejected the Judicial Conference proposal, apparently based on a belief, which I have argued is unfounded, that two-way video testimony is not constitutional unless the witness is in the physical presence of the defendant. There is presumably no constitutional barrier to the use of remote video testimony when the defendant does have the right to be present. A rule that only allowed video testimony of witnesses in the presence of defendants would still be useful for all the other advantages it would confer over present practice. At a minimum, therefore, the rule should propose that much, although it would be far from ideal.

77. Waivers of constitutional rights must be both knowing and intentional. *See, e.g.*, *United States v. Fareta*, 422 U.S. 806, 835 (1975); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege"). Although Gigante's waiver of the right to be present may have been knowing, it could hardly be characterized as intentional, forced as it was by his own illness.

tee her security and may accordingly forbid her the passage necessary to her in-person participation.<sup>78</sup> Professor Friedman's more restrictive proposal would forbid the use of live video to introduce this testimony.<sup>79</sup>

At the same time, conditioning the application of Rule 26(b) on the defendant's absolute right to attend would have no impact on other, already accepted, methods of obtaining the same testimony. A prosecutor could obtain a stenographic record or a videotape, even absent the defendant, in appropriate cases.<sup>80</sup> Live remote testimony is a closer approximation to having the witness in court during trial than either a stenographic or video record. It would make no sense to make *live* remote testimony unavailable where lesser options *are* available. If Rule 26(b) is to mention the right of either party to be present at the witness's location at all, Professor Friedman's more flexible proposal, to permit the opposite party to be present unless there is a compelling reason not to, is the more appropriate.

But, should Rule 26 spell out the right of either party to be present? A defendant already has a qualified right to attend in person based on the Confrontation Clause itself. A strong argument can be made that so long as it is reasonably possible for the defendant to be physically present with the witness, the Clause guarantees her that right. The cases discussed above which authorized the admission of out-of-court testimony though the defendant was *not* present did so only because there was no reasonable way to obtain

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78. See, e.g., *United States v. McKeeve*, 131 F.3d 1 (1st Cir. 1997); *United States v. Gifford*, 892 F.2d 263 (3d Cir. 1989).

79. Professor Friedman states that a rule which allows remote testimony whenever a foreign government resists face-to-face confrontation gives American authorities an incentive to treat foreign objections as dispositive rather than to try to negotiate around them. Friedman, *supra* note 3, at 11 n.22. This is wrong for at least two reasons. First, it is not as if prosecutors see it as being to their advantage to be required to follow foreign procedures. Like defense counsel, we prefer to examine witnesses ourselves and to otherwise follow the procedures with which we are familiar, and in many cases any foreign procedure that restricts the rights of a defendant will restrict the prosecutor's rights as well. Indeed, it has been for just that reason that my colleagues and I have routinely negotiated with foreign governments to get their approval of our use of American-style courtroom procedures each time we have had the need to obtain testimony overseas. Second, few prosecutors are anxious to litigate an unnecessary Confrontation Clause issue. If we can procure the defendant's presence, it is in our interest to do so. In any event, even if one demonstrated that prosecutors do need an additional incentive to try to pressure foreign governments to permit us to obtain testimony under American procedures, it is not clear how workable standards, which would do more good than harm, could be created. In this regard it is helpful to note that, like it or not, we are often at the mercy of foreign governments when we ask their help, and often have little if any bargaining power.

80. *Id.*

the testimony *with* the defendant present.<sup>81</sup> Each wrestled with the Confrontation Clause implications of the decision, and there is no reason to think any would have ruled as it did had it been possible to procure the defendant's in-person presence. Nothing in the proposed amendment to Rule 26 would foreclose such an argument by a defendant.

Although spelling out in the rule the parties' right to be present should not be necessary, it might be useful to avoid confusion. In this regard, it is interesting that although Rule 26(b) was itself silent as to the defendant's presence at the location of the witness, Justice Scalia seems to have assumed that the defendant would *not* be present.<sup>82</sup> An explicit provision that did not go beyond the scope of the Confrontation Clause would avoid any suggestion that Rule 26(b)'s silence on that point means that no such right exists.

If Rule 26 does articulate a right to be present, should it apply only to defendants? Clearly not. While Professor Friedman is obviously correct that there is no Confrontation Clause to protect the prosecution's right to be present, it does not follow that the Rules of Criminal Procedure should perpetuate this asymmetry at trial. At least a part of the rationale behind our current interpretation of the Confrontation Clause is a belief that a party's presence might have some impact on the testimony of witnesses called by the opposing side. If that assumption is correct, surely its impact should be recognized when it is the prosecutor's presence that counts as well as when it is the defendant's. That is, until there is some qualitative support for the notion that the party's live presence does *not* appreciably enhance the accuracy of testimony, the Constitution's silence on this point is no reason to disadvantage the prosecution.<sup>83</sup> This follows from two of the goals our criminal justice system attempts to achieve—accurate trials and fair treatment for both sides. In the absence of some overriding consideration, and none is present in the case of remote video testimony, these goals ought to carry the day.

The potential danger, where the defendant's right is clearly identified in the rule and the prosecution's is not, is that a court might reasonably conclude that the omission means the prosecution has no such right. Therefore, if Rule 26 addresses the right of either party to be present, it should do so for both parties.

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81. See cases discussed at note 42, *supra*.

82. Statement of Justice Scalia at 2.

83. As Professor Friedman acknowledges, he has no such support. Friedman, *supra* note 3, at 8–9.

One last word on this issue. As noted above, there are exceptional circumstances where federal courts have found it acceptable for a prosecution witness to testify although the defendant did not have the opportunity to be present.<sup>84</sup> If exceptional circumstances in some case make the prosecutor similarly unavailable, fairness dictates that the defendant still be able to introduce the testimony.

Next, should the requirement that the video transmission be two-way apply only to prosecution witnesses? Professor Friedman contends (and I agree) that two-way video transmission should be required for prosecution witnesses. As he notes, a prosecution witness may find it harder to lie if he has to look at the defendant while he testifies.<sup>85</sup> As he further notes, given modern technology two-way video should not present a logistical hurdle: "If one-way transmission is practicable, then almost by hypothesis two-way transmission is as well, and it ought to be required."<sup>86</sup>

Despite these sentiments, he suggests that one-way video should suffice if it is the testimony of defense witnesses that is offered.<sup>87</sup> I disagree. Just as a prosecution witness might find it harder to lie while looking at the defendant, a defense witness might find it harder to lie while looking at judge, jury or prosecutor. There is no sound policy reason to free defense witnesses of this potential aid to their truthfulness.

Finally, the third asymmetry—should the defendant be free to introduce testimony by remote video whenever she wants? Professor Friedman's proposed Rule 26(b) would require the court to decide whether it is in the interests of justice for the *prosecution* to introduce remote testimony of its witnesses, but he would leave it up to the defense *alone* to decide when to introduce remote testimony of defense witnesses.<sup>88</sup> He justifies this asymmetry by asserting that remote testimony by defense witnesses is likely to be less effective than in-person testimony.<sup>89</sup> This rationale lacks force for two reasons. There is no support for the statement that remote video testimony will be less effective than the in-person kind. Also, as Professor Friedman notes when discussing his concern about the prosecution's use of remote testimony, there may be something

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84. See, e.g., the cases cited at note 42, *supra*.

85. Friedman, *supra* note 3, at 18.

86. *Id.* at 19.

87. *Id.* at 21.

88. "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 the judgment." Friedman, *supra* note 3, at 21.

89. *Id.*

intangible about testifying in court that has a salutary impact on the witness.<sup>90</sup>

As with the other asymmetries discussed above, there is no policy reason to give defendants the benefit of these doubts. If Professor Friedman's assumptions are correct, permitting the defense freer use of remote testimony would only decrease the accuracy of the trial process without conferring any legitimate benefit on defendants. So long as the justification for not permitting the prosecution unfettered use of remote video testimony is that it might not be as good as the real thing, there is no sound reason to give the defense unilateral power to decide when to use it. If there are good reasons for defense witnesses to testify remotely, courts can be trusted to recognize them after receiving appropriate input from counsel for both sides.<sup>91</sup>

#### IV. THE FUTURE

The proposed amendment, especially as modified by some of Professor Friedman's suggestions, is a worthwhile start to regulating the use of video technology in the criminal courtroom. But it is only a start. The possibility of live remote testimony raises, for the first time, the question whether the interests that are thought to be served by having the witness testify in the physical presence of the defendant can be satisfied by any other means even when the witness *can* be produced in court.

Quite rightly, in the absence of evidence to the contrary Justice Scalia and Professor Friedman counsel us to be very cautious before watering down the requirement that the defendant physically be present with the witness. But, while there is intuitive appeal to the notion that the defendant's physical presence with the witness is a more useful inhibitor of false testimony than is her remote presence, it is by no means certain that our intuition is correct.<sup>92</sup> It is at least plausible that the opposite is true, that is, that the values protected by the Confrontation Clause are protected equally by

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90. *Id.* at 8.

91. It's not clear what those good reasons would be. Defendants certainly do not need freer access to remote testimony to enable them to produce witnesses, as they can already call upon the power of the court in most instances to compel their attendance, and defendants have the court pay the cost of their attendance as well if they are unable to do so.

92. Professor Friedman asserts that remote testimony is "very much a second best procedure." Friedman, *supra* note 3, at 7. His assertion may or may not be true—to my knowledge it has never been tested.

physical and by virtual confrontation. It is also at least plausible that the Clause is fully served merely by subjecting the witness to cross-examination, even if the defendant is neither really nor virtually present. And, it is at least plausible that the physical presence of the defendant makes absolutely no difference when some types of witness testify (e.g. records custodians), but makes a large difference when other types testify (e.g. a cooperating codefendant).

These questions are worth asking. One of the significant monetary costs of the criminal justice system is that of transporting witnesses from various parts of the country to the location of trial. Many of those witnesses testify only about uncontested matters. Although not contested, their testimony is nonetheless important to establish elements of the offense, or to explain parts of the transaction that gave rise to the charge.

As noted above we are likely to see substantially increased reliance on foreign witnesses to make these points in federal criminal cases. The expense of procuring testimony from foreign witnesses is dramatically higher than that of domestic witnesses. The government must pay to transport not only the prosecutor and investigating agent, but also the defendant(s), defense attorney(s), and, if not locally available, a court reporter and videographer, to the location of the witness. In a given case that can easily be tens or hundreds of thousands of dollars to obtain evidence that, while it may be critical, may also be completely uncontested.<sup>93</sup>

If this expense actually furthers a substantial right of a defendant, there is no question that the judicial system should bear it.<sup>94</sup> But, given the costs, we should not simply *assume* that it does.<sup>95</sup> As

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93. The paradigmatic witness (whether foreign or domestic) in a white collar federal criminal case is a business person called on to testify about transactions that took place in what appeared to be the ordinary course of business. The normal contest in such a case is whether the defendant had fraudulent intent, which rarely rests on witness credibility.

94. It may be worth noting the limits of what I see as the ability to use the amended rule to obtain foreign testimony. The overriding consideration is that remote testimony be used only when it is in the interests of justice to do so. While it seems to me that the amendment could greatly simplify the acquisition of non-controversial foreign evidence, I doubt a court would find it in the interests of justice to permit remote testimony that *is* controversial absent a substantially stronger showing of exceptional circumstances by the prosecutor.

95. It is the government that currently pays to transport witnesses to court, and the government that pays to transport defendants, defense attorneys, etc., to witnesses when a deposition is to be taken. It would be the government that pays to transport defendants to be with witnesses under Rule 26(b). Both the government and the taxpayers that support it have a lot of other things on which to spend their money. Those of us who spend taxpayers' money on criminal justice should do so as efficiently as is consistent with doing our jobs effectively and preserving the rights of defendants, and the rules ought to be designed to foster as much to the extent consistent with the Constitution and principles of fairness.

judges continue to grapple with the potential of new technologies, it will be important to the proper exercise of their discretion that they be able to make informed decisions about the impact of those technologies on the parties' right to a fair trial. To my knowledge, no effort has been made to address this issue, and there is substantial potential for worthwhile contributions.