

Statement of SCALIA, J.

**SUPREME COURT OF THE UNITED STATES**  
AMENDMENTS TO RULE 26(b) OF THE FEDERAL  
RULES OF CRIMINAL PROCEDURE

[April 29, 2002]

JUSTICE SCALIA filed a statement.

I share the majority's view that the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b) is of dubious validity under the Confrontation Clause of the Sixth Amendment to the United States Constitution, and that serious constitutional doubt is an appropriate reason for this Court to exercise its statutory power and responsibility to decline to transmit a Conference recommendation.

In *Maryland v. Craig*, 497 U. S. 836 (1990), the Court held that a defendant can be denied face-to-face confrontation during live testimony at trial only if doing so is "necessary to further an important public policy," *id.*, at 850, and only "where there is a case-specific finding of [such] necessity," *id.*, at 857–858 (internal quotation marks omitted). The Court allowed the witness in that case to testify via one-way video transmission because doing so had been found "necessary to protect a child witness from trauma." *Id.*, at 857. The present proposal does not limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that it is "necessary to further an important public policy." To the contrary, it allows the use of video transmission whenever the parties are merely unable to take a deposition under Fed. Rule Crim. Proc. 15. Advisory Committee's Notes on Fed. Rule Crim. Proc. 26, p. 54. Indeed, even this showing is not necessary: the Committee says that video transmission may be used generally as an alternative to depositions. *Id.*, at 57.

This is unquestionably contrary to the rule enunciated in *Craig*. The Committee reasoned, however, that "the use

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of a two-way transmission made it unnecessary to apply the *Craig* standard.” *Id.*, at 55 (citing *United States v. Gigante*, 166 F. 3d 75, 81 (CA2 1999) (“Because Judge Weinstein employed a two-way system that preserved . . . face-to-face confrontation . . . , it is not necessary to enforce the *Craig* standard in this case”), cert. denied, 528 U. S. 1114 (2000)). I cannot comprehend how one-way transmission (which *Craig* says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added. As we made clear in *Craig, supra*, at 846–847, 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. Virtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones.

The Committee argues that the proposal is constitutional because it allows video transmission only where depositions of unavailable witnesses may be read into evidence pursuant to Rule 15. This argument suffers from two shortcomings. First, it ignores the fact that the constitutional test we applied to live testimony in *Craig* is different from the test we have applied to the admission of out-of-court statements. *White v. Illinois*, 502 U. S. 346, 358 (1992) (“There is thus no basis for importing the ‘necessity requirement’ announced in [*Craig*] into the much different context of out-of-court declarations admitted under established exceptions to the hearsay rule”). Second, it ignores the fact that Rule 15 accords the defendant a right to face-to-face confrontation during the deposition. Fed. Rule Crim. Proc. 15(b) (“The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce the defendant at

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the examination and keep the defendant in the presence of the witness during the examination . . .”).

JUSTICE BREYER says that our refusal to transmit “denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology . . . that will help to create trial procedures that are both more efficient and more fair.” *Post*, at 3. This is an exaggeration for two reasons: First, because Congress is free to adopt the proposal despite our action. And second, because nothing prevents a defendant who believes this procedure is “more efficient and more fair” from voluntarily waiving his right of confrontation.\* The only issue here is whether he can be *compelled* to hazard his life, liberty, or property in a criminal teletrial.

Finally, I disagree with JUSTICE BREYER’s belief that we should forward this proposal despite our constitutional doubts, so that we can “later consider fully any constitutional problem when the Rule is applied in an individual case.” *Post*, at 2. I see no more reason for us to forward a proposal that we believe to be of dubious constitutionality than there would be for the Conference to make a proposal that it believed to be of dubious constitutionality. We do not live under a system in which the motto for legislation is “anything goes, and litigation will correct our constitutional mistakes.” It seems to me that among the reasons Congress has asked us to vet the Conference’s proposals—indeed, perhaps *foremost* among those reasons—is to provide some assurance that the proposals do not raise seri-

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\*JUSTICE BREYER’s assertion to the contrary notwithstanding, existing Fed. Rule Crim. Proc. 26 does not prohibit the use of video transmission by consent. *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (“The provisions of [the Federal Rules of Criminal Procedure] are presumptively waivable [unless] an express waiver clause . . . suggest[s] that Congress intended to occupy the field and to preclude waiver under other, unstated circumstances”).

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ous constitutional doubts. Congress is of course not bound to accept our judgment, and may adopt the proposed Rule 26(b) if it wishes. But I think we deprive it of the advice it has sought (in this area peculiarly within judicial competence) if we pass along recommendations that we believe to be constitutionally doubtful.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, filed a dissenting statement.

I would transmit to Congress the Judicial Conference's proposed Fed. Rule Crim. Proc. 26(b), authorizing the use of two-way video transmissions in criminal cases *in* (1) "exceptional circumstances," *with* (2) "appropriate safeguards," and *if* (3) "the witness is unavailable." The Rules Committee intentionally designed the proposed Rule with its three restrictions to parallel circumstances in which federal courts are authorized now to admit depositions in criminal cases. See Fed. Rule Crim. Proc. 15. Indeed, the Committee states that its proposal permits "use of video transmission of testimony only in those instances when deposition testimony could be used." Advisory Committee Notes on Fed. Rule Crim. Proc. 26, p. 53. See Appendix, *infra*, at 5.

The Court has decided not to transmit the proposed Rule because, in its view, the proposal raises serious concerns under the Confrontation Clause. But what are those concerns? 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. And where the defendant seeks the witness' video testimony to help secure exoneration, the Clause simply does not apply.

JUSTICE SCALIA believes that the present proposal does

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not much concern itself with the limitations on the use of out-of-court statements set forth in *Maryland v. Craig*, 497 U. S. 836 (1990). I read the Committee's discussion differently than does JUSTICE SCALIA, and I attach a copy of the Committee's discussion so that the reader can form an independent judgment. In its five pages of explanation, the Committee refers to *Maryland v. Craig* five times. It begins by stating that "arguably" its test is "at least as stringent as the standard set out in [that case]." It devotes a lengthy paragraph to explaining why it believes that its proposal satisfies *Craig*, and it refers to the two relevant Court of Appeals decisions, both of which have so held. See *United States v. Gigante*, 166 F. 3d 75 (CA2 1999), cert. denied, 528 U. S. 1114 (2000); *Harrell v. But-terworth*, 251 F. 3d 926 (CA11 2001), cert. denied, 535 U. S. \_\_\_\_ (2002). Given the Committee's discussion of the matter, its logic, the legal authority to which it refers, and the absence of any dissenting views, I believe that any constitutional problems will arise, if at all, only in a limited subset of cases. And, in any event, I would not overturn the unanimous views of the Rules Committee and the Judicial Conference of the United States without a clearer understanding of just why their conclusion is wrong. Cf. Statement of Justice White, 507 U. S. 1091, 1095 (1993) (The Court's role ordinarily "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").

To transmit the proposed Rule to Congress is not equivalent to upholding the proposed Rule as constitutional. Were the proposal to become law, the Court could later consider fully any constitutional problem when the Rule is applied in an individual case. At that point the Court would have the benefit of the full argument that now is lacking. At the same time, that approach would

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permit application of the proposed Rule in those cases in which application is clearly constitutional. And, while JUSTICE SCALIA is correct that Congress is free to consider the matter more deeply and to adopt the proposal despite our action, the Court's refusal to transmit the proposed Rule makes full consideration of the constitutional arguments much less likely.

Without the proposed Rule, not only prosecutors but also defendants, will find it difficult, if not impossible, to secure necessary out-of-court testimony via two-way video—JUSTICE SCALIA's statement to the contrary notwithstanding. Cf. *ante*, at 3. Without proposed Rule 26(b), some courts may conclude that other Rules prohibit its use. See, e.g., Fed. Rule Crim. Proc. 26 (testimony must "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"). Others may hesitate to rely on highly general and uncertain sources of legal authority. Cf. *United States v. Gigante*, 971 F. Supp. 755, 758–759 (EDNY 1997) (relying on court's "inherent power" to structure a criminal trial in a just manner under Fed. Rules Crim. Proc. 2 and 57(b)); *United States v. Nippon Paper Industries Co.*, 17 F. Supp. 2d 38, 43 (Mass. 1998) (relying on "a constitutional hybrid" procedure that "borrow[ed] from the precedent associated with Rule 15 videotaped depositions [and] marr[ied] it to the advantages of video conferencing"). Thus, rather than consider the constitutional matter in the context of a defendant who objects, the Court denies all litigants—prosecutors and consenting defendants alike—the benefits of advances in modern technology. And it thereby deprives litigants, judges, and the public of technology that will help to create trial procedures that are both more efficient and more fair.

I consequently dissent from the Court's decision not to transmit the proposed Rule.

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*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).

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word “orally,” to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be con-

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sidered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is “unavailable” under Federal Rule of Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, there may be exceptions. *See, e.g., United States v. Salim*, 855 F. 2d 944, 947–948 (2d Cir. 1988) (conviction affirmed where deposition testimony, taken overseas, was used although defendant and her counsel were not permitted in same room with witness, witness’s lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The revised rule envisions several safeguards to address



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possible concerns about the Confrontation Clause rights of a defendant. First, under the rule, the court is authorized to use “contemporaneous two-way” video transmission of testimony. Thus, this rule envisions procedures and techniques very different from those used in *Maryland v. Craig*, 497 U. S. 836 (1990) (transmission of one-way closed circuit television of child’s testimony). Two-way transmission ensures that the witness and the persons present in the courtroom will be able to see and hear each other. Second, the court must first find that there are “exceptional circumstances” for using video transmissions, a standard used in *United States v. Gigante*, 166 F. 3d 75, 81 (2d Cir.), cert. denied, 528 U. S. 1114 (1999). While it is difficult to catalog examples of circumstances considered to be “exceptional,” the inability of the defendant and the defense counsel to be at the witness’s location would normally be an exceptional circumstance. Third, arguably the exceptional circumstances test, when combined with the requirement in Rule 26(b)(3) that the witness be unavailable, is at least as stringent as the standard set out in *Maryland v. Craig*, 497 U. S. 836 (1990). In that case the Court indicated that a defendant’s confrontation rights “may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important government public policy and only where the reliability of the testimony is otherwise assured.” *Craig*, 497 U. S. at 850. In *Gigante*, the court noted that because the video system in *Craig* was a one-way closed circuit transmission, the use of a two-way transmission made it unnecessary to apply the *Craig* standard.

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

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witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

Deciding what safeguards are appropriate is left to the sound discretion of the trial court. The Committee envisions that in establishing those safeguards the court will be sensitive to a number of key issues. First, it is important that the procedure maintain the dignity and decorum normally associated with a federal judicial proceeding. That would normally include ensuring that the witness's testimony is transmitted from a location where there are no, or minimal, background distractions, such as persons leaving or entering the room. Second, it is important to insure the quality and integrity of the two-way transmission itself. That will usually mean employment of technologies and equipment that are proven and reliable. Third, the court may wish to use a surrogate, such as an assigned marshal or special master, as used in *Gigante, supra*, to appear at the witness's location to ensure that the witness is not being influenced from an off-camera source and that the equipment is working properly at the witness's end of the transmission. Fourth, the court should ensure that the court, counsel, and jurors can clearly see and hear the witness during the transmission. And it is equally important that the witness can clearly see and hear counsel, the court, and the defendant. Fifth, the court should ensure that the record reflects the persons who are present at the witness's location. Sixth, the court may wish to require that representatives of the parties be present at the witness's location. Seventh, the court may inquire of counsel, on the record, whether additional safeguards might be employed. Eighth, the court should probably preserve any recording of the testimony, should a question arise about the quality of the transmission. Finally, the court may consider issuing a pretrial order setting out the appropriate safeguards employed

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under the rule. See *United States v. Gigante*, 971 F. Supp. 755, 759–760 (E.D.N.Y. 1997) (court order setting out safeguards and procedures).

The Committee believed that including the requirement of “unavailability” as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant’s Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court’s decision in *Maryland v. Craig*, 497 U. S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements that underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness’s demeanor. *Id.*, at 847. The Court rejected the notion that a defendant’s Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. See also *United States v. Gigante*, *supra* (use of remote transmission of unavailable witness’s testimony did not violate confrontation clause); *Harrell v. Butterworth*, [251] F. 3d [926] (11th Cir. 2001) (remote transmission of unavailable witnesses’ testimony in state criminal trial did not violate confrontation clause).

Although the amendment is not limited to instances

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such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig* is a decision left to the trial court.

The amendment provides an alternative to the use of depositions, which are permitted under Rule 15. The choice between these two alternatives for presenting the testimony of an otherwise unavailable witness will be influenced by the individual circumstances of each case, the available technology, and the extent to which each alternative serves the values protected by the Confrontation Clause. See *Maryland v. Craig, supra*.