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Confrontation During COVID: A Fundamental Right, Virtually Guaranteed

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The novel threats posed to our criminal justice system by the COVID-19 pandemic and attendant shutdowns of courts beg the question of whether our must fundamental pillars of law can withstand the ultimate test of time. And inherent in the ultimate test of time is the ultimate test of technology—this is, will there come a time that technology outgrows the confines of our legal landscape? Consider this: The United States Constitution guarantees every criminal defendant the right to confront their accuser in court; yet, for a substantial period of time in 2020, court, as we knew it, was nothing more than a live, two-way, video-telecommunications stream. Is confrontation via live, two-way video-telecommunication sufficient to comport with the fundamental rights guaranteed to criminal defendants under the Constitution? Fortunately, the era of the Coronavirus Court has largely come to an end with courts re-opening and the mass-dissemination of vaccines and booster shots worldwide; however, the question remains whether we, as a society, are prepared to recognize that the legal landscape of the criminal justice system is changing. And moreover, whether the law, as it is understood and applied today, contemplates this idea that traditional notions of fair play and substantial justice are ever-developing in light of technological and societal advancements.

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> When we are dealing with the words of the Constitution, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters . . . .The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago.[1]

I. INTRODUCTION

The last time the nine Justices of the United States Supreme Court met in person for oral arguments was March 4th, 2020. And shortly thereafter, on May 5th, 2020, for the first time in history, the United States Supreme Court heard remote oral arguments—*over the phone*—and live-streamed the audio directly through their website. The case was *United States Patent & Trademark Office v. Booking.com*,[2] an intellectual property dispute, and for most of the hour-plus long debate, the Court made its first successful foray at live-streamed, teleconferenced arguments. That said, Justice Sotomayor may have briefly forgotten to unmute her phone during the hearing; Justice Breyer's connection seemingly faltered for a second or two, turning part of his question into a jumbled mess; and at one point the unmistakable sound of a toilet was heard flushing.

The outbreak of the novel SARS-CoV-2 ("COVID-19") pandemic has perpetuated a seismic shift in our nations legal landscape over the last year. Many federal and state courts have indefinitely suspended in person proceedings, including a near-total shutdown of criminal and civil jury trials. In one Fairfax County Circuit Court, the prosecutor reported to Courtroom 4J with a tape measure, the public defender arrived with a bag full of six-foot lengths of rope, and a defense attorney showed up lugging a bag of hockey sticks. [3] The attorneys used the tape measure, rope and hockey stick to mark off the proper social distancing for everyone who would be involved in a future proceeding.[4]

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1 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 443 (1934) (citing Missouri v. Holland, 252 U.S. 416, 433 (1920)).

2 United States Patent and Trademark Office v. Booking.com B.V., 140 S.Ct. 2298 (2020). A see also citation to a record, transcript, or article may be appropriate at the end of the sentence, because the case itself does not address what happened during oral arguments.

3 Ann E. Marimow & Justin Jouvenal, *Courts dramatically rethink the jury trial in the era of the coronavirus*, THE WASH. POST (July 31, 2020, 8:54 AM).

4 *Id*.

Alternatively, some jurisdictions have responded to court closures by adopting live, two-way video-teleconference[5] ("VTC") technology platforms.[6] VTC technology allows a witness to testify in real time from anywhere in the world, and be seen and heard in the courtroom as if they were testifying in person. While this most recent development marks a first in our nation's history, our courtrooms are no stranger to the application of advancements in modern technology. Over the last few decades, courts have adopted electronic discovery, software-enabled exhibits, natural language processing for documents, and even procedures enabling the admission of remote testimony in criminal court. However, the magnitude and sheer necessity of our current health crisis has perpetuated a new development in the application of modern technology to courtroom procedures. Remote, two-way VTC platforms like Zoom and Webex that have come to facilitate the practice of law throughout the pandemic have called into question many traditional notions and long-standing practices previously understood as essential to the administration of justice—namely, the need for a physical courtroom.

Notwithstanding the vast potential benefits of integrating VTC into our courtrooms in terms of administrative and procedural efficiency and access to justice, however the use of this technology raises a number of constitutional concerns ostensibly at odds with the fundamental guarantee that a criminal defendant has the right to confront adverse witnesses against them. And the right of confrontation, as enshrined in the Sixth Amendment's Confrontation Clause, is not a virtual guarantee. As Justice Scalia said, "[v]*irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones*."[7]

However, the course of VTC jurisprudence has proven that, under certain circumstances, VTC can still allow for the defendant to see and be seen by the witness, and vice versa, and can ensure the defendant's right to cross-examination—an element of confrontation the Supreme Court has

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5 Video-Teleconference (also known as videoconference) is a set of interactive telecommunication technologies which allow to or more locations to interact via two-way video and audio transmissions simultaneously. For the purposes of this Comment, VTC will refer to the use of two-way simultaneous transmission of audio-visual information picked up by cameras and microphones on one end and communication by monitor and speakers on the other

6 Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, A.B.A. J. (May 11, 2020, 8:00 AM), https://perma.cc/3CPB- B3WF ("According to the National Center for State Courts, 16 states and the territory of Puerto Rico have ordered virtual hearings in response to the novel coronavirus . . . . In Texas, the public has access to hundreds of proceedings on YouTube, where prosecutors, judges, defendants and public defenders convene on Zoom. In Cook County, Illinois, the public can watch bond hearings online.").

7 *Id*. (emphasis added).

long considered to be the bedrock of the Confrontation Clause guarantee.[8] Nevertheless, Federal trial and appellate courts, as well as the Supreme Court, have acknowledged that VTC testimony may not satisfy the Confrontation Clause.

Most often, courts have allowed the use of VTC testimony in the context of child sex abuse cases, in which the threat of emotional trauma to the alleged child victim was great.[9] And some courts have allowed the use of VTC testimony due to the terminal illness or disability of the witness.[10] Others have rejected the use of VTC on substantially the same grounds.[11] Unfortunately, neither the Supreme Court nor the legislature have offered much guidance regarding the permissibility and admissibility of VTC technology in criminal court, and therefore, lower courts remain split in their interpretation of the standards controlling the use of VTC technology with regard to a criminal defendant's confrontation right.

In light of the grave constitutional questions posed by the admission of VTC testimony against a criminal defendant, this note examines the constitutionality of two-way VTC technology in criminal court, with specific reference to its implications on a criminal defendant's right to confrontation under the Sixth Amendment, and as a matter of public policy. Then Chief Justice John Marshall, writing for the Court in *McCulloch v. Maryland*, said the following:

We must never forget that it is a constitution we are expounding . . . .[I]ntended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.[12]

This note advocates that the unprecedented nature of the current health crisis brought on by the COVID-19 pandemic is precisely that which Chief Justice Marshall was referring to in his championed *McCulloch* opinion. The necessity of integrating technological advancements into the modern practice of law is demonstrably clear, and our nation's response to the COVID-19 pandemic has shown that VTC technology has the potential to make trial procedures both more efficient and more fair. Courts should not be constrained from adopting such procedures, in limited circumstances, when the various crises of human affairs demand it. As such, this note ultimately argues for a less strict, more practical interpretation of the Confrontation Clause, in light of modern technology that has come to redefine confrontation within the meaning of the Sixth Amendment.

This note will proceed as follows. Part II will begin with an examination of the development of the Confrontation Clause and the

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8 *See* Coy v. Iowa, 487 U.S. 1012, 1017-20 (1988).

9 *See infra* notes 43 - 52 and accompanying text.

10 *See infra* notes 75 - 79 and accompanying text.

11 *See infra* notes 86- 93 and accompanying text.

12 McCulloch v. Maryland, 17 U.S. 316, 401-14 (1819) (emphasis added).

Supreme Court's current understanding of the law regarding VTC testimony. Part II will then discuss the Supreme Court's rejection of a proposed amendment to Federal Rule of Criminal Procedure 26(b) that would have permitted the use of live, two-way VTC testimony on VTC jurisprudence. Part III will outline the inconsistent application of the law in Federal court. Part IV will discuss three distinct approaches that Federal courts have used to confront the issue of VTC testimony and consider efforts to reconcile VTC testimony with the Confrontation Clause. Part V will address a constitutional framework within which to analyze a categorical approach to the issue of VTC testimony in light of the COVID-19 pandemic. Part VI will conclude this note.

II. THE CONFRONTATION CLAUSE: A PREFERENCE FOR FACE-TO-FACE CONFRONTATION AT TRIAL[13] THAT MUST OCCASIONALLY GIVE WAY TO CONSIDERATIONS OF PUBLIC POLICY AND THE NECESSITIES OF THE CASE[14]

The Confrontation Clause of the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him."[15] Similarly, Federal Rule of Criminal Procedure 26 provides that "[i]n every [federal criminal] trial the testimony of the witness must be taken in open court."[16] The Confrontation Clause of the Sixth Amendment ensures that:

[T]he 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.[17]

At its inception, "the primary object of the [Confrontation 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."[18] The right of face-to-face confrontation was understood as provided four procedural safeguards, without which the integrity of the fact-finding process is called into question: (1) the giving of testimony

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13 *See* Ohio v. Roberts, 448 U.S. 56, 63 (1980).

14 *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895).

15 U.S. Const. amend. IV; *see also* Chambers v. Mississippi, 410 U.S. 284, 295 (1973); *see also* Coy v. Iowa, 487 U.S. 1012 (1988).

16 Fed. R. Crim. P. 26(b)

17 *See Mattox*, 156 U.S. at 242-43; *see also* California v. Green, 399 U.S. 149, 175 (1970) ("Simply as a matter of English the clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial.").

18 *Id*.

under oath; (2) the opportunity for cross examination; (3) the ability of the fact-finder to observe demeanor evidence; and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence.[19] That said, the Court has declared that "the Confrontation Clause only guarantees 'an opportunity for effective cross-examination, *not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'*"[20]

A. Coy v. Iowa: "Face-to-Face"—The Irreducible Literal Meaning of Confrontation

Not until the late 1980s did the Court make evidently clear its disdain against trial procedures that inhibit a defendant's ability to fully observe and interact with adverse witnesses. Writing for the Court in *Coy v. Iowa*, Justice Scalia explained that it is every defendant's right to a face-to-face encounter with an adverse witness which lies at the core of a defendant's confrontation rights,[21] as that right serves "to ensure the integrity of the fact finding process."[22] Scalia noted that the element of face-to-face confrontation was the "irreducible literal meaning of the [Confrontation] Clause" and that face-to-face confrontation reflects the idea that "there is something deep in human nature that regards face-to-face confrontation . . . as 'essential to a fair trial in a criminal prosecution.'"[23]

The *Coy* Court addressed a Confrontation Clause challenge to a modified trial procedure in which a screen was placed between the defendant and the child sexual assault victims, "block[ing] [defendant] from their sight but allow[ing] [defendant] to see them dimly and to hear them."[24] The Court ultimately rejected the procedure as unconstitutional, stating it was "difficult to imagine a more obvious or damaging violation of the defendant's right to a face-to-face encounter."[25] The Court's holding necessarily implied that, while the concerns of protecting victims of sexual abuse from the emotional trauma of facing their abuser in court is undeniably important, such concerns do not outweigh the confrontation rights of the accused. While the Court explicitly declined to address the question of whether an exception exists, dicta suggests the Court

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19 Ohio v. Roberts, 448 U.S. 56, 63-64 (1980) (citing *Chambers*, 410 U.S. at 295; *see also* Maryland v. Craig, 497 U.S. 836, 850 (1990).

20 Pennsylvania v. Ritchie, 480 U.S. 39, 53 (1987) (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)) (emphasis added).

21 Coy v. Iowa, 487 U.S. 1012, 1020-21 (1988).

22 *Id*. at 1020.

23 *Id*. at 1017-21.

24 *Id*. at 1014-15.

25 *Id*. at 1020

acknowledged a construction of the rule in which an exception could be made, however, it left that inquiry to the district courts. [26]

B. Maryland v. Craig: The Standard for One-Way VTC Testimony

Only once has the Supreme Court addressed the issue of VTC testimony and its implications on the Confrontation Clause. Just two years after *Coy*, in the case of *Maryland v. Craig*, the defendant challenged the constitutionality of a Maryland law permitting a child sex abuse victim to testify via a one-way closed circuit television to avoid the emotional trauma of having to face their abuser.[27] Under the procedure in issue, the child witness, the prosecutor, and the defense counsel broke-out into a room adjacent the Courtroom and examined/cross-examined the child, while the defendant, judge, and the jury remained in the courtroom.[28] The defendant and the jury could see and hear the testimony of the witness, but had no opportunity to observe the witness in person, and the witness could neither see, hear, nor interact with the defendant.

Writing for the Court, Justice O'Connor explained that the testimony did not violate the Confrontation Clause, noting the Court has "never held [ ] that the confrontation Clause guarantees criminal defendants the *absolute* right to face-to-face meeting with witnesses against them at trial."[29] The majority established a two-part test to evaluate the constitutionality of VTC testimony: the right to confront accusatory witnesses may be satisfied "absent a physical, face-to-face confrontation" only where the prosecution can demonstrate case-specific finding that: (1) "denial of such confrontation is necessary to further an important public policy,"[30] and (2) "the reliability of the testimony is otherwise assured."[31]

As applied to the facts in *Craig*, the Court first made a threshold determination that the procedure was "necessary to protect a child from [the] trauma [of confronting her abuser]"[32]—i.e., the procedure was necessary to further *compelling* interest. Furthermore, the Court determined the VTC procedure in issue had sufficient indicia of reliability.[33] It concluded that the procedure preserved all of the essential

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[26] *Id*. at 1021 ("We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy.").

[27] Maryland v. Craig, 497 U.S. 836, 840-41 (1990).

[28] *Id*. at 857-60.

[29] *Id*. at 844.

[30] *Id*. at 852-53.

[31] *Id*. at 850.

[32] *Id*. at 857.

[33] *Id*. at 845-46.

elements of confrontation: (1) testimony under oath; (2) witness cross-examination; and (3) the opportunity to assess the demeanor of the witness as she testified in a manner "functionally equivalent to that accorded live, in-person testimony"—with the exception of only one: *the reduced risk of a witness "wrongfully implicat[ing] an innocent defendant" by testifying in his presence*.[34] In this way, the *Craig* court promulgated a forward-looking, practical approach to an examination of the confrontation right, considering policy aims in light of the purpose of confrontation to determine cases in which it is not necessary to preserve all four elements. "Although face-to-face confrontation forms 'the core of the values furthered by the Confrontation Clause,'[35] [the Court] ha[s] nevertheless recognized that it is not the *sine qua non* of the confrontation right."[36] And the Court's forward-thinking disposition on the case left the door open for lower courts to consider the policy aims of the Confrontation Clause in light of the technological advancements that are now entrenched in the modern practice of law. And in so ruling, the Supreme Court made clear that the demands of the Sixth Amendment's right to confrontation were not absolute—*in at least some criminal cases, a physical, face-to-face encounter between the defendant and an adverse witness is not necessary to satisfy the Confrontation Clause.*

C. Crawford v. Washington: Redefining Our Understanding of Confrontation

Before *Crawford*, the Confrontation Clause was understood as a substantive guarantee that any the testimony admitted against a defendant ~~in~~ was reliable because of the fact that it was given in open court.[37]

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[34] *Id*. at 845—46, 851 (explaining the witness "must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury; and defendant are able to view the demeanor of the witness as he or she testifies").

[35] *Green*, 399 U.S. at 157.

[36] Maryland v. Craig, 497 U.S. 836, 847 (1990) (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to prove and expose [testimonial] [sic] infirmities [such as forgetfulness, confusion, or evasion] [sic] through cross examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.").

[37] *Id*. at 846.~~.~~(quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987) ("[T]he right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial . . . .")); *see also* Lee v. Illinois, 476 U.S. 530, 540 (1986) ("[T]he confrontation guarantee serves . . . symbolic goals . . . [and] promotes reliability . . . ."); *see also* Dutton v. Evans, 400 U.S. 74, 89 (1970) (plurality opinion) (quoting *Green*, 399 U.S. at 161) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony].'").

"[T]hese means of testing accuracy are so important that the absence of proper confrontation at trial 'calls into question the ultimate integrity of the fact-finding process.'"[38] The *Crawford* Court, however, under a more narrow interpretation of the Clause, determined that the right was purely a procedural guarantee—one which demanded *actual* confrontation—not a guarantee in which one may read into it substantive aims such as reliability, in subversion of the procedural guarantee.[39]

The *Crawford* Court overruled the previously long-standing interpretation of the Clause enunciated in *Ohio v. Roberts*, requiring that testimonial hearsay[40] bear "sufficient 'indicia of reliability,'"[41] in favor of a more concrete construction of the Clause—"where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: *unavailability and a prior opportunity for cross-examination*."[42] Scalia made his disdain for the *Roberts* test quite clear:

[A]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation . . . .Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. That is not what the Sixth Amendment prescribes."[43]

The majority's construction of the Clause marked a seismic shift in the Courts understanding of the right to confrontation. In making its determination, the Court rejected the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon "the law of evidence for the time being."[44] Justice Scalia emphasized the fact that leaving the regulation of out-of-court statements to the Rules of Evidence at the time of being "would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices,"[45] and that the right

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38 *Roberts*, 448 U.S. at 64 (quoting *Chambers*, 410 U.S. at 295).

39 Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure the reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

40 An out-of-court statement made to further an ongoing or future investigation, offered for the truth of the matter asserted.

41 *Roberts*, 448 U.S. at 68.

42 *Crawford*, 541 U.S. at 68 (emphasis added).

43 *Id*. at 62 (emphasis added).

44 *Id.* at 50-51 (citing 3 Wigmore § 1397, at 101); *accord*, Dutton v. Evans, 400 U.S. 74 (1970) (Harlan, J., concurring).

45 *Id*. at 51.

to Confrontation demands more than "amorphous notions of 'reliability.'"[46]

In so holding, the Court did not overrule, or otherwise void the application of the *Craig* standard; rather, the Court set out a categorical approach to determining the applicability of *Craig*, and in effect, narrowed the scope of the inquiry. Because *Crawford* requires unavailability and a prior opportunity for cross-examination to admit the testimonial hearsay of an adverse witness, and because VTC can provide an opportunity for cross-examination,[47] it follows that a constitutional rule concerning VTC based on *Crawford* would require only that a witness be unavailable, and that VTC allow for cross-examination of that unavailable witness.

D. Proposed Amendment to Federal Rule of Criminal Procedure 26

In 2002, the Supreme Court considered a proposed amendment to Rule 26 of the Federal Rules of Criminal Procedure that would have permitted live, two-way video testimony when a witness is unavailable to testify in court.[48] The proposal did not, however, limit the use of testimony via video transmission to instances where there has been a "case-specific finding" that is "necessary to further an important public policy."[49] The Committee argued that the proposal was constitutional because it allowed video transmission only where deposition of unavailable witnesses may be read into evidence pursuant to Rule 15.[50] In effect, the Committee applied the Second Circuit's rationale in *Gigante*,[51] concluding that VTC afforded greater protections to the confrontation right than did Rule 15.[52] However, despite the unanimous consent of the Rules Committee and the Judicial Conference of the United States to approve the amendment, the Court ultimately rejected the proposal in a 5-3 decision.[53]

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46 *Id*. at 61 ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'").

47 *See infra* notes 51-55 and accompanying text.

48 *See* Order of the Supreme Court, 207 F.R.D. 89, 90 (2002).

49 *Id*. at 93.

50 *Id*. at 95; *see also* Fed. R. Crim. P. 15(c)(1) ("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 the examination and keep the defendant in the presence of the witness during the examination . . . ."); Fed R. Crim. P. 15(c)(2) ("Except as authorized by Rule 15(c)(3), a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court . . . .").

51 *See infra* notes 66-75 and accompanying text.

52 *Id*.

53 *Id*. at 92.

According to Justice Scalia, the proposal was "of dubious validity under the Confrontation Clause of the Sixth Amendment" and "unquestionably contrary to the rule enunciated in *Craig*."[54] Applying the *Craig* standard, Scalia rejected the Committee's argument that the proposal was constitutional because it allowed the use of video transmission to receive testimony only where the deposition of an unavailable witness may be read into evidence pursuant to Federal Rule of Criminal Procedure 15.[55] Scalia points out that the Committee ignores the fact that the constitutional test applied[56] to live testimony in *Craig* is different from the test applied[57] to the admission of out-of-court statements.[58] Moreover, Scalia argues the rule ignores the fact that Rule 15 nonetheless accords the defendant a right to face-to-face confrontation during the deposition.[59] Making it clear that the purpose of the Confrontation Clause is to compel accusers to make their accusations *in the defendants presence*, Scalia "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."[60]

On the other hand, Justice Breyer, joined by Justice O'Connor, would have transmitted to Congress the Judicial Conference's proposed amendment in criminal cases *in* (1) "exceptional circumstances," *with* (2) "appropriate safeguards," and *if* (3) "the witness is unavailable."[61] Breyer pointed out that this particular construction of the rule, with its three restrictions, paralleled the circumstances in which federal courts are authorized to admit depositions in criminal cases.[62] He therefore felt it was "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."[63] Justice Breyer believed the Court should have forwarded the proposal despite its constitutional doubts, so that it could later consider any constitutional problem when the Rule is applied in an individual

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54 *Id.* at 94.

55 *Id*.

56 *Id.* (A case-specific finding that VTC is necessary to further an important public policy).

57 Maryland v. Craig, 497 U.S. 836 (1990).

58 *Id*. (citing 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.").

59 *Id*.

60 *Id*.

61 *Id*.

62 *Id*. (citing Fed. R. Crim. P. 15).

63 *Id*.

case.[64] At that point, he said, the Court would have the benefit of the full argument that it then lacked.[65]

III. RELIABILITY V. NECESSITY—VTC TESTIMONY IN FEDERAL COURT

The constitutionality of VTC testimony has been considered by many Federal courts and held constitutional where either a compelling need or a particularized, specific harm, most often where emotional or physical trauma to a child witness has been demonstrated in the context of sexual abuse cases.[66] The Second Circuit was the first to hold the use of two-way VTC testimony constitutional in *United States v. Gigante*, on the grounds that it preserved the four necessary elements of traditional, in-court testimony.[67] In *Gigante*, the trial court permitted a witness who was both terminally ill and participating in the Federal Witness Protection Program to provide testimony via two-way VTC.[68] On appeal, the defendant argued that the government failed to demonstrate a case-specific finding of necessity to further an important public policy, pursuant to *Craig*.[69] The Second Circuit rejected this argument, and declined to apply the *Craig* standard, noting the difference between the one-way VTC technology used there and the two-way VTC technology in the instant case.[70] The court found more relevant the analogue in Rule 15[71] of the Federal Rules of Criminal Procedure, concluding that the exceptional circumstances

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64 *Id*.

65 *Id*. at 97.

66 *See* United States v. Gigante, 166 F. 3d 75 (2d Cir. 1999); *see also* Harrell v. Butterworth, 251 F. 2d 926 (11th Cir. 2001); *see also* United States v. Benson, 79 F. App'x 813 (6th Cir. 2003) (per curiam); *see also* Horn v. Quarterman, 508 F. 3d 306 (5th Cir. 2007).

67 *Gigante*, 166 F. 3d at 81 ("We agree that the closed-circuit presentation of Savino's testimony afforded greater protection of Gigante's confrontation rights than would have been provided by a Rule 15 deposition. It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of Savino's deposition could have been admitted, which would have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination."); *see also* Maryland v. Craig, 497 U.S. 836, 845-46 (1990) ("[T]he salutary effects of face-to-face confrontation include 1) the giving of testimony under oath; 2) the opportunity for cross examination; 3) the ability of the fact-finder to observe demeanor evidence; and 4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence.").

68 *See Gigante*, 166 F. 3d at 75.

69 *Id*. at 80-81.

70 *Id*.

71 *Id.*

requirement for Rule 15 depositions should extend to VTC testimony as well.[72] Satisfied with the trial court's finding of exceptional circumstances,[73] the court held that VTC testimony "afforded greater protection of Gigante's Confrontation rights than would have been provided by a Rule 15 deposition."[74] The court did, however, make it very clear that two-way VTC should not be considered a commonplace substitute for traditional, in-court testimony by a witness, stating "there may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony."[75]

The Fifth[76] and Sixth[77] Circuits similarly held that VTC testimony may be constitutional in contexts outside child abuse and sexual assault cases, including where a witness is terminally ill. In *Horn v. Quarterman*, appellate court determined that the procedural guarantees of trustworthiness and reliability were preserved[78] where both an attorney for the state and counsel for the defendant were present while the witness

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72 *Id*. at 81.

73 *Id*. at 81-82. The court used a two-part test to determine if an exceptional circumstance existed: "'It is well-settled that the "exceptional circumstances" required to justify the deposition of a prospective witness are present if that witness's testimony is material to the case and if the witness is unavailable to appear at trial.'" *Id*. at 81 (quoting United States v. Johnpoll, 739 F. 2d 702, 709 (2d Cir. 1984)). The court emphasized the witness's fatal illness in determining unavailability. *Id*. at 81-82. "Unavailability is defined by reference to Rule 804(a) of the Federal Rules of Evidence, which includes situations in which a witness 'is unable to be present or to testify at the hearing because of . . . physical or mental illness or infirmity.'" *Id*. at 81 (omission in original) (quoting Fed. R. Evid. 804(a)(4)). *Id*. at 80 (concluding that two-way closed-circuit television testimony "preserved all of [the] characteristics of in-court testimony" where the witness "was sworn; he was subject to cross examination; he testified in full view of the jury, court, and defense counsel; and [he] gave his testimony under the eye of [the defendant' himself.").

74 *Id*. at 81. ("[T]he Supreme Court crafted [the *Craig*-public policy] standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because Judge Weinstein employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case . . . .It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of Savino's deposition could have been admitted which could have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination.").

75 *Id*.

76 Horn v. Quarterman, 508 F. 3d 306, 310 (5th Cir. 2007).

77 United States v. Benson, 79 F. App'x 813, 820 (6th Cir. 2003) (per curiam).

78 *Horn*, 508 F. 3d at 313 ("In Horn's case, given the trial court's efforts to confirm Birk's illness and inability to travel an the care with which the other aspects of Horn's confrontation rights were preserved, we cannot say that the decision to permit Birk to testify via two-way closed-circuit television constituted an unreasonable application of established Federal law.").

testified from their hospital bed via two-way VTC.[79] Significantly, much like the court in *Gigante*, the *Horn* court also held that the VTC procedure used preserved all of the characteristics of in-court testimony because the witness was sworn in under oath; he was subject to full cross-examination; and he testified in full view of the defendant, jury, court, and defense counsel.[80]

Other courts have declined to extend the right of Confrontation to VTC testimony, and explicitly reject the premise that VTC may, in circumstances like those in *Craig*, pass constitutional muster. In *United States v. Shabazz*, the United States Navy Marine Court of Criminal Appeals[81] held that that the accused's Sixth Amendment confrontation right was violated where the district court judge failed to ensure the reliability of VTC testimony of a witness.[82] In the illegal drug distribution and maiming court-martial, and the government's key witness testified from California via VTC as she was unwilling to return to Okinawa, Japan due to safety concerns.[83] Unlike *Gigante*, the fundamental issue in this case was the reliability of the testimony rather than the necessity of VTC itself. The defendant alleged on appeal that the witness was coached during her testimony, and that the military judge erred both in allowing the witness to testify via VTC and in failing to strike her testimony once it was shown to have been tainted. [84] The court found it unnecessary to address the case-specific finding prong of the *Craig* analysis because the court determined that the trial judge failed to ensure the reliability of the testimony, and ultimately held that VTC testimony was constitutionally inadmissible absent sufficient indicia of reliability.[85]

Contrary to the Supreme Court's rationale in *Craig*, some Federal Courts have rejected generalized allegations of harm, particularly to vulnerable groups like children, as sufficient justification for relaxing a

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79 *Id*. at 313.

80 *Id*. at 319.

81 United States v. Shabazz, 52 M.J. 585, 586 (N-M. Ct. Crim. App. 1999).

82 At the time of *Shabazz*, the Military Rules of Criminal Procedure and the Federal Rules of Criminal Procedure were nearly identical regarding the issue of VTC testimony—they both were, and remain up to this point, silent on the issue. Compare Fed. R. Crim. P. 26 (evidently silent on the issue of remote testimony after the Court's rejection of proposed Rule 26(b)) *with* R.C.M. 914(A) (evidently silent on the issue of remote testimony, but allowing remote testimony by children pursuant to the *Craig* standard).

83 *Shabazz*, 52 M.J. at 590-91.

84 *Id*. at 592.

85 *Id.* at 594 ("Not knowing the extent of the taint upon her testimony, and Mrs. White being the key witness to the maiming charge, we cannot find harmless error in this case. Finding material prejudice to a substantial right of the appellant, we will provide relief . . . ."). The court's emphasis on the reliability of the testimony illustrates the pre-*Crawford* understanding of the Confrontation Clause as a substantive guarantee. *See supra* notes 49-51.

defendant's right to confrontation.[86] In *United States v. Bordeaux* and *United States v. Turning Bear*, the Eighth Circuit rejected the use of VTC procedures motivated by the same case-specific, public policy concern in *Craig*—to protect an alleged child victim of sexual abuse from the emotional trauma of testifying in the presence of the defendant.[87] Unlike the Second Circuit in *Gigante*, the Eighth Circuit held that *Craig* controlled the determination of whether to permit VTC testimony, given that both one-way and two-way VTC systems are virtual formats.[88] However, the court concluded that the prosecution failed to make a sufficient showing that the child's fear of the defendant was the primary reason she could not testify, and determined that the in the case of both one-way and two-way VTC testimony, neither system was "likely to lead a witness to tell the truth to the same degree that a face-to-fact confrontation does."[89] The court holding necessarily implied that a per se categorical exception in this context was inapplicable, suggesting that justification beyond general discomfort of the witness is needed to outweigh a defendant's right to confrontation.

Similarly, in 2006, the Eleventh Circuit rejected the use of VTC testimony on the grounds that public policy interests such as the prosecution's ability to present its case in chief are insufficient to satisfy the necessity prong of the *Craig* standard.[90] In *United States v. Yates*, two Australian witnesses were unwilling to travel to the United States to testify against the defendant, and the district court permitted them to testify via VTC.[91] Unlike *Gigante*, the Eleventh Circuit applied the *Craig* standard requiring a case-specific finding that VTC be necessary to further an important public policy, and found that the prosecution's interest in

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86 *See, e.g.*, United States v. Bordeaux, 400 F. 3d 548 (8th Cir. 2005); *see also* United States v. Turning Bear, 357 F. 3d 730 (8th Cir. 2004).

87 *Bordeaux*, 400 F. 3d at 552; *Turning Bear*, 357 F. 3d at 730.

88 *Id*.

89 *Id*. at 554 (noting that whether a two-way system could preserve the necessary features of confrontation would turn on "hard logistical questions" including the size and placement of the monitor and whether the camera angle would "render the theoretical promise of the two-way system practically unattainable," the court held that, "'Confrontation' through a two-way closed-circuit television is not different enough from 'confrontation' via a one-way closed to justify different treatment under *Craig*."); *Turning Bear*, 357 F. 3d at 736 (holding the trial court's finding were insufficient to satisfy the *Craig* requirement that the child be "traumatized, not by the courtroom generally, but by the presence of the defendant.").

90 United States v. Yates, 438 F. 2d 1307, 1307-08 (11th Cir. 2006) (en banc); *But see* Harrell v. Butterworth, 251 F. 2d 926, 930 (11th Cir. 2001) (allowing the admission of VTC testimony because the Eleventh Circuit was satisfied that the district court properly applied the *Craig* standard).

91 *Id*. at 1310.

presenting their "crucial evidence" was insufficient to carry the day.[92] Emphasizing that BTC testimony must be *necessary* rather than merely convenient, the court cautioned that allowing prosecutors to adopt VTC procedures in any case where a witness's evidence was crucial would undermine the fundamental importance of the witness's presence, evidently counter to the primary intent of the Clause.[93]

These cases demonstrate a clear lack of guidance from the Supreme Court or a federal rule of criminal procedure, resulting in conflicting rationales and inconsistent determinations regarding the use of VTC testimony in criminal cases. In a span of eight years, the *Shabazz* court declined to apply *Craig* and overturned the district court's use of VTC testimony because of a particular, case-specific question of reliability.[94] Meanwhile, that same year, the Second Circuit affirmed the district court's use of VTC testimony in *Gigante* by extending Rule 15 of the Federal Rules of Criminal Procedure to the use of VTC and finding the exceptional circumstances requirement satisfied.[95] In *Bordeaux* and *Turning Bear,* the Eighth Circuit rejected the Second Circuits distinction between one-way and two-way VTC, declined to extend Rule 15 to VTC testimony, and ultimately rejected the use of VTC procedures motivated by the same case-specific, public policy concern in *Craig*.[96] Unlike the Eighth Circuit, the Fifth and Sixth Circuits, in applying the *Craig* standard, determined that under certain circumstances, public policy concerns such as those in *Craig*, and beyond, are sufficient to satisfy the confrontation right.[97] And in 2006, contrary to its 2001 ruling in *Harrell v. Butterworth* permitting the use of VTC testimony because the district court properly applied *Craig*, the Eleventh Circuit held in *Yates* that the interests of the prosecution in presenting its case in chief is insufficient to satisfy the Confrontation Clause.[98]

IV. COMPETING INTERPRETATIONS AND CONFLICTING EFFORTS AT RECONCILIATION

With very limited guidance, federal courts seem to have taken three different approaches in considering the issue of VTC testimony in the criminal context. That said, courts seem to be consistently applying the *Craig* standard to the issue of VTC testimony. Courts holding VTC

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92 *Id*. at 1316.
93 *Id*.
94 *See supra* notes 76-80 and accompanying text.
95 *See supra* notes 63-70 and accompanying text.
96 *See supra* notes 81-84 and accompanying text.
97 *See supra* notes 71-75 and accompanying text.
98 *See supra* notes 85-88 and accompanying text.

testimony in violation of the Confrontation Clause have applied *Craig*, yet found the testimony unconstitutional because the prosecution failed to demonstrate it was necessary to further an important public policy.[99] Courts that have held VTC constitutional have either applied *Craig* and found that: (1) the public policy standard was satisfied;[100] or (2) looked to the Rule 15 "exceptional circumstances" standard for guidance.[101] This suggests that VTC testimony may be constitutionally permissible under certain circumstances upon a particularized showing of a compelling need. However, courts remain split as to which public policies justify its use and which standard should be applied—"exceptional circumstances"[102] or "case-specific finding necessary to further an important public policy."[103]

The following three sections provide an evaluation of the viability of each of the three distinct approaches adopted by the Federal courts in assessing the constitutionality of VTC testimony.

A. Option Number 1: Gigante's "Unavailable Witness" and "Exceptional Circumstances" Standard Based on Rule 15

The *Gigante* standard's misplaced reliance on the purportedly analogous Rule 15 standard has three glaring and fatal flaws: (1) the "exceptional circumstances" standard accorded to a deposition is insufficient to justify the admission of live testimony; (2) the rule is seemingly oblivious to the fact that confrontation is satisfied in a Rule 15 deposition; and (3) the court declined to apply the *Craig* standard on the grounds of an arbitrary distinction between one-way VTC (which the *Craig* determined is ordinarily insufficient to satisfy the confrontation right) and the two-way system used here, which Judge Weinstein concluded preserved the face-to-face confrontation championed in *Coy*.[104]

The purpose behind allowing VTC testimony is enabling unavailable witnesses to testify *as though they were in court*. The *Gigante* standard is

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99 Horn v. Quarterman, 508 F. 3d 306, 306 (5th Cir. 2007).

100 Harrell v. Butterworth, 251 F. 2d 926 (11th Cir. 2001).

101 United States v. Gigante, 166 F. 3d 75 (2d Cir. 1999).

102 Crawford v. Washington, 541 U.S. 36 (2004).

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

104 *Id*. at 81 ("[T]he Supreme Court crafted [the *Craig*-public policy] standard to constrain the use of one-way closed-circuit television, whereby the witness could not possibly view the defendant. Because Judge Weinstein employed a two-way system that preserved the face-to-face confrontation celebrated by *Coy*, it is not necessary to enforce the *Craig* standard in this case . . . .It forced Savino to testify before the jury, and allowed them to judge his credibility through his demeanor and comportment; under Rule 15 practice, the bare transcript of Savino's deposition could have been admitted which could have precluded any visual assessment of his demeanor. Closed-circuit testimony also allowed Gigante's attorney to weigh the impact of Savino's direct testimony on the jury as he crafted a cross-examination.").

"of dubious validity under the Confrontation Clause"[105] because the standard for admission applied to live testimony in *Craig* is substantially higher than standard for admission applied to out-of-court statements. Moreover, Rule 15 allows the defendant to be physically presented during a Rule 15 deposition, and therefore the defendant's right of confrontation is satisfied.[106]

Despite the *Gigante* court permitting the use of VTC testimony in this particular instance, the court nonetheless emphasized the fact that two-way VTC testimony should not be considered a commonplace substitute for traditional, in-court testimony by a witness.[107] By overextending the scope of the *Craig* rule to instances beyond considerations of public policy, the *Gigante* standard provides too much flexibility and potential for abuse. The Confrontation Clause is intended primarily to compel witness to make accusations in give testimony *in the defendant's presence*—it does not follow that one-way VTC, which *Craig* says does not ordinarily pass Confrontation Clause muster, becomes full-fledged confrontation when reciprocal transmission is added.[108] The *Gigante* court fails to acknowledge the importance of *Craig*-like "necessity" standard in their analysis of VTC, and therefore the *Gigante* standard must be rejected.

B. Option Number 2: Horn's "Unavailable Witness" and "Cross-Examination" Standard Based on Crawford

The *Horn* standard is much more practical than the *Gigante* standard, as it attempts to preserve, and arguably does preserve, three of the four fundamental elements of confrontation: (1) testimony under oath; (2) witness cross-examination; and (3) an opportunity to assess the demeanor of the witness functionally equivalent to that accorded to live testimony.[109]

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105 207 F.R.D. 89 at 94.

106 *See* Fed. R. Crim. P. 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 the examination and keep the defendant in the presence of the witness during the examination . . . .").

107 *Gigante*, 166 F. 2d at 81 ("[T]here may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.").

108 207 F.R.D. at 94 (explaining that traditional, face-to-face confrontation "is not equivalent to making [accusations against the defendant] in a room that contains a television set beaming electrons that portray the defendant's image."). (internal quotation marks omitted).

109 Horn v. Quarterman, 508 F. 3d 306, 313 (5th Cir. 2007) ("In Horn's case, given the trial court's efforts to confirm Birk's illness and inability to travel an the care with which the other aspects of Horn's confrontation rights were preserved, we cannot say that the decision to permit Birk to testify via two-way closed-circuit television constituted an unreasonable application of established Federal law."); *Cf. Gigante*, 166 F. 3d at 80 (concluding that two-way closed-circuit television testimony "preserved all of [the]

In *Horn*, counsel for both the defendant and the prosecution were present, in the witness's hospital room, when the witness gave his testimony.[110] The witness was sworn in under oath, subject to cross-examination, and testified in full view of the defendant and the jury.[111] These procedural guarantees of trustworthiness and reliability are certainly considerations that should be included in any Federal law regulating VTC testimony.[112] However, like the *Gigante* standard, so too is the *Horne* standard noticeably lacking a "necessity" prong, which the Court has stated *must* be satisfied *any time* a defendant is denied physical, face-to-face confrontation.[113] Any categorical approach to the regulation of VTC testimony based on *Crawford* must be rejected because VTC testimony is live testimony, given in real-time and received by the court *as if the witness were testifying in person*; whereas *Crawford* address the admission of *prior* out-of-court statements being offered against the defendant.[114] Contrary to the dissent's reasoning in *Yates*, which determined that *Crawford* is the correct standard and *Craig* is inapplicable on the grounds that VTC testimony is an "out-of-court statement" within the meaning of the Sixth Amendment,[115] any test based on *Crawford* would overextend the meaning of hearsay and belittle the importance of *Craig* in evaluating remote witness VTC testimony.

C. Option Number 3: Yate's "Case-Specific Finding that VTC is Necessary to Further an Important Public Policy" Standard Based on Craig

While VTC testimony is neither the functional nor constitutional equivalent of testimony given by a witness physically present at trial, the

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characteristics of in-court testimony" where the witness "was sworn; he was subject to cross examination; he testified in full view of the jury, court, and defense counsel; and [he] gave his testimony under the eye of [the defendant' himself.").

110 *Id*. at 313.

111 *Id*. at 319.

112 Crawford v. Washington, 541 U.S. 36, 61 (2004) ("To be sure, the Clause's ultimate goal is to ensure the reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

113 Coy v. Iowa, 487 U.S. 1012, 1021 (1988) (concluding that exceptions to the confrontation clause should apply "only when necessary to further an important public policy").

114 *Compare* Maryland v. Craig, 497 U.S. 836, 847 (1990) with *Crawford*, 541 U.S. at 61.

115 United States v. Yates, 438 F. 2d 1307, 1325-26 (11th Cir. 2006)(Tjoflat, J., dissenting) (explaining that the *Craig* standard is inapplicable because VTC testimony is hearsay and therefore may not be analyzed in the same "constitutional context" as *Craig*); *Id*. at 1332 (Marcus, J., dissenting) (explaining that the facts of *Yates* "were so far removed from the original scope of *Craig as to* render *Craig* inapplicable").

Supreme Court has consistently held that face-to-face confrontation is *not* an *absolute* guarantee under the Confrontation Clause.[116] And the Supreme Court has made it very clear that a defendant's right to confrontation may be satisfied absent a physical, face-to-face confrontation, *"but only where denial of such confrontation is necessary to further an important public policy*."[117] *Craig*, *Coy*, and the Supreme Court's rejection of the proposed amendment to Rule 26 all suggest that any time a defendant cannot physically confront an adverse witness face-to-face in open court, the exception must be necessary to further an important public policy.

Therefore, the *Craig* standard, as applied in *Yates*, requiring a case-specific finding that VTC is necessary to further an important public policy, must form the basis of any rule controlling VTC testimony because it is the only rule that demands what the constitution requires to suppress a criminal defendant's fundamentally guaranteed rights under the Sixth Amendment—necessity. Although two-way, closed-circuit VTC does not allow a defendant to physically confront accusatory witnesses in a manner functionally equivalent to trial[118]—an element of VTC testimony that simply cannot be reconciled with the Confrontation Clause—VTC jurisprudence has demonstrated that the "necessary to further an important public policy standard" is not limited solely to the facts of *Craig* or the context of child abuse cases.[119] Thus, because two-way VTC testimony does not permit face-to-face confrontation, and the *Craig* rule applies to contexts beyond child abuse cases, *Craig* best strikes a balance between a defendant's right of confrontation and the benefits of VTC testimony.

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116 *Craig*, 497 U.S. at 847 (explaining the court has "nevertheless recognized that [face-to-face] confrontation is not the *sine qua non* of the confrontation right")

117 *Id.* at 850(emphasis added); *see also Coy*, 487 U.S. at 1021.

118 *Crawford*, 541 U.S. at 89 (plurality opinion) (quoting *Green*, 399 U.S. at 161) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the [testimony].'").

119 *See id*.; *see also United States v. Shabazz*, 52 M.J. 585 (N-M. Ct. Crim. App. 1999); Harrell v. Butterworth, 251 F. 2d 926 (11th Cir. 2001) ("Because the Florida Supreme Court's decision—that the witnesses' testimony via two-way, closed-circuit satellite transmission did not violate [the defendant's] constitutional rights—was neither contrary to, nor an unreasonable application of, Federal law set forth by Supreme Cases, we AFFIRM [sic]."); United States v. Benson, 79 F. App'x 813 (6th Cir. 2003) (per curiam).

V. A CATEGORICAL APPROACH TO COVID-19?

A. Is this particular violation of the Constitution, constitutional?

A categorical approach to limiting a criminal defendant's right to confrontation that permits VTC testimony where a witness is unavailable to testify due to COVID-19 raises fundamental question of due process. Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law.[120] And the fundamental liberties protected by this Clause include, *inter alia*, most of the rights enumerated in the Bill of Rights.[121] The Supreme Court has repeatedly held that the "the Sixth Amendment's right of an accused to confront the witnesses against him is *a fundamental right* made obligatory on the States by the Fourteenth Amendment."[122] Therefore, the constitutionality of a rule purported to infringe upon a criminal defendant's fundamental right to confrontation must be analyzed under strict scrutiny.

In determining whether the Fourteenth Amendment prohibits a government entity from taking an action that infringes upon an individual's fundamentally guaranteed right to confront an adverse witness, our initial inquiry must address two questions: (1) whether the action is *necessary* to achieve a compelling government interest; and (2) whether the act constitutes the *least restrictive means* by which to further that interest.[123] That said, the inquiry goes beyond merely assessing the means by which to achieve a certain end. The modern Constitutional analysis is characterized by a reasonableness standard, as opposed to the Framer's intent at the time of an emergency.[124]

i. Home Building & Loan Association v. Blaisdell

During the Great Depression in 1933, Minnesota responded to a large number of home foreclosures in the state by passing the Minnesota Mortgage Moratorium Law which extended the amount of time for mortgagors to redeem their mortgages from foreclosure contrary to the

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120 U.S. Const. amend. XIV.

121 Duncan v. Louisiana, 391 U.S. 145, 147-149 (1968).

122 *See* Pointer v. Texas, 380 U.S. 400 (1965); *see also* Douglas v. Alabama, 380 U.S. 415 (1965); *see also California v. Green*, 399 U.S. 149 (1970); *see also* Illinois v. Allen, 397 U.S. 337 (1970) (emphasis added).

123 *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944).

124 *Blaisdell*, 290 U.S. at 426-30.

terms previously agreed upon in the mortgage contract.[125] Home Building & Loan Association was a mortgage lending company that objected to the law on the grounds that it violated the Contract Clause, Due Process Clause, and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[126] The Association brought suit against Blaisdell, the official charged with administering the new law, and the Minnesota Supreme Court ultimately upheld the law as a valid exercise of state power.[127] The Association appealed to the United States Supreme Court.[128]

The narrow question before the court was whether a Minnesota law that extended the amount of time for mortgagors to redeem their mortgages from foreclosure during the Great Depression violates the Fourteenth Amendment.[129] More generally, the question before the court was whether a government actor can limit a parties' contractual rights, in derogation of the Contracts Clause, during times of emergency.[130] The Court ultimately held that an emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community, and the conditions upon which the period of redemption is extended did not appear to be unreasonable.[131]

Writing for the Court, Justice Hughes explained that an emergency does not increase granted power or remove or diminish the restrictions imposed upon powers or reservations: "the Constitution was adopted in a period of grave emergency, and its grants of power to the federal government and its limitations of power of the States were determined in the light of emergency, and they are not altered by emergency."[132] However, while an emergency does not *create* power, it may furnish the occasion for the exercise of power.[133] Thus, the constitutional question in light of an emergency is *whether the power possessed embraces the particular exercise of it in response to particular conditions*.[134] Where the constitutional grants and limitations of power are set forth in general

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125 *Id*. at 415-24.
126 *Id*.
127 *Id*.
128 *Id*.
129 *Id.* at 328.
130 *Id*.
131 *Id*. at 432-34.
132 *Id*. at 425.
133 *Id*.
134 *Id*. ("Where the constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details."); *see also i* ~~*I*~~*d*. at 429 ("It cannot be maintained that that [a] constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of [that right] if made necessary by great public calamity.").

clauses, which afford a broad outline, the process of construction is essential to fill in the details.[135]

ii. Korematsu v. United States

On May 9, 1942, under Civilian Restrictive Order No. 1, based on Executive Order 9066, Japanese-Americans were ordered to move to relocation camps in light of the United states' involvement in World War II.[136] Civilian Exclusion Order No. 34 specifically excluded Japanese-Americans from remaining in San Leandro, California—a region designated as a "Military Area."[137] Exclusion order No. 34 declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities . . . ."[138] Korematsu was an American citizen of Japanese descent who was convicted by the United States government in federal district court for violating Civilian Exclusion Order No. 34, and Korematsu appealed to the United States Supreme Court on the grounds that the Civilian Exclusion Order was unconstitutional, and claimed that when the exclusion order was enacted, all danger of Japanese invasion of the exclusion area had disappeared.[139] The question before the court was rather straightforward: whether Civilian Exclusion Order No. 34, an Executive Order requiring Japanese Americans to relocate to internment camps during World war II, was constitutional.[140]

The Court ultimately rejected the constitutional challenge on the broad grounds that "exclusion from a threatened area, no less than curfew,[141] has a definite and close relationship to the prevention of espionage and sabotage,"[142] which Congress deemed to be a compelling governmental interest. Writing for the *Korematsu* Court, Justice Black explained that the Court cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of the Japanese

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135 *Id*. at 429 ("It cannot be maintained that that [a] constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of [that right] if made necessary by great public calamity.").

136 Korematsu v. United States, 323 U.S. 214, 215 (1944).

137 *Id*. at 217.

138 *Id*. (citing Executive Order 9066, 7 Fed. Reg. 1407).

139 *Id*.

140 *Id*.

141 *See* Hirabayashi v. United States, 320 U.S. 81 (1943).

142 *Id*. at 218.

population, whose number and strength could not be precisely and quickly ascertained. [143]

The Court reasoned that exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, "most of whom we have no doubt were loyal to this country."[144] The Court pointed out that there were, in fact, Americans of Japanese ancestry who "retained loyalties"[145] to Japan, which was confirmed by investigations made subsequent to the exclusion—approximately five thousand American citizens of Japanese ancestry. Justice Black explained that Korematsu was excluded because the country was at war with the Japanese empire, not because of hostility to him or his race.[146] He was excluded because the properly constituted military authorities felt compelled to take proper security measures for the safety of the American people—"because they decided that the necessity and urgency of the situation demanded all citizens of Japanese descent to be temporarily segregated from the west coast." [147] And the court held that Congress, in reposing its confidence in the time of war to our nation's military leaders—"as inevitably it must be—determined that they should have the power to do just that."[148]

B. The Means Justify the End.

These cases are meant to illustrate that the various crises of human affairs often demand the properly delegated authorities act for the necessity of furthering an important public policy, in contravention of a fundamentally guaranteed right. Protecting the lives of criminal defendants, witnesses, jurors, judges, attorneys, and the public at large from the grave and palpable danger of exposure to the COVID-19 virus is certainly a compelling government interest that rises to the level of *Blaisdell*. And even more so, necessary to further an important public policy. VTC technology ensures the health and safety of every individual involved in the litigation process and best preserves the fundamental elements of confrontation at trial. As Chief Justice John Marshall said, "*we must never forget that it is a Constitution we are expounding . . . .*[*i*] *Intended to endure for ages to come, and consequently, to be adapted to*

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143 *Id*. ("We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.").

144 *Id*. at 218-19.

145 *Id*.

146 *Id*. at 223.

147 *Id*. (emphasis added).

148 *Id*.

the various crises of human affairs"[149] The manner in which VTC testimony is adopted in our court system will set a precedent for the way future advancements in technology are embraced and assimilated in the future. Therefore, it is crucial that the Court and/or Congress approach this question with extreme caution. However, our response to the COVID-19 pandemic, and our rapid adoption of VTC technology to facilitate our justice system in a time of national emergency, demonstrates the need for a rule addressing the issue of virtual confrontation immediately. This note recommends that until such a time as courts have more definitive guidance on the issue, the *Craig* standard should be applied in determining the admission of VTC testimony.

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[149] McCulloch v. Maryland, 17 U.S. 316, 407 (1819) (Chief Justice John Marshall writing for the Court explained that, "congress may expound the nature and extent of the authority under which it acts, and that this practical interpretation had become incorporated into the Constitution).