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Videoconference Technology and the Confrontation Clause

I. Introduction

With the rise of virtual communication, many blame technology for ruining the new generation's interpersonal skills.¹ Simply put, they are worried that the lack of physical face-to-face interaction prevents individuals from *actually* speaking to each other. People can text their apologies and vent their anger all while hiding behind a smartphone. Rarely are individuals forced to physically confront a recipient with bad news.

Concerns over face-to-face communications have now spread to the courtroom. Legal theorists worry about the deterioration of face-to-face interaction between courtroom participants. In criminal cases, a key safeguard to requiring face-to-face interaction between the defendant and a witness is the Confrontation Clause.² Generally, this right of confrontation requires that a prosecution witness giving testimony must comply with the following conditions: 1) the testimony should be under oath, 2) the witness should be subject to cross-examination, 3) the witness should be in the presence of the accused, and 4) if reasonable, the witness should be in the presence of the fact-finder.³

A literal reading of the "presence" requirement suggests that the witness and the accused be physically face-to-face in the same room.⁴ The use of videoconference technology, however, puts a major wrench in this assumption. It is questionable whether the virtual "face-to-face" interaction through videoconference technology sufficiently places the witness in the presence of the accused. Courts have promulgated different tolerances in allowing videoconference technology in the courtroom.⁵

While the current perspective of the Supreme Court seems reluctant to give easy access to such technology in a criminal trial, this article shows that federal courts have promulgated different avenues for the allowance of this technology and that each possible path provides some level of access for videoconferencing. As long as these routes provide a measure of access, the future of videoconference technology may lie in the hands of the general public, which bodes well for the future of videoconference technology. If the daily use of videoconference technology becomes second nature to individuals (as it seems to be doing), it might become second nature for the courts.

II. History of Videoconference Technology

Videoconference technology has been slowly finding its way to the commercial market since the 1970s. As this history shows, there have been vast improvements in videoconference technology.

Videoconference technology was first displayed to a public audience at New York's World Fair in 1964. In 1970, AT&T first sold a primitive version of the technology to consumers as Picturephone, but it was prohibitively expensive.⁶

In the 1980s and early 1990s, video conferencing was first brought to a broad commercial market through increases in technology and decreases in price. Compression Labs introduced a

videoconferencing product in 1982 that was \$250,000 and had lines that cost \$100,000 per hour. The system was large and onerous, requiring enough energy to trip fifteen amp circuit breakers. By 1991, IBM introduced the first PC-based black-and-white videoconferencing system costing \$20,000 with a \$30 per hour line fee.⁷

The 1990s saw rapid developments for businesses and consumers because Internet Protocol-based videoconferencing made the technology more practical for personal use. The CU-SeeMe videoconferencing system, developed by Timothy Dorcey at Cornell University, drastically improved the commercial viability of the product.⁸ This was developed for Macintosh for commercial consumption in 1992 and later for Windows in 1995. The product was most popular in school classrooms and training facilities. Alongside this development, AT&T targeted consumers in 1992 with a \$1,500 videophone with moderate success.⁹ Videoconference technology received a major promotional boost in the 1998 Winter Olympics in Nagano, Japan, when choruses from Berlin, Cape Town, Beijing, New York, and Sydney sang simultaneously through videoconferencing for a live performance on the opening night of the Games. The technology was sophisticated enough to prevent lags during the stream of the performance.¹⁰

With the emergence of reasonably priced high-speed Internet in the 2000s, videoconference technology rapidly increased in popularity among individual consumers. Free Internet services like Skype and iChat made online telecommunication popular for personal use. For consumers who prioritize picture quality, LifeSize Communications displayed high definition videoconferencing in Las Vegas in 2005.¹¹

Now, videoconferencing is available as applications on smartphones, making video communication a handheld feature.¹² Videoconferencing technology has become so sophisticated and inexpensive that videoconferencing applications on smartphones are available as free downloads.¹³ At the risk of stating the obvious, videoconference technology has come a long way since a videoconferencing product had a price tag of \$250,000 for communications that cost \$100,000 per hour.

III. History of Videoconference Technology in the Courtroom

Federal courts have promulgated three main veins of reasoning regarding the use of videoconference technology in the courtroom during a criminal case. Each takes a different judicial perspective on videoconference technology's place in the courtroom pursuant to the restrictions of the Confrontation Clause.

A. Maryland v. Craig: Focus on Reliability

In *Maryland v. Craig*,¹⁴ the Supreme Court upheld a Maryland statute that permitted a juvenile victim of alleged sexual abuse to testify off-site via a one-way videoconference stream – the defendant could see the witness, but the child witness could not see the courtroom proceedings.¹⁵ The Supreme Court found that this right to physical face-to-face confrontation was not an absolute, indispensable element of the Confrontation Clause.¹⁶ Instead, in-person confrontation is a “preference” that must occasionally give way to public policy and certain facts of a case.¹⁷ Ultimately, the Court implemented a two-part test, elaborating when a court may deviate from the face-to-face confrontation: “(1) the denial of physical confrontation must be

‘necessary to further an important public policy,’ and (2) the testimony must be sufficiently reliable.”¹⁸

Applying this test to the facts of the case, the Court declared that the Maryland statute was facially constitutional and was correctly applied in this circumstance.¹⁹ The Court found that there was an important state interest in protecting alleged victims of child abuse from any psychological harm that a court appearance might bring.²⁰ They found that the one-way videoconference testimony was reliable because the child witness testified under oath, the defendant retained full opportunity for contemporaneous cross-examination, and the defendant was able to view the demeanor of the witness during the testimony.²¹ The Court noted, however, that actual face-to-face confrontation did have “many subtle” effects that were missing through this videoconference technology.²²

Maryland v. Craig provided a clear statement regarding the constitutional use of videoconference technology,²³ however the case concerns the narrow topic of child abuse and emphasized a reliability framework similar to a now-outdated test governing the admission of evidence.²⁴ Nevertheless, it seems to remain good law and certain scholars believe the Supreme Court may swing back to the focus on reliability of evidence in the future.²⁵

B. United States v. Gigante: The Permissive “Exceptional Circumstances” Test

In *United States v. Gigante*,²⁶ the Second Circuit was faced with another form of videoconference technology in the courtroom: two-way videoconference testimony. In this case, the trial court allowed an ill witness enrolled in the Witness Protection Program to testify via a two-way videoconference stream. While the Court still applied many of the reliability factors used in *Craig*,²⁷ they found that they did not have to apply the full *Craig* test because the videoconference technology allowed for a two-way stream.²⁸ The two-way videoconference technology provided “face-to-face confrontation.”²⁹ The court established a more permissive standard for allowing videoconference technology in the courtroom: videoconference technology did not violate the Confrontation Clause when the trial court makes a finding of “exceptional circumstances” analogous to the FRCP Rule 15 deposition standard.³⁰ While the term “exceptional circumstances” seems stringent, it is not an overly taxing restriction; witness availability was sufficient for a finding of exceptional circumstances.³¹ It is more permissive than *Maryland v. Craig*’s public policy prong.³²

C. United States v. Yates: Skeptical Constitutional Textualism

In *United States v. Yates*,³³ the Eleventh Circuit used the *Craig* test to determine the admissibility of two-way videoconferencing testimony.³⁴ The *Yates* court, however, applied the *Craig* test quite stringently; witness unavailability, witness importance, and administrative ease were not sufficient to promulgate a sufficient public policy worthy of using the technology in the courtroom.³⁵ Just because it was convenient for two witnesses in Australia to testify about Internet fraud conspiracy through a videoconference does not mean that it is necessary.³⁶

The Court applied a more literal, rigorous reading of the Confrontation Clause and its permissible interpretation. Unlike the court in *Gigante*, this Court stressed that that confrontation through a video monitor does not satisfy face-to-face confrontation in the courtroom.³⁷ The Court was likely influenced by the Supreme Court’s refusal to pass to Congress a proposed amendment to FRCP Rule 26 that would have followed the *Gigante* test

and codified the “exceptional circumstances” language.³⁸ Scalia’s rigid textualism played an important role in the rejection of the exceptional circumstances amendment; he found little allowance for videoconference technology in the Confrontation Clause.³⁹ Justice Scalia once quipped: “Virtual confrontation might be sufficient to protect virtual rights; I doubt whether it is sufficient to protect real ones.”⁴⁰ He was also skeptical of the technology behind videoconferencing, calling the technology a “television set beaming electrons that portray the defendant’s image.”⁴¹

IV. Future of Videoconference Technology in the Courtroom

These three veins of reasoning allow for three possible approaches for the future of videoconference technology. Each approach allows access to videoconference technology in the courtroom, albeit with different levels of permissibility. This section will show how each route proves amenable to the use of videoconference technology.

A. Reliability

Maryland v. Craig put a great emphasis on reliability.⁴² Reliability of videoconference technology can play an important role in determining whether it can serve as a worthy placeholder for physical face-to-face confrontation. As the history of videoconference technology has shown, its quality has improved at a rapid pace.⁴³ As the quality and reliability of videoconference technology continues to improve, its appearance in the courtroom should increase. For now, however, Professor Anne Bowen Poulin has outlined three main limitations to how videoconference technology weakens the reliability of witness confrontation. Advances in technology should work on ameliorating these issues, if possible.

First, the camera angle determines exactly what the courtroom sees. When a defendant is in court, the participants can observe the defendant as they see fit. When the camera angle is fixed for the participants, some of this choice is lost; a panoramic shot may provide too many unnecessary distractions, while a close headshot may eliminate certain important bodily features of the participant.⁴⁴

Also, videoconferencing may distort nonverbal cues, such as facial expressions, gazes, postures, and gestures. For example, laggy streams may obscure facial reactions. Even in a live stream that is working perfectly, a headshot may overemphasize facial expression while leaving gestures partially obscured or out of the shot entirely.⁴⁵

Finally, videoconference technology may not replicate eye contact between the witness and the court participants. This artificial eye contact may affect participants’ perceptions of truthfulness.⁴⁶

Nevertheless, the continued improvements in quality make the video feed increasingly reliable and life-like. As this technology becomes more reliable, these fears about the use of videoconference technology will continue to diminish.

B. Exceptional Circumstances

The exceptional circumstances test, as applied by the court in *United States v. Gigante*, provides an easier hurdle to get videoconference technology in the courtroom.⁴⁷ Its future influence may be limited, however. As mentioned earlier, the Supreme Court refused to pass on

to Congress an amendment to FRCP Rule 26 that would have included the “exceptional circumstances” language.⁴⁸ Nevertheless, the Sixth Circuit followed this exceptional circumstances approach in *United States v. Benson*.⁴⁹ If such a rule is ever endorsed, it may allow a proliferation of videoconference technology, provided the technology can help ease the convenience of court proceedings.

C. Rigid Textualism

Rigid textualism and the stringent hurdle placed by *United States v. Yates* provide a difficult path for the use of videoconference technology in conjunction with the Confrontation Clause. Just consider the near zero-tolerance policy that Justice Scalia has promulgated towards the use of videoconference technology to satisfy the Confrontation Clause.⁵⁰ Because of this conservative streak currently in the Supreme Court, scholars have stated that the Supreme Court will likely find unconstitutional any test less stringent than the Craig test.⁵¹ But even this textualist approach provides room for the growth of videoconference technology in the courtroom.

First, the language of the Confrontation Clause uses the word “confronted.”⁵² While this has often been interpreted as in-person confrontation, the language itself is ambiguous enough that it may not per se prohibit the use of videoconference technology.

Additionally, a number of scholars have found problems with a rigid reading that dogmatically opposes videoconference technology in conjunction with the Confrontation Clause. In particular, *Yates* seems to set a higher constitutional standard for admittance of a contemporaneous, live-stream videoconference testimony than the standard for admittance of stale testimony taken by deposition.⁵³ Why does the court view live videoconference testimony as worse than old deposition testimony? This appears to be an example of stubborn resistance to new technology, resulting in an illogical outcome. Correcting this oversight will allow for greater access of videoconference technology in the courtroom.

V. Conclusion

Ultimately, videoconference technology’s use in the courtroom has multiple avenues for growth. Any of these three veins of reasoning allows for at least some wiggle room for the technology’s entrance in the courtroom. The quickest move would be to adopt *Gigante*’s lenient exceptional circumstances test. Textualists, like Scalia, however would likely prevent this from happening. The more stringent test promulgated under *United States v. Yates* will have the slowest transition to videoconference use, but with effort, admittance can still be possible within this framework.

Perhaps most of all, the major factor that could force courts to further accept videoconference technology is public acceptance. People are still worried that the distance or insulation between the defendant and witness could hinder the purpose of the Confrontation Clause. But as videoconference technology continues to become more commonplace, these fears may diminish with time. In fact, courts are usually a couple years behind the general public’s acceptance of technology.⁵⁴ As long as there remain avenues within the law to promulgate the use of videoconference technology in the courtroom, public acceptance may push the use of this technology further along these avenues. If the general public is already on board, the courtroom may feel as if it needs to catch-up.

¹ Jeffrey Kluger, *We Never Talk Anymore: The Problem with Text Messaging*, TIME MAGAZINE, Aug. 16, 2012, available at <http://techland.time.com/2012/08/16/we-never-talk-anymore-the-problem-with-text-messaging/>.

² U.S. CONST. amend. 6 (“[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).

³ Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J.L. REFORM 695, 697-98 (2002).

⁴ *Maryland v. Craig*, 497 U.S. 836, 848-49.

⁵ See *infra* Part III.

⁶ *Video Conferencing History*, NEFSIS, <http://www.nefsis.com/Best-Video-Conferencing-Software/video-conferencing-history.html>.

⁷ *Id.*

⁸ Stattler, Mickey and John Lauer, *Internet TV with CU-SeeMe*, available at <http://sattlers.org/mickey/CU-SeeMe/internetTVwithCUSeeMe/chapter01/introduction.html>.

⁹ *Video Conferencing History*, *supra* note 5.

¹⁰ Stephanie Strom, *The Latest Sport? After a Worldwide Effort, Synchronized Singing Gets In*, N.Y. TIMES, February 7, 1998, available at <http://www.nytimes.com/1998/02/07/sports/xviii-winter-games-latest-sport-after-worldwide-effort-synchronized-singing-gets.html>.

¹¹ George Ou, *High Definition Video Conferencing is Here*, ZD NET, May 10, 2005, <http://www.zdnet.com/blog/ou/high-definition-video-conferencing-is-here/59>.

¹² See Alex Colon, *The Best Video Chat Apps for Your Smartphone*, PC MAG, Aug. 11, 2011, <http://www.pcmag.com/article2/0,2817,2390615,00.asp>.

¹³ *Id.*

¹⁴ 497 U.S. 836 (1990).

¹⁵ *Maryland v. Craig*, 497 U.S. at 840-42 (citations omitted).

¹⁶ *Id.* at 847-49.

¹⁷ *Id.* at 849.

¹⁸ Francis A. Weber, *Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Video Conference-Testimony Provisions*, 86 Temp. L. Rev. 149, 154 (quoting *Maryland v. Craig*, 497 US at 850).

¹⁹ *Craig*, 497 US at 851.

²⁰ *Id.* at 852-53.

²¹ *Id.* at 851.

²² *Id.* It is worth noting that Justice Antonin Scalia wrote a scathing dissent that these subtle differences were all that was needed for the videoconference process to be unconstitutional. He wrote that any deviation from actual face-to-face confrontation “is explicitly forbidden by the constitutional text; there is simply no room for interpretation with regard to the irreducible literal meaning of the [Confrontation] Clause.” *Id.* at 865 (internal quotations omitted).

²³ Weber, *supra* note 18, at 154.

²⁴ The Court first promulgated this reliability framework in *Ohio v. Roberts*, 448 U.S. 56 (1980). While *Maryland v. Craig* appears to remain good law, the court has moved away a judge-made determination of reliability to determine admission of evidence. See *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁵ See the section entitled “*Cracks in the Crawford Coalition*” in GEORGE FISHER, EVIDENCE 624-25 (3d ed. 2013).

²⁶ 166 F.3d 75 (2d Cir. 1999).

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- ²⁷ United States v. Gigante, 166 F.3d at 80-81.
- ²⁸ *Id.* at 81.
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ Matthew J. Tokson, *Virtual Confrontation: Is Videoconference Testimony by an Unavailable Witness Constitutional?*, 74 U. CHI. L. REV. 1581, 1592-93.
- ³² Marc Chase McAllister, *Two-Way Video Trial Testimony and the Confrontation Clause: Fashioning a Better Craig Test in Light of Crawford*, 34 FLA. ST. U. L. REV. 835, 857 (2007).
- ³³ 438 F.3d 1307 (11th Cir. 2006).
- ³⁴ United States v. Yates, 438 F.3d at 1313.
- ³⁵ *Id.* at 1316.
- ³⁶ *Id.*
- ³⁷ *Id.* at 1315.
- ³⁸ Weber, *supra* note 18, at 1596-97.
- ³⁹ *Id.*
- ⁴⁰ Friedman, *supra* note 3, at 703 (citations omitted).
- ⁴¹ *Id.*
- ⁴² *See supra* section III.A.
- ⁴³ *See supra* section II.
- ⁴⁴ Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 Tul. L. Rev. 1089, 1108-1109 (2004).
- ⁴⁵ *Id.* at 1010.
- ⁴⁶ *Id.* at 1111.
- ⁴⁷ *See supra* section III.B.
- ⁴⁸ *See supra* note 38 and accompanying text.
- ⁴⁹ 79 F. App'x 813 (6th Cir. 2003).
- ⁵⁰ *See supra* notes 39-41 and accompanying text.
- ⁵¹ Weber, *supra* note 18, at 173.
- ⁵² U.S. CONST. amend. 6 (“[I]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”).
- ⁵³ Tokson, *supra* note 31, at 1597-98.
- ⁵⁴ Manev Tanneeru, *Can the law keep up with technology?*, CNN (November 17, 2009, 10:08 AM), <http://www.cnn.com/2009/TECH/11/17/law.technology/>.