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ADMINISTRATIVE OFFICE OF THE U.S. COURTS

CRIMINAL RULES COMMITTEE HEARING

Wednesday, April 25, 2001

8:35 a.m.

Judicial Conference Center

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P R O C E E D I N G S

JUDGE DAVIS: We have got a couple of things on the agenda today, so let's get started.

We have three new members who I want to welcome to the committee. We have Judge Rita Strubhar, from Oklahoma City; and we have Judge David Trager, from Eastern District of New York in Brooklyn; and we have Mr. Bob Fiske, a distinguished lawyer with Davis Pope, from New York.

I am glad to welcome all of you to the committee, and I think before the end of the day you are going to see that your timing in coming on this committee was just perfect. This is hopefully the tail end of our style project.

I know our hearing is the first thing on the agenda but, before we do that, let's go around the table so all the new members and the witnesses can see who we are.

I will start it off. I am Gene Davis. I live in Lafayette, Louisiana, and I sit on the 5th Circuit and I am chair of the committee.

MR. SCHLUETER: I am Dave Schlueter. I teach at St. Mary's University School of Law in San Antonio, Texas, and I am the reporter.

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MR. FISKE: Judge Davis, I am Bob Fiske, from the firm of Davis, Pope and Wardwell, in New York City.

JUDGE STRUBHAR: I am Rita Strubhar, the presiding judge at the Oklahoma Court of Criminal Appeals.

JUDGE ROLL: Good morning. I am John Roll and I am with the District Court in Tucson.

MR. GOLDBERG: I am Don Goldberg. I am a Philadelphia Lawyer with Ballads Barr [ph.]

MR. KIBBLE: I am Joe Kibble. I teach at Kanastuli [ph.] Law School. I am one of the Style consultants for the committee.

MR. SPANIEL: I am Joe Spaniel, retired. I am a consultant with the standing committee, and I also work in Style.

MS. HOOPER: I am Laurel Hooper, and I am a research attorney with the Federal Judicial Center.

JUDGE TRAGER: The chair introduced me. I am James Trager, from Brooklyn, New York, and I sit on the District Court.

MR. CAMPBELL: I am Lucien Campbell, Federal Defender in San Antonio.

MR. PAULEY: I am Roger Pauley, a career attorney

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in the Criminal Division of the Justice Department.

MR. RABIEJ: I am John Rabiej with the Rules Committee Office.

JUDGE CARNES: I am Ed Carnes. I am with the 11th Circuit and I am in Montgomery.

JUDGE FRIEDMAN: I am Paul Friedman. I am in the U.S. District Court here in Washington, which is probably why I was the last one to arrive.

JUDGE MILLER: I am Tommy Miller from Northern Virginia. I am a United States Magistrate Judge for the Eastern District of Virginia.

JUDGE DAVIS: All right. Kate Stith is the academic member of the committee, but she couldn't be here today. I hope she will be here tomorrow. We are missing one other member, Judge Buckelew from Tampa, Florida.

Our first item is our hearing, and we have six witnesses scheduled to testify. Mr. Goldberger agreed to split his time with Mr. Gregory Smith. Let me just say that the comment period and the oral comments we get from the witnesses is critical to our process, and we sincerely appreciate all you taking the time to come here at your own expense to talk to us.

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Let me tell you a little bit about the procedure we will follow. Each of you, I think, Mr. Goldberger and Mr. Smith will split your time so you will have roughly 15 minutes between you. The other witnesses will have uninterrupted time of 15 minutes to make a statement and then you will be subject to questions by the committee.

Judge Carnes and Judge Roll, who are chairs of the subcommittees dealing with these rules, will lead off on any questions and then they can turn it over to members of their subcommittee. Then, after that, any other member of this committee will have an opportunity to ask questions.

So we will start with Judge Borman.

Incidentally, we have all of your written --each committee member has all of your written comments in front of us, just so you will know that.

Judge Borman, you sit on the U.S. District Court in Detroit as I understand it.

JUDGE BORMAN: I do, yes.

JUDGE DAVIS: All right. Go ahead, please.

JUDGE BORMAN: Thank you, Judge Davis, members of the committee.

My testimony represents my personal views. I,

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first of all, have to get that out. I am here because I have significant concern about proposals No. 2 in the Rules of Procedure 5 and 10, dealing with what I will call video teleconferencing of significant proceedings in the criminal justice process.

Rule 5 deals with initial appearance. Rule 10 deals with arraignment. My concern, as I said, relates to proposals for alternative site video conferencing of both proceedings, with the second alternative is without securing the Defendant's waiver of the right to be present in court.

I believe there are compelling reasons to reject the second alternative which forces the defendant into a video proceeding from the site of incarceration. I think it really significantly diminishes the critical role of the judiciary in the federal criminal justice process.

Presently, as you all know, the judicial officer presides over a hearing that requires the presence of all parties--the prosecutor, the defendant, the defense attorney--in a neutral forum, an open courtroom, where also they are allowed to have citizens and the press come in and see exactly live bodies as to what is going on there.

The forced video--what I will call a videoized

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defendant from a place of incarceration, I think, really radically changes the scenario and with regard to the rights of the defendant makes the judicial officer a talking head on a TV screen and eliminating the courtroom, the presence of a critical party--the critical party, indeed, because it is his life and liberty or her life and liberty that are at stake.

The parties are separated from each other and you don't have a chance--the judge doesn't have a chance to eyeball the defendant, the situation that he or she is in. The defendant doesn't have an opportunity to eyeball a live judge right in front of them and get an appreciation of the magisty of the federal courtroom presence and the importance of a federal judicial proceeding where you are there alive.

Right now, the dictates of Rule 5(d)(1) require that initial appearance that the defendant be informed of the right to retain counsel, and many times the person may well have counsel at that time or counsel will attach at that proceeding where they will call a lawyer or a defender over if the person is indigent or his or her retained counsel may even be there at that initial proceeding; if not, then certainly the issue of the right to retain counsel

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requesting appointment.

The circumstances about pretrial release, what could be more important than an individual's liberty and, yet, to create a proceeding where the individual would be detained somewhere else when the issue is released, freedom or not at that point, really cuts out the heart of the concept of a determination of pre-trial release at the get-go which is what Rule 5(d)(1) requires the presiding judicial officer to advise the individual of; and, of course, the rights not to make a statement and the whole mirandizing thing.

This is a significant proceeding. This is not a minor fly spec in the federal criminal justice process. And the two significant components that we are talking about for the existing proceeding is a neutral convener, the federal judicial officer, and a neutral site, a federal courtroom--and I don't believe that a televised judicial officer at a prison site is really a neutral convener, and I don't believe that a detention site is a neutral site for giving the individual his rights and allowing the rules and the rights to play out at that particular time.

The proposal rule will keep the individuals

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incarcerated in some way, obviously, that will be in an penal institution during these proceedings, and I think that this is a critical disconnect because from being in a neutral courtroom where there is a forum for the judicial officer to effectively inform the defendant of the charges against him and his rights. I think the courtroom provides the greatest potential for the defendant to comprehend the gravity of the situation and to understand the rights.

And Rule 5(d)(2), proposed rule, says the judge must allow defendant reasonable opportunity to consult with counsel. I think the opportunity for consultation with counsel is diminished if not rendered meaningless if the defendant is incarcerated one location and the attorney is in the courtroom miles away. On the other hand, if the attorney is present with the defendant at courtroom--I am sorry--at the institution, and the prosecutor is present with the judge in the courtroom, I think you undermine the effectiveness of defense counsel and give the prosecutor the appearance of a preferred position in physical proximity to the judge.

And, under these scenarios, the appearance of justice is compromised, the role of the federal judiciary is

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diminished, and the defendant's rights to effective assistance of counsel and meaningful courtroom appearance are compromised. I think that is what the judiciary is here for is to provide this disconnect within our wonderful system of justice and to have all of the parties to be present and not to have someone locked up in an incarceration site with a TV camera in a room where the judge can see maybe the individual and the place where he or she is sitting, but certainly not the whole environment. Even if you can see the whole environment, it is a different environment, it is not a neutral environment and not the kind where an individual defendant is likely to really receive, understand, appreciate and exercise his or her rights in an effective manner.

The reasons advanced by the committee for off-site forced video teleconferencing I don't think are compelling. The fact that some states are using this procedure does not mean that this is a procedure that is preferable, that is something that we would want to do in the federal criminal justice system, and that fact that some states are doing it doesn't, I think, justify converting our system and allowing what I will call the lowest common denominator to take

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precedent over the appearance of justice and the actual giving out of justice or dealing with justice in the system.

A second justification is security problems caused by creating transport situations of defendant's to a courtroom. That happens in every criminal case, and I think that, yes, obviously, if a person never came to a courtroom from a jail we would save money but we would lose justice.

And a third justification, which is inherent in the justification but not really mentioned, is the dollar saving. Again, I think there will always be security and financial concerns that can support continuing incarceration rather than bringing the defendants to court. I don't underestimate these concerns, but at the same time I believe that the concerns should not be satisfied at the cost of minimizing the role of the federal judiciary and at the expense of the rights of the defendant.

And, indeed, the committee, I am not picking up on and creating a new thought, the committee in its discussion points out, in proposed amendments on page 146, the committee is very much aware of the argument permitting a defendant to appear by video conferencing might be considered an erosion of an important element of the

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criminal process. Then they say, well, we will allow it--on page 146--as long as the defendant consents. Well, what we are talking about here with alternative 2 is an erosion with no consent, and I think that the no waiver alternative should be rejected.

You know, a possible alternative--I know it happened in Eastern Michigan when they had the initial arrest of James Nichols who was the brother of Terry Nichols concerning the Oklahoma matter was in that situation the magistrate judge and the prosecutor and the defense lawyer went out to Milan Federal Correctional Institution, they have a public room, they had the hearing there. So in a significant case where there is an overly--not overly, but a significant concern relating to security and matters like that, in the unusual case, the parties can all go to a federal institution and have the hearing there. I don't think that should be the regular procedure but, in the one that really requires it, that is a possibility.

Another matter I think is that obviously with regard to white collar crime cases, those individuals are often not incarcerated at the time of the initial appearance. I think in most of the situations that the

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persons incarcerated will be indigent. Does this make a two-tier system of justice where the person charged with the white collar offense who is not incarcerated at the time of the initial appearance gets a first class in- court proceeding, whereas the indigent who has been arrested and is incarcerated gets a significantly less appearance and actuality of fair impartial justice with not being in a courtroom? That, I think, again supports, even more, why our system must continue, I hope, to allow the defendant to make the call, but in ordinary situations where the defendant does not consent to have it done in a neutral courtroom.

Now Rule 10 with arraignment, again, the committee note repeats the cautionary language contained in Rule 5, talking about it as an erosion of an important element to do it by alternative site video conferencing. Because--your own words-- it may be important for a defendant to see and experience firsthand the formal impact of the reading of the charge; second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially when there is a real question whether defendant actually understands the gravity of the

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proceeding; and, third, there may be difficulties in providing defendant with effective and confidential assistance of counsel if counsel but not the defendant appears at the arraignment.

So it weakens the link to use a term from that horrible new television show, "The Weakest Link." I think it goes beyond the weakest link, I think it cuts off the real link in the federal process between a neutral situation where a judicial officer is in charge. And I think that the commentary on page 161 and 162 states the obvious truth that the incarcerated defendant on video teleconference continues to be a jailed prisoner during the arraignment process.

And I think that it is clear that the justification which is advanced under Rule 10, later on, talking about that certain Districts deal with a high volume of arraignments, the defendants in custody, distances involved--yes, I recognize that problem, but I don't think that the tail should wag the dog and that we should lower the bar to allow because of that situation every arraignment to be done if the judicial officer or the marshall or the parties together except for the defendant want to have it where the defendant is in lock up and the other parties are

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a long way away.

I recognize the expense. I recognize the seriousness. I recognize the numbers. At the same time, I recognize the importance of our system of justice, and I don't think that we should compromise on this issue and allow that situation to trump the defendant's right or to lower the effectiveness of the federal judicial officer being in charge of the proceeding.

The committee's response, also, the more controversial Rule 10 alternative--they said that we think the beneficial use of video conference arraignments will be lost to the defendant's consent was required, and I guess that is exactly my point that the defendant is entitled to have a proper convening on significant procedures within the federal judicial process in criminal cases. The fact that defendants chose to exercise that right is something that should be honored and not taken away.

So I don't think that a video conference technology situation should undermine the role of the judiciary. Criminal hearings involve critical, fundamental rights and the Rules 5 and 10 the judicial officer, prosecutor, defense counsel must be all present, in person,

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in an open courtroom where the public can attend to enable the federal judicial officer to effectively perform the judiciary's vital function under our system.

Anything less than a human eyeballing of the defendant and the judge and the judge and the defendant, I think turns the criminal justice process into a TV show that is not worthy of the federal criminal process.

I would be glad to take questions or respond to questions or discuss it because I think this is not a minor technical amendment, this is a significant change to the federal criminal justice process. And I know that you all are of it because I think it had been talked about years back on the committee and put away somewhere, then it was brought out. But it is here now, and I think it has to be dealt with.

JUDGE DAVIS: Okay, thank you, Judge Borman.

Judge Carnes is chair of the subcommittee that had Rule 5, so Judge, lead off.

JUDGE CARNES: Judge Borman, when I think about the needs that have been communicated to me about this rule, I don't think about that Eastern District of Michigan or Middle Alabama or something like that. Maybe just to

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confirm my assumptions about that, what is the greatest distance in your district from a federal courthouse to a place where a federal prisoner might be detained?

JUDGE BORMAN: Well, it would probably be in the Northern Division from Shiawase to Bay City or to Flynn, it is probably about 20-25 miles.

JUDGE CARNES: Which I guess even in traffic you are talking about less than an hour drive.

JUDGE BORMAN: I would guess so, yes.

JUDGE CARNES: A problem that some districts are confronted with and I would like your reaction to this, particularly in the Western states is that it can be hundreds of miles, particularly detention in a state facility or local jail or that sort of thing. And an argument that has been made to us or that we perceived in favor of this is that in some instances--and we don't cover it in the commentary as much as we should--but, in some instances, it is not at all unrealistic to assume that the initial appearance by video conferencing can be done much more promptly than it could be done by transporting the prisoner hundreds of miles or what not.

You could shave as much as a day or day and a half

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off if the marshall is going to wait until the next day and there is nothing to require them not to do it that way. If they are going to wait until the next day to take the prisoner to the courthouse, but it could be set up to be done that day.

Do you think we should give some weight to having these things done more promptly? Isn't that entitled to something, particularly in these Western states?

JUDGE BORMAN: I recognize what you are saying, Judge Carnes, and I think it should be the defendant's option which is your No. 1 option, to say, "I will waive the promptness of getting there today to get there tomorrow to have a hearing in open court with my lawyer and with the full panoply of rights and the atmosphere, rather than done that."

So I don't think that the No. 1 option takes away from that, and I think it allows for that to occur.

JUDGE CARNES: The problem with that and I have thought about it, and the problem also with the alternative version--or the problem with the consensual version is you almost have to have an initial initial appearance to explain to the defendant what he is waiving and how he can waive it.

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One of our witnesses today has made the point that you are getting into an initial appearance when you start explaining to the guy what he is being asked to waive or when you have the local people "here, just sign on this" and that sort of thing.

Let me ask you another thing. One of your--in your footnote in here, you talked about it could have an impact on defendant's who are hospitalized. How would you do that? Guy is in the hospital and he has been injured in an automobile wreck, in a chase, and you have got 48 hours to do it and--?

JUDGE BORMAN: Well, I know what we have done in Detroit is the Magistrate Judge will go to the hospital and conduct an arraignment there. I think, again, these are rare situations, but that is what we have done in situations in Detroit.

JUDGE CARNES: That is all the questions I have.

JUDGE DAVIS: Judge Roll, you had Rule 10?

JUDE ROLL: Yes. Good morning, Judge.

JUDGE BORMAN: Morning.

JUDGE ROLL: We appreciated your oral comments this morning and also the written materials that you

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submitted.

Judge, in Rule--as I understand what you have said this morning and in gleaning from your materials, you do not approve of this procedure whether it is with or without the consent?

JUDGE BORMAN: No, no. If there is consent, then I would say it would be okay. I think that is the linchpin.

JUDGE ROLL: So your opposition is only as to--

JUDGE BORMAN: Part 2.

JUDGE ROLL: Without the consent?

JUDGE BORMAN: The alternative without consent.

JUDGE ROLL: That is both as to initial appearances and as to arraignments?

JUDGE BORMAN: Yes.

JUDGE ROLL: And there has been some discussion about really reasons existing for treating them differently--treating 5 and 10 differently in that some viewed 10 as more of a summary proceeding, perfunctory proceeding that isn't nearly as important as the initial appearance. And there has even been some suggestions that maybe as to Rule 10 it would be an appropriate place to not require consent but require consent for the initial

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appearance.

JUDGE BORMAN: Well, I think that people vary. Some think that 10 is more important, some think 5 is more important. I think consent is most important. But 10 could be the most important where a person isn't arrested before the indictment; then, the arraignment on the indictment would be the initial appearance, and so you are back to 5 but it is under the guise of 10. In a fair number of cases, the indictment will be sealed or--particularly in significant large number cases.

So I think that it is important, a both stages, to do it with again the consent alternative.

JUDGE ROLL: Thank you.

JUDGE DAVIS: Any other member of the committee have questions?

JUDGE MILLER: Judge Miller. In Iowa--I am familiar with the process there--they had a fantastic TV system at all public buildings, fiber optic equipped, and the courthouses are on the system. We have, for years, conducted initial appearances from the courthouse in De Moines to the courthouse in Davenport--assuming this morning there is still a courthouse in Davenport.

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Apparently, it is about a four-hour drive on a two-lane highway in good weather, and my friends in Iowa tell me there is no good weather in Iowa. But, in any event, they actually conducted jury trials from the judge in one place and witnesses and other parties in the other, and jurors.

You have made the assumption that the defendant will be in a detention facility. In Iowa, the defendant is in a federal courthouse in Davenport and surrounded by court personnel and gives consent and they do the initial appearance, as opposed to either a judge taking four hours or more to go up to Davenport or the marshals taking four hours to go back. They fax the release forms back and forth and the judge signs them and the person is released.

Would it make any difference if the rule required that the appearance be in a federal courthouse or a federal facility of some sort where proper dignity can be controlled by the federal judge?

JUDGE BORMAN: I don't think that giving up the live eyeball appearance where the judge can see the individual and explain to the individual what is going on so the individual can appreciate it and not through a

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television camera--I don't think the camera substitute is one that we want to bring in to the federal criminal justice process and certainly not to a trial which you say there are already heading into doing trials without live presence of the defendant which is worse.

JUDGE MILLER: It is civil trials.

JUDGE BORMAN: Right, absolutely. I think that--this isn't the nose in the tent. I mean, yes, it might be coming down the line, but I am worried that this is bad enough as it is. This is the whole tent in terms of these critical proceedings at the initiation of the federal criminal justice process that I think we should not do the lowest common denominator, the cheapest way, and put it on a TV box for the defendant or put the defendant on a TV box, no matter how good the fiber optics are.

You know, if you have grandchildren, you don't want to--it is nice to get a video, but it is not the same thing as seeing the human body.

JUDGE CARNES: How would you handle the flood situation? Unfortunately, it seems to recur with some regularity somewhere out West.

JUDGE BORMAN: The flood situation?

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JUDGE CARNES: Yeah, where you have got a magistrate and a courthouse here, and a flood between the magistrate and the courthouse and where the defendant is. I mean, that does happen in Iowa and elsewhere?

JUDGE BORMAN: Well, the FEMA director was on TV yesterday saying they ought to build things so they don't get floods. But--again and again.

I guess, you know, in an emergency situation, you deal with an emergency situation. And, in that situation, you know, in Davenport, you are across from Molene and Rock Island, aren't those the quad cities or something? And maybe a magistrate judge could come across from another circuit, just to handle that proceeding on a ad hoc basis. You know, because Davenport is across the river from--there may be a magistrate judge in the Southern Illinois who can get there if there is an emergency situation or things like that. We are a federal judiciary, and I think it can be dealt with.

But I don't think, again, that unique situation should control.

JUDGE DAVIS: Anybody else have questions?

JUDGE FRIEDMAN: One of the other things we talked

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about in committee or at least in our subcommittee with Judge Carnes was each of these situations, Rule 5 and Rule 10, also provides the opportunity for the defendant and his or her lawyer to see each other face-to-face. It is not just the judge. And that sometimes important things happen at those meetings talking about pleas face-to-face, talking about trial strategy face-to-face.

Some people take the view, well, that is not our concern; that good lawyers have ethical obligations to do what they have to do for their clients and they may have to travel hundreds of miles to do it. Other people take the realistic view that a lot of lawyers are doing this kind of work because maybe they are not first-rate lawyers and that they need judges and courts to prompt them to do the right thing and to prepare properly to avoid ineffective assistance of counsel.

Would it change your view at all if, in either the Rule 5 or Rule 10 situation, that there could be teleconferencing so long as the defense lawyer and the defendant were in the same physical location, even if the judge and the prosector were not?

JUDGE BORMAN: No. Because you don't have the

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judge eyeballing the defendant, and I think that is what the federal judicial process is that we are here to act as an initial detached magistrates or judges to make sure that the proceeding occurs in a way that there is a meaningful situation, meaningful instruction of the rights, meaningful appreciation of the defendant of what is going on.

JUDGE DAVIS: Any other questions?

JUDGE STRUBHAR: Judge, I appreciate the comments that you have made. Remember that I come from a state system. In the state systems across the United States where there are hundreds of thousands of cases, in your large cities, they are all being done by teleconferencing these days, and I am talking about Rule 5 which would be your initial appearance. In fact, when I first looked at the federal rules, I was quite surprised to see that the federal rules didn't even allow that.

Obviously, they have to do it on the state system, many times, just for nothing else than security and money matters and that kind of thing. Many times your prosecutors, many times your defenders have come from state systems and certainly many of these defendants have been in the state system and appeared on TV many times before.

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Are you sure there is really an expectation that they be allowed to see a judge on initial appearance?

JUDGE BORMAN: Well, I have been involved in the federal criminal justice process--I was an Assistant U.S. Attorney in the 60's, I was a Defender in the 90's, and now I am a judge in the 1000's. I think within the federal process that there is that expectation. I think there has been that appreciation and I think that it is a significant component of the federal criminal justice system.

And I think that it is the preferable way to go, and I think that the number-- as you say, the number of federal criminal cases is not as great as the state, and I think that many times situations where individuals are experiencing, in the federal process, significant jail sentences, significant jeopardy situations, apart from the capital cases in the state system--I think that because of the whole process that we do not want to change the federal criminal justice process to bring it in a situation where an individual and the judiciary--I think the judiciary is not what it should be. We are fortunate, we are blessed, the federal judiciary, to do it the right way and I think that, to the extent that we can, we should continue to do it the

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right way for the federal justice system.

MR. GOLDBERG: Do you think it is likely to have any affect on the judge's determination as to whether or not to release?

JUDGE BORMAN: Oh, of course. Yes. I think that when the individual is there, when you see someone in person, that you have a different understanding of the individual, a greater appreciation of the individual. If the individual's family is in court to lend testimony or other things that, when they are there with the defendant, I think it creates a situation that is more amenable to a humanizing process.

JUDGE CARNES: Of course, that kind of stuff--

JUDGE BORMAN: Sometimes, the family--

MR. GOLDBERG: Understand and appreciate are neutral terms.

JUDGE BORMAN: Well, I think, again, it may not result in the person being released, but it will result in the person appreciating that I have had a proceeding where I have been treated as a human and not as someone on a TV screen. And they have determined that I am to be detained, and that is the law and it happens, but it happens in a way

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--the same way as if a wealthy person was brought in on a white collar crime and they get to come right into court and I am stuck over in a jail somewhere.

JUDGE DAVIS: Mr. Pauley?

MR. PAULEY: This most recent interchange really leads into one of the questions I wanted to ask which, is assuming that the committee determines to go with a consent requirement, can you see any instances in which the government's interest in the defendant's presence is sufficient to warrant that the government also be required to consent?

I think you were talking with regard to the release determination. Might there not be some situations in which the defendant was willing to waive but the government would prefer that the defendant appear personally?

JUDGE BORMAN: I can see that situation, I suppose, if the government--there might be a situation where the government thinks that the individual might want to cooperate. They might want to have them brought there. But that isn't one of the alternatives, but I think that is something that you all can discuss.

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My concern is, though, that the defendant who is the one being prosecuted, whose liberty is at stake, should have the call; but, the government, you may well want to throw that in as well.

MR. PAULEY: My second question is, if it is just a one-way consent requirement as one of the alternatives now provides, namely that of the defendant, what is accomplished by such a rule?

I assume you are of the view that this is a right that can be waived now. Indeed, the practice in some districts is to do this with the defendant's consent. What would a rule that put that into black letter law accomplish?

JUDGE BORMAN: Well, I think what we are faced with is two alternatives and, to me, the question was should either be adopted or none be adopted? I have a feeling that there is some rolling interest in adopting one of the rules, and I think that, to that extent, I have spoken with regard to preferring alternative 1 to alternative 2.

So, in the likelihood that you are going to adopt something, I think that that preserves the justice process in the federal system.

JUDGE DAVIS: Any other questions?

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MR. CAMPBELL: Judge Borman, you mentioned the importance of defense counsel being in the same room with the defendant and being in the same room with the judge. Can it also be important for defense counsel to be in the same room with the prosecutor?

JUDGE BORMAN: Well, I think so, too. I think that everyone should be there. I think that there is interplay with all the parties, and they are all in the same process, and I think we all belong together. That is the way it is now, and I don't think anyone should be left out.

I mean, I won't--you know, you can't do a sentencing or other things. I even don't like it when prosecutor who hasn't done the case comes in for the sentencing and then has no position or understanding. I think we are talking about a system and all the parties should be there. That is part of the federal judicial process that we convene a hearing and have the parties there.

JUDGE DAVIS: Any further questions of Judge Borman?

All right. Judge Borman, again, thank you very much for coming.

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JUDGE BORMAN: Appreciate your asking me.

JUDGE DAVIS: All right. Our next witness is Professor Richard Friedman.

Professor Friedman, would you just tell us, give us a little bit of background what you are doing now and what your educational background is, your writings.

PROFESSOR FRIEDMAN: Sure. I taught the Law of Evidence for many years. You wanted my education, do you mean degrees and all that stuff?

JUDGE DAVIS: No, just a summary.

PROFESSOR FRIEDMAN: I have taught for the last, oh, my goodness, 19 years. The Law of Evidence has been probably my principle area of research. I have been working for some years on a Treatise on the Law of Hearsay which is focused--my work has really focused a great deal on confrontation and that drew me to Rule 26.

I have to apologize, in fact, my nephew a Treasury Department lawyer, called to my attention that at the head of my commentary I put "Comments on Proposed Amendment to Federal Rule of Civil Procedure 26" which is some indication of where my teaching practices had lead, I taught civil procedure for some years; criminal procedure only once.

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But it is principally the question of confrontation that drew me to this. While I am at it, there is one other typo, I am afraid.

JUDGE DAVIS: Let me just tell you that, at the last subcommittee meeting, the subcommittee recommended that we change this rule to make it clear that two-way transmission is required.

PROFESSOR FRIEDMAN: That is great.

JUDGE DAVIS: You know, I can't guarantee the committee is going to accept that, but I am reasonably sure they will.

PROFESSOR FRIEDMAN: Good, good. I think that is one thing that should be required.

JUDGE CARNES: We did that in response to your submission and to Mr. Goldberger's and Professor Marsh's. We just kind of assumed it would be that way, but all three of you stressed that it needed to be explicit.

PROFESSOR FRIEDMAN: I think it does have to be to be certain.

Let me say I on the technical matters, I--well, first, I should say I think the--it is a good thing that the committee is trying to see what can be done with modern

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technology and video transmission. It is certainly a worthwhile effort and I am glad of that. I also think the committee is right in not trying to specify technical standards.

But I do think it is important to specify standards, if you will, of output, of what the quality of the transmission should be, not in any technical terms, but I have tried to do it in the draft rule that I presented, presumptuously, basically saying that people have to be able to see and hear each other clearly. I think that is important. Possibly, we would want to say without detectable delay. Because, in most systems now in operation--I understand this isn't true in all, but most systems now in operation there is a delay which can be troublesome.

Beyond the--and I think that you can address that very briefly without getting too technical, but I think it is important to state some standard.

Beyond those matters, well, the core of my comments did focus on the confrontation issue, so I want to focus on the court case of a prosecution witness testifying by remote with all of the other participants in the

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courtroom. Now it is obvious, in most respects, this is better than the traditional deposition which has been allowed for several hundred years, a deposition taken stenographically and then presented in paper; but it is not better than a traditional deposition in one critical respect, and that I think is something that has to be taken into account.

In the traditional deposition as in traditional courtroom testimony, the defendant and counsel are in the same room with the witness. So there is confrontation in the true sense, face-to-face as has been the battle cry, really, within the common law for several hundred years. So it might appear that, well, if the video transmission is of good quality, what is lost? And my problem is we don't know.

It could be that the committee knows more than I do about this because I don't claim any expertise on the psychological aspect, but I don't know of any studies that raise the issue--that address the issues that I have raised, and I have asked those whom I thought might know and they don't know of any. The questions--and they are very substantial, I think, is how much less of a sense of

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confrontation does the witness--and, for that matter, the defendant--feel from being at remote, from seeing the courtroom presentation, courtroom participants by remote rather than being in the same room? That is the first question.

And the second is, how impaired is the cross-examining attorney from having to conduct the examination by remote? These are testable matters, I think. But, to my knowledge, there hasn't been any considerable testing of them. I could go through the studies that I know of that bear on it slightly, but I won't unless the committee is interested.

I think that the time delay is a significant concern. Because in most systems, as I said, now in operation there is a detectable time lag and I think that could very plausibly make cross examination more difficult.

So my proposal is that the defendant have the right to be brought to the witness, if there is going to be testimony by remote. In all but extraordinary circumstances, that should be feasible. And that really is a traditional way. Judge Borman was talking about the magistrate going to the hospital for arraignment. It has

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long been done that the defendants are brought to witnesses for depositions, and this would be the same thing.

If that is done, then a video recording of that testimony is clearly superior to the traditional stenographic deposition.

The committee mentions two cases, and I want to say I appreciate that the committee is not the court determining constitutional standards, but I think neither should the committee's work ignore the value underlying those standards. And it isn't a sufficient answer to a criticism or concern to say, "but it is constitutional." I assume the committee doesn't regard its work as, "let's see if we can go out to the constitutional maximum and push the lines."

The commentary cites the Salim case in which a witness was held in custody in France and the defendant wasn't allowed under French law to be in the presence of the witness. Personally, I think that is just a bad result; in other words, to allow the testimony to be taken under the French standards in those circumstances. I think it is basically abdicating to France the power of determining standards under which testimony is going to be admissible in our courts.

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But, even if it is a result to be approved, that case made very clear that it was only allowing these standards because there is no way of arranging confrontation because the witness was in the custody of the French authorities and they weren't allowing the defendant to be brought there. So it clearly distinguished the domestic context, and it shouldn't be any kind of precedental authority here.

The other case is also from the 2nd Circuit, is the Gigante case in which there really were extraordinary circumstances. You had quite a conjunction; a dying witness who was in witness protection, and a defendant unable to travel. So it appears it would have been an extremely difficult to arrange any kind of confrontation face-to-face. It is not clear, actually, that the defendant asked to be brought before the witness. In my reading of the case, it wasn't clear that he did. It is certainly not clear that counsel asked to be brought before the witness, and it is possible that if those issues had been presented that it could have been arranged. In fact, during the telecast that was made, the defendant, through counsel, clearly waived eye-to-eye--any need for eye-to-eye contact.

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So I don't think those cases are any basis on which to craft a rule that would push aside the long-standing right of the defendant to be brought face-to-face with witness. And I think this is--well, here we are talking not about initial appearance or arraignment, we are talking about the heart of the procedure, the trial, where the confrontation right takes effect. I think it is just an area where the committee ought to tread very, very carefully.

As I understand, studies in this area haven't been funded. If the committee indicated an interest that this is an area in which policy determinations might be made, I think that studies would be conducted.

My other comments are addressed to the unavailability requirement. I appreciate the committee's attempt to achieve simplicity by incorporating language from Rules 804(a)(4) and (5) but, for the reasons I have stated in my written commentary, I think this rule needs its own definition of unavailability. I think--or more broadly its own definition of when the testimony by remote would be allowed.

It is particularly important, I think, that mental

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infirmity not be allowed to be a basis on which testimonies from remote would be allowed, if mental infirmity can include the idea that the witness would find it too stressful to testify before the defendant. Because it is very, very easy to imagine that that argument would be made and that many judges would accept it; that the witness says and a doctor backs this up, "the witness has a mental infirmity, sure she can testify, but not in the courtroom."

If that is allowed, then we really, really have--would have achieved a major transformation in the way that trial testimony is given. I do worry that without pretty stringent standards that there will be--that this rule could create a significant transformation.

I will just mention here because the sentence didn't read right to me, on page 6 of the commentary I say in the fist paragraph: "Mental infirmity at time of trial may well perfunctively preclude...." That should be "effectively preclude a person from giving testimony at that time."

So that is the essence of my comments. I am happy to answer any questions.

JUDGE DAVIS: Judge Carnes?

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JUDGE CARNES: I had several, and I would like to thank you for your submission. It did strike a chord with the committee about--subcommittee, at last, about recommending the two-way transmission. I think that is a very good point.

The Salim situation where you have got a witness in jail in France, in prison. Let's say you have got a person incarcerated--I don't know if this is the situation in Salim--but you have got a person incarcerated here because of his record or crime charged is a serious one and France says, "Don't bring him over here. You know, you have got to keep him over there." In the alternative, assuming it is in Salim, and let's say we are in the 2nd Circuit--the alternative is between a deposition and video-transmitted testimony.

Wouldn't video-transmitted testimony be preferable under the Confrontation Clause?

PROFESSOR FRIEDMAN: Well, when you say "deposition," I mean, of course now a deposition can be done by video, so I think--

JUDGE CARNES: It wasn't in that case, though; was it? I thought there--

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PROFESSOR FRIEDMAN: In that case, as I understood it, it was a video transmission with the lawyer and the defendant not in the room with the witness. But, all right--and I am just saying I don't know what the term "deposition" is at this--or what the definition of "deposition" means.

It is clearly preferable, as long as the technical standards are met, to have the testimony presented in video form, whether it be contemporaneous or by videotape. Sure, that is better. But, then you say, okay, is it okay if the testimony was taken without the lawyer and the defendant being in the same room? And I am saying, if they want to be in the same room, then they ought to be allowed to be in the same room, at least unless it is really impractical.

I am not sure why, in the Salim case, they wouldn't allow the lawyer to be there. I don't think the lawyer was there. But, I mean, my broader concern is simply that these are standards that we never would allow in the domestic context and we are allowing the French to pick them. I wonder why?

I mean, certainly there are plenty of--I mean, let's say the French authorities said, "You can't ask

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questions at all. This is the way we do it. We will give you a prepared statement that has been taken by our magistrate, and here is your testimony, and that is all we will allow you."

We would say, sorry, we don't do it that way. That is not good enough testimony for us. I mean, that has been sort of a proud of the Anglo-American system for centuries.

JUDGE CARNES: I was focusing more on deposition versus video transmission, blind testimony. Is there an advantage in confrontation terms to why testimony via video--

PROFESSOR FRIEDMAN: Oh, versus previously taken testimony, I see. I am sorry, you are talking about then the time element.

JUDGE CARNES: Sure. That is what we are down to. If you can videotape deposition and you can, and you video-transmit testimony and you can, then why not just videotape the deposition and do it at the convenience of all the parties and before trial or continuance during trial--come in, stick the VHS in the machine and the jury watches.

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PROFESSOR FRIEDMAN: Well, that would be a video deposition with the defendant in the room and the counsel in the room would be a perfectly appropriate response.

JUDGE CARNES: But what I am saying is suppose it is across town in a hospital--

PROFESSOR FRIEDMAN: Right.

JUDGE CARNES: --and the defendant and the defendant's attorney and the prosecutor can go to the hospital room, conference room in the hospital whatever, and it is live testimony versus videotaped deposition; is there any Confrontation Clause distinction, any ramifications for the Clause between the two?

PROFESSOR FRIEDMAN: I don't think so in the ordinary case because there is such a well-established principle that, if the witness is unable to come to the court, the testimony may be taken by deposition. Now--even stenographic deposition without the jury being able to observe the demeanor of the witness if the witness is unable to come to court.

Now clearly, in some cases, the defendant may be able to make an argument that a deposition taken well before trial is inadequate because the defendant needs to cross

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examine with other trial testimony in view. But, ordinarily, that is not true. I mean, the essentials for confrontation is, as I understand it, are that the defendant and counsel be there and that the defendant--the witness be under oath, that there be cross examination and adequate record be presented to the jury; and that, if the witness is able to do it at trial, that the witness do it. But I don't think there is a confrontation problem if it is done in the hospital before trial.

JUDGE CARNES: I will confess that the bias for this question comes from being in the Southeastern United States where our criminal cases are heavy and they are heavily oriented toward multi-defendant drug cases. What would you do in a situation where you have got 7 or 8, I have seen as many as 14 to 16 defendants in the courtroom, and it is tough to take them to the witness wherever he is, particularly when they are all incarcerated--and, at the same time, it is tough to have a confrontation, assuming that his testimony, you know, statement during a conspiracy is admissible against all of them.

How do you have a confrontation right with him, if he is not there, that witness is not there, and you have

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got--as a practical matter, and you have got 8, 10 or 12 co-defendants?

PROFESSOR FRIEDMAN: Let me understand the situation. It is beginning to sound like the type of problem I try to pose in class.

JUDGE CARNES: It was in Southern Florida.

PROFESSOR FRIEDMAN: Right, right.

So we have a witness who is, what in the hospital?

JUDGE CARNES: Say he is in the hospital or let's say he is in France, an international drug conspiracy, and they rounded up 8 or 10 folks in this country who didn't get caught in France. And they are incarcerated over here during a trial, and the government says, "This is a critical witness, we want his testimony. So we want a video depose him or we want a live transmission of him."

PROFESSOR FRIEDMAN: Right.

JUDGE CARNES: I was thinking under that, well, that would clearly be preferable to have video transmission because you couldn't get the 12 folks over there and all that kind of thing. But, then, when you start--I mean, what do you do? You have 12 TV sets in his room and one focused on each? How does he--how do the defendants confront him?

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PROFESSOR FRIEDMAN: Well, you know, I am reluctant to say that a defendant's confrontation rights are diminished by the fact that there are other defendants who are in the same situation. Sometimes we have to have 12 separate trials if, you know, there are witness problems.

JUDGE CARNES: It might be there is no answer, you can't do it.

PROFESSOR FRIEDMAN: It could be very hard. I mean--okay, we have 12 defendants, none of them waive anything, I guess, to make the toughest case--

JUDGE CARNES: They are all career criminals, facing life without and they don't want to waive anything.

PROFESSOR FRIEDMAN: Yeah, they are not going to waive anything and they got--and the government put to it says, we have done our best and we can't bring the witness here.

All right. I think that is going to be a very unusual case. Then I would say, well, government, if it is really important to you--if it is really important to you, then bring those defendants and the lawyers who are not waiving their rights to the witness, and do it that way.

Now, if there were substantial studies showing

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that nothing is lost by doing it by video, then I think it becomes more feasible in a case like that to--

JUDGE CARNES: I don't see how the studies could show that in the--

PROFESSOR FRIEDMAN: They could get some comfort--

JUDGE CARNES: They have some right to confront.

PROFESSOR FRIEDMAN: Right.

JUDGE CARNES: At the very least, the defendant has a right for the witness to see the defendant's face while the witness is testifying; rare exception, Craig, this isn't Craig.

And the technical problems with doing that in a multi-defendant case are significant. I mean, the rewrite of rule you were talking about which was helpful and you said in there, "so the defendant can see and hear clearly persons participating in the trial." Well, if you pull back far enough, that is no confrontation right at all because everybody is small. You don't have to look across a courtroom.

PROFESSOR FRIEDMAN: "Allows the defendant to see and hear clearly persons participating." No, it is something, obviously, that attention would have to be paid

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to. When I am saying, "the persons," is basically the witness has to be able to see--I think the witness should be seeing the defendant--again, this isn't Craig--the witness clearly has to--certainly has to be able to see and hear the examining attorney and the judge, if the judge speaks. Now, whether that requires multiple camera, whether it requires a mobile camera, I am not sure. I wasn't necessarily saying it should be pulled way back which would be one possibility.

JUDGE CARNES: You have split screen like Greta VanSustern does on TV.

PROFESSOR FRIEDMAN: It possibly could be a split screen. I mean, in most cases, it seems to me the video deposition is going to be preferable because it is easier to arrange these matters. But, you know, I suppose, I mean, in your multi-defendant case, I am thinking, wow, even if you have got a witness coming in to the courtroom in a 12-defendant case, that creates very significant problems, and sometimes you just can't do it. So, well, all right, we still have those problems.

The confrontation right means that we have to go through considerable difficulty to have a trial. If it were not for the confrontation right, we basically wouldn't have

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much in the way of a trial because we wouldn't be trying not to bring witnesses to trial altogether. I mean, a large part of the difficulty and complications we have in running trials is from this fundamental norm, which goes back to Biblical times and before, that witnesses and defendants should be brought together.

JUDGE CARNES: One final question, our committee note that we circulated, last paragraph, first sentence said, "By the finding unavailability for purposes rule in the context of Federal Rule of Evidence 804(a) (4) and (5), the rule indicates a preference for remote transmission of live testimony as opposed to a deposition."

I am not sure it does that, but as I understand what you are saying we shouldn't indicate a preference.

PROFESSOR FRIEDMAN: Well, probably not. I mean, I think it's certainly worthwhile to indicate a preference to testimony presented by sound and visual means to testimony presented stenographically.

JUDGE CARNES: But there is no reasons depositions can't do videotape.

PROFESSOR FRIEDMAN: And there is no reasons that depositions can't be videotaped.

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JUDGE CARNES: The preference we ought to express, if any, is whichever procedure accommodates the defendant's presence in the same room with the witness during the testimony.

PROFESSOR FRIEDMAN: That is right, and presents the testimony to the fact-finder in as full a sense as possible.

JUDGE CARNES: Thank you.

JUDGE DAVIS: Judge Friedman?

JUDGE FRIEDMAN: He is an appellate judge, so he understands the law better than I do, but does the Confrontation Clause, by definition, require that people be in the same room with each other?

PROFESSOR FRIEDMAN: Well, that is the question. I mean, we do have Maryland v. Craig, which is sort of a child exception, and a child-specific exception for cases in which the child is going to suffer trauma.

Again, I am a little reluctant to talk about what Confrontation Clause requires because that is in terms of what the Supreme Court under current jurisprudence is requiring, and I think the committee's charge is somewhat different.

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JUDGE FRIEDMAN: It seems to me that this rule is generally viewed as an exception. Everybody agrees that the best system is when the defendant and the prosecutor and the judge and every witness is in the same courtroom during the course of a trial.

PROFESSOR FRIEDMAN: Right.

JUDGE FRIEDMAN: So that is why we have compelling circumstances, that is why we have whether we refer back to 804 or we have some other definition of unavailability.

But, then, when you get to the situation where you really have to have a witness who is not in the courtroom, there are a lot of practical problems. If we agree with your idea that we were going to have the testimony during the course of the trial, but the defense lawyer and the defendant had to be in the same room, and let's suppose it is in the hospital room across town or hundreds of miles away, trial judges would say, "Look, we can't do that. We can't disrupt the whole trial for one witness and, you know, take a day or two out while people travel."

In the deposition context, I think Judge Carnes' question is a good one because a lot of cases are multi-defendant cases and, then, you are talking about 3 or

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4 or 5 defense lawyers and 3 or 4 or 5 defendants and 3 or 4 or 5 deputy U.S. Marshals with those 3 or 4 or 5 defendants, all going to the hospital room for the deposition.

PROFESSOR FRIEDMAN: Judge, I didn't mean that--at last ordinarily, the defendant ought to be able to insist on the testimony being conducted from the remote location during the trial. In fact, the draft rule that I present suggests that, so long as the prosecution gives adequate notice, the defendant essentially ought to be put to an election, at least in the ordinary case, to say look, this witness can't be brought here, so you have got two choices; either you can take the deposition ahead of time and it will be presented, presumably, in video means so you will have the confrontation or you waive the right to confrontation.

Because, unless there is a very good reason for breaking up the trial--I mean, the judge ought to be able to say it is too difficult in this case. Unless there is a very good reason we are not going to do that, so we are going to take the testimony ahead of time. That, I think, is perfectly appropriate.

If I can just put it in historical context, I was fascinated when I wound up going back to 17th century and

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before, and I was very, very interested to see that back then they had a very well-developed sense of when a deposition could be taken and when it could be used, even then, and a well-developed sense of when the defendant was unavailable.

But the strong idea was that the defendant has a right to be there when the witness testifies, and I hate to see something that has been established by several hundreds of years of Anglo-American jurisprudence just sort of washing away on this idea that, well, it is by video, it is the same, without some pretty careful thought about it. I am not sure it is the same.

JUDGE DAVIS: Any other questions.

MR. CAMPBELL: Professor, in your written comments, you alluded to the problem of off-camera coaching.

PROFESSOR FRIEDMAN: Right.

MR. CAMPBELL: And, in your remarks this morning, you have mentioned one measure that would indirectly control that; that is, giving the defendant an option of being brought to the witness.

If the committee elected not to impose that requirement, can you imagine some other effective way that

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the world might deal with that problem directly or indirectly?

PROFESSOR FRIEDMAN: Well, you would have to provide either that nobody else be in the room but that is hard, particularly for witnesses who need assistance, or that the transmission methods be able to transmit an image of everybody who is in the room. And I think you would want to do it by image, not just sound, because there is always the possibility of visual coaching. So I think you would have to do that.

I should say I think that should apply whether you preserve the confrontation right or not. I mean, even--in other words, even if--let's say we are doing the testimony via remote without the defendant there because let's say the defendant has elected not to be there and said, I prefer the testimony to be by remote during trial instead of me having to go there--I mean, let's say that. Still, I think the defendant ought to be able to say, but while you are doing this, I still should be able to have the testimony presented in a first-class way which means the jury ought to be able to hear and ought to be able to see if there is any coaching going on.

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JUDGE DAVIS: Mr. Fiske?

MR. FISKE: Two points. One, just as a trial lawyer, I think most trial lawyers would prefer the live transmission as opposed to the deposition because in a trial there is a sequence of witnesses and, when a witness gets up, you put a witness on and you want to adjust your questioning to what has already occurred in the trial with the witnesses before. And it becomes more of a vivid part of the trial itself than if you have to go take a deposition a month before and it is isolated from the sequence of the trial.

That is the trade-off for that is that you don't have the direct confrontation with a witness, you are doing it by video. But, just talking as a trial lawyer, I sort of concur with the sentence that there is a preference for doing it during the trial by video as opposed to introducing a deposition that has been taken earlier.

The second question I have is with respect to the mental infirmity. I appreciate your point. It seems to me that where we were before in talking about a situation where there had been prior testimony in some deposition forum and, at the time of the trial, the witness has a mental infirmity

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that makes he or she unable to testify, then you introduce the deposition.

I don't think there should be a rule that if the witness has a mental infirmity at the time of the trial that somehow you can then videotape their testimony which wouldn't otherwise be admissible because of a mental infirmity, and I don't think most trial judges would accept the notion that because a witness preferred not to confront the defendant face-to-face in the courtroom that that constituted some kind of a mental infirmity.

I don't know how you would write a rule that covers all those circumstances. It just seems to me that that particular part of Rule 804 just doesn't apply in this situation.

PROFESSOR FRIEDMAN: Well, thanks, Mr. Fiske. Addressing the second point first, I think you are putting your finger on a problem in the rule as it is drafted by incorporating these portions of Rule 804. 804 is basically addressed in situations which the witness is unable to testify now. The rule that--the proposal that we are taking about here is addressing the situation where the witness is able to testify now.

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So there really--I mean, that is the whole point of this rule, really, is that the witness is able to testify now. So they are really significantly different situations, and that is why I say that I think you need a different definition without trying to piggyback on to Rule 804.

Now, I would like to think most trial judges would do as you say, not say that constitutes a mental infirmity. But the language, as it stands, I think would be capable of being read that way. I took a crack at it on page 8 of my written commentary saying "such illnesses or infirmity to be assessed without respect to the presence of other persons in the courtroom," meaning--.

I am not sure that is great drafting either, but meaning the basic idea is that you can't say, there is an infirmity which--an agoraphobia which presents--"defendantaphobia," I mean, the witness has this infirmity of being unable to testify in front of the defendants. I mean, I think it should be--if we agree that the result would be a bad one, I think the rule should be drafted in a way to prevent judges from reaching that result.

On the first point--well, okay, the defendant

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ideally would like to have confrontation face-to-face in the same room and for it to be during the course of the trial and not beforehand. Then, if you say, well, if you are going to have to give up one or the other, which would you give up? And you are saying well, you would have a preference, maybe, for giving up the face-to-face aspect rather than the timing sequence, though in some cases you might decide not to--and it would depend in part I think on how comfortable you felt cross examining by video.

There is an argument--so what I am suggesting is that basically the defendant be put to a choice.

Now there is an argument, of course, that the defendant ought not be put to that choice at all. The defendant ought to say, why should I have to give up being able to cross examine the witness during the course of the trial or face-to-face; I should be able to do it face-to-face during the course of trial. And, in many cases, I think the judge might say, yes, and we can arrange that if it is just a matter of going across town. That is not a big deal.

But, if it is more difficult, I think the judge ought to be allowed to say, look, the only feasible way of

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doing this, if you want to be in the same room, is to do it before a trial, and we have the precedent that for several hundred years there have been depositions which are conducted before a trial.

So nothing in what I am saying is meant to deprive a defense lawyer who would be in the position that you are in to say, I want to conduct my examination during trial, it is just that, gee, there are going to be some circumstances in which I think it is reasonable to say you can't have it all.

MR. FISKE: I guess my only response to that would be lots of times you go into a trial and you really don't know whether you want to call a particular witness because, you know, that is a decision you want to make depending on how the evidence comes in. You may decide in the end you would rather not call that witness, put the witness on the stand at all.

If you have to make that decision before the trial even starts and go out and take a deposition, then it seems to me you are compromising the effectiveness of the trial lawyer. Is that a problem?

PROFESSOR FRIEDMAN: If you are talking about the

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defense calling its witnesses, which is something I address in my written commentary, haven't spoken about it here, but I mean, just focusing, first, on the defense calling its witnesses, so far as I am concerned--I mean, my view is that, golly, there is no confrontation concern. As long as the transmission is clear and all that, I think it is fine.

I think the rule should not aim for false symmetry, and the standards for when the defense ought to be allowed to present a witness by remote can be a lot laxer. If the defense says, "This is what I can do conveniently and this is what I chose to do," that ought to be allowed and so the defendant can make that decision very late. And I think that would be just fine. I don't think we would have to worry terribly about unavailability. In that case, it is better to have the testimony that not at all.

But, in terms of if it is a prosecution witness and we are saying, "Well, we are presenting the defendant with the choice," well, all right, I guess--I am not sure how you would change the rule, provide for it. I am simply saying, gee, the defendant should have that right of being face-to-face with the witness and having the lawyer face-to-face with the witness. It is acceptable to have

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that face-to-face be before trial. It is acceptable on traditional grounds because it has been done that way. It is acceptable as a matter of practicality at times.

So, if that is the only way it can be done, it is reasonable to do it that way. But the defendant ought to be able to allow--to say, well, okay, I am willing to waive it here you we can give me the examination by remote during trial.

JUDGE DAVIS: Mr. Pauley?

MR. PAULEY: I want to focus on the rules requirement that there be compelling circumstances, and I know that--I have to say that I take issue with at least this aspect of your written statement which sort of pooh-poohs that requirement, and says, well, it is a vague term and if you suspect that many courts will deem it to be satisfied when subdivision (b)(b) is satisfied, merely that the witness be unavailable.

I certainly don't think that that is what the committee intends by compelling circumstances. I think, rather, certainly in my mind and I gleaned from the committee's prior discussions that what is intended is an extremely rigorous test. I mean, you noted the unusual

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confluence of factors in Gigante and then Salim, I think those are the kinds of situations that the committee had in mind by its reference to those decisions as constituting compelling circumstances.

And, in terms of the option that you want to afford to defendants, there may be compelling circumstances where that is completely impractical. In the sense that the event giving rise to the witness's unavailability occurs right on the eve of the trial when all the other witnesses have come in from around the country or around the world or, even in a multi-day trial, during the trial itself so that the option of doing this pretrial--some kind of deposition--just doesn't exist.

Isn't that the kind of compelling circumstance that this rule really is aimed at and where it would make the most sense?

PROFESSOR FRIEDMAN: Well, maybe. I mean, I assume that you are aiming at that, but, you know, we have seen, Sam, the residual exception to the hearsay rule where the advisory committee had said this is going to be reserved for exceptional circumstances, and that has just kind of washed away and it is used extremely routinely now.

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I think the term--

MR. PAULEY: Do you think the note should be strengthened in terms of indicating what the committee contemplates for compelling circumstances?

PROFESSOR FRIEDMAN: That would be a help. I think it would be better yet to say--I mean, to say that it is listed conjunctively so that there is the argument that compelling circumstances have to be more than simply inadmissibility, but it would be better to put on the face of the rule the idea that compelling circumstances requires something more than simply satisfying the inadmissibility criteria--the unavailability criteria.

I think it would be better, yet, to say compelling circumstances are those that preclude bringing the defendant and counsel to the witness, if you really are going to preclude them. And I think it is better, yet, to--it is better, yet, not to allow such--I mean, I would be more inclined to say in those extraordinary cases we would just do without the testimony, if that confrontation really can't be arranged.

But I do think that the tendency is going to be to go through the availability determination and say, well,

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that is pretty compelling because we can't get the witness in, unless you give more of a boost to that in the rule.

JUDGE CARNES: I am not sure how you do that, though, other than the way we have done it. We say in subsection: If (1) establishes compelling circumstances, (2) and (3) the witness is unavailable. I mean, we listed them as separate.

PROFESSOR FRIEDMAN: They are conjunctive, but I mean, how often have we seen multi-part tests where the judge applying a test applies two sections together, and says, satisfying part (a) and this case satisfies part (c).

JUDGE CARNES: Other than language in the commentary though, and other than saying, after the word "and," "and we really mean `and.'"

PROFESSOR FRIEDMAN: I mean, that is why I think the whole thing has to be tightened. Do you mean compelling-I think, what do you mean? I mean, what is it besides unavailability that is--

JUDGE CARNES: I took that--and I will confess I am a little bit influenced by a lot of the discussion about what we thought we meant, and that is why it is good to have someone who wasn't in on the discussion read it and tell us

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what they think it means from them.

PROFESSOR FRIEDMAN: Right.,

JUDGE CARNES: I thought what we were talking about is critical evidence, important evidence that couldn't be obtained by other means. That sort of thing.

PROFESSOR FRIEDMAN: I am sorry--oh, that the testimony itself is critical to the case?

JUDGE CARNES: Yeah.

PROFESSOR FRIEDMAN: I see.

JUDGE CARNES: And you can't get it by some other means; in other words, if it is the fourth person who was present and heard this conversation and you have got three other witnesses testifying, maybe they have been impeached but this guy has got the same record they have got, that is not a compelling circumstance.

PROFESSOR FRIEDMAN: Yeah. I will just point out that that is a different interpretation of compelling than yours which was Gigante, Salim, extraordinary circumstances, maybe not being able to bring together.

I would guess that, very often, the prosecution is going to be able to support that argument and say, well, sure, this witness adds something that the others don't. I

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wouldn't be bothering bringing this witness and going to all this trouble if--

JUDGE CARNES: That is part of my problem, and I seem to vaguely remember--I am to blame for this--but maybe part of our problem is taking the phrase "compelling circumstances" from the Civil Rule of Deposition Use, as opposed to just using "exceptional circumstances" in Rule 15 here.

In other words, the theory is if you can do a deposition you ought to be able to do live video transmission of testimony, then why not use the same phrase that Rule 15 uses, and that would answer some of the written responses we have got about it. It is not really symmetrical with Rule 15.

PROFESSOR FRIEDMAN: Well, maybe--I am not sure how much that would help. I mean, let me say if the defendant and the attorney are brought into the same room with the witness, then I think confrontation rights are preserved and there is no reason to demand compelling circumstances, just to say--it is enough then I guess that the witness can't be brought to trial because of the unavailability, so what more do you need?

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So if the right of confrontation is preserved, to the extent that we are talking about circumstances in which the defendant has the option of saying "Bring me to the witness," I don't think you need more than compelling. If you are going to be saying, though, that there are going to be some circumstances in which even though the defendant says, "I want to be brought to the witness and my attorney to be brought to the witness"--and, yet, the court should be empowered to say, "No, sorry. Even though you have indicated this early, you are not going to--we are going to allow the testimony to be done by remote, even though you are not going to be in the same room."

My preference would be to say, no, the court can't do it. But, if you are going to allow it, then you should say compelling circumstances making it infeasible to bring the defendant and the attorney to the witness.

Am I making myself clear now? If preserving the confrontation rights, I think merely the unavailability, under proper definition, is enough. If you chose--and I hope you don't--to give the court the ability to override the right because of compelling circumstances, then I think you have to spell out that it is unfeasible to bring--that,

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only because it is not reasonably possible, whatever, to bring the defendant to the witness. So, Salim may be a case like that, maybe Gigante.

JUDGE DAVIS: Mr. Schlueter?

MR. SCHLUETER: Just a couple quick questions. Concerning your mental infirmity, I have been thinking here: first question, you talked about the concern that witnesses might be able to claim that they are frightened and, therefore, they are not available and that the judge might accept that.

PROFESSOR FRIEDMAN: Right.

MR. SCHLUETER: Would not this rule pass constitutional muster if this were Maryland v. Craig, where you had a very serious case and a witness that feared for his or her life, although they weren't in the witness protection program, and the judge, after going through very carefully and assessing the pros and the cons of the situation would count on the fact in making that determination that the witness really would be afraid and perhaps would not testify ever in person, perhaps not even in a deposition.

Have you not now done away with something

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equivalent to a Maryland v. Craig. Let's make it a child witness to a brutal action involving drugs where you have got federal jurisdiction, and counsel for the witness says, "I am not going to permit her to testify, she is in fear of her life and we suggest remote transmission."

PROFESSOR FRIEDMAN: Right. Would it pass--

MR. SCHLUETER: Let me ask you to make it a short answer because otherwise I think we could probably engage in a long dialogue. I guess I raise that as a hypothetical because my thought was--and I would want to give more thought to it-- it seems to me that, in solving one, problem you have simply created another, and that was not the intent of the rule.

PROFESSOR FRIEDMAN: I don't think so. I mean, Maryland v. Craig was very child-specific. I hope--I mean, it was a 5-4 decision, and who knows how it would come out now, but I hope it is not going to be extended to adults. And I think we would be doing away with a lot of the way trials are run if it is extended to adults. The child situation is handled in most states and in federal law by child-specific rules. I think it is 18 USC 3509, if my memory is serving me right, which is a rule on the

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presentation of child testimony, and I think that is the way the statute--

MR. SCHLUETER: In other words, you would end up with an option which you are suggesting is we could leave the law simply the way it is right now, and defendant, under Craig, might very well have less confrontation rights than if we were to adopt this rule. Because, at least in this case, the defendant and the witness would be able to see each other even albeit it at a distant location.

Do you see what I am saying? Because the court, in Craig, clearly indicated that the four elements of confrontation--first of all, the right is not absolute and that physical presence or the ability of the witnesses and their peers to see each other is not an absolutely essential element, and that as long as, on balance, it appears that the rights of the defendant have been preserved in some way because of the oath, the cross examination, the ability of the jury to see the demeanor of the witness, that you might end up with something less than a perfect world but nonetheless where you would have--

I guess my point is that, under the rule, you might end up with greater confrontation protections for a

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defendant than if you were, for example, to rely on a blatant hearsay statement that otherwise would satisfy the confrontation rights; for example, an excited utterance.

PROFESSOR FRIEDMAN: Well, I mean, there is no doubt that there are worse things that can happen and I think that do happen than testimony by remote, without the defendant in the room. By giving the prosecution an extra option, you are not strengthening the defendant's rights.

MR. SCHLUETER: But the courts might see it that way. In other words, the court might say, "Well, counsel you are actually--because of the technology we have and I a going to have a surrogate at the other end, we are going to satisfy all of those criteria. Counsel are going to represent both ends, and you will now have an opportunity for contemporaneous, live cross examination under oath with the jury seeing it in color, if we don't go it this way the prosecution is going to be able to bring in witnesses to present hearsay testimony."

Do you hear what I am saying?

PROFESSOR FRIEDMAN: What you are saying is that because there is the possibility of procuring the testimony by this means that, therefore, some of the other

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methods--some of the other hearsay statements under 804 would be less likely to get by.

MR. SCHLUETER: And 803, as long as it is a firmly- rooted hearsay exception.

PROFESSOR FRIEDMAN: I mean, 803 doesn't depend on the unavailability. I mean, yeah, I think creating this option is clearly better than having the hearsay where there has been no cross examination at all. I mean, there is no doubt about it.

The question is--I think it is going to be a very limited set of circumstances, though, in which the prosecution is told, "Sorry you can't bring in that hearsay because you can do this." I think it would be a very limited set of circumstances. I am looking to see, you know, can this be made better.

I think it is a mistake, though, to look at Maryland v. Craig, and to say, gee, we can do this and, therefore, we ought to. I mean, do you understand? Your charge isn't really to go to the constitutional limit. I mean, there is that language in Maryland v. Craig, but what would the application be? I have got a lot of trouble--I don't think that if Maryland v. Craig were--instead of a

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child witness, if it were an adult late complainant, in that case, it would have come out the same way. To my knowledge, no jurisdiction has adopted a Maryland v. Craig type of procedure with respect to the adult witness.

But this proposal as it stands, it seems to me, would leave that open to a trial judge giving the right expert testimony to conclude that and then we are moving--I mean, we talked about the tent--then you are talking about a lot of the tent, right? Because then you are talking about instead of confrontation the emphasis is on insulation, insulation of the witness.

JUDGE DAVIS: Any other questions?

Professor Friedman, thank you very much.

Judge Trager?

JUDGE TRAGER: I am new to this subject so, on this definition of unavailability, it strikes me that if unavailability existed prior to the trials, your proposal that the defense have the option to chose makes a lot of sense. But, if the unavailability arises suddenly during the trial, you know, someone is suddenly injured, and they need this witness doesn't your option--doesn't that then, unavailability itself constitute compelling circumstances?

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PROFESSOR FRIEDMAN: Well, okay, in that case then, you couldn't say, hey, here is a choice. You want confrontation, you got to do it beforehand. But--so we are in the middle of trial and all of the sudden the witness is unable to come to trial, in most cases--in most cases, the witness is going to be in the same city and so it wouldn't be that--

JUDGE TRAGER: Say they got injured in a car accident and in the hospital and you really can't bring the person to the hospital?

PROFESSOR FRIEDMAN: Boy, there are old cases in which the witness is dying and, when the courts really cared about confrontation, they would bring the defendant to the witness because the defendant has the right to confront.

I mean, if the defendant has the ability to make a statement in response to questions, I am not so sure it is so difficult. If you can have the cameras in the room, I am not so sure you can't bring the defendant there. But, if you want to provide for that case and say, sorry, you don't get the confrontation, then we go to what I was saying before that, okay, that could constitute a compelling case in which it is impractical to bring the defendant there if

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you really believe that.

JUDGE TRAGER: Most of the other cases where the availability existed before, I think most judges would say the prosecution had plenty of time--

PROFESSOR FRIEDMAN: You had plenty of time, right.

JUDGE TRAGER: --why didn't you bring it to my attention before and let the defendant make his choice.

PROFESSOR FRIEDMAN: Yeah, right. So this could be a compelling circumstance if you chose to provide for that in which you say well, we just can't bring them face-to-face.

But, you know, it is always possible to come up with these circumstances in which, oh, the prosecution is going to lose testimony if we don't allow this, and I think it is always critical to bear in mind, you know, let's say that instead of just being injured that witness had died in the accident. Well, we don't say, gee, you know, we are going to lose the testimony if this statement that the witness made to the cops is inadmissible. What we say is, tough luck, prosecution. We have our standards as to how testimony has to be given, and it has got to be given under

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cross examination and under oath, so you lost the testimony.

It is hard. It happens every day.

JUDGE TRAGER: But you lost the cross examination which is--

PROFESSOR FRIEDMAN: Right, which you don't hear--so there is certainly a better argument to say all you lost was being in the same room. It is absolutely an argument. But I think you can't approach it too much from the perspective of--I mean, you have to worry about lost testimony but sometimes we lose testimony because it is not given under adequate--or we lose testimony because it is not possible to take the testimony under adequate conditions and prior statements don't come in.

So if we can have the--I mean, my view would be if we can have that witness testify under adequate conditions, tough. But, okay, if you want to make room for compelling circumstances, that would be one.

JUDGE TRAGER: Well, I am not trying to make it copyright, but I think your case is most compelling. Then, in fact, the "unavailability" or however it is defined existed prior to--

PROFESSOR FRIEDMAN: Right, right.

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JUDGE TRAGER: I have very little sympathy for the prosecution who doesn't give the defense the opportunity to make a choice.

PROFESSOR FRIEDMAN: Right, okay. All right. And, if you make room for compelling circumstances, the prosecution would say in a case like this, look, we didn't have the ability to give advance notice, and it is not feasible to bring the defendant to the witness so this is the only way that we can present the testimony.

JUDGE TRAGER: The limits that you are concerned about, though, are a very narrow class of cases. Because, if you can find unavailability, I think, in advance, you might be pointing out that problem.

PROFESSOR FRIEDMAN: Yeah.

JUDGE TRAGER: In every instance, you can protect this choice, at least.

PROFESSOR FRIEDMAN: Right, yeah.

JUDGE DAVIS: All right. Thank you very much.

PROFESSOR FRIEDMAN: Thank you.

JUDGE DAVIS: We appreciate your presence.

We are going to take about a 15-minute break before we take the next witness.

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[Recess from 10:11 a.m. until 10:35 a.m.]

JUDGE DAVIS: Our next two witnesses are representatives of the National Association of Criminal Defense Lawyers. We have Mr. Pete Goldberger and Mr. Gregory Smith. They can divide their time anyway they see fit.

Mr. Goldberger, do you want to lead off and tell us a little bit about yourself, first?

MR. GOLDBERGER: Yes. Thank you, Judge.

My name is Peter Goldberger. I am the co-chair of the committee on Rules of Procedure for the National Association of Criminal Defense Lawyers, NACDL. And those of you who have been on the committee for a time know that we try to comment exhaustively on every set of proposals at some length. We try to touch on nearly every rule. We take this process very seriously and we really appreciate the process that this committee is such an important part of. And we feel that we are participants in it.

NACDL is a 10,000-member organization of private criminal defense lawyers and public defenders, voluntary specialized bar association, truly national, and we try to be the voice of the defense at the highest standards.

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I, personally, have a national, federal, appellate practice out of a small town outside of Philadelphia, but I travel around the country arguing federal appeals. I am a former law clerk for Judge Edward Becker when he was a District Judge. I was an assistant federal public defender. I was a full-time law professor for six years, and then last--a little more than 15 years, I have had this private specialized practice.

MR. GOLDBERG: The 3rd Circuit occasionally confuses us.

MR. GOLDBERGER: Yes.

MR. GOLDBERG: I always remind them that he wins all of this cases and I don't.

MR. GOLDBERGER: And I am always flattered when we are confused.

I mentioned to Judge Davis outside and I want to say on the record that these comments which are sometimes referred to as Mr. Goldberger's comments--Judge Carnes referred to our comments before, I appreciate that--are not my comments. This is a true committee; eight people, north, south, east, west and middle of this country public defenders and private lawyers all worked hard and

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cooperatively on our comments, and I am just the final editor and compiler and, of course, a contributor to those comments, as well.

So they really do represent our organization, and we try very hard to make them represent the view of the Defense Bar and of the organization.

With me is Greg Smith, a member of our association who will introduce himself a little further and he is going to do an in-depth presentation on the video issues from the defense perspective.

Our committee, as you know, submitted over 40 pages of comments on the rules pertinent to just to this committee and also additional pages on the appellate rules. I am certainly not going to try to even mention, much less summarize, what we said about the other rules; yielding, most of the time, to Greg. I want to just bullet point about four other things and then turn it over to him.

First, on the Style revision--I acknowledge that it reflects a lot of hard work, but I believe there is still a lot of tedious checking yet to do. We picked up, as you know from our comments, at least six technical errors that could have a substantive meaning, of the dozen or so

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comments that we made on the style errors. Just in the last two weeks of dialogue between Greg and me about what we were going to do here, we came up with another three which I am going to share with the reporter so at least you can have them for your meeting.

But, I personally believe, even though I may be whistling in the wind on this, that we are not ready to send this up yet. I would like to read it--I would like to let it sit for months and then read it again because every time we look at it we see something else; just one being a place where just the word "judge" is used where it clearly doesn't mean judge as defined in Rule 1, and it would seem to authorize a state judge to do something that this rule, in particular, meant a federal judge to do. It would authorize a magistrate to do something that a district judge has to do.

Things like that, they are so hard to pick up the first 22 times you read it. And we are still looking and we would like a little more time. If that doesn't happen, we will at least give you what we have right now.

The Habeas and 2255 Rules, I know are within the purview of this committee. We had some comments on the

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suggestions. We would like to see a much more complete and thorough redo of those 1977 rules in light of EDPA and the case law now. Just to make a few changes, they are not even all the changes we need to make right now.

I think we should have a dialogue about whether the committee should supersede the Anti-Terrorism Act on matters that are purely procedural, use its power under the Rules Enabling Act, to make rules that are not going to be constantly made fun of by judges in decisions because they are so badly written in the statute.

We would like to take that seriously and work with you on that, and we made some proposals there that we would like you to look at carefully for right now.

Rule 32, the Sentencing Rule, we very much appreciate and support the proposed amendment to require a judicial finding on facts that are material not just to the sentencing guidelines calculations but also to the Bureau of Prisons process. We have suggested that the definition of "material" be moved right into the Definition Section of Rule 32 to make that even stronger and clearer.

And we have made a large number of other organizational suggestions on Rule 32, in particular, which

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could be viewed as substantive or comments or as style comments. But that rule does not fall--as currently written, or as revised by the Style people, does not reflect the order in which things happen at a sentencing, not correctly, and does not accurately reflect who should see what, when and the times that occur between steps in the process. We have tried to lay that all out on Rule 32.

Finally, on Rule 41, the Covert Observation Warrant, we think--I don't want the committee to misunderstand that the failure to testify about that is in any way a suggestion that it is not one of the most important proposals that has come through this year. We are very strongly against it. We wrote about it in detail, and we just commend that to your attention, our written comments.

JUDGE DAVIS: Thank you, sir.

MR. SMITH: Judge Davis, members of the committee. My name is Greg Smith. Prior to a recent stint in the White House Counsel's Office, I was a lawyer for 15 years in Atlanta; first, with King and Spalding, and then with the Federal Defender Program. My peers in Atlanta elected me both as president of the Atlanta Bar Association, the

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largest metropolitan Bar in the Southeast, and to represent the State Bar of Georgia in the ABA House of Delegates where I still serve.

More importantly for purposes of this hearing, I have ten years of experience as an assistant federal defender, and I have served on the Executive Council of the ABA's Criminal Justice Section. I think I have a good working knowledge of the Federal Criminal Rules, not only in theory but, more importantly, from your perspective as to how those theories play out in every day practice.

Let me stress I speak only for myself here today and for NACDL, but I think I can give you the benefit of my thoughts.

As a lawyer with fairly substantial committee experience in the Bars, I first want to thank you for your work on the committee. Work on drafting rules and procedures are often tedious and thankless types of work and you are to be commended for your willingness to do this important work. I also personally do believe that there are benefits, potential benefits in periodically examining your rules as a whole, doing comprehensive review to see how patchwork of amendments over the years fit together.

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Although you and I may disagree on some of the specifics, I do think that you should know that I and other practicing lawyers appreciate your desire to make these rules fairer and simpler; such as, for example, the change to try to make the days--the counting of the days consistent between the district and the appellate rules.

I come to you today to speak primarily on one area of proposed changes that I strongly disagree with, and that is the proposed change to suggesting video conferencing in lieu of live court appearances effecting Rules 5, 10 and 26. While my strongest objections, by far, relate to Rule 5, let me say just by way of overview that I am not sure I fully understand why the committee is moving ahead so rapidly and proposing to adopt, at this stage, the fundamental and profound changes suggested by these rules.

My experience with the federal courts is that they have been hesitant in moving forward with changes to courtroom decorum, particularly on the use of cameras. In the Estes case in 1966, for example, the Supreme Court talked about the ways in which witnesses can be affected by testifying in front of cameras, causing some witnesses to clam up and others to showboat. While technological

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advances have caused other courts to move into this area, I think that the federal courts have remained quite cautious in moving in, recognizing the difficulties of putting the genie back into the bottle.

The wisdom of this cautious approach has, in my opinion, been confirmed over the years. We have not seen a situation, despite the same types of outgoing and ambitious folks that we saw in the O.J. Simpson trial. The federal courts are the envy of the world, in my opinion. It has been a point of pride for me to practice there.

It is, therefore, as I said, quite surprising to me that we would be vaunting into the lead on this issue, this controversial issue of video conferencing; particularly before we have had the benefit of empirical studies in terms of how this is played out in state courts; particularly before constitutional challenges to those state court's use of video have worked their ways through the courts and the habeas process and before any federal pilot projects have even begun to try to assess how this might work out and to try to work out the kinks before we adopt a nationwide standard.

Even if one were to fully accept the desirability

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of video conferencing, it occurs to me that these latest proposals put us far too out in front of the curve in this matter; moreover, video conferencing is, in my opinion, highly questionable as to its ultimate desirability, particularly at the initial appearance stage. I believe video conferencing would inhibit justice and seriously impair the fundamental constitutional rights of accused persons in this country.

I strongly urge you not to amend Rule 5 in the manner in which it is suggested. I don't think I can adequately convey to you in the short time here the importance of a defendant's physical presence at an initial appearance. A number of the concerns of NACDL have been expressed in writing and I won't repeat them here, but I want to tell you in personal terms why I believe this hearing is essential to our system of justice and the defendant's personal appearance is essential.

For centuries, the defendant's initial appearance in court has marked the transition of a case from the police phase to the court phase. A neutral judge now knows of the defendant's existence and will protect his rights. When a hearing is held by video remote and an accused remains in

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jail, that transition loses its edge. Symbolically, the proceedings are cheapened and the hearing takes on the luster of a police court or at least the cattle call air that is sometimes seen in our most overcrowded and criticized state and local courts.

The judge is not a human being who is present, but a visage like the great and powerful "Oz."
A subtle message is sent to the accused, "You are not worth our time." This is not a message to which I believe our federal courts should aspire, even if it is constitutional. I believe it will lead to criticism of the type that is lodged against certain foreign countries who hold criminal courts in jails and promote the image of the dehumanized system of justice predicted by futurists long ago. I do not want this to happen to the federal courts, our great federal courts of which I am so proud.

If initial appearances were a mere formality, perhaps you might chose to adopt this policy notwithstanding such symbolism. As NACDL acknowledges, for example, some movement into video conferencing might be acceptable in the context of arraignments that occur after initial appearances.

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But initial appearances are not a mere formality. They are, in my opinion, often the most important, the most important proceeding in a case in terms of building an attorney/client relationship, particularly for a public defender like me who is distrusted initially by your clients and whose clients fear that they are about to get sold out.

Initial appearances invariably are the most important hearings in terms of establishing an attorney/client relationship. It is like my mamma said to me, "You never get another chance to make a good first impression."

Several of the potential problems with the proposed changes to Rule 5 are set forth in NACDL's earlier letter. I won't expound on them here, but I want to highlight a few, and I want to raise some additional issues that may not have been apparent to NACDL or to you at first blush.

First, I want to focus on an accused's family. The first question I almost always got from the family after a client was arrested is: How is he doing? Is he all right? This could, God forbid, be you or me someday, upon hearing who's son or a daughter or a grandson or a granddaughter was

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arrested. I assure you that, in court appearances by defendants at an initial appearance, it is highly important in reassuring family members and our citizenry in general that the process is working as it should, particularly given some institutions reasonable limitations on pre-trial visits from family. Sometimes, this is the only time a family member can physically see the defendant for a while.

An accused who is in a courtroom with a judge also will feel freer to discuss issues of medications or abuse than he ever would in a remote location surrounded by jailers, and these are important, often timely, issues. A live judge will also reassure a frightened accused in a way that simply cannot be done if an accused is in a remote location and is watching a TV monitor in jail. And, fundamentally, fundamentally, I believe a judge ought to see a defendant as a human being before holding him without bail.

In other countries when someone is charged, don't we ask, when are they going to be brought to court? Remember, these are not prisoners, they are human beings arrested on what may be rather petty offenses as we learned yesterday and all of whom are supposed to be presumed

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innocent at this stage. Such persons deserve as right to see a judge, at least once, before trial.

The combined proposals here in Rules 5 and 10 raise the very real possibility that the first time a defendant will ever step into a courtroom will be the day he walks into his trial or his plea. From an attorney/client perspective, many defendants also will have never seen their lawyer perform inside a courtroom before that day arrives.

Potential disparities in the proposed system also exist. Presumably, in-court hearings would be held for some defendants, such as highly publicized cases or those in which a defendant appears on a summons, but not in others. The pendulum, thus, would swing further in favor of prosecutors and agents being able to use these issues as hammers, telling some defendants, correctly, that they will never even see the inside of a courtroom for several months if they don't cooperate. Worse, it will perpetuate a perception among certain defendants and members of our society that there are two systems of justice in our country; one for the powerful, connected, and another for the less fortunate.

Let me say I disagree with those views. I

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strongly deny that we have such a dichotomy in our federal system of justice. I am innately proud of it. Everyone now has the same right to tell a judge their side of the story straight to a judge. But, if these rules are adopted, that argument will be far more difficult in persuading clients and society if these rules go into effect.

Accused persons in the underclass will be forced to make their all-important pitch for bail into a camera or a video screen, but probably a camera. Could you do that? Could you make a persuasive appeal staring into a video camera? The normal feedback one gets during one-on-one interaction when you are talking with someone and seeing their feedback is just not possible in a remote or even in a two-way feedback because-- particularly where one's view is limited to what the camera provides.

I believe you will see a significant increase in motions to replace appointed counsel and petitions to proceed pro se. Defendants will constantly wonder and challenge what is going on in the courtroom that they don't see and the camera isn't picking up. Indeed, it is difficult to understand how a prosecutor and a judge will avoid the appearance, if not possibly even the actuality of

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ex parte communications when they are together in court trying to patch in a video conference when the defense lawyer is with his client in jail.

Important matters, more importantly, occur at an initial appearance. With all the players present, deals can be struck, especially for cooperation. Judge Friedman was talking about how this is sometimes not necessarily for the best lawyers to do this; but, if you are working a cooperation deal, you got to do it then, you have got to do it right away. And, when agents are present and the prosecutor is present is the time to do it. Time is of the essence and there is no substitute for having everybody at that stage. It will change justice for some folks. The same cannot occur by remote.

Other unforeseen issues also may exist, unforeseen. Videotape proceedings may constitute potential evidence to be subpoenaed by the parties. One can envision defendants, for example, who may seek copies of videotaped testimony of initial appearance of cooperating witnesses who later turn on them to use in cross examination. Other possible evidentiary uses of these proceedings by parties and the media abound.

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Under this proposal, a defendant [sic.] is faced with a Hobson's choice of either being with a client in jail or representing the client in the courtroom. Some of that has been discussed. Either option has significant downsides as set forth in the letter. I hear, anecdotically, that in state courts the use of video remotes leads to the poorer lawyers simply going into the courtroom and being there and never really visiting the client in prison.

Diligent lawyers might go to the jail to be with their client and handhold them, but delays in entry to the prison and limitations on the use of telephones and other equipment from the jails will prevent them from finding witnesses to come to court to help in bond hearings, as well as difficulties in negotiating with the prosecutor and the pretrial services officer, all essential elements of representing someone competently in the day-to-day affairs in the courtroom.

Other issues such as the need for interpreters and how that plays in add to this equation.

The theory of permitting waivers of initial appearances may seem appealing, but I urge you not to go that route either. I have had clients at initial

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appearances who were willing to waive everything and go back to their jail cell, but the procedures leading up to and including a live appearance brought home the fact they were suicidal or otherwise in need of psychiatric help. Seeing how a defendant holds up in court and the client seeing how you hold up in court, is often a highly useful window into the future of a case.

As NACDL's letter notes, there also is a real question as to how voluntary such waivers will be. It is quite possible that certain accused persons will be pressured to waive their rights to a physical appearance as a condition of a favorable bond recommendation. Although penalizing a defendant for exercising his constitutional rights is supposed to be illegal, the prosecution will argue that this isn't a constitutional violation, that the very promulgation of these rules prove that it is not a constitutional right.

We will see U.S. Attorney's Offices, quite possibly, adopting broad policies saying that they will oppose bond for anyone who insists on a personal appearance. Even if we don't go that far, even if it is not done that blatantly, accused persons might face subtler but equally

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effective discussions about how a prosecutor's bond recommendation will take into account how difficult a client has been.

Should an accused person presumed innocent face this when all he wants is his day in court? Not when the gains will be offset so substantially, if not entirely, by other cost.

As we know, remote video will increase CJ attorney time and costs, delay bond releases at the cost of $60 per day per defendant.

As conflicts arise, as they often do during consultation with a client, particularly multiple clients, how are you going to get multiple new lawyers for the other defendants in a case to go out to the jail to attend the hearing? There will be delays that will cause people to spend additional time in prison.

Now, typically, a new lawyer can be recruited over to the courthouse quite quickly, but it will be far more difficult in remote jail production facilities.

JUDGE DAVIS: Mr. Smith, I am putting the yellow light on. Wrap it up in a couple minutes, please.

MR. SMITH: Okay. Thank you, Judge.

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I believe the system will increase motions to replace counsel, as I said. And let me say this, too, I know there is a lot of discussion about cost, but the cost particularly at the initial appearance stage is not the same. Defendants now, unless they are arrested the night before, are brought directly to the lockup in the district court. They are not taken to a jail facility. So the discussion about having to transport someone from jail is far less compelling, as well, in connection with the initial appearance stage of Rule 5.

Two more points I want to make, this heads us down a fairly slippery slope. As Judge Miller noted a while ago, if a defendant's presence is not required at his initial appearance, is it really required at an evidentiary hearing on motions? Wasn't the hearing on detention really more important than some motion?

If somebody can miss an evidentiary hearing on motions, does the defendant really need to be present at his sentencing which may not include any testimony? Does the defendant really need to attend a trial when he doesn't plan to testify? And, if he does testify, does his presence really add anything, his physical presence?

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Apparently, from what Judge Miller said, we are even seeing some of this. Frankly, almost every argument that is being made for excluding a defendant from his initial appearance can also be made about his physical presence during a trial and a sentencing. The fact that these seem different today may not mean they always will be. As I said, to me, the initial appearance, to me, is often the most important hearing.

Finally, at the very least, I think this committee should wait to examine the empirical data and particularly how the costs and benefits have worked in existing state and local systems using such technology, perhaps in some future pilot project before incorporating these controversial changes. The benefits are questionable and the costs, both tangible and intangible, are significant and fundamental.

I strongly urge you not to move forward with the proposed changes to Rule 5.

JUDGE CARNES: How often counsel appointed before the initial appearance?

MR. SMITH: Beg your pardon?

JUDGE CARNES: How often do we have initial appearance where counsel shows up with the defendant?

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MR. SMITH: Judge Carnes, my experience has been we are called as soon as they are brought into lockup. It is a very rare case that we would not get a chance to talk to the client before the initial appearance and also to follow up on what they tell us by contacting their family and witnesses to try to get them to the initial appearance, as well as talking to pretrial services officer and the prosecutor.

JUDGE CARNES: That is not required, but as a matter of practice--at least in Northern Georgia.

MR. SMITH: My experience is limited to Northern Georgia.

JUDGE CARNES: Yeah, I think that judicial conferencing encourages it but doesn't require it.

MR. SMITH: Yes, sir.

JUDGE CARNES: Let me ask you this, too--

MR. GOLDBERGER: Judge, could I just mention that even on multi-defendant cases or known conflict cases in the Eastern Pennsylvania where people in my office take CJA cases, we will even get calls from magistrate judge's chambers asking if someone is available to come down right then, before--you know, to help.

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JUDGE CARNES: I believe that is called putting a body in the barricade, from what I understand.

That leads into my second question, and I know that happens a lot in multi-defendant cases. We don't worry so much about the conflict at the initial appearance and you will have the PD representing eight people at initial appearance. But, as soon as that initial appearance is over, you have got to do the conflict work. And, if you are lucky, you end up representing one of them and the other seven get other counsel.

And I know it important when you can do it and in the perfect ought to be able to do it, but a lot of times you are not talking about building an attorney/client relationship that will last through the proceedings because it can't because of conflicts.

How often--how often, and I think Northern Georgia would be probably a good medium, maybe a little bit on the urban side--but how often does the attorney who shows up at the initial appearance with the defendant follow through that case to a plea bargain or trial?

MR. SMITH: If I attend the initial appearance, I will--unless some rare development occurs in the future--I

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will always represent at least one of the people that I am representing in the case. Now, in a multi-defendant case, you are correct that there are--it is typical for us to handle a case with the other co-defendants at the initial appearance as a matter of course.

But, even on that, there are exceptions; for example, where one person indicates a desire to turn on other defendants and there is a clear palpable conflict from the get-go. There will be times when a magistrate will ask that a new lawyer be brought in quickly, either before or immediately after the conference to try to discuss--represent that person and work out a cooperation deal.

JUDGE CARNES: You can't very well start working on cooperation when you are representing all seven guys.

MR. SMITH: Correct.

JUDGE CARNES: Let me ask you this, also--and maybe this is going to vary a lot from district to district but, how often is the counsel who is made available, informally appointed, for the defendant at the initial appearance--how often is that counsel located in the place of detention as opposed to the place of the courthouse?

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I know you said they bring them to lock-up, but even still everybody who represents somebody brought to the marshal's lock-up, let's say in Atlanta, doesn't live in Atlanta, I know. So, how often--if there is a separation between the lock-up and the courthouse and the magistrate judge is, how often does the attorney get appointed from the courthouse locale as opposed to the lock-up locale or the detention locale?

MR. SMITH: I want to make sure I am understanding your question.

JUDGE CARNES: Actually, it works better in Montana. You got 230 miles between the state jail where he has been arrested and the federal courthouse. I wonder if you know and if there is any way for us to find out, how often the magistrate judge appoints an attorney from where the crime occurred, where he has been locked up, as opposed to where the magistrate judge is sitting?

MR. SMITH: Well, I will grant you that the Western states raise different types of logistical issues. But our experience in Atlanta has been that the federal government has contracted with local jails and the pretrial facility is not the same as the federal prison. The

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pretrial facility is a state facility in Atlanta, run by the city of Atlanta, where they put their pretrial people in that to where it is fairly close the courthouse.

But, as I say, with an initial appearance as well, I believe that it is not unusual and certainly not that difficult for someone to bring the defendant directly to the magistrate judge, to the courtroom lock-up, as opposed to taking them directly to the jail as this proposal might encourage to get the hearing done.

JUDGE CARNES: But, if all the districts were like Atlanta or even like the 11th Circuit, this rule really isn't designed for Atlanta. It is designed for Wyoming and Montana and maybe some of the other western states like that, when you are talking about where you can just bring the defendant to the courthouse.

If you appoint a lawyer--and I know when it comes to appointing lawyers, sometimes you have to spread the web to get folks who will take it at the CJA rates, you are also talking abut bringing the lawyers the 230 miles. And, if there is family that wants to attend, you are talking about bringing them the 230 miles and any witnesses-- albeit rare, any witnesses, the same thing.

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There are certain cases and circumstances in which the values that we are talking about might be better served by leaving everybody at the scene of the crime, at the scene where the defendant's family is, where the attorney and the defendant are. Now they couldn't consult with a prosecutor, as well, if he is over here.

But, you know, I worry about not making available a rule that there is a need for, in some parts of the country, just because in your and my part of the country we don't it.

MR. SMITH: Judge, I guess I would respond two ways. One, is by suggesting that perhaps using Montana as the norm is something like the tail wagging the dog. I think that more of--the larger number of federal defendants in this country occur in urban settings and using Montana as the example to set the standard, I am not sure it ought to be the norm.

I guess the other suggestion I would have is in those kinds of areas, if the court--I mean--I am used to talking, Judge Carnes, in the court--if the committee has a desire to explore those sort of possibilities for Montana, that--and is desirous of moving forward with this,

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notwithstanding the concerns expressed, perhaps Montana would be a location for a pilot project. But to set this up as a nationwide system, at this stage, I think is premature.

JUDGE CARNES: Or to cover the winter.

See, my assumption had been, when we were talking about this, that the urban areas-- [?]. Why should Miami, for example, with that detention facility in the underground tunnel right next to the federal courthouse, it is easier for them to physically bring them to the federal courthouse or send the magistrate next door, then it wouldn't be the video transmission.

But, if you don't consider the problems of Montana and Wyoming and all that sort of stuff, you are letting the dog forget about the tail, sort of in a way. And I am sympathetic to it having seen what winter looks like in some of those northern states, and seeing all this stuff about the floods.

I wonder if there wouldn't be some way to restrict it where there is a great deal of distance or weather difficulties?

MR. SMITH: I think that the rules provide for a flood example. The rules provide that you can go to the

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nearest available magistrate. It doesn't have to be in the same district; plus, when there are circumstances, state and local judges can hear--

MR. GOLDBERGER: It doesn't even have to be a federal magistrate under Rule 5.

MR. SMITH: So I think those emergencies situations may exist, although I doubt they are used frequently, nor do I think you want them used frequently.

But, in terms of whether the cities, the urban areas would approve this, I think--I mean, based on what we were hearing about the local systems, most of the urban areas in the local systems have adopted--or I don't know most, but several of them, and I think it starts because that is where the money is and the money pressures are in the urban areas.

I think it would be certainly tempting, agents could simply take someone to the jail and park them instead of having to come to the courthouse and be present during the hearing. It certainly would be tempting for them to just take everyone to a jail and leave them in the jailer's hands to do all the proceedings. I think you would see pressures not only in the rural areas but in the urban areas

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because of the cost--potential cost benefits that seem to be apparent on the surface, as well as pressures from video companies, maybe, to take advantage of this.

I don't know, but I don't think you would just see this in the rural areas. I agree that that is the--if you are going to do this, the place to start. I don't think it would be limited to that.

MR. GOLDBERGER: The judges would feel a lot of pressure from the marshals to shift those costs. Because what it is it is a cost-shifting proposal from the marshals to the defense. It shifts the money to the CJA fund from the marshall's budget.

JUDGE DAVIS: Let me just share with you something Judge Murtha who is a district judge in Vermont and is on the standing committee, he called me to talk about the rule and he says that--I don't remember where he sits, but he is on one end of the state and he said most of the penitentiaries and the lawyers are in opposite end of the state.

So they have been using video conference for some time. They will get the prisoner and his lawyer and they will go to a courtroom somewhere near their place of

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residence and the hook-up then will be with the magistrate judge or Judge Murtha in his courtroom, and he says that the--you know, they do it by consent already, and the prisoners like it better and so do the lawyers. It is a matter of, you know, they have done it and they are comfortable with it.

I don't know if you have any comment about that.

MR. SMITH: Well, I guess I don't have the benefit of hearing firsthand like you do. I can see why there will be some lawyers who will like this because it seems easier to them to simply go to the courtroom. I would be curious as to how the lawyers are handling it there, whether they are going to handle it from the jail or whether they are--how they are handling this Hobson's choice I mentioned.

But, from a defendant's perspective, it is difficult for me to imagine, particularly in an initial appearance, that they would be happy or satisfied with that. To the extent that they are, perhaps they just don't recognize the benefits of an initial appearance.

JUDGE DAVIS: Have either of you had any experience with initial appearance by video conference?

MR. SMITH: I haven't.

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MR. GOLDBERGER: I have not.

JUDGE DAVIS: Judge Miller?

JUDGE MILLER: Mr. Smith, I would like you to know that we just didn't jump in this rule and write it up without taking some time to study it. Mr. Rabiej got together all the studies that the FJC had done and the Administrative Office had done. We looked--there have been federal pilot projects on video conferencing of arraignments, with the defendant's consent.

None of the lawyers, this is the Public Defender's Office, would consent, so there were no hearings in the federal pilots because they didn't know what the appellate courts would do. So that seems to us to be a useless avenue to explore, to redo a pilot program that had already been done. Instead, we went out and solicited comments from judges who were actually doing these programs and public defenders who actually do these programs.

Also, we went to William and Mary and the members of the video teleconferencing committee at their 2001, it is probably now 2010--I don't know what it is--but they had just redesigned the courtroom and we had a hook-up with Portland, Oregon and they had flat screen video systems

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seated above where a witness--a person was seated in Oregon, right above the chair of the witness.

I swear, it almost looked live; not quite, it is not complete, but it was--the technology is there to make it close to lifelike. So your initial comments indicated that we knew we should have explored these other studies, but we have got the state studies. We got Oregon records, we read them. I just wanted you to know that we just didn't jump in this without taking a view of it before we wrote the rule.

JUDGE CARNES: You know, in commenting on what Judge Miller says, and it had not occurred to me before. I don't understand why nobody would consent for the pilot project but there is consent jurisdictions all over the country where they are already doing it; one out in Iowa, one in Vermont. Why didn't the AO just go in and study where it is being done by consent now and call it a project and give them some money?

JUDGE MILLER: I think that was so long ago that they didn't--evidently, the Defender's Office didn't consent to it.

JUDGE DAVIS: It got set up, apparently, a district to conduct it in and then when they got to that

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district the judges didn't want to do it, they were afraid it would get reversed.

JUDGE CARNES: They picked the wrong district.

JUDGE MILLER: I would also like to say on the William and Mary thing, in all fairness, when we went there, there was--that night, there was a good bit of delay because there was a technical snafu in getting the transmission through.

MR. GOLDBERGER: I have seen that. I have seen that with remote video for appellate arguments where Judge Aldesir in Santa Barbara will participate in the 3rd Circuit argument that is occurring in Philadelphia. It is not the same and it is always a snafu.

JUDGE CARNES: The 2nd Circuit does it routinely, routinely; and upstate lawyers--and they go to the local Kinko store and stand in front of the camera there and make the argument.

MR. SMITH: Judge Miller, I didn't mean to suggest that the committee had willy-nilly jumped into this. Obviously, some thoughtful consideration had been made. I was not aware and am not aware of the specific background.

JUDGE MILLER: We don't have it in our notes, so I

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wanted you to hear where the--it wasn't a--.

MR. SMITH: It is not purely the video concept, per se. As I say, you know, there are some formal arraignments where they are truly formalities, if they are separate from the initial appearance, where I might very well--I mean, I would see no problems. I mean, you can waive formal arraignment in misdemeanors now, the defendant's presence. I don't think that that is something that is an impossibility at all.

But I see the initial appearance as incredibly different. I just don't know how to express it more strongly than I did. I resolved cases, worked out cooperation deals, always developed a relationship with my client, developed trust, argued for bond; those were all things that are--particularly as you head down the road, developing that relationship with your client, always invariably that first appearance is most important.

And, if--you know, Peter was telling me in Philadelphia that the clients that he is talking about, that I heard about in the local system there, they complained. It was sort of a jailhouse joke that, if your lawyer is selling you out to get you a video bond hearing, he ain't

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much of a lawyer.

You know, I do think it will create disparities and not be good for our system for the initial appearance to change that fundamentally.

JUDGE DAVIS: One more challenge--excuse me, Judge Roll.

JUDGE ROLL: Mr. Smith, I think your comments are very articulate and I think you really gave a very good summary of what your position is, and I was reassured by what you said about the fairness of the system because that is what one would glean from the letter that NACDL submitted regarding the two-tier system or the perpetration of a two-tier system.

I just wanted to clarify that we are talking about Montana but I am from a border district and, unless the statistics have drastically changed, last year when we had the conference in New Mexico, the border districts, we were one through five in the United States in criminal case loads. So we are not talking about Montana, Wyoming; we are talking about the Southern District of California, the District of Arizona, the District of New Mexico, the Southern District of Texas and the Western District of

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Texas, and these involve very, very large areas and areas where individuals are kept and detained some distance from the courthouse; in many cases, hundreds of miles and hours away.

There is a need in connection with those border districts and not just districts that are large states with small populations and minimal case loads. We are talking about districts where--in our district, in Tucson Division, 50 to 90 people at an initial appearance is routine; and sentencings in the range of 50 to 70 per judge, per month, is routine.

MR. SMITH: I think those numbers--I mean, admittedly are significant. I guess what I am trying to convey here is, yeah, we can do this. I mean, Judge Davis was asking me my impressions of Vermont. I mean, yes, it can and has been done. But I think what we are missing here is what we don't know. Do we know that those people have lost out on good representation, the ability to work out a plea deal or cooperation?

It is the unknown of what might have been that when folks are not brought in we will never know. Would someone have talked about their suicidal concerns had they

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come in front of a judge instead of being surrounded by jailers or their abuse, had they not? I don't mean to suggest that abuse happens frequently, but medications--the real personal concerns that are sometimes expressed in courtrooms and the benefits of trying to negotiate with a pretrial services officer and get a bond or just to show your client that you are fighting for it and able and willing to fight for them in front of a judge within the scope of the rules.

Those are things that, you know, would that pro se motion to proceed pro se and fire the lawyer have been filed if an initial appearance had been in person?

MR. GOLDBERGER: Can I complete the response to Judge Roll just to say that the members of the large and diverse membership of NACDL would certainly--is not of one mind on that very fundamental question of how fair the system is to poor people versus the wealthy defendant. Many of us and many of us are our ambivalent selves, from day to day, about it. We don't disavow what we wrote and don't disavow what Greg said.

I mean it is a difficult, very difficult problem, and there are a lot of people do feel very strongly and more

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strongly than we said in the letter on that.

MR. FISKE: Mr. Smith, one of the provisions here is that this video conferencing would only take place with the defendant's consent which I assume is given after conferring with a lawyer. I assume the first thing that happens is the lawyer talks to the defendant and says, "We have an option here, we can go to court or we can do this by video conferencing" and explains the advantages and disadvantages. Then, if there is a waiver, it is a waiver with the advise of counsel.

I can understand your position as to why you probably wouldn't agree to that; as a defense lawyer, you would rather be in court. But the assumption is that lawyers are going to analyze this carefully and make the right judgment for their clients.

As I listen to you, it sounds to me like what you are really saying is we can't trust a lot of lawyers to make the right judgment, so we ought to have a rule that doesn't even allow defendant's consent.

MR. SMITH: Well, I guess what I am trying to convey is that I think that there are serious questions about voluntariness in this context and pressures that are

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brought to bear, even on good lawyers--that could be brought to bear, and I think likely would be brought to bear, for them to waive personal appearance. The marshals will not only put pressure on the judges to encourage this, but also on the prosecutors to adopt policies or at least take into consideration before they recommend a bond whether the defendant is willing to waive a personal appearance.

You are adding another arrow to the prosecutor's weapons when you do this. The prosecutor--and I guess that is part of why I am less concerned at the arraignment stage. Because the bond determination has been made by then, a decision to waive arraignment is not going to be a quid pro quo in order to get a bond recommendation. It is going to be a straight up or down, more likely to be voluntary sort of waiver.

At the initial appearance, the pressures are different. You know, what are you going to do--you know, there is nothing in this rule that prevents a district--from adopting a U.S. Attorney's Office from adopting a policy, "We will oppose bond for any that insists on a personal appearance."

MR. GOLDBERGER: Where are these lawyers? I don't

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understand where these lawyers are that you are imagining.

JUDGE TRAGER: Wouldn't that be a violation of law? The statute doesn't include that as a proper consideration in determining bond. And the judges, when they would become aware of it, do you think the magistrate or district judges are going to allow that?

MR. SMITH: Well, I think, as I say, my understanding of the law is only if you are asked to waive a constitutional right is it in violation of law. So--but, more importantly, as I said, I think you would see more subtler types of--but equally effective ways, where rather than saying it so explicitly or adopting a policy that might be criticized, the defense lawyer is told, well, you know, how difficult is this client going to be? It may weigh into what kind of a bond recommendation I make.

JUDGE TRAGER: What I am reading here is you don't trust the defense lawyers? It strikes me, as Fiske says, that a defense lawyer knows it is a kind of case that he is never going to get bail, all right, he is not going to waste his time and his client's trying to make a useless application.

But, on the other hand, if he thinks personal

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appearance--it is a close case and a personal appearance might make the difference, he will exercise his duty as a defense counsel to request that personal appearance. And, if it is the kind of case, obviously, that normally gets bail, I find it really incredible that the U.S. Attorney is going to adopt it as a policy to oppose it because some lawyer foolishly is pushing for a personal appearance when he is going to get it anyway.

MR. SMITH: I guess, Judge Trager, waivers occur now. They occur in court. But waivers of hearings, essentially what happens is the defendant is brought in. He can waive his bond hearing, waive his initial appearance, but at least there is some assurance that we have moved from the police phase of the process into the court phase. And, when it is done under those circumstances, you are not as concerned that it is being done for reasons other than the straight up and open reasons. The defendant is brought in, knows the judge is there willing to hear him, knows he can proceed, but makes what I view as a more voluntary choice.

MR. GOLDBERGER: I was just going to ask a follow-up about Fiske's question or comment. What do we know about whether or not there are arraignments and how

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many of them in this country where there are no lawyers present at all--I mean, first initial appearances, and how are we going to assure that if we go to the waiver option of this proposal that there is a lawyer present somewhere before the initial appearance to advise this person about whether or not to waive his right to be present at the initial appearance?

Or is that just--does that not happen? Is that an unrealistic assumption?

MR. SMITH: Well, in my district, there was always a lawyer present at the initial appearance.

MR. FISKE: But that is because it is at the courthouse and the federal defender--I mean, in our district, it is no problem because, first of all, we are a very small jurisdiction, but the federal defendant has a lawyer present at arraignment court and before the magistrate every day.

MR. GOLDBERGER: That is common. The defendant does not have a lawyer until he walks in there and the federal defenders says, I am your lawyer or at least for today I am your lawyer.

Now, if we move that process someplace else where

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the federal defender's office is not located, how do we assure that someone is there to advise the person before the day of the initial appearance whether or not he or she should consider waiving the initial appearance. And, if it is waived, how do we assure that that person has a lawyer representing him at the initial appearance and that the defendant and the lawyer get a chance to talk to each other before the initial appearance? How does that happen?

I think that is one of our comments on the rule is that it doesn't design to answer that important question, and that was my response to Mr. Fiske's comment also is that there is--the initial appearance is the institutionalized mechanism by which we see that each defendant gets a lawyer. And, except in the districts that have and in which is--I guess my friend Shelley Stark will probably know this off the top of her head, I doubt--how many of the districts now have established federal public defender offices relative to those that are dependent entirely on CJA plans?

But, unless there is an established defender office that assigns someone, even when it is in the courtroom you won't necessarily have a lawyer prior to that moment of initial appearance. And, if defendants are--you

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certainly can't have the waiver occur in court in order that the defendant not be brought in, it defeats the whole purpose of this reform.

I think that--it may be a logical insurmountable obstacle to have this happen in a fair way because the waiver can't occur without the lawyer, without legal advise.

MR. FISKE: I can understand that is a legitimate concern; but, in the situation you are talking about, when would that defendant get a lawyer? At some point, he is going to have a lawyer--

MR. GOLDBERGER: Appointed by the magistrate judge at the initial appearance. That is the guarantee.

MR. FISKE: But if the person is out away from the courthouse in this outlying--why can't the lawyer be appointed at that very first stage to advise the defendant at that point whether or not to waive the initial appearance?

MR. GOLDBERGER: This is the first stage--the initial appearance is the first stage. There is no stage prior to that. Maybe I am understanding what you are saying.

MR. FISKE: Then does the defendant get a lawyer?

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JUDGE DAVIS: At the initial appearance.

JUDGE CARNES: No, no, no, no. He can be appointed. In a substantial number of cases--the judicial conference recommended policy and a substantial number of cases, a lawyer shows up with the defendant representing the defendant at initial appearance. It may be fewer than 50 percent, I don't know, but there are a large number of districts--and I think Northern Georgia is one, I know Southern Florida is one--in which at the initial appearance there is at least a body with a law degree representing the defendant at that time.

So some instances there will be an attorney to advise whether to waive or not, in some there won't, before the initial appearance.

MR. GOLDBERGER: But you can't insure that there--if you can only use the rule in the situations where the magistrate judges have set up a procedure for getting a lawyer to meet with the defendant before the initial appearance, how is that lawyer then going to--is that lawyer supposed to go the 300 miles or the 200--maybe the lawyer is half-way and only has to go 150 miles to go to the jail to talk to about whether--I mean, the person is arrested is

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supposed to be brought without unnecessary delay before the nearest available judicial officer, not to the nearest available jail.

We are assuming a step in the process that is wrong and doesn't--it isn't a step in the process. It is supposed to go from arrest to court, and we are institutionalizing--we would be seeming to institutionalize and encourage here a completely wrong idea of the first step in the process.

JUDGE DAVIS: Mr. Trager?

JUDGE TRAGER: Couldn't you set up a process that is similar to what we use in the normal court, of a calendar of lawyers who would be available on a rotating basis to go to the place of incarceration to meet with them? Wouldn't that take care of your problem?

MR. GOLDBERGER: You could.

JUDGE TRAGER: So then why do you object to the even the consent rule; that is why we are unhappy with--.

MR. SMITH: Well, in a--Judge Trager, I guess it has to do with concerns about the true voluntariness of the consent, particularly at a very vulnerable stage for a defendant where bond is on the line. You know, we talked

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about the waiver of rights, and you raised an issue as to whether that sort of policy would ever fly with the judges in the district.

We have seen, at least in my district, similar requests for waives of appeal, where there is essentially--well, things that we never thought we would see in that context where folks are told you are not going to get a plea bargain at all in writing unless you waive appeal, your right to appeal the sentence, and waive your habeas rights.

So I don't think it is necessarily farfetched to think that a U.S. Attorney's Office somewhere facing these kinds of costs might adopt such a policy where the bond is made contingent on the waiver of the rights; even short of that, though, as I say, even if it enters into the mix, I don't think it is right. All these accused, presumed innocent folks are asking is that they be able to come into court, and I don't think that they should pay a price for that.

JUDGE DAVIS: We need to move on, unless somebody has got a question that just won't hold.

JUDGE MILLER: We want to thank you for your

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comments on those. I was the subcommittee that helped draft the rules, and your comments were very enlightening. I just wanted to let you know that.

MR. GOLDBERGER: I appreciate that. Thank you.

MR. GOLDBERG: Professor Goldberger, has Rule 6(e) as presently written the prosecution could not petition the trial judge to command a witness to keep the secrecy of his testimony--in the Style changes, you highlight the fact that a sentence has been omitted. The sentence being "no obligation of secrecy may be imposed on any person, except in accordance with the rule."

If that goes into effect, it seems to me the government could then go to the court and say, we are asking the court, for whatever special reasons there are in a case, to command that the witness not be allowed to reveal the contents of his testimony. Could you address that.

MR. GOLDBERGER: I just want to say because that change appeared in the Style change I assumed it was inadvertent, and that our calling it to your attention would cure it. I harken back on that one, not to the merits or demerits of grand jury secrecy and how it should be implemented but to the need for people who haven't read the

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rules 300 times to go read the 4 times to find all the other little mistakes that might be there.

MR. PAULEY: In the wake of Judge Miller's comment on your submission on Rule 41, that was something I had indeed intended to complement on that before the subcommittee that has previously met has indeed recommended restoration of that language. Its omission was inadvertent and I have every expectation the full committee will adopt that recommendation.

I did want to make one comment on this wavier issue, and that is that I think it proceeds from the assumption that the presence of an attorney is indispensable to a fair or valid waiver. Of course, the first thing that happens after one is arrested is that one may be interrogated by a law enforcement officer and, being read his or her Miranda rights, asked to waive constitutional rights.

So I am not certain that I understand why you think that a valid or fair waiver, even in those situations where a lawyer has not already been appointed at the initial appearance stage, cannot be made when what is at stake from the accused's standpoint at that time is merely whether to

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appear in person for the initial appearance or to have that conducted by video means.

MR. SMITH: Well, I mean, I think constitutional rights can be waived if they truly are free and voluntary. I don't think there is much doubt about that, but I see the interrogation process as still a part of the police phase and I think what--the point that--I think that is an accepted part of the police phase; whereas, here, we are talking about when do we move into the court phase.

I just think it is troublesome symbolically, and it is troublesome in terms of adequately representing the client, and the court ensuring itself that the defendant is being represented adequately for a judge to never appear on the scene until a defendant walks into a trial. I think there will be concerns that end up never getting addressed. You know, if we had--Mr. Fiske's comment, if we had perfect defense lawyers and perfect prosecutors who always did everything they were supposed to, then perhaps--

JUDGE ROLL: We already have perfect judges.

MR. SMITH: Well, that is what we are wanting is to let the judges see the defendant. The reality is--and I suppose we can blind our eyes to this, but sometimes the

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process doesn't work as it should. Sometimes people do get caught between the cracks or defense lawyers aren't doing what they are supposed to. I think part of the process of having an initial appearance is to make sure that things are moving in the right direction, and that a court is overseeing a case, and that there is an interaction that makes that very clear to the defendant and to all people involved.

MR. GOLDBERGER: The rule can't be written to work only in the ideal world. It has got to deal with the reality that some people are not as good as others at doing the--some of the important parts of this process.

MR. SMITH: Again, your question is it constitutional? I am not here arguing that this rule would be unconstitutional. I am not here--I mean, maybe the argument could be made, but I don't think that is the issue before you. We are not reaching toward the constitutional bottom. This is a policy determination, what is the preferable rule?

I am proud of our federal courts and I am proud of our federal courts in part because we haven't fallen into this video conferencing cheapening of the process. I think

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it is important for every defendant to know they get a day--when they are arrested, they are going to be in front of a magistrate judge live and they can talk face-to-face with the judge. I think it is a credit to the federal system and our numbers are such that I think we can sustain it.

JUDGE DAVIS: Thank you, gentlemen. I appreciate very much your being here.

MR. SMITH: Thank you.

MR. GOLDBERGER: Thank you.

JUDGE DAVIS: We hear next from Professor Marsh. Professor Marsh comes to us on behalf of the Criminal Justice Section of the American Bar Association.

Professor Marsh, do you want to tell us a little bit about yourself.

PROFESSOR MARSH: Yes, Judge Davis. Thank you very much.

First of all, I want to thank you very much for the opportunity to appear before you here today on behalf of the Criminal Justice Section. As you have stated, my name is Elizabeth Marsh. I am a professor at Uinnipiac University School of Law in Hamden, Connecticut, and I serve

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as the chair of the Criminal Justice Section, Committee on Rules of Criminal Procedure and Evidence.

I teach in the area of criminal procedure. I teach in the area of evidence. I teach in the area of constitutional law and criminal law, as well, for longer than I care to admit. Prior to that, however, I served as a prosecutor in the office of Robert Morganthau, and I came to academia from the prosecutorial viewpoint.

My purpose for being here today was primarily to amplify some of the remarks that were in the written testimony on behalf of the Criminal Justice Section Committee's comments on behalf of Rule 41, which I understand has been sent back to committee for further consideration.

JUDGE DAVIS: Is that Rule 41?

PROFESSOR MARSH: Yes. But I also wanted to echo some of the comments that had been made dealing with the video teleconferencing. With that said, perhaps my greatest virtue today may be brevity.

First of all, I wanted to thank the committee for all that they are doing. This is a mammoth undertaking, and I think everyone in the Criminal Justice Section which

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represents, of course, defense and prosecution and the judiciary, is very, very grateful for it. But, in terms of some of the comments we had, there were some areas that we thought needed further consideration.

I don't want to regurgitate all of the comments that were made in writing but just very quickly, in addition to Rule 41 that we hoping would be more closely considered if it was going to be adopted at all, we were concerned about both the teleconferencing for initial appearance and arraignments and for the contemporaneous testifying.

We also--we had a minor concern about Rule 30, where we were concerned that perhaps a judge might require a request for instructions prior to the close of evidence. I think that is an inadvertent reading of the rule, but I just draw it to your attention.

JUDGE CARNES: I don't think it is. I think that is a correct reading of the rule. Let me just say that most members of the committee, in our collective experience, judges are now doing that. We thought we were bringing the rule into conformity with practice, more or less.

PROFESSOR MARSH: All right. Well, in terms of that, I am--many of my comments were made trying to

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synopsize the various constituencies within the Criminal Justice Section, but I heard when we were discussing it as a group that the jurisdictions from which our constituency was drawn followed the procedure wherein at the close of evidence requests for instructions were made, as opposed to having it said at the beginning of trial when you don't know exactly what is going to be put before you.

JUDGE CARNES: I think the situation is worse for your constituency than you realize. The present rule says "at the close of evidence or at such earlier time during trial." So, presently, judges can under the rule say, as soon as the jury is in the box, give me your jury instructions, before opening statements or during opening--after opening statements.

What the rule would propose is to require--the submission of the change would do, if adopted, is permit the judge to require the submission of proposed jury instructions before the trial begins. But I mean, right now, under the rule--and I know particularly in short trials they do it--right now, under the rules, the judges can require the jury instructions, the first hour of trial.

So we are there now and the question is whether to

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push it before trial. You might want to address that.

PROFESSOR MARSH: Well, in terms of pushing it before trial, the obvious conflict for the litigants would be not knowing precisely the way the evidence will fall out. From the prosecution viewpoint, you are never quite sure what the defense will put forth and you don't actually have a right to know that completely until the close of your case; from the defense viewpoint, you want to see what come out, what witnesses are going to be called, et cetera.

So that, as a practical matter--I defer to your great judicial expertise but, as a practical matter, I can't see it being requested before a trial.

MR. FISKE: Can I just ask, is this a real problem? In other words, my practice is to ask both sides for the proposed instructions before trial, with the understanding that we are going to revisit the question later and there may be some that are relevant or not relevant. But, if the defense says, I don't want to give you a defense theory until the close of the evidence, I will say, fine, don't give me a defense theory until the close of the evidence, but I want everything else before trial.

I mean, if we are really only talking about the

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defense theory instruction, how frequently is this a problem where some judge would insist on having the defense theory before trial. I just don't see that most judges would do that.

MR. GOLDBERG: I think it is unimaginable. I don't even know what my defense is in most cases before trial.

MR. FISKE: And sometimes not even until after trial, right partner?

MR. GOLDBERG: Right.

JUDGE CARNES: The point is the practice where you practice about requiring the instructions.

MR. GOLDBERG: Some judges require it, some don't. Those who require it, I hand in a set of instructions which is general and I supplement it during the trial.

PROFESSOR MARSH: Have you ever had a situation where supplementation was not permitted?

MR. GOLDBERG: Never.

PROFESSOR MARSH: So maybe the rule of common sense is sufficient here. It caused enough concern that people on the council wanted me to mention it. I don't think it was a main thrust of their remarks though. I think

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that they video conferencing and the covert warrants were the main reason I believe the Criminal Justice Section was hoping to be heard.

With regards to video conferencing, I think most of what we had to say has been said already. On the initial appearance, the consolidation of the various purposes of the initial appearance is something that we saw as laudable, but it also means that the use of video teleconferencing may take on additional weight when you use it for things such as revocation or modification of parole--I am sorry, probation, which has now been incorporated within the rule.

And, as you have heard people talking today, there is a vast array of technology out there and Fred Letterer's work at William and Mary with the courtroom of the 21st century certainly shows what could be done. I am not sure, however, when you talk about the resources that are available today, that all the court systems that have video teleconferencing are up to that standard of the flat screens and the care that has been taken with that provision.

So, as such, we were recommending that if video teleconferencing be done for all the rules, 5 10 and 26, that we make sure that there is a two-way link and also that

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it be done in color. I don't know if you wanted to include additional technological floors as well but I put that forward to you for consideration.

Everyone, so far, has commented on the difficulties this raises for the attorney, sort of the notion of putting the attorney between a rock and a hard place. When someone comes for initial appearance or for arraignment, there is a sense that you want your lawyer beside you or you want the lawyer in court? Some of my colleagues have suggested that maybe you need two lawyers now, if you move to teleconference. I don't think that the rule has to go that far, but it would be one possible response here.

The other concern that I don't think has been brought up too much with Rules 5 and 10 is that some of the judicial members of the Criminal Justice Section have suggested that, as judges, they really want the individual before them to be able to use their judicial intuition, if you will, for being able to read what has been called how the defendant stands up in court.

One judge spoke fairly movingly about the notion that a person appeared before them for I believe it was

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arraignment and he was able, by questioning, to discern that there had been a mistaken identity, in terms of the person was picked up on a warrant and the wrong person had been picked up. He thought he would not have been able to discern that so quickly had the person been arraigned by video teleconferencing at a distance and in some way intimidated by the process. So he was suggesting that the video conferencing might come at a cost to the quality of judging, as well as the quality of representation that has been mentioned so far.

At the very least, the Criminal Justice Section would ask that if the rules are made--the rules are changed in Rules 5 and 10 for video teleconferencing that the Criminal Justice Section would like to weigh in on the side of requiring the waiver or perhaps requiring consent. You might want to think about the difference between waiver and consent as you look at that. It might be less burdensome to require consent as opposed to a full-scale waiver. What comes to mind is the idea of 4th Amendment consent searches as opposed to 5th Amendment waiver.

But, at the very least, however, the Criminal Justice Section would ask for a provision that would require

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the defendant to actually affirmatively agree, either through consent or waiver, to the process.

In terms of Rule 26, the confrontation aspects have been discussed at length. I have been told that the two-way video conferencing for the contemporary testimony has been put into the commentary; is that correct, Judge Carnes?

JUDGE CARNES: In the rules. Yeah, the rules.

PROFESSOR MARSH: Into the rule itself; excellent. The one aspect I haven't heard talked about today that we did address, though, was the idea of using the contemporaneous video testifying by defense witnesses as opposed to prosecution witnesses. Now, in terms of that, the rule requires that contemporaneous video teleconferencing can be used only for good cause.

Some of the constituents, from the defense viewpoint, were concerned that this might limit their ability to use contemporaneous video teleconferencing for witnesses more than it should be. Because there, of course, if the defense calls a witness you don't have the confrontation concerns. And, although I hope I am not wrong on this, it seems to me that if you have contemporaneous

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testimony you don't have a hearsay problem because it would seem to fall within the non-hearsay--it would not be hearsay under the definition of the Federal Rules of Evidence 801.

And people who have talked about this in the Criminal Justice Section from the defense perspective saw this as a boon to defense lawyers to be able to use experts from other areas that they might not be able to afford, otherwise. And they were concerned that the compelling--I am sorry, that the good cause language in Rule 26 might be too limiting to their use.

As I said, the main reason I wanted to appear before you today was to discuss the covert warrants. I don't want to waste your time, however, if that is going to be considered later. I can just hit the high points, if you would prefer.

JUDGE DAVIS: I think you would be safe in just hitting the high points.

PROFESSOR MARSH: Okay.

I was a little surprised as I got into this that this--and this will reveal my Ivory Tower nature at this point--at how widespread these practices are now, more widespread than I was lead to believe you the reported case

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law.

It is clear that the Supreme Court of the United States has allowed covert entry under the Dalia case, but that was for a wiretap situation. When you look at changes to Rule 41, I am left-- perhaps it is my own blindness, but I am left wondering what exactly is meant by the term "covert."

The commentary draws on surreptitious entry. The commentary draws on the great sneak and peak warrants. But there is a sense that it might be read to go beyond that. Now, under the terms of the rule, it is clear that probable cause is needed but, as I state in the comments, there is a fear that that probable cause standard might be diluted, simply because if you look at the Villegas case, you have a situation where information is given that a farm house in upstate New York was being used for a drug lab that the people who purchased the farm house were people a rather modest income-- had a job paying rather a modest income, that you had the departure and arrival of numerous people of Hispanic backgrounds, men, women and children, and that there were lots of grey plastic trash cans around the farm.

Well, so far, I don't hear probable cause there.

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Then you add the facts that well, gee, there is a tip that there is a drug operation in the area and it is being run by Ricardo, and Ricardo drives a red Ford van with this license plate and has a phone number in the city. Then you learn that that number has tracked through a PIN register that calls from that number to someone who is believed to be involved in a drug ring.

Well, from that, the agents begin to get a sneak and peak warrant. But I am worried that the sneak and peak warrant may be nothing more than a warrant to get a warrant. Because, when you look at the affidavit that was used there, part of the application talked about the difficulty of surveillance in a rural area. And, as such, it becomes permission to sort of undercut what they couldn't get otherwise, they need to use the sneak and peak to get to it.

The other main concern with the sneak and peak warrant, of course, is the notice. There is some case law on the books saying that the lack of contemporaneous notice invalidates sneak and peak warrants. But, in that case law, the good faith exception has virtually saved most if not all of the cases where sneak and peak warrants were used.

The case law sort of relies--finally lights on a

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7-day notice requirement which is what it is adopted in Rule 41. But the thing that is troublesome to me is that, when you look at that 7-day notice, the rule provides that extensions can be granted for good cause, and it is unclear how many postponements can be given and how long this covert surveillance can go on. It is possible that this surveillance might indeed be more intrusive than some other surveillances that would be under a more conventional warrant.

Now I talked about the definition of what is a covert surveillance. I think it could apply to more than sneak and peak warrants. It could be--obviously, sneak and peak warrants are being used now for drug labs, for methamphetamine labs, et cetera. But the other context where we might need to do give some consideration would be the idea of silent videos, all right? If you have your video with sound, you come under the wiretapping law. If you have a videotape in public, arguably the 4th Amendment is not implicated.

But if law enforcement wanted to put a silent video camera one that doesn't pick up sound, under the use of a sneak and peak warrant, I think it would be conceivable

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that it might be granted under the changes to Rule 41. And, as such, I would worry about the breadth of the sneak and peak warrants going around.

Similarly, the sneak and peak warrants might lead to further computer surveillance. There was--this is somewhat anecdotal but, in the proposed Methamphetamine Antiproliferation Act that was not enacted--but there was a sneak and peak provision that would allow the government to go in and search computer files, download computer files, but not disturb the computer otherwise. That was characterized as perhaps being a sneak and peak type of approach. The bi-partisan committee struck that and it was not enacted, but I think you may find that you will not have the Congressional support for a full sneak and peak without further limitation.

Coming from a prosecutorial background, I am loathe to use the metaphor of George Orwell's "1984." I have often heard it invoked as sort of an over-the-top type of argument. But, if this provision is passed, I do see the possibility of it leading us down the path to unchecked silent covert and continuous surveillance for more than the seven days permitted in the rule; and, as such, I am left to

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wonder if we will be left cowering in the doorway the same way that the protagonist in "1984" was, trying to avoid the government's omnipresent search powers.

With that, I would strongly urge more careful consideration of Rule 41. I understand that there is thought about extending it for beepers, some thought for extending it to PIN registers. As such, I would be very interested to see what changes flow.

Thank you very much.

JUDGE DAVIS: Thank you very much.

Any questions of Professor Marsh?

[No response.]

JUDGE DAVIS: Okay, thank you very much.

Ms. Stark is a federal public defender in Pittsburgh, and she appears on behalf of Federal Public and Community Defenders.

MS. STARK: Thank you, Judge Davis, members of the committee. I am not only the clean-up batter, I am actually a pinch hitter. I am here for Mr. Tom Hillier who wrote the Public Defender Position paper that I hope all of you have received.

As Judge Davis said, I am the Federal Public

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Defender for the Western District of Pennsylvania. I graduated from Penn Law School in 1973 and I have spent most of the last 28 years representing indigents and primarily as a public defender, except for a 10-year period during which I became a law professor in order to support my public defender habit which I carried on on the side.

In addition to having practiced extensively as a public defender, I am presently an administrator of the Public Defender Office of the Western District and, in that capacity, I, to a large extent, control the CJA panel. So I hope to be able to answer some of your questions in terms of the availability and the cost of supplying counsel for indigents in far away places.

As you know, the Federal Public and Community Defenders are opposed to video teleconferencing. We are entirely opposed without consent of the defendant, and we are opposed in relation to initial appearances. We can agree to consent for arraignments--with consent, for arrangements under Rule 10; however, we think that is somewhat unnecessary given that arraignments can now be waived. And I would suggest that, in many cases, arraignments will be waived particularly when the defendants

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are housed far from the courthouse.

There is very little I could say more eloquently than Mr. Hillier said in our letter or than NACDL said in relation to video teleconferencing. I can note three things about the notes, however, of this committee in reference to the rule.

No. 1, the notes say that video teleconferencing is based on convenience and cost effectiveness. In fact, we are convinced it is neither.

The notes say time is of the essence, and we are absolutely convinced that this will result in more delay.

And, finally, the notes express a strong preference for appearances before magistrate judges. We believe that video teleconferencing, in fact, deprives the defendant of an actual appearance before a federal magistrate judge.

Why is it not cost effective and why is it not more time efficient? Really what this does is, as someone else has previously noted, it moves the cost from the marshals to the judiciary. And, particularly, it moves the costs to the CJA panel and counsel.

In answer to your question, Judge Carnes, it

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appears that after the judicial conference in 1988 recommending that lawyers be appointed before the initial appearance, approximately half of the districts have complied. So, in a district where counsel is appointed before the initial appearance, counsel then must travel to the prison. Normally, that takes an entire day. Counsel must take an interpreter, paying an interpreter an hourly rate. Counsel often and my assistants always take the investigator with them. An investigator is essential to begin the investigation required for pretrial release.

That is enormously costly. In fact, I would suggest it is so costly and so time consuming that many CJA panel attorneys will not take these cases because they cannot afford an entire day away from the office to travel long distance to a prison. Certainly the cost of paying CJA counsel an hourly rate is more than paying the marshals to transport the defendants to the courthouse.

Pretrial Services will also have to go to the institutions. In my district, Pretrial Services now is facing a bigger budget crunch than I am. Their budget is under increased scrutiny, they have limited personnel, and I suggest could not provide a person to be gone the entire day

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to an institution simply to interview one defendant and, yet, Pretrial Services is committed to face-to-face interviews. The requirement that Pretrial Services must go and meet the defendant, again, increases the cost of video teleconferencing.

In addition, Pretrial Services, as like the lawyer, will be unable to do their job once they get to the prison. You can't make phone calls. You can't find out a defendant's background, his family, his employment, alternative places for housing, from an institution many miles away from where the defendant lives.

So the lawyer and the Pretrial Services people will have to go back to their offices, try to get everything ready and then go back to the prison, probably the next day, for the initial appearance. That would not only greatly increase the cost, but obviously increases the time required.

In the districts where counsel is not appointed before the initial, then the question becomes--and this, I think, is responsive to your question--who advises the defendant at the prison that they have a right to waive the initial appearance; if they don't have a lawyer, who tells

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them? And I think the NACDL paper very eloquently presents the problems with that, with having a prosecutor or an agent or, worse, the jailer, explain to an incarcerated person what their rights are to an initial appearance and whether or not they should waive it.

For the same reasons that the Supreme Court requires Miranda warnings because of the inherent pressure of interrogation, the same pressure would exist at the institution when a prosecutor or an agent or a U.S. Marshall is asking an inmate to waive their appearance at the initial appearance. The same pressure is brought to bear on the person, and I find it hard to believe that a knowing and intelligent involuntary waiver of initial appearance could occur at that point.

The federal defenders are also convinced that video teleconferencing will result in more defendants demanding detention hearings. And, if they demand detention hearing then, obviously, the defendant must be transported to the courthouse and any savings that will have occurred from a video teleconferencing will have been lost.

Our second concern is one of trust. Now I believe that, at this moment, the largest problem facing my

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assistants and me in representing our clients is the difficulty of establishing trust. We walk in, we meet them and they see us as the government, the same government that is trying to put them in prison. Trust between the client and the lawyer is not just something the lawyers worry about, but I submit to you that this entire process depends on the trust our clients have for us. If they don't trust us, you will never get a plea. If they don't trust us, cooperation is very difficult.

Trust between the defendant and his or her lawyer is essential to the smoothness of the entire process. There are no private phone conversations in an institution. In Allegheny County jail where I practice, every phone call is tape recorded, including phone calls with counsel. In the outer- lying institutions in order for us to speak to our clients by phone, there must be a counselor present with the inmate. There are no confidential phone conversations. It is impossible in that situation to develop trust with your client.

Now the NACDL paper also refers to Professor Amsterdam's analysis of the first meeting between client and counsel as the single most important interview that occurs

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in the criminal process. If counsel is unable to go and be present with the defendant, we are robbed of that opportunity to establish personal trust. If the client watches the lawyer over the videotape, the client sees the lawyer in the courtroom with the prosecutor and with the judge and not with him.

The client needs to see the lawyer in action, in order to begin to develop trust and the client needs to talk directly and confidentially with the lawyer in order to begin to develop that relationship which is essential to the entire process.

Second only, in importance to trust, is what occurs at the initial appearance when there is counsel, and that is that that is where deals are made. And the only way to make a deal in an initial appearance is to talk simultaneously with the client and with the prosecutor, to pass back and forth between the two. Personal contact is essential to that process, not only with the prosecutor and with the defendant but to have the defendant with you when he sees you talking to the prosecutor. If the defendant sees you talking to the prosecutor over a video screen, then defendant has no idea what you are talking about, doesn't

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really know you and no reason to trust that you are talking in his or her best interest.

In order to have cooperation after the initial appearance, we must have contact with our clients. I have had clients released from the initial appearance to the street wired to do an undercover operation with the agents. That must occur as fast as possible in order to keep the danger to the defendant at a minimum. It is essential that that happen quickly, and it requires simultaneous discussions with the agent, with the prosecutor and, most importantly, with the client.

Opportunities occur at the initial appearance, like cooperation, that don't come back later. They are lost if they are not taken advantage of then. For example, the first defendant to cooperate is usually the defendant to receive the greatest benefit. Certainly a defendant who must sit in prison or in a jail before they can be released to engage in cooperation is at risk of having a co-conspirators figure out what has happened.

The fourth concern which was brought home to me very recently is the need for the magistrate judge to see the defendant and for the defendant to see the magistrate

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judge. I sat next to a client two weeks ago who was so badly beaten in a county jail that he had four broken ribs, 20 stitches to his eye, his face was completely swollen and he could not get out of his chair. The magistrate judge, without making any determination as to who was at fault or why or how the altercation occurred, immediately was able to see for himself that the defendant could not be housed again at that county jail.

Many of our clients come into court sick and injured, and even more of them come in with mental illnesses. A federal prisoner killed himself in our county jail a month ago and, since then, every magistrate that has faced every defendant at a preliminary initial appearance has questioned the defendant about their mental health history out of fear that the same thing will happen again.

Only by seeing the defendant in person, eyeball-to-eyeball, can a magistrate make such a determination as the need for mental health treatment, not to mention suicide watch. We had a defendant, two months ago, brought in in a wheelchair who had been shot in the head, and the magistrate spent about 30 seconds in the presence of this defendant before he turned to the

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prosecutor and said, I don't think you want to proceed with this prosecution. I do not believe that the magistrate would have been able to make such an immediate determination of the physical and mental competency of this defendant over a videotape.

Equally as important, the defendant must be able to talk to the magistrate. We first developed the idea of appearances before a judicial officer so that people arrested, who are generally terrified and often don't know why they have been arrested, are taken to a detached, neutral person for whom they have respect and who appears to provide a safe haven. They need to be able to talk candidly with the magistrate.

A defendant who has been abused in jail is highly unlikely to talk to the magistrate about what happened in the presence of the jailers. The defendant needs to know that there is a safe place, that there is a neutral judge, and that the government and people that care know that he is being held and know why he is being held.

Fifth, based on my experience, I can say, unequivocally, nothing works in a jail. And anything that should work will often not work. Who will service the video

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equipment? Will people go to every jail within a state, every county jail? Who will pay for that? How can the federal government possibly keep video equipment in good working order in every jail in the country?

And let me tell you, jails are highly inconvenient places with which to deal. They routinely have lock downs. You can't see people during meals. And, often, you can't see your client out of sheer ineptitude of the jailers. Will the magistrate judge sit and wait for hours and hours until a lock down has ended, a lock down that is unpredictable, that you don't know about until you get there? I venture to say, not.

And then there is the delay in the broadcast, I have yet to see a video teleconferencing that allows for a natural, honest communication without a seconds, 5- to 10-second delay. I am actually very interested in the description of the one of the large screen. I have never seen one that was so realistic and, in fact, those that I have seen have made communication almost impossible because of the delay.

Imagine having that conversation through an interpreter. As difficult as it is to talk with a 10-second

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delay to someone who speaks your language, imagine if everything said on both sides had to go through an interpreter. It would make the communication, I believe, almost impossible.

And, finally, we have touched on the question of racial and economic disparity. It is not a question of whether we believe there are two systems in this country. It is whether we are doing things that create that appearance. The NACDL paper says that, in 1996, over 82 percent of detainee in this country were people of color. Now, if it is the detainee who have video teleconferencing, will we not have a system where the wealthy and white go to court and the poor and the people of color go to a box and see a judge on a box?

It is not that any of us believes that we have a two-tiered system, but do we want to create a procedure that makes it look like we do? Where the result has a disparate impact on one group? Where we have an appearance of unfairness and of disparity, regardless of whether the truth is the same?

And, finally, I have read the committee's considered notes and they do seem very considered, to me,

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and clearly a lot of thought has been put into these proposals, but I see nothing in the notes that justifies what the problems are that we believe this procedure will present. I have heard not one word today of any evidence of increased danger for bringing people for initial appearances. We have not heard any hard evidence of more security problems and why this would create more problems than would transporting people for other hearings.

And I would suggest that the mantra of security is an insufficient basis for changing an entire procedure and depriving people of the benefits of bringing them to a live courtroom.

I would close by reading to the committee, Judge Covenhower's, part of his letter that he submitted to the committee stating his opposition to video teleconferencing, in relation to this question of security. "The solemnity and fairness of a defendant's initial appearance or arraignment in a court of law in the presence of counsel, the prosecutor and the judge, to answer to charges of criminal conduct far outweighs the security concerns to law enforcement or court personnel. Heightened vigilance should be the proposed remedy, not the sacrifice of cherished

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traditions and defendant's rights."

Thank you.

JUDGE DAVIS: Thank you, Ms. Stark.

Any questions?

JUDGE CARNES: I wanted to clarify one thing that was in the letter. How often are witnesses presented at an initial appearance?

MS. STARK: Only, Your Honor--

JUDGE CARNES: In your experience.

MS. STARK: Most often, when the question of bail--

JUDGE CARNES: I mean, percentagewise. The reason I asked, I am not trying to get you to contradict Mr. Hillier. He said the question of release versus--"the release decision frequently involves the appearance of live witnesses and examination of those witnesses."

My impression was 98 percent of these initial appearances go five minutes or less and no witnesses are heard. Is that erroneous?

MS. STARK: No, Your Honor. I think that is correct, but what Mr. Hillier was talking about was that the rule really anticipates that bail and detention be addressed

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at the initial appearance. In his district, that is possible. They do address--I asked him the same thing and they do address detention at the initial appearance.

JUDGE CARNES: But they don't do it in Philadelphia?

MS. STARK: In Pittsburgh, not usually. But that is because we are often not appointed until after the initial appearance.

JUDGE CARNES: I see, you are not in one of the 50 percent that furnishes an attorney before the initial appearance.

MS. STARK: That is correct. That is correct. But, also, Your Honor, we then have to ask for a continuance for a detention hearing, and we always, always do that; and, at detention hearings, witnesses are almost always called. And I believe that because of the timing and the arrangements in Seattle that Mr. Hillier is able to address the detention question at the initial appearance.

JUDGE CARNES: So the collateral inefficiencies of this rule that we are talking about would be more felt in his district because it would, effectively, require separating the detention hearing from the initial

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appearance.

MS. STARK: That is true.

JUDGE CARNES: Which is less of a cost in your district because you have--you already have them separated.

MS. STARK: That is true. Although, it would put the defendant at a far distance, so we would then have to go--everything I said in relation to the initial appearance would then come true in relation to the detention hearing if--well, I guess nobody would have to bring--

JUDGE CARNES: You would have to bring them in for the detention hearing.

MS. STARK: It would probably delay it because we wouldn't have a face-to-face meeting with the client then until they were brought in for the detention hearing.

JUDGE CARNES: And the 48-hour deadline is on the initial appearance--

MS. STARK: Yes.

JUDGE CARNES: --as opposed to the detention hearings.

MS. STARK: The detention hearing can be waived for three days by the defense and five by the prosecutor.

JUDGE CARNES: Is that three plus five or is it

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whichever is less, three or five?

MS. STARK: I think it is whichever is less.

JUDGE CARNES: The other question I had was a factual question, too. A lot of the response we have got assumes that counsel will live closer--office will be closer to the courthouse than the place of detention. Is there any empirical basis for that? I don't know that to be true.

MS. STARK: Yes. Your Honor, I do believe that is true and I think you had asked about it in relation to Montana. The reason for that is that most of the CJA panel lawyers live in the cities and close to the courthouse. So, it is very difficult to find CJA counsel at flung distances from the courthouses.

JUDGE CARNES: What about in your--in Pittsburgh?

MS. STARK: That is also true in my district. I actually cover the entire Western District of Pennsylvania, and so I have to cover the courthouse in Johnstown and Erie and Pittsburgh. I think I have three lawyers on the CJA panel in Johnstown.

JUDGE CARNES: The southerner's view of Pittsburgh is it just people and buildings everywhere, so it is not a problem.

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MS. STARK: I know. We actually have the largest rural population in the entire country that lives in Pennsylvania.

JUDGE CARNES: Densely populated rural area.

MS. STARK: Right, more people live rurally in Pennsylvania than any other state. It is a little known fact, but it is true and it does make the geography a problem in administering my office to cover the whole district.

But--and I know it is true in Montana because I know Tony Gallagher is the defender there and he has a very difficult time finding lawyers far from the major cities. If he has one or two he can count on, he is lucky. But, then that creates a problem in reverse for the lawyer out there, then, when that lawyer has to come to court; again, there is travel time involved in that direction. So, either way, it is an expensive proposition.

JUDGE DAVIS: Ms. Stark, you heard my example I gave, Judge Murtha's story he told me about how they used video conferencing to do initial appearance by consent in Vermont.

MS. STARK: Yes.

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JUDGE DAVIS: Did you talk to any of the federal public defenders there or anywhere else where they are using it? Did you get any reports from the public defenders on that?

MS. STARK: No, Your Honor. In fact, I believe that the public defender in Vermont is the new office that is situated in the northeastern part of New York. There hasn't been a Public Defender there until very recently. No, I have not spoken.

JUDGE DAVIS: Not just Vermont. I know they do this in several jurisdictions by consent, they do video conferencing for initial appearances. And I just wondered if you had talked to any of the federal public defenders where they do that?

MS. STARK: No, Your Honor. In fact, I was surprised to hear you say that that was happening in the federal court there because I didn't know of any place where there was the possibility of consent.

JUDGE DAVIS: Anybody else have questions?

JUDGE STRUBHAR: I have a real fast question. I have learned more things here this morning. I watched too many initial appearances in state courts where there has

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never been a public defender, never been a public defender available. So, now with your statements, Ms. Stark and Mr. Smith's statements, I am going--now, who is making the decision if you are one of the 50 percent who is going to appoint a public defender before initial appearance or not?

Are you doing that as the public defender? Are you saying, Western District of Pennsylvania will not appoint before initial appearance or is someone somewhere else telling you that your district is not going to be one of them?

MS. STARK: That is a really good, a very good question, and I am not sure anyone knows the answer to why the permutations and how they have developed across the country, except that I can tell you that what happened was in 1988 the judicial conference recommended that counsel be appointed before the initial appearance.

And they did that largely because of the enactment of the Sentencing Guidelines and the serious repercussions. And, in fact, Mr. Meacham's notice to the district courts is attached to Mr. Hillier's letter, telling the districts that they should now appoint counsel before the initial appearance.

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Some districts complied, some didn't. By custom, in my district, the initial appearance is used as often as not to obtain the affidavit for appointment of counsel. We have objected to that on many occasions because often the very taking of the affidavit involves statements by the defendant that may or may not incriminate him, even answering some of the questions may in fact give the government information, and that is something that I have been trying to work out since I took over as the Federal Defender during the last six years.

But it really is just a matter of custom and the preference of the district courts.

JUDGE STRUBHAR: I have one other. But the importance of that, what I was saying was that where there is counsel appointed before, there is incredible expense and delay having counsel go to the defendants; and where counsel is not appointed, districts like mine, there is an even bigger problems which is who will counsel them as to whether or not they should waive their initial appearance.

One other question that I just don't understand exactly. Again, as a former state district judge, I would have, clearly, defendants in front of me and I could go

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through their constitutional rights in at least less than 90 seconds, and then just determine who they were and hand them a piece of paper and then they were gone.

I heard a statement here as to plea negotiations at that time and all kinds of other things happening at that time, what happens if in fact they have a public defender appointed to them and then they make bond? I mean, I used to--one of my big little speeches was, "You understand, if you make bond, you have to go get your own attorney. Because the public defender only represents you if, in fact, you remain in jail."

Is that not what is happening on the federal level; even if they make bond, are you still represent them?

MS. STARK: That was one of the largest shocks to me, going from being a state public defender to being a federal public defender. In the state, you had to be on welfare and in jail to get a public defender. That is not true in the federal system, the federal courts are much more generous with supplying counsel. There are no rigid income guidelines, so there are clients on bail; although, most clients who are--they get OR bond, once--if there is no detention, or they get an unsecured bond.

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But, in fact, no, we still can represent them. And that was another earlier question--my assistants never would represent more than one person at an initial appearance, and the main reason being is I would then view that as conflicting us out of all of the cases, after that point, once we have undertaken--

JUDGE CARNES: That varies, then, nationwide because it is viewed as a necessity in some districts; particularly where they have on-duty PDs. I don't know if you just don't go deep enough to start talking about the case, maybe that is what happens--and I see Greg telling me that is Northern Georgia, too. You just get them past the initial appearance and then worry about real lawyering as they say.

MS. STARK: I make those decision before my attorneys first meet a client, so as to--and I make a lot of conflict decisions. And I guess the fact that we don't represent people at the initial helps me have time to make that kind of conflict decision.

JUDGE CARNES: One thing we have seen or are seeing more and more is there is a lot of variation.

MS. STARK: Yes.

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JUDGE CARNES: From district to district, circuit to circuit. I am not sure how that cuts, although I suspect it might cut in favor of some of these rules that you are speaking against. Because some districts might adopt them in ways that meet the needs of everybody involved in that district, with as little cost to cherished values and efficiencies as possible, and other districts might say it is just not worth it.

MS. STARK: Well, I thought about that last night and I have never, obviously, been a national legislator, so--and I assume that is a problem that all of you face all the time on this committee that I have not had to face. So I hesitate to even venture an opinion--but I could make an argument that, if you alter the process or the procedures or the alternatives for one section in a way that that will actually hurt or may hurt, that we are not really other places and that have countervailing reasons for not doing it, then in fact, maybe we are doing more a disservice than we are addressing a problem in a given area.

Secondly, I would say, Judge, that if that is true then I would urge you to limit it to situations where it is with the consent of the defendant, and that it not be--

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JUDGE CARNES: A counseled consent.

MS. STARK: Pardon me? A counseled consent, yes, and that is why we could only see--

JUDGE CARNES: That kind of connotes an initial appearance before the initial appearance.

MS. STARK: I don't know how else to do it and--Judge Strubhar, you were talking about sending the defender of the day to the institutions. The problem with that is, in Western Pennsylvania, there could be 50 institutions and I really can't man 50 institutions for initial appearance that may or may not happen there.

JUDGE DAVIS: Further questions?

[No response.]

JUDGE DAVIS: Ms. Stark, thank you very much for coming.

MS. STARK: Thank you.

JUDGE DAVIS: All right. We will break for lunch. Let's take an hour and come back at 1:30.

[Whereupon, at 12:28 p.m., the proceedings were adjourned to resume at 1:30 p.m., in executive session, which was not reported.]