

# Confrontation Clause First Principles: A Reply to Professor Friedman

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Current Confrontation Clause doctrine is confused—in its reasoning more than in its results—and Professor Friedman’s proposed alternative would eliminate much of the confusion.<sup>1</sup> Professor Friedman’s key substantive insight is that the word “witnesses” in the Clause should be construed more narrowly,<sup>2</sup> but that when the Clause does indeed apply, it lays down a bright-line rule, not a mushy balancing test.<sup>3</sup> Professor Friedman’s key methodological insight is that the Confrontation Clause is “very distinct” from ordinary hearsay doctrine.<sup>4</sup> To interpret the Clause properly, we need to look, first and foremost, to constitutional law, not evidence law. All this is, I think, exactly right.

But in crafting his proposed alternative, Professor Friedman fails to carry his substantive and methodological insights to their logical conclusions. He argues that “witnesses” under the Confrontation Clause should not encompass all out-of-court declarants, but should include all those who make accusatory statements with the understanding that those statements will later be presented to a factfinder at trial.<sup>5</sup> Substantively, his definition of “witnesses,” though cleaner and narrower than that adopted by the Supreme Court, is still a tad too broad. Methodologically, his definition unwittingly reflects residual traces of hearsay doctrine and tends to slight constitutional text, history, and structure. Professor Friedman’s proposal is vastly more coherent than current doctrine, but I think we can do better still.

Concretely, I suggest that the Clause encompasses only those “witnesses” who testify either by taking the stand in person or via government-prepared affidavits, depositions, videotapes, and the like. When Abner tells his best friend Betty—before the government has even appeared on the scene—that he saw Carl rob the liquor store, Abner is not a Confrontation Clause “witness” simply because *Betty* later takes the stand against Carl, and tells the jury what Abner told her. Within the meaning of *hearsay doctrine* and *evidence law*, Abner may

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1. See Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011 (1998).

2. See *id.* at 1029-31.

3. See *id.* at 1026-38.

4. See *id.* at 1014-22.

5. See *id.* at 1029-31, 1038-43.

indeed be an “out-of-court declarant”—or more precisely still, an “out-of-court declarant whose utterance is introduced to prove the truth of the matter asserted.”<sup>6</sup> But this is not the proper test of the meaning of the word “witness[]” in the Constitution’s Confrontation Clause. Within the meaning of both *constitutional law*—as evidenced by text, history, and structure—and *common sense*, Betty is the “witness,” not Abner.

### I. EASY CASES

Consider first the ordinary, everyday, common-sense understanding of the word “witness”: someone who testifies in the courtroom. Of course we also can refer to someone who saw the underlying out-of-court event (the liquor store stick-up) as an “eyewitness” even if that person never testifies at all. But surely this latter definition could never be a sensible interpretation of the word “witness[]” in the Sixth Amendment Confrontation Clause. If it were, Carl could demand that he “be confronted” by Abner even if the government never put Abner on the stand, never put Betty on the stand, never even knew that Abner and Betty existed—and, indeed, even if Abner had died immediately after the stick-up. This has never been the Supreme Court’s understanding, and both Professor Friedman and I agree it should not be.<sup>7</sup> For if, as we believe, the language of the Clause is narrow but absolute, it should not matter that the late Abner is unavailable for trial;<sup>8</sup> and surely it is outlandish to insist that Carl must go free at trial because the government fails to allow him to “be confronted” by the dead Abner.

Other language of the Sixth Amendment confirms that the word “witnesses” in the Confrontation Clause means in-court “witnesses” who testify rather than out-of-court (liquor store) eyewitnesses who do not. The entire Sixth Amendment is about in-court rules—about formal criminal “prosecutions” featuring a “speedy and public trial” before an in-court “jury” hearing “witnesses” and listening to the legal “counsel” of the man who stands formally “accused.”<sup>9</sup> And so the obvious idea of the Clause is that when the government places Betty on the stand and elicits her testimony to persuade the jury in the courtroom, Carl has a right to confront *Betty* face-to-face, and to cross examine *her* in front of the jury. Even if Betty recounts what Abner told her, this recounting does not make Abner a Confrontation Clause “witness.” If Abner is still alive during and after Carl’s trial, and a friend asks Abner if he (Abner) was a “witness” in the state’s “trial” and “prosecution” when Carl stood “accused” of robbery and an “impartial jury” decided Carl’s fate, Abner would no doubt say that he was not a “witness.” Indeed, he may never have spoken to any government agent about the crime and may not even know that Betty mentioned him.

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6. Cf. FED. R. EVID. 801(c).

7. See Friedman, *supra* note 1, at 1015-16, 1029-31.

8. See *id.* at 1031-38.

9. See U.S. CONST. amend. VI.

Close examination of the Constitution confirms this reading of the word “witnesses” in the Confrontation Clause. Evidence law and hearsay doctrine may treat an out-of-court declarant like Abner as a kind of “witness,” but none of the three other constitutional provisions featuring the word “witness” would treat Abner as a “witness.” Suppose Carl is on trial for treason, and Betty takes the stand and testifies that she saw Carl commit an overt act of treason, and that Abner saw it too, and told her so. This counts as one “witness,” not two, within the meaning of the Treason Clause, which demands the “Testimony of two Witnesses to the same overt Act, or . . . [a] confession in open Court.”<sup>10</sup> Here, it is obvious that unless Abner himself formally testifies, he is not a “witness.” The explicit references to “testimony” and “open court,” the placement of the Treason Clause in Article III of the Constitution (dealing with courts) and the history and policy of the Treason Clause all make clear that “witnesses” here mean those who formally testify, not out-of-court declarants like Abner.

Consider next the Fifth Amendment Self-Incrimination Clause, which provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>11</sup> Here too, the core meaning of the Clause focuses on witnesses who testify in a formal criminal court “case.” If Abner is on trial in a criminal prosecution, the government may not compel him by subpoena to take the stand and testify in his own case. But if, out of court, Abner has voluntarily confessed to his friend Betty—again, let’s assume before state agents have even appeared on the scene—then the state may indeed subpoena Betty to take the stand in Abner’s trial. Here, we would properly say that, even if Betty recounts what Abner told her out of court, she is the “witness,” not Abner. The state has not compelled *Abner* to be a “witness” against himself in his own criminal case.

Finally, consider the fraternal twin of the Confrontation Clause, the textually adjoining Sixth Amendment Compulsory Process Clause: “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.”<sup>12</sup> Surely this too focuses on witnesses who formally testify. If Carl is on trial, he may subpoena Abner and/or Betty and oblige either or both to testify in court. But it seems outlandish—just plain weird—to think that the Compulsory Process Clause somehow empowers Carl to subpoena Abner to tell his story to (private citizen) Betty without the government even present, and that Betty should somehow then take the stand and recount what Abner told her.

In short, the definition of “witnesses” that Professor Friedman proposes for the Confrontation Clause would not work as a sensible definition of the word anywhere else in the Constitution. This is, standing alone, hardly a dispositive objection, but consider a few more objections. Friedman’s somewhat elaborate

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10. U.S. CONST. art. III, § 3, cl. 1.

11. U.S. CONST. amend. V.

12. U.S. CONST. amend. VI.

definition of “witnesses” may seem to fit well with various ideas of evidence law, but it lacks deep roots in ordinary everyday English. A Constitution that speaks in the name of the people and that draws its legitimacy from ratification by the people—ordinary citizens—should be presumed to use words in their ordinary sense, absent a strong countervailing argument. Professor Friedman’s accent on out-of-court accusers like Abner rather than on formal in-court testifiers also blurs the sharp focus of the Sixth Amendment generally. And I doubt that Professor Friedman’s specific definition has deep roots in constitutional history. (He does not point to any specific early sources of his proposal to treat various out-of-court accusers like Abner as “witnesses.”) In his most interesting and elegant argument, Professor Friedman invokes the specter of a clever private accuser seeking to get his story before the jury while denying the accused’s right to confront the accuser in the courtroom,<sup>13</sup> but this clever argument sidesteps a powerful counterargument rooted in a basic principle of constitutional structure: the Constitution is mainly addressed to *state* action. The document gives Carl rights against the state, not against Abner, and seeks to prevent state misconduct and manipulation, not private trickery. The Sixth Amendment is triggered when Carl is “accused” by the state, not by Abner.

## II. HARDER CASES

So far, we have reached two tentative conclusions. First, if Betty takes the stand, she is a Confrontation Clause “witness.” Second, if Abner accuses Carl of robbery before the police arrive, but never talks to the police or testifies at trial, Abner is not a Confrontation Clause “witness” even if Betty tells the jury what Abner told her. But what about an intermediate case in which the state deposes Abner pretrial, while excluding Carl, and then tries to introduce the deposition at Carl’s trial? In ordinary English, if we asked Abner whether he was a witness against Carl, the issue seems ambiguous. Abner might plausibly say, “No, I was never a witness. I never stepped into the witness box inside the courtroom; I never saw the jury or appeared before the judge.” Or Abner might instead plausibly say,

Yes, I was a witness. The government asked me questions and I answered under oath. My precise words were transcribed by the state and given to the jury as formal testimony, prepared by the government as testimony and introduced as testimony. I was indeed a formal witness, but I testified by deposition [or affidavit, or videotape or what have you] rather than in person.

How should we resolve the ambiguity of “witnessing” by deposition?

If we consider the history of the Confrontation Clause, it is clear that it was designed to encompass—and thereby regulate—“witnessing” via government-prepared affidavits and depositions. The historical background evidence sug-

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13. See Friedman, *supra* note 1, at 1038-43.

gests that when the state first prepares and then introduces affidavits and the like, it must allow the defendant to confront and question the witness/affiant either pretrial or at the trial itself. And if we consider the other three constitutional clauses that feature the word “witness,” in each case the clause can sensibly be read to encompass those who testify via a government-prepared deposition or its equivalent. A witness who testified via affidavit was counted as a treason witness—and it was precisely to counter certain abuses associated with this form of “witnessing” that the Sixth Amendment was drafted. If the state compels criminal defendant Abner via subpoena to answer questions in a state-run pretrial deposition and then reads the deposition to Abner’s jury at trial, Abner has indeed been compelled to be a “witness” against himself in a criminal case within the meaning of the Fifth Amendment.<sup>14</sup> And if accused defendant Carl would like to depose eyewitness Abner pretrial (say, because Carl is afraid Abner might die before trial), it makes good sense to read the Compulsory Process Clause as giving Carl the right to subpoena Abner as a “witness” in this way.

When the government gets testimony from Abner pretrial, with all the trappings of testimony—under oath, in a formal setting, in answer to official questions propounded by a prosecutor or her agent—and yet excludes Carl from this setting, it has schemed to evade the limits on state action laid down by the Constitution: when the government prepares Abner’s statements as testimony, and introduces them as such to the jury, the government is estopped from claiming that Abner is somehow not a formal testifying “witness.” Precisely because a formal deposition purports to be a precise rendition of Abner’s words, under oath, a jury may treat it as the exact legal equivalent of in-court testimony—and it should be treated as such for Confrontation Clause purposes.

Police station confessions and statements are a tad trickier. Although such statements are often made without oath, they typically have other formal indicia of testimony—response to precise questions, purportedly precise rendition or transcription or taping, signature, and the like. Most important, they are prepared by the *government* for in-court use and are then used in court. Thus, they may be treated as functional depositions/affidavits, and therefore as “witnessing” under both the Fifth and Sixth Amendments.<sup>15</sup>

#### CONCLUSION

For all the reasons set out in Part II, Abner’s formal witnessing by affidavit or deposition is very different from any accusatory out-of-court statement Abner might make to Betty before the police arrive. Professor Friedman is thus right in

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14. See AMAR, *supra* note \*, at 46-88 (discussing my conception of the proper meaning of the Fifth Amendment Self-Incrimination Clause).

15. Even if a police station statement were viewed as “witnessing” for Treason Clause purposes, the statement still might not qualify under that Clause, because it was not given under oath and arguably was not, strictly speaking, “testimony” within the meaning of the Clause. See BLACK’S LAW DICTIONARY 1476 (6th ed. 1990).

viewing government-prepared depositions and the like as Confrontation Clause “witnessing”;<sup>16</sup> and he is also right to say that most ordinary out-of-court declarations should not be so viewed.<sup>17</sup> But I think he errs in suggesting that certain private accusations made out of court by one private person to another, before government agents even appear on the scene, should ever be viewed as Confrontation Clause “witnessing.” The Confrontation Clause, properly read, allows Betty to testify that Abner told her that Carl did it.

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16. See Friedman, *supra* note 1, at 1029-31.

17. See *id.* I also think he is right in his clever and elegant arguments for a forfeiture/“chutzpa” exception. See *id.* at 1029-31. For a similar suggestion in the double jeopardy context, see Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 54-56 (1995).