EXECUTIVE SUMMARY

In 2002, the Executive Office for Immigration Review (EOIR) moved televisions into one of the Chicago immigration courtrooms and began conducting hearings for detained immigrants in removal proceedings by videoconferencing. In Chicago's videoconferencing hearings, the judges are located in the downtown court, and the detainees appear from a small detention facility in a Chicago suburb.

EOIR believes that videoconferencing enhances efficiency but has not to date undertaken a study of its efficacy or fairness. Since the consequences of removal from the United States are so severe for immigrants and their families, we believed that these videoconferencing hearings deserved further examination. During the summer and fall of 2004, we observed 110 videoconferencing hearings and recorded our findings. The hearings we observed were "Master Calendar" hearings, where the Immigration Judge determines whether the removal proceeding was properly commenced, examines the charges against the immigrant, schedules future hearings, and, in some cases, orders the immigrant's removal.

Findings

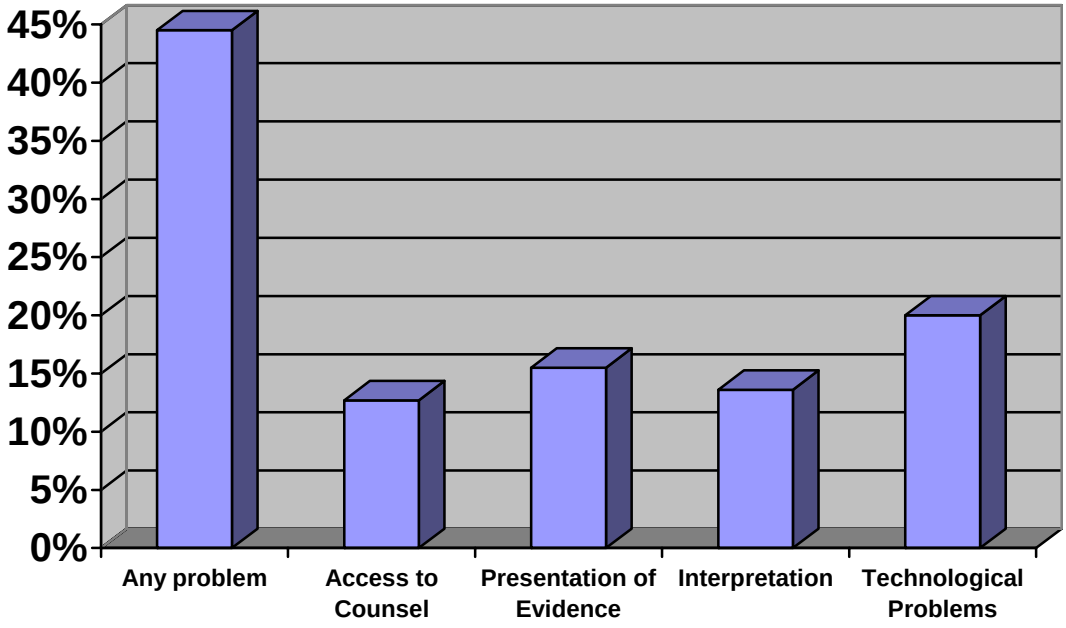
We found that videoconferencing is a poor substitute for in-person hearings. Among other problems, we observed deficiencies related to access to counsel, presentation of evidence, and interpretation. Latino immigrants appeared to fare especially poorly in videoconferencing hearings. Compounding these errors, the immigrants whom we observed had little chance to speak or ask questions, were unable to easily communicate with their attorneys (if they were represented), and typically were informed of what had happened only at the conclusion of the hearing. There was little interpretation given for the benefit of non-English speakers.

We were impeded from conducting our study by a general lack of transparency in the removal process for detained immigrants. There was no public access to the remote courtroom, and Immigration and Customs Enforcement (ICE) refused to allow us to interview immigrants who had gone through videoconferencing hearings. There is virtually no regulation or written policy, moreover, governing videoconferencing in the immigration court.

In summary, our study found the following:

- Videoconferencing in the Chicago Immigration Court is marked by the frequent occurrence of problems. In the aggregate, nearly 45% of the observed cases had one or more problems. Observers noted technical problems in one in five hearings, problems related to access to counsel in one in six hearings, problems related to the introduction of evidence in one in six hearings, and problems related to interpretation in three in ten hearings involving non-English speakers.
- A substantial number (29%) of hearings that we observed resulted in the immigrant being ordered removed or agreeing to removal, a fact that is striking given that at the time of our study, videoconferencing was not used in Chicago for final hearings on the merits.

Frequency of Problems in Master Calendar Videoconference Hearings



The Impact of Representation

- The effect of videoconferencing was more severe on detained immigrants who were unrepresented persons than those with attorneys. A disproportionate share of unrepresented persons (44%) were ordered removed compared to represented persons (17.7%).

The Impact of Language and Ethnicity

- 12% of all observed immigrants had interpretation problems, either because they lacked an interpreter when they appeared to need one, or because their interpreter misinterpreted or failed to interpret statements.

- Nearly 30% of those who had an interpreter appeared to misunderstand what was happening during the hearing, either due to misinterpretation or lack of adequate interpretation.
- Other problems were generally more prevalent for non-English speakers. 70% of non-English speakers experienced at least one problem related to videoconferencing during their hearing and almost 50% received removal orders (as opposed to 21% for English-speakers).
- The likelihood of removal increased for Latinos who did not speak English. 76% of non-English-speaking Latinos were removed, as opposed to 46% of English-speaking Latinos.

Recommendations

1. Impose a general moratorium on videoconferencing

Our findings suggest that videoconferencing in the Chicago Immigration Court undermines the fairness of the judicial process. The use of videoconferencing is marked by persistent problems with equipment, presentation of evidence, access to counsel, interpretation, and assessment of credibility. Videoconferencing is widely disliked by immigrants' attorneys. Although we were largely unable to interview detained immigrants, relevant studies suggest that videoconferencing has the potential to undermine the perception of immigrants that they are receiving fair process. If EOIR is to continue to use videoconferencing, it must seriously reform current practices. This process will take time, and while EOIR studies the issue, and undertakes comprehensive rulemaking, it is unfair to immigrants currently in removal proceedings to subject them to a defective system.

Recommendation: If videoconferencing is to remain, EOIR must improve and regulate it better. In the meantime, EOIR should impose a moratorium on the use of videoconferencing in removal hearings to prevent immigrants from being unjustly removed because of its current deficiencies.

2. Providing regulatory guidance and comprehensive training for the implementation of videoconferencing

Current EOIR regulations provide no real guidance for the use of videoconferencing and no standards as to when it should not be used. EOIR training materials focus on issues of sound quality and jurisdiction (in many cases an immigrant is held in one jurisdiction and the court is in another), ignoring most of the issues discussed in our study. Judges receive no training specific to videoconferencing. Currently videoconferencing is used inconsistently throughout the country; some courts use videoconferencing for Master Calendar and merits hearings, others just use videoconferencing for Masters Calendar hearings, and some courts do not use videoconferencing at all. Given how much is at stake, EOIR should provide more guidance to Immigration Judges. Such guidance will not only enhance the efficiency and fairness of videoconferencing, but will make its use more consistent.

Recommendation: EOIR should issue comprehensive regulations concerning videoconferencing. (Some of the recommendations that follow this one focus on areas where rulemaking is especially needed.) The judges, court personnel, and attorneys who participate in videoconferencing should be trained in these standards. EOIR should train its judges and clerks; ICE should train the trial attorneys; and bar associations should train immigrant defenders.

3. Allowing immigrants to opt out of videoconferencing in cases where their substantive rights are at stake

Literature concerning videoconferencing in other contexts suggests its power to distort credibility judgments and negatively impact "remote" litigants. This aspect of videoconferencing is especially problematic in the immigration context. Immigrants are often indigent, non-English speakers, of minority ethnicities or races. Many of them have just arrived in the United States and have no knowledge of our court system. In some cases, they have recently escaped persecution and torture. Unaccompanied immigrant minors are especially vulnerable. In general, detained clients face much greater obstacles in locating counsel, preparing, and presenting their cases than non-detained clients, who are not subject to videoconferencing. The literature that criticizes videoconferencing for marginalizing already disempowered groups seems especially apposite in this context.

Credibility, moreover, is often central to an immigrant's case and for this reason alone, courts should refrain from using videoconferencing at any hearing where an Immigration Judge reaches a decision on the merits. Lastly, our finding of disproportionate removal of non-English speaking and Latino immigrants in Master Calendar hearings is troubling and merits a study conducted in accordance with scientific principles. In a context where credibility is central and communication is at a premium, and where the subjects are often non-English speaking minorities, it seems imprudent to introduce new technologies that appear to undermine the fairness of the court process.

Recommendations:

- EOIR should issue regulations barring the use of videoconferencing in merits hearings, except by written consent of the immigrant. In cases where an immigrant agrees to have a merits hearing proceed via videoconferencing, the

court should require that the immigrant be told by the court of his/her right to an in-person hearing and sign a written waiver explaining his/her right to an in-person hearing.

- EOIR should issue regulations allowing immigrants to have in-person Master Calendar hearings for good cause. For a definition of "good cause," EOIR should look to the one adopted by the Social Security Administration for the purpose of opting out of Social Security videoconferencing hearings.[1]
- EOIR should issue regulations barring the use of videoconferencing in bond hearings, except by written consent of the immigrant. Although videoconferencing may increase the speed with which bond may be decided, which will often be of great benefit to immigrants, some bond hearings will require assessing the credibility of the immigrant. In such cases, immigrants may prefer to be physically present before the judge, and they should not be forced to accept videoconferencing.
- Finally, EOIR should bar the use of videoconferencing in the case of children, represented or not, who are especially likely to be adversely affected by videoconferencing.

4. Improving interpretation

Interpretation failures were endemic to videoconferencing hearings. Technological issues undoubtedly played a role (for instance, telephone interpreters may have been difficult for immigrants to understand), but at root was a larger problem with

[1] *See* 20 C.F.R. § 404.936(e) (2005). The Social Security Administration regulations state that the desire for an in-person hearing is in and of itself good cause for holding an in-person hearing. *See also* 38 C.F.R. § 20.700(e) (2005) (Applicants for benefits from the Veteran's Administration are permitted to appeal either in-person or by videoconferencing, according to their preference).

the culture of the hearings themselves. Many of the judges did not attach enough importance to interpretation within the court process and did not require (or allow) the interpreter to interpret much of what was said. When there was interpretation, it was uniformly consecutive rather than simultaneous (interpretation that occurs as a speaker speaks). These interpretation problems are probably not limited to videoconferencing cases but may be exacerbated by videoconferencing, which increases the propensity of an interpreter to serve the needs of the physically immediate judge (for whom interpretation is an after-thought), rather than the remote immigrant. Moreover, before videoconferencing, the lack of full in-court interpretation could be mitigated somewhat by attorneys who brought their own interpreters to sit beside the immigrant, which is impossible in videoconferencing hearings.

In addition, with videoconferencing, telephonic interpretation is "double remote," since the interpreter is in one place, the judge and attorneys in another, and the immigrant in yet another location. The interpreter cannot see anyone, and the immigrant may not even know where the interpreter's voice is coming from. It is possible that the interpreter is also unaware that the immigrant is not in the same place as the other parties. A recent study on remote interpreting with video input reveals that even under extremely good technical conditions, interpreters who are not in the same location as the speakers experience more fatigue and stress, which adversely affects the quality of their work.[2]

Recommendation: In videoconferencing hearings, interpreters should be physically located at the remote facility (Broadview) whenever possible, and should be

[2] Barbara Moser-Mercer, *Remote interpreting: Assessment of human factors and performance parameters, Joint Project International Telecommunication Union (ITU)-Ecole de Traduction et d'Interpretation, Université de Genève (ETI)*, Communicate, *at* http://www.aiic.net, Summer 2003.

trained in simultaneous interpretation. Simultaneous interpretation will be necessary for immigrants to fully understand what is happening in Immigration Court, since so much of it occurs in the form of off-the-record conversations between the judge and interpreters, where pausing for consecutive interpretation would be inconvenient. In general, interpreters must strive to interpret everything and be independent of the judge.

Where it is impossible to have interpreters physically present at Broadview, EOIR should invest in a sophisticated two-line telephonic interpretation system such as the one used in the Federal District Court in Las Cruces, New Mexico. In the federal court in Las Cruces, New Mexico, language interpreters use an interpretation system where the interpreter listens to the judge and non-English speaking litigant on separate lines through a headset, and interprets what is said on one line into the other line, where it is heard through a speakerphone by the judge or a headset by the litigant. In contrast to the traditional, "consecutive" telephonic interpretation used by the Chicago immigration court, the Las Cruces system allows for simultaneous interpretation.

5. Enabling immigrants and their representative to confer

With its capacity to impede detained immigrants from effectively presenting their case, videoconferencing makes the need for counsel acute. Detained immigrants who are held in remote facilities already are severely restricted from communicating with their attorneys. It creates a Hobson's choice for immigrants' attorneys: they can either appear at the remote site, where they will be able to confer more freely with their clients but have reduced access to the court; or they can appear in court, where they will have greater access to the judge, trial attorney, and the file, but less access to their client.

Making it easier for attorneys to confer with their client from court will help to mitigate this problem.

Recommendation: The court should establish private booths at court and at remote sites so that attorneys can have confidential discussions with their clients before, during, or after hearings.[3] EOIR should make clear that judges must permit a recess of a hearing, when requested, to give attorneys and their clients the opportunity to confer in private.

6. Improving technology

Many of the technical problems we found, such as image freezes, transmission delays, and poor sound quality, could be resolved with better technology. Larger video screens would make it easier for the parties to see each other and for immigrant detainees to feel more involved in their removal hearings. In addition, some of the interpretation problems that we observed could be ameliorated with better interpretation technology.

Improved technology might also alleviate some of the evidentiary problems we observed. In particular, we saw cases in which immigrants had not received documents or had difficulties seeing documents on the television screen. Attorneys also reported that the current fax system is riddled with problems – if, for example, they faxed ten pages to Broadview, only seven would actually arrive. Additionally, no fax machine is located in the courtroom at the remote site. The ability to present and review documents is an essential component of immigrants' due process rights, and a better facsimile system could go far towards protecting these rights.

[3] The Georgia Supreme Court, for example, mandates that in criminal proceedings where videoconferencing is used, the defendant and defense counsel shall be provided with a private means of communication. Ga. S. Ct. R. 9.2(b) (2005).

Recommendation: EOIR should invest in larger video screens and install high-quality fax machines in both the courtroom and in the courtroom at the remote site. EOIR should seek out the most sophisticated technology, especially for interpretation systems, which are essential for many immigrants. In order to find the best possible technologies, EOIR should look to other courts for models.

7. A better remote facility

Many of the problems related to the transfer of documents that we observed could be resolved if EOIR maintained better control over the remote site, including the presence of a trained clerk at the remote site. At present, ICE guards, untrained in court procedure and not employees of EOIR, essentially serve as clerks at the remote site. This is in contrast to other administrative hearings, such as videoconferencing hearings held by the Social Security Administration, where an administrative officer is stationed at the remote site. Immigrants may better understand the nature of a videoconferencing hearing where court personnel are available at the remote site, and EOIR will have better control over problems arising during the proceedings.

Additionally, ICE relies on lack of space at Broadview as grounds for excluding the public from the remote site (contrary to applicable regulations), although it claims to have plans to "reconfigure" Broadview at some indefinite time in the future. Public access is a critical safeguard in our judicial system and helps preserve the integrity of our courts. EOIR should take immediate steps to ensure that public access exists.

Recommendation: Where the remote site is an ICE detention center, EOIR should create greater independence between itself and ICE by stationing court personnel at the remote site. EOIR should take whatever steps necessary to ensure immediate

public access to Broadview, and ICE should permit immigrants to speak to the general public about their experiences with videoconferencing.

8. Notice

Notice of a removal hearing must reach the immigrant in advance of the scheduled hearing, and should provide more information about the videoconferencing hearing process itself. As a model, EOIR should look to notice of videoconferencing hearings provided by the Social Security Administration in administrative disability determination proceedings.[4] When the Social Security Administration proposes to hold a videoconferencing hearing, it sends a notice explaining to the applicant of how the videoconferencing hearing will be conducted, and advising the applicant of the right to request an in-person hearing. Accompanying the notice is a form that the applicant can fill out to request an in-person hearing.

Recommendation: EOIR should draft a separate notice for videoconferencing cases in the languages most-commonly spoken by immigrants, explaining the nature of videoconferencing hearings and the basic videoconferencing procedure, including the right of an immigrant to request an in-person hearing for good cause.

[4] *See* Social Security Administration Temporary Instruction, Video Teleconferencing Procedures (Sept. 2, 2003), Attachment 3, Sample Notice.

Conclusion

Mandatory detention and aggressive enforcement of the immigration laws have placed strains on immigration courts, creating a pressure to resolve cases more quickly and efficiently. Against this pressure must be balanced the due process rights of immigrants, who are both important contributors to our national economy and culture, and a vulnerable minority. As more than one court has observed, "virtual reality is rarely a substitute for actual presence and . . . even in an age of advancing technology, watching an event on the screen remains less than the complete equivalent of actually attending it."[5] Given this truth, special care must be taken to assure that remote immigrants are afforded the same process and treated with the same respect as if they were in court. This is so particularly in the case of detained immigrants, who have greater barriers to accessing counsel and are often housed far from family.

We found much evidence to suggest that this is not the case. Remote immigrants often experience problems with technology, the presentation of evidence, access to their attorney, or language interpretation. They are more likely to experience these problems if they do not speak English, and they are more likely to be ordered removed at their hearing if they are Latinos, especially if they are non-English speaking Latinos. In contrast, we found little evidence to support the claim that videoconferencing enhances efficiency. Given the real danger that immigrants are being hurt by videoconferencing, we propose that EOIR enter a moratorium of videoconferencing-conducted removal hearings, at least until videoconferencing hearings are improved and appropriately regulated.

[5] Rusu v. INS, 296 F.3d 316, 322 (4th Cir. 2002) (quoting United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001)).