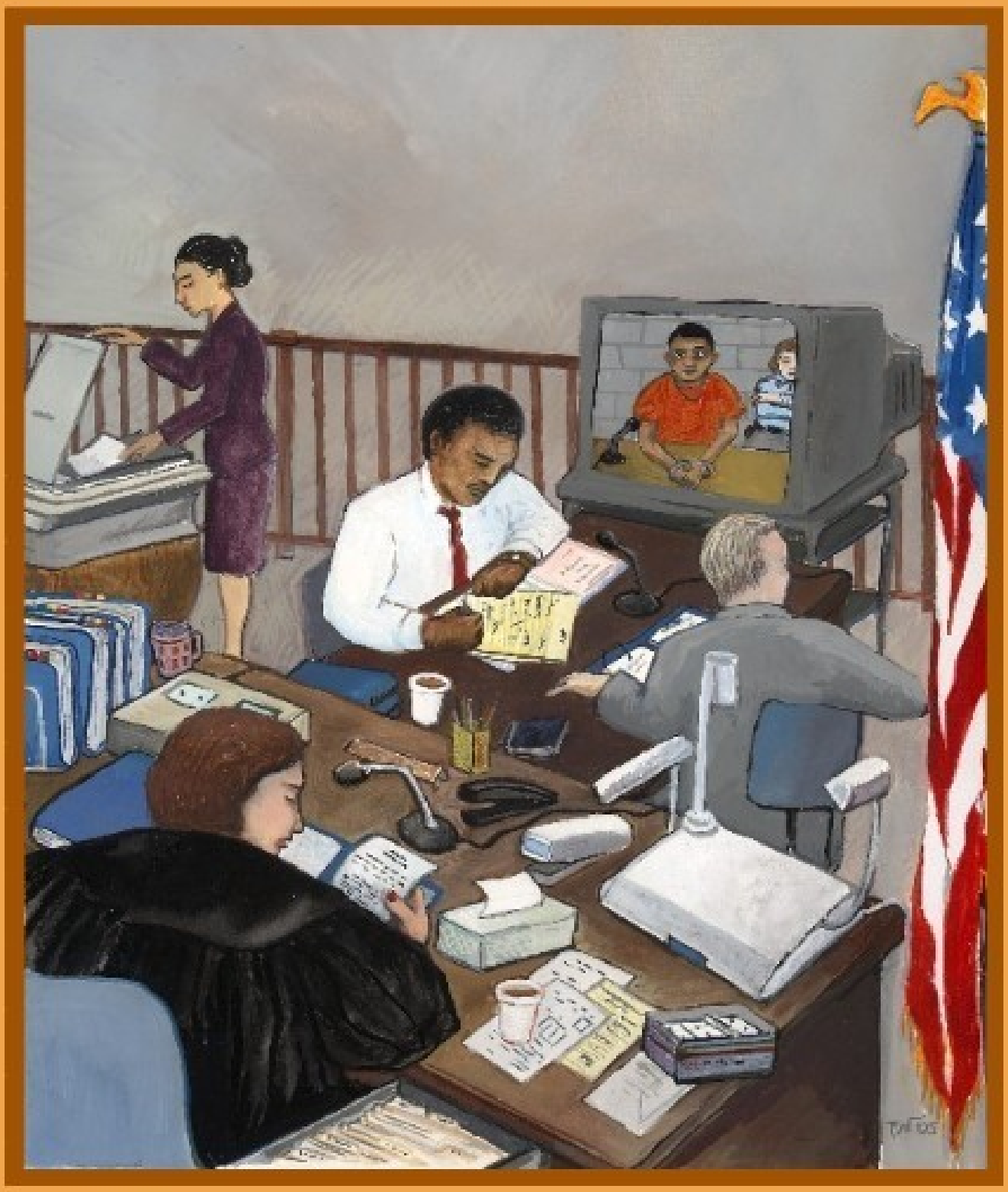
Videoconferencing in Removal Hearings:
A Case Study of the Chicago Immigration Court



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August 2, 2005

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ORGANIZATIONS

The Legal Assistance Foundation of Metropolitan Chicago (LAF) is the largest free legal services provider for civil matters in the Chicago metropolitan area. The Legal Services Center for Immigrants, a special project of LAF, provides legal representation for immigrants in removal proceedings. The Center also represents certain asylum-seekers, immigrant victims of domestic abuse and trafficking, and people applying for permanent residency or citizenship.

Authors: Julie Dona, Geoffrey Heeren, Lisa Palumbo, Diana White

The Chicago Appleseed Fund for Justice is a social impact research and advocacy organization focusing on social justice and government effectiveness issues. We seek to achieve fundamental, systemic reform by addressing policies, practices, and structures that thwart social justice and that prevent individuals from achieving their full potential. Chicago Appleseed utilizes a combination of legal and social science research, law practice, and grassroots advocacy to accomplish our goals of developing reform-minded recommendations and working for their implementation. We are the Chicago affiliate of the Appleseed Foundation.

Authors: Amanda J. Grant, Mollie G. Hertel, Malcolm C. Rich

We also wish to thank Camille Gerwin, Marissa Pines, and Rodney Tonkovic for their assistance with this project.

ACKNOWLEDGMENTS

This project involved the work of many people. We thank the students who monitored removal proceedings, the private attorneys who agreed to be interviewed, and Christopher Timberlake, who took the photographs included in the report. We are also grateful for the cooperation of the Executive Office for Immigration Review and the Chicago Immigration Court.

This report would not have been possible without the feedback of our Advisory Board members. The conclusions and recommendations in this report, however, are ours only and do not represent the views of the members of the Advisory Committee. Responsibility for any errors is also ours alone.

Finally, we are sincerely grateful to Tona Wilson for her design of the cover page of this report.

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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 videoconference 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 videoconference hearings deserved further examination. During the summer and fall of 2004, we observed 110 videoconference 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 videoconference hearings. Compounding these errors, the immigrants whom we observed had little chance to speak or ask questions, were unable to communicate easily with their attorneys (if they were represented), and typically were

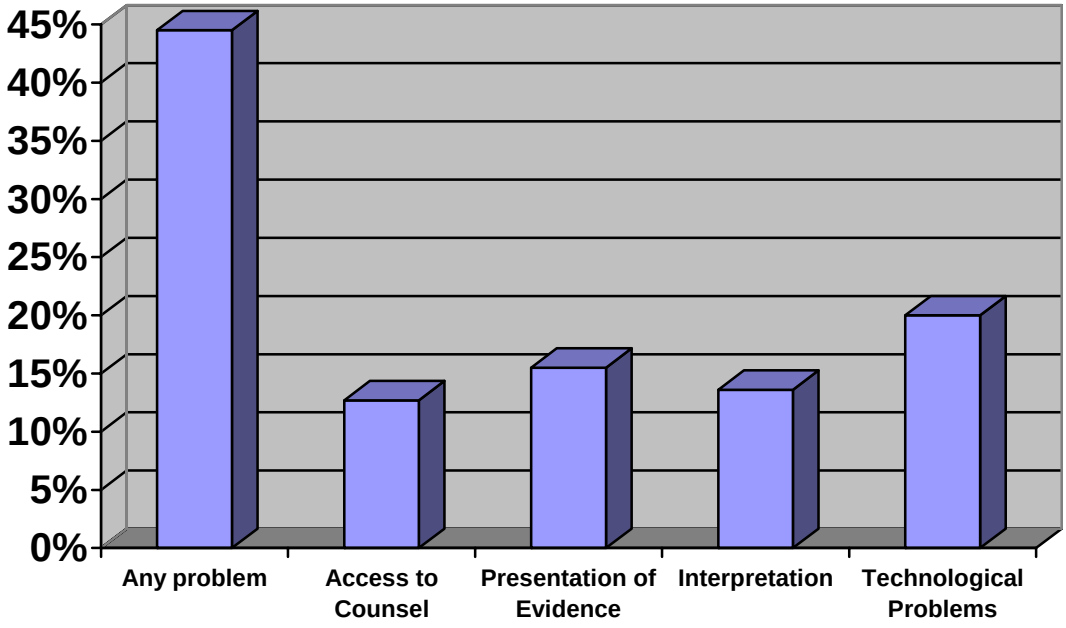
informed of what had happened only at the conclusion of the hearing. There was little interpretation given for the benefit of non-English speakers.

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 videoconference 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



See table 4.1 for the number counts for each problem.

The Impact of Representation

- The effect of videoconferencing was more severe on detained immigrants who were unrepresented than on 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.

Recommendation for a Moratorium on Videoconferencing

Given the serious problems that we observed, LAF and Chicago Appleseed suggest that EOIR impose a moratorium on videoconferencing in removal cases until it can be improved. In general, videoconference hearings should be better regulated, immigrants should be able to opt out of videoconferencing when their substantive rights are at issue, judges and attorneys should be better trained in conducting and participating in videoconference hearings, and communication and technological problems should be addressed. In light of how much is at stake in removal cases, significant changes need to be made before videoconferencing can be an acceptable substitute for in-person hearings.

INTRODUCTION

Chicago Immigration Court Videoconferencing Courtroom,
located at 55 East Monroe Street in downtown Chicago.

Videoconferencing is increasingly being used to conduct hearings in immigration court. This phenomenon is driven in no small part by the growing population of immigrants held in detention in the United States, often in locations remote from the immigration courts.[1] Immigration reforms enacted in 1996 mandated the detention of many immigrants placed in "removal" (formerly deportation or exclusion) proceedings, and the current enforcement priorities of the Department of Homeland Security (DHS) have increased the number of detained immigrants.[2] Immigrants are held in special private or government-administered detention facilities, in state or county prisons, and sometimes in local jails.[3] Confronted with a shortage of Immigration Judges and the logistical problem of transporting detained immigrants to court, the Executive Office for Immigration Review (EOIR), the agency of the Department of Justice responsible for carrying out removal proceedings, sees videoconference hearings as a solution.

To date, EOIR has not conducted a formal study of the effectiveness of videoconferencing, nor does it maintain statistics concerning videoconferencing outcomes relative to non-videoconferencing outcomes.

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[1] In fiscal year 2003, 231,500 immigrants were detained in the United States by the Department of Homeland Security. The average daily detention population was 21,133. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, CUSTOMS AND IMMIGRATION SERVICES, YEARBOOK OF IMMIGRATION STATISTICS 148 (2003). Between 1994 and 2003, the number of detainees increased at an annual rate of almost 12%, resulting in a total increase of over 171%. OFFICE OF THE INSPECTOR GENERAL, AUDIT OF THE DEPARTMENT OF JUSTICE, OFFICE OF THE FEDERAL DETENTION TRUSTEE, AUDIT REPORT NO. 05-04 (December 2004), *available at* http://www.usdoj.gov/oig/reports/OBD/a0504.

[2] *See* 8 U.S.C. 1226(c) (2005) (mandating detention of all aliens in removal proceedings who have been convicted of various broad categories of crimes). In fiscal year 2003, 1,046,422 aliens were apprehended by DHS, the majority (931,557) by Border Patrol. Yearbook, *supra*, note 1, at 146. That same year, 1,505,073 aliens were either formally removed, granted voluntary departure, or withdrew applications for admission. This represented an increase of 24% from 2002. *Id.* at 149.

[3] *See* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 9 (2004). Sixty percent of all detainees in 2003 were held in local prisons and jails and in private contract facilities. *Id.*

Nationwide, forty-six immigration courts currently use videoconferencing.[4] EOIR is pleased with its new technology and anticipates that the use of videoconferencing in immigration courts will continue to grow.[5] To date, however, EOIR has not conducted a formal study of the effectiveness of videoconferencing, nor does it maintain statistics concerning videoconferencing outcomes relative to non-videoconferencing outcomes.[6] Training materials provided by EOIR to immigration judges do not address the issue of when, if ever, it might be inappropriate to hold a hearing through videoconferencing.[7] We are unaware of any other organization that has undertaken a study of videoconferencing in immigration court. Given this backdrop, we decided to undertake a case study of videoconferencing in the Chicago Immigration Court. Although videoconferencing is used in the Chicago Court for some non-detained cases, we examined detained cases only. In light of our limited geographic reach, our goal was not to present an exhaustive survey of videoconferencing, but to assess its effectiveness in Chicago and initiate a broader dialogue concerning its use nationwide.

Over the course of the summer and fall of 2004, trained law students and other volunteers observed 110 videoconferencing Master Calendar hearings, recording their

[4] Videoconferencing is currently used in the following immigration courts: Arlington, VA; Atlanta, GA; Baltimore, MD; Batavia, NY; Bloomington, MN; Boston, MA; Bradenton, FL; Buffalo, NY; Chicago, IL; Dallas, TX; Denver, CO; Detroit, MI; Elizabeth, NJ; Eloy, AZ; El Paso, TX; Guaynabo, Puerto Rico; Harlingen, TX; Hartford, CT; Honolulu, HI; Houston, TX; Imperial, CA; Krome, FL; Lancaster, CA; Las Vegas, NV; Los Angeles, CA; Memphis, TN; Miami, FL; New Orleans, LA; New York, NY (plus Varick Street, NY; Jamaica, NY; Fishkill, NY; Ulster, NY); Newark, NJ; Oakdale, LA; Orlando, FL; Philadelphia, PA; Phoenix, AZ; San Antonio, TX; San Diego, CA: San Pedro, CA; Seattle, WA; Tucson, AZ; York, PA; and EOIR Headquarters Court in Falls Church, VA. Letter of Assistant Chief Immigration Judge Michael F. Rahill, Appendix B at page 1.

[5] Rahill letter, Appendix B at page 4.

[6] *Id.*

observations with respect to categories including language interpretation, technical quality, access to counsel, and presentation of evidence. Although we attempted to observe hearings at both ends – in the immigration court and at the remote site where the detained immigrants are being held – the office of Immigration and Customs Enforcement (ICE) strongly "recommended" to us that non-attorneys not attempt to view hearings at the remote site, since they might be "turned away due to a lack of space."[8]

To supplement our data, we interviewed immigration practitioners about their experience with videoconference hearings. We asked EOIR for permission to interview Immigration Judges. EOIR declined our request but did respond to a set of written questions we submitted concerning videoconferencing. We also attempted to interview detained immigrants but with little success. Because immigrants have no right to appointed counsel, many proceed through their removal hearing unrepresented. For this reason, we believed it was important to speak to immigrants directly about their experiences with this new system. It was difficult to contact detainees because they cannot receive incoming phone calls, and they can only place outgoing calls collect.[9] In early February 2005, we sent letters to individual detainees at the Kenosha County Detention Center (most of whom had asked to meet with us), advising them that we

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[7] *See* EOIR IMMIGRATION JUDGE BENCHBOOK, Ch. 2 (2001) at Appendix C; EOIR, *Interim Operating Policies and Procedures Memorandum No. 04-06: Hearings Conducted Through Telephone and Video Conference* (August 18, 2004) at Appendix D.

[8] Appendix E, Letter of October 6, 2004 from Deborah Achim, ICE Field Office Director for Detention and Removal, to Geoffrey Heeren. ICE is responsible for the detention and removal of non-citizens. Since the inception of videoconference proceedings in Chicago, ICE's holding facility in Broadview, Illinois, has been designated as the "remote" facility for videoconference hearings.

[9] Detention facilities within the jurisdiction of the Chicago Immigration Court also have a phone system for detainees to place free calls to providers of free legal services and consulates, called the "Pro Bono Platform." This platform has been functioning inconsistently since its installation, and much of the staff at certain facilities remains unaware, as of the writing of this study, of its existence.

would visit them if they wished. But a corporal at the facility called to inform us that we should cancel our visit because ICE would not allow it.[10]

These interviews would have provided an important supplement to our data. ICE's refusal to allow us access to detained immigrants effectively denied immigrants the opportunity to speak about an issue that profoundly affects their lives and futures – the manner in which their removal hearings are conducted. This muting of immigrants is sadly consonant with our findings, which indicate that videoconferencing may interfere with the ability of immigrants to present their cases in court and also creates a lack of transparency of the process. In particular, we found considerable evidence that videoconferencing was marred by technical problems, exacerbated interpretation difficulties, interfered with access to counsel, and impaired the presentation of evidence.

ICE's refusal to allow us access to detained immigrants effectively denied immigrants the opportunity to speak about an issue that profoundly affects their lives and futures – the manner in which their removal hearings are conducted.

[10] *See* Appendix F, Letter of February 8, 2005 from Geoffrey Heeren to Deborah Achim.

PART ONE

An Overview of Court Videoconferencing

Downtown Chicago Videoconferencing Courtroom has a document viewer (front), tape recorder (left), photocopier (far left), table for counsel (center) and two television screens.

EOIR first tested videoconferencing in 1995 as part of a pilot program in three cities: Baltimore, Maryland; Dallas, Texas; and Oakdale, Louisiana.[11] At that time, videoconferencing was by no means new to courts. It had been used in certain types of criminal proceedings since at least 1972,[12] and many state courts have recently expanded their use of videoconferencing. Most states currently confine videoconferencing to initial appearances and arraignments, [13] which are the only circumstances under which videoconferencing is explicitly permitted under the Federal Rules of Criminal Procedure.[14] Courts have generally prohibited the use of videoconferencing at trial, given the constitutional right to confront witnesses enjoyed by criminal defendants.[15]

The United States Supreme Court has declined to extend many of the constitutional protections of criminal defendants to immigrants facing removal, which it

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[11] *See* Rahill letter, Appendix B at page 1.

[12] Michael D. Roth, *Comment, Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. Rev. 185, 192 (2000).

[13] For example, the Missouri state courts use videoconferencing for initial appearances, the waiver of preliminary hearings, arraignment on an information or indictment where a plea of not guilty is entered, any pretrial or post-trial proceeding that does not permit the cross-examination of witnesses, and sentencing after a plea of guilty. Waivers from the defendant are required in Missouri only for arraignments involving guilty pleas and for sentencing after convictions. Florida allows videoconferencing to be used in arraignments, and does not require a waiver. North Dakota requires that the defendant object if she or he does not want videoconferencing to be used in the initial appearance or arraignment.

[14] Federal Rule of Criminal Procedure 43 provides that the defendant must be "present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." Some of the federal Circuit Courts of Appeal have taken "presence" to mean physical presence for purposes of Rule 43. *See* United States v. Torres-Palma, 290 F.3d 1244, 1248 (10th Cir. 2002); United States v. Lawrence, 248 F.3d 300, 303-04 (4th Cir. 2001); United States v. Navarro, 169 F.3d 228, 235-39 (5th Cir. 1999); Valenzuela-Gonzalez v. United States Dist. Court for Dist. of Ariz., 915 F.2d 1276, 1280 (9th Cir. 1990). However, Federal Rule of Criminal Procedure 5 allows a defendant to appear via remote hearing for his or her initial appearance if the defendant consents. Rule 10 allows the arraignment to be conducted via videoconferencing, with the defendant's consent.

[15] *See* Maryland v. Craig, 497 U.S. 836, 850 (1990).

does not consider to be "punishment."[16] As a result, EOIR has always taken the position that videoconferencing may be used for a hearing of any type.[17]

In 1996 Congress amended the Immigration and Naturalization Act (INA) to authorize removal proceedings to take place through videoconferencing. EOIR, in turn, issued regulations that allow videoconferencing at the unfettered discretion of the Immigration Judge.

In 1996, Congress amended the Immigration and Naturalization Act (INA) to authorize removal proceedings to take place through videoconferencing.[18] EOIR, in turn, issued regulations that allow videoconferencing at the unfettered discretion of the Immigration Judge.[19] Under the EOIR regulations, judges can use videoconferencing for preliminary hearings, called "Master Calendars", for "Individual Calendars" (hearings on the merits); or not at all. Even in the case of hearings involving children, EOIR takes the position that there should be a presumption in favor of videoconferencing.[20] While the regulations require the consent of an immigrant for a merits hearing to be held by telephone, no consent is required for a videoconferencing hearing.[21] Some individual

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[16] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

[17] See Rahill letter, Appendix B, page 1.

[18] 8 U.S.C. § 1229a(b)(2)(A) (2005) ("The proceeding may take place . . . through video conference").

[19] 8 C.F.R. § 1003.25(c) (2005) ("An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person").

[20] EOIR, *Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children* (Sept. 16, 2004), 9 Bender's Immigration Law Bulletin 1321, 1325 (2004) ("when handling cases involving unaccompanied alien child respondents, if under ordinary circumstances the hearing would be conducted by video conference, the immigration judges should determine if particular facts are present in the case to warrant an exception from the usual practice"). This policy is contrary to standards issued by the American Bar Association. *See* AMERICAN BAR ASSOCIATION, COMMISSION ON IMMIGRATION, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES 63 (2004) ("The Child's right to be present at any proceeding requires all proceedings, including both master calendar and merits hearings, to be conducted live and not via videoconference").

[21] 8 C.F.R. § 1003.25(c).

courts appear to have made informal decisions to use videoconferencing for certain types of cases but not for others. In Chicago, the court declined to use videoconferencing for merits hearings up until June 2005, when the Chicago Immigration Court seemed to abruptly shift its policy and began to use videoconferencing for all hearings, including merits hearings. Until June, detainees were driven to the Chicago Court for merits hearings.

EOIR touts the increased efficiency achieved through the use of videoconferencing.[22] To date, there has been no study evaluating the advantages and disadvantages of videoconferencing in immigration court. The one federal court to consider a challenge to the use of videoconferencing in an immigration (asylum) hearing found that the technology had the potential to skew a judge's credibility determination.[23]

Much of the literature on videoconferencing concerns its use in criminal court.[24] Commentators have focused particularly on the risk that videoconferencing may skew a court's perception of defendants or other witnesses through its failure to convey subtle nonverbal cues, its interference with ordinary eye contact, and the possibility that camera

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[22] *See* Rahill letter, Appendix B at page 4.

[23] Rusu v. INS, 296 F.3d 316, 322 (4th Cir. 2002) ("video conferencing may render it difficult for a factfinder in adjudicative proceedings to make credibility determinations and to gauge demeanor"). The court also noted the diminished effectiveness of the asylum applicant's attorney in videoconferencing cases. *Id.* at 323. However, the court ultimately denied the applicant's due process claim, finding that he could not show actual prejudice from the use of videoconferencing because the changed political climate in his native Romania defeated his claim that he would suffer persecution there.

[24] *See, e.g.*, Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology:The Remote Defendant*, 78 Tul. L. Rev. 1089 (2004); Roth, *supra* note 12; Diane M. Hartmus, *Videotrials*, 23 Ohio N.U. L. Rev. 1 (1996); Jeffrey M. Silbert, Una Hutton Newman & Laurel Kalser, *Telecommunications in the Courtroom: The Use of Closed Circuit Television for Conducting Misdemeanor Arraignments in Dade County, Florida*, 38 U. Miami L. Rev. 657 (1984); Gordan Bermant & M. Daniel Jacubovitch, *Fish Out of Water: A Brief Overview of Social and Psychological Concerns about Videotaped Trials*, 26 Hastings L.J. 999 (1975).

angles or screen size will distort perceptions of a witness's affect.[25] Criminal defendants, who lack make-up, coaching, and winning wardrobes, are unlike the photogenic persons we are accustomed to seeing on television, and this disconnect with one's expectations has the potential to impact decision-makers' perceptions negatively.[26] A defendant appearing from a remote facility (often inside a prison) may not exhibit the demeanor one expects in a courtroom.[27] Studies, moreover, confirm that people evaluate those with whom they work face-to-face more favorably than those with whom they work over a video connection.[28] Studies indicate that fact-finders empathize more with live witnesses,[29] and that decision makers are less likely to be sensitive to the impact of negative decisions on physically remote persons.[30] Finally, commentators have pointed to the possibility that videoconferencing may make it more difficult for criminal defendants to understand what is happening in court, adding yet another level of marginalization for people who are

Studies confirm that people evaluate those with whom they work face-to-face more favorably than those with whom they work over a video connection.

[25] Poulin, *supra* note 24, at 1108-10.

[26] *Id.* at 1112-13, 1127-28.

[27] *Id.* at 1125.

[28] Gene D. Fowler & Marilyn E. Wackerbarth, *Audio Teleconferencing Versus Face-to-face Conferencing: A Synthesis of the Literature*, 44 W. J. Speech Comm. 236, 245 (1980); John Storck & Lee Sproull, *Through a Glass Darkly: What Do People Learn in Videoconferences?*, 22 Hum. Comm. Res. 197, 201 (1995).

[29] Gail S. Goodman, et al., *Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 L. & Hum. Behav. 165, 195 (1998); Graham Davies, *The Impact of Television on the Presentation and Reception of Children's Testimony*, 22 Int'l J.L. & Psychiatry 241, 248 (1999)

[30] Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 Hum. Rel. 57, 63-65 (1965).

already disproportionately undereducated and indigent members of racial minorities.[31] EOIR does not acknowledge any of these issues in its materials concerning videoconferencing.[32]

[31] Poulin, s*upra* note 24, at 1134.

[32] *Supra* notes 7 and 20.

PART TWO

The Chicago Immigration Court

Downtown Chicago Videoconference Courtroom:
View from the Immigration Judge's desk.

Removal Proceedings in Chicago

In order to understand the impact of videoconferencing, readers must have a rudimentary understanding of the Chicago Immigration Court, and the laws and procedures that govern it. There are seven judges in the Chicago Immigration Court, which has jurisdiction over cases arising in Illinois, Wisconsin, and Indiana. The immigration judges hear both detained and non-detained cases.[33] The detained cases are placed on an expedited docket and are typically resolved in a matter of months, as opposed to the non-detained cases, which may take years. In Chicago, the detained cases comprise the majority of the cases that are heard through videoconferencing.[34]

Immigrants in detention within the jurisdiction of the Chicago court are principally held in five facilities located in Illinois and Wisconsin.[35] Many of them have committed crimes, but often the crimes were committed in the distant past, and were punished with suspended sentences, probation, or mere supervision. Immigrants may have been arrested when they were going through customs after leaving the country for a vacation, when they tried to become citizens, or when they applied for some other immigration benefit. Some of the people in detention have committed no crime at all, such as those who arrive at a port of entry in the United States and ask for asylum.

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[33] In February 2005, the Chicago Immigration Court placed all detained cases on the docket of a single judge, Immigration Judge George Katsivalis.

[34] Immigration Judges in Chicago handle two other types of videoconference hearings. Institutional Hearings for aliens serving a sentence of incarceration in the Illinois Department of Corrections are held at the State of Illinois Building (the Thompson Center) with the State's own videoconferencing equipment. Videoconference hearings are also used for cases arising in Kansas City, MO, and Omaha, NE.

[35] These facilities are the Dodge County Detention Center in Juneau, WI; the Kenosha County Detention Center in Kenosha, WI; the McHenry County Jail in Woodstock, IL; the Ozaukee County Jail in Port Washington, WI; and the Tri-County Detention Center in Ullin, IL. It takes approximately five to six hours to drive to the Tri-County Detention Center from Chicago.

Immigration law is arcane, often depending on counter-intuitive distinctions.[36] Persons in removal proceedings, for instance, may be either "inadmissible" or "deportable."[37] "Inadmissible aliens" are persons attempting to enter the United States for the first time or persons who have resided in the United States permanently but have left the country temporarily and seek readmission. "Deportable aliens," on the other hand, are persons physically present in the United States who have been found in an unlawful status, have applied for an immigration benefit and been denied, or have lawful status here but have been charged with having violated the immigration laws in some way. The grounds of inadmissibility and deportability are similar, but not identical. In either case, DHS can detain both inadmissible and deportable persons pending a decision on their removal. All removal hearings can be held by videoconferencing, regardless of the seriousness of the alleged immigration law violation.

In general, persons may be removed for entering without inspection, lacking proper immigration documentation, or overstaying a visa; for crimes that they have committed; for being indigent if they are at risk of becoming a "public charge"; health-related grounds, or for terrorism or other security concerns.[38]

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[36] Of this trait, Judge Kaufman (who presided over the notorious Rosenberg trial) once remarked: "We have had occasion to note the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges. In this instance, Congress, pursuant to its virtually unfettered power to exclude or deport natives of other countries, and apparently confident of the aphorism that human skill, properly applied, can resolve any enigma that human inventiveness can create, has enacted a baffling skein of provisions for the I.N.S. and courts to disentangle." Lok v. INS., 548 F.2d 37, 38 (2d Cir. 1977).

[37] *Compare* 8 U.S.C. § 1182 (general classes of aliens ineligible to receive visas and ineligible for admission; waivers of inadmissibility) *with* 8 U.S.C. § 1227 (general classes of deportable aliens).

[38] *See* 8 U.S.C. §§ 1182, 1227.

Where immigrants are entitled to a hearing before an immigration judge, removal proceedings are commenced by the service of a charging document, called a "Notice to Appear" (NTA).[39] Following service with this document, the immigrant is summoned to appear at a preliminary hearing, called a "Master Calendar" hearing. In spite of the complexity of immigration law, there is no right to counsel paid for by the government in immigration proceedings, and many immigrants are unrepresented. After one or more Master Calendar hearings, an immigrant may (if eligible for some relief) be scheduled for an "Individual Calendar," or merits hearing, which is a final evidentiary hearing.

Detained immigrants within the jurisdiction of the Chicago court often do not receive advance written notice of their first Master Calendar hearing. The Chicago Immigration Court does not send notice directly to the immigrant at his or her place of detention, but to the Chicago ICE office, which ICE lists as the immigrant's address for all detained NTAs filed with the Immigration Court. ICE asserts that it provides this notice to detained immigrants on the morning of their first court appearance, when they are awakened as early as 3:00 a.m. to be transported to the remote videoconferencing hearing room in Broadview, a Chicago suburb.[40] As a result, immigrants receive insufficient advance notice of the hearing, and no notice that their hearing will take place through videoconferencing.

The Chicago Immigration Court does not send notice directly to the immigrant at his or her place of detention. . . . As a result, immigrants receive insufficient advance notice of the hearing, and no notice that their hearing will take place through videoconferencing.

[39] 8 U.S.C. § 1229 (initiation of removal proceedings).

[40] It may seem odd for ICE to transport detainees hundreds of miles only to stop a few miles outside Chicago. It is our understanding that ICE prefers not to bring detainees these last few miles because traffic can be congested during rush hour, when detainees are transported to and from downtown Chicago.

At the Master Calendar hearing, the judge is required to advise the immigrant of his or her right to representation (at no expense to the government), the right to a continuance to obtain counsel or prepare a defense, and the availability of free legal services. The judge ideally uses the hearing to learn the basic facts of the case, whether the NTA was properly served, and what applications for relief may be filed. The immigrant will typically plead to the charges in the NTA. If the immigrant admits and concedes the charges, (s)he may indicate which applications for relief the (s)he intends to file with the Court.[41] If there are contested issues of law, the court may set a briefing schedule and schedule another Master Calendar hearing to address these issues, or the judge may decide the issue then and there. The judge often issues a ruling as to whether the immigrant is subject to removal as charged at the Master Calendar hearing. If the immigrant agrees to removal, the court may consider motions for voluntary departure or withdrawal of an application for admission.[42]

Although EOIR materials describe Master Calendar hearings as a kind of preliminary hearing, Immigration Judges often make decisions at Master Calendars that have sweeping import.

Although EOIR materials describe Master Calendar hearings as a kind of preliminary hearing, Immigration Judges often make decisions at Master Calendars that have sweeping import. First, though it is technically not part of the Master Calendar hearing, judges often hold a bond hearing immediately before or after a videoconference

[41] An immigrant may file various applications for relief from removal, which, if granted, will allow him/her to maintain or be granted lawful status to remain in the United States. *See, e.g.*, 8 U.S.C. § 1229b (providing for the "cancellation of removal" of lawful permanent residents convicted of certain crimes); 8 U.S.C. § 1158 (providing for asylum status to be granted to immigrants who have a well-founded fear of persecution). In many cases, an immigrant is eligible for relief from removal even where the Immigration Judge has found her inadmissible or deportable as charged on the NTA.

[42] *See* EXECUTIVE OFFICE OF IMMIGRATION REVIEW, IMMIGRATION JUDGE BENCHBOOK Ch. IV.III, V.II.B (2001).

Master Calendar hearing. Bond hearings are of great importance to an immigrant. Release on bond can mean the difference between having one's freedom and being able to prepare a defense, and trying to stave off removal from detention, spending months, even years in a jail cell, at a significant distance from family and counsel. Second, judges often make rulings at Master Calendar hearings that dispose of a case, including rulings on complex legal issues regarding inadmissibility or deportability, or findings that an immigrant is ineligible for any relief before the Court. Moreover, it is not uncommon for Immigration Judges to make factual findings at Master Calendar hearings, even though there is no authority for treating Master Calendar hearings as evidentiary hearings. Immigration Judges can – and do – enter final orders of removal at Master Calendar hearings.

Videoconference Hearings in the Chicago Immigration Court

The Chicago videoconference court does not look like other courtrooms. Located on the nineteenth floor of an office tower, the courtroom looks nothing like the stark and formal chambers of the nearby Dirksen Building (federal court) or the Daley Center (state court). The judge's "bench" is really just a table. The attorney for the government (the "trial attorney") and the attorney for the immigrant sit facing each other at tables adjacent to the bench, within reach of the television. The Chicago videoconference court has a copy machine, printer, and ample office supplies. A fax machine did not exist in the Chicago courtroom or at the remote site during the time we observed hearings.

A Spanish-speaking interpreter sometimes sits at the immigrant attorney's table, translating exactly what the judge tells him or her to translate and nothing more. The interpreter often serves as a de facto clerk of the Immigration Court, passing files to the

judge, printing and delivering notices or other documents to counsel, and organizing the court call for the Master Calendar hearings. When an immigrant does not speak English or Spanish, the judge typically uses a telephonic translation service. During the time that we observed hearings, the judge called the interpreter through a speaker-phone at the Chicago court. The detainee heard the interpreter at the remote site through the same microphone that picked up the speech of the judge and the attorneys; the detainee did not, in other words, have any direct telephone connection to the interpreter.[42] The judge did not advise the detainee that he was using a telephone interpreter, and the judge did not tell the interpreter that the detainee was appearing by videoconferencing. On rare occasions, interpreters who spoke languages other than Spanish were physically present for Master Calendar hearings. When in-person interpreters were used, they appeared at the Chicago court, and not at the remote site.

A television with a 27-inch screen is set up in front of the tables, and cameras project an image of the immigrant onto the television. During our observation period, spectators could watch their detained family member on another television, situated in front of the gate separating the attorneys and judge from the rest of the courtroom.[43] The judge controls the television cameras with a remote control and typically focuses on the

[42] The Chicago Immigration Court has recently begun using telephonic interpreters for Spanish-speaking immigrants too. The Court now uses, when it is functioning, a technology that feeds the interpreter's voice directly through the television.

[43] This television does not exist in the new videoconferencing courtroom, and family members can no longer see their relative at the hearing.

immigrant's upper body.[44] There is a device for projecting documents onto the television screen, so that the immigrant can view them.

At Broadview, the remote site, immigrants sit in a row of chairs in a narrow hallway while they wait for their hearings. An ICE guard escorts them one-by-one in and out of a small room with an open door, a 27-inch television, a small table and two chairs – one for the guard, and one for the immigrant. Although attorneys may, in theory, appear at Broadview to represent their clients, few choose to do so, since appearing at Broadview means sacrificing access to the court, the trial attorney, and files, and losing the ability to gauge the dynamics of the courtroom.[45] The guard sits next to the immigrant, regulates the equipment, and performs clerical duties like giving application forms to immigrants and checking the general Broadview fax machine for documents sent by the Court. From his chair, the immigrant can watch the judge, the attorneys, and the interpreter (if there is one) in Chicago.

The judge and attorneys often carry on lengthy, untranslated conversations off the record. Court proceedings are not transcribed by a stenographer but taped from a recorder controlled by the judge. The judge usually commences the hearing by asking the immigrant his or her name to assure that the equipment is functioning properly. After that initial exchange, the judge and the attorneys typically ignore the immigrant until the

[44] According to the EOIR, its videoconferencing technology has the capability to display frames within a frame, so that the court and the detainee can see how each appears to the other. We did not see the Chicago court use this function.

[45] It is so unusual for attorneys to appear at Broadview that when one attorney from the Legal Assistance Foundation of Metropolitan Chicago did so, he was at first told by the ICE guard that he was not permitted to sit with his client in front of the videoconferencing monitor.

conclusion of the hearing, when the judge will order the interpreter to translate the judge's rough summary of what has been ordered at the hearing.[46]

[46] For another description of a typical videoconferencing hearing, see Peggy Gleason, *Realty TV for Immigrants: Representing Clients in Video Conference Hearings*, 5 Bender's Immigration Bulletin No. 17 (2000).

PART THREE

Methodology

Downtown Chicago Videoconferencing Courtroom:
Clerk's desk (left) and Immigration Judge's desk (center),
with speaker phone and additional supplies.

Observed Hearings

Staff at the Legal Services Center for Immigrants at LAF trained approximately fifteen law students and volunteers on basic immigration law, the nature of Master Calendar hearings, and observation and data recording techniques. Center staff held a one- to two-hour training session for observers. Once trained, each observer attended several Master Calendar hearings conducted by videoconferencing in the "Ceremonial Court Room" at the Chicago Immigration Court. In total, observers witnessed 110 hearings (involving 112 immigrants) over the course of the summer and fall of 2004.[47] Each hearing lasted between five and forty-five minutes, and observers usually watched several hearings at a single sitting. Observers viewed Master Calendar hearings before five different judges.[48] In order to minimize any "observer effect" – that is, changes in behavior when people are aware they are being observed – we did not inform the court that the hearings were being monitored.

We would have preferred to compare these results with observed results from a control group of in-person detained Master Calendar hearings. Unfortunately, there was no control group available during this study.[49] Even with the absence of a control group,

[47] Some immigrants' cases were consolidated into a single hearing and some immigrants were observed in multiple hearings, though the observation of the same immigrant occurred randomly.

[48] These five judges were the only judges that conducted detained Master Calendar hearings by videoconferencing during the summer and autumn of 2004. One judge declined to use videoconferencing for reasons of which we are unaware, since we were barred by EOIR from interviewing judges.

[49] During the time that we conducted our court observations, very few detained Master Calendar hearings were performed without videoconferencing. The few in-person hearings that took place were adjudicated by the one judge who did not use videoconferencing for any hearings. We considered conducting observations on non-videoconference detained Master Calendar hearings in the spring of 2005, when there was a brief window of time during which detained hearings were being done in-person, but these hearings were again before only one judge, who did not conduct any hearings by videoconferencing. It would have been impossible when comparing videoconferencing outcomes to non-videoconferencing outcomes to determine which differences were attributable to videoconferencing and which to a judge's particular habits and style. We also considered using in-person, non-detained Master Calendar hearings as a control group,

we expected to collect useful information in two main areas: (a) the types and prevalence of videoconferencing-related problems during hearings, and (b) the hearing outcomes. We expected this information to allow us to assess the potential seriousness of any problems related specifically to videoconferencing proceedings.

Observers were given questionnaires to complete for each hearing.[50] They recorded basic facts (the immigrant's name, country of citizenship, the name of his or her lawyer, the alleged basis for removal, etc.). The monitoring sheet also asked observers to note issues relating to the following categories: interpretation, technical quality, access to counsel, and testimony and evidence. In each of these categories, observers were asked to specify what problems, if any, had occurred. For example, with respect to technical issues, there were checkboxes next to subcategories such as "equipment malfunction," "image freeze," and "transmission delays." Observers were asked to comment on any problems that they reported. The monitoring sheet also included questions about whether observers had noted any other issues related to hearing procedures, the judge's use of videoconferencing, and the outcome of the hearing.[51]

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but the substantial differences between cases of detained immigrants and cases of immigrants who are not detained made comparisons between these two groups inappropriate.

[50] *See* Hearing Monitoring Sheet, at Appendix G.

[51] When recording hearing outcomes, some observers did not differentiate between decisions of removal (deportation) and voluntary departure, nor did they differentiate between continuances for more Master Calendar hearings or continuances for merits hearings. Consequently, we aggregated case outcomes of removal and voluntary departure into one outcome category; we also aggregated continuances to Master Calendar and merits hearings into another category.

The results from these monitoring sheets were analyzed using SPSS statistical software. Chi-square tests were used to compare outcomes of different groups, and differences were considered statistically significant if they had a *p*-value of .05 or less.[52]

Interviews with Attorneys

Observers recorded the names of the attorneys representing immigrants, and of these, we randomly selected seventeen to contact for interviews. Volunteers contacted these attorneys and explained that we were conducting a study identifying the strengths and weaknesses of videoconferencing in detained Master Calendar hearings. Fourteen attorneys consented to give interviews, each of which lasted between 15 and 40 minutes. Ten of these attorneys worked at private firms, and four worked at nonprofit legal organizations. All attorneys interviewed had represented immigrants in two or more videoconference hearings.

We used a semi-structured interview technique: that is, interviewers asked all of the listed questions and encouraged attorneys to elaborate on responses during the interview.[53] Interviewers asked attorneys for their general impressions about the use of videoconferencing in immigration court. Interviewers then asked about the occurrence and severity of technical, interpretation, access to counsel, and evidentiary/testimonial complications. After approximately half of these interviews were completed, we revised the interview schedule to include specific questions about the potential strengths of

[52] *Statistical significance* means that the differences observed between two categories are sufficiently substantial and consistent so that it is highly unlikely that the observed differences are random. For example, there is a statistically significant difference in the likelihood of removal between represented detainees and unrepresented detainees at the .05 level. This means that there is at least a 95% probability that the different rates in removal that we observed in our study reflect a real difference in rates of removal for unrepresented detainees compared to represented detainees in general.

[53] See Appendix H for the interview schedules.

videoconferencing, particularly about whether videoconferencing increased the effectiveness, efficiency, or security of the hearing process. Attorneys indicated whether they preferred videoconferencing or in-person hearings and gave recommendations for the improvement of videoconferencing.

Efforts to Interview Detained Immigrants

We were not permitted to observe videoconference hearings at the Broadview detention center to see how they worked from the immigrants' perspective. We tried to interview immigrants about their experiences using videoconferencing, but we encountered several obstacles in contacting detained immigrants. First, we faxed letters to immigrants whose hearings we had observed, inviting them to contact us for an interview.[54] Although we sent letters to approximately 20 immigrants, we received only two calls in response. A private attorney visited the Kenosha County Detention Center in Kenosha, Wisconsin and conducted two interviews for this project. When we attempted to conduct additional in-person interviews at the Kenosha facility, ICE denied us access to the detained immigrants. ICE later notified us that under no circumstances would we be permitted to speak with immigrants whom we were not representing or considering representing.[55] We then mailed approximately 14 questionnaires to immigrants randomly selected from a recent Master Calendar docket list but received almost no responses. Again, in a majority of cases, we were unable to ascertain whether questionnaires reached the immigrants, and if they did, whether immigrants were uninterested in participating or merely unable to communicate with us.

[54] These faxed letters explicitly stated that interviews were for research purposes only.

[55] In-person meeting with Deborah Achim, Field Director of ICE, Chicago on March 18, 2005.

In total, we conducted two interviews by telephone and two in person at a detention facility, and we received two partially completed questionnaires. We considered these data when analyzing other qualitative data to see if there were major discrepancies between these immigrants' experiences with videoconference hearings and the experiences the attorneys described. We saw none; however, the limited amount of data we were able to gather prevented us from incorporating the perspectives of immigrants into this study, as we had hoped to do.

Questionnaire from the Executive Office for Immigration Review

We made a written request to the Executive Office for Immigration Review to interview Chicago Immigration Judges about their experiences with videoconferencing. EOIR denied our request but agreed to respond to written questions.[56]

Questionnaire from the Department of Homeland Security

We made a written request to the Department of Homeland Security, Office of the Chief Counsel, to answer a series of questions about the experience of trial attorneys with videoconferencing. DHS did not respond to our request.

[56] *See* Appendix B.

PART FOUR

Analysis

Downtown Chicago Videoconference Courtroom:
Seating area for the public, which includes a separate television for viewing individuals at the remote courtroom. (EOIR's current courtroom, now located elsewhere, has no television for public view of the remote site.)

Observers witnessed problems caused or exacerbated by videoconferencing technology in nearly half of the observed hearings in the Chicago Court.

Table 4.1: Problems Experienced by Immigrants During Videoconference Hearings

Type of Problem Experienced	***Count (of 110 hearings)***	***Percent of All Hearings***
Access to Counsel	14	12.7%
Evidentiary/Testimonial	17	15.5%
Interpretation	15	13.6%
Equipment/Technological	22	20%
Total Hearings with 1 or more Problems*	*49*	*44.5%*

** Because many immigrants experienced more than one type of problem during their hearings, the "total hearings with 1 or more problems" count is less than the combined row counts.*

It is important, as an initial matter, to note that substantial issues were often adjudicated in these hearings. In fact, almost 30% of the hearings we observed ended in the immigrant receiving an order of removal. We discuss our detailed findings in the following pages.

Technical Problems in the Courtroom

Equipment problems in the courtroom are common: of the hearings we observed, one in five had at least one equipment problem, usually short-term equipment malfunctions or poor sound quality (poor sound quality affected at least one in ten hearings).[57] Image freezes or transmission delays were relatively rare, although one observer reported that an entire day's worth of hearings had to be postponed because the visual images kept freezing until the system finally crashed.

There did not appear to be any strong relationship between the occurrence of technical problems and the outcome of the hearings – that is, detained immigrants who experienced equipment difficulties were not more likely to be ordered removed than those who did not. In fact, both attorneys and observers indicated that, if severe technical problems arose, the judge was likely to reschedule the hearing. The major concern expressed by attorneys about technical problems was that these mishaps slowed the process down and led to continuances that could have been avoided if the hearings had been held in person.

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[57] One or more technical equipment failure occurred in 22, or 20%, of the observed hearings.

Technical Problems at the Detention Facility

Given ICE's refusal to allow us to interview detained immigrants or observe Master Calendar hearings at Broadview, it was much more difficult to assess the adequacy of the Broadview equipment. Only one attorney interviewed said that he had ever gone to Broadview and represented a client there. This attorney said that he could only understand about 80% of what the judge and trial attorney said, although nobody in the court in Chicago seemed to perceive any communication difficulties. Observers in the courtroom did not see judges making clear efforts to ensure that the immigrant could adequately hear what was happening in court. Often the judge seemed to assume that asking the immigrant his or her name and getting an audible response was a sufficient test of the sound equipment.

Only one attorney interviewed said that he had ever gone to Broadview and represented a client there. This attorney said that he could only understand about 80% of what the judge and trial attorney said, although nobody in the court in Chicago seemed to perceive any communication difficulties.

Access to Counsel

We found that videoconferencing creates a major barrier to a detained immigrant's access to counsel. In theory, there are two potential types of access to counsel problems: (a) not being able to obtain counsel at all, and (b) having trouble making contact with an attorney who has agreed to represent the immigrant. Videoconferencing did not appear to have an adverse impact on the first type of access problem: almost all unrepresented immigrants received a list of free legal services providers and were given additional time to find an attorney if they requested it. However, videoconferencing did undermine the ability of immigrants to confer with their

representatives. The observers witnessed problems in about one in six hearings with represented immigrants.[58]

The attorneys we interviewed explained advocate-client communication in the old system to show how videoconference hearings have made communication more difficult. Because removal cases for this region (Illinois, Indiana, and Wisconsin) are heard in Chicago, immigrants routinely seek assistance from Chicago-based attorneys. ICE detains immigrants in distant facilities, however, so it is rare for Chicago lawyers to consult with their clients in person before the hearing. Under the pre-videoconferencing system, Chicago attorneys could meet with their clients in ICE visitation rooms at the courthouse immediately before the hearing began. Because ICE now brings detained immigrants to a locked facility in suburban Broadview, rather than to court in downtown Chicago, attorneys are unable to speak privately with their clients before the actual hearing. One attorney explained, "No [detainee] is kept near an attorney. My client is being held in Kenosha [Wisconsin, about 1.5 hours from Chicago], but some people are held 3 to 4 hours away. Representation is becoming more and more difficult."

Thus, the first impediment to sufficient and proper representation, once counsel is obtained, is that videoconferencing makes it more difficult for an attorney to consult with the client before the hearing.

The second common complaint is that videoconferencing makes any private consultation during the hearing impossible. Only one attorney reported being able to speak to the immigrant by seeking time to consult and asking the judge to clear the court. The vast majority of lawyers believed that private conference was impossible. Observers

[58] Access to counsel problems occurred in 14, or 12.7%, of the observed hearings.

regularly witnessed attorneys and clients becoming frustrated because they had no privacy. In one observed hearing, an attorney asked to speak to the immigrant in private. In this case, the trial attorney left the courtroom, although other court officials did not. The detention officer at Broadview did not leave the room either. Observers never saw a judge outright deny a lawyer's request to speak with the client privately.

The vast majority of lawyers believed that private conference was impossible. Observers regularly witnessed attorneys and clients becoming frustrated because they had no privacy.

In most cases, these impediments to attorney-client communication seemed to slow the hearing process. One attorney explained that he would never ask a question or do anything else in court that he and his client had not discussed beforehand. Since the lawyer and his client could not speak privately during the hearing, the lawyer would ask for a continuance if any unexpected issues arose, thus slowing the overall pace of that immigrant's case. In most cases, attorneys would ask for a continuance or for a merits hearing. In a small number of cases, observers saw the outcome of the immigrant's case actually changing in the course of a videoconferencing hearing, as in the following example:

> The immigrant decided during the hearing to just accept the charges and return to his country. At that, the attorney requested to be relieved, and the immigrant granted his wish. I wonder whether things would have gone differently if the two had a chance to speak in private.

Interpretation Problems

Language interpretation is a serious problem in the Chicago court, and videoconferencing exacerbates it. Observers witnessed interpretation problems in 14% of

all hearings and in almost 30% of hearings in which interpreters were used.[59] Because the typical observer was not fluent in the native language of the observed immigrant, Table 4.2 includes only the miscommunications that were apparent to non-speakers of the immigrant's language. For example, one observer saw the following incident occur:

> The interpreter asked [the] immigrant if the woman in Chicago on screen was his lawyer. He said yes, and the interpreter translated his answer as "no." Fortunately, the immigrant realized and fixed the error.

In situations like these, someone in court perceived and drew attention to the miscommunication. It is probable that there were other interpretation failures that went unnoticed by both courtroom participants and the observer; consequently, the true rate of interpretation problems may be substantially higher than 30%.

The vulnerability of interpreter-dependent immigrants is highlighted by two striking statistics: first, interpreter-dependent immigrants were much more likely to experience other videoconferencing-related problems during their hearings, and second, interpreter-dependant immigrants experienced a much higher rate of removal orders during Master Calendar hearings.

[59] In the 33 hearings in which interpreters were used, 9 were noticeably affected by miscommunication between the interpreter and the immigrant.

Table 4.2: Use of Interpreter and Frequency of Problems[60]

	Problems Occurred	*No Problems Occurred*	*Total*
Hearings with no interpreter (% of row total)	26 (33.8%)	51 (66.2%)	**77 (100%)**
Hearings with interpreter (% of row total)	23 (69.7%)	10 (30.3%)	**33 (100%)**
Total (% of row total)	**49 (44.5%)**	**61 (55.5%)**	**110 (100%)**

Immigrants who used interpreters were statistically more likely to have difficulties with videoconferencing. As shown above, 70% experienced problems, while only 33% of immigrants without interpreters had any trouble. The higher frequency of problems was largely due to a higher rate of interpretation difficulties, but interpreter-dependent immigrants also tended to experience more technical problems, access to counsel issues, and testimonial and evidentiary problems than immigrants who did not use interpreters. Immigrants who depended on interpreters had a statistically higher rate of experiencing evidentiary-testimonial complications, such as not having access to charging documents.

An immigrant who relied on an interpreter had a statistically higher chance of removal as well. Almost one-half of those using interpreters received removal orders during their videoconference hearing, as opposed to 23% for English-speaking immigrants.[61] This is a difficult trend to unravel – we did not have enough data to make

[60] Cited problems included technical failures, access to counsel, the presentation of evidence, and interpretation.

[61] 18 (or 23.4%) out of 77 English-speaking immigrants received removal orders, while 16 (or 48.5%) of 33 non-English speakers received removal orders.

a full assessment of the relationship between interpretation problems and removal orders. The trend is complicated by our finding that almost all of the deported immigrants were Latino in origin; thus, Latino immigrants who needed Spanish-English interpreters fared much worse than Latinos who did not.

There are a multitude of potential explanations for this phenomenon, and we cannot definitively identify the strongest one. However, one common observation may provide some insight into the relationship between removal and language. Observers consistently reported that most of what was said at the hearing was not translated for immigrants, even when immigrants did not have legal representation. It must be assumed that many immigrants who depended on interpreters had no idea of what was happening in their cases. One observer described the phenomenon this way:

Observers consistently reported that most of what was said at the hearings was not translated for immigrants, even when immigrants did not have legal representation.

> The majority of the hearing was conducted without the inclusion of the interpreter and therefore the immigrant. The immigrant was addressed at the beginning of the hearing and after the judge presented an official oral decision.

We saw that judges, trial attorneys, and even defense attorneys routinely ignored immigrants during Master Calendar hearings. This finding is consistent with the literature concerning videoconferencing, which indicates that remote litigants are less likely to participate in the proceedings than persons who are physically present in court.[62] This inattention may be detrimental to all detained immigrants, but it is particularly problematic for unrepresented detainees and non-English speakers who have no way of knowing what the trial attorney and judge are discussing.

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[62] Poulin, *supra* note 24, at 1141.

The interpreter was located in the courtroom or translated by phone (phone translation is the rule in the case of languages other than Spanish). In the few hearings we observed with non-Spanish interpreters, we saw serious problems. One observer reported that four Mandarin-speaking immigrants had a group hearing, and that it was "chaotic." On five occasions, observers reported that the court seemed reluctant to use an interpreter, even when it appeared that the immigrant could not understand everything that was said in the courtroom. One observer described the case of an Arabic-speaking immigrant: "The immigrant spoke English, but imperfectly. He told long, somewhat jumbled stories. His lawyer requested an interpreter and the judge deemed it unnecessary." In other cases, observers made comments like the following: "There was no interpreter and I got no sense that the immigrants understood what was going on."

A few attorneys discussed their frustration with the interpretation procedures. Some attorneys complained about the distance between the interpreter and the immigrant. Two attorneys mentioned that interpretation over the phone was often difficult or "messy," and others suggested having the interpreter at Broadview. However, as one attorney pointed out, most attorneys have limited foreign language abilities, and they are often not able to evaluate the effectiveness of any interpretation. We suggest that the immigrants themselves, and possibly the interpreters, would be the best sources for more information about how videoconferencing affects courtroom interpretation.

The Presentation of Evidence and Testimony

Problems concerning the presentation of evidence and testimony were relatively common in our observed hearings – about one in six immigrants experienced some type

of problem.[63] Some of these stemmed from poor use of technology. On several occasions, when the document projector was broken, the judge just held documents up to the camera. Observers reported that immigrants squinted to see documents, but could not tell whether the immigrant could actually read the text. Likewise, immigrants had difficulties presenting paperwork to the judge: in one case, "the immigrant tried to show [the] judge documents, such as [a] newspaper article of him being tortured in Ghana and [a] letter requesting him in Hong Kong, but the Judge could not see."

Not having documents in court was the evidentiary problem most commonly noted by observers. Several attorneys likewise mentioned the inability to share important legal documents between the court in Chicago and the client at Broadview. If the immigrant needed an application or form, for example, the court could not simply hand it to him. One attorney explained:

> An efficient system of communication between Broadview and the court would improve things. Often times not everything will reach the detainee. We'll say, 'I'll fax you later.' The detainee will get 10 out of 15 pages and they are usually not complete. Some way to make all this simultaneous would help.

Echoing a concern found in the literature on videoconferencing, the attorneys we interviewed worried that videoconferencing undermined the judge's ability to assess the immigrant's credibility. One attorney pointed out that split-second delays in the video transmission made the image "choppier" in a subtle way and made the immigrant appear less truthful. Others commented that emotions were less clearly communicated over videoconferencing. One attorney said, "Recently my client was nervous and his testimony came across as unreliable." Other attorneys expressed the sense that judges

[63] In seventeen, or 15.5%, of 110 hearings, immigrants experienced one or more evidentiary/testimonial problems.

were likely to feel more emotionally distant from and apathetic to an immigrant on a television screen. [64]

This sense was seconded by at least one of our observers, who was alarmed by the degree of indifference displayed by judges and attorneys in videoconference hearings:

[The immigrant] was sobbing. She looked like she was a teenager. No one even noticed how stressed out she was. Everyone was stapling exhibits and passing papers, and then it was over.

> [The immigrant] was sobbing. She looked like she was a teenager. No one even noticed how stressed out she was. Everyone was stapling exhibits and passing papers, and then it was over. . . . No one explained why [the case] was being continued. Her usual attorney wasn't there. It seems like her condition might have had more of an impact had she been in the courtroom, but no one even noticed her.

The Role of Representation

Over half of the immigrants observed were represented,[65] and we saw that whether an immigrant had an attorney or not had a statistically significant effect on the outcome of the hearing. Only 18% of represented immigrants received orders of removal, as opposed to 44% of those without representation.[66] Attorneys tended to perceive the plight of unrepresented immigrants in videoconference hearings as especially precarious. One lawyer explained, "Masters are mostly for attorneys, but if there is any interaction [between the court and the immigrant], the videoconferencing

[64] For a discussion of the role of emotion in judging, see Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 St. John's L. Rev. 23, 27-28 (1996) (construing ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 21 (1976)).

[65] The immigrants were represented in about 58% of the hearings that we observed; in 42% of the hearings, the immigrants did not have attorneys.

[66] This difference is statistically significant at the .005 level

causes big problems."[67] Unrepresented immigrants were more likely to be affected by the problems identified in our observation form. Immigrants often appeared to be ignored in court, even when they were representing themselves. Unrepresented immigrants must be able to understand the judge and the trial attorney and to speak in court, and this ability was undermined by equipment inadequacies. Further discussion with immigrants themselves would be helpful in assessing the different experiences of represented and unrepresented immigrants.

Issues of Ethnicity

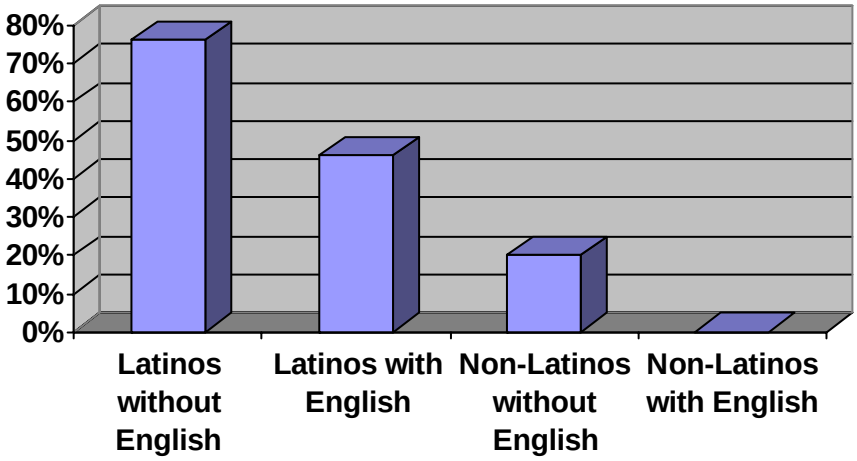
Latino immigrants had a much higher probability of being ordered removed than non-Latinos during videoconference Master Calendar hearings. About 57% of Latinos received removal orders, whereas almost no non-Latino immigrants were ordered removed.[68] There was no difference in rate of removal between Mexican immigrants and immigrants from other Latin American countries. The likelihood of removal increased if the immigrant depended on an interpreter for communication in court.[69]

[67] We did not find that videoconferencing problems were either more or less frequent among unrepresented immigrants, as compared to represented immigrants – both groups experienced a 44% occurrence of videoconferencing-related problems.

[68] 32 of 34 immigrants who were ordered removed were identified as Latino. Of the two other immigrants, one was Ukrainian, and the other's nationality was not recorded (and thus could have been either Latino or non-Latino).

[69] In fact, about 76% of Latinos who did not speak English were ordered removed, considerably higher than the 46% of Latinos who spoke English. About 39% of Latinos used interpreters compared of 15% of non-Latinos and 29% of immigrants of unknown origin.

Graph 4.1: Rate of Removal among detained Immigrants, by Ethnicity and Language

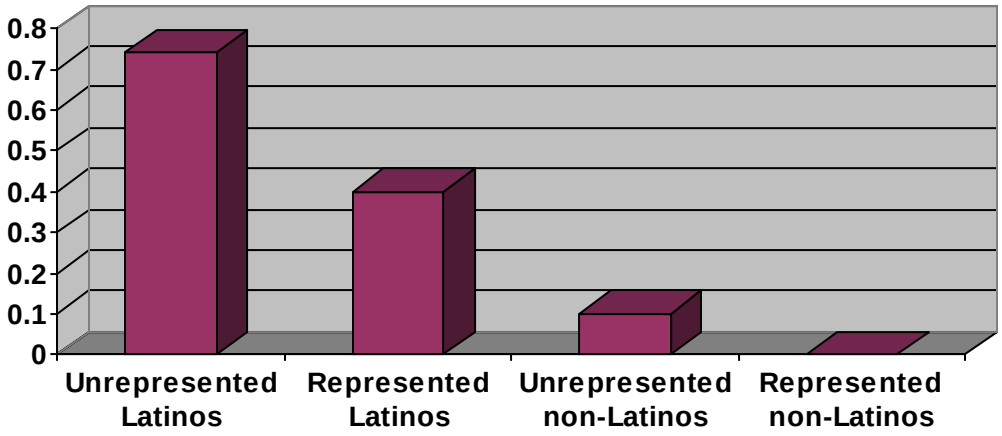


Some of the removals undoubtedly arose because immigrants agreed to their removal or voluntary departure.[70] However, many of those who received removal orders had representation and were less likely to be seeking removal.[71]

[70] An immigrant can choose not to contest the charges of inadmissibility or deportability and seek voluntary departure, agreeing to pay the expense of returning to the home country by delivering a plane ticket to ICE. An immigrant must show that (s)he merits such relief. An immigrant can also choose not to defend against charges that, if proven, will result in an order of removal.

[71] 74.1% of unrepresented Latinos received removal orders, while 40% of represented Latinos received them. Only one of ten unrepresented non-Latinos received a removal order.

Graph 4.2: Rate of Removal among Detained Immigrants, by Ethnicity and Representation



The phenomenon is troubling and, ultimately, perplexing. While Latino immigrants tended to experience interpretation problems (perhaps owing to weaker English skills) and evidentiary/testimonial problems more frequently,[72] these factors do not fully explain their much higher rates of removal. The proximity of Mexico and ease with which Mexican immigrants can re-enter the United States may explain why many Mexican immigrants are willing to concede removal, but many of the Latino immigrants ordered removed in our study were from more distant Latin American countries (such as Guatemala, the Dominican Republic, and Peru.) Further research is necessary to understand the disturbing interplay of race and ethnicity, language, and removal in the Chicago Court.

[72] Latinos made up the vast majority of those with evidentiary/testimonial problems – comprising 13 out of the 17 that had problems; 9 of those were non English-speaking.

PART FIVE

Recommendations

Downtown Chicago Videoconference Courtroom showing the public viewing television (no longer available), in addition to a third television which was simply stored in the courtroom.

After compiling our data, we shared it with a multi-disciplinary advisory board, and in consultation with the board, we developed a series of recommendations for the future use of videoconferencing in immigration court.

1. Imposing 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 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 videoconference hearings.[73]

[73] *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).

- 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 is decided (and a speedy decision 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, a class of immigrants who are especially likely to be adversely affected by videoconferencing.

4. Improving interpretation

Interpretation failures were endemic to videoconference hearings. Technological issues undoubtedly played a role (for instance, telephone interpreters may have been difficult for immigrants to understand), but the real problem was 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 they may be exacerbated by videoconferencing, because videoconferencing 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—a palliative measure that is impossible in videoconference 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.[74]

Recommendation: In videoconference hearings, interpreters should be physically located at the remote facility (Broadview) whenever possible, and should be trained in simultaneous interpretation. Simultaneous interpretation will be necessary for immigrants to understand fully what is happening in Immigration Court, since so much of what transpires takes the form of off-the-record conversations between the judge and attorneys, 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 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

[74] 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.

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. Videoconferencing 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.[75] 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.

[75] 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).

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.

Recommendation: EOIR should invest in larger video screens and install high-quality fax machines in both the courtroom and 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. Providing 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 having a trained clerk stationed there. At present, ICE guards, who are untrained in court procedure and are not employees of EOIR, essentially serve as clerks at the remote site.

In other administrative hearings, such as videoconference hearings held by the Social Security Administration, an administrative officer is stationed at the remote site. Immigrants may understand the nature of a videoconferencing hearing better 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. Provide adequate 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 videoconference hearings provided by the Social Security Administration in administrative disability determination proceedings.[76] When the Social Security Administration proposes to hold a videoconferencing hearing, it sends a notice explaining to the applicant how the

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

videoconferencing hearing will be conducted, and advising the applicant of the right to request an in-person hearing. Accompanying the notice is a form 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 videoconference hearings and the basic videoconferencing procedure, including the right of an immigrant to request an in-person hearing for good cause.

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."[77] 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 the right balance has not been achieved. Remote immigrants often experience problems with technology, 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. At the same time, 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 declare a moratorium on videoconference removal hearings, at least until hearings are improved and appropriately regulated.

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

GLOSSARY

Aggravated Felony: A statutory term encompassing a broad array of criminal offenses. If a non-citizen is deemed an "aggravated felon," he or she will be ineligible for almost all forms of relief from removal, will be removed from the United States, and will face a permanent bar to ever returning.

Alien: Any non-citizen, regardless of immigration status. The study refers generally to non-citizens as "immigrants," but within immigration law, "immigrant" is actually a category of aliens.

Asylum: Asylum is granted to non-citizens in the United States who demonstrate a well-founded fear of persecution in their native country on account of their race, religion, nationality, membership in a particular social group, or political opinion. A person granted asylum in the United States is called an "asylee," and can apply for lawful permanent residency one year after being granted asylee status.

Crime Involving Moral Turpitude (CMT): A category of crimes that can form the basis for removing an alien. Immigration law does not define this term, however, administrative decisions have interpreted a crime of moral turpitude to be any "conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality."

The Department of Homeland Security (DHS): The agency in charge of the enforcement of the immigration laws, including removal (deportation) from the United States.

Deportation Grounds: The provisions in the Immigration and Nationality Act that the Government uses to charge an alien already present in the United States with removal. Deportation grounds can range from being in the country without proper documentation to past convictions for certain criminal offenses. Aliens seeking admission to the United States are subject to different rules. See *Inadmissibility Grounds* below.

EOIR (the Executive Office for Immigration Review): An agency under the jurisdiction of the Department of Justice that is charged with administering removal proceedings. This agency includes the immigration judges and the Board of Immigration Appeals, and is housed in Falls Church, Virginia. EOIR is not part of DHS.

ICE (Immigration and Customs Enforcement): A sub-agency of DHS that is responsible for apprehending, charging, and detaining removable aliens, and removing those aliens ordered removed.

Immigration and Nationality Act (INA): The Immigration and Nationality Act, 8 U.S.C. § 1101, *et seq.*, is the statute that sets forth the immigration and nationality (citizenship) laws of the United States.

Inadmissibility Grounds: The provisions in the Immigration and Nationality Act that the Government uses to charge an alien seeking admission to the United States. Grounds of inadmissibility can range from health-related grounds to past convictions for certain criminal offenses. Aliens already present in the United States are subject to different rules. See *Deportation Grounds* above.

Individual Calendar Hearing: Also known as a merits hearing, an individual calendar hearing is a final hearing before an immigration judge to determine whether an alien in removal proceedings should be ordered removed. The hearing is a kind of trial, in which the parties may make opening and closing statements, present witnesses, and submit evidence. The immigration judge makes both legal and factual findings in a merits hearing. Unlike most trials in state and federal court, the rules of evidence are relaxed in merits hearings, and the immigration judge may sometimes question witnesses.

Lawful Permanent Resident (LPR): A lawful permanent resident is an alien who is entitled to live and work in the United States and to travel outside the United States, but who can be subject to removal proceedings if convicted of certain criminal offenses.

Master Calendar Hearing: A master calendar hearing is a hearing that occurs prior to the merits hearing, in which the immigration judge makes findings with respect to issues such as whether the charging document was properly served, whether the alien is removable as charged, and what applications for relief may be filed. At the master calendar hearing, the alien will typically plead to the charges and state which applications for relief (s)he intends to file.

Notice to Appear (NTA): The notice to appear is the charging document served upon an alien that initiates removal proceedings and that gives the alien notice of the legal and factual bases for removal.

Removal: The process by which a person is deported from or found inadmissible to the United States for violations of the immigration laws, including criminal offenses.

Undocumented Alien: An individual who has no lawful status in the United States. The individual may have originally entered lawfully but overstayed a visa, or may have originally entered without any documents and "without inspection," i.e., by evading the normal port of entry or border checkpoint where documents are checked by an immigration agent.

Appendix A

Table 1

Countries of Origin of Immigrants

Country	*Number of Immigrants*
Bahamas	1
Bosnia	1
China	7
Cuba	2
Dominican Republic	1
El Salvador	1
Georgia	1
Germany	1
Ghana	1
Guatemala	2
Honduras	3
Indonesia	1
Iraq	1
Jamaica	1
Jordan	2
Laos	1
Mexico	40
Nicaragua	1
Pakistan	3
Peru	1
Turkey	2
Ukraine	1
Yugoslavia/Serbia	1
Unclear	20
Unclear: Africa	2
Unclear: Asian	1
Unclear: Eastern Europe	2
Unclear: Latin American	11
Total	112

Table 2

Outcome of Hearing, by Region of Origin (Number Count)

	Continued or Merits Hearing Scheduled	*Removal Order or Voluntary Departure*	*Released*	*Other*	*Total*
Mexico	16	23	0	1	40
Latin America*	5	9	0	0	14
East Asia	9	0	0	0	9
South Asia	3	0	0	0	3
Africa	3	0	0	0	3
Middle East	2	0	0	0	2
Eastern Europe/ Central Asia	8	1	0	0	9
Unknown/Other	28	1	1	0	30
Total	68	34	1	1	110

* Latin America includes all of Central America, South America, and the Caribbean. Because of the high number of Mexican immigrants, Mexico is excluded from this category and listed separately.

Table 3

Outcome of Hearing, by Region of Origin (Percentage)

	Continued or Merits Hearing Scheduled	*Removal Order or Voluntary Departure*	*Released*	*Other*	*Total*
Mexico	40%	57.5%	0	2.5%	100%
Latin America*	35.7%	64.2%	0	0	100%
East Asia	100%	0	0	0	100%
South Asia	100%	0	0	0	100%
Africa	100%	0	0	0	100%
Middle East	100%	0	0	0	100%
Eastern Europe/ Central Asia	88.9%	11.1%	0	0	100%
Unknown/Other	93.3%	3.3%	3.3%	0	100%
Total	61.8%	30.9%	0.9%	0.9%	110

Appendix B

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

March 3, 2005

Geoffrey Heeren
Legal Assistance Foundation of Metropolitan Chicago
111 West Jackson Boulevard, Suite 300
Chicago, IL 60604-3502

Dear Mr. Heeren:

Thank you for your letter of January 28, 2005, enclosing a list of questions about the Immigration Court's use of video teleconferencing equipment throughout the country. Enclosed are answers to the questions you posed.

I hope this information is useful in your survey.

Yours truly,

Michael F. Rahill
Assistant Chief Immigration Judge

Enclosure

Video Tele-conferencing (VTC) in Immigration Court Hearings

Questions presented by the Legal Assistance Foundation of Metropolitan Chicago

1. **How long have courts used VTC for any purpose?**

   The Immigration Court began using video tele-conferencing (VTC) for hearings in 1995. VTC was piloted in three locations that conducted detained hearings: 1) from the Immigration Court in Baltimore, MD, to the Wicomico County, MD, jail; 2) from the Immigration Court in Dallas, TX, to the Bureau of Prisons facility in Big Springs, TX; and 3) from the Immigration Court in Oakdale, LA, to the Immigration and Naturalization Service Processing Center in Oakdale, LA.

2. **In what capacity was VTC initially used (e.g. master calendar hearings, merits hearings, as part of a pilot program in limited geographic regions, for detained cases, for cases in areas under-served by immigration judges, etc.)?**

   Although VTC was initially used primarily for master calendar hearings at these three detained settings, immigration judges were permitted and encouraged to use the equipment for merits hearings whenever appropriate.

3. **Which immigration courts currently use VTC?**

   Arlington, VA; Atlanta, GA; Baltimore, MD; Batavia, NY; Bloomington, MN; Boston, MA; Bradenton, FL; Buffalo, NY; Chicago, IL; Dallas, TX; Denver, CO; Detroit, MI; Elizabeth, NJ; Eloy, AZ; El Paso, TX; Guaynabo, Puerto Rico; Harlingen, TX; Hartford, CT; Honolulu, HI; Houston, TX; Imperial, CA; Krome, FL; Lancaster, CA; Las Vegas, NV; Los Angeles, CA; Memphis, TN; Miami, FL; New Orleans, LA; New York, NY (plus Varick Street, NY: Jamaica; NY; Fishkill, NY; Ulster, NY); Newark, NJ; Oakdale, LA; Orlando, FL; Philadelphia, PA; Phoenix, AZ; San Antonio, TX; San Diego, CA; San Pedro, CA; Seattle, WA; Tucson, AZ; York, PA; and EOIR Headquarters Court in Falls Church, VA.

4. **In what capacity is VTC used in those courts?**

   a. **Do some courts use VTC only for master calendar hearings, or for particular kinds of cases?**

      Section 240(b)(2)(A) of the Immigration and Nationality Act and 8 C.F.R. § 1003.25(c) authorize the use of VTC equipment for immigration court hearings. As the regulation states, an immigration judge "may conduct hearings through video conference to the same extent as he or she may conduct hearings in person." Therefore, immigration court policy does not distinguish between in-person and VTC hearings. They are functionally equivalent. Immigration judges, however, have discretion on a case-by-case basis to determine if special circumstances might warrant an in-person hearing. Within those parameters,

judges make determinations about their cases. Additionally, in some courts, VTC equipment is used primarily to handle a particular docket: respondents detained at a remote location; Institutional Hearing Program (prison) cases; a non-detained court in a remote location; etc.. Even then, however, circumstances might warrant that the court would also use VTC equipment for other hearings, such as covering a detail in another city.

b. Which courts are set up with the immigration judge and counsel in court, and the alien elsewhere, and which courts are set up with the immigration judge alone and all other parties elsewhere?

There are no set configurations for VTC hearings. Frequently, but not always, when the immigration judge is conducting detained hearings, most of the parties will be at the judge's location. When a non-detained hearing is conducted via VTC equipment, parties might be at either location. Likewise, for detained hearings, the immigration judge does not require counsel or witnesses to appear at either location. Rather, within parameters set by the detention center or prison, the parties to the hearing are free to determine where they will appear.

5. Can you describe the actual technology that is used for VTC? For example, how many cameras are used, and where are they located (focused on judge, attorney, detainee, documents, etc.)?

Several different brands of VTC equipment are used, but the equipment is similar. Each location has a video monitor and a camera. Typically the immigration judge controls the camera settings on either end, using a remote control device. The units permit picture-in-picture displays, so both sides can see each other and can also see how they appear to the other party. As the hearing progresses, the immigration judge will adjust the camera to focus on the appropriate person or document. Courts with VTC equipment also have fax machines to permit documents to be exchanged during the hearing. Additionally, there are supplies of forms (appeal, change of address, etc.) at the remote site.

6. Are EOIR personnel ever located at the out-of-court site (not with the judge) to monitor or facilitate that portion of the hearing?

In most instances, personnel from the Executive Office for Immigration Review (EOIR) are not located at the remote site. Frequently, however, prison personnel or detention center personnel will assist with equipment set-up, form distribution, etc. Each VTC remote site has a contact person who will intervene if technical problems develop.

7. What, if any, training materials or other memoranda are provided to immigration judges concerning the use of VTC? Could we have copies of these materials? (Note that we already have the bench book that is posted on your website.)

Judges are provided copies of the technical material (user guide, etc.) issued by the equipment manufacturer. They are trained in its operation by EOIR personnel, usually the court administrator or designated VTC coordinator in their court. Additionally, as with other training, they observe colleagues conducting VTC proceedings before they conduct such proceedings themselves. The Office of the Chief Immigration Judge has included VTC hearings as a topic during training programs for new and experienced judges. It has also issued Interim Operating Policies and Procedures Memorandum No. 04-06, "Hearings Conducted Through Telephone and Video Conference" (copy attached).

8. What, if any, formal training is conducted by EOIR for immigration judges concerning the use of VTC?

Please see the answer to Question 7.

9. Is there any EOIR standard concerning what amount of technical assistance is to be made available to immigration judges using VTC?

It is the responsibility of the EOIR court administrator (or designee) to be available at all times when VTC hearings are conducted. If technical problems arise, it is the court administrator or the designee -- not the immigration judge -- who is responsible for finding a solution. Frequently they will obtain assistance from the VTC support staffs in EOIR and the Department of Homeland Security (DHS).

10. What, if any, procedure is in place for immigration judges to express concerns regarding specific problems with the use of VTC?

As with problems during any hearing, the court administrator is the first line of response for technical concerns about VTC equipment. Working with the EOIR and DHS support staffs, the court administrators are usually able to resolve the problem. Similarly, if there are other non-technical problems (scheduling, detainee access, etc.) the court administrator can usually resolve those problems with the VTC coordinator at the remote site. Additionally, immigration judges are always free to contact the Office of the Chief Immigration Judge to discuss concerns.

11. Are immigration judges allowed, at their discretion, to opt out of the use of VTC?

Please see the answer to Question 4a. VTC hearings are one of the ways that immigration courts handle their dockets, and they are now a routine part of court practice. If a judge wishes to hold an in-person hearing in a situation where the docket typically is covered via VTC technology, the decision must be based on the particular facts of the case.

12. Does EOIR maintain statistics concerning the use of VTC, such as, but not limited to, the number of cases disposed of through VTC and the outcome? If so, would you be willing to share those statistics.

No. As noted in response to Question 4a, immigration court policy does not distinguish between in-person and VTC hearings. They are functionally equivalent. Therefore, there is no distinction for statistical purposes.

13. Has EOIR ever undertaken any study of the effectiveness of VTC? If so, could we view the study, or at least an abstract?

No formal study has been conducted. However, our experience with VTC equipment has been decidedly positive.

14. Does EOIR have access to statistics concerning the demographic breakdown of respondents/applicants in removal proceedings? If so, could we view those statistics?

There are no statistics maintained on the "demographic breakdown" of respondents and applicants in removal proceedings conducted by VTC technology. However, for statistical information generally, we recommend you consult EOIR's Statistical Year Book, available on the Internet at http://www.usdoj.gov/eoir.

15. What, if anything, can EOIR say about what it anticipates will be the role of VTC in immigration proceedings in the future? Will VTC be used increasingly or decreasingly, and in the same or different capacities?

We anticipate the use VTC equipment in immigration courts will grow. Our goal is for all courts to have the capability of conducting VTC hearings, not only to handle their own dockets, but also to be available to respond to emergencies in other courts. VTC technology enables the system to respond more quickly and effectively to many of the logistical problems posed by conducting removal proceedings nationwide. As technology improves and costs drop, the immigration courts – like other court systems throughout the nation – will use technology to further its mission.

Appendix C

CHAPTER TWO

TELEPHONIC HEARINGS / TELEVIDEO HEARINGS

I. OVERVIEW

A. GENERALLY

1. Traditionally, telephonic hearings are conducted at the Immigration Court having administrative control (Administrative Control Office) by the presiding Immigration Judge by telephone to a detail city where the INS and the alien are present. As a general rule, these are master calendar and custody/bond hearings. Contested full evidentiary hearings on the merits may be conducted telephonically only with the consent of the alien. The alien is advised of her rights and pleadings of the alien are taken on the record by a tape recorder at the Administrative Control Office. In some instances, the case may be heard and completed on the merits. In other instances, the case is scheduled for an individual hearing on a date when the Immigration Judge visits the detail city.

2. Recently, the Institutional Hearing Program (IHP) has utilized telephonic hearings more extensively in state correctional institutions. Telephonic hearings in the IHP provide several benefits, including limiting the necessity of prisoner movement, thereby enhancing security, and improving the ability of counsel to represent detained aliens. State corrections officers act as a part of the Court by distributing forms, moving aliens and in general taking direction from the Judge during the proceedings.

3. TeleVideo hearings are conducted in much the same way except that the Judge can see what is happening in the hearing room instead of relying what she hears over a speaker telephone. TeleVideo hearings are being successfully conducted on a regular basis in state correctional facilities in Florida and Texas, and expansion of the program is planned. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) specifically authorizes TeleVideo hearings. INA § 240(b)(2)(A)(iii), as added by IIRIRA.

B. ADVANTAGES

Telephonic hearings are an effective and efficient way for the Court to do business. They are cost effective as they require no travel or per diem expenditures. They enable Judges to resolve many minor or uncontested cases. Further, they help to more effectively utilize the Court's time when visiting a detail city. All cases convened by the Immigration Judge at a detail city are individual cases on the merits where a dispute exists among the parties. TeleVideo hearings can, in the Judge's discretion, eliminate the need for in-person hearings. This results in a more efficient use of a Judge's calendar time.

C. CONTROL OF PROCEEDINGS BY THE IMMIGRATION JUDGE

1. It is essential that the Immigration Judge maintain full control of the proceedings telephonically and via TeleVideo. For example, an alien that is unrepresented may be subject to prompting by others should the Judge have failed to state at the outset how the proceedings will be conducted.

    a. It is recommended that the Judge announce prior to the calling of the first case for the day what she expects of the parties on the other end. The Judge sets the tone for the proceedings on the other end. All parties on the other end must be instructed to speak loudly and clearly. A test should be done with the tape recorder both in the courtroom and on the other end to make certain that the parties are being properly recorded to avoid transcriptions that have a number of "indiscernible" notations on them.

    b. Tests of recording equipment and sound should also be conducted with TeleVideo equipment as well to make certain that an audible and accurate transcription of the proceedings is being created.

2. In the event that an order is issued or a case reset as a part of the telephonic proceeding, care must be taken to have the respondent present

for the purpose of receiving a verbal advisal of rights, including failure to appear for a subsequent hearing, failure to depart in compliance with a grant of voluntary departure, and that failure to appear for deportation. The person with the alien at the other end will have to furnish the written advisals after the Judge has given the oral advisals. Written advisals under IIRIRA are given in the English language and no other.

D. AUTHORITY

Section 240(b) of the Act, as added by IIRIRA makes specific statutory provisions for both telephonic hearings and video conference hearings. Under IIRIRA an alien does not have the right to an in-person hearing where video conferencing equipment is used.

1. Background: Exclusion, Deportation and Rescission.

   a. Prior regulations at 8 C.F.R. § 3.25(c) (1995) provided that: "An Immigration Judge may conduct hearings via video electronic media or by telephonic media in any proceeding under 8 U.S.C. §§ 1226, 1252, or 1256, except that contested full evidentiary hearings on the merits may be conducted by telephonic media only with the consent of the alien."

   b. Following sections 240(b)(2)(A) and (B) of the Act as added by IIRIRA, the regulations now distinguish between video electronic media hearings and telephonic hearings, and do not require consent to the video electronic media hearings. Therefore, for removal proceedings, video electronic media hearings are within the discretion of the Immigration Judge. The current regulation at 8 C.F.R. § 3.25(c) (2000) provides that:

      An Immigration Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien.

c. It is also important to be aware that the United States Court of Appeals for the Ninth Circuit determined in 1989 that section 242(b) of the Act required that deportation hearings be conducted with the hearing participants in the physical presence of the Immigration Judge, and that "telephonic hearings by an Immigration Judge, absent consent of the parties, simply are not authorized by statute." Purba v. INS, 884 F.2d 516, 518 (9th Cir. 1989). This view has thus been incorporated into the statute at section 240(a)(2)(B) of the Act for purposes of removal proceedings.

2. Custody/Bond

a. Regulations at 8 C.F.R. § 3.19 (2000) permits an Immigration Judge in his or her discretion, to conduct custody/bond determination by telephone.

b. It is the policy of the Office of the Chief Immigration Judge (OCIJ) to conduct all master calendar hearings in detail cities telephonically. The reasons for this are set forth in paragraph B above. Bond hearings require immediate attention and therefore are always conducted telephonically to detail cities unless the Immigration Judge is present at the detail city when a request for a custody/bond hearing is made.

E. CREDIBILITY AND DUE PROCESS CONCERNS

1. The demeanor of witnesses in telephonic hearings, despite the inability to observe the appearance of the witness, can still be judged by other factors, such as the inherent plausibility of the testimony, the tenor of the witness's voice, inconsistencies and contradictions in testimony and specificity of testimony. See, e.g., Babcock v. Unemployment Division, 696 P.2d 19, 21 (1985).

2. Although the subject of an administrative hearing has the right to give oral testimony, actual physical presence is not required. See Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970); Kansas City v. McCoy, 525 S.W.2d 336 (Mo. 1975).

II. TELEPHONIC HEARING CHECKLIST

A. PRE-HEARING (Master/Individual)

1. Proceedings may not commence until the charging document has been received by the Immigration Court having administrative control over the city or site where the hearing is to be held. See 8 C.F.R. § 3.14(a) (2000) The exception to this rule is the conducting of a bond/custody hearing which may be held before the Immigration Court receives the charging document. Note that the respondent must have been served with the charging document for all hearings except for bond/custody proceedings.

2. Prior to the telephonic hearing date the Immigration Judge should encourage parties to conduct a pre-trial conference to reach stipulations and narrow issues for consideration by the Court. This will shorten the length of the hearing.

3. Require all parties to exchange documentary evidence and other documentation.

4. Ad-hoc telephonic conferences can be useful to ensure that all parties are ready to proceed as scheduled at a detail city. This mechanism is a useful tool when a case is on a call-up calendar and before the Immigration Judge to determine if applications have been timely filed and/or a Form I-130 or Form I-751 has been properly adjudicated by INS.

B. PRIOR TO COMMENCEMENT OF HEARING

1. Ensure that the parties and the interpreter (if one is present) are all positioned so that you can hear them clearly through the speaker and they can hear you. This will also afford an opportunity to check the clarity of the connection.

2. Many connections will be made by means of a telecommunications satellite. This means that the speaker's voice must travel to the satellite for retransmission to the receiving phone. This entire procedure takes only about three seconds but it is important that you instruct the parties to pause three seconds before speaking, thus ensuring that the entire statement is recorded. Instruct the parties to identify themselves before speaking.

III. HEARING PROCEDURE

A. GENERALLY

1. Start the recorder and make the usual opening statement for the record, reciting the name and "A" number of the case, the date of hearing, your name, the names of the representatives and the name and language of the interpreter. It is also appropriate to state for the record that the hearing is being held telephonically, giving your location and the location of the parties.

2. Proceed as though conducting an in-person hearing. See Chapters Three (Bond/Custody Hearings), Four (Exclusion Hearings), Five (Deportation Hearings), and Seven (Removal Proceedings). Inform the alien of his or her right to be able to hear all of the proceedings.

3. It would then be appropriate to have the parties state any stipulations for the record.

4. Mark the exhibits. The first exhibit for the record is almost always the charging document. Mark it in evidence, stating for the record that you have done so.

5. Schedule a date for the individual hearing (next available date when you or another detail judge will be sitting in the detail city) and give notice of date, time, and location of the hearing to the parties. In certain prison settings security concerns of the institution may frown upon this practice, however, in many prison settings, hearings require adjournment because the prison custodian has failed to deliver a hearing notice. If the Immigration Judge gives out the hearing notice, then lack of notice to the alien ceases to be an issue. Unless untimely notice of a hearing is waived by the alien, the statutory time frames for notice depending on the type of proceeding must be observed, and the hearing continued if necessary.

6. In instances where an individual telephonic hearing has been held:

    a. Once the record is fully developed as to all issues and after the parties have rested, render your decision.

    b. Use the appropriate form to memorialize your decision. If you use a Form EOIR-6 or 7, you must dictate a complete oral decision unless the alien accepts your decision and waives appeal. If appropriate, enter a written form order, clearly stating the reasons for your decision. Give the alien the appeal date, have the party on the other end serve the alien with the appeal form as well as the fee

waiver form and serve copies of your order on the parties by mail.

c. It is recommended that you staple a yellow "Rush--Detained at Government Expense" card on the front of the ROP. Certain unscrupulous attorneys and representatives have been known to file appeals checking the "non-detained" box on the appeal form attempting to secure release of an alien in custody. When the ROP is properly noted as a detained case, an appeal if filed timely is placed on a fast track at the BIA.

d. Once the decision is entered, ascertain which party, if any, wishes to reserve appeal. If appeal is reserved, the forms should be given to the respondent or counsel and have the record reflect that this has been done. Then, close the hearing. It is recommended that in all settings that the Judge furnish appeal forms directly to the alien and explain the process to the alien. The BIA is now strictly imposing filing deadlines and appeals are routinely dismissed if they are not timely filed. Attorneys many times are the worst violators of following filing deadlines.

IV. POST HEARING ACTIONS

A. SERVICE OF DECISION

1. If you have entered a summary written decision on Form EOIR-6 or 7, or other form at your location, ensure that copies of the decision are mailed to the parties immediately, and that the appeal date is clearly noted on the lower left hand corner of the order. If appeal is waived, circle on the order that appeal has been waived by both parties. This has great significance as when appeal is waived, the order becomes administratively final. See Matter of Shih, 20 I&N Dec. 697 (1993); see also Matter of J-J-, 21 I&N Dec. 976 (BIA 1997).

2. If you have rendered an oral decision, you should prepare a memorandum of the decision and serve it on both parties. The ANSIR system has separate memorandum of decision forms for Exclusion, Deportation, and Removal.

B. MISCELLANEOUS

The normal clerical procedures should be completed, including the posting of the

hearing calendar, assembly of the exhibits, putting all tapes in the tape envelope, and instructing the clerk on the disposition of closed files. In the case the use of a contract interpreter, (you most likely will not have a Court interpreter present) the burden is on you to get the file to the correct place.

V. BOND/CUSTODY TELEPHONIC/TELEVIDEO HEARING PROCEDURE

A. GENERALLY

1. Application to review bond determinations must be made to one of the following Courts in this order: (1) Where the alien is detained; (2) to the Immigration Court having jurisdiction over the place of detention; (3) the Immigration Court having administrative control over the case; or (4) to the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court. 8 C.F.R. § 3.19(c) (2000).

2. The hearing need not be recorded. See Matter of Chirinos, 16 I&N Dec. 276 (BIA 1977). Generally the bond/custody hearing is not recorded unless the hearing is complicated, testimony is taken, and the Judge feels it appropriate to record. If the hearing is recorded, follow the procedure outlined in section III of this chapter.

3. Advise the alien of the nature and purpose of the proceedings and her legal rights, including service of List of Free Legal Services Providers. Verify that the alien has requested a bond/custody redetermination hearing and instruct the parties on how you wish them to proceed. It is suggested that the Judge advise the alien that the request for a redetermination of the bond/custody can result in an increase as well as a decrease in the bond amount.

4. Specifically, you should determine what the alien is seeking -- the reduction of bond and/or changes in conditions, and the reasons why reduction and/or change is appropriate. You should also determine the position of the INS and why the INS has taken that position.

5. Avoid the tendency toward a formal hearing unless you feel it critical to the decision. Bond hearings should be brief. The Transitional Period Custody Rules (TPCR) expired on October 9, 1998. As of this writing, Congress has made no provision to extend these rules. Generally, INS must pick up an alien after the conclusion of the hearing and hold the alien without bond until removal. Certain exceptions exist, however, they apply to aliens that cannot be readily removed from the United States. After

October 9, 1998, the INA as amended by IIRIRA imposes the duty of detention on the INS in almost all circumstances.

6. As an option, you may wish to use a Custody Redetermination Questionnaire that you have designed based on the factors and cases presented in this chapter.

7. Render your decision and record your order on Form EOIR-1, advising parties of appeal rights.

8. Follow regular post-trial procedures and serve the order on parties by mail.

B. APPEAL RIGHTS

1. If an appeal is taken, it is required that you make a written memorandum of your oral decision for review by the Board of Immigration Appeals.

2. No fee is required for a bond appeal.

Appendix D

U.S. Department of Justice

Executive Office for Immigration Review

Office of the Chief Immigration Judge

Chief Immigration Judge

5107 Leesburg Pike, Suite 2500
Falls Church, Virginia 22041

August 18, 2004

MEMORANDUM

TO: All Assistant Chief Immigration Judges
All Immigration Judges
All Court Administrators
All Support Staff

FROM: The Office of the Chief Immigration Judge

SUBJECT: Interim Operating Policies and Procedures Memorandum No. 04-06:
Hearings Conducted through Telephone and Video Conference

TABLE OF CONTENTS

I. INTRODUCTION

This OPPM **supersedes OPPM No. 04-04, Hearings Conducted Through Telephone Conference and Video Conference**, and sets forth new interim uniform procedures for conducting and handling Telephone and Video Conference hearings. These procedures are interim in nature, and will continue to be revised and reformulated to reflect any changes that may be necessary.

II. CREATING A CLEAR RECORD OF THE LOCATION OF THE HEARING

The regulation at 8 C.F.R. § 1003.14 provides that "[j]urisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the Service [now Department of Homeland Security (DHS)]." When a charging document is filed with an Administrative Control Immigration Court pursuant to 8 C.F.R. § 1003.11, the proceedings may actually take place in a location other than where the charging document is filed. Thus, it is important to record the actual location of the hearing.

An immigration judge who conducts a hearing either telephonically or through video conference must create a clear record of where the hearing is taking place. At the beginning of each session of the hearing, the immigration judge must identify himself or herself for the record. The immigration judge must note that he or she is sitting via telephone or video conference and identify the specific hearing location where he or she is conducting the hearing (i.e., **the location where the case is docketed for hearing**). All hearing locations are published in the Office of the Chief immigration judge's Administrative Control List. This list is made available to the public pursuant to 8 C.F.R. § 1003.11, and is available on the Executive Office for Immigration Review's (EOIR) Intranet and Internet.

In addition, the immigration judge should note the location of the respondent, the respondent's counsel or representative, if any, and counsel for the DHS, in order to create a clear and complete record. For example, at the beginning of a hearing conducted through video conference by an immigration judge in Chicago who is conducting a hearing in our Kansas City, Missouri, hearing location, the immigration judge should state: "This is Immigration Judge John Doe of the Chicago Immigration Court sitting, via video conference, at the hearing location in Kansas City, Missouri. The respondent, the respondent's attorney, and the attorney for the DHS are all present in Kansas City, Missouri." In this example the immigration judge identified Kansas City, Missouri, as the hearing location because the case was docketed for a hearing in Kansas City, Missouri. The immigration judge's participation in the hearing through video conference did not change the hearing location.

The immigration judge must follow the steps outlined above each time he or she commences a session of a hearing through video or telephone conference. In addition, the circuit law that is to be applied to proceedings conducted via telephone or video conference is the law governing the hearing location (i.e., **the location where the case is docketed for hearing**). In the example set forth above, the law applied would be that governing Kansas City, Missouri, the United States Court of Appeals for the Eighth Circuit.

III. ORDERS AND DECISIONS ISSUED IN HEARINGS THROUGH TELEPHONE OR VIDEO CONFERENCE

Any order or decision by an immigration judge in a hearing conducted through video or telephone conference where the case was docketed for a hearing location (as opposed to an administrative control court/base city court) must include the hearing location (not the administrative control court/base city court) in the caption. The order or decision must include a statement that the hearing was conducted through video or telephone conference and a statement that sets forth the administrative control court and address for purposes of correspondence and post-hearing motions.

In an effort to promote uniformity in procedures, the following examples are provided. It should be noted that the ANSIR **minute order form** will be modified to create this standard form. In the interim, the court should create a Word Perfect version of each of the minute orders (Attachment A and B) until IRM can program them into ANSIR and subsequently CASE.

1. Attachment A is an example of an ANSIR **Minute Order** issued by an immigration judge who conducted a video conference hearing for a case docketed at an administrative control court/base city court. In this example, a New York immigration judge conducted a hearing through video conference for a case docketed in Detroit, Michigan. Note that a minute order from the Detroit Immigration Court is used and at the bottom of this order there is a notation that the matter was handled through video or telephone conference.

2. Attachment B is an example of an ANSIR **Minute Order** issued by an immigration judge who conducted a video conference hearing for a case docketed at a "hearing location" (a site other than an administrative control court/base city court). In this example, a Chicago immigration judge conducted a hearing through video conference for a case docketed in Kansas City, Missouri. Note that the "hearing location" is listed in the heading and that the address for the administrative control court and a notation that the matter was handled through video or telephone conference are listed at the bottom of the order.

3. Attachment C is an example of a **Written Decision/Order/Other Memoranda** issued by an immigration judge who conducted or is conducting a video conference hearing for a case docketed at a "hearing location" (a site other than an administrative control court/base city court). In this example, a Chicago immigration judge rendered a written decision for a case docketed in Kansas City, Missouri. Note that the "hearing location" is listed in the heading, and a sentence has been inserted in the body of the decision indicating that the matter was heard by video conference followed by a footnote that sets forth the specific hearing location and the address of the administrative control for this hearing location.

4. Attachment D is an example of the appropriate **heading and caption for the Oral Decision of the Immigration Judge** where the hearing was conducted by video conference. Note that in rendering the oral decision the immigration judge must inform the transcriber to place the hearing location (the place where the case was docketed for hearing) in the heading. The immigration judge will also instruct the transcriber to state in the body of the decision that the matter was heard by video conference at the hearing location (i.e., the location where the case was docketed for hearing) followed by a footnote. The footnote should state that "all correspondence and documents pertaining to the case must be filed with the administrative control court" at the listed address. However, if this hearing was conducted by video conference for a case docketed at an administrative control court/base city court, it would not be necessary to include the above mentioned footnote.

IV. CONCLUSION

This memorandum has been issued in an effort to promote efficiency of operations and uniformity of procedures in handling or conducting immigration hearings through video or telephone conference.

Michael J. Creppy
Chief Immigration Judge

Attachments

ATTACHMENT A

IMMIGRATION COURT
1155 BREWERY PARK BLVD., STE 450
DETROIT, MI 48207

In the Matter of: (Name) File No: A XX-XXX-XXX

Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on May 28, 2004. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____ or in the alternative to_____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to_____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternate order of removal to _____.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal was ( ) granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( )denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision

[ ] Proceedings were terminated.

[ ] Other _____

Date:
Hearing Conducted by: Telephone Conference/Video Conference
Appeal: Waived/Reserved Appeal Due By: _____

_____
(Name)
Immigration Judge

ATTACHMENT B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HEARING LOCATION: KANSAS CITY, MISSOURI

In the Matter of: (Name) File: A XX-XXX-XXX

Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of oral decision entered on _____. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to _____.
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.
[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of _____ with an alternative order of removal to _____.
[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for withholding/deferral of removal under Article 3 of the Torture Convention was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for cancellation of removal under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for cancellation of removal under Section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's application for a waiver under Section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn ( ) other.
[ ] Respondent's application for adjustment of status under Section 212c of the INA was ( ) granted ( ) denied ( ) withdrawn . If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's status was rescinded under Section 246.
[ ] Respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission, respondent is to post a $ _____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the immigration judge's oral decision.
[ ] Proceedings were terminated, without prejudice.
[ ] Proceedings were administratively closed.
[ ] Other: _____

Date:
Administrative Control Court: Immigration Court, 55 East Monroe, Suite 1900, Chicago, IL 60603
Hearing conducted by: Telephone Conference/Video Conference
Appeal: WAIVED/RESERVED (A/I/B)
APPEAL DUE BY: _____

_____
(Name)
Immigration Judge

ATTACHMENT C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HEARING LOCATION: KANSAS CITY MISSOURI[1]

DECISION OF THE IMMIGRATION JUDGE

The hearing in this matter was conducted in Kansas City, Missouri, through video conference pursuant to INA § 240(b)(2)(A)(iii).

[1] Pursuant to 8 C.F.R. § 1003.11, all correspondence and documents pertaining to this case must be filed with the administrative control court: Immigration Court, 55 East Monroe, Room 1900, Chicago, Illinois 60603.

ATTACHMENT D

TRANSCRIBER CAPS AND CENTERED AT THE TOP OF THE PAGE PLEASE CREATE THE FOLLOWING HEADING:

UNITED STATES DEPARTMENT OF JUSTICE - NEXT LINE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW - NEXT LINE
IMMIGRATION COURT - NEXT LINE
HEARING LOCATION: KANSAS CITY, MISSOURI

PLEASE COME DOWN THREE SPACES AND CREATE THE FOLLOWING CAPTION:

IN THE MATTER OF:	)	
	)	FILE NO.: A XX-XXX-XXX
	)	
(NAME)	)	
RESPONDENT	)	

TRANSCRIBER THE TITLE WILL BE AS FOLLOWS: BOLD CAPS AND CENTERED "THE ORAL DECISION OF THE IMMIGRATION JUDGE"

Proceed to dictate your Oral Decision and be certain that the first paragraph includes the following statement; "The hearing in this matter was conducted in Kansas City, Missouri, through video conference pursuant to INA § 240(b)(2)(A)(iii)". Then remind the transcriber to add the following footnote "Pursuant to 8 C.F.R. § 1003.11, all correspondence and documents pertaining to this case must be filed with the administrative control court" and be certain to list the address.

The body of the decision should then proceed as usual.

Appendix E

Office of Detention and Removal Operations
U.S. Department of Homeland Security
10 West Jackson Blvd.
Chicago, IL 60604

U.S. Immigration and Customs Enforcement

October 6, 2004

Geoffrey Heeren
Legal Services Center for Immigrants
111 West Jackson Blvd.
Chicago, Illinois 60604

Re: Public Access to Broadview

Dear Mr. Heeren:

I received your letter dated September 27, 2004 regarding access to the Broadview Staging Area in Broadview, Illinois. At no time has my office indicated that these hearings cannot be viewed by the public. Those hearings can be viewed from 55 West Monroe at the Executive Office of Immigration Review.

We have made accommodations for attorneys to be with their clients, at the Broadview Staging Area during hearings, if they wish to do so. Your office has indicated that they believe this accommodation should be made for all members of the general public. This presents a problem, as the Broadview video teleconferencing area can only accommodate a limited number of people. It is recommended that members of the general public view the hearings from the 55 East Monroe courtroom, rather than the Broadview location, in order to avoid being turned away due to lack of space.

It is my position that we have not interfered with the general public's ability to view the hearings, and we are not in violation of 8 C.F.R.

Sincerely,

Deborah Achim

Deborah Achim

Appendix F

LEGAL ASSISTANCE FOUNDATION
OF METROPOLITAN CHICAGO

111 West Jackson Boulevard
Suite 300
Chicago, Illinois 60604-3502
312.341.1070 Phone
312.341.1041 Fax
312.431.1206 TDD
www.lafchicago.org

Writer's Direct Number: (312) 347-8398

February 8, 2005

Deborah Achim
Field Office Director for Detention and Removal Operations
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
10 W. Jackson Blvd.
Chicago, IL 60604

Re: Interviews with Detainees Concerning Video-teleconferencing

Dear Ms. Achim:

I am writing to you concerning your decision of February 3, 2005 to deny my office access to speak with detainees concerning issues of public concern and private legal representation. Because neither you nor Officer Glen Triveline have returned my phone calls, I am unable to determine the precise contours of your decision. It is my hope that you have not issued a blanket denial of our access to detainees concerning these matters, or, perhaps, that this issue has arisen through a simple misunderstanding. In the absence of a telephone dialogue, however, I can only write you this letter, explaining my understanding of the matter, and formally requesting a response.

In the days preceding February 4, 2005, a representative of my office, Julie Dona, faxed letters to fourteen detainees at the Kenosha County Detention Center. Of these fourteen, five were persons who had previously contacted our office seeking legal representation, whose cases we had declined. These letters stated simply that on February 4, 2005, Ms. Dona and Ms Jessica Price of our office would be present at the Kenosha County Detention Center, to speak with detainees concerning their experience with the use of video-teleconferencing (VTC) in the Chicago Immigration Court. The five letters stated explicitly that the detainees need not meet with Ms. Dona, if they did not wish to do so, but that she might request to see them, and if they wished, they could meet with her.

The other nine letters were sent to potential clients who had requested to speak with our office concerning a variety of issues, including the conditions of detention, and VTC. In addition, I myself faxed letters to a current client of mine, and a person whose case I was considering for representation, confirming that both of them had orally agreed to speak with Ms. Dona concerning VTC, and other issues.

On February 3, 2005, Ms. Dona received a telephone call from Kurt Mikutis at the Kenosha County Detention Center, relaying a message he had received conveying your order that we be prohibited from speaking with detainees the next day. According to Corporal Mikutis, your explanation was that you had previously denied my written request to speak with detainees concerning VTC.

I have never made any request to you, orally, or in writing, to speak with detainees concerning VTC. I have made a number of requests to you concerning other matters. I sent a letter to you on September 27, 2004, confirming your statement, during our meeting of September 9, 2004, that our office could not view the portion of VTC hearings held at Broadview. I sent another letter to you on November 22, 2004, concerning your decision that my office cannot distribute information to detainees concerning obtaining legal representation from our office (to which you still have not responded). I have made a written request to the Executive Office of Immigration Review (EOIR) that we be allowed to speak with immigration judges concerning VTC, a request that EOIR has denied. But never have I asked you or anybody else to speak with detainees.

The reason I have not asked for permission to speak with detainees is that I do not believe such a request is required. Prior to attempting to arrange these meetings with detainees, I reviewed the DHS Detention Standards and called Kenosha to inquire as to their visitation policy. I found no reference to nor was I told of any requirement that attorneys and their assistants obtain advance approval for visits. However, if given our circumstances, you are now requiring that we seek permission for our visits, we will gladly comply. We understand that Kenosha may have certain operational constraints, and we would be happy to work with you or the staff of Kenosha to ensure that our visits are not unduly burdensome upon them. Indeed, I can assure you that although we sent faxes to a significant number of persons, had Ms. Dona and Ms. Price been allowed to visit Kenosha, they would have comported themselves in a very professional manner, and would not have insisted on meeting with persons beyond the capacity of Kenosha to accommodate.

Although we have no wish to interfere with the functioning of Kenosha, persons in detention do have a right to visitors. We recognize that you may reasonably regulate the time and manner of these visits. You cannot, however, regulate the subject matter, which is protected by the First Amendment. The issues that we were prepared to discuss with these clients, moreover, were not limited to VTC, and were at least partially encompassed by the attorney-client relationship.

I ask that you please contact me at your earliest convenience, so that I can better understand your position, and so that my office can determine what next steps may be necessary to allow us to speak with detainees.

Sincerely,

Geoffrey Heeren
Senior Attorney

cc: Karen Lundgren
Deputy Chief Counsel
U.S. Immigration and Customs Enforcement

Appendix G

VTC Hearing Monitoring Sheet

Name of Monitor: _____ E-mail: _____
Date _____ Immigration Judge _____
Where did you observe? (Check one) 55 E. Monroe _____ Broadview _____
Case # ("A #") __ __ - __ __ __ __ __ __ Name of Immigrant _____
Immigrant's country of citizenship _____
Respondent Represented? Y/N:_____
If Yes: Attorney name: _____ Where was lawyer for hearing? (Chicago) (Broadview)
If No: Pro se? Y/N: _____ Does respondent want/need a lawyer? Y/N: _____
Reason immigrant is in deportation proceedings _____

Outcome of hearing (continued, ordered removed, applied for relief and scheduled for merits hearing) If continued, why and for how long? _____

Problems *(Check all that apply. Space for explanation, is provided below each category.)*

INTERPRETATION PROBLEMS:

Interpreter used? _____ Language: _____ Location Interpreter: (Chi) (Brdvw) (Phone)
Interpretation problems, Y/N: Yes _____ No _____

- Immigrant has difficulty understanding interpreter, or the reverse _____
- Interpreter signals for immigrant to stop talking but immigrant does not see the signal and continues talking _____
- *(when at Broadview)* Interpreter does not appear on immigrant's television screen _____
- Other _____
- Describe or elaborate on any answers checked above. _____

TECHNICAL PROBLEMS:

Technical issues, Y/N: Yes _____ No _____

- Equipment (television or video camera) malfunction _____
- Image freeze on television screen _____
- Transmission delays _____
- Poor sound quality _____
- Other _____
- Describe or elaborate on any answers checked above. _____

ACCESS TO COUNSEL PROBLEMS:

Immigrant's access to counsel impeded, Y/N: Yes _____ No _____

- Immigrant failed to receive legal services list _____
- VTC process impeded immigrant from finding an attorney and now, immigrant is denied more time to find one

- Attorney unable to examine document(s) submitted against the client _____
- Attorney cannot review evidence with immigrant and needs to _____
- Attorney unable to cross-examine adverse witnesses _____
- Attorney unable to communicate with the client in confidence _____
- Other _____
- Describe or elaborate on any answers checked above. _____

TESTIMONIAL/EVIDENTIARY PROBLEMS:

Testimonial and/or evidentiary problems, Y/N: Yes _____ No _____

- Judge cannot see (on television screen) immigrant's face while he speaks _____
- Immigrant does not have charging documents in court _____
- *(monitoring at Brdvw)* Immigrant can't see court or attorney on television screen _____
- Immigrant unable to review document(s) submitted against him _____
- Other _____
- Describe or elaborate on any answers checked above. _____

GENERAL DUE PROCESS CONCERNS:

General due process concerns, Y/N: Yes _____ No _____

- Was there a general conclusion that the immigrant's case was prejudiced, or that the immigrant was disadvantaged, because of the VTC system? Y/N: _____ If so, why? _____

JUDGE'S USE OF VTC:

- Did the judge ask the respondent if the respondent could see the courtroom and its occupants clearly? _____
- Did the judge ask the respondent if the respondent could hear the judge sufficiently? _____
- Did the judge ask the respondent if the respondent could hear the interpreter sufficiently? _____
- Did the judge ask the attorneys if they would do the final merits hearing by VTC? _____
  If yes, did the attorney agree to VTC merits? Y/N: _____
- Did the judge seem able/willing to change his/her hearings to accommodate for VTC issues? _____
  Explain: _____

Considering the VTC problems with the case, would it be worthwhile to schedule an interview with the client? _____ ... the attorney? _____

Appendix H

Interviewer's name:
Date and location of interview:

Interview Questions for Attorneys

Attorney's name: _____
Legal Firm: _____
Case of his/hers that we monitored (detainee name, A#): _____

1) About how many detained clients have you represented in the last six months? ___

2) Of those, with how many did you use VTC? _____

3) What are your general impressions of the use of VTC in the courtroom? _____

4) Now I'll ask you about specific aspects of VTC hearings.

   a. Have you experienced any technical problems during any hearings? _____

      i. What kinds of problems did you encounter? _____

      ii. How many times? _____

   b. Have you experienced any interpretation problems? _____

      i. What kinds of problems did you encounter? _____

      ii. If so, how many times? _____

   c. Have you seen any access to counsel problems? _____

      i. What kinds of problems did you encounter? _____

      ii. If so, how many times? _____

   d. Have you experienced any testimonial/evidentiary problems? _____

      i. What kinds of problems did you encounter? _____

      ii. If so, how many times? _____

(over)

Date and location of interview:

e. Have you witnessed other due process issues? _____

i. What kinds of problems did you encounter? _____
_____

ii. If so, how many times? _____

5) In your opinion, what are the strengths of VTC?
_____
_____
_____

6) Have you ever asked not to use VTC? (If so, what was the result of this request?)
_____

7) Will you use VTC for masters and merits or only for masters?
_____

8) Ultimately, do you think that the VTC should remain or that we should go back to the old system? Why? _____
_____
_____

9) Would you make any alterations to VTC? (What kinds of alterations?) _____
_____
_____

10) What, if any, are the most effective practices you have developed in doing VTC hearings? _____
_____
_____

11) Particular hearing that I watched (questions about that one)
a. How did you think the hearing went? _____
_____

b. Did you think there were any problems in using VTC for this case? _____
_____

c. (Maybe I will ask questions about what I saw.) _____
_____
_____