

6

Reducing the Unfairness of Videoconferencing

At the federal Immigration Court in Arlington, Virginia, the waiting room is packed. A standing room crowd spills into the hall that leads to five small courtrooms.... The Immigration Judge is here, and the attorneys for the aliens are also here. But the aliens are actually somewhere else.... No one whose immigration case is being heard today is in this building. Instead, about 150 detainees will be beamed into these courtrooms via video from local jails or federal detention centers around Virginia, Cincinnati, Cleveland and El Paso....

In the [courtroom], . . . a TV is set up on the side, with the screen split four ways. In an upper corner of the screen, one detainee appears. He is sitting against a white wall in prison-issue clothing. For activist Paromita Shah of the National Immigration Project, the effect is something of a wide-angle mug shot....

National Public Radio, All Things Considered,
"Debate Over Video In Immigration Courts,"
February 10, 2009

Unbiased judges, professional Trial Attorneys and competent interpreters are not enough so long as hearings are conducted by videoconference. Regrettably, the use of videoconferencing has become widespread in Immigration Courts, impairing the immigrant's ability to participate fully in court and compromising the right to receive the confidential assistance of counsel. According to a recent report on National Public Radio, DHS plans to install videoconferencing equipment in all new detention centers in the United States. Ultimately, nearly all detainees—who comprised 48 percent of all completed cases in fiscal year 2008—may be relegated to trial by videoconference.

The government conducts immigration hearings by videoconference because it allows judges to decide these cases without having to leave the

comforts of their courtrooms, and it means DHS does not need to transport detained immigrants to Immigration Courts. As a result, cases can be processed more quickly and cost effectively.

But this efficiency comes at a very high cost. In the case of *Rusu v. INS*, the U.S. Court of Appeals wrote that videoconferencing makes "it difficult ... to make credibility determinations and to gauge demeanor." The judge cannot read the person's body language or demeanor, which can provide the richest information as to whether the immigrant is lying or telling the truth. Even more importantly, videoconferencing dehumanizes immigrants. The immigrant becomes a blurry image in a corner of a small television screen, rather than a living, breathing human being in the courtroom. Videoconferencing can also make an immigrant—isolated in a room (typically in a detention center) looking at a video screen—uncomfortable or confused, which can result in the perception that he or she is being less than fully candid. Quite simply, removing the personal contact between the immigrant and Immigration Judge makes it harder for immigrants to make their cases. An interviewee said simply that the judge "can't feel [the immigrant's] emotion" when "they are talking to a TV." The *Rusu* court agreed, ultimately reaching the same conclusion that our interviewees expressed to us over and over again: "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." We should not be making this tradeoff solely for the sake of expediency and convenience.

To address the problems identified by the Court of Appeals and scores of interviewees, Appleseed recommends the following action items.

Return to in-person merits hearings.

EOIR should bar the use of videoconferencing in merits hearings, except by written consent of the immigrant, and should allow immigrants to have in-person Master Calendar hearings for good cause. Although in-person hearings will impose additional financial costs to the Immigration Court system, these costs should not be overstated. For example, DHS transports detainees hundreds of miles to Broadview, Illinois, just outside of Chicago, for videoconference hearings, even though these hearings could be conducted in person just by driving a few more miles. In cases such as this one, the added transportation costs would be modest. Even in those cases where the incremental costs are significant, the problems with videoconferencing are so severe that we believe these costs are necessary to achieve fair and impartial justice. EOIR could minimize the cost somewhat by holding in-person hearings in the detention centers equipped with a courtroom. Eventually, all detention centers ought to be equipped with courtrooms. At that point, the need for videoconferencing will be vastly reduced, limited to cases in which it can facilitate pro bono representation or advance other compelling interests.

Restore confidential attorney-client communications.

When hearings are conducted by videoconference, any discussions between an attorney and a client may be overheard by the Immigration Judge and DHS Trial Attorney, so an immigrant is unable to confer privately with his or her lawyer. In theory, the lawyer could be at the same location as the immigrant, but in practice that rarely happens. As one interviewee said, “There is no way on earth” she would appear with her client due to concern over “what [she] might miss” by being apart from the Immigration Judge and DHS Trial Attorney. In most cases, the immigrant and the immigrant’s lawyer are in different locations and are unable to hold a private discussion. An attorney should not be forced to choose between effective assistance to

the client and appearing in court. One interviewee characterized this practice as “flawed due process.”

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EOIR should create the capacity for direct, confidential attorney-client communications during any videoconference. Immigrants should always be able to confer with their attorneys during hearings, without the lawyers having to give up the ability to file and review documents in the courtroom and confer directly with the Immigration Judge. One potential way EOIR could implement this capability would be through the use of headsets between the lawyer and the immigrant.

Provide technical training to Immigration Court staff.

No doubt, videoconferencing has many inherent limitations, but compounding these limitations by using untrained video-operating staff is inexcusable. One interviewee told us about an Immigration Judge who ruled that her client’s story about physical abuse was not credible. The judge could not see the scars on the back of her dark-skinned Somali client on the small, dimly-lit television screen. Had the immigrant been present in person in court, the judge would have been able to see the scars with ease. Appropriate use of zoom, contrast and brightness might have enabled the judge to see the evidence of torture and led to a different credibility determination. A trained video operator can be responsive to a judge’s requests to show as vividly as possible the essential visual elements of the witness’s testimony.

Rigorous technical training should be mandated for all Immigration Court personnel involved in operating videoconferencing equipment. EOIR could implement enhanced technical training quickly and with relatively little cost. The Immigration Judge Benchbook contemplates

the need for testing videoconferencing equipment “to make certain that an audible and accurate transcription of the proceedings is being created,” but there is no corresponding requirement that the individuals operating the equipment be technically proficient. For example, training should teach the video operators how and when to zoom in on the witness. Operators should also understand how to make use of contrast, brightness, sharpness and volume to make the testimony as close to an in-person experience as possible.

Provide the capability for real-time document transmission.

An immigrant appearing by videoconference is not only physically separated from her lawyer and the judge, but in many cases has no way during the hearing to review or provide documents, such as medical records or passports. In contrast, the DHS Trial Attorney in the courtroom can provide evidence to the court during the hearing and is able to review any evidence provided to the court by the immigrant. Although Immigration Judges often allow parties to fax documents to the court during videoconference hearings, the Immigration Court Practice Manual does not require judges to do so. Some courtrooms do not even have a fax machine or scanner for this purpose. In order to remedy these problems, EOIR needs to install the necessary equipment in those courtrooms and detention centers that currently lack them. Moreover, EOIR should require Immigration Judges to allow immigrants to send documents in real time during videoconference hearings and to review any relevant documents sent by the immigrant during the hearing.

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