INA § 240/8 USC § 1229a. Removal proceedings (excerpt)

(a) Proceeding.
(1) In general. An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.
(2) Charges. An alien placed in proceedings under this section may be charged with any applicable ground of inadmissibility under section 212(a) [*8 USCS § 1182(a)*] or any applicable ground of deportability under section 237(a) [*8 USCS § 1227(a)*].
(3) Exclusive procedures. Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 238 [*8 USCS § 1228*].

(b) Conduct of proceeding.
(1) Authority of immigration judge. The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses. The immigration judge may issue subpoenas for the attendance of witnesses and presentation of evidence. The immigration judge shall have authority (under regulations prescribed by the Attorney General) to sanction by civil money penalty any action (or inaction) in contempt of the judge's proper exercise of authority under this Act.
(2) Form of proceeding.
(A) In general. The proceeding may take place--
(i) in person,
(ii) where agreed to by the parties, in the absence of the alien,
(iii) through video conference, or
(iv) subject to subparagraph (B), through telephone conference.
(B) Consent required in certain cases. 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 through video conference.
(3) Presence of alien. If it is impracticable by reason of an alien's mental incompetency for the alien to be present at the proceeding, the Attorney General shall prescribe safeguards to protect the rights and privileges of the alien.
(4) Aliens rights in proceeding. In proceedings under this section, under regulations of the Attorney General--
(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,
(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this Act, and
(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

8 CFR § 1003.25 Form of the proceeding.

(a) Waiver of presence of the parties. The Immigration Judge may, for good cause, and consistent with section 240(b) of the Act, waive the presence of the alien at a hearing when the alien is represented or when the alien is a minor child at least one of whose parents or whose legal guardian is present. When it is impracticable by reason of an alien's mental incompetency for the alien to be present, the presence of the alien may be waived provided that the alien is represented at the hearing by an attorney or legal representative, a near relative, legal guardian, or friend.

(b) Stipulated request for order; waiver of hearing. An Immigration Judge may enter an order of deportation, exclusion or removal stipulated to by the alien (or the alien's representative) and the Service. The Immigration Judge may enter such an order without a hearing and in the absence of the parties based on a review of the charging document, the written stipulation, and supporting documents, if any. If the alien is unrepresented, the Immigration Judge must determine that the alien's waiver is voluntary, knowing, and intelligent. The stipulated request and required waivers shall be signed on behalf of the government and by the alien and his or her attorney or representative, if any. The attorney or representative shall file a Notice of Appearance in accordance with § 1003.16(b). A stipulated order shall constitute a conclusive determination of the alien's deportability or removability from the United States. The stipulation shall include:

(1) An admission that all factual allegations contained in the charging document are true and correct as written;

(2) A concession of deportability or inadmissibility as charged;

(3) A statement that the alien makes no application for relief under the Act;

(4) A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act;

(5) A concession to the introduction of the written stipulation of the alien as an exhibit to the Record of Proceeding;

(6) A statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently;

(7) A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings; and

(8) A waiver of appeal of the written order of deportation or removal.

(c) Telephonic or video hearings. 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.

Excerpt from Immigration Court Practice Manual

4.7 Hearings by Video or Telephone Conference

***(a) In general*. —** Immigration Judges are authorized by statute to hold hearings by video conference and telephone conference, except that evidentiary hearings on the merits may only be conducted by telephone conference if the respondent consents after being notified of the right to proceed in person or through video conference. See INA § 240(b)(2), 8 C.F.R. § 1003.25(c). See also Chapter 4.6 (Form of the Proceedings).

***(b) Location of parties*. —** Where hearings are conducted by video or telephone conference, the Immigration Judge, the respondent, the DHS attorney, and the witnesses need not necessarily be present together in the same location.

***(c) Procedure*. —** Hearings held by video or telephone conference are conducted under the same rules as hearings held in person.

***(d) Filing*. —** For hearings conducted by video or telephone conference, documents are filed at the Immigration Court having administrative control over the Record of Proceedings. See Chapter 3.1(a) (Filing). The locations from which the parties participate may be different from the location of the Immigration Court where the documents are filed. If in doubt as to where to file documents, parties should contact the Immigration Court.

In hearings held by video or telephone conference, Immigration Judges often allow documents to be faxed between the parties and the Immigration Judge. Accordingly, all documents should be single-sided. Parties should not attach staples to documents that may need to be faxed during the hearing.

***(e) More information*. —** Parties should contact the Immigration Court with any questions concerning an upcoming hearing by video or telephone conference.

CONSTANTIN RUSU, Petitioner, v. U.S. IMMIGRATION & NATURALIZATION SERVICE; JOHN ASHCROFT, Attorney General, Respondents. AMERICAN IMMIGRATION LAW FOUNDATION; AMERICAN IMMIGRATION LAWYERS ASSOCIATION; CATHOLIC LEGAL IMMIGRATION NETWORK, INCORPORATED; CAPITAL AREA IMMIGRANTS' RIGHTS COALITION; LUTHERAN IMMIGRATION AND REFUGEE SERVICE, Amici Curiae.

No. 01-1776

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

296 F.3d 316*; *2002 U.S. App. LEXIS 14676

February 27, 2002, Argued
July 22, 2002, Decided

SUBSEQUENT HISTORY: Related proceeding at *Rusu v. Ashcroft, 2004 U.S. App. LEXIS 7226 (4th Cir. Va., Apr. 14, 2004)*

PRIOR HISTORY: [**1] On Petition for Review of an Order of the Board of Immigration Appeals. (A70-278-077).

DISPOSITION: Petition for review denied, and judgment of Board of Immigration Appeals affirmed.

COUNSEL: ARGUED: Michael Joseph Begland, HUNTON & WILLIAMS, Richmond, Virginia, for Petitioner.

Afsaneh Ashley Tabaddor, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

Jungyoun Traci Hong, AMERICAN IMMIGRATION LAW FOUNDATION, Washington, D.C., for Amici Curiae.

ON BRIEF: E. Marie Tucker Diveley, Turner A. Broughton, HUNTON & WILLIAMS, Richmond, Virginia, for Petitioner.

Robert D. McCallum, Jr., Assistant Attorney General, Allen W. Hausman, Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondents.

JUDGES: Before WIDENER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge. Judge King wrote the opinion, in which Judge Widener and Senior Judge Hamilton joined.

OPINION BY: KING

OPINION

[*318] KING, Circuit Judge:

Petitioner Constantin Rusu seeks our review of the May 2001 Order of the Board of Immigration Appeals (the "BIA") denying his application for asylum. Order of the Board of Immigration Appeals, File No. A 70 278 077 (BIA 2001) [**2] (the "BIA Order"). Rusu contends that his video conferenced asylum

hearing violated his due process and statutory rights, and that the BIA erred in declining to grant him asylum. Although we agree that his asylum hearing was conducted in a haphazard manner, we conclude that Rusu suffered no prejudice as a result thereof. We therefore deny his petition for review and affirm the BIA.

I.

Rusu fled his native Romania in 1989, allegedly out of fear of persecution by the Communist government of Nicolai Ceausescu. Rusu apparently had been an organizer for a transcendental meditation group which the Ceausescu government deemed to be subversive. Rusu contends that, as a result of his involvement in this group, he was interrogated and assaulted on multiple occasions by the Romanian secret police (the Securitate) in the years preceding his flight from that country. On one occasion, the Securitate supposedly held Rusu for three days, during which they tortured him by removing his teeth with pliers and a screwdriver.

Upon escaping from Romania, Rusu travelled first to Yugoslavia and applied for asylum there. Before Rusu's status could be determined, however, war broke out in the Balkans. He [**3] then fled to Canada and applied for asylum, but his application was denied. In November 1999, he left Canada and illegally entered the United States. Shortly after arriving in this country, Rusu obtained a passport from the Romanian Embassy. In February 2000, he flew to Great Britain, but he was refused entry and forcibly returned to the United States.

Upon his return, Rusu was placed in a detention facility in Farmville, Virginia, and he was charged by the Immigration and Naturalization Service (the "INS") with being removable under § 212(a)(6)(A)(i) of the Immigration and Naturalization Act (the "INA"). [1] On February [*319] 28, 2000, the INS instituted removal proceedings against him. Rusu then applied for Asylum and Withholding of Removal (the "Application") and, on September 18, 2000, an Immigration Judge (the "IJ") conducted an asylum hearing. [2] The hearing was conducted by video conference, during which Rusu remained in an INS detention facility in Farmville, while the IJ, as well as counsel for Rusu and the INS, were in a courthouse in Arlington, Virginia. [3] Under this procedure, video cameras and television monitors were set up in both Farmville and Arlington to provide contemporaneous [**4] transmission of the hearing's images and sounds between the two sites.

1 Rusu was also charged with being removable under § 212(a)(2)(A)(i)(I) of § 212(a) of the INA, which provides that aliens who are convicted of crimes involving moral turpitude are inadmissible (not eligible for admission into the United States). The BIA found this charge to be without merit, and we therefore need not address it.

2 Because Rusu filed his Application with the INS after it had instituted removal proceedings, the Application was referred to an IJ for adjudication in those proceedings. *8 C.F.R. § 208.14(c)(1)*. As the essence of Rusu's appeal is that he was denied a meaningful opportunity to plead his asylum claim, we characterize the proceeding before the IJ as Rusu's "asylum hearing."

3 Pursuant to *8 U.S.C. § 1229a(b)(2)(A)(iii)*, a removal proceeding "may take place . . . through video conference. . . ."

Rusu's asylum hearing consumed approximately three hours, and [**5] it was plagued by communication problems. Although Rusu's best language is Romanian, he declined to accept an interpreter and chose instead to testify in English. In addition, due to his damaged mouth and missing teeth, he was unable to speak clearly. The IJ had difficulty comprehending Rusu's testimony, and on numerous occasions she stated that she could not understand Rusu and requested that he repeat himself. The court reporter was also unable to fully understand him, and the transcript of Rusu's asylum hearing testimony is marked "indiscernible" a total of 132 times. Moreover, Rusu had difficulty comprehending the questions of his counsel, Mr. Schneiderman, and the IJ, and they were often obliged to repeat themselves. Rusu also became confused when the person addressing him was not the one on camera (e.g.,

Schneiderman would ask a question but the camera would be focused on the IJ), and on several occasions he directed his response to the wrong person. Finally, there were technological problems with the video conference equipment. During the hearing, the IJ asked a correctional officer in Farmville to move Rusu closer to the camera, once stating "I think maybe that will help me [**6] understand him better." The IJ was also compelled to suspend the hearing at one point in order to check the quality of the equipment and its ability to record Rusu's voice.

In sum, the record reveals that the IJ and the lawyers, on the one hand, and Rusu, on the other, had difficulty understanding one another. After some effort, however, the IJ concluded that she could glean the asserted factual basis of Rusu's Application. In her decision she stated:

> We are conducting the hearing by televideo conference and had to have [Rusu] repeat some of his answers in order to understand it. We have assured ourselves however that we did understand the testimony. The testimony appears to be clear on the tape.

Oral Decision of the Immigration Judge, File No. A 70 278 077 at 5 (Sept. 18, 2000) (the "IJ Decision"). In the IJ Decision, she observed that, in order to be eligible for asylum, a petitioner must have a wellfounded fear of persecution, and that such a fear must be objectively reasonable. *Id.* [*320] at 3-4. She noted that Romania had undergone substantial reform of its political process, and, pursuant to 1992 legislation, most of the former Securitate officers had been purged [**7] from the present security force. [4] She also observed that there was no evidence that individuals who either (1) engaged in transcendental meditation, or (2) were previously critical of the Ceausescu government, were currently in danger of persecution. Thus, the IJ concluded that Rusu's fear of future persecution was not well-founded. *Id.* at 7-8. In addition, while she found Rusu's claims of past persecution to be unpersuasive, she stated that, assuming their validity, he nonetheless failed to qualify for asylum as a matter of discretion. [5] *Id.* at 9-10. The IJ therefore ordered Rusu to voluntarily depart the United States or, in the alternative, to be deported. *Id.* at 12.

> 4 The Ceausescu government was overthrown in 1989 and replaced with a constitutional democracy. The Securitate has been disbanded, and the present security force lacks the powers of arrest and detention. May 1998 Dep't of State, Bureau of Democracy, Human Rights and Labor, Romania: Profile of Asylum Claims and Country Conditions.
>
> 5 An individual who has experienced past persecution may be eligible for asylum, even if he does not have a well-founded fear of future persecution, if the balance of equities favors a grant of asylum. *Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989).*

[**8] Rusu appealed the IJ Decision to the BIA, which dismissed his appeal on May 17, 2001. Rusu has now petitioned for our review of the BIA Order, and we possess jurisdiction pursuant to *8 U.S.C. § 1252.* [6]

> 6 In considering a petition for review such as that of Rusu, we review only "the findings and order of the BIA, not those of the IJ." *Huaman-Cornelio v. BIA, 979 F.2d 995, 999 (4th Cir. 1992)*. The BIA has the power to "review an IJ's findings de novo, to make its own findings even as to matters of credibility, and to assess the legal sufficiency of the evidence." *Id. at 998*. In this case, however, the BIA made findings identical to those of the IJ. BIA Order at 3-4.

II.

It is elementary that any judicial inquiry into the handling of immigration matters is substantially circumscribed. As the Supreme Court observed in *Landon v. Plasencia*, "control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature." *459 U.S. 21, 34, 74 L. Ed. 2d 21, 103 S. Ct. 321 (1982).* [**9] Deportation and asylum hearings, however, are subject to the requirements of procedural due

process. *Mathews v. Diaz, 426 U.S. 67, 77, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976)*; *Yamataya v. Fisher (The Japanese Immigrant Case, 189 U.S. 86, 100-01, 47 L. Ed. 721, 23 S. Ct. 611 (1903)*; *Gandarillas-Zambrana v. BIA, 44 F.3d 1251, 1255 (4th Cir. 1995)*. We review de novo a claim that the procedures utilized in such hearings contravened due process or the INA. *Jacinto v. INS, 208 F.3d 725, 727 (9th Cir. 2000)*. In order to prevail on a due process challenge to a deportation or asylum hearing, an alien must demonstrate that he was prejudiced by any such violation. *Gandarillas-Zambrana, 44 F.3d at 1256-57*; *Farrokhi v. INS, 900 F.2d 697, 703 n.7 (4th Cir. 1990)*. Similarly, an alien must "establish prejudice in order to invalidate deportation proceedings on a claim that [his] statutory or regulatory rights were infringed." *Garcia-Guzman v. Reno, 65 F. Supp. 2d 1077, 1085 (N.D. Cal. 1999)* (citing *United States v. Cerda-Pena, 799 F.2d 1374, 1377 (9th Cir. 1986))*. [**10] And we may only find prejudice "when the rights of [an] alien have been transgressed in such a way as is likely to impact the results of the proceedings." [*321] *Jacinto, 208 F.3d at 728*; *see also Farrokhi, 900 F.2d at 702-03*.

III.

Rusu maintains that the video conferencing procedures utilized in his asylum hearing violated due process and the INA by rendering him unable to present his case for asylum in a meaningful manner. [7] Before addressing the merits of this contention, we will briefly examine the legal principles governing the procedural rights of asylum petitioners.

> 7 In performing a due process analysis, we also dispose of Rusu's statutory claims under the INA. Pursuant to *8 U.S.C. § 1229a(b)(4)*, an alien is entitled to (1) "the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing"; (2) "a reasonable opportunity to examine the evidence against" him; (3) a reasonable opportunity to "present evidence on [his] own behalf"; and (4) a reasonable opportunity to "cross-examine witnesses presented by the Government." The purpose of these protections is to ensure that an asylum petitioner receives a meaningful hearing. If a petitioner is not able to examine the evidence against him, to present evidence on his own behalf, or to cross-examine witnesses to the extent of his statutory rights under *8 U.S.C. § 1229a(b)(4)*, then he has failed to receive a full and fair hearing consistent with due process. *Jacinto v. INS, 208 F.3d 725, 727-28 (9th Cir. 2000)* ("When these [statutory] protections are denied and such denial results in prejudice, the constitutional guarantee of due process has been denied."); *Campos-Sanchez v. INS, 164 F.3d 448, 450 (9th Cir. 1999)*.

[**11] A.

In assessing whether a deportation or asylum hearing has comported with due process, we are guided by the principles of *Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)*, in which the Court recognized that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." [8] As the Court acknowledged, what constitutes being heard at "a meaningful time and in a meaningful manner" will have different meanings in different circumstances, and due process only "calls for such procedural protections as the particular situation demands." *Id. at 334*. Because of the Government's compelling interest in controlling immigration, hearing procedures that comport with due process in the asylum context might well be unacceptable in other proceedings. *Mathews v. Diaz, 426 U.S. at 79-80*. Nevertheless, due process requires, at a minimum, that the INS adopt procedures to ensure that asylum petitioners are accorded an opportunity to be heard at a meaningful time and in a meaningful manner, i.e., that they receive a full [*322] and fair hearing on their claims. *Jacinto, 208 F.3d at 727*; [**12] *CamposSanchez, 164 F.3d at 450*; *cf. Landon v. Plasencia*, 459 U.S. at 36 (observing that fair exclusion hearing for permanent resident alien must provide alien with opportunity to present case effectively); *Gandarillas-Zambrana, 44 F.3d 1251, 1257 (4th Cir. 1995)* (concluding that IJ's questioning in deportation hearing did not violate

due process because it did not deprive petitioner of "fair and meaningful hearing").

> 8 The INS maintains that *Mathews v. Eldridge* is inapplicable to Rusu's case. It observes that, while *Mathews v. Eldridge* lays out the requirements for procedural due process, i.e., the procedures the Government must observe before depriving an individual of life, liberty, or property, Rusu, as an illegal immigrant, has no legally protected liberty interest in remaining in the United States. The Government is correct on this point; Rusu has no vested "right to stay and live and work in this land of freedom." *Landon v. Plasencia, 459 U.S. 21, 34, 74 L. Ed. 2d 21, 103 S. Ct. 321 (1982)*. Nevertheless, it is well established that "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to [the] constitutional protection" of the *Fifth Amendment's Due Process Clause*. *Mathews v. Diaz, 426 U.S. 67, 77, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976)*. As such, an illegal alien possesses an identifiable liberty interest in being accorded "all opportunity to be heard upon the questions involving his right to be and remain in the United States" before being deported. *Yamataya v. Fisher (The Japanese Immigrant Case, 189 U.S. 86, 101, 47 L. Ed. 721, 23 S. Ct. 611 (1903)*. Although Rusu's interest is, in these circumstances, substantially attenuated, it remains a cognizable interest within the *Mathews v. Eldridge* framework.

[**13] B.

Therefore, regardless of how rapidly technological improvements, such as video conferencing, may advance, the Government remains obliged to ensure that asylum petitioners are accorded a meaningful opportunity to be heard before their cases are determined. In this regard, the procedures utilized in Rusu's hearing could have resulted in the denial of a full and fair hearing on his claim. The utilization of video conferencing, although enhancing the efficient conduct of the judicial and administrative process, also has the potential of creating certain problems in adjudicative proceedings. As Chief Judge Wilkinson has appropriately 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." *United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001)* (discussing video conferencing in sentencing proceedings). More specifically, video conferencing may render it difficult for a factfinder in adjudicative proceedings to make credibility determinations and to gauge demeanor. *United States v. Baker, 45 F.3d 837, 844-46 (4th Cir. 1995)*; [**14] *Edwards v. Logan, 38 F. Supp. 2d 463, 467 (W.D. Va. 1999)* ("Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion."). [9]

> 9 *Rule 43 of the Federal Rules of Civil Procedure* was amended in 1996 to permit video conferencing in certain circumstances, and the potential adverse impact of such technology on credibility determinations was observed in the Advisory Committee Notes. Those Notes provide, in pertinent part, as follows:
>
> > The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The oppor tunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.
>
> Advisory Comm. Notes to *Fed. R. Civ. P. 43(a)*, 1996 Amendment.

[**15] The potential negative impact of video conferencing on a factfinder's credibility assessments may be of little consequence in certain types of proceedings. *See Baker, 45 F.3d at 844-45* (concluding that factfinder's ability to judge demeanor and credibility have limited value in civil commitment hearing). In asylum hearings, however, findings made with respect to a petitioner's credibility are usually central to the resolution of the asylum claim. As the BIA has observed, "it is well established that we attach significant weight to the credibility of an asylum applicant. A [petitioner's] consistent and detailed testimony can be sufficient to meet the burden of establishing persecution." *In Re O-D-, 21 I. & N. Dec. 1079*, I. & N. Dec. Interim No. 3334 (BIA 1998); *see also 8 C.F.R. §§ 208.13(a) & 208.16(b)* ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). [*323] Moreover, the BIA accords deference to an IJ's credibility determinations, primarily because the IJ had an opportunity to personally observe the petitioner's testimony. *In Re A-S-, 21 I. & N. Dec. 1106*, I. & N. Dec. Interim No. 3336 (BIA 1998) ("Because [**16] the Immigration Judge has the advantage of observing the alien as the alien testifies, the Board accords deference to the Immigration Judge's findings concerning credibility and credibility-related issues."); *see also Matter of Burbano, 20 I. & N. Dec. 872 (BIA 1994)*. In fact, as the Ninth Circuit has observed, "an adverse determination of [the credibility] issue, by reason of our highly deferential standard of review, would be almost insurmountable." *Kaur v. INS, 237 F.3d 1098, 1101 (9th Cir. 2001)*. Put simply, an IJ's ability to judge a petitioner's credibility and demeanor plays a pivotal role in an asylum determination; an unfavorable credibility determination is likely to be fatal to such a claim.

A second problem inherent in the video conferencing of asylum hearings is its effect on a petitioner's lawyer. Because video conferencing permits the petitioner to be in one location and an IJ in another, its use results in a "Catch-22" situation for the petitioner's lawyer. [10] While he can be present with his client -- thereby able to confer privately and personally assist in the presentation of the client's testimony -- he cannot, in such a circumstance, [**17] interact as effectively with the IJ or his opposing counsel. Alternately, if he decides to be with the IJ, he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option. [11]

10 As coined by the novelist Joseph Heller, a "Catch-22" is a situation in which the only two seeming alternatives actually cancel each other out, leaving no means of escape from a dilemma. *See* Joseph Heller, *Catch-22* (1961).

11 We do not suggest that a petitioner has a right to counsel in an asylum hearing. *See 8 U.S.C. § 1229a(b)(4)*. Rather, to the extent asylum hearing procedures preclude a petitioner from fully exercising the privilege of counsel, that fact must be considered in determining whether he has been accorded a hearing that comports with due process. *Farrokhi v. INS, 900 F.2d 697, 701 (4th Cir. 1990)*.

In addition to the problems [**18] inherent in the use of video conferencing technology, the manner of how video conferencing functioned in Rusu's hearing created additional barriers to the presentation of his case. The record reveals several instances where Rusu's difficulty in communicating with the IJ resulted from technological problems beyond his control. Specifically, the IJ at one point asked that Rusu be moved closer to the camera because she felt it might make it easier for her to understand him. On another occasion, she asked him to be moved because she was having difficulty seeing him. Moreover, there was some question about sound quality, as reflected in the 132 instances in the hearing transcript where Rusu's testimony was marked "indiscernible," and the IJ paused to check the sound quality during the hearing. Finally, the video conferencing technology did not permit Rusu to see everyone at the Arlington site, forcing him to converse with individuals who were not visible to him on camera. [12]

12 We must observe that Rusu seems a poor candidate for video conferencing. Because of his dental problems, he had

> difficulty speaking and communicating orally. Therefore, while video conferencing may normally impair communication to some extent, its use in this hearing appears to have compounded Rusu's communication problems.

[**19] Our acknowledgment of these problems, however, does not mean that Rusu was [*324] denied a full and fair hearing on his asylum claim. First, at least part of Rusu's inability to communicate with the IJ resulted from his decision to testify in English. As we noted previously, due process and the INA merely require that Rusu have a meaningful *opportunity* to present his claim. The INS and the courts were under no obligation to ensure that Rusu made a meaningful presentation -- that was properly left to Rusu and his lawyer. Therefore, to the extent that Rusu's problems were self-inflicted, he is unable to seek relief from the judiciary. Second, in his asylum hearing, Rusu was afforded a substantial amount of time to explain the basis of his claim. Moreover, it is clear to us that, throughout the hearing, the IJ made a sincere effort to understand his testimony, and she provided him with numerous opportunities to elaborate and to clarify it. *Cf. Perez-Lastor v. INS, 208 F.3d 773, 782 (9th Cir. 2000)* ("We recognize that, as a practical matter, an IJ may ameliorate the damage caused by an incompetent translation by asking for clarification or repetition."). The record demonstrates [**20] that, by the end of the hearing, the IJ understood the factual predicate for Rusu's Application. As such, although the circumstances of the asylum hearing were problematic, and they should not have been countenanced by the INS, Rusu nevertheless seems to have had an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge, 424 U.S. at 333*.

C.

In the final analysis, however, we need not definitely resolve whether Rusu was accorded a full and fair hearing, because he is unable, in any event, to show any prejudice resulting from a due process violation. *Farrokhi, 900 F.2d at 703 n.7*. To prevail on his contention that the video conferencing procedures violated due process, Rusu must show that better procedures are likely to have made a difference in the outcome of his hearing. *Cf. Perez-Lastor, 208 F.3d at 780* ("In the case of an incompetent translation claim, the [prejudice] standard is whether a better translation would have made a difference in the outcome of the hearing."). Rusu, however, can make no such showing.

As we observed in *Huaman-Cornelio v. BIA*, an alien is only eligible for [**21] asylum if he is a refugee, and a refugee is "any person who is unable to return to his or her country because of'persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.'" *979 F.2d 995, 999 (4th Cir. 1992)* (quoting *8 U.S.C. § 1101(a)(42)(A)*). In that decision, we further noted that "the standard for proving a 'well-founded fear of persecution' is the 'reasonable person test.'" *Id.* (quoting *M.A. v. INS, 899 F.2d 304, 311 (4th Cir. 1990)* (en banc)). Therefore, an individual seeking asylum must show (1) that he has a subjective fear of persecution based on race, religion, nationality, social group membership, or political opinion, (2) that a reasonable person would have a fear of persecution in that situation, and (3) that his fear has some basis in objective reality. [13] *Id.*

> 13 The standard for prevailing on a petition for withholding of removal is even more stringent than the standard for asylum. To qualify for withholding of removal, a petitioner must show that he faces a clear probability of persecution because of his race, religion, nationality, membership in a particular social group, or political opinion. *INS v. Stevic, 467 U.S. 407, 430, 81 L. Ed. 2d 321, 104 S. Ct. 2489 (1984)*. As such, a determination that a petitioner fails to meet the asylum standard "necessarily means that [the] petitioner did not meet his burden on the more difficult withholding of [removal] claim." *Huaman-Cornelio, 979 F.2d at 1000*. Therefore, in concluding that Rusu could not have prevailed on his asylum claim, we also dispose of his petition for withholding of removal.

[**22] [*325] Rusu is unable to satisfy this three-prong standard for asylum eligibility.

Regardless of the procedures utilized in his asylum hearing, Rusu could not have shown that former members of the Securitate would still persecute him today. Since Rusu left Romania in 1989, the Ceausescu government has fallen and the security force has been substantially reformed. Moreover, Rusu does not appear to know anything of vital interest to former security officers; his best rationale for fearing persecution is that a cabaret dancer once told him that unnamed Romanian officials were selling weapons and training troops in foreign countries. As such, a reasonable person in Rusu's circumstances would not have a well-founded fear of persecution.

Rusu is also unable to qualify for asylum based on his claim of past persecution. The BIA has recognized that victims of past persecution may occasionally qualify for asylum, even when a threat of persecution no longer exists, if the past persecution was so severe that the balance of equities favors a grant of asylum. *Matter of Chen, 20 I. & N. Dec. 16 (BIA 1989)*. In this case, however, no such equities exist. Rusu has no familial or other ties to [**23] this country, and, although the persecution he suffered, if his testimony is credited, was horrible, it is not of the scale warranting a grant of asylum.

Therefore, even if Rusu's asylum hearing had not been conducted in such a haphazard manner, and even if his testimony had been fully credited, he could not have prevailed on his claim for asylum. Because he suffered no prejudice from the manner in which his asylum hearing was conducted, we must sustain the decision of the BIA. [14]

14 Rusu also contends that the BIA's decisions to deny his requests for asylum and for withholding of removal are not supported by substantial evidence. In analyzing such a contention, we reverse the BIA only if "the evidence presented by the petitioner 'was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution.'" *Huaman-Cornelio, 979 F.2d at 999* (quoting *INS v. Elias-Zacarias, 502 U.S. 478, 483-84, 117 L. Ed. 2d 38, 112 S. Ct. 812 (1992))*. A reasonable factfinder could easily find that Rusu did not qualify for asylum, because he provided insufficient evidence of a well-founded fear of persecution. As such, this challenge is without merit.

[**24] IV.

For the foregoing reasons, we deny Rusu's petition for review, and we affirm the judgment of the Board of Immigration Appeals.

PETITION FOR REVIEW DENIED AND JUDGMENT AFFIRMED

Excerpt from *Eke v. Mukasey*, 512 F.3d 372, 382-383 (7th Cir. 2008)

C

Finally, Eke claims that the government violated his due process rights by conducting his hearing by televideo rather than in person. Eke contends that if the IJ had seen him in person, the IJ would have recognized that Eke is in fact homosexual.

We note at the outset that the statute governing Eke's hearing, 8 U.S.C. § 1229a, specifically authorizes proceeding by means of a video conference. See 8 U.S.C. § 1229a(b)(2)(A)(iii). Eke claims that this part of the statute, which is implemented by 8 C.F.R. § 1003.25(c), violates his constitutional due process rights. No court has ever so held, however. Indeed, the Fourth Circuit rejected a due process argument in similar circumstances. Rusu v. INS, 296 F.3d 316, 324 (4th Cir. 2002). In Rusu, the three-hour hearing "was plagued by communication problems." Id. at 319. The petitioner's "damaged mouth and missing teeth [made him] . . . unable to speak clearly." Id. Yet even though the IJ had difficulty comprehending the petitioner's testimony, the court reporter had to write "indiscernible" a total of 132 times on the transcript of the hearing, and the petitioner had difficulty comprehending the questions of his counsel, and even though there were technological problems with the video conference equipment, the Fourth Circuit found no due process violation because "the IJ concluded that she could glean the asserted factual basis of [*383] Rusu's Application." Id. (No such technical difficulties occurred in this case.) The Rusu court relied on the Supreme Court's decision in Mathews v. Eldridge, 424 U.S. 319, 333-34, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), which "recognized that 'the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner' . . . [but that] will have different meanings in different circumstances, and due process only 'calls for such procedural protections as the particular situation demands.'" Rusu, 296 F.3d at 321; see also Hermez v. Gonzales, 227 Fed. Appx. 441, 445 (6th Cir. 2007) (nonprecedential).

We agree with the Fourth Circuit that Eldridge should guide our analysis here. An alien in removal proceedings is not entitled to all of the protections that a criminal defendant would receive, even though at a broad level of generality both are entitled to due process. As for Eke, even if we thought (stereotypically) that something about his physical presence could prove his homosexuality, he has not explained how the televideo format prevented the IJ from considering that evidence. Thus, Eke has failed to show prejudice, which is required for him to succeed on this claim. Capric v. Ashcroft, 355 F.3d 1075, 1087-88 (7th Cir. 2004).

Fed Rules of Civil Procedure, Rule 43

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. **For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.**

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

***

Notes of Advisory Committee on 1996 amendments. Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of

a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

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ARTICLE: EFFECTIVE PROCESSING OR ASSEMBLY-LINE JUSTICE? THE USE OF TELECONFERENCING IN ASYLUM REMOVAL HEARINGS

NAME: FRANK M. WALSH * AND EDWARD M. WALSH **

BIO:

* Georgetown University Law Center, Juris Doctor, May 2007; Yale University, B.A., May 2004. I would like to thank Professor Andrew Schoenholtz for all his inspiration and guidance on this article. His footprint on this article is deep.

** Yale University, B.A., May 2007. The authors dedicate this article to our father, Edward Whaley Walsh, 1954-2006, for teaching us the necessity of moral clarity, the value of seeking justice, and the importance of doing what is right. We will never forget his lessons or the example he set.

LEXISNEXIS SUMMARY:

... While VTC has been lauded as the panacea for backlogged immigration dockets, no previous researcher has used statistics to analyze the effect of VTC on asylum removal hearings. ... This article confronts some of these questions in the narrow context of removal hearings in immigration court when an alien claims relief as a refugee. ... The grant rate for asylum applicants whose cases were heard in-person is roughly double the grant rate for the applicants whose cases were heard via VTC: ... Even the most sophisticated VTC systems affect a listener's perception of an asylum applicant's testimony by undermining the Immigration Judge's ability to assess credibility. ... When using VTC, Immigration Courts may very well adjudicate the issue not on the actual merits of the case but rather on the cognitive externalities inherent in VTC; an asylum applicant would thus never get the substantive merits hearing to which he is entitled. ...

HIGHLIGHT: ABSTRACT

This article, based on statistics compiled by the Executive Office for Immigration Review ("EOIR") exclusively for this article, the author's experience at the Department of Defense, and the author's trial experience in multiple asylum hearings, examines the use of video teleconferencing ("VTC") in asylum removal hearings as codified in 28 U.S.C. § 1229a. While VTC has been lauded as the panacea for backlogged immigration dockets, no previous researcher has used statistics to analyze the effect of VTC on asylum removal hearings. Based on the decisions in over 500,000 cases, this article argues that VTC roughly doubles to a statistically significant degree the likelihood that an applicant will be denied asylum. In addition

to calling into question the effectiveness of VTC, the statistical effect of VTC also implicates an asylum applicant's Due Process rights. This article rejects the use of VTC at asylum hearings and argues for a more selective use of VTC that would better protect the integrity of United States Immigration Courts.

TEXT:

[*259] I. INTRODUCTION

The integration of new information technologies to allow for greater video teleconferencing ("VTC") in modern courtrooms has been championed as a way to expand access to justice n1 and efficiently process potentially costly cases. n2 Since the Federal Judicial Conference, the policymaking body of the federal courts, authorized the use of VTC in prisoner civil rights pretrial [*260] proceedings, n3 VTC is considered "one of the hottest little niches for courthouses right now." n4 Especially in the field of immigration law, courts are turning to VTC as a way to efficiently carry out removal hearings for aliens in detention. n5 Proponents of VTC believe that the future of the effective administration of America's courts lies with this new "telejustice system." n6 Nonetheless, there are serious unanswered questions as to the practice's policy and legal implications. n7

This article confronts some of these questions in the narrow context of removal hearings in immigration court when an alien claims relief as a refugee. n8 Under the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA), an alien's deportability hearing can be held via VTC. n9 The fundamental issue, then, is whether a hearing conducted entirely via VTC is an example of "fair and efficient" n10 processing or a "McDonaldization" of the asylum determination where assembly line justice values the quantity of verdicts at the expense of their quality. n11

The Executive Office for Immigration Review ("EOIR") adamantly supports the use of VTC in removal hearings. In its fact sheet discussing VTC, EOIR argued that VTC does not affect the decision making process in any way:

> Congress made no distinction between an in-person hearing and a hearing conducted by [VTC], including no requirement for consent of [*261] the participants to conduct a [VTC] hearing. [VTC] does not change the adjudicative quality or decisional outcomes. Hearings conducted by [VTC] are fair and fully protect the participants' right to procedural due process. There is a means of transmitting and receiving additional evidence between all locations and all participants. n12

Two assertions lie at the core of EOIR's justification of VTC: (1) "[VTC] does not change the adjudicative quality or decisional outcomes," and (2) "[h]earings conducted by [VTC] are fair and fully protect the participants' right to procedural due process." The first assertion is a matter of policy: VTC does not affect an Immigration Judge's decision making process. The second assertion is a matter of law: VTC adequately complies with the Due Process Clauses in the Fifth and Fourteenth Amendments

This article argues that the both of the assertions in the EOIR memorandum are false: (1) as a matter of policy, the use of VTC does not result in "fair and efficient immigration hearings" n13 because VTC alters the way that a judge perceives an asylum applicant's testimony and influences the outcome of a hearing, and (2) as a matter of law, VTC does not have a coherent

rationale and it tests the limits of the Due Process Clause. n14 Part II of this article describes the evolution of VTC since the passage of § 1229a in 1996 to the present. Part III discusses inconsistencies in U.S. law's treatment of in-person factual determinations. Part IV analyzes the policy dimension of VTC by focusing on the psychological effects of VTC and on new asylum statistics compiled by the Department of Justice for this article. Part V analyzes the legal dimension of VTC use by focusing on whether VTC satisfies an asylum applicant's rights under the Due Process Clause. Part VI concludes by recommending that VTC use be limited to Master Calendar hearings.

II. ALIEN DETENTION, IIRIRA'S SECTION 1229A, AND VTC IN THE IMMIGRATION CONTEXT

The story of VTC in immigration courts begins with the widespread and growing use of detention for removable aliens. The modern form of alien detention has its roots in 1996's IIRIRA, the same statute that made VTC permissible in deportation hearings. The IIRIRA created an "interrelated statutory structure designed to streamline the removal process and expeditiously [*262] remove criminal aliens from this country." n15 Efforts to streamline the system were based on using VTC in hearings, n16 while § 1231 mandates the detention of aliens who are found to be unlawfully within the United States. n17 As a result of the mandatory detention policy, the Bureau of Immigration and Customs Enforcement ("BICE") currently detains over 200,000 non-citizens annually and plans to expand its detention capacity by 40,000 over the next three years. n18

Two factors exacerbated the need to use VTC in processing detained aliens. First, IIRIRA shortened the removal period from 180 to ninety days, n19 requiring a faster processing system. Second, detained aliens were generally held in remote detention centers hours away from the immigration courts. n20 Dealing with these remotely detained aliens was a daunting endeavor because it was both costly n21 and involved security challenges due to the flight risk of the individual. n22 By increasingly detaining aliens in remote facilities but simultaneously shortening the time allocated to process them, IIRIRA stressed the logistical resources of immigration courts: the courts were asked to handle more cases, and process aliens held in more remote places, and to do all of this faster than before.

Congress' solution to the increasing backlog of detained aliens was to turn to VTC. The IIRIRA listed VTC and in-person observation as equally acceptable manners of hearing testimony. n23 The equal status given to VTC and in-person observation was based on the lack of preference given between § 1221a(b)(2)(A)(i), authorizing in-person hearings, and § 1221a(b)(2)(A)(iii), authorizing VTC hearings. Both methods are provided in an exhaustive list of acceptable means with no hierarchy in testimonial value.

As described by EOIR, "VTC provides real-time transmission of audio [*263] and video between two or more locations and permits individuals to see, hear, and speak with each other as though they are at the same location." n24 Often, VTC is used to connect an alien in detention with a judge in his chambers, and the counsel for the alien and DHS in a third location. n25 With advances in high-definition technology and increasing data transfer capabilities, proponents of VTC claim that they can "functionally duplicate" an in-court testimony via VTC. n26 A reasonably priced VTC system, n27 allows for courtrooms to speed up proceedings anywhere from 25 to 50 percent. n28 Jurisdictions from West Virginia n29 to Florida n30 have turned to VTC as a cheap and fast way to conduct procedural hearings and minor claims. As one judge

stated, VTC "allows us to turn our driving time into working time." n31 Additionally, proponents of VTC in immigration court argue that the system is healthier for EOIR employees n32 and encourages pro bono representation of aliens. n33

EOIR has fully embraced the use of VTC in America's immigration courts, n34 and the office hopes to increase the system's usage. n35 VTC systems are currently installed at EOIR headquarters in Arlington, Virginia, at forty (of fifty-three) Immigration Courts, and at seventy-seven other sites where immigration hearings are conducted, including detention centers and correctional facilities where immigration hearings are conducted. n36

[*264] III. VTC AMERICAN DOMESTIC LAW IS INTERNALLY INCONSISTENT AS TO WHETHER IN-PERSON DETERMINATIONS AFFECT THE ADJUDICATIVE PROCESS

Before analyzing the policy and legal continua of VTC, it is important to recognize that the use of VTC challenges fundamental American jurisprudence on the importance of face-to-face observation of testimony. One of the basic underpinnings of American jurisprudence is that observers of testimony while in the presence of a defendant are in the best position to determine its validity. n37 IIRIRA, however, rejects this position, and "makes no distinction between an in-person hearing and a hearing conducted by [VTC]." n38

A. *Deference to Face-to-Face Observers in the Case Law*

Because the "opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition," n39 and American trial courts are given deference in weighing the credibility of a witness, judges can detect nuanced, nonverbal indicators that are not part of the written record. n40 As the Supreme Court explained in *United States v. Raddatz*, the face-to-face interaction between a trier of fact and the witness yields special insight into the testimony:

> The principle that deference must be paid to the findings of the official who hears the testimony is reflected in a wide variety of areas of the law. Under *Rule 52 of the Federal Rules of Civil Procedure*, a trial court's factual findings may be reversed only when "clearly erroneous," a standard that reflects the common understanding that [because of the face] to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. n41

Other courts have echoed the unique vantage point of those who heard testimony in person, arguing that the trier of fact "sees and hears the witnesses at first hand and comes to appreciate the nuances of the litigation." n42

While the preceding cases described the trial judge's superior perspective vis-a-vis an appellate court that was reviewing a court transcript, the same [*265] principles that demand deference to face-to-face encounters apply in the VTC context. n43 While an appellate judge receives a verbatim account of the words spoken at trial, the trial court is granted deference because a transcript fails to convey nonverbal cues and a sense of the applicant's demeanor. As described in Part IV(a), *infra*, VTC fundamentally alters the way a judge perceives an asylum applicant's testimony because (1) VTC fails to capture the nuanced nonverbal elements of

testimony, and (2) VTC makes an applicant seem less trustworthy. VTC thus conveys less information to the trial judge in the same way court transcripts convey less information to the appellate judges; in both cases, only parts of the testimony reach the decision-maker. Precedent suggests that replacing traditional face-to-face hearings with a system that loses some of the testimony's richness is not proper; nevertheless, this is exactly the replacement that IIRIRA demands.

B. *Deference to the Face-to-Face Observer in REAL ID*

The greatest internal inconsistency regarding VTC is statutory in nature. In 2005, Congress increased the discretion given to Immigration Judges with the passage of the REAL ID Act of 2005 ("REAL ID"). n44 REAL ID, in addition to clarifying that there was "[n]o presumption of credibility" in asylum hearings, n45 gave the Immigration Judge almost unreviewable power in deciding whether an applicant's testimony was credible. n46 With REAL ID, Congress seemed to echo the traditional jurisprudential idea that an in-court observer was best situated to make credibility determinations about testimony.

The legislative history of REAL ID shows that an Immigration Judge's ability to rely on the intangible aspects of an applicant's testimony was exactly why Congress granted such wide latitude to the Judge:

> An immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial [*266] evidence. He is, by virtue of his acquired skill, uniquely qualified to decide whether an alien's testimony has about it the ring of truth. n47
>
> All aspects of the witness's demeanor-including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other nonverbal communication-may convince the observing trial judge that the witness is testifying truthfully or falsely. n48

The House Conference Report on REAL ID justified the increase in discretion, and the potential loss of judicial uniformity, n49 by stressing the Immigration Judge's unique ability to perceive nuanced nonverbal communication. n50 For REAL ID, there was no question that a judge's presence in-court made all the difference when it came to assessing an applicant's credibility and veracity.

The two statutes, separated by eleven years, are internally inconsistent as to the Immigration Judge's relative importance to the asylum system as a whole. IIRIRA argues that personal contact with an applicant is superfluous, even though VTC fails to convey a number of nonverbal cues. REAL ID, on the other hand, argues that personal contact with the applicant is so important that the statute all but precludes review by the Bureau of Immigration Appeals ("BIA"). Simply put, face-to-face contact is either important or not, and these statutes fail to articulate which it is.

IV. VTC's AS A MATTER OF POLICY: VTC SUBSTANTIVELY AFFECTS ASYLUM HEARING DETERMINATIONS BECAUSE VTC FORCES JUDGES TO MAKE DECISIONS ON LIMITED INFORMATION

The core of EOIR's argument that VTC is a good policy is the assertion that "[VTC] does not change the adjudicative quality or decisional out-comes." n51 This article will refute both aspects of this statement by (1) explaining how VTC changes the "adjudicative quality" of the Immigration Judge's decision by fundamentally altering the perception of the testimony, and (2) showing that VTC constitutes a statistically significant factor in the "decisional outcome" of an asylum case.

A. *The Adjudicative Quality of VTC Hearings*

The use of VTC in removal hearings affects the manner in which an [*267] Immigration Judge hears an applicant's testimony; even with the most sophisticated high-definition television systems, the applicant is still perceived via a two-dimensional screen. Despite assurances that current VTC "functionally duplicates" a live appearance, n52 the reality is that live and VTC testimony are different. The issue, then, is whether the inherent differences between the types of testimony affect the manner in which the judge perceives the testimony and, consequently, whether the judge's adjudication is affected by the type of testimony.

While the United States, Australia, and Canada all currently use VTC to process refugee claims, n53 only Canada has commissioned a formal evaluation of VTC. In 2004, Ottawa asked Ronald Ellis to assess the effects of VTC on Canada's Immigration and Refugee Board's asylum hearings. n54 The Ellis Report recommended further studies into the use of VTC, n55 and acting on that recommendation the Canadian government contacted Mark Federman to analyze the psychological effect of VTC on an Immigration Judge's perception of testimony. n56 Federman, in his seminal work on the effect of VTC in immigration hearings, concluded that VTC inherently results in a loss of nonverbal cues and a more strained communication relationship between the speaker and the observer. n57 This article will analyze these findings and will [*268] then conclude by arguing that these effects result in skewed perception of an asylum applicant.

1. *VTC Fails to Capture the Vital Nonverbal Components of Oral Communication*

The first problem Federman identified with VTC was that the technology could not sufficiently convey a number of the nuanced nonverbal cues that are inherent in oral communication. n58 Simply put, nonverbal elements constitute an integral component of normal oral conversation. n59 Albert Mehrabain, a psychologist at UCLA, concluded that the meaning of an oral communication is a function of three factors: words, tone of voice, and body language. n60 Words account for seven percent of meaning, tone of voice for thirty-eight percent, and body language for fifty-five percent. n61 Mehrabian summarized this composition in what he called the 7-38-55 percent rule. n62 The problem with VTC is that it fails to adequately capture subtle changes in tone of voice and it often misrepresents body language, skewing ninety-three percent of the testimony's meaning.

The expressions, gaze, posture, and gestures that provide important insight into an asylum applicant's credibility or level of understanding are skewed when viewed via VTC. n63 Video transmission may exaggerate or flatten an applicant's affect and audio transmission may cut off the low and high frequencies of the applicant's voice; n64 both of these anomalies impair the

fact finder's ability to assess the veracity of the applicant's story. Additionally, multiple studies have found that VTC communication is not as rich as face-to-face communications and diminishes the ability to generate positive feelings among participants. n65

The issue of eye contact illustrates on the inherent difficulties in attempting to convey nonverbal communications via VTC. Eye contact is consistently ranked as the most important element of nonverbal communication because, in American culture, a failure to make eye contact triggers feelings [*269] of distrust in an observer. n66 In a VTC hearing, it is physically impossible to look at both the camera and the visual depiction of the judge on a monitor near the applicant. In order for the judge to perceive that the applicant is maintaining eye contact, the applicant must speak into the camera (a non-intuitive skill that applicants may not have). By speaking into the camera, the applicant is unable to see the judge's reactions to his or her testimony. The necessity of having an applicant speak to an inanimate object inherently affects the testimony: a person speaking to a live individual will deliver the same testimony differently when speaking to a brick wall. The judge, however, only sees the version of an applicant's testimony that was delivered into an inanimate object. n67

2. *VTC Undermines the Applicant's Ability to Build an Emotional Connection with the Judge*

For an asylum seeker, the ability to emotionally connect with the judge is of paramount importance. The applicant's story involves the flight from persecution and its facts are those that would usually evoke an emotional response. Judicial compassion and sympathy are factors in judicial discretion, n68 and an applicant's story is the applicant's primary tool in evoking the judge's empathy. n69 VTC undermines the applicant's ability to make that emotional connection because the observer feels an artificial distance from the applicant. n70 This distance is often described as the "dehumanizing" n71 effect of VTC: the applicant appears to be more of a character on a television set than an actual person telling his or her story of persecution and escape.

The problem with a perceived distance between the judge and applicant is that the applicant will seem less trustworthy and less credible. n72 The cognitive dissonance between hearing a story that should be emotionally evocative and not feeling that reaction because the applicant is perceived as distant leads to a subconscious skepticism in the Immigration Judge's mind. n73 Consciously imperceptible small delays on VTC, which last between [*270] 200 and 400 milliseconds, are unconsciously perceptible by the human brain and adversely affects the listener's perception of the speaker. n74 This lack of trust also contributes to a skewed perception of the testimony.

3. *Immigration Judges Will Equate the Skewed Testimony Delivered via VTC with Reality, Fundamentally Altering the Adjudicative Process*

This article has thus far discussed several cognitive externalities that could influence the way an Immigration Judge perceives the testimony of an asylum applicant. The proponents of VTC argue that these effects can be controlled because most Immigration Judges are sophisticated enough to recognize that they are viewing a VTC image and will consciously note the limitations of the system. n75 The real danger of the latent cognitive externalities, however, is subconscious in nature. An Immigration Judge will, without making a conscious decision, attribute the factors he sees on the VTC display to the applicant. n76

Recent studies have shown that interaction between the viewer and the image that viewer is observing is so intense that a viewer cannot cognitively differentiate between the screen images and reality--humans tend to equate media images and reality. n77 This "media equation" means that viewers will respond to screen images as if they are real and will attribute the attributes of the image onto real life. Two Stanford professors, Byron Reeves and Clifford Nass, discuss the implications of the media equation:

> [Most people think] that the confusion of mediated life and real life is rare and inconsequential, and it can be corrected with age, education, or thought. We have collected a great deal of evidence that shows this conclusion is not true. Equating mediated and real life is neither rare nor unreasonable. It is very common, it is easy to foster, it does not depend on fancy media equipment, and thinking will not make it go away. The media equation--media equal real life--applies to everyone, it applies often, and it is highly consequential. n78

In the immigration context, this means that, even though an Immigration Judge consciously separates the artificial VTC image from the real applicant, the Judge will attribute the characteristics of the VTC image to the applicant. If the image on the screen appears untrustworthy or unemotional, then the Judge will unconsciously think of the applicant as untrustworthy or unemotional.

[*271] B. *The Use of VTC Doubles the Likelihood that an Asylum Applicant Will Be Denied Asylum*

The EOIR Office of Planning, Analysis, and Technology recently prepared a statistical report on the use of VTC in asylum hearings at the request of the author for this article. The report, entitled "Statistical Request OPA 07-116" [hereinafter "EOIR Report"], is attached as Appendix A and gives grant/ denial statistics for all asylum cases differentiated between hearings conducted via VTC, telephone, and in-person. This EOIR Report is the first DOJ statistical request processed on the use of VTC in the asylum context.

The grant rate for asylum applicants whose cases were heard in-person is roughly double the grant rate for the applicants whose cases were heard via VTC: n79

TABLE 1. GRANT RATES FOR VTC AND IN-PERSON HEARINGS IN FY2005 AND FY2006

	FY 2005	FY 2006
VTC Hearings	23.27%	21.86%
In-Person Hearings	38.20%	44.87%

The differences in these grant rates are statistically significant, with less than a two percent chance that the differences are a random occurrence. n80 Simply put, the stark difference in grant rates between VTC and in-person hearings refutes EOIR's contention that the use of VTC "does not change . . . the decisional outcomes." n81 In reality, the use of VTC actually makes asylum half as likely for those who are forced to use the system.

The effects of VTC are still significant even if we control for the higher incidence of unrepresented aliens who rely on VTC. n82 Since represented asylum applicants are "four to six times more likely to win their asylum cases" than unrepresented applicants, n83 proponents of

VTC might claim that the higher incidence of unrepresented aliens in VTC hearings might constitute [*272] a lurking variable that could explain the difference in grant rates. n84 This contention can be easily refuted because, even if only represented clients are considered, there is still a clear difference in the grant rates:

TABLE 2. GRANT RATES FOR REPRESENTED ALIENS IN VTC AND IN-PERSON HEARINGS

	FY 2005	FY 2006
VTC Hearings	23.27%	29.15%
In-Person Hearings	38.20%	46.25%

The differences in grant rates, accounting for the unrepresented status of aliens, are also statistically significant. n85 Thus, even when comparing only those applicants who have the benefit of an attorney, the use of VTC materially affects the likelihood of an asylum grant.

VTC affects the asylum hearing process. Even the most sophisticated VTC systems affect a listener's perception of an asylum applicant's testimony by undermining the Immigration Judge's ability to assess credibility. n86 VTC also has a statistically significant effect on asylum grant rates; asylum applicants are only half as likely to win an asylum grant if their hearing uses VTC. n87 The onus is now on EOIR to decide whether, as a matter of policy, VTC's efficiency gains outweigh the system's inherent distortions to the justice system and holistic effect on grant rates.

V. VTC AS A MATTER OF LAW: VTC DOES NOT "FULLY PROTECT THE PARTICIPANTS' RIGHT TO PROCEDURAL DUE PROCESS" BECAUSE IIRIRA AND REAL ID ESTABLISH A SYSTEM WHERE FLAWED CREDIBILITY DECISIONS ARE VIRTUALLY UNREVIEWABLE

EOIR's second premise in justifying the use of VTC is that "[h]earings conducted by [VTC] are fair and fully protect the participants' right to procedural due process." n88 This assertion is suspect because the IIRIRA and REAL ID work together to drastically increase the likelihood that a bona fide refugee could be denied asylum status. The consequences of a system that facilitates erroneous adjudications of asylum status are two-fold: it (1) [*273] violates the United States' treaty obligation of *non-refoulement* under the Refugee Protocol of 1967, thereby violating international law, n89 and (2) violates domestic law by violating the Due Process Clause. n90

A. *IIRIRA and REAL ID Particularly Prejudice an Asylum Applicant because Applicants are Especially Dependent on Their Testimony to Establish Refugee Status*

Immigration Courts place great importance on the testimony of asylum applicants. By definition, a refugee is someone who has fled his or her country when that country is unwilling or unable to protect the refugee from persecution. n91 While fleeing from persecutors and a complicit government, refugees seldom have time to compile the type of documentary evidence American courts often demand in domestic trials. n92 As the United Nations Refugee Handbook states, "a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." n93 With little or no documentation to corroborate their story of persecution, asylum applicants must rely on the strength of their testimony to establish a prima facie case of eligibility under *8 U.S.C. § 1101*(a)(42)(A). Indeed,

an applicant's testimony is so important that a judge can grant asylum status based exclusively on that testimony. n94

Given that an asylum applicant disproportionately relies on his or her testimony, any procedure that undermines the richness or effectiveness of testimony would disproportionately prejudice asylum seekers. This is exactly what VTC does: as described above, VTC fundamentally alters the way judges perceive an applicant's testimony. n95 By endorsing VTC, § 1221a forces Immigration Judges to make credibility determinations based on only a fraction of the information conveyed by the applicant's oral communication. n96 Not only does VTC limit any potential positive effects of an applicant's [*274] testimony by failing to convey corroborative nonverbal cues and discouraging any emotional connection, VTC actually prejudices the applicant by making the applicant seem less trustworthy than he or she would appear in person. n97 Put another way, the asylum applicant can often rely on a single tool to build his case for asylum, and the IIRIRA dulls even that.

Compounding the asylum applicant's plight is the fact that adverse credibility rulings by the trial judge that are based on VTC testimony are all but unreviewable by the BIA after the passage of REAL ID. n98 Even if the BIA believes that the record supports an applicant's credibility, the BIA cannot overturn an Immigration Judge's adverse credibility ruling unless the Immigration Judge's decision was wholly unreasonable. n99 For the asylum seeker, this means that there is little or no appellate recourse to correct problems associated with testimony delivered via VTC. Working in conjunction, the IIRIRA forces judges to make credibility determinations on flawed evidence and REAL ID makes those determinations binding.

B. *VTC Implicates International Law because the United States Has an Independent Treaty Obligation Not to Refoul Bona Fide Refugees*

As a signatory of the 1967 Refugee Protocol ("Protocol"), the United States has assumed the duty of *non-refoulement* of those who meet the definition in Art. 1 of the 1951 Refugee Convention ("Convention"). n100 This duty, at its most basic level, means that the United States cannot return a refugee to the country of his persecution or torture. n101 The danger of IRRIRA and REAL ID in the context of the Refugee Convention is that those statutes increase the chances that the American courts will misapply the Article 1 definition of a "refugee" because of the cognitive externalities inherent in VTC. While any system of individualized adjudication assumes the risk of possibly denying a bona fide applicant the appropriate relief, the use of VTC raises the inherent structural risk of a false negative to the level of a near certainty.

The Refugee Convention's duty of *non-refoulement* applies to American courts until their asylum seekers are determined ineligible for relief. n102 When using VTC, Immigration Courts may very well adjudicate the issue not on the [*275] actual merits of the case but rather on the cognitive externalities inherent in VTC; an asylum applicant would thus never get the substantive merits hearing to which he is entitled. Continued use of VTC risks violation of the *non-refoulement* obligation under Art. 33(1) of the Refugee Convention and thus not only frustrates the pragmatic goals of reliable asylum adjudications but also violates America's humanitarian promises internationally.

C. *VTC Implicates Domestic Law Because it Violates Due Process*

1. *The* Mathews v. Eldridge *Test*

The use of VTC also implicates the Due Process Clauses of the Fifth and Fourteenth Amendments. The Due Process Clause applies to all "persons" within the territorial jurisdiction of the Constitution. n103 The Supreme Court has also described the Clause as fundamentally requiring an "opportunity to be heard at a meaningful time and in a meaningful marmer." n104 The United States Code reflects this standard in § 1229a(b)(4)(B): the applicant must be allowed "reasonable opportunity to . . . present evidence on the alien's behalf." n105 In *Mathews v. Eldridge*, the Supreme Court announced a three-part balancing test for adjudicating allegations that a particular procedure--like VTC--does not satisfy the procedural protections of the Due Process Clause. n106 The *Eldridge* test requires a court to weigh three factors in determining whether an individual's Due Process rights have been violated: (1) the applicant's interest that is being deprived, (2) the government's interest in depriving the individual, and (3) the likelihood of an erroneous deprivation and the probable value of other alternative procedural safeguards. n107

The first *Eldridge* factor, the applicant's interest, is satisfied for an asylum seeker. The Supreme Court has recognized that the right "to stay and live and work in this land of freedom" is a "weighty" interest. n108 Bona fide refugees also have another interest in not being returned home: in their native countries, the refugees have a well-founded fear of persecution and have [*276] already been persecuted. The level of abuse that rises to the level of persecution is a serious matter and adds to the weight of the asylum applicant's interest in the litigation. n109

On the other hand, the Court has also found the government's countervailing interest in regulating immigration to be an important interest n110 and has interpreted Congress's power over entry to be nearly plenary: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." n111 The power to regulate immigration, however, does not mean the power to engage in a needlessly prejudiced hearing procedure; indeed, the Court has acknowledge that Congress "is subject to important constitutional limitations." n112 The government may also argue that its interest in VTC is the desire for a cheaper, more efficient immigration system. While financial and administrative savings are appropriately considered factors in weighing the government's interests, n113 mere financial interests do not outweigh serious personal stakes like life, liberty, or a child's interest in receiving an education. n114 Thus, the government has weighty but not dispositive interests in using VTC.

The final *Eldridge* factor is a two-part inquiry into (1) the likelihood of an erroneous deprivation, and (2) an analysis of available alternatives to the challenged regulatory scheme. n115 First, as described above in Part IV.A., the likelihood of erroneously depriving asylum relief drastically increases when adjudications are based on unreviewable determinations and skewed testimony. Either IIRIRA or REAL ID would have increased the chances of an erroneous deprivation; taken together, however, their synergy eviscerates any chance for meaningful review. Second, simple and straightforward alternatives to VTC exist that satisfy the cost/practicality concerns in *Mathews*; the most obvious is a return to the pre-IIRIRA process of allowing an in-person [*277] hearing for all aliens. Alternatively, as described immediately below, Department of Homeland Security (DHS) could strike a middle ground between efficiency and in-person hearings by limiting the use of VTC to master calendar hearings. Either way, there are viable alternatives to the unnecessarily risky process of using VTC to conduct substantive hearings.

2. *Multiple Courts of Appeal have Found VTC Constitutes a Due Process Violation*

While no case has applied the Eldridge test to § 1221a and VTC, n116 a number of courts have questioned the process' effectiveness. n117 The Courts of Appeals have chipped away at VTC's foundation by asserting that VTC testimony is fundamentally different from in-person testimony, and that applicants might not be "present" in the legal sense when appearing via VTC. n118

First, the courts have questioned the validity of EOIR's reliance on the fact that "Congress made no distinction between an in-person hearing and a hearing conducted by VTC." n119 The Fourth Circuit acknowledged the reality that testimony observed via VTC fails to convey the emotion and power of an in-person observation: "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." n120 The Seventh Circuit has echoed this sentiment:

> Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion. n121

The courts' reluctance to accept Congress' implication of ambivalence between using VTC and in-person hearings bodes well for a reevaluation of the system. If courts adhered to the legal fiction that VTC and in-person hearings were functionally equivalent n122 then any legal challenge to the [*278] system on Due Process grounds would likely fail. VTC and in-person hearings are different; the next question for the courts is whether the processes are so different that they violate Due Process.

The second major area where the Courts of Appeal have questioned VTC is on the issue of "presence." Since removal hearings are not criminal hearings, neither the Sixth Amendment's Confrontation Clause n123 nor *Federal Rule of Criminal Procedure 43* n124 apply. n125 However, the issue of whether an asylum applicant is present at the hearing is much like that for one charged with a crime: is the applicant "present"? n126 According to the Fourth, Fifth, Ninth, and Tenth Circuits, "presence" means "physical presence." n127 Both the Tenth Circuit and the Fourth Circuit relied upon Black's Law Dictionary to find that a defendant's actual presence was not satisfied by a projection of the defendant on a television screen. n128 Just as appearing via VTC does not constitute presence in a criminal court, appearing via VTC in immigration court should not constitute presence either. Therefore, if an alien is not legally present at the hearing there is a heightened likelihood that the hearing will result in an erroneous decision.

VI. POLICY RECOMMENDATION THAT PROPERLY PRIORITIZES JUSTICE AND EFFICIENCY: LIMIT VTC TO MASTER CALENDAR HEARINGS

Despite the number of problems addressed in this analysis, the use of VTC still holds enormous potential for increasing efficiency of America's asylum system. By selectively using VTC in situations where nuanced, nonverbal cues are not critical to the hearing's purpose, there are ways EOIR could capitalize on VTC's strengths while minimizing the technology's weakness. With this selective-use paradigm in mind, the best use of VTC would be at the mandatory master calendar hearings that all asylum seekers must attend. The master calendar hearing, akin to an arraignment in the criminal context, is a procedural hurdle that often takes less than twenty

minutes. The purpose of the master calendar hearing is to establish the grounds for relief and to schedule a subsequent removal hearing; both of these tasks are straightforward and do not require the judge to engage in ambiguous credibility determinations. Thus this article recommends two statutory changes: (1) [*279] §1229a(b)(2)(A)(iii) should be deleted so that hearings can be heard in person, in absentia with consent of the parties, or via telephone conference with the consent of the alien, n129 and (2) a paragraph (C) should be added to § 1229a(b)(2) that allows for master calendar hearings to be heard via VTC.

This limitation on use of VTC echoes the use of the technology in other parts of the American judicial system. In the non-immigration context, VTC has a very limited application: it is used in civil litigation, preliminary procedural hearings in criminal cases, and in parole hearings. n130 The Supreme Court acknowledged this distinction between minor hearings and substantive trials in its April 2002 rejection of an amendment to *Federal Rule of Criminal Procedure 26* that would allow for VTC in substantive hearings. n131 This rejection is especially telling because the Court approved two amendments that allowed for VTC to be used in procedural initial appearances and arraignments. n132 For the Supreme Court, substantive hearings demand more than the fractured testimony produced by VTC. n133 EOIR should follow the Court's example.

EOIR's fundamental goal in the use of VTC was "[t]o provide fair and efficient immigration hearings through video-teleconferencing (VTC) at established hearing locations throughout the United States." n134 As described in this article, the use of VTC in removal hearings fails to achieve this goal. VTC fails as both a matter of policy and as a matter of law; it fundamentally alters the Immigration Judge's decision-making process and infringes on the alien's Constitutional right to Due Process. EOIR's goal is conjunctive: the Office hopes to provide "fair *and* efficient" hearings. By using VTC in removal hearings, EOIR has advanced its efficiency goal; However the fairness of proceedings has suffered. By limiting VTC appearances to Master Calendar hearings, EOIR can advance both of its stated goals and ensure that efficiency stands alongside justice in the American Immigration Court system.

[*280] APPENDIX A. STATISTICAL REQUEST OPA 07-116

U.S. Department of Justice Executive Office for Immigration Review Office of Planning, Analysis and Technology

Statistical Request OPA 07-116

FY 2005 Asylum Decisions

By Initial Hearing Type

	Grants *	Denial	Withdrawn	Abandoned	Other
Video Conference	104 (3)	343 (77)	145	45	330
Telephonic	128 (0)	177 (20)	83	21	185
In Person	11,526 (56)	18,650 (1,836)	13,192	3,583	12,130

FY 2006 Asylum Decisions

By Initial Hearing Type

	Grants	Denial	Withdrawn	Abandoned	Other
Video Conference	80 (1)	286 (94)	193	44	621
Telephonic	156 (3)	150 (19)	77	21	159

	Grants	Denial	Withdrawn	Abandoned	Other
In Person	13,120 (87)	16,123 (1,529)	10,082	3,858	13,081

Total Immigration Judge Decisions

By Initial Hearing Type

	FY 2005	FY 2006
Video Conference	5,692	7,413
Telephonic	1,533	1,574
In Person	257,522	264,724

* Number in parenthesis are subsets indicating the number of unrepresented aliens

APPENDIX B. STATISTICAL SIGNIFICANCE OF THE DIFFERENCE IN GRANT RATES

The disparity in grant rates between VTC and in-person hearings is statistically significant because the difference in grant rates in 2005 and 2006 had z-scores of --7.4 and --10.54, respectively. n135 The difference in means is modeled in a binomial distribution, which mirrors a normal distribution. It is generally acknowledged that z-scores above 2 are significant; the disparity in the grant rates is thus highly statistically significant. The formula for a two-proportion z-test with unequal variances is: [*281] Image 1

The calculations for both FY2005 and FY2006 are as follows. Image 2

Running this calculation for the asylum data given in OPA 07-116 generates the following: Image 3

Once this z-score has been obtained, the next step in determining the significance of a binomial distribution is to find the place of the z-score on a binomial distribution. The binomial distribution resembles a normal distribution, depicted in the following graph: n136 [*282] Figure 1

The x-axis on this graph represents standard deviations from the mean; for binomial distributions this is equivalent to the z-score. A z-score of three, for example would encompass 98 percent of random samples and indicate only a 2 percent chance that the deviation from the mean was random. Z-score of--7.4 and --10.56, the value of the difference in grant rates between VTC and in-person determinations in FY 2005 and FY 2006 respectively, are exponentially more significant. The null hypotheses that VTC and in-person interviews have comparable grant rates are rejected.

APPENDIX C. ACCOUNTING FOR A LACK OF REPRESENTATION

The difference in grant rates is statistically significant even when the higher number of unrepresented asylum applicants using VTC. The calculation for new z-scores is identical to the calculation in Appendix B except that the unrepresented cases have been removed from the total: Image 4

[*283] Running this calculation for the asylum data given in OPA 07-116 within parenthesis generates the following: Image 5

The z-test for FY 2006: Image 6

The absolute value of these z-scores is still far above the z-score of 3 that accounts for 98% of random solutions. The null hypotheses that VTC and in-person interviews have comparable grant rates, accounting for the higher number of unrepresented aliens using VTC, are rejected.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewImmigration LawAdmissionSelection SystemPreferences & PrioritiesImmigration LawAsylum & Related ReliefGeneral Overview

FOOTNOTES:

n1 *See* Cormac T. Connor, Note, *Human Rights Violations in the Information Age*, 16 GEO. Whim. L.J. 207, 214 (2001) (discussing the difficulties aliens in remote detention centers have in reaching an attorney).

n2 *Operations of the Immigration and Naturalization Service: Hearing Before H. Jud. Comm, (1994) 1994 WL 545250* (F.D.C.H.) (testimony of Doris Meissner, Commissioner of Immigration and Naturalization Service).

n3 Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 LAW & POL'Y 211, 213 (2006).

n4 Anne Chen, *Court Summons IT*, PC WEEK, June 14, 1999, at 87; *see also* Mark Leibowitz, *Videoconferencing Minimizes Costs*, AMERICAN CITY & COUNTY, Dec. 1998, at 10.

n5 *See* Eugenio Mollo, Note, *The Expansion of Video Conferencing Technology in Immigration Proceedings and Its Impact on Venue Provisions, Interpretation Rights, and the Mexican Immigrant Community*, *9 J. GENDER RACE & JUST. 689, 692-93 (2006)* (arguing that the "increased use of technology to the courts is inevitable").

n6 Leibowitz, *supra* note 4, at 10 (internal quotations omitted).

n7 *See* Johnson & Wiggins, *supra* note 3, at 212 ("Despite the gravity of the rights involved and the strong opinions on both sides of the debate over the use of videoconferencing, little empirical information is available about the extent of its use in criminal cases or the effects of videoconferencing on the behavior of participants and thus, potentially, on defendants' rights.").

n8 *See 8 U.S.C. § 1101*(a)(42)(A) (2006) (defining a "refugee" as "any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution

on account of race, religion, nationality, membership in a particular social group, or political opinion").

n9 *8 U.S.C. § 1229a*(b)(2)(A)(iii) (2006).

n10 *See* U.S. Dep't of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Headquarters Immigration Court (HQIC) Fact Sheet*, http://www.usdoj.gov/eoir/sibpages/HQICFactSheet.pdf (last visited Mar. 27, 2007) [hereinafter *HQIC Fact Sheet I*].

n11 *Cf.* Mark Umbreit, *Avoiding the Marginalization and 'McDonaldization' of Victim-Offender Mediation, in* RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 213 (George Bazemore & Lode Walgrave eds., Criminal Justice Press 1999) (discussing how efficiency interests have undermined the value of mediation efforts); David Shichor, *Three Strikes as a Public Policy: The Convergence of the New Penology and the McDonaldization of Punishment*, 43 CRIME AND DELINQUENCY 470-93 (1997) (discussing how efficiency interests have undermined the rehabilitation efforts).

n12 *See* U.S. Dep't of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Headquarters Immigration Court (HQIC) Fact Sheet* (July 21, 2004), http://www.usdoj.gov/eoir/press/04/HQICFactSheet.pdf [hereinafter *HQIC Fact Sheet II*].

n13 *See HQIC Fact Sheet I, supra* note 10 at 1.

n14 *See* J. Antonin Scalia, Statement on Amendments to *Rule 26(b) of the Federal Rules of Criminal Procedure*, Apr. 29, 2002 at 2 (stressing the importance of "compel[ing] accusers to make their accusations *in the defendant's presence*--which is not equivalent to making them in a room that contains a television set beaming electrons that portray the defendant's image").

n15 Myrna Pages, Note, *Indefinite Detention: Tipping the Scale Toward the Liberty Interest of Freedom After* Zadvydas v. Davis, *66 ALB. L. REV. 1213, 1217 (2003); see also* S. REP. No. 104-250, at 10 (1996); Connor, *supra* note 1, at 214.

n16 *8 U.S.C. § 1229a*(b)(2)(A)(iii) (2006).

n17 *See 8 U.S.C. § 1231*(a)(2) (2006) ("During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible. . . .").

n18 *See* MARK Dow, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 9 (2004); Donald Kerwin, *Looking for Asylum, Suffering in Detention*, 28 Hum. RTS.: J. SEC. INDIVIDUAL RTS. & RESPONSIBILITIES 3, 4 (2001) (describing the difficulties aliens face in detention).

n19 *8 U.S.C. 1231*(a)(1)(A) (2006) ("Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the 'removal period').").

n20 *See* Dow, *supra* note 18, at 174-75; Joren Lyons, *Mandatory Detention During Removal Proceedings: Challenging the Applicability of* Demore v. Kim *to Vietnamese and Laotian Detainees, 12 ASIAN L.J. 231, 233 (2005)* (stating how detainees can sometimes "spend more time in civil immigration custody than they serve for their criminal offense, often while housed in remote federal detention facilities").

n21 *See* Chen, *supra* note 4, at 87 (describing the "the traditionally long and arduous process of transporting prisoners from the jailhouse to the courthouse for arraignment or trial").

n22 *See United States v. Baker, 45 F.3d 837, 847 (4th Cir. 1995)* (discussing the dangers of transporting aliens); Johnson & Wiggins, *supra* note 3, at 212.

n23 *See 8 U.S.C. § 1229a*(b)(2)(A)(i), (iii) (2006).

n24 *HQIC Fact Sheet I, supra* note 10; *see also* Chen, *supra* note 4, at 87.

n25 *See* Aaron Haas, *Videoconferencing in Immigration Proceedings, 5 PIERCE L. REV, 59, 59 (2006).*

n26 Interview with the Honorable Frederic Lederer, Chancellor Professor of Law and Director of the Center for Legal and Court Technology in Washington, D.C. (Mar. 28, 2007).

n27 National Center for State Courts, Videoconferencing, Briefing Papers, http://www.ncsconline.org/WC/Publications/KIS_VidConBriefPub.pdf, (last visited Mar. 28, 2007) (stating that a monitor and camera unit cost approximately $ 40,000 and that price is rapidly falling).

n28 *See* Craig Savoye & Seth Stern, *Lawyers Can Now Call Witnesses by Remote Control*, CHRISTIAN SCIENCE MONITOR, Dec. 12, 2001 at 1 (quoting Professor Frederic Lederer as saying that "in a normal trial, an inordinate amount of time is spent literally walking around the courtroom, showing a piece of evidence to opposing counsel, showing it to a witness, taking it over to the jurors, and sometimes having them pass it from one to another"); Leibowitz, *supra* note 4, at 10 (discussing the variety of ways VTC saves money).

n29 Margaret Boitano, *Wired in West Virginia Jails (of All Places)*, FORTUNE, Dec. 18, 2000, at 68 (describing how West Virginia built a $ 25 million network linking its courthouses and jails to avoid "skyrocketing" transportation costs).

n30 *See* Chen, *supra* note 4, at 87.

n31 *See id.*

n32 *See* Mollo, *supra* note 5, at 692 (discussing allegations that aliens carry Tuberculosis and Hepatitis B).

n33 U.S. Dep't of Justice, Executive Office for Immigration Review, *Strategic Plan Fiscal Years 2005-2010* (Sept. 2004) http://www.usdoj.gov/eoir/statspub/FinalTEREOIRStrategicPlan2005-2010September%202004.pdf [hereinafter *EOIR Strategic Plan*].

n34 *See HQIC Fact Sheet I, supra* note 10.

n35 *See* EOIR Strategic Plan, *supra* note 33, at 15.

n36 *See* Mollo, *supra* note 5, at 691.

n37 *See* Connor, *supra* note 1, at 216.

n38 *HQIC Fact Sheet II, supra* note 12.

n.39 *Thornton v. Snyder, 428 F.3d 690, 698 (7th Cir. 2005).*

n40 *See United States v. Oregon Medical Society, 343 U.S. 326, 339 (1952).*

n41 *447 U.S. 667, 697, n.3 (1980)* (citations omitted).

n42 *Cumpiano v. Banco Santander P.R., 902 F.2d 148, 152 (1st Cir. 1990); see also Amlong & Amlong, P.A. v. Denny's, Inc., 457 F.3d 1180, 1199 (11th Cir. 2006)* ("Indeed, the raw transcript of the hearing could not have captured the nuances of the testimony or the demeanor of the witnesses in a way that would have fairly allowed the district court to make a reliable determination that the magistrate judge was wrong in finding facts and choosing to believe the witnesses.").

n43 *Thornton v. Snyder, 428 F.3d 690, 698 (7th Cir. 2005)* ("The importance of presenting live testimony in court cannot be forgotten.").

n44 *See* Pub.L. No. 109-13 (2005).

n45 *8 U.S.C. 1158*(b)(1)(B)(iii) (2006). Additionally, REAL ID increased an Immigration Judge's ability to rely on evidence outside the testimony given in the hearing: "In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record." *8 U.S.C. 1158*(b)(1)(B)(ii).

n46 *See 8 U.S.C. § 1252*(b)(4)(D) (2006) ("No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."); *see also* Aubra Fletcher, *The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law, 21 BERKELEY J. GENDER L. & JUST. 111, 126 (2006)* ("Finally, the 'trier of fact' language in this section may lead the BIA and federal courts to defer to IJ findings in this regard.").

n47 H.R. REP. No. 109-72, at 167-68 (2005) (Conf. Rep.) (quoting *Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1395 (9th Cir. 1985).*

n48 *Id.* (quoting *Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003)).*
n49 *See* Fletcher, *supra* note 46, at 126 (discussing the danger of inconsistent verdicts when Immigration Judges are accorded greater discretion).

n50 H.R. REP. No. 109-72, at 167-68.

n51 *HQIC Fact Sheet II, supra* note 12.

n52 Interview with the Honorable Frederic Lederer, supra note 26 (maintaining that modem technology allows for VTC testimony that is functionally the same as live testimony).

n53 Mark Federman, *On the Media Effects of Immigration and Refugee Board Hearings via Videoconference,* 19 J. REFUGEE Snip. 433, 434 (2006).

n54 Ronald Ellis, Ellis Report to the Immigration and Refugee Board Audit and Evaluation Committee, (Oct. 21, 2004), *available at* http://www.irb-cisr.gc.ca/en/about/transparency/reviews/video/index_e.htm#conclusion [hereinafter "Ellis Report"]. Ellis' specific mandate was to "review the Board's use of videoconferencing in refugee hearings for the purpose of assessing the impact the technology may have on the fairness of the hearings and whether the practice maintains an appropriate balance between fairness and efficiency." *Id.*

n55 *See id.* The Ellis Report concluded that:

> My main conclusion is that the RPD should not make a final decision about the appropriateness of the use of videoconferencing in refugee hearings without further and more sophisticated trials and investigation.
>
> The important concerns addressed by the scientists about the efficacy and appropriateness of video-mediated communication in refugee matters cannot be appropriately ignored. Neither would it be right to ignore the inherent reservations evidenced in the survey responses as to the possible negative impact on the ability of refugee claimants to perform in videoc onferenced

> hearings at levels of comfort that allow them to communicate effectively and to display demeanour that reflects their true selves.
>
> But it is too early to say that these are problems that could not be solved with some felicitous adjustments in the protocol, procedures and technical facilities, at least perhaps for a significant proportion of cases . . . . My recommendation is that the Board commit to a significant 'testing period' during which the videoconferencing would be delivered in the most acceptable way possible and the relative fairness and effectiveness of video conferenced hearings as compared to traditional hearings would be carefully and systematically evaluated through an independent and scholarly empirical study.

Id. The Ellis Report then gave a detailed list of modifications to the VTC process that would better improve the system.

n56 *See* Federman, *supra* note 53, at 435.

n57 *See id.* at 438-44.

n58 *See id.* at 436-38, 442-45.

n59 *See* Haas, *supra* note 25, at 68-70.

n60 ALBERT MEHRABIAN, NONVERBAL COMMUNICATION 178 (1972).

n61 *Id.* at 79.

n62 *See id.*

n63 *See* Johnson & Wiggins, *supra* note 3, at 215-16.

n64 *See id.* at 216.

n65 *See* Haas, *supra* note 25, at 74; S.G. Straus, et al, *The Effects of Videoconference, Telephone, and Face-to-Face Media on Interviewer and Applicant Judgments in Employment Interviews*, 27 J. OF MGMT. 363, 372 (2001) ("Interviewers reported that it was much easier to regulate the conversation and achieve mutual understanding in [face-to-face] versus [VTC] interviews . ."); John Stock & Lee Sproull, *Through a Glass Darkly: Why Do People Learn in Videoconference*, 22 HUM. COMM. RES. 197, 202-05 (1995). In the Stock and Sproull study, participants were organized into pairs and tasked with a map orienteering exercise. The amount of verbal dialogue needed to complete the exercise for the participants using VTC was far greater than the amount of dialogue needed for those participants speaking face-to-face. *Id.* at 202-05.

n66 *See* Connor, *supra* note 1, at 217.

n67 *Cf.* Robert Feldman & Richard B. Chesley, *Who is Lying, Who is Not: An Attributional Analysis of the Effects of Nonverbal Behavior on Judgments of Defendant Believability*, 2 BEHAVIORAL SCIENCES AND THE LAW 109, 110 (1984) (the mere presence of a camera in the room could make the applicant more nervous).

n68 *See* Connor, *supra* note 1, at 218-19.

n69 *See* Haas, *supra* note 25, at 75 ("The ability to connect with the judge and win his empathy is often crucial to immigrants who must rely on their personal story to win their case.").

n70 *Id.*; Michael J. Mallen, et al., *Online Versus Face-to-Face Conversations: An Examination of Relational and Discourse Variables*, 40 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 155, 158-60 (2003).

n71 Johnson & Wiggins, *supra* note 3, at 215.

n72 *See* Ederyn Williams, *Medium or Message: Communications Medium as a Determinant of Interpersonal Evaluation*, 38 SOCIOMETRY 119, 125 (1975) (This 'media equation' means that viewers will respond to screen images as if they are real; that is, viewers will attribute the attributes of the image onto real life.).

n73 *See* Haas, *supra* note 25, at 75.

n74 *See* Federman, *supra* note 53, at 438.

n75 Interview with the Honorable Frederic Lederer, *supra* note 26.

n76 *See* Haas, *supra* note 25, at 67.

n77 *See id.*

n78 BYRON REEVES & CLIFFORD NASS, THE MEDIA EQUATION (1996).

n79 *See* EOIR Report, Appendix A. The grant rates are calculated by dividing the number of grants by the sum of the cases that were granted and denied. Cases reported as withdrawn, abandoned, or "other" are not included in the grant/denial rate calculation. For a detailed description of the statistics the EOIR Office of Planning, Analysis, and Technology uses, see Executive Office for Immigration Review, Office of Planning, Analysis, & Technology, FY 2006 Statistical Year Book, Feb. 2007, at D1-D2, *available at* http://www.usdoj.gov/eoir/statspub/fy06syb.pdf.

n80 For a detailed discussion of how statistically robust the differences in grant rates are, see Appendix B.

n81 *HQIC Fact Sheet II, supra* note 12.

n82 *See* Appendix B.

n83 Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous than the Big Bad Wolf for Unaccompanied Juvenile Aliens?, 109 PENN ST. L. REV. 609, 649 (2004)* (quoting Women's Commission for Refugee Women and Children, *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children*, May 2002, at 6).

n84 Aliens in VTC hearings are three- to four-times as likely to be unrepresented than applicants in in-person hearings. In FY 2005, 17 percent of VTC asylum applicants were unrepresented while only 6 percent of in-person applicants were unrepresented. In FY 2006, 25 percent of VTC applicants were unrepresented while only 6 percent of in-person applicants did not have counsel. *See* Appendix A.

n85 For a detailed discussion of the unrepresented/represented statistics, please see Appendix C.

n86 *See supra* notes 51-78 and accompanying discussion.

n87 *See supra* notes 79-83 and accompanying discussion.

n88 *HQIC Fact Sheet II, supra* note 12.

n89 *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, *19 U.S.T. 6223;* Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951, *available at* http://www.ohchnorg/english/law/refugees.htm.

n90 *See* U.S. CONST. amend V; U.S. CONST. amend XIV, § 1.

n91 *See 8 U.S.C. § 1101*(a)(42)(A) (2006).

n92 *See Abankwah v. INS, 185 F.3d 18, 26 (2d Cir. 1999)* (stressing that "[A] genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation.").

n93 OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS 196 (rev. ed. 1992).

n94 *See Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984); see also 8 U.S.C. § 1158*(b)(1)(B)(iii) (2006); *Sangha v. INS, 103 F.3d 1482, 1487 (9th Cir. 1997)* ("Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone."). While an applicant's testimony is sufficient to

meet the evidentiary burden, REAL ID settled a circuit split between the Ninth Circuit and the rest of the country by holding that an immigration judge *may* require corroborating documentation if the judge believes the documents are reasonably required. *See 8 U.S.C. 1158*(b)(1)(B)(ii).

n95 *See supra* notes 51-78 and accompanying discussion.

n96 *See supra* notes 58-64 and accompanying discussion.

n97 *See supra* notes 75-78 and accompanying discussion.

n98 *See 8 U.S.C. § 1252*(b)(4)(D) (2006).

n99 *See id.* ("No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.").

n100 *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, *19 U.S.T. 6223;* Convention Relating to the Status of Refugees, art. 33(1), July 28, 1951 ("No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

n101 Convention Relating to the Status of Refugees, art. 33(1).

n102 *Id.*

n103 *Yick Wo v. Hopkins, 118 U.S. 356, 368-71 (1886); see also Reno v. Flores, 507 U.S. 292, 306 (1993)* ("The Fifth Amendment entitles aliens to due process of law in deportation proceedings.").

n104 *Mathews v. Eldridge, 424 U.S. 319, 333 (1976)* (quoting *Armstrong v. Manzo, 380 U.S. 545, 552 (1965))* (internal quotations omitted).

n105 *8 U.S.C. § 1229a*(b)(4)(B) (2006).

n106 *Matthews, 424 U.S. at 335.*

n107 *See id.; see also Landon v. Plasencia, 459 U.S. 21, 34 (1982)* (stating that the *Eldridge* test is mandatory when evaluating procedural Due Process).

n108 *Landon v. Plasencia, 459 U.S. 21, 33-34 (1982)* ("[An alien's] interest here is, without question, a weighty one. [The alien] stands to lose the right 'to stay and live and work in this land of freedom.' Further, [the alien] may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual."); see also *Moore v. City of East Cleveland, 431 U.S. 494, 499, 503-04 (1977)* (plurality opinion)

(holding family unification is a weighty interest); *Stanley v. Illinois, 405 U.S. 645, 651 (1972)* (same).

n109 *See Prela v. Ashcroft, 394 F. 3d 515, 518 (7th Cir. 2005)* ("Although these events may qualify as harassment or even intimidation [the petitioner was detained, interrogated, harassed, and beaten], they are not so extreme that they rise to the level of persecution."); *Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995)* ("Persecution is an extreme concept that does not include every sort of treatment our society regards as offensive.").

n110 *See Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952)* ("We think that ... it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation.").

n111 U.S. *ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); see also Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893)* ("The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."); *Nishamura Ekiu v. United States, 142 U.S. 651,* (1892) (sanctioning Congressional power to inspect).

n112 *Zadvydas v. Davis, 533 U.S. 678, 695 (2001); see also Chae Chang Ping v. US, 130 U.S. 581, 604,* (1889) (noting that Congressional power over immigration is limited "by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations").

n113 *See* Connor, *supra* note 1, at 223.

n114 *Plyler v. Doe, 457 U.S. 202, 228 (1982)* (finding the state's interest in saving money outweighed by children's interest in obtaining an education).

n115 *See* Connor, *supra* note 1, at 221.

n116 *See* Haas, *supra* note 25, at 79-80.

n117 *See, e.g., Thornton v. Snyder, 428 F.3d 690, 692 (7th Cir. 2005).*

n118 *Id.*

n119 *HQIC Fact Sheet I, supra* note 10.

n120 *Rusu v. INS, 296 F.3d 316, 322 (4th Cir. 2002)* (*quoting United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001)).*

n121 *Thornton, 428 F.3d at 697.* The *Thornton* court went on to say, "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to

judge the demeanor of a witness face-to-face is accorded great value in our tradition." *Id. at 698.*

n122 Interview with the Honorable Frederic Lederer, *supra* note 26. Lederer believes that he can create a VTC system that is functionally equivalent to in-person hearings. *Id.*

n123 U.S. CONST. amend. VI.

n124 *Fed. R. Crim. P. 43*.

n125 *Bridges v. Wixon, 326 U.S. 135 (1945).*

n126 *See* Haas, *supra* note 25, at 81-82 ("While not directly applicable to administrative hearings like immigration, [the fact that other cases required physical presence] strengthens the view that the due process presence requirement demands actual presence.").

n127 *See United States v. Torres-Pahena, 290 F.3d 1244, 1245 (10th Cir. 2002)* (finding "presence" under Rule 43 means "physical presence"); *Lawrence, 248 F.3d at 304* (same); *United States v. Navarro, 169 F.3d 228, 235 (5th Cir. 1999)* (same); *Valenzuela-Gonzalez v. United States Dist. Ct. for Dist. of Az., 915 F.2d 1276, 1280 (9th Cir. 1990)* (finding that Rule 10 and Rule 43 combined require that a defendant be physically present at arraignment). The arraignment procedure in the criminal context is equivalent to the master calendar hearing in the immigration context.

n128 *See Torres-Pahena, 290 F.3d at 1245; Lawrence, 248 F.3d at 303.*

n129 *See 8 U.S.C. § 1229a*(b)(2)(iii) (2006)..

n130 *See Lawrence, 248 F.3d at 301* (finding sentencing via VTC violated *Federal Rule of Criminal Procedure 43*'s requirement that criminal defendant be present at sentencing); Johnson & Wiggins, *supra* note 3, at 212-14; Boitano, *supra* note 29, at 68; *see also* Chen, *supra* note 4, at 87; *cf.* National Center for State Courts, Videoconferencing, Briefing Papers, http://www.ncsconline.org/WC/Publications/KIS_VidConBriefPub.pdf, (last visited Mar. 28, 2007) (describing the first use of VTC in American courts in a 1972 bail hearing).

n131 *See* Johnson & Wiggins, *supra* note 3, at 213. The actual amendment has three requirements: (1) the requesting party established "exceptional circumstances" for its use, (2) "appropriate safeguards" were used, and (3) the witness was unavailable within the meaning of *Federal Rules of Evidence 804(a)(4)*-(5). *Id.* Justice Scalia based his statement on the preposition that there was no "individualized determination" of whether VTC was warranted in the case. *Id.; see also* Haas, *supra* note 25, at 84 (discussing the need for closed-circuit witness testimony in child abuse cases because of the emotional and psychological impact on abused children if the children testified in front of their abusers).

n132 *See* Johnson & Wiggins, *supra* note 3, at 213.

n133 *See id.*

n134 *See HQIC Fact Sheet I, supra* note 10.

n135 The negative value of the z-score does not affect the analysis; the absolute value of the z-score is all that matters in a binomial distribution.

n136 ROBERT J. MARZANO, ET AL., CLASSROOM INSTRUCTION THAT WORKS: RESEARCH-BASED STRATEGIES FOR INCREASING STUDENT ACHIEVEMENT, Binomial Distribution, Association for Supervision and Curriculum Development, *available at* http://www.ascd.org/portal/site/ascd/template.chapter/menuitem.b71d101a2f7c208cdeb3ffdb62108a0c/?chapterMgmtId = a343a2948ecaff00VgnVCM1000003d01a8cORCRD.