

IMMIGRATION HEARINGS BY VIDEO: A THREAT TO CHILDREN'S RIGHT TO FAIR PROCEEDINGS

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Executive Summary: Children face many obstacles to a fair day in immigration court where they carry the burden to show that they are eligible for protection from deportation. There is no right to counsel free-of-charge for children, regardless of indigency, and thus an average of half of all children in immigration court proceedings do not have attorneys.¹ With few exceptions, children are subject to the same substantive and procedural requirements as adults. Only the most vulnerable children are appointed an independent Child Advocate to fight for their best interests.

Hearings-by-video, or video-teleconferences (VTCs), pose significant risks for children in adversarial immigration proceedings. In a VTC, an immigration judge sits in a courtroom along with the attorney representing the Department of Homeland Security (DHS). The child sits (often alone) in a room at a detention facility and watches their own court case over a TV screen. If the child has an attorney, that child's attorney must choose between attending court and speaking directly to the judge while losing the ability to consult confidentially with the child, or traveling to the child's detention center where the attorney can no longer engage directly with the judge or opposing counsel. Likewise, Child Advocates must choose between accompanying children at the facilities and helping them understand what is taking place on the TV screen or leaving the child to present their recommendations about the child's best interests—safety and well-being—directly to the judge.

In children's cases, VTCs directly undermine the protections in federal law that ensure children have a fair opportunity to be heard, including the opportunity to present their claims for protection in a manner that reflects their status as children.² VTCs diminish children's ability to convey their wishes and to engage in informed decision-making, deprive them of effective representation, and significantly undermine their substantive claims for protection. Most importantly, the use of VTCs prevents children's unique stories and status as children from being central to any decisions made regarding their future.

As the independent Child Advocate (best interests guardian *ad litem*) for vulnerable immigrant children, we recommend the immediate discontinuation of VTCs and urge the government to abandon all plans to expand the use of VTCs for children, including families in MPP proceedings.

THE THREE RISKS VTCs POSE FOR CHILDREN

#1: Children in VTCs often do not understand what is happening and cannot participate in their proceedings

#2: Children in VTCs cannot communicate effectively with their attorneys, child advocates or the immigration judge

#3: Children in VTCs are more likely to be returned to danger as a result of confusion and misunderstanding

History of VTCs: When a hearing is conducted via VTC, the subject (respondent) of an immigration case appears before the court by video. These hearings were first authorized by the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, in which Congress authorized the Department of Justice (DOJ) to hold immigration removal proceedings by video and made VTCs and in-person hearings interchangeable.³ DOJ regulations then gave immigration judges complete discretion regarding the use of VTCs for not only master calendar but also merits hearings—where the ultimate decision about whether an applicant will be granted protection is made.⁴

Recent Expansion of VTCs for Children: DOJ primarily uses VTCs for detained adults, but VTCs are also used for children in custodial facilities run by the Office of Refugee Resettlement (ORR). DOJ has specifically stated that children's cases may be heard by VTC unless a case warrants an exception.⁵ In support of these hearings, government officials claim that VTCs save time and money, expand access to counsel, and allow cases to be heard more efficiently.⁶ However, studies have shown these hearings to be deeply flawed and problematic for the fair adjudication of adult claims.⁷

Until 2018, the use of VTCs in children's cases was exceptional and rare; but last year, the DOJ radically expanded the use of VTCs for children in government custody. Children's attorneys pushed back and insisted on having staff in both locations: one with the child and one in the courtroom. Not long after, DOJ ended this "experiment" with VTCs for children. However, Child Advocates and attorneys working with children continue to hear rumors that DOJ will implement the use of VTCs in children's cases. Most recently, VTCs have been used in the CBP "tent courts" at the border, for the people denied entry under the so-called "Migrant Protection Protocols," or MPP.⁸ Nearly one third of the people returned to Mexico under this program are children.⁹ When Young Center staff visited the Brownsville "tent court," they learned that CBP requires families with children to travel in the dead of night, without protection, and report at 3 or 4 AM for 8:30 hearings just meters from the border. Families wait for hours in freezing conditions before "appearing" before a remote court by video. They cannot see the government attorney arguing against them, and in some cases they cannot see the IJ or interpreter. In almost all cases, they appear without an attorney in these isolated border communities.¹⁰

The Young Center spoke with Child Advocates and attorneys who participated in these hearings across the country and identified three specific ways in which VTCs for detained children render proceedings unfair and increase the risk of unsafe outcomes.

1. VTCs DIMINISH CHILDREN'S ABILITY TO EXPRESS THEIR WISHES AND MAKE DECISIONS ABOUT WHAT THEY WANT

Consistent technical difficulties and the narrow visual and audio functionality of VTCs diminish children's ability to effectively express their wishes and make informed decisions. Technical glitches such as bad connections, bad audio, and pixelated screens make it difficult for children to understand and participate. A report commissioned by the DOJ acknowledged that VTCs raise due process concerns because of the poor video and sound quality.¹¹ It is also more difficult for children to hear and understand interpreters, who are located in the courtroom with the judge and not in the same room as the child. When a child has an attorney and that attorney is in the courtroom with the judge, children are reluctant to speak up and, for example, let their attorney know that they don't understand the interpreter.

The static position of the cameras means that the children often see only the judge, not the ICE trial attorney or their own attorney (if they have one). Judges frequently are unable to properly see and hear children when they try to make themselves heard. The court's continued use of a paper-based system, rather than electronic filing where everyone has access to records, also complicates proceedings by making it difficult to serve the child with court documents, particularly if the child's attorney is not in the same room as the judge or DHS trial attorney.

Many children find it difficult to understand immigration court proceedings, even in person, because they are interacting with government systems for the first time and are doing so in a different language. This is exacerbated for children appearing via VTC. VTCs require even higher cognitive engagement than in-person hearings and can quickly lead to fatigue, which in turn prevents children from understanding what's going on and effectively communicating with the court. As the report commissioned by the DOJ acknowledged, judges lose the ability to analyze children's nonverbal communications; gestures and facial expressions are lost over video.¹² Most importantly, children are unable to interact and develop a relationship with the immigration judge—the person charged with making decisions about their future.

"There were a lot of glitches trying to exchange documents during the VTC hearing. The court tried to email the documents to the shelter, but the shelter could not open the encrypted document. In the end, the court had the documents driven five minutes down the road to the shelter. This made both the judge and the kids lose patience."
—Young Center Child Advocate

2. VTCs DEPRIVE CHILDREN OF EFFECTIVE REPRESENTATION AND ADVOCACY

The use of VTCs means that the attorney is not sitting next to their client and as a result the child cannot communicate confidentially, depriving children of effective representation. Attorneys sometimes are forced to make a difficult decision between being with the child in the ORR facility and providing them with in-person support or being in court and able to be face to face with the judge and government attorney. If the child's attorney chooses to go to court, where they have the greatest opportunity to directly engage with and persuade the judge of the child's position, the attorney is unable to consult with their client. The alternative is to have members of the legal services team in both locations—a costly and resource-intensive alternative that doesn't resolve the child's difficulty in understanding that what is happening over a TV screen is, in fact, real.

"I was appointed as Child Advocate for a child with developmental delays—he was 16 with the developmental capacity of a 9-year-old. Even though an independent psychologist found that the child had limited capacity to understand his immigration proceedings, the child was scheduled for a VTC hearing. Doing a hearing by VTC would have compounded the child's confusion and heightened his vulnerability. We helped to ensure the VTC did not happen in his case."

—Young Center Child Advocate

Young Center Child Advocates face similar challenges: they must decide whether to be present with the child with whom they have developed a trusting relationship or in court to present their Best Interests Recommendation to the judge. Children have repeatedly expressed their desire to have their Child Advocate, with whom they've typically met each week for months, at their side. But Child Advocates, like the attorney-of-record, know that their recommendations are most persuasive when made in person and when they can engage directly with the judge and government attorney.

After the hearing, the child's attorney or Child Advocate cannot immediately debrief with the child, leaving a child in prolonged confusion and distress. Children who appear through VTCs usually can see only the judge and are unable to see their attorney or Child Advocate on the screen. These difficulties can lead children to lose trust in their attorneys and advocates, as they do not feel assured that their allies are on their side and adequately representing their wishes. Without that trust, it can be challenging for attorneys to represent the child's expressed interests and for Child Advocates to fight for the child's best interests.

3. THE USE OF VTCs PLACES CHILDREN AT RISK OF BEING SENT BACK TO DANGER

The procedural challenges inherent in VTCs have very concrete, substantive results: children are at risk of being sent back to situations of danger and persecution because their ability to present a case is impaired. A study found that immigrants appearing through VTCs are less likely to seek counsel, be granted relief, and less likely to seek voluntary departure, which means they would end up with removal orders.¹³ The longer children have been in a facility, and without any hope that they will be able to present their case to a judge in person, the more likely it is that they will relinquish otherwise viable claims to legal relief that would allow them to remain safe in the United States. In contrast, children who have in-person court hearings are better able to understand their cases, receive the guidance of legal counsel, and seek relief.

Credibility is integral to a child's claim for protection from removal, especially because many children do not have the documentation to corroborate their story and must rely on the strength of their testimony. Because VTCs make it difficult for judges to read a child's body language and demeanor, they may be more likely to issue a negative credibility finding and deny children protections for which they are eligible. This risk of erroneous credibility findings increases when judges located in another part of the country adjudicate the case, since they cannot adequately see the child. Child Advocates witnessed multiple hearings with remote judges who usually worked only on adult immigration cases. Immigration judges have noted themselves that there is a benefit to being able to "just have a conversation in person" with a child during hearings.¹⁴ Furthermore, federal courts have expressed concerns about VTCs and their negative impact on credibility determinations.¹⁵

"More than once, children would be watching the camera feed from the courtroom, when the video screen in front of the child went black. In response, children would stop talking and look around the room. But back in the courtroom, neither the Judges nor the DHS Trial Attorneys knew what had happened; their video feeds continued operating. They had no idea what was happening in the children's location and could not put the children's reactions (silence, confusion) into context."
—Legal Services Provider

VTCs can adversely affect a child's case even when used for master calendar hearings. Though these hearings are considered to be preliminary, children receive integral information about their rights and a plain language explanation of the charges against them. During these hearings, judges could dispose of a case, finding that a child does not have an avenue of legal relief. For the many children without an attorney or Child Advocate, there is a great risk that they might hastily waive their rights because they do not understand them or the gravity of the proceedings; they then might not seek counsel or make a claim for relief. This risk is substantially greater when a child appears by VTC. Further, immigration judges form a subconscious impression of the child that is curtailed by video during VTC master calendar

hearings, which can negatively affect every decision a judge makes regarding the child's case moving forward.

Ultimately, VTCs dehumanize children. Each child has a unique story to tell. Their stories are often traumatic, and children exhibit great courage when they speak about what happened to them. A child's presence in immigration court, in the same room as the decision maker, ensures that their humanity, their individuality, and their status as a child is front and center in their case.

Conclusion and Recommendations: The use of VTCs will mean children are rushed through proceedings and removed without due process. As of May 2019, the administration has made the increased use of VTCs a priority for its regulatory agenda,¹⁶ and it has implemented VTCs in its "tent courts" at the border. A child's presence in court is integral to their right to be heard, which is guaranteed in our Constitution. Children's status as children makes their in-person appearance in court integral to their ability to understand and fully participate in hearings that were designed for adults and which are already difficult to navigate.

We therefore unreservedly recommend that **the Department of Justice discontinue the use for VTCs for all children's hearings, including under MPP, unless requested by the child's counsel.** In rare cases, a child's attorney may request a hearing by VTC—often to effectuate a child's return to home country in an emergency. In those exceptional cases, DOJ should permit VTCs after remedying the problems above.

For more information, please contact Young Center Policy Associate Miriam Abaya at mabaya@theyoungcenter.org or visit www.theyoungcenter.org.

¹ *Juveniles—Immigration Court Deportation Proceedings*, TRAC/IMMIGRATION, <https://trac.syr.edu/phptools/immigration/juvenile/> (showing data from 2005 to 2019).

² See 8 U.S.C.A. § 1232 (d)(7)(B); 8 U.S.C. § 1158(b)(3)(C).

³ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-546, 3009-589 (codified at 8 U.S.C. § 1229a(b)(2)(A)(iii) (2012)).

⁴ 8 CFR §3.25(c) (1997).

⁵ Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, DEPT. OF JUSTICE EXECUTIVE OFFICE OF IMMIGRATION REVIEW (Sept. 16, 2004).

⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES, 51 (2017).

⁷ *Videoconferencing in Removal Proceedings: A Case Study of the Chicago Immigration Court*, THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO & CHICAGO APPLESEED FUND FOR JUSTICE (Aug. 2, 2005).

⁸ *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, HUM. RTS. FIRST 12-15 (Oct. 2019), <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>.

⁹ Kristina Cooke, Mica Rosenberg, Reade Levinson, *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, REUTERS (Oct. 11, 2019), <https://www.reuters.com/article/us-usa-immigration-babies-exclusive/exclusive-u-s-migrant-policy-sends-thousands-of-children-including-babies-back-to-mexico-idUSKBN1WQ1H1>.

¹⁰ See *Contrasting Experiences: MPP vs. Non-MPP Immigration Court Cases*, TRAC (Dec. 19, 2019), <https://trac.syr.edu/immigration/reports/587/> (noting that only 4 percent of immigrants in MPP have attorneys).

¹¹ *Legal Case Study: Summary Report*, DEPT. OF JUSTICE EXECUTIVE OFFICE OF IMMIGRATION REVIEW 22 (Apr. 6, 2017), available at https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/immigration_judge_performance_metrics_foia_request_booz_allen_hamilton_case_study.pdf.

¹² *Id.*

¹³ Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NORTHWESTERN UNI. L. REV. 933, 961 (2015).

¹⁴ *Id.* at 987.

¹⁵ See *Rusu v. INS*, 296 F.3d 316, 322 (4th Cir. 2002) ("More specifically, video conferencing may render it difficult for a factfinder in adjudicative proceedings to make credibility determinations and to gauge demeanor.").

¹⁶ *Jurisdiction and Venue in Removal Proceedings*, OFF. OF INFO. & REG. AFF., OFF. OF MGMT. & BUDGET (Spring 2019), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=1125-AA52>.