

Enhancing Quality and Timeliness in Immigration Removal Adjudication

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This draft report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the authors and do not necessarily reflect those of the members of the Conference or its committees. *

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[Authors' note: This material is a revision of several sections of our larger interim report and recommendations, dated February 17, 2012. The material is also updated based on our survey results and comments and suggestions received by the authors and ACUS. The page references listed at the beginning of each section are to the February 17, 2012, draft, and the recommendations have been reformatted and renumbered for consistency with the interim draft. After the Committee on Adjudications has had an opportunity to discuss these recommendations, the material will be reinserted into the master report.]

a. Representation

[The material at pp. 1-3 is a revision of material at pp. 61-63 of the February 17 version of the report.]

[2] Technology to Enhance Consultation and Representation

We discuss here several technology-based possibilities for enhancing access to legal advice and representation.

[a] Audio or video links for consultation

According to a 2011 Administrative Conference staff report,¹ video conferencing equipment is available or under installation in all immigration courts, and in 77 other facilities, including detention facilities. In general, both EOIR and DHS officials seemed receptive to the idea of making those links available to pro bono legal service providers and law school clinics and perhaps others who would be willing to answer questions from detained respondents; DHS officials, in informal comments on an earlier draft of this report, said that current ICE detention standards “allow[] detainees to make direct or free calls to their legal representatives.” They added that “future, proposed detention standards will provide that full telephone access shall be granted in order for a detainee to contact legal representatives to obtain legal representation, when subject to expedited removal, and to legal service providers or organizations listed on the ICE free legal service provider list.”

Providing even this simple technology in some detention centers, however, faces considerable hurdles. The proposal may be doomed by realities on the ground. For one thing, some state and local jails in which DHS rents space may refuse to permit such links in their facilities. A 2010 National Immigrant Justice Center study reported that 78 percent of the over 25,000 detainees it surveyed were in facilities that prohibited attorneys from scheduling private calls with their clients.² Yet, some state and local jails are introducing video technology to allow family members to visit with incarcerated relatives. In New York, the State Bar is exploring whether immigration counsel could use

¹ Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, ADMIN. CONFERENCE OF THE U.S., (May 10, 2011) (draft report) available at <http://www.acus.gov/wp-content/uploads/downloads/2011/05/Revised-Final-Draft-Report-on-Agency-Use-of-Video-Hearings-5-10-11.pdf>.

² NAT'L IMMIGRATION JUST. CNTR., *supra* note 155.

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the video conferencing equipment in a secure, confidential manner, to allow attorney consultation and preparation.

[b] Using video technology to enhance KYR presentations

KYR presentations sponsored under the aegis of EOIR's LOP cannot reach all respondents who might benefit from them, when they might benefit from them. Many of the detention centers are in locations that are not easily accessible by attorneys or non-profit representatives. Moreover detainees may miss a presentation because they are moved from a facility before they can attend the relevant program or meet with any potential representative. Language accessibility can also be a problem. Many "know-your-rights" presentations are only in English or Spanish, yet the detained population may have dozens of other languages.

Video technology can broaden access to legal orientation information, and ICE detention standards "encourage[] qualified individuals and organizations to submit electronically formatted presentations (i.e., videotape, DVD, etc.) on legal rights," the content of which ICE must approve. They also direct facilities to "provide regularly scheduled and announced opportunities for detainees in the general population to view or listen to the electronic presentation(s)."³ Some of this information is available through prerecorded video with foreign language captioning. The technology to facilitate this is widely used on such websites as You Tube. To the degree the detained population has access to these recordings, later in-person visits or telephone consultation by non-profit organizations could spend more time on case-by-case assessment and counseling. The ABA Commission on Immigration is preparing such a video and working to secure translation of the video into several languages.

Stacey Strongarone of the Vera Institute reported, about our earlier draft, that LOP presentations are available as audio recordings on CD or MP3 for LOP participants in Arabic, Mandarin, Vietnamese, and French. She reported that, as part of a recent pilot effort, Vera is putting a small amount of LOP funds towards phone based interpreter services, to help LOP providers work with non-English and non-Spanish speakers. In many of the detention facilities televisions and DVD players are available in the dormitories, recreational rooms, and law libraries. Access to the law library may be too limited for short-term detainees and to the degree facilities limit visits, these KYR videos should also be available in other areas of detained facilities.

Although the ICE standards speak in terms of prerecorded electronic presentations, it appears that some groups make KYR presentations by video. One judge, in supplementary comments on our survey, said that his court "is proactive with AILA and other groups in promoting these KYR presentations. The use of the Court's facilities (when available) and VTC system has greatly increased the number of detained aliens

³ Standard 37, "Legal Rights Group Presentations," section M ("Electronic Presentations") *available at* <http://www.ice.gov/detention-standards/2008/>

offered the KYR presentations and has made it much easier for the pro bono attorneys to volunteer to make these KYRs.”

Several non-profit commentators while agreeing that video technology could help expand KYR and even limited representation in detention facilities, urged caution in relying solely on such technology, arguing “that in-person presentations and meetings are preferable to video, and that video should only be used if necessary.” A few commentators told us that VTC is inappropriate for vulnerable populations such as juveniles or people with mental illness, victims of trafficking and some categories of asylum seekers because attorneys cannot build sufficient rapport and trust with the clients and more importantly, might miss evidence due to poor communication or lack of a physical meeting where scars and other evidence of violence might be readily apparent to the attorney.

Recommendations

16. That DHS, to improve the availability of legal consultation for detained respondents and help reduce continuances granted to allow attorney preparation:
 - a. provide video technology in all detention facilities allowing private consultation and preparation visits between detainees and counsel;
 - b. require such access in all leased or privately controlled detention facilities.
 - c. in those facilities where video technology is not available, designate duty officers whom attorneys and accredited representatives can contact to schedule collect calls from the detainee.
17. That DHS and/or EOIR, to improve the availability of legal reference materials for detained respondents:
 - a. provide video versions of the “Know-Your-Rights” presentations in every detention facilities available to be played in the dorms throughout the day and on demand in the law libraries;
 - b. assist in the transcription of the text of the forthcoming ABA Immigration Commission video into additional languages or provide audio translations in the major languages of the detained populations.
- 18 That EOIR encourage judges to permit pro bono attorneys to use the court’s video facilities to transmit KYR presentations into detention centers.

[The material at pp. 3-16 is a revision of pp. 89-96 of the February 17 version of the report.]]

c. Video Hearings

Video conferencing (VC) (or video teleconferencing, VTC) allows judges to conduct hearings even though the judge, respondent and government attorney—and respondent’s counsel and witnesses, if any— are in two or more different locations. In this section of the report, we describe the use of VTC in removal adjudication, summarize competing

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claims as to its strengths and weaknesses, present and analyze responses to the two VTC question on our survey of judges, and consider preliminarily the effect, if any, of VTC on the outcomes of asylum cases in immigration court.

[1] Immigration court use of VTC

In the mid-1990s, EOIR introduced VTC in removal adjudication on a pilot basis. Congress in 1996 authorized its use at the discretion of the judge, without requiring the parties' consent. (Telephone proceedings on the merits do require the respondent's consent.)⁴

According to information that EOIR provided in 2011 to an ACUS research team, VTC is available in 40 immigration courts and being installed in the remainder of the courts and in 77 other places, including DHS detention facilities. In addition, in 2004, EOIR created the "Headquarters Immigration Court" (HQIC) within its main building in Falls Church. This court does not have its own docket. Instead, its four judges conduct hearings in proceedings that courts around the country transfer to the HQIC in order to ease backlogs.⁵

Table K shows the in-person, video, and telephone hearings held in proceedings and bond redeterminations that were completed in 2010. Not all the hearings occurred in 2010; some cases that were completed in 2010 originated and held hearings in prior years. VTC was used in over 12 percent of the over 850,000 hearings conducted in removal proceedings and in almost 30 percent of the roughly 78,000 bond redetermination hearings—overall usage of almost 14% of the hearings.⁶

Table K: VTC Use in Hearings in Proceedings and Bond Redeterminations Completed in 2010

	Removal Proceedings	Bond Redeterminations	Both
All hearings	852,230	78,187	930,417
In person	737,385 (86.5%)	53,390 (68.3%)	790,775 (84.9%)
Video	105,901 (12.4%)	22,933 (29.3%)	128,834 (13.8%)
Telephone	8,944 (1.1%)	1,864 (2.4%)	10,808 (1.2%)

Because VTC obviates the need for respondents to go to a hearing site, it is used more for hearings involving detained respondents (including those seeking bond redeterminations) than for hearings for non-detained respondents. But VTC is not used only in detained cases. In addition to the "headquarters courts," judges in other courts conduct VTC hearings for respondents in courthouses in other cities.

⁴ INA §§ 240(b)(A)(iii)-(iv), 240(b)(B) (2010); 8 U.S.C. §§ 1129a(b)(2)(A)(iii)-(iv), 1129a(B) (2006).

⁵ See Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: Headquarters Immigration Court*, U.S. DEP'T JUST., (2008), available at <http://www.justice.gov/eoir/sibpages/HQICFactSheet.pdf>.

⁶ Table based on *OPAT DATA*, *supra* note **Error! Bookmark not defined.**

VTC arrangements can vary considerably. The judge, for example, may be in a courtroom with the government attorney and any witnesses. The respondent may be in a detention center. If the respondent is represented, the attorney has to choose whether to be with the client or the court. A few detention facilities bar respondents' from participating in the hearing from the detention facility; in those situations—and in situations when the attorney does not for other reasons appear in the detention facility—the respondent and his counsel communicate solely through the video technology during the hearing.

The government or the respondent in a VTC hearing may request an in-person hearing. We do not know how often they do, but we have the number of adjournments that judges attributed to the respondent's or government's "request for an in person hearing" (and we assume that an adjournment so described mean an adjournment to an in-person hearing). The number of such grants is small but may be on the rise, as shown below.

		2005	2008	2010
Adjournments for request for an in-person hearing by:	Alien	408	333	1,296
	DHS	54	69	84
	Total	462	402	1,380

From 2005 to 2010, the total number of hearings increased by 24 percent, but the number of adjournments to in-person hearings increased from 462 to 1,380 (198 percent). We don't know whether adjournments to in-person hearings in 2010 grew at a much greater rate than hearings generally because of the increase in VTC hearings generally or judges' growing willingness to grant request for in-person hearings or some combination. Nor do we know whether the increase in 2010 is an aberration and/or whether the numbers reflect the inadequacies of the adjournment codes.

[2] Competing claims about VTC in Removal Proceedings

The "In-House Research Report" (for ACUS's recent project on VTC's use in high-volume administrative adjudication agencies⁷) summarizes the results of ACUS staff interviews with, and other information provided by, EOIR officials.⁸ Its summary of the arguments for and against current and expanded use of VTC in removal adjudication tracks those that we heard in our interviews with immigration judges, and with government and respondent counsel, and arguments found in the literature.⁹ (The report used VTC in social security and veterans' benefits adjudication as case studies but

⁷ AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION, REC. NO. 2011-4, ADMIN. CONFERENCE OF THE U.S. (2011) (adopted on June 17, 2011) available at [www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-4%20\(Video%20Hearings\).pdf](http://www.acus.gov/wp-content/uploads/2011/10/Recommendation%202011-4%20(Video%20Hearings).pdf) [Hereinafter ACUS VIDEO HEARINGS REPORT].

⁸ Olorunnipa, *supra* note 1.

⁹ See ACUS VIDEO HEARINGS REPORT, *supra* note 1; Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings*, 22 GEO. IMMIGR. L.J. 259 (2008) (both citing the literature). See also ABA Comm'n on Immigr. Rept., 2010, *supra* note **Error! Bookmark not defined.**, at 2-26–27.

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decided against assessing VTC in removal adjudication on the same case-study basis, citing the complications involved and the lack of data within EOIR on VTC's use. Although the report said, in an apparent reference to our project, that ACUS "plans to study the use of video hearings by EOIR in-depth as part of its forthcoming Immigration Adjudication project,"¹⁰ we did not have the time or resources to go deeply into the matter, certainly not to design and execute empirical research to answer the dispositive question, viz., whether VTC is associated with significant differences in outcomes of removal adjudication proceedings.)

Of the four non-governmental entities that commented on the VTC portions of our earlier draft, all were unabashedly opposed to its use in any but the most limited circumstances, if at all. They said video hearings threaten respondents' due process rights to be heard, to consult meaningfully with counsel, to have proceedings adequately translated, and to fully see, and be seen by, the other participants. Human Rights First said it welcomed "short-term efforts " to improve VTC's use but objected to our description of VTC as "here to stay," and said the short term efforts should not "serve to institutionalize or normalize the use of VTC in the system." The American Immigration Council's Legal Action Center "reject[ed] the premise that the use of video hearings should continue pending the execution of empirical research to assess the impact of this practice on the outcome of removal proceedings." The American Bar Association said that it "opposes using ... VTC... in immigration hearings, except in procedural matters in which the noncitizen has given consent." The Harvard Immigration and Refugee Clinical Program "recommend[ed] that [VTC] be eliminated in immigration court."

EOIR officials, not surprisingly, take a different view, as summarized in the 2010 ACUS draft report:¹¹

In line with the agency's goal, an EOIR official noted that the use of VTC technology to hold hearings is a force multiplier that is a tool of efficient caseload management used by the agency as a way to respond flexibly and efficiently to the demands of its high caseload. When asked, one EOIR official noted that VTC technology has significant advantages over in-person hearings such as convenience, safety, flexibility in scheduling hearings and increasing efficiency in administration by, in effect, projecting Immigration Judges into various DHS detention facilities where respondents scheduled to appear before an IJ on immigration related charges are being held.

[a] Quality of transmissions

Proponents claim that the integrity and quality of the visual images that VTC provides is more than adequate and does not require the compromises that might have been necessary in earlier versions of the technology. In 2004, EOIR asserted that "VC does not change the adjudication quality or decisional outcomes."¹² Subsequent EOIR press

¹⁰ ACUS VIDEO HEARINGS REPORT, *supra* note 1, at 2 n.7.

¹¹ ACUS VIDEO HEARINGS REPORT, *supra* note 1, at 32

¹² See Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: Headquarters Immigration Court*, U.S. DEP'T JUST., (July 21, 2004) available at www.justice.gov/eoir/press/04/HQICFactSheet.pdf.

advisories have been less definitive; a 2009 release asserted “VTC technology allows court proceedings, as well as meetings and training, to be conducted efficiently and effectively, even though participants are not together at one site.”¹³

As explained in more detail in the next section, only 13.4 percent of judges responding to our survey agreed that VTC hearings, “all things considered, are basically no different than ‘in-person’ hearings” and less than a third, 31.9 percent, said the VTC equipment “allows me to hear and see clearly all participants in remote locations.” Nevertheless 66.2 percent said VTC was “effective for most master calendar hearings;” a smaller number, 37.3 percent, said it was effective for most merits hearings.

Critics say the quality of the VTC transmissions vary greatly, including as between EOIR equipment and that maintained by DHS in some detention facilities. They also say that a screen image, regardless of visual quality, cannot duplicate an in-person hearing, where the fact finder can observe “nonverbal cues and a sense of the applicant’s demeanor.”¹⁴ Critics argue that in cases where credibility assessments are key to an immigration judge’s ruling, especially in asylum and related cases, the video format may not provide adequate visuals of body language. (As we previously noted, the Asylum Office uses VTC to conduct some limited interviews but does not use it for full asylum interviews.¹⁵ USCIS officials told us that all VTC interviews that result in a negative finding—lack of credible fear—are subject to supervisory view.¹⁶)

Proponents of VTC use in immigration court respond, as paraphrased by the ACUS staff report, that EOIR tells judges that assessing demeanor (whether at a video hearing or an in-person one) is the agency’s least preferred method of determining credibility and that judges should not use it when other methods of judging credibility are available.¹⁷

Finally, critics, while acknowledging VTC’s growing use in administrative and civil adjudication in other court systems, note that it has been resisted in criminal proceedings, partly because of the confrontation clause. Removal proceedings, of course, are civil and thus the confrontation clause does not apply as it would in criminal proceedings. Still, many observers point to the functional similarities between removal adjudication and criminal procedures.¹⁸

¹³ Executive Office for Immigration Review, Office of the Chief Immigration Judge, *Fact Sheet: EOIR’s Video Teleconferencing Initiative*, U.S. DEP’T JUST., (Mar. 13, 2009) available at www.justice.gov/eoir/press/VTCFactSheet031309.pdf.

¹⁴ Walsh & Walsh, *supra* note 9, at 265.

¹⁵ Letter from Baker to Baer, *supra* note **Error! Bookmark not defined.**

¹⁶ Email from Ted Kim, *supra* note **Error! Bookmark not defined.**

¹⁷ ACUS VIDEO HEARINGS REPORT, *supra* note 7, at 35.

¹⁸ See, e.g., J. Chacón, “A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights,” 59 Duke L. J. 1503 (2010), S. Legomsky, “The New Path Immigration Litigation: Asymmetric Incorporation of Criminal Justice Norms,” 64 Wash. & Lee L. Rev. 469 (2007)

[b] Effect on representation and translation

Proponents say VTC can increase the availability of representation during hearings, even if the lawyers are not in the same location as the respondent. VTC enables an attorney who is unable or unwilling to travel to the site of a hearing to participate in the hearing from a remote location. Furthermore, OCIJ has encouraged judges to allow attorneys appearing pro bono to use the VTC equipment to confer briefly with their clients in remote locations¹⁹ (a request that would seem equally justified for most paid counsel). We received a summary of an informal survey that the assistant chief immigration judges undertook to learn their respective courts' practices as to such requests.²⁰ It indicates that judges usually grant such requests, if the time involved is brief, partly on the view that doing so may speed the hearing. When judges grant such request, they often clear the courtroom except for a security guard and translator.

The equipment has the auxiliary benefit, subject to EOIR or DHS policies, of allowing lawyers to consult with detained clients, apart from hearings themselves, and possibly permitting family members to observe proceedings to which they might otherwise not have access.

On the other hand, critics point to the inability of respondent's counsel to be physically present with both the judge and the respondent. A lawyer who is with the judge during the hearing cannot confer freely with the respondent in a remote location. A lawyer who is with the respondent cannot, as the ABA Report put it, "establish credibility and connect emotionally with the judge."²¹ Critics say translation may be hampered depending on the translator's location vis-à-vis the non-English speaking respondent.

[c] Effect on case management

Proponents say VTC hearings enhance case management because they allow judges to be available in numerous sites, when needed, within short time spans. The point is obvious.

On the other hand, there can be delays in delivery of documents that parties submit during the hearing. In an in-person hearing, documents can be exchanged hand-to-hand, but during a VTC hearing, they must be faxed to the judge or other participants (EOIR does not yet authorize email transmission of hearing-related documents). The OCIJ Practice Manual at Chapter 3.1 tells practitioners that, as a general matter, "The Immigration Court does not accept faxes or other electronic submissions unless the transmission has been specifically requested by the Immigration Court staff or the Immigration Judge."²² Chapter 4.7, section (d), however, on VTC hearings, recognizes that "Immigration Judges often allow documents to be faxed between the parties and the Immigration Judge."

¹⁹ *OPPM: Facilitating Pro Bono Legal Services*, *supra* note **Error! Bookmark not defined.**

²⁰ *QUERY RE: VTC and current practice: Summary of Comments Received*, (Exec. Off. for Immigr. Rev. informal manuscript (Oct. 2011) (provided by EOIR officials) (on file with authors).

²¹ *ABA Comm'n on Immigr. Rept., 2010*, *supra* note **Error! Bookmark not defined.**, at 2-27.

²² OCIJ PRACTICE MANUAL, *supra* note **Error! Bookmark not defined.**

We heard anecdotal evidence that some judges refuse to accept faxed materials for admission into the record; parties either will have to have mailed all documents prior to the hearing or the judge will have to adjourn the proceedings to await receipt of the documents. One judge explained that he refused to accept faxed transmissions in VTC hearings in order to enforce the Manual’s filing deadlines because allowing faxes would encourage late or last-minute filings.)

In response to our survey, as explained in more detail in the next section, 26.5 percent of the judges agreed that the need to fax documents sometimes creates “non-trivial” problems in conducting the proceedings.

[d] Cost

Proponents say VTC hearings provide save EOIR the cost of transporting judges and staff to hearing sites and saves DHS costs of transporting detained respondents. Although this point is obvious, assuming that equipment costs do not exceed replaced travel costs—and using only those variables as cost elements—the amount of savings is not obvious.

EOIR officials provided ACUS researchers a one-page, undated document, evidently prepared by the EOIR Controller’s office in order to identify savings resulting from the “AG Savings Initiative: Increase the use of video conferencing for the Department.” The document states that \$2,374,451 in “Actual FY 2020 Annual Savings” were attributable to EOIR use of video conferencing. “This is a savings offset, calculated by estimating the amount it would have cost in detail travel, had the Judges and Court Staff not been able to handle the hearings via videoconference.”²³ The document provides no further details.

The cost savings figure is somewhat puzzling, based on an estimate of EOIR’s 2010 budget allocations that one of us undertook (for a separate project) using published Justice Department object class figures and additional data provided EOIR’s Public Affairs Office.²⁴ By that estimate, in 2010 EOIR allocated \$2,044,500 to travel for the immigration courts. We assume the bulk of that estimated figure was for hearings, although some was probably for expenses such as orientation and continuing education.

One way to assess the savings that EOIR attributes to VTC is to combine estimated actual 2010 travel expenses and travel expenses that EOIR says would have been allocated had VTC not been available.

Estimate of 2010 actual travel expenditures	\$2,044,500 (46.2%)
Travel savings in 2010 that EOIR attributes to VTC	+ <u>\$2,374,451</u> (53.7%)
Total funds needed for travel if no VTC	\$4,418,951

²³ Document in possession of authors. It is identified as being at Tab E of the ACUS report.

²⁴ See text at, and note 7, supra. (We provided this estimate to EOIR officials at the outset of the project and asked for comments or actual EOIR budget figures but received no response.)

By this calculation, travel costs saved by VTC in 2010 were greater than funds actually spent for all immigration court travel and probably even greater than funds spent on hearing travel alone.

But, according to Table K (at 4, *supra*) VTC accounted for slightly less than 14 percent of the 930,417 hearings involved in proceedings and bond determinations concluded in 2010. To be sure, this does not mean that 14 per cent of hearings convened in 2010 involved VTC, because the hearings, especially for removal proceedings may have occurred in 2009 or earlier. EOIR’s expansion of VTC equipment and use may have meant a higher percentage of video hearings during the 12 months of fiscal year 2010, than in earlier years, but we doubt that VTC hearings increased to 54 percent of all hearings that year. (Of course, this analysis assumes a one-to-one relationship between travel dollars and number of hearings, which is not likely, but even with liberal allowances for differences, the numbers still seem hard to square.)

Given the opposition to any VTC by sizable portions of advocates representing aliens, and tepid enthusiasm for it among judges, as explained in the next section, it is important that claims of cost savings attributable to VTC be solid.

[3] Survey responses

Two of our survey questions dealt directly with VTC. One asked judges to select one of the five options shown below. Of the 159 judges who responded, 41 said they had “[in]sufficient experience with VTC to permit me to consider the statements.” The remaining 118 judges responded as follows:

Video teleconference hearings (VTC) are (select one):	N and percent
Effective for most master calendar hearings, but not for most merits hearings.	39 (33.1%)
Effective for most merits hearings but not for most master calendar hearings.	5 (4.2%)
Are usually effective for both.	39 (33.1%)
Are usually effective for neither	16 (13.5%)
None of these statements describes my view.	19 (16.1%)

Adding the respondents who said VTC was effective for both types of hearings to those who said it was only effective for one or the other produces this breakdown:

Effective for most master calendar hearings: 66.2%

Effective for most merits hearings: 37.3%

The only control we have for assessing these responses is whether the judges identified their caseloads as primarily detained, primarily non-detained, or roughly evenly split. On that measure we saw little difference in the responses, except that 19.4 percent of those with primarily detained dockets said VTC was “usually effective for neither” master nor merits hearings, while only 10.8% of judges with mostly non-detained dockets selected

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that option. These might reflect better VTC equipment used in hearings involving judges with mainly non-detained dockets, but the numbers are small and thus the percentages volatile.

These forced-choice responses, moreover, may be somewhat misleading. Eight of the 39 judges who selected “usually effective for both” added comments, mostly negative, such as “But the equipment is so crappy it takes twice as long as an in person hearing”; “Definitely not the ideal way to conduct hearings”; “Documents must be served in advance for this to work well”; “Our agency needs greater technical support;” “The VTC system often has problems ensuring that the interpreter by phone and the respondent by VTC can communicate effectively”; and “VTC is effective assuming the equipment is compatible by DHS’s equipment at the detention facility and the VTC has been tested for sound quality”.

Furthermore, of the 19 judges who selected the “none-of-the-statements-describes-my-views” option, eight added written comments, seven of which were negative. One judge said:

I have not done master calendar hearings by VTC, but I consider VTC to be an inadequate medium for merits hearings, even though I have been forced to use them that way on occasion. I think it is extremely difficult to judge credibility even in the best of circumstances. When the witness is a tiny little head on a TV screen, it is even more difficult. Where attorney and client are [in] two different places, their communication is also extremely difficult. I understand the reasons for using VTC, but I think it raises important due process issues which have not been sufficiently addressed.

A second survey item asked the judges to select as many of the six statements listed below that applied. Again, 159 judges responded, but 40 said that they had insufficient experience with VTC to consider the statements. The remaining 119 responded as follows (percentages exceed 100 percent because judges could select more than one statement).

	<u>N and percent</u>
The equipment allows me to hear and see clearly all participants in remote locations.	38 (31.9%)
VTC hearings, all things considered, are basically no different than “in-person” hearings	16 (13.4%)
Equipment failures that require delay or adjustment occur often enough to be a non-trivial problem in conducting proceedings.	56 (47.1%)
VTC hearings, all things considered, are basically no different than “in-person” hearings—except that the need to transmit documents by fax sometimes creates a non-trivial problem in conducting proceedings	31 (26.5%)
VTC hearings, all things considered, are basically no different than “in-person” hearings—except that other aspects of VTC sometimes create a non-trivial problem in conducting proceedings.	25 (21.0%)
None of these statements describes my view.	30 (25.2%)

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Of the 119 judges, almost half (47.1 percent) said that “equipment failures” occur often enough to be a non-trivial problem in conducting proceedings, and some of those judges likely selected at least one of the additional options, as to problems caused by document transmission or other things. If so, that would likely raise the 47.1 percent figure to over half. (Note that 119 judges selected 166 options, in addition to the 30 who said that none of the statements reflected their views.)

As displayed below, there are differences in responses based on the judges’ docket (mostly detained and mostly non-detained) but they are not easy to interpret.

(Factors paraphrased.)	Mostly detained		50-50		Mostly non det		Total
Equip. lets me see/hear clearly	11	28.9%	1	26	68.4%	38	
VTC no different than “in person”	5	31.3%	0	11	68.8%	16	
Equip. failures occur too often	23	41.1%	4	29	51.8%	56	
VTC no different except for doc. transmission	12	40.0%	1	17	56.7%	30	
VTC no different except other	7	29.2%	1	16	66.7%	24	
None describes my views	7	23.3%	2	21	70.0%	30	

Percentages are of the row totals; those shown do not total 100 because percentages aren’t shown for the small number of responses from judges with dockets roughly half-and-half detained and not.

Judges with mostly non-detained docket were much more likely than those with mostly detained dockets to say:

- the equipment allowed them to see and hear participants in remote locations,
- VTC is basically no different from in-person hearings (although the numbers are small).

But they were also more likely to say:

- equipment failures occurred often enough to be a non-trivial problem
- faxing documents sometimes caused non-trivial problems in conducting proceedings, and
- “other aspects of VTC” sometimes created problems.

These responses may suggest, as above, that equipment used in VTC hearings of judges with mostly nondetained dockets is superior to that in hearings of judges with mostly detained dockets. It may also suggest that the cases before judges with mostly non-detained problems are more complex than those of judges with mostly detained populations, with more documents and other moving parts in the hearings that can cause problems.

Thirty-eight of those who responded to this item added written comments:

- ten were essentially neutral (“effective for people who want a speedy hearing and to go home”);

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- six were favorable (even though “observing the witness is not as good on VTC as it is live, I think the benefits of VTC far outweigh the negatives”); and
- 22 were critical (including from seven judges who selected the “none-of-these-statements-describes-my-views” option. Five of the 22 commented on the inability to assess demeanor.

(One other item in our survey dealt with VTC: We asked that judges select, from a list of ten factors, four “that you believe would most improve your court.” One of the ten factors was “Increased reliance on video teleconferencing.” Of the 153 judges who responded, four selected that factor.)

[4] Effect on outcomes

What is missing in these arguments is reliable evidence of whether VTC has an effect on outcomes—put differently, whether differences that may be observed in the outcomes of VTC versus in-person hearings can reliably be attributed to the use of VTC.

EOIR officials told the ACUS staff, and more recently us, that they monitor the use of VC equipment, consider comments received from attorneys and others, and emphasize to judges the need to try to accommodate needs of participants in VTC proceedings. But they also acknowledged, quoting the ACUS report, that “the agency does not keep or analyze evaluative data regarding outcomes of video hearings versus in-person hearings.”²⁵ EOIR officials said that, given the many variables at play in removal adjudication, a reliable evaluation might be impossible.

The best way to answer the question of effects, if any, on outcomes would be a classic control-group experiment that randomly assigned cases that are similar in all major characteristics either to VTC or in person hearings. The challenges of such an effort in the overworked immigration courts are obvious.

We are aware of only one effort to identify outcome differences attributable to VTC in immigration court proceedings, a 2008 article that mainly summarized popular, academic, and judicial commentary on the hard-to-discount differences in how fact-finders perceive individuals who are physically present in a courtroom versus those observed through the VTC medium.²⁶ The article also presented OPAT-provided data on the disposition of asylum claims in 2005 and 2006,²⁷ as summarized in Table L below, to which we have added 2010 data that OPAT provided us. (We eliminated the small number of telephonic hearings; hearings involving withdrawn or abandoned claims, as well as larger numbers of hearings coded as “Other”, which typically represent a case in which the judge did not decide on the asylum claim because the respondent, for example may have received another type of relief.)

²⁵ ACUS VIDEO HEARINGS REPORT, *supra* note 7, at 37.

²⁶ Walsh & Walsh, *supra* note 9.

²⁷ *Id.* at 271-72.

For all three years, grants for all VTC asylum applicants were in the 23 percent to 29 percent range, while in-person grant rates rose from 38 percent to 50 percent.

Table L: Asylum Grants and Denials for Seekers in VTC and In-Person Hearings*

Disposition and forum	2005	2006	2010
VTC grant	109 (23%)	101 (24%)	216 (29%)
In-person grant	11,473 (38%)	13028 (45%)	8,338 (50%)

*--2005 2006 data as reported by OPAT to 2008 article authors; 2010 data as reported by OPAT to Benson/Wheeler

Their conclusion from the 2005-06 data: “the use of VTC actually makes asylum half as likely for those who are forced to use the system.”²⁸

The authors also analyzed outcome differences for asylum seekers not represented by attorneys and observed only minor differences with the rates for all seekers. They furthermore reported that the results were statistically significant as to the general population and the unrepresented population.

The authors did not report, however, the effect of detained status on the relationships. Detained asylum claimants may be more likely to be ineligible for asylum for the same reasons they were detained, such as statutory bars due to criminal conduct, or were less likely to have approvable asylum claims. We asked OPAT to provide us information on 2010 asylum grants by type of hearing (VTC or in person), representation status, and detained status. Table M presents the results for those in detention, those who had been detained but were released when the case was completed, and those who were never detained.

Table M: 2010 Asylum Application Grants and Denials, By Detention Status and Representation Status

	Total	Represented	Not represented
DETAINED			
VTC grant	136 (24%)	127 (42%)	9 (4%)
IP grant	212 (11%)	153 (18%)	59 (6%)
RELEASED			
VTC grant	43 (39%)	35 (43%)	8 (28%)
IP grant	1,153 (46%)	1,048 (48%)	105 (33%)
NEVER DETAINED			
VTC grant	37 (42%)	34 (48%)	3 (18%)
IP grant	6,973 (57%)	6,699 (59%)	274 (38%)

Table L shows a 50 percent grant rate for all asylum seekers with in-person hearings. In Table M, that grant rate for 2010 asylum seekers with in-person hearings drops to 11 percent for those in detention. In fact, detained asylum seekers in 2010 did better overall

²⁸ *Id* at 271

if they had a VTC hearing (24 percent) than an in-person hearing (11 percent). Detained seekers in VTC hearings who were represented got asylum 42 percent of the time.

For 2010 asylum seekers with VTC hearings, those who had been released from detention, and those who had never been detained fared better than detained respondents (39 percent and 42 percent respectively), but, unlike detained respondents, fared worse than respondents in in-person hearings (39 percent to 46 percent for released applicants and 42 percent to 57 percent for never detained applicants). The number of released and never-detained asylum seekers who had VTC hearings was quite low (in double or single digits, making the percentages volatile). The differences in success for represented and non-represented respondents are noticeable in all categories—for example, 42 percent of detained respondents in VTC hearings got relief versus 4 percent (N=9) for non-represented VTC detainees.

It is not possible from these data to draw firm conclusions on the impact of VTC alone on outcomes, although the 2008 article's flat assertions that VTC affects asylum outcomes seem questionable. A more reliable assessment of VTC's impact would come from an experiment that controlled for such factors such as the nationality of the asylum applicant, the reason for the denial (statutory bar vs. credibility determination), whether interpreters were used, and the availability of alternative forms of relief.

Recommendations

These recommendations are based on the assumption that EOIR, for budgetary reasons and in response to legislative pressures, will continue to expand the use of VTC in removal proceedings. We appreciate the concerns of the advocacy groups that oppose all VTC hearings, but we do not think their elimination is at all likely. Increased use is the greater likelihood.

37. That EOIR and DHS, in light of the judges' generally negative evaluations of VTC—especially evaluations from judges who serve primarily detained dockets—provide and maintain first rate VTC equipment.
38. That EOIR, in order to facilitate more effective representation in removal proceedings, including self-representation:
 - a. provide— in the OCIJ Practice Manual and other aides it may prepare for attorneys, and for pro se respondents—more guidance about how to prepare for and conduct proceedings using VTC.; and
 - b. encourage judges to permit counsel and respondents to use the courts' VTC technology to prepare for the hearing so that their first experience is not the high stakes hearing.
39. That EOIR consider more systematic assessments of VTC beyond the informal monitoring that it conducts today, not for the purpose of revisiting the use of VTC, to which Congress and EOIR are committed, but rather to provide more systematic information on how to make its use more effective and to ensure against undue prejudice. Assessments might include:

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- a. consultation with the Asylum Office and review of their VTC best practices for possible adoption and integration into EOIR procedures;
 - b. randomly selecting VTC hearings for observation by ACIJs and/or other highly trained personnel such as BIA staff attorneys or visits by senior members of the Asylum Office, to prepare formal evaluations of the VTC hearings, especially those involving claims for asylum or other humanitarian relief. Ideally these special observers would also review a random selection of in-person hearings to offer a comparative assessment;
 - c. providing surveys or questionnaires to the parties and their witnesses to gather information about how the VTC may have impaired hearing during the proceeding and evaluating the data collected periodically to determine if corrections to procedures or technology are warranted;
 - d. a realistic assessment of the net monetary savings attributable to EOIR's use of VTC;
 - e. in the interests of transparency, periodic publication of the results of these assessments.
40. That EOIR, as it works toward implementing electronic docketing and electric case files (which will permit ready access to documents in video proceedings), consider the interim use of document cameras in video proceedings to avoid the need to fax documents between locations.

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