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LEGAL CONSIDERATIONS FOR REMOTE HEARINGS IN AGENCY ADJUDICATIONS

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BACKGROUND

Agencies are increasingly using and relying on remote hearings to fulfill their workload responsibilities during the COVID-19 pandemic.¹ The Administrative Conference of the United States (ACUS) has previously recommended best practices for using and expanding the use of video teleconferencing (VTC) in agency adjudications² and published a *Handbook on Best Practices for Using Video Teleconferencing in Adjudicatory Hearings*.³ ACUS has also addressed the use of written-only hearings in adjudications not subject to the Administrative Procedure Act's (APA) formal-hearing requirements.⁴

This Report is intended to supplement those materials by providing an overview of legal issues that federal agencies may encounter as they develop and implement processes for remote hearings, defined broadly to include any adjudicatory hearing in which at least one individual participates by VTC, by telephone or internet telephony, or through written submissions. It does not condone or condemn the use of remote participation in any circumstance or attempt to set forth best practices for its implementation. Readers interested in these subjects should refer to the ACUS materials noted above.

¹ ACUS is collecting materials related to federal agency adjudication during the pandemic on its website at <https://www.acus.gov/coronavirus-and-adjudication>.

² Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Ctr. for Legal & Court Tech., *Best Practices for Using Video Teleconferencing for Hearings and Related Proceedings* (2014) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/best-practices-using-video-teleconferencing-final-report>; Nathaniel Flanders & Amber Williams, Admin. Conf. of the U.S., *Memorandum on the History of Agency Video Teleconferencing Adjudications* (Nov. 26, 2014), https://www.acus.gov/sites/default/files/documents/VTC%20Hearing%20History_FINAL.pdf; Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion* (May 10, 2011) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/agency-use-video-hearings-final-report>.

³ MARTIN E. GRUEN & CHRISTINE R. WILLIAMS, ADMIN. CONF. OF THE U.S., *HANDBOOK ON BEST PRACTICES OR USING VIDEO TELECONFERENCING IN ADJUDICATORY HEARINGS* (2015), *available at* <https://www.acus.gov/report/handbook-best-practices-using-video-teleconferencing-adjudicatory-hearings>.

⁴ Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016); *see also* MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., *FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 80–81* (2019), *available at* <https://www.acus.gov/publication/federal-administrative-adjudication-outside-administrative-procedure-act>.

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INTRODUCTION

Adjudicatory hearings vary widely across federal agencies. While some evidentiary hearings resemble federal-court proceedings, complete with formal rules of procedure and evidence, others are as simple as an informal conversation or the exchange of documents. Depending on the proceeding, participants may include a single adjudicator or multiple adjudicators, adjudicative staff, representatives of the agency as a party, a private party or multiple private parties, attorney or non-attorney representatives of private parties, agency witnesses, non-agency expert and lay witnesses, and foreign- and sign-language interpreters.

Adjudicators ordinarily conduct adjudicative hearings from their official duty station or a designated hearing space managed by the agency or another federal-, state-, or local-government entity. They sometimes also conduct hearings from non-government spaces secured for the purpose of holding a hearing. During the COVID-19 pandemic, many adjudicators are, for the first time, conducting hearings remotely from their alternative duty stations—generally their homes.⁵ This raises new practical and potentially legal questions as adjudicators are unlikely to have ready home access to the same quality of remote-hearing infrastructure or level of administrative support.

Non-adjudicator participants participate in evidentiary hearings in person or remotely by VTC or telephone from designated agency hearing spaces or elsewhere, or through the interchange of written correspondence. The basic features of each of these four manners of participation are:

	Same Space as Adjudicator	Synchronous Visual	Synchronous Audio	Information Exchange
In person	●	●	●	●
Video teleconference		●	●	●
Telephone			●	●
In writing				●

Although we often speak of “in-person hearings” and “remote hearings,” all participants in a proceeding need not participate in the same manner. One party may appear in person before the adjudicator while another participates remotely. Both parties may participate remotely from the adjudicator, separately or sometimes from the same location. A witness or interpreter may participate remotely in an otherwise in-person hearing. Indeed, individual participants may participate by different means at various stages of a case—in person at an initial hearing and remotely at a supplemental hearing, for example. For purposes of this Report, a “remote” hearing means any evidentiary hearing in which at least one participant participates by VTC, telephonically, or in writing.

As a matter of policy, each manner of participation has its benefits and costs and the potential to provide, in appropriate circumstances, an effective and efficient means of exchanging information and developing a record for decisionmaking. However, this Report addresses only the legal questions regarding their use. Part I examines legal questions agencies may encounter when parties voluntarily participate by remote means. Part II examines legal questions agencies may

⁵ See *supra* note 1.

encounter when they require private parties to participate remotely. Part III examines legal questions that have arisen when witnesses and opposing parties participate remotely. Part IV addresses potential legal questions related to remote-hearing infrastructure, including technical problems that may occur during remote hearings and legal standards governing privacy, accessibility, and open hearings.

I. VOLUNTARY REMOTE PARTICIPATION BY PRIVATE PARTIES

Many agencies, by rule or practice, permit parties to voluntarily participate in evidentiary hearings by remote means. Depending on an agency tribunal's rules of practice, parties may voluntarily participate by remote means when:

- an adjudicator grants a party's individual request to participate remotely;
- an adjudicator grants opposing parties' joint request to participate remotely;
- a party agrees to an adjudicator's offer or request that he or she participate remotely;
- a party declines or fails to follow procedures to inform the adjudicator in advance of scheduling that he or she would prefer not to participate remotely; or
- an adjudicator notifies a party that he or she is scheduled to participate remotely, and the party declines or fails to avail himself or herself of procedures to opt out of remote participation.

Legal questions may arise when a party claims that his or her remote participation was not truly voluntary. A party may allege, for example, that he or she followed procedures to opt out of remote participation,⁶ showed good cause for not following opt-out procedures,⁷ did not understand or receive legally required notice that he or she would be participating remotely,⁸ lacked knowledge of a deadline to object to remote participation,⁹ did not understand the effect of participating remotely,¹⁰ or was not given adequate time to make travel arrangements to attend in person.¹¹ Agencies should be mindful of any statutory or regulatory requirements for obtaining parties' consent or processing objections to remote participation.

Even in instances in which a party explicitly agrees to participate by remote means, legal questions may arise related to another participant's manner of participation, technical problems

⁶ See, e.g., *Dudek v. Comm'r of SSA*, 2018 U.S. Dist. LEXIS 164261, at *3–4 (E.D. Mich. Aug. 24, 2018), *adopted by* 2018 U.S. Dist. LEXIS 163588 (E.D. Mich. Sep. 25, 2018); *McDavid v. Colvin*, 2017 U.S. Dist. LEXIS 32397, at *5–10 (N.D. Ill. Mar. 7, 2017); *Alzamora v. Comm'r of Soc. Sec.*, 2014 U.S. Dist. LEXIS 176093, at *8–11 (M.D. Fla. Dec. 22, 2014); *Pittman v. Astrue*, 2013 U.S. Dist. LEXIS 122707, at *3–5 (M.D. Ga. July 29, 2013), *adopted by* 2013 U.S. Dist. LEXIS 121523 (M.D. Ga. Aug. 27, 2013).

⁷ See, e.g., *Cavazos v. Berryhill*, 2018 U.S. Dist. LEXIS 215851, at *7–9 (W.D.N.Y. Dec. 21, 2018).

⁸ See, e.g., *Zuniga v. Barr*, 934 F.3d 1083, 1085 n.2 (9th Cir. 2019); *Birdwell v. Berryhill*, 2018 U.S. Dist. LEXIS 128999, at *15 (E.D. Tenn. June 22, 2018), *adopted by* 2018 U.S. Dist. LEXIS 128571 (E.D. Tenn. Aug. 1, 2018); *Kilcrease v. Comm'r of Soc. Sec.*, 2018 U.S. Dist. LEXIS 38675, at *25–31 (E.D. Tenn. Mar. 9, 2018); *Pokluda v. Colvin*, 2014 U.S. Dist. LEXIS 59337, at *11–13 (N.D.N.Y. Mar. 21, 2014), *adopted by* 2014 U.S. Dist. LEXIS 58394 (N.D.N.Y. Apr. 28, 2014).

⁹ See, e.g., *Scott v. Comm'r*, 2014 U.S. Dist. LEXIS 45266, at *24–27 (D. Md. Apr. 2, 2014).

¹⁰ See, e.g., *Gunter v. OPM*, 15 Fed. Appx. 873, 874 (Fed. Cir. 2001).

¹¹ *Momentum EMS v. Sebelius*, 2013 U.S. Dist. LEXIS 183591, at *29 (S.D. Tex. Dec. 18, 2013).

which occur during the hearing, or other issues related to the agency’s remote-hearing infrastructure. These issues are discussed in Parts III and IV.

Legal questions may also arise when an agency denies a party’s request to participate remotely and mandates that he or she participate in person. Such disputes typically arise when a party contends that a disability or other limitation prevents him or her from traveling to an in-person hearing site or participating in an in-person setting. When evaluating claims that due process requires an agency to accommodate an individual’s request to participate remotely, courts seem to consider factors including the party’s compliance with agency procedures to request an alternative manner of participation, the nature of the alleged limitation and evidence of its limiting effects, and any actual effect on the conduct of the hearing or the outcome of the proceeding.¹²

Parties may also raise parallel claims of disability discrimination under section 504 of the Rehabilitation Act. Section 504 provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency or by the United States Postal Service.”¹³ (Similar requirements under the Americans with Disabilities Act are inapplicable to federal agencies.¹⁴) Parties have occasionally alleged that agencies violate section 504 when they mandate in-person participation for parties whose disabilities may with their ability to travel to a hearing site or participate in an in-person setting.¹⁵

During the COVID-19 pandemic, most federal agencies have postponed in-person hearings or encouraged parties to agree to participate remotely to curb the virus’s spread. At least one federal agency, the Executive Office for Immigration Review, has continued to conduct in-person hearings in some circumstances.¹⁶ A recent suit requested that a federal district court issue a temporary restraining order that would require the EOIR to “postpone all in-person detained hearings, with the exception of bond hearings, for the longer of the duration of the currently declared National Health Emergency or a Relevant State Emergency” and install adequate remote-hearing infrastructure.¹⁷ Although the court ultimately concluded it lacked jurisdiction to hear the case, it stressed that “promoting public health—especially during a pandemic—is in the public

¹² See, e.g., *Calderon v. Comm’r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 89079, at *13–18 (M.D. Fla. May 31, 2013), *adopted by* 2013 U.S. Dist. LEXIS 89264 (M.D. Fla. June 24, 2013); *Pitts v. Comm’r*, 2010 Tax Ct. Memo LEXIS 136, at *27–28 (2010); *Walker v. Astrue*, 2009 U.S. Dist. LEXIS 65096, at *53–55 (E.D.N.Y. July 28, 2009); *Vicari v. Astrue*, 2009 U.S. Dist. LEXIS 9670, at *17–18 (E.D.N.Y. Feb. 10, 2009); *Davidson v. Astrue*, 2008 U.S. Dist. LEXIS 91401, at *27–28 (W.D. Wis. Nov. 6, 2008)

¹³ 29 U.S.C. § 794(a).

¹⁴ See *Sanders v. Herin*, 2019 U.S. Dist. LEXIS 230540, at *9–10 (D.S.C. Dec. 12, 2019), *adopted by* 2020 U.S. Dist. LEXIS 75272 (D.S.C. Apr. 29, 2020); *Pitts v. Comm’r*, 2010 Tax Ct. Memo LEXIS 136, at *27–28 (2010).

¹⁵ See, e.g., *Sanders v. Herin*, 2019 U.S. Dist. LEXIS 230540, at *10–12 *adopted by* 2020 U.S. Dist. LEXIS 75272 (D.S.C. Apr. 29, 2020); *Wilson v. Astrue*, 2012 U.S. Dist. LEXIS 89923, at *9–13 (W.D.N.C. May 23, 2012), *adopted by* 2012 U.S. Dist. LEXIS 88861 (W.D.N.C. June 26, 2012).

¹⁶ Exec. Office for Immigr. Rev., EOIR Operational Status During Coronavirus Pandemic, <https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic> (last visited May 15, 2020).

¹⁷ *Nat’l Immigration Project of the Nat’l Lawyers Guild v. EOIR*, 2020 U.S. Dist. LEXIS 74324, at *25–29 (D.D.C. Apr. 28, 2020).

interest” and that the court is “certainly not well-positioned to second-guess [the agency’s] health and safety determinations.”¹⁸

II. MANDATORY REMOTE PARTICIPATION BY PRIVATE PARTIES

Some agencies have adopted policies or practices that permit officials to compel parties to participate remotely in agency evidentiary hearings. These policies, and their application in individual cases, have faced legal challenges under agency-specific statutes, generally applicable statutes such as the Administrative Procedure Act (APA) and Rehabilitation Act, and the Fifth Amendment’s Due Process Clause.

A. *Agency-Specific Statutes*

Many statutes guarantee parties the opportunity for a hearing before a federal agency decisionmaker. Some explicitly authorize or prohibit an agency from compelling a party to participate by any or by specific remote means. Most, however, require the agency to provide the opportunity for a hearing without specifying its format.

1. **Statute Explicitly Authorizes an Agency to Mandate Remote Participation**

At least one statute, the Immigration and Nationality Act (INA), explicitly grants an agency the discretion to compel parties to participate by VTC.¹⁹ As discussed in Part II.C., courts have thus far rejected facial due-process challenges against this broad grant of discretion.

2. **Statute Explicitly Prohibits an Agency from Mandating Remote Participation**

Some statutes explicitly prohibit an agency from compelling a private party to participate by any or by specific remote means. They do so either by requiring the agency to secure the party’s consent prior to scheduling him or her to participate remotely, or by granting the party an absolute right to opt out of remote participation. For example:

- Immigration courts may only schedule removal hearings by telephone “with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.”²⁰
- The Department of Agriculture’s (USDA) National Appeals Division must conduct evidentiary hearings in person, “unless the appellant agrees to a hearing by telephone or by a review of the case record.”²¹

¹⁸ *Nat’l Immigration Project of the Nat’l Lawyers Guild*, 2020 U.S. Dist. LEXIS 74324, at *40–41.

¹⁹ 8 U.S.C. § 1229a(b)(2); *see also* *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Melgar v. AG of the U.S.*, 442 Fed Appx. 695, 697–98 (3d Cir. 2011); *Veliz v. Holder*, 375 F. Appx. 148, 149 (2d Cir. 2010); *Eke v. Mukasey*, 512 F.3d 372, 382 (7th Cir. 2008); *Ezenabo v. CBP*, 2019 U.S. Dist. LEXIS 81771, at *4–6 (E.D. Mich. May 15, 2019).

²⁰ 8 U.S.C. § 1229a(b)(2); *accord* *Gaye v. Lynch*, 788 F.3d 519, 533 (6th Cir. 2015).

²¹ 7 U.S.C. § 6997(c)(2).

- The America Invents Act requires an “oral” hearing before the Patent Trial and Appeal Board on post-grant and inter partes review of patents.²²
- Although the Board of Veterans Appeals (BVA) is authorized to docket cases for a hearing “by picture and voice transmission at a facility of the Department where the Secretary has provided suitable facilities and equipment to conduct such hearings,” it must grant a party’s request to participate in person. (Parties who are scheduled to appear in person are also entitled to participate remotely from a Department facility. Additionally, any party can request to appear from a location of their choosing “via a secure internet platform established and maintained by the Secretary that protects sensitive personal information from data breach.”²³)

An agency would almost certainly violate federal law by compelling a party to participate remotely or by proscribed remote means in contravention of its organic statute. The only question would be whether the party enjoys a remedy on judicial review. Legal questions are more likely to focus on whether an agency’s procedures to secure parties’ consent or process parties’ objections comply with statutory directives, or whether the agency or an individual party complied with those procedures in a specific case.²⁴

3. Statute Requires a “Hearing” Without Explicitly Specifying Its Format

Federal statutes more commonly require agencies to provide parties the opportunity for a “hearing” without specifying its format. Some agencies have either declined to recognize statutory authority to compel parties to participate remotely or have simply not exercised it. Others—especially those that adjudicate a higher volume of cases—have interpreted such language to permit officials to compel parties to participate by remote means in at least some circumstances. For example:

- The Internal Revenue Code guarantees taxpayers a “fair hearing” before the Internal Revenue Service (IRS) files a lien notice or imposes a levy on a person’s property or right to property.²⁵ Treasury Department rules grant the IRS Independent Office of Appeals discretion to conduct informal Collection Due Process (CDP) hearings in person (“face-to-face”), by telephone, or through written correspondence. The Independent Office of Appeals ordinarily grants a taxpayer’s request for an in-person CDP hearing only if he or she presents “relevant, non-frivolous reasons for

²² See, e.g., *id.* §§ 316(a)(10), 326(a)(9). Federal law tends to contrast “oral” and “written” hearings. See, e.g., *id.* § 5327(c)(1) (Financial Stability Oversight Council).

²³ *Id.* § 7107(c). The virtual hearings program has been fully operational since early 2020 via the Department of Veterans Affairs’ telehealth application, VA Video Connect. Under the program, veterans can participate in BVA hearings from home using their mobile phone or personal computer.

²⁴ See, e.g., *McDavid v. Colvin*, 2017 U.S. Dist. LEXIS 32397, at *5–10 (N.D. Ill. Mar. 7, 2017); *Garcia v. Colvin*, 2014 U.S. Dist. LEXIS 183925, at *15–17 (S.D. Cal. Dec. 17, 2014), *adopted by* 2015 U.S. Dist. LEXIS 65542 (S.D. Cal. May 15, 2015).

²⁵ 26 U.S.C. §§ 6320(b), 6330(b); see generally Danshera Cords, *How Much Process Is Due? I.R.C. Sections 6320 and 6330 Collection Due Process Hearings*, 29 VT. L. REV. 51 (2004).

disagreement with the proposed levy;” provides certain materials; and agrees to appear at a local agency office.²⁶

- The Social Security Act guarantees parties the “opportunity for a hearing” in disputes concerning Social Security Old-Age, Survivors, and Disability Insurance (OASDI) and Supplemental Security Income (SSI).²⁷ SSA rules provide parties a 30-day window to object to appearing by VTC, after which the agency may schedule parties to appear before an administrative law judge (ALJ) in person or, absent an objection, by VTC subject to certain good-cause exceptions.²⁸ However, the rules permit the agency to direct incarcerated parties to appear by telephone or VTC subject to certain good-cause exceptions.²⁹ (SSA abandoned a 2018 proposal that would have removed the opportunity for non-incarcerated parties to opt out of appearing by VTC.³⁰)
- The Social Security Act grants parties in disputes over Medicare Parts A, B, and C the same opportunity for a “hearing.”³¹ HHS rules direct ALJs in the Health and Human Services Department’s Office of Medicare Hearings and Appeals (OMHA) to schedule unrepresented Part A and Part B beneficiaries and Part C enrollees to appear by VTC and other appellants to appear by telephone or in some cases by VTC with exceptions for good cause. Parties who wish to appear in person must explain their objection “at the earliest possible opportunity before the time set for the hearing” but are not guaranteed in-person participation.³²
- The Perishable Agricultural Commodities Act (PACA) provides for a “hearing . . . before a duly authorized examiner of the Secretary [of Agriculture]” in cases where an investigation substantiates the existence of PACA violations with alleged damages exceeding \$30,000.³³ USDA rules provide that such hearings “shall be conducted by audio-visual telecommunication” with certain good-cause exceptions for in-person participation. Examiners may also conduct hearings by telephone when doing so would be more cost-effective, “[w]ould provide a full and fair evidentiary hearing,” and “[w]ould not prejudice any party.”³⁴
- Certain federal employees and applicants have a statutory right to a “hearing” before the Merit Systems Protection Board.³⁵ The Board has held that MSPB administrative judges (AJ) “may hold videoconference hearings in any case, regardless of whether the

²⁶ 26 C.F.R. § 301.6330-1(d)(2) (Q&A-D6, Q&A-D7, and Q&A-D8).

²⁷ 42 U.S.C. §§ 405(b)(1), 1383(c)(1)(A).

²⁸ 20 C.F.R. §§ 404.936, 416.1436.

²⁹ 20 C.F.R. §§ 404.936, 416.1436.

³⁰ *See* Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 84 Fed. Reg. 69,298, 69,300 (Dec. 18, 2019).

³¹ 42 U.S.C. §§ 1395w-22(g)(5), 1869(b)(1)(A).

³² 42 C.F.R. §§ 405.1020, 423.2020.

³³ 7 U.S.C. § 499f(c)(2).

³⁴ 7 C.F.R. § 47.15(c)(3).

³⁵ 5 U.S.C. § 7701(a)(1).

appellant objects,” so long as individual adjudications are “fair and just.”³⁶ (The Board undertakes a more searching inquiry when an AJ directs a private party to participate by telephone and credibility is at issue.³⁷)

Courts have applied a variety of interpretive methods and deference doctrines to reach different conclusions on whether a right to a “hearing” guarantees parties the right to an *in-person* hearing. For example:

- Courts have consistently upheld the Treasury Department’s CDP-hearing rules under both textualist and intentionalist readings of the Internal Revenue Code, emphasizing that the statute does not specify the format for a “hearing” and that Congress was aware of the IRS’s practice of using telephone hearings when it enacted the statute.³⁸
- An earlier version of the INA required that determinations of deportability be made “in a proceeding *before* a special inquiry officer.”³⁹ Relying on a popular dictionary, the Ninth Circuit held that Congress “used ‘before’ to require the appearance of the [immigration judge] and the persons charged in each other’s physical presence during the course of a deportation proceeding.”⁴⁰ The Eleventh Circuit rejected that holding, instead deferring to the agency’s “reasonable interpretation” of the INA.⁴¹
- Before it was repealed, a 1976 statute granted prisoners the right to “appear” before the Parole Commission. The Sixth Circuit held that the statute unambiguously barred the agency from compelling prisoners to appear by VTC because Congress could not have foreseen using VTC for parole proceedings when it enacted the statute in 1976.⁴²

Except for persons outside the United States,⁴³ the courts have not definitively resolved whether mandatory remote participation comports with the broad language of the Social Security Act.

B. Generally Applicable Statutes

Parties have sometimes alleged that policies that permit agencies to compel a party to participate by remote means, or their application in specific cases, contravenes generally applicable statutes such as the APA and the Rehabilitation Act.

³⁶ Koehler v. Dept. of the Air Force, 99 M.S.P.R. 82, 87–88 (2005).

³⁷ See Lowe v. Dept. of Defense, 67 M.S.P.R. 97, 99 (1995); see also Robertson v. Dept. of Transp., 2009 M.S.P.B. 229 (2009).

³⁸ Robinson v. Comm’r, 572 Fed. Appx. 846, 847–48 (11th Cir. 2014); Murphy v. Comm’r of Internal Revenue, 469 F.3d 27, 30 (1st Cir. 2006); Kindred v. Comm’r of Internal Revenue, 454 F.3d 688, 691 n.4 (7th Cir. 2006); Katz v. Comm’r, 115 T.C. 329, 337–338 (2000); Davis v. Comm’r, 115 T.C. 35, 41 (2000).

³⁹ 8 U.S.C. § 1252(b) (1982) (emphasis added).

⁴⁰ Purba v. INS, 884 F.2d 516, 517 (9th Cir. 1989).

⁴¹ Bigby v. U.S. INS, 21 F.3d 1059, 1963 (11th Cir. 1994).

⁴² Terrell v. U.S., 564 F.3d 442, 449–54 (6th Cir. 2009).

⁴³ Courts have upheld mandatory remote participation for persons outside the United States. Mendoza v. Soc. Sec. Comm’r, 92 Fed. Appx. 3, 4 (D.C. Cir. 2004); Reyes v. Sec. of HEW, 476 F.2d 910, 915 (D.C. Cir. 1973).

1. Administrative Procedure Act

The APA’s formal-adjudication provisions generally require that agencies provide an opportunity for a “hearing” before it takes final action.⁴⁴ In claims for money or benefits and applications for initial licenses, the APA explicitly permits agencies to “adopt procedures for the submission of all or part of the evidence in written form” so long as those procedures will not “prejudice” the parties.⁴⁵ Parties in other proceedings are generally entitled to present their case “by oral or documentary evidence, . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”

The Supreme Court has held that the term “hearing” as used in the APA “does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses or the right to present oral argument to the agency’s decisionmaker.”⁴⁶ Although the Supreme Court reached this holding in the context of a formal rulemaking, its logic likely forecloses the argument that the APA necessarily grants parties the right to an in-person or oral hearing in all formal adjudications.⁴⁷

This is not to suggest that remote or non-oral participation will satisfy the APA in all contexts. The APA’s text contemplates that written participation could, in some cases, “prejudice” a party. And it is conceivable that a particular form of remote participation could, in some circumstances, inhibit the “full and true disclosure” of certain facts. For example, it may be more difficult to accurately assess a party’s credibility when he or she participate by phone or through the submission of written materials.⁴⁸ When an agency in a proceeding governed by the APA’s formal-adjudication provisions intends to compel a party to participate in a particular remote manner, it should, as applicable, consider whether the chosen form of remote participation will facilitate a “full and true disclosure” of the facts in issue or will not “prejudice” the party.

2. Rehabilitation Act

As discussed before, section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . . under any program or activity conducted by any Executive agency or by the United States Postal Service.”⁴⁹ (Similar requirements under the Americans with Disabilities Act are inapplicable to federal agencies.⁵⁰)

Advocates in both the Social Security and immigration contexts have argued that agencies violate section 504 when they mandate remote participation for parties whose disabilities may

⁴⁴ 5 U.S.C. § 554(a).

⁴⁵ *Id.* § 556(d).

⁴⁶ *U.S. v. Fla. E. Coast Rwy.*, 410 U.S. 224, 240–42 (1973).

⁴⁷ *See Lunsford v. Comm’r*, 117 T.C. 159, 171–73 (2001) (Halpern, J., concurring).

⁴⁸ *Cf. ASIMOW*, *supra* note 4, at 81.

⁴⁹ 29 U.S.C. § 794(a).

⁵⁰ *See Sanders v. Herin*, 2019 U.S. Dist. LEXIS 230540, at *9–10 (D.S.C. Dec. 12, 2019), *adopted by* 2020 U.S. Dist. LEXIS 75272 (D.S.C. Apr. 29, 2020); *Pitts v. Comm’r*, 2010 Tax Ct. Memo LEXIS 136, at *27–28 (2010).

negatively impact their ability to participate by remote means.⁵¹ While courts have so far decided these challenges on jurisdictional grounds without reaching the merits, agencies should be mindful of section 504's requirement to provide reasonable accommodations or respond to reasonable accommodation requests.⁵²

C. *Constitutional Due Process*

Many parties and other stakeholders have argued that agencies deny parties due process of law when they compel them to participate by remote means generally, by particular remote means, or by remote means in specific circumstances.

The basic guarantee of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner” before an agency deprives a person of a liberty or property interest.⁵³ With few exceptions, courts have rejected the general argument that agencies inherently deny parties such an opportunity when they compel them to participate by remote means.⁵⁴

Courts instead evaluate claims under the familiar three-part rubric of *Mathews v. Eldridge*.⁵⁵ This framework requires courts to consider (1) “the private interest that will be affected by the official action;” (2) “the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards;”

⁵¹ See Class Action Complaint at 52–54, P.L. v. U.S. ICE, 2019 U.S. Dist. LEXIS 104478 (S.D.N.Y. June 21, 2019) (No. 19 Civ. 01336), available at <https://www.bronxdefenders.org/wp-content/uploads/2019/02/19-Civ.-01336-Complaint-Digital.pdf> (last visited May 6, 2020); Comment of Nat'l Ass'n of Disability Representatives (Jan. 11, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0063>; Comment of Nat'l Org. of Soc. Sec. Claimants' Representatives (Dec. 21, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0041>.

⁵² Cf. *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (requiring that service providers offer “meaningful access to the benefit that the grantee offers” including “reasonable accommodations” under some circumstances).

⁵³ *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁵⁴ *Reyez v. AG U.S.*, 767 Fed. Appx. 358, 362 (3d Cir. 2019); *Gibbs v. U.S.*, 517 Fed. Appx. 664, 668 (11th Cir. 2013); *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Melgar v. Atty. Gen. of the U.S.*, 442 F. App'x 695, 698 (6th Cir. 2011); *Swidecki v. DOC*, 431 Fed. Appx. 900, 902–03 (Fed. Cir. 2011); *Leiva-Molina v. Holder*, 439 Fed. Appx. 571, 573 (9th Cir. 2011); *Miller v. AG of the U.S.*, 397 Fed. Appx. 780, 783 (3d Cir. 2010); *Veliz v. Holder*, 375 F. App'x 148, 149 (2d Cir. 2010); *Toyama v. Leavitt*, 408 Fed. Appx. 351, 353 (Fed. Cir. 2010); *Jhin v. OPM*, 368 Fed. Appx. 118, 121–22 (Fed. Cir. 2010); *Chavez-Vasquez v. Mukasey*, 548 F.3d 1115, 1118 (7th Cir. 2008); *Raphael v. Mukasey*, 533 F.3d 521 (7th Cir. 2008); *Eke v. Mukasey*, 512 F.3d 372, 382 (7th Cir. 2008); *Ligoussou v. Mukasey*, 297 Fed. Appx. 11, 12 (1st Cir. 2008); *Fall v. Gonzales*, 218 Fed. Appx. 385, 389 (6th Cir. 2007); *Brienza-Schettino v. AG of the U.S.*, 221 Fed. Appx. 140, 145 (3d Cir. 2007); *Burroughs v. Dep't of the Army*, 254 Fed. Appx. 814, 818–19 (Fed. Cir. 2007); *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002); *Butler v. Apfel*, 144 F.3d 622, 627–28 (9th Cir. 1998); *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980); *Ezenabo v. CBP*, 2019 U.S. Dist. LEXIS 81771, at *6 (E.D. Mich. May 15, 2019); *Kollmeyer v. Comm'r of SSA*, 2019 U.S. Dist. LEXIS 13158, at *46 (D. Ariz. Jan. 28, 2019); *Sahin v. Green*, 2018 U.S. Dist. LEXIS 3138, at *5 (D.N.J. Jan. 8, 2018); *Brown v. Comm'r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 177223, at *17 (M.D. Fla. Nov. 24, 2015), adopted by 2016 U.S. Dist. LEXIS 40192 (M.D. Fla. Mar. 28, 2016); *Loya v. Colvin*, 2015 U.S. Dist. LEXIS 35787, at *8–10 (D. Colo. Mar. 20, 2015); *Dalton v. Comm'r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 15324, at *14 (E.D. Mich. Jan. 23, 2012), adopted by 2012 U.S. Dist. LEXIS 15344 (E.D. Mich. Feb. 8, 2012); *Doyle v. Astrue*, 2009 U.S. Dist. LEXIS 117142, at *22–23 (N.D.N.Y. Sep. 30, 2009), adopted by 2009 U.S. Dist. LEXIS 117110 (N.D.N.Y. Dec. 15, 2009). But see *Kirby v. Astrue*, 731 F. Supp. 2d 453 (E.D.N.C. Aug. 3, 2010) (“The use of video conferences for hearings before an ALJ raises serious questions as to a claimants [sic] due process rights to receive a full and fair hearing.”).

⁵⁵ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); see *Eke*, 512 F.3d at 383; *Rusu*, 296 F.3d at 316.

and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁵⁶

The *Mathews* calculus will necessarily differ from agency to agency and from case to case given factors including the nature of the private interests at stake; the factual and legal issues in question; the nature of probative evidence and the probable value of an alternative manner of participation for adducing such evidence; and the governmental interests at stake, including the fiscal and administrative costs associated with providing the alternative manner of participation. The first three of the following sections compare certain compelled means of participation with frequently requested alternatives. The fourth section addresses additional legal questions that agencies may encounter during the COVID-19 pandemic.

1. Video Teleconference Participation Versus In-Person Participation

Both in-person and VTC participation provide parties and adjudicators synchronous oral and visual communication with other participants. However, when a party participates by VTC, he or she does not participate in the adjudicator’s physical presence and must communicate with the adjudicator through software and hardware systems. Parties may request in-person participation in place of VTC participation.

Proponents of VTC often assert that video participation preserves the most salient features of in-person participation—sight and sound—while allowing for more efficient case processing, greater scheduling flexibility for agency and non-agency participants, and reduced travel expenses.⁵⁷ Critics often assert that the lack of physical presence or the need to participate through hardware and software systems can substantially increase the risk of an erroneous deprivation of the private interest at stake in agency proceedings.

A growing body of anecdotal and empirical research suggests that private parties in some mass adjudication programs may be more likely to prevail when they participate in person rather than by VTC.⁵⁸ Some agencies have argued that disparities in decisional outcomes between in-person and VTC hearings are not statistically significant, or that such disparities result from factors

⁵⁶ *Mathews*, 424 U.S. at 334–35 (1976).

⁵⁷ See Recommendation 2014-7, *supra* note 2; Recommendation 2011-4, *supra* note 2.

⁵⁸ See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-37, SOCIAL SECURITY DISABILITY: ADDITIONAL MEASURES AND EVALUATION NEEDED TO ENHANCE ACCURACY AND CONSISTENCY OF HEARINGS DECISIONS 26, 44 (2017); 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 51–59 (2017); Lenni B. Benson & Russell R. Wheeler, Enhancing Timeliness and Quality in Immigration Removal Adjudication 100 (2012) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/immigration-removal-adjudication-report>; Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933 (2015); Ctr. for Legal & Court Tech., *supra* note 2, at 16–17; Harold Krent & Scott Morris, Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms 46–47 (2013) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/achieving-greater-consistency-social-security-disability-adjudication-report-final>; Comment of Ass’n of Admin. Law Judges (Dec. 20, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0040>.

other than those that distinguish the two forms of participation.⁵⁹ Critics suggest several possible explanations for these disparities, including that:

- technical issues affecting a party’s opportunity to be heard in a meaningful manner are more likely to arise when a party participates through the hardware and software systems required by VTC;
- adjudicators may have greater difficulty assessing the credibility, trustworthiness, demeanor, presentation, or symptomology of parties who participate by VTC due to a video screen’s constraints on an adjudicator’s field of vision, diminished eye contact, or difficulty interpreting nonverbal cues such as body language, facial expressions, and tone of voice over video;
- parties may feel greater discomfort interacting or communicating with other participants by VTC;
- parties and adjudicators may become distracted when they communicate using VTC;
- VTC participation may not foster the same degree of interpersonal rapport or emotional connection among hearing participants;
- non-local adjudicators, who frequently conduct hearings in which a party participates by VTC, may have less familiarity with regional conditions than local adjudicators who frequently preside over in-person hearings;
- members of the public or press may be less likely to attend or face greater difficulty attending hearings conducted using VTC.⁶⁰

These possible effects may be more consequential in some circumstances than in others. For example, the Fourth Circuit in a seminal opinion acknowledged “[t]he potential negative impact of video conferencing on a factfinder’s credibility assessments” but cautioned that this “may be of little consequence in certain types of proceedings” where credibility is not central to an adjudicator’s decision.⁶¹ When agencies compel parties to participate by VTC rather than in

⁵⁹ SOC. SEC. ADMIN., FISCAL YEAR 2017 VIDEO TELECONFERENCE REPORT: ADMINISTRATIVE LAW JUDGE HEARING DECISIONS (2017), <https://www.regulations.gov/document?D=SSA-2017-0015-0006>; GAO-18-37, *supra* note 58, at 76; GAO-17-438, *supra* note 58, at 76, 145 (2017).

⁶⁰ *See, e.g., Rusu*, 296 F.3d at 322–23; GAO-17-438, *supra* note 58, at 51–59 (2017); Booz Allen Hamilton, *Legal Case Study: Summary Report* 23 (Apr. 6, 2017) (report to the Exec. Office for Immigr. Rev.); Ctr. for Legal & Court Tech., *supra* note 2, at 13–16; Eagly, *supra* note 58; Neil Fox, Note, *Telephonic Hearings in Welfare Appeals: How Much Process Is Due?*, 1984 U. ILL. L. REV. 445 (1984); D. Randall Frye, *Statement of the Association of Administrative Law Judges, Committee on Ways and Means, Subcommittee on Social Security, June 27, 2012*, 33 J. NAT’L ASS’N ADMIN. L. JUD. 35, 50–51 (2013); Allan A. Toubman, Tim McArdle & Linda Rogers-Tomer, *Unemployment Compensation and Procedural Issues: Due Process Implications of Telephone Hearings: The Case for an Individualized Approach to Scheduling Telephone Hearings*, 29 U. MICH. J.L. REFORM 407 (1995–1996); 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); Comment of Rep. Richard E. Neal et al. (Jan. 31, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0247>; Comment of Nat’l Ass’n of Disability Representatives (Jan. 11, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0063>; Comment of Nat’l Org. of Soc. Sec. Claimants’ Representatives (Dec. 21, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0041>; Comment of Ass’n of Admin. Law Judges (Dec. 20, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0040>.

⁶¹ *Rusu v. INS*, 296 F.3d 316, 322–24 (4th Cir. 2002); *see also Vilchez*, 682 F.3d at 1199 (9th Cir. 2012) (quoting *Rusu*).

person, they should consider whether any adverse effects are particularly likely under the circumstances.

Both ACUS and the Government Accountability Office have recommended that agencies take steps to measure and remedy differences that develop in the decisional outcomes of in-person and VTC hearings.⁶² Agencies should be prepared to respond to due-process concerns where measurable disparities in decisional outcomes exist, regardless of their cause—not only in litigation but also in rulemaking proceedings, congressional interactions, and public affairs.

To succeed on a due-process claim, courts have typically required parties to demonstrate that their participation by VTC actually resulted in substantial prejudice.⁶³ For example, some parties have argued that the lack of physical presence in VTC hearings or reliance on current VTC technologies impeded an adjudicator's ability to assess their credibility or demeanor. Although federal courts have occasionally found that VTC negatively impacted an adjudicator's credibility assessment and resulted in great consequence,⁶⁴ parties appear to face a high bar demonstrating that the non-voluntary use of VTC likely affected an adjudicator's decision or otherwise resulted in actual prejudice. For example, courts have frequently denied relief, finding that a party failed to show how VTC prevented an adjudicator from accurately assessing his or her credibility; that an adjudicator did not make an adverse credibility determination; that an adjudicator made an adverse credibility determination based on inconsistencies between a party's testimony at the hearing and other evidence, a lack of corroborating evidence in the record, or other evidence of record; or that an adjudicator decided the case based primarily on factors other than an adverse credibility determination.⁶⁵

⁶² GAO-17-438, *supra* note 58, at 51–59 (2017); Recommendation 2014-7, *supra* note 2, ¶ 11; Recommendation 2011-4, *supra* note 2, ¶ 2(c)

⁶³ *See, e.g.,* Vilchez v. Holder, 682 F.3d 1195, 1199–1200 (9th Cir. 2012). *But see* Pataro v. Berryhill, 2019 U.S. Dist. LEXIS 47150, at *54 (quoting Absalon v. Comm'r of Soc. Sec., 2009 U.S. Dist. LEXIS 32767, at *8 n.4 (S.D.N.Y. Apr. 17, 2009)), *adopted by* 2019 U.S. Dist. LEXIS 43979 (S.D.N.Y. Mar. 18, 2019); Taylor v. Astrue, 2010 U.S. Dist. LEXIS 112583, at *7 (E.D.N.C. Oct. 22, 2010).

⁶⁴ Many of the cases identified present fairly idiosyncratic fact patterns. *See, e.g.,* McDavid v. Colvin, 2017 U.S. Dist. LEXIS 32397, at *8–10 (N.D. Ill. Mar. 7, 2017); Benson v. Colvin, 2016 U.S. Dist. LEXIS 125222, at *33–34 (D. Idaho Aug. 18, 2016), *adopted by* 2016 U.S. Dist. LEXIS 125807 (D. Idaho Sep. 12, 2016); Perry v. Colvin, 2015 U.S. Dist. LEXIS 164239, at *7–8 (E.D.N.C. Dec. 8, 2015); Hernandez v. Colvin, 2014 U.S. Dist. LEXIS 177950, at *19–20 (C.D. Cal. Dec. 29, 2014); Kalishek v. Astrue, 2011 U.S. Dist. LEXIS 107615, at *17 (M.D. Fla. Aug. 23, 2011), *adopted by* 2011 U.S. Dist. LEXIS 107554 (M.D. Fla. Sep. 21, 2011); Kirby v. Astrue, 731 F. Supp. 2d 453, 457 (E.D.N.C. Aug. 1, 2010); Jopson v. Astrue, 517 F. Supp. 2d 689, 707 (D. Del. 2007)).

⁶⁵ *See, e.g.,* Talipov v. Holder, 591 Fed. Appx. 4, 7 (2d Cir. 2014); Liu v. Holder, 566 Fed. Appx. 333, 334 (5th Cir. 2014); Vilchez, 682 F.3d at 1200; Li v. Holder, 478 Fed. Appx. 884, 887 (5th Cir. 2012); Veliz v. Holder, 375 Fed. Appx. 148, 149–50 (2d Cir. 2010); Miller v. AG of the U.S., 397 Fed. Appx. 780, 783 (3d Cir. 2010); Atugah v. Holder, 321 Fed. Appx. 431, 436 (6th Cir. 2009); Eke v. Mukasey, 512 F.3d 372, 382–83 (7th Cir. 2008); Jean v. Gonzales, 461 F.3d 87, 91 n.1 (1st Cir. 2006); Vanepps v. Comm'r of Soc. Sec., 2019 U.S. Dist. LEXIS 43300 (N.D. Iowa Mar. 18, 2019); Kilcrease v. Comm'r of Soc. Sec., 2018 U.S. Dist. LEXIS 38675, at *28–30 (E.D. Tenn. Mar. 9, 2018); Loya v. Colvin, 2015 U.S. Dist. LEXIS 35787, at *9–10 (D. Colo. Mar. 20, 2015); Maurice v. Colvin, 2014 U.S. Dist. LEXIS 91263, at *61–62 (S.D.N.Y. July 2, 2014); Walker v. Comm'r of Soc. Sec., 2014 U.S. Dist. LEXIS 46013, at *23–25 (D.N.J. Apr. 3, 2014); Scott v. Comm'r, 2014 U.S. Dist. LEXIS 45266, at *27–28 (D. Md. Apr. 2, 2014); Shreve v. Colvin, 2014 U.S. Dist. LEXIS 23098, at *22 (D. Colo. Feb. 24, 2014); Yearby v. Astrue, 2013 U.S. Dist. LEXIS 46604, at *18 n.4 (N.D. Ala. Apr. 1, 2013); Encinas v. Astrue, 2012 U.S. Dist. LEXIS 59890, *25–28 (D. Ariz. Apr. 30, 2012), *adopted by* 2015 U.S. Dist. LEXIS 142373 (D. Ariz. Oct. 20, 2015); Warner v. Comm'r of Soc. Sec., 2012 U.S. Dist. LEXIS 38875, at *8–10 (E.D. Mich. Mar. 22, 2012); McGovern v. Astrue, 2012 U.S. Dist.

Some parties have alleged that they possess some attribute which makes it difficult for them to participate by VTC.⁶⁶ Individuals whom stakeholders have suggested may have difficulty participating by VTC include:

- individuals with hearing or vision impairments;
- individuals who require the services of a foreign- or sign-language interpreter (especially where the interpreter participates telephonically or from another location);
- individuals who speak softly or have speech impairments, as a result of a physical or mental disorder;
- individuals with auditory or visual hallucinations;
- individuals with epilepsy or other seizure disorders;
- individuals who, as a result of mental impairments, do not recognize the individual with whom they are remotely interacting as the adjudicator who will decide their case, distrust technology, or fear being recorded;
- individuals with intellectual disabilities, borderline intellectual functioning, brain injury, learning disabilities, and developmental disorders such as autism;
- low-income and elderly individuals who may be less familiar with VTC; and
- children.⁶⁷

Several agencies have adopted policies that provide adjudicators the flexibility to permit in-person participation as circumstances require. SSA rules, for example, require the agency to consider “[a]ny facts in [a party’s] particular case that provide a good reason to schedule [his or her] appearance . . . in person.”⁶⁸ OMHA rules require agency officials to consider whether “[s]pecial or extraordinary circumstances exist” which may warrant in-person participation.⁶⁹ And PACA examiners at the USDA have discretion to permit in-person appearances when “necessary because of a disability.”⁷⁰

When courts confront challenges that an agency denied a party due process by requiring him or her to participate remotely despite a limitation, they seem to consider factors such as the nature of the alleged limitation, the existence of evidence corroborating the alleged limitation, the party’s compliance with agency procedures to request an accommodation or object to remote

LEXIS 38551, at *51 (W.D. Wash. March 1, 2012), *adopted by* 2012 U.S. Dist. LEXIS 38548 (W.D. Wash. Mar. 21, 2012); *Dalton v. Comm’r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 15324, at *13–15 (E.D. Mich. Jan. 23, 2012), *adopted by* 2012 U.S. Dist. LEXIS 15344 (E.D. Mich. Feb. 8, 2012); *Cassidy v. Astrue*, 2011 U.S. Dist. LEXIS 104094, at *39–41 (N.D. Fla. Aug. 9, 2011), *adopted by* 2011 U.S. Dist. LEXIS 104093 (N.D. Fla. Sep. 13, 2011).

⁶⁶ See *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970) (“[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”).

⁶⁷ See, e.g., Comment of Rep. Richard E. Neal et al. (Jan. 31, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0247>; Comment of National Ass’n of Disability Representatives (Jan. 11, 2019), <https://www.regulations.gov/document?D=SSA-2017-0015-0063>; Comment of Nat’l Org. of Soc. Sec. Claimants’ Representatives (Dec. 21, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0041>; Comment of Ass’n of Admin. Law Judges (Dec. 20, 2018), <https://www.regulations.gov/document?D=SSA-2017-0015-0040>; see also *Legal v. Lynch*, 838 F.3d 51, 53 (1st Cir. 2016); *Tankisiv v. Comm’r of Soc. Sec.*, 521 Fed. Appx. 29, 31 (2d Cir. 2013); see also *Ctr. for Legal & Court Tech.*, *supra* note 2, at 44–45.

⁶⁸ 20 C.F.R. §§ 404.936(c)(1)(iii), 416.1436(c)(1)(iii).

⁶⁹ *Id.* §§ 404.1520(b)(1)(ii)(B), 423.2020(b)(1)(ii)(B).

⁷⁰ 7 C.F.R. § 47.15(c)(3).

participation, and any effects on the outcome of the proceeding that actually resulted from the alleged limitation.⁷¹

Finally, parties may allege that a technical issue interfered with their opportunity to be heard in a meaningful manner. Technical issues—which can also occur when parties voluntarily participate by VTC—are discussed in Part IV.A.

2. Telephonic Participation Versus In-Person or Video Teleconference Participation

Parties may request in-person or VTC participation in place of telephonic participation. In-person, VTC, and telephonic participation all provide parties and adjudicators synchronous oral communication. Of course, telephonic participation lacks the physical presence of in-person participation. Compared with VTC, its primary benefit is that it can be simpler to install and use. (Telephonic participation often requires nothing more than an operable telephone at each location, a conference bridge, and perhaps a means to record the conversation.) However, parties may argue that accurate decisionmaking requires that some participants be able to see each other.⁷²

Although courts have generally found compulsory telephonic participation consistent with due process,⁷³ visual observation may be fundamental to the accurate resolution of a genuine issue of material fact in some circumstances. For example, administrative and judicial decisionmakers have been skeptical of telephonic participation when a participant's credibility is central to a decision given the potential significance of nonverbal cues.⁷⁴

As with VTC participation, agencies should also consider whether individual parties have attributes (e.g., hearing loss) which might make it difficult for them to participate by telephone.⁷⁵

3. Written Participation vs. Oral Participation

Although written participation allows for the exchange of information, it lacks the physical presence of in-person participation, the visual aspect of in-person and VTC participation, and the opportunity for oral communication common to all other manners of participation. In many cases, parties have instead requested a manner of participation that permits oral communication.

⁷¹ See, e.g., *Brown v. Comm'r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 177223, at *11–21 (M.D. Fla. Nov. 24, 2015), adopted by 2016 U.S. Dist. LEXIS 40192 (M.D. Fla. Mar. 28, 2016); *Pitts v. Comm'r*, 2010 Tax Ct. Memo LEXIS 136, at *27–28 (2010); *Evans v. Astrue*, 2009 U.S. Dist. LEXIS 123360, at *22–25 (E.D. Tenn. Nov. 16, 2009), adopted by 2010 U.S. Dist. LEXIS 3502 (E.D. Tenn. Jan. 15, 2010).

⁷² See, e.g., *Koehler v. Dept. of the Air Force*, 99 M.S.P.R. 82, 87 n.3 (2005); Comment of Center for Medicare Advocacy (Aug. 29, 2016), <https://www.regulations.gov/document?D=CMS-2016-0122-0060>.

⁷³ See, e.g., *Jhin v. OPM*, 368 Fed. Appx. 118, 121–22 (Fed. Cir. 2010); *Sanford v. Comm'r*, 283 Fed. Appx. 780, 783 (11th Cir. 2008); *Casey v. O'Bannon*, 536 F. Supp. 350, 353–55 (E.D. Pa. 1982).

⁷⁴ See, e.g., *Johnson v. Colvin*, 2016 U.S. Dist. LEXIS 166436, at *53 (M.D. Pa. Dec. 2, 2016); *Couch v. Comm'r of Soc. Sec.*, 2012 U.S. Dist. LEXIS 36223, at *18 (S.D. Ohio Mar. 19, 2012); see also *infra* note 90 (discussing telephone participation by witnesses); *Krehibel v. USPS*, 2011 MSPB LEXIS 4568 (July 25, 2011); *Leighton v. OPM*, 2007 MSPB LEXIS 8188 (Oct. 18, 2007), review denied by 2008 MSPB LEXIS 116 (Jan. 24, 2008). But see *Lev v. Astrue*, 2010 U.S. Dist. LEXIS 77456, at *20–21 (N.D. Cal. July 30, 2010).

⁷⁵ See *supra* notes 67–71 and accompanying text.

Whether compulsory written participation satisfies due process likely depends on the material issues in dispute, the nature of probative evidence, and the usefulness of oral testimony or argument. In *Goldberg v. Kelly*, for example, the Supreme Court held that written participation, at least by beneficiaries of public benefits, provides a “wholly unsatisfactory basis for decision” “where credibility and veracity are at issue.”⁷⁶ And in hearings not governed by the APA’s formal-adjudication provisions, ACUS has recommended that “good candidates for written-only hearings” are those that “solely involve disputes concerning: (a) Interpretation of statutes or regulations; or (b) Legislative facts as to which experts offer conflicting views.”⁷⁷

As with VTC and telephonic participation, agencies should also consider whether individual parties have attributes which might make it difficult for them to participate in an adjudicative hearing through the submission of written materials.⁷⁸ Again in *Goldberg*, for example, the Supreme Court held that written participation is “an unrealistic option for most [public assistance benefits] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance.”⁷⁹ Other factors may make it difficult for certain persons or persons with certain attributes to effectively present evidence and arguments in written form.

4. Remote Participation Versus In-Person Participation During the COVID-19 Pandemic

During the ongoing COVID-19 pandemic, many federal agencies have closed their facilities to the public and adopted or encouraged maximum telework. State stay-at-home directives and social-distancing guidelines may also be in place. As a result, many agencies have adopted or explored policies that would mandate remote participation in appropriate circumstances.⁸⁰ In many cases, the only alternative may be to indefinitely delay an in-person hearing.

The courts have not yet addressed the fiscal and administrative burdens associated with indefinitely delaying case processing during a global pandemic or requiring agency officials to conduct in-person hearings. In a recent suit, a family asked a federal district court to enjoin the EOIR from mandating that they participate by VTC during the pandemic.⁸¹ Although the court ultimately concluded it lacked jurisdiction to hear the case, as noted before, at least one federal court has stressed that “promoting public health—especially during a pandemic—is in the public interest” and that the court is “certainly not well-positioned to second-guess [the agency’s] health

⁷⁶ *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970).

⁷⁷ Recommendation 2016-4, *supra* note 4, ¶¶ 21–22.

⁷⁸ See *supra* notes 67–71 and accompanying text.

⁷⁹ *Goldberg v. Kelly*, 397 U.S. 254, 268–69 (1970). In *Goldberg*, the Court found that written participation is “an unrealistic option for most [public assistance benefits] recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance” and are a “wholly unsatisfactory basis for decision” “where credibility and veracity are at issue.” *Id.*

⁸⁰ ACUS is collecting materials related to federal agency adjudication during the pandemic on its website at <https://www.acus.gov/coronavirus-and-adjudication>

⁸¹ *Rosales v. Barr*, 2020 U.S. Dist. LEXIS 55132, at *24 (N.D. Cal. Mar. 30, 2020).

and safety determinations.”⁸² Other courts may apply similar reasoning. Courts may also consider factors such as the government’s interest in promptly resolving matters before it, avoiding litigation resulting from an indefinite delay of in-person hearings, and protecting the health and wellbeing of agency employees and the public.⁸³

III. REMOTE PARTICIPATION BY OPPOSING PARTIES AND WITNESSES

Parties who participate in person have sometimes objected to remote participation by opposing parties and witnesses based on a statutory or regulatory right to an in-person hearing or to cross-examine witnesses, the Fifth Amendment’s Due Process Clause, and the Sixth Amendment’s Confrontation Clause.

The Confrontation Clause applies only in criminal proceedings and is inapplicable in the civil administrative context.⁸⁴ Courts have not identified a general due-process right to confront opposing parties or witnesses in person.⁸⁵ They have also typically rejected arguments that a statutory or regulatory right to an in-person hearing or to cross-examine witnesses entitles parties to confront other participants in person.⁸⁶

Courts have tended to reject arguments that remote participation by witnesses, standing alone, inherently denies parties due process. In the Social Security context, for example the Eighth Circuit has held that due process “does not require in-person cross-examination,” reasoning, “we do not believe that, in a non-adversarial proceeding, an in-person cross-examination would significantly increase the accuracy of determining a witness’s credibility over that of a telephone cross-examination.”⁸⁷ The Ninth Circuit has rejected the argument that telephonic testimony undermined the reasonableness of credibility findings in a disciplinary action affirmed by the

⁸² *Nat’l Immigration Project of the Nat’l Lawyers Guild*, 2020 U.S. Dist. LEXIS 74324, at *40–41.

⁸³ *See Doe v. Transylvania*, 2020 U.S. 63965, at *37 (E.D. Ky. Apr. 13, 2020); *MPLX Ozark Pipe Line LLC*, 171 F.E.R.C. 63,018 (May 4, 2020); FERC Chief Administrative Law Judge’s Notices to the Public, Docket No. AD20-12-000, Notice of Remote Hearings (Apr. 23, 2020).

⁸⁴ *Cf. Akinwande v. Ashcroft*, 380 F.3d 517, 522 (1st Cir. 2004); *Gibbs v. SEC*, 1994 U.S. App. LEXIS 10771, at *10–11 (10th Cir. May 13, 1994) (citing *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 742 (1984)); *Peretti v. NTSB FAA*, 1993 U.S. App. LEXIS 16132, at *3–5 (10th Cir. 1993) (same); *see also* *Ctr. for Legal & Court Tech.*, *supra* note 2, at 10.

⁸⁵ *See, e.g., EF Int’l Language Schs. v. NLRB*, 673 Fed. Appx. 1, 3–4 (D.C. Cir. 2017); *Reyes v. U.S. A.G.*, 565 Fed. Appx. 785, 787–88 (11th Cir. 2014); *Aslam v. Mukasey*, 537 F.3d 110, 114–15 (2d Cir. 2008); *Akinwande*, 380 F.3d at 522; *Pujols v. Ashcroft*, 2003 U.S. App. LEXIS 23042, at *10 (3d Cir. Oct. 6, 2003); *Beltran-Tirado v. INS*, 213 F.3d 1179, 1185–86 (9th Cir. 2000); *Gibbs*, 1994 U.S. App. LEXIS 10771, at *8–10.

⁸⁶ *See, e.g., Pujols*, 2003 U.S. App. LEXIS 23042, at *10 n.5; *Beltran-Tirado*, 213 F.3d at 1185–86; *Wight v. Vilsak*, 2011 U.S. Dist. LEXIS 167723, at *17–18 (W.D. Tex. Apr. 7, 2011); *see also U.S. v. Fla. E. Coast Rwy.*, 410 U.S. 224, 240–42 (1973). A notable exception is the federal Individuals with Disabilities Education Act (IDEA) whose text guarantees parts the right to “confront” witnesses. Many courts have interpreted this language to provide parties a right to in-person confrontation. *See, e.g., Genn v. New Haven Bd. Of Educ.*, 2015 U.S. Dist. LEXIS 29663, at *3–8 (Mar. 11, 2015); *Farmington Public Schools v. Lenhoff*, 1989 U.S. Dist. LEXIS 17801, at *8–13 (E.D. Mich. May 25, 1989). State agencies administer the IDEA. No statute administered by a federal agency appears to include explicit language permitting a party to “confront” witnesses.

⁸⁷ *Hepp v. Astrue*, 511 F.3d 798, 805–06 (8th Cir. 2008); *see also Henry*, 561 Fed. Appx. at *57–58; *Johnson v. Colvin*, 2014 U.S. Dist. LEXIS 49372, at *10–11 (W.D.N.Y. Apr. 9, 2014).

Securities and Exchange Commission.⁸⁸ And although the Tenth Circuit has upheld telephonic testimony by an Immigration and Customs Enforcement agent, it cautioned that in other cases “the lack of in-person confrontation might so undercut the purposes of cross-examination as to deprive a lawful resident of the fundamental protections of procedural due process.”⁸⁹

However, individual cases may present factors that raise due process concerns, especially when a technical problem interfered with a party’s ability to examine or cross-examine a remote witness (see Part IV.A) or a party demonstrates that a witness’s remote participation negatively impacted an adjudicator’s ability to assess his or her credibility. For reasons discussed earlier, credibility arguments may be stronger when a witness participates by telephone rather than VTC,⁹⁰ so long as the party can demonstrate that telephonic testimony resulted in actual prejudice to a party, likely affected the outcome of the case,⁹¹ or otherwise violated an agency rule.⁹²

Of note, parties have occasionally (and unsuccessfully) challenged an adjudicator’s decision *not* to permit a witness to testify remotely.⁹³

IV. REMOTE-HEARING INFRASTRUCTURE

Another class of potential legal issues relates to the design and functioning of remote hearings, including the privacy and accessibility of physical spaces designated for remote hearings; the security and usability of the hardware and software systems that enable remote participation; procedures for resolving technical issues when they arise; and compliance with open-hearing requirements. Agencies are facing new legal questions during the COVID-19 pandemic due to

⁸⁸ *Alderman v. SEC*, 104 F.3d 285, 288 n.4 (9th Cir. 1997).

⁸⁹ *Barrera-Quintero v. Holder*, 699 F.3d 1239, 1247–49 (10th Cir. 2012).

⁹⁰ *See, e.g.*, *EF Int’l Language Schs. v. NLRB*, 673 Fed. Appx. 1, 3–4 (D.C. Cir. 2017); *Ngassaki v. Holder*, 538 Fed. Appx. 28, 30 (2d Cir. 2013); *Edwards v. Astrue*, 2011 U.S. Dist. LEXIS 88293, at *28–29 (D. Conn. Aug. 10, 2011), *adopted by* 2018 U.S. Dist. LEXIS 15156 (D. Conn. Jan. 31, 2018); *Ainsworth v. Astrue*, 2010 U.S. Dist. LEXIS 60686, at *10–12 (D.N.H. June 17, 2010); *see also* *Robertson v. Dept. of Transp.*, 2009 M.S.P.B. 229 (2009).

⁹¹ *See Barrera-Quintero*, 699 F.3d at 288 n.4.

⁹² *See, e.g.*, *Bryant v. Colvin*, 661 Fed. Appx. 686, 689–91 (11th Cir. 2016); *Henry v. Colvin*, 561 Fed. Appx. 55, at *57–58 (2d Cir. 2014); *De Rojas v. Gonzales*, 2007 U.S. App. LEXIS 5511, at *5–6 (9th Cir. 2007); *Torres v. Colvin*, 2015 U.S. Dist. LEXIS 177283, at *9–24 (D. Conn. Dec. 2, 2015), *adopted by* 2016 U.S. Dist. LEXIS 40078 (D. Conn. Mar. 28, 2016); *Ramsay v. Comm’r of Soc. Sec.*, 2015 U.S. Dist. LEXIS 73125, at *22–26 (S.D. Ohio June 5, 2015); *Cooley v. Comm’r of SSA*, 2015 U.S. Dist. LEXIS 43022, at *48–59 (D.S.C. Mar. 13, 2015); *Hannah v. Colvin*, 2014 U.S. Dist. LEXIS 85751, at *7–19 (M.D. Fla. June 4, 2014), *adopted by* 2014 U.S. Dist. LEXIS 85754 (M.D. Fla. June 24, 2014); *Brown v. Comm’r, SSA*, 2014 U.S. Dist. LEXIS 37942, at *20–24 (E.D. Tex. Mar. 24, 2014); *Lipincott v. Comm’r of Soc. Sec.*, 982 F. Supp. 2d 358, 378–81 (D.N.J. Nov. 8, 2013); *Richey v. Colvin*, 2013 U.S. Dist. LEXIS 133683, at *65–66 (N.D. Cal. Sep. 17, 2013); *Cheatham v. Comm’r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 62386, at *27–31 (E.D. Mich. Mar. 19, 2013), *adopted by* 2013 U.S. Dist. LEXIS 61311 (E.D. Mich. Apr. 30, 2013); *King v. Comm’r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 46392 (D. Mass. Mar. 28, 2013); *Green v. Astrue*, 2013 U.S. Dist. LEXIS 23629, at *30–34 (D. Mass. Feb. 20, 2013); *Tardiff v. Astrue*, 2012 U.S. Dist. LEXIS 30132, at *15–20 (D.N.H. Mar. 7, 2012); *Koutrakos v. Astrue*, 2012 U.S. Dist. LEXIS 52319, at *13–27 (D. Conn. Jan. 9, 2012), *adopted by* 906 F. Supp. 2d 30 (D. Conn. 2012); *Porter v. Barnhart*, 2006 U.S. Dist. LEXIS 101838, at *3–6 (W.D. Wash. Apr. 12, 2006).

⁹³ *See, e.g.*, *Barriga v. Barr*, 2020 U.S. App. LEXIS 7537, at *3 (2d Cir. Mar. 11, 2020); *Zhang v. AG U.S.*, 632 Fed. Appx. 680, 683 (3d Cir. 2015).

office closures, increased telework, state and local stay-at-home directives, social-distancing guidelines, travel limitations, and other factors.

A. *Technical Issues*

Many of the most successful legal challenges related to remote participation are those in which a party demonstrates that a limitation or technical problem with an agency's remote-hearing technology interfered with the conduct of the hearing, resulted in an incomplete recording or transcript, or may have affected the proceeding's outcome.⁹⁴

Whether a court will actually find that a specific limitation or technical problem denied a party due process and warrants remedial action depends heavily on both the facts and outcomes of the individual case, including whether the issue substantively prejudiced the party. Courts have remanded for a new hearing where a VTC participant was unable to review important documents;⁹⁵ where an immigration court did not record a witness's telephonic testimony;⁹⁶ where an expert's telephone testimony "cut out;"⁹⁷ and where the hearing transcript indicated that telephonic testimony was frequently "indiscernible" or "inaudible."⁹⁸ Courts have declined to remand cases when they found the technical issue harmless, for example where an adjudicator was briefly unable to see a private party,⁹⁹ where testimony was "indiscernible" but the broader context suggested that the participants were ultimately able to communicate or that the technical issues did not affect the outcome of the proceeding,¹⁰⁰ and where only a few words were inaudible and not so significant as to create an "evidentiary gap" that could change the outcome of the proceeding.¹⁰¹

Agencies should be mindful of potential limitations and technical problems in remote hearings and take steps to address them systemwide before they occur. Useful resources include ACUS materials on best practices in VTC hearings, especially the *Handbook on Best Practices for Using Video Conferencing in Adjudicatory Hearings*.¹⁰² When technical issues do occur in individual proceedings, initial and appellate adjudicators should consider their likely effect, if any, on the outcome of the proceeding to determine an appropriate response.

⁹⁴ See *Vilchez v. Holder*, 682 F.3d 1195, 1199 (9th Cir. 2012); *Fall v. Gonzales*, 218 Fed. Appx. 385, 389 (6th Cir. 2007); *Rusu v. INS*, 296 F.3d 316, 324 (4th Cir. 2002).

⁹⁵ *Rapheal*, 533 F.3d at 532–34.

⁹⁶ *Millian-Zamora v. Ashcroft*, 228 F. Supp. 2d 272, 277–80 (E.D.N.Y. 2002).

⁹⁷ *Edwards v. Astrue*, 2011 U.S. Dist. LEXIS 88293, at *28–29 (D. Conn. Aug. 10, 2011), *adopted by* 2018 U.S. Dist. LEXIS 15156 (D. Conn. Jan. 31, 2018).

⁹⁸ See, e.g., *Semenov v. AG of the U.S.*, 346 Fed. Appx. 783, 787–90 (3d Cir. 2009); *Ainsworth v. Astrue*, 2010 U.S. Dist. LEXIS 60686, at *10–12 (D.N.H. June 17, 2010).

⁹⁹ *Loya v. Colvin*, 2015 U.S. Dist. LEXIS 35787, at *9 (D. Colo. Mar. 20, 2015).

¹⁰⁰ *Vilchez v. Holder*, 682 F.3d 1195, 1200 (9th Cir. 2012); *Garza-Moreno v. Gonzales*, 489 F.3d 239, 241–42 (6th Cir. 2007); *Rusu v. INS*, 296 F.3d 316, 323–24 (4th Cir. 2002); *Cherry v. Comm'r of Soc. Sec.*, 2019 U.S. Dist. 48080, at *25–26 (S.D.N.Y. Mar. 22, 2019); *Momentum EMS v. Sibelius*, 2013 U.S. Dist. LEXIS 183591, at *29–31 (S.D. Tex. Dec. 18, 2013); *Bates v. Astrue*, 2008 U.S. Dist. LEXIS 30817, at *38–39 (D. Del. Apr. 11, 2008); see also *Jhin v. OPM*, 368 Fed. Appx. 118, 121–22 (Fed. Cir. 2010).

¹⁰¹ *Ford v. Astrue*, 2009 U.S. Dist. LEXIS 24204, at *14–16 (M.D. Fla. Mar. 23, 2009).

¹⁰² See *supra* notes 2–4.

During the COVID-19 pandemic, hearing participants (including parties, their representatives, witnesses, and even adjudicators) are unlikely to have ready home access to the same quality of remote-hearing infrastructure or level of administrative support. Although some agencies, notably the Board of Veterans Appeals,¹⁰³ have experience with fully virtual hearings, most have had to quickly adopt commercially available programs such as Zoom for Government.¹⁰⁴ Adjudicators and other participants may be relatively unfamiliar with these programs, or they may not offer the same features as technologies previously procured for agency hearing rooms. Some individuals may also lack home access to a computer; reliable, high-speed internet; or a private location from which to participate.¹⁰⁵

B. Accessibility for Parties

As agencies develop infrastructure to facilitate remote participation by parties, they should remain mindful of the requirements of laws governing access to federal buildings and programs, including section 504 of the Rehabilitation Act, which bars discrimination against persons with disabilities;¹⁰⁶ section 508 of the Rehabilitation Act, which sets minimum standards for federal-government information technology systems;¹⁰⁷ and the Architectural Barriers Act (ABA), which mandates that federal buildings be accessible to persons with disabilities.¹⁰⁸ Although courts have not decided the merits of section 504 challenges, and parties do not appear to have litigated the application of section 508 and the ABA to remote-hearing infrastructure, agencies should consider potential implications for telephone- and VTC-hearing systems, remote interpretation services, and VTC-only hearing rooms.

Several agencies have considered or begun using commercially available programs to conduct remote hearings during the COVID-19 pandemic. Agencies should ensure that these systems satisfy federal accessibility requirements, including sections 504 and 508 of the Rehabilitation Act.

C. Privacy and Confidentiality

Agencies are subject to various laws intended to protect sensitive information, including the Freedom of Information Act,¹⁰⁹ the Privacy Act,¹¹⁰ and the Federal Information Security

¹⁰³ U.S. Dept. of Veterans Affairs, *Board of Veterans' Appeals Virtual Hearing Option*, https://www.bva.va.gov/docs/VirtualHearing_FactSheet.pdf (last visited June 16, 2020).

¹⁰⁴ See, e.g., Merit Systems Protection Bd., *Zoom for Government Privacy Act Statement* (Apr. 2020), https://www.mspb.gov/privacy/MSPB_Privacy_Act_Statement_for_Zoom_for_Government_Apr_2020.pdf.

¹⁰⁵ Brennan Ctr. for Justice, *Promise and Peril as Courts Go Virtual Amid Covid-19* (May 29, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/promise-and-peril-courts-go-virtual-amid-covid-19>; Letter of New Yorkers for Responsible Lending to Chief Administrative Judge, New York State Unified Court System (Apr. 15, 2020), http://www.nyrl.org/wp-content/uploads/2019/01/2020.4.15-NYRL-Ltr-re-virtual-appearances.pdf?fbclid=IwAR1tJJnALfomjBs7H0KNqt0NrskvmN8_uaFR9lcaz2SO-wTDuo5DirYxdXU.

¹⁰⁶ 29 U.S.C. § 701.

¹⁰⁷ *Id.* § 794d.

¹⁰⁸ 42 U.S.C. § 4151 *et seq.*

¹⁰⁹ 5 U.S.C. § 552.

¹¹⁰ *Id.* § 552a.

Modernization Act (FISMA).¹¹¹ Although parties have not litigated the application of these statutes to remote-hearing infrastructure, agencies should consider whether their remote-hearing infrastructure—including systems for exchanging written information and oral testimony over the internet—complies with the requirements of these and other generally applicable statutes and regulations under them.¹¹² Personally identifiable information that an agency collects through remote-hearing technologies may constitute a system of records for Privacy Act purposes.¹¹³

Agencies should also be mindful of relevant agency-specific statutory and regulatory requirements. For example, federal law directs the Department of Veterans' Affairs to establish and maintain a "security internet platform" for VTC participation in BVA hearings "that protects sensitive personal information from a data breach."¹¹⁴

Several agencies have considered or begun using commercially available programs to conduct remote hearings during the COVID-19 pandemic. Agencies should ensure that these systems satisfy federal privacy and confidentiality requirements.

D. Open Hearings

The First Amendment may require that agencies open hearings to the public in certain circumstances.¹¹⁵ The Government in the Sunshine Act generally requires that multi-member agencies conduct agency business in open hearings.¹¹⁶ Provisions of the APA, agency-specific statutes, and agency rules of practice may also provide for open hearings in at least some circumstances.¹¹⁷

Open-hearing issues are likely to arise when adjudicators conduct hearings individually from their offices, homes, or elsewhere, or jointly from a space to which members of the public lack access. Although courts do not appear to have addressed the application of open-hearing requirements to wholly remote hearings, agencies should consider whether their remote-hearing infrastructure complies with relevant statutory and regulatory requirements and provides public access to remote hearings when appropriate.

Many individual adjudicators and members of multi-member panels are participating in hearings from their homes during the COVID-19 pandemic. Agencies should ensure that the use

¹¹¹ 44 U.S.C. § 3541 *et seq.*

¹¹² *See, e.g.,* Scott v. Shinseki, 2014 U.S. App. Vet. Claims LEXIS 191, at *3–4 (Feb. 7, 2014).

¹¹³ *See* 5 U.S.C. § 552a; *see also supra* note 104.

¹¹⁴ 38 U.S.C. § 7107(c)(2)(C)(i)(II).

¹¹⁵ *See* N.Y. Civ. Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 300–01 (2d Cir. 2011); N.J. Media Gp. v. Ashcroft, 308 F.3d 198, 208–09 (3d Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002); *see generally* Christopher B. McNeil, *The Public's Right of Access to "Some Kind of Hearing": Creating Policies That Protect the Right to Observe Agency Hearings*, 68 LA. L. REV. 1121 (2008); Comm. on Comm. and Media Law of the Ass'n of the Bar of the City of N.Y., "If It Walks, Talks, and Squawks . . ." *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENT. L. 21 (2005).

¹¹⁶ 5 U.S.C. § 552b. The Sunshine Act makes some exception for certain adjudicatory actions. *Id.* § 552b(c)(10); *see* Philadelphia Newspapers v. NRC, 727 F.2d 1195, 1200 (D.C. Cir.); Shurberg Broadcasting of Hartford v. FCC, 617 F. Supp. 825, 828–30 (D.D.C. 1985).

¹¹⁷ ASIMOW, *supra* note 4, at 77–78; *see, e.g.,* 8 C.F.R. § 1003.27 (immigration courts).

of remote hearing technologies to conduct such proceedings complies with applicable open-hearing requirements.

CONCLUSION

If there are any clear lessons regarding the law of remote hearings in agency adjudication, it is that the law is rarely clear. With scarce exceptions, there are relatively few bright-line rules. As agencies weigh the benefits and costs of developing and implementing remote-hearing policies and practices, they should carefully consider relevant statutory directives and the application of the *Mathews* balancing test given factors including the public and private interests at stake in agency proceedings, the nature of the facts in issue and testimony adduced at typical evidentiary hearings, the quality of their remote-hearing infrastructure and any technical problems that arise, and any personal attributes that may impact individuals' ability to participate remotely.