



Administrative Conference of the United States

MEMORANDUM ON THE HISTORY OF AGENCY VIDEO TELECONFERENCING ADJUDICATIONS

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I. Introduction

Video conferencing (VTC) is a relatively recent technological development that has reshaped the way some federal agencies hold hearings, and it is likely more agencies will use the technology as its capabilities continue to improve and its benefits continue to accrue. Its use has been a slow but steady progression, and a study of VTC's implementation highlights its successes, as well as the challenges experienced in implementing it. The use of VTC in agency adjudications began in the early 1990s.¹ Usage increased as the decade continued by agencies either implementing or expanding their VTC programs.² Beginning in the mid-2000s, technological improvements, tight budgets, and high travel costs spurred the implementation of VTC by the federal government.³ Most federal agencies limited their use of VTC to internal administrative matters, but those that used it to conduct hearings found it was an effective tool.

This report primarily draws information from five different sources: (1) agency annual reports; (2) internal and external audits of agencies; (3) Federal Register notices; (4) an Administrative Conference of the United States (ACUS) draft report; and (5) a Freedom of Information Act (FOIA) request from an advocacy group. Some of the information was compiled by fiscal year (FY), while other information was organized by calendar year. For the sake of this report's organization, information that was organized by FY was treated as if it fell within the calendar year instead, except for the statistical information included in Part III.

¹ FUNMIE. OLORUNNIPA, AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION 1 (2011) (citing Robert Anderson, *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future*, 66 S. CAL. L. REV. 1762, 1770 (1993)); see also, e.g., Frederic I. Lederer, *The Randolph W. Throver Symposium: Changing Litigation with Science and Technology: Technology Comes to the Courtroom, and ...*, 43 EMORY L.J. 1095, 1097-1100 (1994) (discussing Courtroom 21, unveiled in 1993 to provide a testing ground and model for the use of new technologies in adjudications).

² See, e.g., Diane M. Hartmus, *Videotrials*, 23 OHIO N.U. L. REV. 1, 1-3 (1996) (discussing the increasing use of video in courtrooms and advocating in its favor).

³ See OLORUNNIPA, *supra* note 1, at 3-4. Despite a handful of agencies with long-running VTC programs, state and federal courts led in the implementation of VTC for adjudicatory purposes. *Id.*

II. History of Agency VTC Hearings

The federal agencies that have contemplated using VTC for hearings generally fall into two categories: those which, upon piloting the technology, implement it wholeheartedly, and those that have statutory authorization to use it and only do so to a limited extent. The Board of Veterans' Appeals (BVA) and the Executive Office for Immigration Review (EOIR) were early implementers and fall within the first category. The Social Security Administration (SSA) followed suit a little less than a decade later, and not too long after that, the Department of Energy's Office of Hearings and Appeals (DOHA) did as well. The other agencies discussed throughout this history have used VTC to conduct hearings, but for the most part have not embraced the technology to the same extent as the BVA, EOIR, SSA, or DOHA.

1991

In 1991, the General Accounting Office (GAO) became one of the first federal agencies to experiment with VTC.⁴ It felt the time was right because technological advances had lowered the cost of VTC, as well as improved its overall quality.⁵ The pilot test only spanned five months and included 87 VTC sessions, none of which involved adjudications, but participants in the program left with a positive opinion of VTC.⁶ Additionally, the agency exited the pilot test with an increased appreciation for VTC's flexibility.⁷ Several years passed, however, before any agencies began using VTC to conduct hearings.

⁴ U.S. GEN. ACCOUNTING OFFICE, VIDEO TELECONFERENCING: GAO'S PILOT TEST 4 (1991).

⁵ *Id.*

⁶ *Id.* at 5-7.

⁷ *Id.* at 13-14.

1994

That changed in 1994. Congress passed a bill authorizing the BVA to hold VTC hearings as long as the agency had the claimant's consent.⁸ That same year, the EOIR published notice of a proposed rule allowing immigration judges to use VTC in deportation hearings.⁹ The EOIR also participated in a six month joint test with the Immigration and Naturalization Service and the Bureau of Prisons piloting the use of VTC in the deportation process.¹⁰

1995

In 1995, while the BVA began a pilot project using VTC to conduct hearings,¹¹ the EOIR adopted the rule it had proposed the year before.¹² The agency differentiated between telephonic and VTC hearings, requiring the appellant's consent to conduct a telephonic hearing but not requiring it to conduct VTC hearing.¹³ The EOIR believed that VTC technology was advanced enough to preserve an appellant's due process rights.¹⁴ In addition to the new regulations, the agency also conducted a larger pilot program than it had in 1994, although it was still limited in scope to three immigration courts and three detention facilities.¹⁵ Thus, as of 1995, two agencies used VTC to conduct hearings, one with the party's consent, and the other without any extra authorization.

⁸ Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994, Pub. L. No. 103-271, sec. 7, § 7107(e), 108 Stat. 740, 742-43 (1994).

⁹ Stipulated Requests for Deportation or Exclusion Orders Telephonic, Video Teleconferenced Hearings, 59 Fed. Reg. 24976 (proposed May 13, 1994) (to be codified at 8 C.F.R. pt. 3).

¹⁰ AM. IMMIGRATION COUNCIL, EOIR SECOND PRODUCTION IN RESPONSE TO FOIA REQUEST REGARDING VIDEO TELECONFERENCING 16 (2013) [hereinafter EOIR SECOND PRODUCTION], available at <http://legalactioncenter.org/sites/default/files/VTC%20Prod%202%20FIN.pdf>.

¹¹ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1995 11 (1996).

¹² Stipulated Requests for Deportation or Exclusion Orders, Telephonic, Video Electronic Media Hearings, 60 Fed. Reg. 26351 (May 17, 1995) (to be codified at 8 C.F.R. pt. 3).

¹³ *Id.* at 26352.

¹⁴ *Id.*

¹⁵ See EOIR SECOND PRODUCTION, *supra* note 10, at 16; see also AM. IMMIGRATION COUNCIL, EOIR FIRST PRODUCTION IN RESPONSE TO FOIA REQUEST REGARDING VIDEO TELECONFERENCING 12 (2012) [hereinafter EOIR FIRST PRODUCTION], available at <http://legalactioncenter.org/sites/default/files/VTC%20Prod%201%20FIN.pdf>.

1996

1996 was an important year in agencies' use of VTC. Throughout the year, the BVA continued to test VTC technology, conducting roughly the same number of hearings with it as it had the year before.¹⁶ More importantly, the BVA anticipated a radical expansion of the program during the next year since its pilot had affirmed the value of VTC hearings.¹⁷ While the BVA did more than any other agency with VTC hearings this year, the SSA also took action that laid the foundation of its future VTC program. It gave notice that it was going to focus on offering customers more avenues to interact with the agency electronically, including via VTC, but there was no mention of hearings.¹⁸ It would be several years before this notice bore fruit in the adjudicatory context.

1997

Throughout 1997, the BVA and EOIR continued expanding their programs, firmly establishing themselves as VTC pioneers, while another agency, the United States Postal Service (USPS), incorporated VTC hearings into its regulations. The BVA held almost five times as many hearings as it had the previous year.¹⁹ It held approximately half of the hearings it had intended to,²⁰ but its projection for the next year was as ambitious as the year before.²¹ During 1997, the EOIR broadened its VTC capabilities by installing seven new VTC systems.²² For its

¹⁶ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1996 11-12, 43 (1996).

¹⁷ *Id.*

¹⁸ Electronic Service Delivery, 61 Fed. Reg. 68808-01 (Dec. 30, 1996).

¹⁹ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1997 11, 25 (1997).

²⁰ *Id.* at 43.

²¹ *Id.* at 25.

²² EOIR SECOND PRODUCTION, *supra* note 10, at 16.

part, the USPS revised a regulation to clarify that, when a particular type of adjudication required oral hearings, those hearings could be held via VTC.²³

1998

The next year, 1998, saw substantial growth in the use of VTC, as well as increased recognition of its value. It was a red letter year for the BVA in particular. First, the BVA and Veterans Benefits Administration signed a memorandum of understanding articulating their dedication to expanding the use of VTC as part of both organizations' long-term planning goals.²⁴ Second, the BVA installed equipment in five more offices, expanding its operations to twenty offices.²⁵ Third, it exceeded its estimates for the number of VTC hearings for 1998 by 15%.²⁶ This was the first year the BVA not only met, but exceeded its goals for utilizing VTC hearings.²⁷ Finally, the General Services Administration gave four Achievement Awards to BVA employees for their "outstanding achievement implementing [VTC hearings]."²⁸

The Merit Systems Protection Board (MSPB) also made substantial progress implementing VTC technology. During 1998, it equipped eight field offices with VTC and used the technology to conduct 61 hearings. The MSPB also used VTC for other steps in the adjudicatory process, such as prehearing conferences.²⁹ The MSPB estimated that each use of equipment could save up to \$2,500 per hearing in travel expenses, and Vice President Al Gore awarded the agency's VTC implementation team the Hammer Award in recognition of its efforts

²³ Rules of Practice in Proceedings Relative to Administrative Offsets Initiated Against Former Employees of the Postal Service, 62 Fed. Reg. 63278 (Nov. 28, 1997) (to be codified at 39 C.F.R. pt. 966).

²⁴ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1998 14-15 (1998).

²⁵ *Id.* at 15.

²⁶ *Id.* at 33.

²⁷ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEARS 1995-1998 (1996-1998).

²⁸ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1998 16 (1998).

²⁹ U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FISCAL YEAR 1998 30-31 (1998).

to reduce adjudicatory costs.³⁰ Finally, the EOIR also expanded its operations, placing an additional seven systems, as well as evaluating another twenty potential sites at which to install systems.³¹

1999

Both the BVA and MSPB were actively developing their VTC programs in 1999. The BVA continued to expand its VTC operations by installing five more systems and contracting for an additional forty.³² The number of hearings it held throughout 1999, however, was only a modest expansion over the previous year.³³ The MSPB continued to expand its use of VTC as well, installing equipment in a ninth office and holding 128 VTC hearings during the year.³⁴

2000

The turn of the millennium was an important year for federal agency VTC hearings. First, the BVA was still expanding its VTC operations, although it would be several years before there was any notable activity beyond a steady increase in the number of VTC hearings held.³⁵ Second, the EOIR had also increased its use of VTC technology over the past two years, and by the end of 2000, the agency planned to have the technology operational in 31 immigration courts, a little less than double the number of operational units it had at the end of 1998.³⁶ More importantly, the EOIR planned to install the technology in *every* immigration court at whatever

³⁰ *Id.* at 31. Vice President Al Gore created the Hammer Award to recognize “teams of federal employees who have made significant contributions in support of reinventing government principles.” NAT’L P’SHIP FOR REINVENTING GOV’T, *What Is a Hammer Award?*, UNIV. N. TEX. LIBRARIES, <http://govinfo.library.unt.edu/npr/library/awards/hammer/whatis.html> (last visited Nov. 18, 2014).

³¹ EOIR SECOND PRODUCTION, *supra* note 10, at 16.

³² BD. OF VETERANS’ APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1999 15 (1999).

³³ *Id.* at 33.

³⁴ U.S. MERIT SYS. PROT. BD., FY 2000 PERFORMANCE REPORT 19 (2000).

³⁵ See BVA statistics *infra* Part III.

³⁶ EOIR FIRST PRODUCTION, *supra* note 15, at 144.

pace the agency's budget allowed.³⁷ Third, the MSPB held slightly fewer VTC hearings—113—than the previous year, but it planned to continue using VTC as a cost saving mechanism and also partially attributed a decrease in its backlog, as well as in processing times, to VTC hearings.³⁸ The agency also surveyed the experiences of the administrative law judges (ALJs) and parties involved with VTC hearings.³⁹

The most important event that occurred in 2000, however, was the entry of another major federal agency into the realm of VTC adjudications. The SSA conducted VTC test hearings between several locations to assess the technology's potential.⁴⁰ According to the data gathered, VTC hearings had lower processing times, and more people showed up for their scheduled VTC hearings than they did for in-person hearings.⁴¹

2001

During 2001, both the MSPB and the SSA laid the foundation for the next steps in their VTC programs. The MSPB had issued a survey regarding VTC hearings and worked to evaluate and incorporate the feedback into its adjudicatory procedures.⁴² For its part, the SSA published a notice a proposed rulemaking to use VTC technology for hearings before ALJs.⁴³ The agency specified in its notice that it would not require anyone to participate in a VTC hearing who did not want to participate.⁴⁴

³⁷ *Id.*

³⁸ U.S. MERIT SYS. PROT. BD., FY 2000 PERFORMANCE REPORT 15, 19 (2000).

³⁹ *Id.* at 21.

⁴⁰ OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-05-12-21287, CONGRESSIONAL RESPONSE REPORT: CURRENT AND EXPANDED USE OF VIDEO HEARINGS, at B-1 (2012) [hereinafter OIG EXPANDED VIDEO HEARINGS].

⁴¹ *Id.*

⁴² U.S. MERIT SYS. PROT. BD., FY 2001 PERFORMANCE REPORT 24 (2001).

⁴³ Scheduling Video Teleconference Hearings Before Administrative Law Judges, 66 Fed. Reg. 1059 (proposed Jan. 5, 2001) (to be codified at 20. C.F.R. pts. 404, 416).

⁴⁴ *Id.*

2002

A case decided by the MSPB in 2002, *Crickard v. Dep't of Veterans Affairs*, made clear that agencies did not always hold similar views about VTC. An ALJ had held a hearing via VTC over an appellant's objection.⁴⁵ The MSPB's statutes and regulations, however, did not clarify whether the parties were entitled to an in-person hearing.⁴⁶ The Board ruled that, since there were material facts in dispute that required credibility determinations, the ALJ could not deny an appellant's request for an in-person hearing.⁴⁷ This view point was in direct contrast to the EOIR's approach of treating VTC hearings as equivalent to hearings conducted in person.

2003

The SSA took a substantial step forward in December 2003 when it adopted a final rule governing VTC hearings that originated from the agency's proposed rulemaking in 2001.⁴⁸ In its rule, the agency recognized credibility as an important issue in the context of a claimant's desire to present his or her case in person.⁴⁹ The SSA's discussion of credibility thus focused on VTC's effects on how claimants viewed the process rather than the effect VTC had on an adjudicator's ability to assess credibility. The new rule still gave claimants the option of having an in-person hearing, which the SSA believed would assuage any concerns regarding forced participation in VTC hearings.⁵⁰ The agency thought more claimants would be willing to participate in a VTC

⁴⁵ *Crickard v. Dep't of Veterans Affairs*, 92 M.S.P.R. 625,627 (2002).

⁴⁶ *Id.* at 634.

⁴⁷ *Id.* at 636.

⁴⁸ Video Teleconferencing Appearances Before Administrative Law Judges of the Social Security Administration, 68 Fed. Reg. 69003 (Dec. 11, 2003) (to be codified at 20 C.F.R. pts. 404, 416).

⁴⁹ *Id.* at 69007.

⁵⁰ *Id.*

hearing knowing that the participation was optional.⁵¹ The notice also tentatively contemplated allowing private firms to maintain their own VTC sites for agency adjudications.⁵²

2004

Aside from the SSA's new rule, 2003 was a relatively quiet year; 2004 proved to be quite different. First, the EOIR planned to open a national video immigration court at its headquarters.⁵³ The initial purpose of this Headquarters Immigration Court was to assist other immigration courts around the country to reduce their backlogs.⁵⁴ Although representatives expressed concern with the use of VTC,⁵⁵ the EOIR reiterated its belief that VTC and in-person hearings were equivalent.⁵⁶ The SSA had also been expanding its VTC capacity, and by 2004, it had 148 VTC units with plans to increase this number to 351 units at 302 sites by 2006.⁵⁷ In addition, the Department of Justice's Parole Commission gave notice of a pilot program testing the use of VTC technology for parole release hearings.⁵⁸ By year's end, the agency completed 102 VTC hearings at 11 different institutions through its pilot program.⁵⁹

Also in 2004, the Department of Health and Human Services (HHS) issued a report to Congress and outlined its intention to use VTC to conduct hearings as part of its larger plans to relieve the SSA of the Medicare workload.⁶⁰ The GAO had several concerns with the implementation and cost of the program, however. The GAO's audit pointed out that the HHS's

⁵¹ *Id.*

⁵² *Id.* at 69005.

⁵³ EOIR FIRST PRODUCTION, *supra* note 15, at 137.

⁵⁴ *Id.* at 139.

⁵⁵ *See id.* at 137.

⁵⁶ *Id.* at 140.

⁵⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, MEDICARE: INCOMPLETE PLAN TO TRANSFER APPEALS WORKLOAD FROM SSA TO HHS THREATENS SERVICE TO APPELLANTS 18 (2004).

⁵⁸ Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes, 69 Fed. Reg. 5273 (Feb. 4 2004) (to be codified at 28 C.F.R. pt. 2).

⁵⁹ Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes, 70 Fed. Reg. 19262 (Apr. 13, 2005) (to be codified at 28 C.F.R. pt. 2).

⁶⁰ SOC. SEC. ADMIN. & HEALTH & HUMAN SERVS., PLAN FOR THE TRANSFER OF RESPONSIBILITY FOR MEDICARE APPEALS 14 (2004).

plan for implementing the necessary regulations to outline the agency's use of VTC hearings was inadequate given the HHS's short timeline.⁶¹ The audit also observed that the HHS's plan assumed that the efficiencies produced by VTC hearings would essentially balance out the costs within the first year, but the plan lacked evidence to prove it.⁶²

2005

In 2005, the MSPB made a substantial change to its policies as evidenced in *Koehler v. Department of the Air Force* in which the Board granted judges the discretion to conduct a VTC hearing regardless of the parties' consent.⁶³ In the case below, the administrative judge (AJ) conducted a VTC hearing over the appellant's objections that the AJ would not be able to make accurate credibility determinations.⁶⁴ The AJ stated that (1) demeanor was only one of several factors he would use to determine credibility; (2) demeanor was, in fact, the least reliable factor in a credibility determination; and (3) even so, a VTC hearing would have no effect on his evaluation of demeanor.⁶⁵ The Board affirmed the AJ's decision, citing improvements in VTC technology, the technology's efficiency, and the fact that the stakes were lower in these kinds of cases as compared with criminal cases.⁶⁶ This decision made the MSPB the second agency (the first being the EOIR) to explicitly state that VTC hearings were substantially similar to in-person hearings, such that a party's request to opt out of a VTC hearing did not have to be granted.

⁶¹ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 57, at 14-15.

⁶² *Id.* at 13.

⁶³ *Koehler v. Dep't of the Air Force*, 99 M.S.P.R. 82, 87-88 (2005).

⁶⁴ *Id.* at 83.

⁶⁵ *Id.* at 83-84.

⁶⁶ *Id.*

Not all agencies took this view, however. The SSA, for example, published a final rule which gave the ALJ discretion to determine whether *anyone else but the claimant* would appear remotely or in person.⁶⁷ Claimants retained the right to an in-person hearing.

Three other agencies were also active this year. The first, the Parole Commission, issued an interim rule allowing the agency to use VTC to conduct parole release hearings, which built on the pilot program the Commission had conducted the previous year.⁶⁸ The agency solicited comments and stated it planned to expand the use of VTC to institutional revocation hearings.⁶⁹ The second agency, the HHS, was still experiencing difficulties, however. The agency received a letter from Congress expressing concern that the limited number of field offices being established would force the HHS to rely on VTC to conduct Medicare appeals, but Congress felt the agency had so far failed “to make VTC a realistic part of its initial operation.”⁷⁰ The final agency, the Railroad Retirement Board (RRB), published a proposed rule allowing it to conduct VTC hearings.⁷¹

2006

The RRB finalized the rule it had proposed the year before.⁷² If a party objected to the use of VTC, the hearing would be conducted either in person or via a telephone conference call at the hearing officer’s discretion.⁷³

⁶⁷ Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16424, 16436 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404-05, 416, 422).

⁶⁸ Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes, 70 Fed. Reg. 19262 (Apr. 13, 2005) (to be codified at 28 C.F.R. pt. 2).

⁶⁹ *Id.*

⁷⁰ Letter from Chuck Grassley & Max Baucus, Senators, U.S. Senate Committee on Finance, to Michael O. Leavitt, Secretary, Department of Health and Human Services (Mar. 25, 2005), *available at* <http://www.finance.senate.gov/newsroom/chairman/release/?id=90fe00b7-8d2c-4b95-83d3-c3577078f441>.

⁷¹ Requests for Reconsideration and Appeals Within the Board, 70 Fed. Reg. 73175 (proposed Dec. 9, 2005) (to be codified at 20 C.F.R. pts. 260, 320).

⁷² Requests for Reconsideration and Appeals Within the Board, 71 Fed. Reg. 55283 (Sept. 22, 2006) (to be codified at 20 C.F.R. pts. 260, 320).

⁷³ *Id.*

By 2006, the Equal Employment Opportunity Commission (EEOC) was also conducting VTC hearings, but it is not clear when the agency first utilized the technology. Although the exact beginning of the EEOC's VTC program is unclear, in 2006, the AJ who issued the initial decision in *Allen v. U.S. Postal Serv.* held the hearing using VTC.⁷⁴ Originally, because of concerns regarding an adjudicator's ability to make credibility determinations remotely, the EEOC only allowed VTC to be used in exigent circumstances or in situations where the parties jointly requested it.⁷⁵ The EEOC noted, however, that a VTC hearing was superior to a telephonic hearing and planned to give adjudicators more latitude to use VTC, while outlining several safeguards to ensure VTC was a good alternative to an in-person hearing.⁷⁶

2007

In 2007, the Parole Commission expanded its use of VTC to probable cause hearings, although it continued to allow a party to opt out of a VTC hearing if he or she chose.⁷⁷ In expanding its VTC use, the Commission considered whether VTC hearings would impact a judge's ability to make credibility determinations, and decided this was not a problem for two reasons. First, a probable cause hearing was not a criminal trial.⁷⁸ Instead, it was the first step in a process that included a face-to-face revocation hearing with the hearing examiner, releasee, the releasee's lawyer, and the witnesses.⁷⁹ Second, the Commission cited two studies, one

⁷⁴ OFFICE OF FED. OPERATIONS, *The Digest of Equal Employment Opportunity Law Vol. XIX, No. 1 Winter 2008*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/federal/digest/xix-1.cfm> (last visited Nov. 17, 2014).

⁷⁵ *Id.*

⁷⁶ *Id.* at 22-23. The EEOC recommended considering the following factors: (1) proximity of the VTC facilities to all participants; (2) adequacy of the facilities, technological and otherwise; (3) costs involved versus the savings in travel time; (4) number of participants; (5) objections by the parties; (6) whether the hearing provides a "fair and reasonable" opportunity to explain/supplement the record and examine witnesses; and (7) any technological problems that could arise and impede the hearing. *Id.*

⁷⁷ Paroling, Recommitting, and Supervising Federal Prisoners: Prisoners Serving Sentences Under the United States and District of Columbia Codes, 72 Fed. Reg. 53116, 53116-17 (Sept. 18, 2007) (to be codified at 28 C.F.R. pt. 2).

⁷⁸ *Id.* at 53117.

⁷⁹ *Id.*

demonstrating that VTC psychiatric evaluations were as reliable as those conducted in person, and another revealing little difference between interacting with someone via VTC or in person when determining the truthfulness of their statements.⁸⁰

2008

In 2008, the SSA took a step that no other agency had before. It initiated its Representative Video Project program, which allowed claimants to attend VTC hearings from the offices of their representatives rather than at a SSA VTC facility.⁸¹ Although the SSA implemented the program without conducting a pilot first,⁸² an internal audit supported the program by making recommendations to improve it rather than recommending its cessation.⁸³

Two other agencies were also active this year, the HHS and the Foreign Services Grievance Board (FSGB). By this point, the HHS had worked out its challenges with its planned VTC program and proposed new rules that implemented VTC hearings.⁸⁴ For its part, the FSGB conducted mostly document-only hearings, and few, if any, oral hearings.⁸⁵ Despite that, the FSGB increased its VTC capacity in 2008 to assist parties who were often located overseas.⁸⁶

2009

In 2009, there were notable developments at four different agencies, one of which was new to VTC hearings. The BVA had been continuously increasing the number of VTC hearings

⁸⁰ *Id.* (citing Sara Landstrom et al., *Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory*, 19 APPLIED COGNITIVE PSYCHOLOGY 913, 913-33 (2005); Frances J. Lexcen et al., *Use of Video Conferencing for Psychiatric and Forensic Evaluations*, 57 PSYCHIATRIC SERVS. 713-15 (2006)).

⁸¹ OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-05-09-19101, REPRESENTATIVE VIDEO PROJECT AUDIT REPORT 1 (2011) [hereinafter OIG RVP AUDIT]. From October 2008 to April 2010, 23 RVP sites conducted 1,952 hearings, although just 4 sites conducted 71% of the hearings. *Id.* at 3.

⁸² *Id.* at 12.

⁸³ *Id.* at 14.

⁸⁴ Application of Certain Appeals Provisions to the Medicare Prescription Drug Appeals Process, 73 Fed. Reg. 14342 (proposed Mar. 17, 2008) (to be codified at 42 C.F.R. pt. 423).

⁸⁵ The FSGB only conducted approximately 12 oral hearings between 2006 and 2013. FOREIGN SERV. GRIEVANCE BD., ANNUAL REPORTS FOR THE YEARS 2006-2013 (2006-2013).

⁸⁶ FOREIGN SERV. GRIEVANCE BD., ANNUAL REPORT FOR THE YEAR 2008 1 (2008). The extent to which the FSGB used VTC to conduct hearings before this point remains unclear.

it held each year.⁸⁷ This year, however, it set several important goals for 2010-2011. The agency planned to: (1) upgrade its VTC technology; (2) increase the number of VTC hearing rooms from five to thirteen; and (3) expand the number of VTC hearings that could be conducted in the field.⁸⁸ The HHS finalized the rule incorporating VTC hearings that the agency had proposed the year before.⁸⁹ The FSGB also increased its VTC capabilities in 2009.⁹⁰ Another agency, the DOHA, set up a new VTC facility to conduct personnel security hearings for the Nuclear Regulatory Commission.⁹¹

2010

By 2010, the EIOR was conducting 12% of all hearings using VTC technology.⁹² Although that percentage might appear small on its face, the number of VTC hearings totaled 110,773.⁹³ The FSGB also expanded its VTC operations by purchasing a new VTC system to upgrade its capabilities.⁹⁴ Besides these two developments, however, 2010 was a relatively quiet year for VTC hearings. Those agencies that were already conducting VTC hearings continued to expand their usage, but no additional agencies implemented VTC hearings.

2011

In 2011, the BVA once again emphasized its desire to improve the quality and use of its VTC program.⁹⁵ Although the BVA had steadily increased the number of hearings it held via VTC each year up to this point, because the total number of hearings also increased, the

⁸⁷ See BVA statistics *infra* Part III.

⁸⁸ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2009 8 (2009).

⁸⁹ Application of Certain Appeals Provisions to the Medicare Prescription Drug Appeals Process, 74 Fed. Reg. 65340 (Dec. 9, 2009) (to be codified at 42 C.F.R. pt. 423).

⁹⁰ FOREIGN SERV. GRIEVANCE BD., ANNUAL REPORT FOR THE YEAR 2009 1 (2009).

⁹¹ OFFICE OF HEARINGS & APPEALS, DEP'T OF ENERGY, FY 2009 ANNUAL REPORT 7 (2009).

⁹² EOIR FIRST PRODUCTION, *supra* note 15, at 111.

⁹³ *Id.* at 109-10.

⁹⁴ FOREIGN SERV. GRIEVANCE BD., ANNUAL REPORT FOR THE YEAR 2010 1 (2010).

⁹⁵ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FY 2011 7, 9 (2011).

percentage of hearings conducted via VTC plateaued at approximately 30%.⁹⁶ During 2011, the EOIR held at least 124,248 VTC hearings, a noticeable increase over the previous year.⁹⁷ Although it is not clear if the proportion of VTC-to-in-person hearings increased, it did demonstrate the EOIR's commitment to VTC hearings.

Two other agencies were actively involved in the VTC arena as well. The first one, the FSGB, continued to utilize VTC technology to conduct hearing and conferences with parties, although it did not increase its capacity.⁹⁸ The second, the ACUS, adopted *Recommendation 2011-4: Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, which encouraged agencies, particularly those with large caseloads, to conduct VTC hearings.⁹⁹ The recommendation also discussed best practices for VTC hearings.¹⁰⁰ One of the recommendations suggested that each agency that held VTC hearings should analyze VTC's effects on efficiency, fairness, and the participants' satisfaction in order to address concerns that VTC might "hamper a decision-maker's ability to make credibility determinations."¹⁰¹

2012

During 2012, the BVA upgraded all of its VTC equipment and reemphasized its desire to expand its use of VTC.¹⁰² It also increased the proportion of its hearings conducted by VTC from 30% in 2011 to 40% in 2012.¹⁰³ On its face, this appears to be a substantial increase in the BVA's VTC capacity, but the statistical boost appears to be a result of conducting fewer hearings

⁹⁶ See BVA statistics *infra* Part III.

⁹⁷ EOIR FIRST PRODUCTION, *supra* note 15, at 114-16.

⁹⁸ FOREIGN SERV. GRIEVANCE BD., ANNUAL REPORT FOR THE YEAR 2011 1, 5 (2011). It is not surprising that the agency did not increase its capacity given the small number of cases that actually required oral hearings.

⁹⁹ Adoption of Recommendations, 76 Fed. Reg. 48789 (Aug. 9, 2011).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 48796.

¹⁰² BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2012 7 (2013).

¹⁰³ *Id.* at 4, 24.

overall.¹⁰⁴ The number of hearings conducted via VTC increased by roughly the same amount as it had the previous years.¹⁰⁵ The BVA's promotion of the increased percentage, however, underlines the importance the agency placed on conducting VTC hearings.

2013

In 2013, one agency, the SSA, sought to slightly modify its VTC program while another, the DOHA, achieved an important milestone. In order to promote efficiency, the SSA proposed a change to its regulations which, while still allowing claimants to opt out of VTC hearings, limited the timeframe claimants could so object.¹⁰⁶ The DOHA made significant strides in expanding its VTC hearing program. During 2013, it conducted 101 hearings using VTC technology, which amounted to 85% of all hearings it conducted.¹⁰⁷

2014

Although 2014 appears to be relatively quiet with regards to developments in agency VTC hearings, once the agency performance reports for this and the previous year have all been published, this analysis could change. Two things of note have occurred thus far, however. First, the SSA issued a final rule by which claimants must object to VTC hearing within a certain timeframe, or forfeit their right to object.¹⁰⁸ Second, an ALJ for the National Labor Relations Board (NLRB) allowed a witness overseas to testify via VTC during a hearing for the first time.¹⁰⁹ One of the parties objected, arguing that using VTC "would not allow adequate

¹⁰⁴ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2012 24 (2013).

¹⁰⁵ BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2012 24 (2013).

¹⁰⁶ Changes to Scheduling and Appearing at Hearings, 78 Fed. Reg. 38610, 38610-12 (proposed June 27, 2013) (to be codified at 20 C.F.R. pts. 404-405, 416).

¹⁰⁷ OFFICE OF HEARINGS & APPEALS, DEP'T OF ENERGY, ANNUAL REPORT FY 2013 2 (2013).

¹⁰⁸ David D. Camp, *Video and Telephone Hearings Final Regulation Issued*, CURRENT SOC. SECURITY NEWS, no. 4, 2014, at 3.

¹⁰⁹ OFFICE OF PUB. AFFAIRS, *Witness testifies via international video conferencing in NLRB proceeding*, NAT'L LABOR RELATIONS BD. (Sept. 23, 2014), <http://www.nlr.gov/news-outreach/news-story/witness-testifies-international-video-conferencing-nlr-proceeding>.

opportunity for assessment of credibility and might not be trustworthy, therefore constituting a denial of due process.”¹¹⁰ The ALJ, however, found that various precautions and the quality of the VTC setup rendered any such objections moot.¹¹¹

Although the number of agencies venturing into the realm of VTC technology continued to grow throughout the 2000s, the advent of the Great Recession coincided with the end of new agencies implementing VTC hearings. The NLRB’s actions, however, could signal the beginning of a new wave of agency implementation of VTC hearings. Meanwhile, those agencies that already use VTC will likely continue to expand their operations.

III. Statistics

This part contains statistics from the BVA, EOIR, SSA, and DOHA. It does so for two reasons: (1) these agencies are the ones that have the largest VTC programs, either based on raw numbers or based on the ratio of VTC to in-person hearings, and (2) these agencies are the only ones that have readily available statistics of a scope to merit inclusion. The BVA and SSA provide the most complete statistics, while the DOHA provides percentages in its annual reports (as opposed to raw numbers). The EOIR statistics are the result of a FOIA request that compelled their production.

¹¹⁰ LEF Int’l Language Sch., Inc., 20-CA-120999 at 2 (Sept. 15, 2014).

¹¹¹ *Id.* at 2, 4. The precautions included the following: (1) a representative for the respondent was on location in Madrid to observe all of the testimony being given remotely; (2) the court reporter in the U.S. was able to clearly transcribe all of the testimony; (3) all parties were able to hear everyone who spoke; (4) adjustable cameras allowed for both close-up and panoramic views; (5) the parties exchanged all exhibits prior to the VTC session; and (5) technicians were present to immediately address any technical difficulties. *Id.* at 2.

A. Board of Veterans' Appeals¹¹²

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Total Hearings	2,685	707	2,924	6,094	4,875	5,711	4,428	5,560	4,503	6,046
VTC Hearings	0	0	48	233	1,151	1,282	1,385	1,308	1,475	1,689
Percent VTC	--	--	1.6%	3.8%	23.6%	22.4%	31.3%	23.5%	32.8%	27.9%
	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Total Hearings	7,256	8,576	9,158	9,971	10,652	11,629	13,515	14,727	12,334	--
VTC Hearings	2,108	2,618	2,719	2,870	2,891	3,375	3,979	4,355	4,868	--
Percent VTC	29.1%	30.5%	29.7%	28.8%	27.1%	29%	29.4%	29.6%	39.5%	--

B. Executive Office for Immigration Review¹¹³

	2009	2010	2011
Total Hearings	--	--	--
VTC Hearings	106,049	110,773	>124,248
Percent VTC	--	12%	--

¹¹² BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEARS 1994-2012 (1994-2013). The drop in hearings in FY 1995 was the product of a statutory change that made hearings before the Board a statutory right. BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1995 4 (1996). As a result, some hearings would be held an "unacceptably long period" before the Board actually reviewed the case. *Id.* The BVA suspended all hearings from May 1994 to January 1995 to reduce this delay. *Id.* The subsequent uptick in hearings was likely due to the end of the suspension, as well as statutory and administrative reforms at the BVA. *Id.* at 7-14.

¹¹³ EOIR FIRST PRODUCTION, *supra* note 15, at 109-11, 114-16. As of May 2012, the EOIR does not maintain any statistics that identify the number of VTC hearings as compared to in person hearings. *Id.* at 15. The only reason the statistics here are present is because of a FOIA request.

C. Social Security Administration¹¹⁴

	2009	2010	2011	2012	2013	2014
Total Hearings	--	596,461	656,013	670,652	684,140	609,681
VTC Hearings	86,320	120,624	129,775	152,788	179,308	171,478
Percent VTC	17%	20.3%	20.1%	22%	26.2%	28.1%

D. Department of Energy Office of Hearings and Appeals¹¹⁵

	2010	2011	2012	2013
Total Hearings	--	--	--	--
VTC Hearings	--	68	--	--
Percent VTC	32%	54%	78%	85%

¹¹⁴ OIG EXPANDED VIDEO HEARINGS, *supra* note 40, at 4; *FY 2010 – Hearings Held In-Person or Via Video Conferencing*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/archive/06_FY2010/06_September_Hearings_Held_Person_Video.pdf (last visited Nov. 17, 2014); *FY 2011 – Hearings Held In-Person or Via Video Conferencing*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/archive/06_FY2011/06_September_Hearings_Held_InPerson_Video_Report.pdf (last visited Nov. 17, 2014); *FY 2012 – Hearings Held In-Person or Via Video Conferencing*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/archive/08_FY2012/08_September_National_New_Court_Cases_and_Remands.pdf (last visited Nov. 17, 2014); *FY 2013 – Hearings Held In-Person or Via Video Conferencing*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/archive/06_FY2013/06_September_Hearings_Held_InPerson_Video_Report.pdf (last visited Nov. 17, 2014); *FY 2014 – Hearings Held In-Person or Via Video Conferencing*, SOC. SEC. ADMIN., http://www.ssa.gov/appeals/DataSets/archive/06_FY2014/06_September_Hearings_Held_InPerson_Video_Report.pdf (last visited Nov. 17, 2014). The total number of hearings for each year was calculated manually based on per-office statistics from the SSA. The total number of VTC hearings for 2012-2014 was also calculated manually based on the same statistics. The total VTC hearings for 2009-2011 come from a report issued by the SSA, as well as the percentages for 2009-2012. Where there was a discrepancy between the percentages provided and those calculated, the provided statistics were used. This accounts for why, e.g., the 22% for 2012 is actually 22.8% when calculated based on the available numbers. An error likely arose when the figures were manually totaling the numbers from each SSA office.

¹¹⁵ OFFICE OF HEARINGS & APPEALS, DEP'T OF ENERGY, FY 2011-2013 ANNUAL REPORTS (2011-2013).

IV. Why Agencies Use VTC

One reason agencies conduct VTC hearings is to lower costs. VTC hearings save both claimants' and judges' travel costs.¹¹⁶ These costs include direct costs (flights and hotels), as well as time judges lose in transit.¹¹⁷ According to the DOHA, when it increased the proportion of its hearings held via VTC from 32% one year to 54% the next, it saved an additional 41% in travel expenses.¹¹⁸ The MSPB estimated that each VTC hearing could save up to \$2,500 in travel expenses.¹¹⁹ The SSA estimated that VTC hearings would generate \$5.2 to \$10.9 million in annual savings.¹²⁰

Agencies also use VTC hearings to improve the efficiency of agency procedures. VTC hearings decrease the processing time for requests, particularly when adjudicators would otherwise have to travel to remote locations.¹²¹ In the past, the BVA's judges have often had to travel to field stations to conduct hearings. At one point, only 74% of appellants would show up for their hearings, which meant the judges would often be idle.¹²² VTC hearings allow the judges to simply move on to another appeal.¹²³ VTC also gives agencies more flexibility in scheduling the time and place of hearings, which in turns allows them to work on reducing backlogs by

¹¹⁶ See, e.g., Video Teleconferencing Appearances Before Administrative Law Judges of the Social Security Administration, 68 Fed. Reg. 69003-04 (Dec. 11, 2003) (to be codified at 20 C.F.R. pts. 404, 416); BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1995 11-12 (1996); OFFICE OF HEARINGS & APPEALS, DEP'T OF ENERGY, FY 2009 ANNUAL REPORT 7 (2009); OIG EXPANDED VIDEO HEARINGS, *supra* note 40, at 7-8.

¹¹⁷ OIG EXPANDED VIDEO HEARINGS, *supra* note 40, at 7.

¹¹⁸ OFFICE OF HEARINGS AND APPEALS, DEP'T OF ENERGY, FY 2011 ANNUAL REPORT 18 (2011).

¹¹⁹ U.S. MERIT SYS. PROT. BD., ANNUAL REPORT FOR FISCAL YEAR 1998 31 (1998).

¹²⁰ OIG EXPANDED VIDEO HEARINGS, *supra* note 40, at 3.

¹²¹ See, e.g., Video Teleconferencing Appearances Before Administrative Law Judges of the Social Security Administration, 68 Fed. Reg. 69003-04 (Dec. 11, 2003) (to be codified at 20 C.F.R. pts. 404, 416); BD. OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 1995 11-12 (1996); OIG RVP AUDIT, *supra* note 81, at E-1.

¹²² BD. OF VETERAN'S APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2012 7 (2012).

¹²³ OIG EXPANDED VIDEO HEARINGS, *supra* note 40, at 7.

reallocating resources to conduct hearings for inundated offices.¹²⁴ In addition, the SSA has found that claimants are more likely to attend VTC hearings than they are in-person hearings.¹²⁵ Finally, the DOHA noted that VTC hearings reduce its carbon imprint.¹²⁶

V. Other Agency Uses of VTC

Hearings are one of many uses agencies have found for VTC technology. When the GAO first piloted VTC for office meetings, it discovered a variety of unanticipated uses.¹²⁷ These ranged from simultaneously discussing and revising drafts of documents from remote locations, conducting employment interviews, presenting awards, and conducting “sensitive personnel matters that required face-to-face contacts.”¹²⁸ The technology has improved to the point that, in some contexts, personal computers are as adequate as an entire room specifically devoted to use of VTC.¹²⁹ For example, the Department of Veterans Affairs uses desktop VTC equipment as part of a telehealth program that allows veterans to: (1) consult doctors from their home computers, or (2) consult doctors in different states from a nearby clinic.¹³⁰ Certain equipment even allows doctors to listen to heartbeats, conduct close-up examinations of wounds, and other such things.¹³¹

¹²⁴ See, e.g., OFFICE OF HEARINGS & APPEALS, DEP’T OF ENERGY, FY 2009 ANNUAL REPORT 7 (2009); OIG EXPANDED VIDEO HEARINGS, *supra* note 40, at 5, 7-8.

¹²⁵ OIG RVP AUDIT, *supra* note 81, at E-1.

¹²⁶ OFFICE OF HEARINGS & APPEALS, DEP’T OF ENERGY, FY 2009 ANNUAL REPORT 7 (2009).

¹²⁷ UNITED STATES GENERAL ACCOUNTING OFFICE, *supra* note 4, at 13-14.

¹²⁸ *Id.*

¹²⁹ Grant Fjermedal, *Video Conferencing: Key to Unlocking Health Benefits, Cost-Savings and Productivity*, FEDTECH MAG. (Feb. 12, 2014), <http://www.fedtechmagazine.com/article/2014/02/video-conferencing-key-unlocking-health-benefits-cost-savings-and-productivity>.

¹³⁰ *Id.*

¹³¹ *Id.*

VI. Conclusion

Although the pace at which new agencies implement VTC hearings has slowed in recent years, if history is any indication, it is probable that federal agencies will continue to expand existing VTC hearing programs, as well as implement new ones. The benefits, both in efficiency and savings in time and cost are substantial, and as VTC has improved, it has come to essentially replicate the in-person hearing experience. Implementing VTC has proved to be a challenging proposition for those agencies that undertake it, but those same agencies believe it to be well worth the effort as demonstrated by the way they have expanded and fine-tuned their programs.