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**AGENCY USE OF VIDEO HEARINGS: BEST PRACTICES AND POSSIBILITIES FOR EXPANSION**

Administrative Conference of the United States In-House Research Report

Funmi E. Olorunnipa\*

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\* Attorney Advisor, Administrative Conference of the United States. The author prepared this report in her capacity as a Conference staff member, but the views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees.

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## **I. Introduction And Background**

### **A. Project Background And Origination**

Since the early 1990s, video teleconferencing technology (also known as “VTC”) has been explored by various entities in the public and private sectors for its potential use in adjudicatory proceedings<sup>1</sup> In the last 10 years, advances in technology and carrier services coupled with reduced budgets and increased travel costs have made the use of video teleconferencing more attractive to local, state and federal governments. In the public sector, the rise in the use of video teleconferencing by federal and state courts has particularly been noted by academics and has been the subject of a number of law review articles.<sup>2</sup> Similarly, in the past 10 years, there has been an increase in the use of video hearings by federal agencies with high volume caseloads. Since pilot programs for video hearings at agencies first began in the early 1990s, the use of video teleconferencing technology has become more advanced, more readily available and less expensive.

Certain federal agencies with high volume caseloads, such as the Social Security Administration’s Office of Disability Adjudication and Review (“ODAR”), the Department of Veteran Affairs’ Board of Veteran Appeals (“BVA”) and the Department of Justice’s Executive Office for Immigration Review (“EOIR”) have been using video teleconferencing technology for years. Other agencies with high volume caseloads have yet to employ video teleconferencing technology to conduct administrative hearings. The use of video teleconferencing to conduct adjudications is not without controversy. Some applaud the use of video teleconferencing because it offers potential efficiency benefits, such as reducing the need for travel and the costs associated with it, reducing caseload backlog, increasing scheduling flexibility for the courts and attorneys and increasing access to the courts for litigants.<sup>3</sup> Critics, however, have suggested that

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<sup>1</sup> See, e.g., Anderson, Robert, *The Impact of Information Technology on Judicial Administration: A Research Agenda for the Future*, 66 S. Cal. L. Rev. 1762, 1770 (1993).

<sup>2</sup> See, e.g., Sherwin, Richard K., Feigenson, Neal and Spiesel, Christina, *Law in the Digital Age: How Visual Communication Technologies are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. Sci. & Tech. L. 227, 229 (2006); Catterson, Cathy, *Changes in Appellate Caseload and Its Processing*, 48 Ariz. L. Rev. 287, 295 (2006); Lederer, Fredric, *The Road to the Virtual Courtroom? A Consideration of Today’s -- and Tomorrow’s -- High Technology Courtrooms*, (State Justice Inst. 1999), reprinted in 50 S.C. L. REV. 799, 801 (2000).

<sup>3</sup> See Dunn, Meghan and Norwick, Rebecca, Federal Judicial Center Report of a Survey of Videoconferencing in the Court of Appeals (2006), pp. 1-2, available at [http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/\\$file/vidconca.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf).

hearings conducted by video may hamper communication between a party and the decision-maker; hamper communication between a party and their attorney; and/or hamper a decision-maker's ability to make credibility determinations.<sup>4</sup>

Recognizing both the praise for and critique of the use of video teleconferencing in adjudicatory proceedings, the Administrative Conference of the United States (“the Conference”) has conducted an in-house research project studying the use of video hearings by federal government agencies with high volume caseloads and the possibilities for expanding the use of video hearings by agencies as a means of increasing efficiency and reducing cost in administrative adjudication.<sup>5</sup> The study, as detailed in this report, supports the Conference's statutory mandate of making improvements to the regulatory and adjudicatory process by improving the effectiveness and fairness of applicable laws.<sup>6</sup>

### **B. Project Summary And Project Goals**

Part one of this report aims to summarize the Conference's examination of the use of video hearings by federal agencies, using ODAR and BVA as case studies. The goal of part one of this report is to provide a detailed look at how video hearings were implemented and currently used by those two agencies. Part one also summarizes information the Conference learned from a limited study of the use of video hearings at EOIR. However, EOIR is not used as a case study in this report because the use of video hearings in the context of immigration proceedings is a complicated issue which requires further inquiry and analysis as well as information from the agency which was not available to the Conference during the course and scope of this study.<sup>7</sup>

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<sup>4</sup> See American Bar Association's Commission on Immigration Report entitled “*Reforming the Immigration System*” (2010), pp. 2-26-2-27.

<sup>5</sup> The Conference and the Office of Government Information Services (“OGIS”) of the National Archives and Records Administration also held a workshop in November 2010, which brought together experts from the public and private sectors to discuss technological best practices in dealing with high-volume case loads. At the workshop, senior officials from agencies that have led in adopting new technologies, such as electronic records and video adjudication, presented lessons they have learned and challenges they continue to face. For more information about that workshop, see the Conference's website *available at* <http://www.acus.gov/events/technology-in-the-management-of-high-volume-caseloads/>.

<sup>6</sup> See *generally* Administrative Conference Act, 5 U.S.C §§ 591-596.

<sup>7</sup> The Conference plans to study the use of video hearings by EOIR in-depth as a part of its forthcoming Immigration Adjudication project which will study potential improvements to the procedures for immigration adjudication. For more information about the Immigration Adjudication project, see the Conference's website *available at* <http://www.acus.gov/research/the-conference-current-projects/immigration-adjudication/>.

Information in the first part of this report comes primarily from interviews with knowledgeable officials at the three agencies, observations of some video hearings by the Conference's in-house researcher and, where available, relevant documents about the use of video hearings as provided by agency officials. Part one of this report also notes where additional information would have been helpful but not available from the agency or through independent research by the Conference.

Part two of this report uses the information learned through the research conducted for part one to make recommendations for the use of video hearings by other federal agencies with high volume caseloads. The second part of the report recognizes that there are agencies that may benefit from the use of video hearings to improve efficiency, save costs and reduce caseload backlog. However, the report also recognizes that the fiscal and non-fiscal costs associated with the use of video hearings may present some disadvantages that agencies must consider and weigh as factors in the determination of whether it is in the best interest of the public and the agency to use video hearings. The goal of part two of this report is to set forth the Conference's recommendations for which agencies should consider the use of video hearings, what criteria agencies should consider when determining whether to use video hearings and what best practices advice for the use of video hearings is available as learned from the agencies studied in this in-house project. Accordingly, this report is not necessarily intended to provide recommendations for the improvement of the current use of video hearings at ODAR, BVA or EOIR.

### **C. Background On The Use Of Video Hearings Generally**

Prior to examining the agencies specifically identified in this report, it is important to briefly review the rise of the use of video hearings more generally. In the last 10 years, advances in technology, coupled with reduced budgets and the high cost of travel, have led to a rise in the use of VTC technology and equipment by various branches within local, state and federal governments. In the public sector, the rise in the use of video teleconferencing by federal and state courts has been documented in a number of law review articles.<sup>8</sup> For example, at the federal level, a 2006 Federal Judicial Center Report of a Survey of Video Teleconferencing in the Court of Appeals noted that VTC has been used to conduct oral arguments in the Second,

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<sup>8</sup> See supra note 2.

Third, Eighth, Ninth and Tenth Circuits.<sup>9</sup> The report noted that VTC was also used to conduct other court business such as committee or court meetings. The report stated that the judges interviewed cited the fiscal cost-savings and the reductions in travel time as the primary benefit to use of video teleconferencing. Other benefits mentioned include increased scheduling flexibility for the courts and attorneys, increased access to the courts for litigants and faster processing of the hearing time for cases. The report also noted that while there were some disadvantages to the use of video hearings, (such as technical difficulties with the video equipment and the decreased level of personal interactions), the majority of judges agreed that the benefits of VTC technology outweighed the costs. Although no similar report regarding the use of video hearings by federal district courts was found, a 2010 Video Conferencing Survey Summary compiled by the National Center for State Courts showed that more than 25 different state court systems use video teleconferencing technology.<sup>10</sup>

Beginning in the early 1990s, a number of federal agencies conducting administrative adjudications decided to begin conducting video hearings or to use VTC technology to conduct certain types of hearings and/or other adjudicatory proceedings (such as meetings, status conferences and expert witness testimony by video). In addition to the three agencies reviewed in part one of this report, other agencies, such as the Railroad Retirement Board, the United States Postal Service, the Department of Health and Human Services' Office of Medicare Hearings, specifically have statutes or regulations allowing for the use of video teleconferencing.<sup>11</sup> Similarly, other agencies, such as the U.S. Merit Systems Protection Board and the Commerce Trademark Trial and Appeal Board, use video teleconferencing technology to conduct hearings and/or meetings as a matter of practice under the broad statutory and/or regulatory discretion given to them to hear and adjudicate administrative proceedings.<sup>12</sup>

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<sup>9</sup> A copy of the Federal Judicial Center's 2006 report is *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/\\$file/vidconca.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/vidconca.pdf/$file/vidconca.pdf).

<sup>10</sup> A copy of the National Center for State Courts' 2010 Summary is *available at* <http://www.ncsc.org/services-and-experts/areas-of-expertise/technology/~media/Files/Video%20Conferencing%202010/Videoconferencing%20Survey-3.ashx>.

<sup>11</sup> *See* 20 CFR § 260.5; 39 CFR § 966.9; and 42 CFR § 405.

<sup>12</sup> *See* 5 U.S.C. § 1204(a)(1) and 37 CFR § 2.129(a).

## **II. Part One : Case Studies Of The Use Of Video Hearings At ODAR And BVA And Information Learned About Use Of Video Hearings At EOIR**

### **A. A Case Study Of The Use Of Video Hearings At ODAR**

The section of the report uses information learned through data collected from ODAR and interviews with ODAR officials to examine the use of video hearings and provides general background on ODAR's use of video hearings, the technology used by ODAR to conduct video hearings, the training provided to ODAR officials and a summary of how video hearings are conducted. The costs and benefits of ODAR's use of video hearings are also explored.

#### **i. General Background On Claims Heard By ODAR**

ODAR oversees the Social Security Disability hearing and decision process to determine whether or not a Social Security Disability claimant qualifies to receive Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) benefits.<sup>13</sup> SSDI is an insurance program administrated by SSA for workers who have paid certain taxes and subsequently become disabled and unable to work. SSDI provides monthly disability benefits and health coverage for disabled workers or retired workers' disabled dependents. SSI is a needs-based benefit program administrated by SSA which pays monthly cash benefits to people who are age 65 or older or people who have a disability and have little or no income.

To apply for SSDI or SSI benefits based on disability, a person must first make a claim. After a claim for SSDI or SSI benefits is filed, evidence of the claimant's disability is gathered and presented and an initial determination is made by a state disability determination agency. If the claim is denied at an initial determination stage, a request for reconsideration is made and considered by the state agency. If the social security disability claim is still denied, a claimant may file a request for a hearing before an Administrative Law Judge ("ALJ") at ODAR. Once the claim is assigned to an ALJ, the ALJ may consider the evidence already submitted and approve the claim without a hearing. If the claim is not approved based on the written documentation and evidence, a hearing date with the ODAR ALJ is scheduled. At the hearing, the claimant and his representative (if any) have the opportunity to present the claimant's case regarding his claim for SSDI or SSI benefits.

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<sup>13</sup> General information about the SSDI and SSI claim and hearing process is on the SSA Hearings and Appeals website *available at* <http://www.ssa.gov/appeals/>.

## ii. General Background On The Use Of Video Hearings At ODAR

ODAR is one of the leading government agencies utilizing VTC. VTC technology was first introduced to ODAR in 1996 as a pilot program allowing ODAR's ALJs to conduct disability hearings by video.<sup>14</sup> ODAR's use of video hearings was introduced as part of ODAR's strategic effort to reduce its significant caseload backlog at the time and to increase efficiency and save costs in its hearing processes.<sup>15</sup> A video hearing allows hearing participants to see and hear each other through large color television screens. To conduct the hearing, the ALJ remains in his or her office, and the claimant and their representative (if any) go to a local ODAR hearing site equipped with video.

ODAR holds three types of video hearings: point-to-point teleconferencing which is two-way conferencing between the judge and the claimant; multi-point which is teleconferencing occurring at three or more sites, including those conferences where the judge, the claimant and the claimant's representative are all at different sites; and ODAR's Representative Video Project ("RVP") which consists of video hearings where the claimant and representative are at a site owned by the representative and the judge is at an ODAR video-equipped site.<sup>16</sup> Transmission of the hearing is secure, and privacy of the process is protected.<sup>17</sup>

According to ODAR officials, the agency internally assigns individuals who file a disability claim with its offices to either an in-person hearing or a video hearing. The video hearing is scheduled and a date is given to the claimant and their representative (if any). For convenience, video hearing dockets are typically scheduled to be in the same room on any given day; however, because of video capabilities, ALJs are able to hear cases in different locations on any given day as well. Claimants who are assigned to a video hearing always have the option to refuse the video hearing in favor of an in-person hearing. However, a request for an in-person hearing will often delay the claimant's hearing date since the wait for an in-person hearing is

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<sup>14</sup> See Fiscal Year 2008: Plan to Eliminate the Hearing Backlog and Prevent Its Recurrence *available at* [http://www.socialsecurity.gov/appeals/Backlog\\_Reports/Annual\\_Backlog\\_Report\\_FY\\_2008-Jan.pdf](http://www.socialsecurity.gov/appeals/Backlog_Reports/Annual_Backlog_Report_FY_2008-Jan.pdf), pp. 21-23.

<sup>15</sup> *Id.*

<sup>16</sup> See September 16, 2008: Congressional Testimony of Frank A. Cristaudo, Chief Administrative Law Judge *available at* [http://www.socialsecurity.gov/legislation/testimony\\_091608.htm](http://www.socialsecurity.gov/legislation/testimony_091608.htm), pp. 10-11.

<sup>17</sup> *Id.*



typically longer than the wait for a video hearing.<sup>18</sup> Accordingly, the number of individuals assigned to a video hearing who request a change to an in-person hearing is quite small.<sup>19</sup>

Since 2003, ODAR's use of video hearings has expanded at a rapid pace and ODAR now uses video hearings regularly to conduct many of its disability hearings. Currently, all of ODAR's hearing offices and permanent remote sites are equipped to hold video hearings.<sup>20</sup> In addition, the ODAR's National Hearing Center ("NHC") in Falls Church, Virginia has 10 video hearing rooms and all of its hearings are conducted by video.<sup>21</sup> Since ODAR's implementation of the video hearings, the agency has held over a third of a million disability hearings using video equipment.<sup>22</sup> Indeed, in the past three years alone, the number of video hearings held has more than doubled. In 2008, ODAR conducted 55,869 video hearings, in 2009, ODAR conducted 86,320 video hearings and in 2010, ODAR conducted a total of 120,624 video hearings.<sup>23</sup>

### **iii. Technology Used By ODAR For Video Hearings**

ODAR uses various types of video equipment for its video hearings which it purchased through the Polycom Company and installed at the NHC and other ODAR hearing sites across the country. The equipment used includes Polycom VTC units, 65-inch projection televisions installed in the offices at the NHC as well as 52-inch and 58-inch large screen plasma flat panel monitors installed in ODAR hearing sites around the country.<sup>24</sup> ODAR has also installed Polycom Desktop Video Units (DVU) in many of its ALJs' offices. A Conference staff visit to the NHC in December 2010 included an opportunity to examine the advanced technology used

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<sup>18</sup> Interview with officials from ODAR's Office of the Chief Administrative Law Judge on December 9, 2010 at ODAR National Hearing Center. A list of the interview questions and the name and job title of the individuals interviewed is Appendix "A" to this report and is on file with the Conference.

<sup>19</sup> *Id.*

<sup>20</sup> Social Security Administration Strategic Plan for Fiscal Years 2008-2013 available at [http://www.socialsecurity.gov/asp/ASP2008-2013\\_Final.pdf](http://www.socialsecurity.gov/asp/ASP2008-2013_Final.pdf), p. 12.

<sup>21</sup> *Id.*

<sup>22</sup> See Annual Performance Plan for Fiscal Year 2011 and Revised Final Performance Plan for Fiscal Year 2010 available at <http://www.socialsecurity.gov/budget/ANNUAL%20PERFORMANCE%20PLAN.pdf>, p. 19.

<sup>23</sup> *Id.*

<sup>24</sup> See supra note 18.

by ODAR.<sup>25</sup> Based on this visit, Conference staff was able to observe that at the NHC, every ALJ's office is equipped with a large screen plasma television monitor along with a smaller screen DVU which allows the ALJ to see the claimant's location from a distance as well as up close. Microphones and speakers are also built into the equipment and sound is controlled via remote at both the claimant's location and the ALJ's location.

According to ODAR officials, any ALJ conducting a hearing can use a remote control to move the video camera around in the claimant's location and the video equipment appears to be user-friendly with many functions being controlled through the use of a remote.<sup>26</sup> There is a central video help desk office staffed with IT personnel who can be contacted regarding any issues with the video equipment at any of ODAR's locations throughout the country.<sup>27</sup> The central office works effectively and efficiently to troubleshoot any problems and they often are able to access the system at any given location remotely.<sup>28</sup> Each hearing center has an IT office specialist to assist with any technological issues.<sup>29</sup> Moreover, the hearing officer present at every video hearing has been trained to troubleshoot minor technological issues which may arise at the claimant's location.<sup>30</sup>

The rapid installation of additional video equipment in the past three years reflects the significant growth of ODAR's use of video hearings. For example, from 2007 to 2008, 545 video units were installed.<sup>31</sup> In 2009, an additional 302 units were installed and in 2010, an additional 226 video units have been installed.<sup>32</sup> For the fiscal year 2011, ODAR anticipates installing another 87 video units.<sup>33</sup>

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<sup>25</sup> Conference staff visited the SSA ODAR National Hearing Center for a tour of the office and its video hearing equipment and to witness a video hearing before an ODAR Administrative Law Judge on December 2, 2010.

<sup>26</sup> *See supra* note 18.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See supra* note 20.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

#### **iv. A Summary Of How An ODAR Video Hearing Is Conducted**

Conference staff visited the NHC in December 2010 to witness a video hearing being conducted.<sup>34</sup> For this hearing, the ALJ was at the NHC in Falls Church, VA and the claimant and his attorney were at an ODAR hearing center in Flint, Michigan. At the Flint location, a hearing officer/court reporter was present. A vocational expert was also present in Flint, although he could be heard but not seen on camera.<sup>35</sup> The technology used for this hearing included video equipment, a DVU, which sat on the ALJ's desk, and a 52-inch plasma television which was mounted on a wall that sits approximately six feet from the desk where the ALJ sits. The technology allowed the ALJ to use a remote control to zoom in and out and to focus the picture being projected on both the DVU and the plasma television. The zoom function could be used to focus in on a particular subject for close examination or observation or it could be rotated to view either one individual or all of the individuals at the claimant's location. From the claimant's location in Flint, the claimant was only able to see the ALJ and the blue background video screen located directly behind the ALJ.

During the hearing, Conference staff observed that one could clearly see the claimant's face on the plasma television screen. In cases where observation of the claimant's face and body is necessary for credibility determinations or for other reasons, the projection on the television screen appeared to allow for such observation. One could also hear the claimant and his representative clearly. When the court reporter/hearing officer or vocational expert spoke, they could also be heard clearly. Since ODAR maintains an electronic filing system, the ALJ reviewed the claimant's file from his computer desk as the video hearing is being conducted. This process of reviewing the file electronically also appeared to run smoothly. The ALJ conducted the video hearing using the same procedures as are used during an in-person hearing. At the end of the hearing, the ALJ informed the claimant that he would render a decision on the disability claim within the next 14 days and that the claimant and his representative would be notified of the decision in writing. Overall, during observation by Conference staff, the video

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<sup>34</sup> See supra note 25.

<sup>35</sup> When asked, ODAR officials interviewed noted that the inability to see the vocational expert was not a concern since even during in-person hearings, vocational experts dial-in by telephone and the expert's credibility is not at issue.

hearing equipment appeared to work well and there were no technological issues during the hour-long hearing.

**v. Employee Training On ODAR Video Hearing Technology**

According to ODAR officials, during the initial rollout of ODAR's use of video hearings, training on the use of VTC, and how to conduct video hearings occurred very informally and on an ad-hoc basis.<sup>36</sup> Training sessions in the beginning of video hearing use were often conducted by outside consultants or by IT specialists. However, following the initial rollout, ODAR's ALJs and its hearing officers have been formally trained to use the video hearing equipment installed at hearing locations. ODAR personnel have been an integral part of the training process. ODAR's chief ALJ and other ODAR staff, including hearing officers around the country, have developed techniques to train their peers on how to conduct video hearings. There is a video-on-demand training guide for ALJs and pamphlets as well as other written materials on how to conduct video hearings are provided to agency personnel.

**vi. Costs And Benefits Of ODAR's Use Of Video Hearings**

Determining the exact costs and benefits of ODAR's use of video hearings is difficult because relevant data is scarce and the exact costs and benefits can be difficult to measure. However, in August 2009, ODAR evaluated the cost and benefits of video hearing use by hiring consultants from Booz Allen Hamilton ("Booz Allen") to do a "Cost-Benefit Analysis of the ODAR Video Telecommunication Conferencing Program." Accordingly, Booz Allen consultants produced a detailed PowerPoint presentation which summarized their findings using available quantitative and qualitative data regarding the costs and benefits of video hearings at ODAR.

The purpose of the study was to do a cost-benefit analysis ("CBA") comparing various alternatives for the use of video hearings at ODAR. The analysis compared the costs and benefits of ODAR hearings prior to the use of VTC (when ALJs had to travel across different regions of the U.S. for hearings), with the current use of video hearings and three other alternatives for future use of video hearings by ODAR. The CBA concluded that to achieve optimal results, ODAR should continue to advance the use of video hearings by steadily

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<sup>36</sup> See supra note 18.

increasing the number of video units it has while also continuing to conduct some in-person hearings.

In the CBA, Booz Allen estimated that the cost of conducting ODAR hearings without the use of any video hearings would be \$838,459,548 over a 10-year lifecycle. The majority of costs making up this figure were estimates of labor costs for ALJs and support staff as well as travel time costs for ALJs. Accordingly, the estimated cost of conducting only in-person hearings at ODAR would be approximately \$83,845,954 annually. In contrast, the Booz Allen consultants estimated the cost of ODAR's current use of video hearings, (and with the amount of in-person hearings ODAR currently conducts), at \$242,803,891 over a 10-year lifecycle, assuming that the number of video hearings conducting continued to grow at the current rate of growth. The costs making up this figure included labor costs for ALJs and support staff as well as technology costs associated with the maintenance of the several hundred VTC units already in use and an annual growth of 100 VTC units (wall mounts and DVUs). Accordingly, the estimated cost of ODAR's current use of video hearings would be approximately \$24,280,389 per year. Thus, according to the figures provided by Booz Allen consultants, the current use of video hearings at ODAR reduces the estimated cost of the agency's administrative adjudications by approximately 70 percent. Similarly, maintaining the current use of video hearings, instead of solely conducting in-person hearings saves ODAR over \$59 million dollars annually.

Certain factors contribute to the estimated annual cost savings figure which must be noted. First, the figure measuring the estimated cost of the current use of video hearings assumes that the use of video hearings at ODAR will grow over a 10-year lifecycle at the current rate of growth. Accordingly, the figure assumes that while video hearings currently only make up about 18 percent of the total number of hearings at ODAR, by the end of the 10-year lifecycle, video hearings will make up approximately 35 percent of the total number of hearings at ODAR. Second, initial capital costs were not factored into either of the estimated total cost figures. Accordingly, Booz Allen consultants did not factor in the significant start-up costs paid for the technology and administration associated with the initial set-up of video hearing use at the agency.

With respect to initial capital costs for the set-up of video hearings at ODAR, agency officials interviewed noted that ODAR does not have a capital cost estimate for its video teleconferencing network and that providing such a cost estimate would be a significant

endeavor requiring considerable time and research. Within SSA, major systems hardware, software and telecommunications purchases are directed by the Office of Systems and the agency's video network was implemented in incremental stages over 10 years based on the extent to which funding was made available to SSA and the extent to which SSA had locations available (hearing rooms, remote sites, field offices, representative's office). As a result, capital costs are difficult to measure since those costs varied depending on multiple factors such as the year, the equipment (wall unit or desktop), and the infrastructure (e.g., bandwidth).

Moreover, the process used to determine the costs estimated in the CBA is complex. The CBA (and the estimates contained therein) was developed through a variety of techniques and with significant input from what Booz Allen consultants referred to as Subject Matter Experts (SMEs), individuals within ODAR with significant knowledge of the agency's use of video hearings and the various components of that use who were interviewed and asked to provide relevant data. To determine the 10-year lifecycle cost estimate figures, a standard cost analysis methodology was customized for ODAR's operating environment. To create the analysis, consultants first defined cost categories that fully captured expected costs associated with hearings over a 10-year lifecycle. Second, a basis for estimation was defined that (a) captured global assumptions, i.e., economic factors such as the discount and inflation rates and (b) captured project-specific drivers and assumptions, i.e., assumptions about personnel salary increases. Booz Allen consultants then gathered cost data via discussions with SMEs from across SSA, including at ODAR, the Office of Telecommunications and Systems Operations and the Office of Budget. Finally, costs were phased by fiscal year and then totaled over a 10-year period. All cost estimates were discounted and risk-adjusted per OMB guidance to agencies conducting a cost-benefit analysis.

Consultants then used the analysis developed to estimate the total projected cost of ODAR hearings over a projected 10-year lifecycle if ODAR only used in-person hearings. To do this, consultants used data collected from ODAR to estimate a variety of costs associated with conducting hearings in-person, including ALJ travel costs, ALJ labor costs, support staff costs, travel costs for non-SSA personnel whose travel is paid for by ODAR (e.g. vocational experts) and the transportation of documents and materials needed for the hearings. The consultants then used the total figures in each category of costs to calculate a total cost-per-case figure for in-person hearings and multiplied the cost-per-case figure by the estimated number of hearings to

be conducted by ODAR in a 10-year lifecycle. To estimate the cost of ODAR's current use of video hearings combined with the cost of in-person hearings currently used, consultants first used the cost-per-case figure for in-person hearings multiplied by the estimated number of ODAR cases to be heard in-person over a 10-year life cycle to arrive at a total cost for the percentage of hearings conducted in-person. That total amount was then added to the estimated cost for video hearing use at the current rate of growth, which included estimated costs for purchasing additional technology, maintenance and facilities.

In addition to the findings in the CBA as detailed above, qualitative research consisting of interviews with ODAR officials revealed that the use of video hearings has other benefits which may be hard to quantify.<sup>37</sup> According to ODAR officials, video hearings give ODAR the flexibility to distribute the hearings workload more efficiently among its ALJs. Video hearings also allow ODAR to serve the public better by scheduling hearings faster, and in the order that requests for hearings are received. According to ODAR officials, since a video hearing can be scheduled faster than an in-person appearance, claimants have less waiting time before their claims may be heard and ultimately adjudicated.

Also, according to ODAR officials, a video hearing location may be closer to a claimant's home than an in-person hearing site which reduces the time and costs associated with claimant travel. A closer video hearing location may also make it easier for claimants to have their witnesses or other people accompany them to a hearing. The use of video hearings has also led to reductions in travel by ALJs who often used to have to travel to claimant locations in order to conduct an in-person hearing. Now, through the use of video technology, many ALJs can hear a claimant's case without having to travel to the claimant's location. Accordingly, ALJs can spend more time on hearing cases instead of traveling. According to ODAR officials, this has led to a reduction in caseload backlog. In addition, according to ODAR officials, many ALJs feel that their quality of life has improved since their amount of work-related travel has significantly reduced.

An ODAR ALJ has noted that another benefit to using video hearings is that video technology may allow an ALJ to closely examine injuries that a claimant wants to show the ALJ. It is not uncommon for claimants to want to physically show ALJs their injuries. During in-

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<sup>37</sup> See supra note 18.

person hearings, ALJs are likely to view those injuries from the bench to avoid any social discomfort associated with moving closer to inspect the claimant's injury. However, through the use of video camera lens technology, an ALJ can also zoom in on injuries more closely and clearly than they might have during an in-person hearing.

Interviews with ODAR officials also revealed certain costs associated with the use of video hearings that are difficult to measure. According to ODAR officials, when video hearings were first implemented, there were problems with the technology and its capabilities which took some time to work through. In addition, there were costs associated with personnel training on how to conduct video hearings as well as resistance from some ALJs who were used to conducting in-person hearings and who were reluctant to switch to video hearings.

Some additional costs mentioned in interviews with ODAR officials include the fact that not all ALJs believe that their quality of life has improved due to reductions in travel. Some ALJs enjoyed traveling as a part of their job and in many cases video hearings have significantly reduced or eliminated the need for travel. For ALJs who enjoyed traveling, their job satisfaction may have decreased as a result of the use of video hearings. In addition, some ALJs working at the NHC have reported that since the video hearing rooms they use also serve as their offices, there have been occasional distractions during hearings that are commonplace in an office setting (such as a phone call or someone knocking on the door).

#### **vii. Evaluation Methods and Strategies Used To Evaluate Use Of Video Hearings At ODAR**

ODAR officials maintain that the agency continuously evaluates its use of video hearings to ensure that video hearings are serving their purpose and to make improvements where necessary. This includes formal evaluations like the cost-benefit analysis performed by outside consultants, Booz Allen Hamilton in August 2009, as well as informal assessments conducted by the Office of the Chief Administrative Law Judge at regional and national meetings with administrative law judges conducting ODAR video hearings. In 2009, SSA's Office of Quality Performance ("OQP") did a Quality Review Assessment Report on Video Teleconference Hearings.<sup>38</sup> The report reviewed both video and in-person hearings for comparison purposes to identify any differences or problematic areas between hearings conducted using VTC technology

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<sup>38</sup> A copy of the Quality Review Assessment Report on Video Teleconference Hearings is Appendix "B" to this report and is on file with the Conference.



and hearings conducted in-person. The assessment included an in-depth post-effectuation quality review regarding the accuracy of ALJ decision-making when comparing VTC hearing decisions to in-person hearing decisions. The report conducted a series of case assessments which evaluated decisions made by ALJs in both video hearings and in-person hearings and determined whether there was any disagreement with the decision made upon review.

To conduct the special review, OQP randomly selected and reviewed 560 administratively final disability claims in which an ALJ conducted a hearing and issued a decision. The selection included 280 video hearings and 280 in-person hearing decisions issued between July 1, 2007 and December 31, 2008. Each of the 280 was comprised of 140 allowances and 140 denials. Disability examiners and program leaders in OQP conducted each case assessment which consisted of reviewing the electronic folder and listening to the hearing evaluation. The disability examiners then completed a data collection form reflecting their evaluation of the decision, including an assessment as to whether the decision was supported by a preponderance of the evidence. This is the same standard OQP applies when conducting its other disability quality reviews and the same standard used by the ALJs when making their decisions.

The report concluded that there was no statistically significant difference between the decision agreement rates of video hearings and in-person hearings. The report also found that the rate of representation among claimants who appeared by video was slightly higher (81 percent) than those who appeared in-person (78 percent). Although the report noted minor technical issues with video hearings, the report did not find any substantial technical problems specific to video hearings nor did it identify any differences or problematic areas between hearings conducted by VTC and hearings conducted in-person. Although ODAR did not have available data on whether there is any statistically significant difference between the rate of allowance of benefit claims heard in-person or by video, agency officials explain that the post-effectuation quality review shows that the use of video hearings does not affect an ALJ's decision-making ability as the results of the review show that there is no difference between the accuracy of ALJ decision-making when comparing video hearing decisions to in-person hearing decisions.

In addition to the OQP, internal data compiled by ODAR show that there is no statistically significant difference between the allowance rate (*i.e.* the rate of claims granted) at

ODAR's National Hearing Center ("NHC"), where all hearings are conducted by video, and the allowance rate at ODAR's other hearing offices across the nation, where hearings are conducted both by video and in-person. Moreover, internal data compiled by ODAR show that on average, cases which go to hearing at the NHC are processed (from initiation to completion) 135 days sooner than cases which go to hearing at other hearing offices. ODAR officials noted that they offered these internal data to the Conference for information purposes only and that comparing the NHC with other hearing offices is not a true comparison of in-person hearings versus video hearings since ALJs at the NHC are supervisors who only hear cases by video whereas ALJs at other hearing offices are not supervisors and they hear cases both by video and in-person (including cases which require travel).<sup>39</sup>

ODAR officials also noted that in the past, they have evaluated claimant satisfaction with the use of video hearings. When asked to identify examples of the agency's evaluation of claimant satisfaction, officials pointed to the text of a proposed rule which SSA promulgated in 2003 to revise regulations and expressly authorize the use of VTC technology to conduct hearings.<sup>40</sup> The proposed rule noted a survey of claimants who had their ODAR hearing conducted by video in the state of Iowa. According to the text of the proposed rule, the results of that survey showed that a large percentage of the respondents rated hearings using video teleconferencing technology as "convenient" or "very convenient," and overall service as either "good" or "very good." ODAR officials also noted that they regularly receive and review comments and feedback from claimants and attorneys representing claimants regarding their experience with ODAR video hearings.

### **B. A Case Study Of Video Hearings At BVA**

This section of the report summarizes information learned through data collected from BVA and interviews with BVA officials to examine the use of video hearings by the agency.

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<sup>39</sup> ODAR officials also noted that although the agency does not have data reports readily available comparing ALJ allowance rates, productivity, and processing time for video hearings versus in-person hearings such information could be developed provided the time and programming support.

<sup>40</sup> See Federal Old-Age, Survivors and Disability Insurance and Supplemental Security Income for the Aged, Blind, and Disabled; Scheduling Video Teleconference Hearings Before Administrative Law Judges, 68 Fed. Reg. 5210-5221 (February 3, 2003) (amending parts of 20 CFR §§ 404 and 416). Also note that the proposed rule does not identify what percentage of the respondents rated the hearings positively and that information was not available from ODAR.

This section provides a general background on the use of video by BVA, the technology used to conduct video hearings, the training provided to BVA officials, a summary of how video hearings are conducted and how the agency's use of video hearings is evaluated. The costs and benefits of BVA's use of video hearings are also briefly summarized.

### **i. General Background On Claims Heard By BVA**

BVA adjudicates appeals on behalf of the Secretary of Veterans Affairs when a claimant appeals a decision by a local Department of Veterans Affairs' ("VA") Regional Office. BVA reviews all appeals for entitlement to Veterans' benefits, including, but not limited to, claims for service connection, increased disability ratings, total disability ratings, pension, insurance benefits, educational benefits, home loan guaranties, vocational rehabilitation, dependency and indemnity compensation, and burial benefits. BVA's mission is to conduct hearings and issue timely, understandable, and quality decisions for Veterans and other appellants in compliance with the requirements of law.<sup>41</sup>

A Veteran (appellant) may elect the option of a hearing before a Veterans Law Judge ("VLJ"). BVA hearings are non-adversarial and the BVA hearing is an opportunity for the Veteran (or his representative, if any) to present his case and evidence supporting his claim for benefits. BVA hearings are scheduled upon a request by an appellant who has appealed a denial of their claim by the Regional Office. In the Fiscal Year 2010, BVA completed 49,127 decisions, and conducted 13,515 hearings.<sup>42</sup> BVA conducts its hearings in one of three ways: via VTC between the BVA Central Office and Regional Offices, at the Central Office in Washington DC, and at a VA facility by a traveling VLJ. A Veteran claimant may elect which way he wants to hold his hearing as video hearings are optional.<sup>43</sup>

### **ii. General Background On The Use Of Video Hearings At BVA**

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<sup>41</sup> Telephone interview with officials from BVA's Office of the Chief Counsel for Operations and the Chief of the Hearing Branch on February 18, 2011. A list of the interview questions and the name and job title of the individuals interviewed is Appendix "C" to this report and is on file with the Conference.

<sup>42</sup> See BVA's Chairman's Annual Reports *available at* [http://www.bva.va.gov/Chairman\\_Annual\\_Rpts.asp](http://www.bva.va.gov/Chairman_Annual_Rpts.asp).

<sup>43</sup> *Id.*

BVA has been leveraging VTC technology to conduct video hearings since 1995, which was first implemented to assist in the reduction of backlog of Veterans requesting a hearing.<sup>44</sup> BVA first began to experience an increased volume of cases and a major case backlog with the passage of the Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687 (Nov. 18, 1988), which established the U.S. Court of Veterans Appeals (now the U.S. Court of Appeals for Veterans Claims). The passage of this act increased the volume of hearings significantly from 1988 to 1994 and in turn caused an increase in processing time for a BVA decision.<sup>45</sup> The use of video hearings began to be discussed internally within BVA as early as 1991.<sup>46</sup> In 1993, former BVA Chairman Cragin discussed BVA's legislative proposal to expand the definition of "hearings" in Chapter 71 of Title 38 of the U.S.C. to include teleconferenced and video hearings.<sup>47</sup> In March of 1994, at the request of the Chairman, a Select Panel on Productivity Improvement at BVA was convened.<sup>48</sup> Among their recommendations was to seek legislation to expand the geographic locations at which video hearings may be held.<sup>49</sup> On July 1, 1994, the President signed into law the "Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994" as Pub. L. No. 103-271. This law authorized the use of electronic media to conduct hearings.

In 1995, Chairman Cragin discussed the implementation of a pilot program for video hearings and in July 1995, the VA Regional Office in St. Petersburg, Florida began using video hearings.<sup>50</sup> During Fiscal Year 1995, 41 video hearings were conducted.<sup>51</sup> Since the pilot

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<sup>44</sup> See supra note 41.

<sup>45</sup> Evidence of this increase in hearing requests was noted in former BVA Chairman Cragin's 1994 report where he noted that after the VJRA made a hearing before "a traveling section of the Board" a matter of statutory right, hearing requests had increased significantly and that six times as many Travel Board hearings were conducted in 1993 than in 1983. See BVA's Chairman's Annual Reports available at [http://www.bva.va.gov/Chairman\\_Annual\\_Rpts.asp](http://www.bva.va.gov/Chairman_Annual_Rpts.asp).

<sup>46</sup> See supra note 45.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See BVA's Chairman's Annual Reports available at [http://www.bva.va.gov/Chairman\\_Annual\\_Rpts.asp](http://www.bva.va.gov/Chairman_Annual_Rpts.asp).

<sup>51</sup> *Id.*

program was successful, BVA decided to expand the use of video hearings since the VTC equipment allowed Veterans to have their hearings sooner. During Fiscal Year 1997, VTC technology was installed in an additional 13 Regional Offices.<sup>52</sup> By 1998, the use of video hearings at BVA had expanded substantially with 1,151 video hearings held that year and with VTC technology available at 20 Regional Offices and three video hearing rooms constructed at BVA Headquarters in Washington D.C.<sup>53</sup> The use of video hearings was so successful that BVA’s effective use of VTC technology was acknowledged during Fiscal Year 1998 by the General Services Administration, which presented Achievement Awards to four Board employees for their “outstanding achievement implementing cost effective use of video teleconferencing to conduct nationwide long distance appellate hearings and training for the BVA.”<sup>54</sup> In Fiscal Year 1999, 1,282 video hearings were conducted.<sup>55</sup> Video teleconferencing technology was installed in an additional five Regional Offices and a fourth video hearing room was constructed at BVA.<sup>56</sup> By Fiscal Year 2001, VTC technology was installed at 69 VA sites, including some Veterans Health Administration clinics.<sup>57</sup>

With each Fiscal Year, the number of total hearings conducted by BVA has significantly increased.<sup>58</sup> As a result, BVA’s use of video hearings has also expanded over time and the number of video hearings conducted has increased as well, as illustrated by the table below which officials at BVA provided:

	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002
Travel Hearings	2445	4564	2469	3512	2505	3336	2556

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See supra* note 41.

<sup>55</sup> *See supra* note 42.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See supra* note 50.

Video Hearings	48	233	1151	1282	1324	1308	1475
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	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Travel Hearings	3707	4346	5220	5885	6680	7089	7784
Video Hearings	1689	2108	2618	2719	2870	2891	3375

### iii. Technology Used By BVA For Video Hearings

The VTC systems that were initially installed at BVA operated on a very costly Integrated Services Digital Network (“ISDN”) which reached the end of its life cycle in 2008.<sup>59</sup> Over the past two years, BVA has initiated a major upgrade and expansion to upgrade the VTC units and transition the network from ISDN to Internet Protocol (“IP”) at BVA, the Regional Offices, and strategic satellite sites through secure transmission.<sup>60</sup> This new upgrade provides BVA with the ability to conduct two-way conferencing between the VLJ and the claimant, and to conduct multi-site conferencing to facilitate the instance where the VLJ, the claimant, and the claimant’s representative are all at different sites.

BVA used a phased-in approach in order to ensure no interruption with conducting BVA video hearings during completion of the required upgrade. The first phase was to upgrade five hearing rooms, expand an additional three hearing rooms at BVA, and to upgrade three Regional Offices. The second phase consisted of upgrading 54 Regional Offices. The third phase consisted of expanding, and adding an additional system at three of the busiest Regional Offices, adding a system in 10 remote satellite sites, and planning five additional hearing rooms at BVA’s new building. In summary, the upgrade and expansion encompassed more than 57 locations and

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<sup>59</sup> *Id.*

<sup>60</sup> *See supra* note 41.

92 endpoints in the continental United States, Puerto Rico, Guam and the Philippines across the existing VA enterprise network via the Enterprise Video Teleconferencing Network (“EVTN”).<sup>61</sup>

According to BVA officials, this upgraded VTC system eliminated failures, improved efficiency, and expanded hearing services through the various Regional Offices. BVA officials interviewed also noted that the new system has increased BVA’s VTC capability by more than 200 percent, which will help the agency reduce the current backlog of hearing requests, and reduce the travel costs to BVA and to Veterans.<sup>62</sup> BVA officials maintain that the newly upgraded technology is reliable, and that the agency has contingency plans in place to mitigate any video technology failure as a way to ensure the continuity of its goals for the use of video at the agency.

#### **iv. A Summary Of How A BVA Video Hearing Is Conducted**

At the national level, BVA coordinates with the Veterans Benefits Administration’s Regional Offices, and authorizes the video hearing dates (docket) needed for each Fiscal year. The Regional Office hearing rooms are in different locations throughout the country, and they are responsible for notifying Veterans and representatives to report to their hearings. However, the administrative oversight and command and control are managed centrally by BVA Hearing Branch. Each Regional Office is able to schedule seven Veterans per docket and is responsible for scheduling each Veteran, and notifying them of the date, time and place of their scheduled video hearing.

At the request of BVA Chairman, the VA Secretary may provide suitable facilities and equipment to BVA or another component of VA to allow an appellant to have a video hearing.<sup>63</sup> VA’s regulations permit a Veteran to have a video hearing so long as suitable facilities and equipment are available.<sup>64</sup> Further, BVA regulations provide that video hearings “shall be conducted in the same manner as, and considered the equivalent of an in-person hearing.”<sup>65</sup> Currently, if the appellant does not wish to have a video hearing, he or she still has the right to

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See* 38 U.S.C. § 7107(e).

<sup>64</sup> *See* 38 U.S.C. § 7107(e); 38 C.F.R. § 20.700(e).

<sup>65</sup> *Id.*

have an in-person hearing at a VA facility or in Washington, DC.<sup>66</sup> Similarly, although hearings are scheduled by the Regional Offices through an administrative process, if any Veteran specifically elects to have a hearing, they must be afforded one.<sup>67</sup> According to an official at BVA, there is no statistical difference between the grant rate of claims heard in-person and those heard by video.<sup>68</sup>

A Conference staff visit to BVA Offices in March 2011 included an opportunity to observe a hearing where video teleconferencing technology and equipment were used. In the proceeding viewed, the Veteran and his representative were seated in a hearing room at a Regional Office and they used VTC to communicate directly with the VLJ in Washington, DC.<sup>69</sup> The VLJ conducted the hearing using the same procedures he would have used if the hearing was in-person and the hearing was audio-recorded but not video-taped.<sup>70</sup> The screen resolution for the monitor used by the VLJ appeared to be clear and the volume was normal. The VLJ could adjust the camera at the Veteran's location as well as the volume with a remote control and there did not appear to be any lag time on the screen when the Veteran or his representative spoke. There did not appear to be any technological issues during the time that the proceeding was held. One noted difference with the use of video hearings is that since the Veteran and the VLJ are not in the same room, if the Veteran needed to submit additional evidence, it would have to be mailed, emailed, or faxed to BVA.<sup>71</sup> However, according to BVA officials, this does not affect the outcome of a decision because the VLJ does not decide the appeal at the time of the hearing.<sup>72</sup>

#### **v. Employee Training On BVA Video Hearing Technology**

According to BVA officials, VLJs receive training on how to conduct in-person and video hearings at the same time because the two are very similar. BVA also has a training

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *See supra* note 41.

<sup>69</sup> Conference staff visited BVA's Offices to witness a video hearing before a VLJ on March 28, 2011.

<sup>70</sup> *Id.*; *see also supra* note 41.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*



program that is coordinated with the Department of Veterans Affairs' Office of Information Technology ("OIT"), which works to train the hearing coordinators and other administrative support staff on the use of video teleconferencing technology and equipment. BVA also has a Video Specialist from OIT at the Hearing Branch to assist with any video hearing technology concerns that may arise on site.

**vi. Costs And Benefits of BVA's Use Of Video Hearings**

Determining the exact costs and benefits of BVA's use of video hearings is difficult because relevant data is scarce and the exact costs and benefits can be difficult to measure. However, according to BVA officials, the cost-benefit to conduct video hearings is very similar to the cost-benefit of the use of video hearings at ODAR.<sup>73</sup> BVA spends nearly \$1,000,000 per year on travel costs for VLJs and supporting counsel to conduct in-person hearings with Veterans in the field.<sup>74</sup> By comparison, there are no travel expenses associated with conducting hearings via VTC. According to BVA officials, OIT recently completed a cost/benefit analysis and, as a result, the videoconference equipment at BVA was upgraded and expanded at a significant cost savings to the agency.<sup>75</sup> BVA officials maintain that the increased use of video conference technology also creates a time savings and that video hearings are more efficient in that they increase VLJs' ability to produce more decisions on appeal.

BVA officials also noted that even as productivity is increased with the use of video hearings, quality decision-making has not been sacrificed. Over the past five years, the difference in grants between video hearings and in-person hearings has been within one percent.<sup>76</sup> BVA officials state that the biggest benefit of BVA's use of video hearings is the increased productivity.<sup>77</sup> According to BVA officials, video hearings conserve the productivity

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<sup>73</sup> When asked, officials at BVA did not have exact figures for the cost of their current technology nor did they have specific information regarding the cost of conducting video hearings in comparison to the costs for in-person hearings.

<sup>74</sup> See supra note 41.

<sup>75</sup> This internal analysis was not available to the Conference at the time research for this report was completed and BVA has not completed any external cost/benefit analysis examining video hearings due to the costs of conducting such an analysis.

<sup>76</sup> See supra note 41.

<sup>77</sup> *Id.*

capability of BVA because VLJs do not always have to travel to conduct hearings. Accordingly, BVA is able to recapture former VLJ travel days as decision-generating workdays. Productivity is also maximized because the BVA Hearing Branch is located in BVA's building, so VLJs can return to their offices and complete other tasks when there is a gap in their docket. As a result, VLJs do not lose time due to appellants failing to appear for their hearings. BVA officials also noted that the agency has also been able to use video hearings to decrease the appeal cycle time as video hearings reduce the time Veterans currently have to wait for their hearing.<sup>78</sup> In some instances, video hearings have eliminated the need for Veterans to wait for a Travel Board hearing, which might only be held once or twice a year at each Regional Office.

Measuring the non-fiscal costs and benefits of the use of video hearings at BVA is difficult because relevant data is scarce. Officials at the agency maintain that BVA monitors the "show rate" at its hearings on a routine basis as one way of measuring the non-fiscal costs and benefits of the use of video hearings. The average video hearing show rate, (*i.e.* the rate at which Veterans actually show up to their scheduled hearing), over the past three years has been approximately 72 percent, which is similar to the average for Travel Board hearings.<sup>79</sup> According to a BVA official, these similar show rates illustrate that video hearings are a viable and effective alternative to Travel Board hearings.<sup>80</sup>

#### **vii. Evaluation Methods And Strategies Used To Evaluate Use Of Video Hearings At BVA**

An official at BVA acknowledged that at the early stages of introducing video hearings, some appellants and representatives were apprehensive about the use of new technology.<sup>81</sup> But, over time, the number of requests for video hearings has increased significantly, signifying that appellants and representatives are becoming more comfortable with using video hearings.<sup>82</sup>

To evaluate the use of hearings at the agency, BVA also takes the additional step of soliciting comments about its use of video hearings through comment cards which are provided

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *See supra* note 41.

<sup>82</sup> *Id.*

to the Regional Offices to give to Veterans after their hearings.<sup>83</sup> Veterans are free to comment on any aspect of the hearing, including the use of technology, by completing a comment card and mailing it back in a pre-paid envelope.<sup>84</sup> Although this mechanism provides some opportunity for BVA to receive feedback about the agency's use of video hearings, an official at BVA acknowledged that the agency only receives a small number of completed comment cards every year.<sup>85</sup> Based on the comment cards received, the satisfaction rate for hearings is 97 percent.

There is no formal system for soliciting feedback from BVA's VLJs. However, the agency's leadership has an open door policy and a VLJ may speak with anyone in BVA leadership about concerns regarding how video hearings are conducted and those concerns will be addressed.<sup>86</sup> Generally speaking, VLJs like conducting video hearings.<sup>87</sup> A BVA official noted that VLJs found it frustrating when the older technology used in video hearings did not function properly.<sup>88</sup> However, according to BVA officials, the technology has advanced over the years and is now considered to be "state of the art." BVA officials noted that VLJs, Veterans, and their representatives appreciate the advancement in technology and that since BVA implemented its new technological upgrade, the agency rarely experiences functionality problems with VTC.<sup>89</sup>

### **C. Information Learned From The Use Of Video Hearings At EOIR**

The Conference was unable to use EOIR as a case study in this report because the use of video hearings in the context of immigration proceedings is a complicated issue that requires further analysis. Further, EOIR officials maintain that some information from the agency was not available during the course and scope of this study in part because EOIR already has statutory authority for video hearings pursuant to Section 240(b)(2) of the Immigration and Nationality Act ("INA") and because EOIR has not conducted any recent study of video hearings

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

on its own. Accordingly, this section of the report summarizes only the information learned about video hearings at EOIR through the Conference’s limited study of the relevant information received from EOIR and interviews with EOIR officials. This section provides general background on the use of video hearings by EOIR, the technology used to conduct video hearings, the training provided to EOIR personnel, a summary of how video hearings are conducted and how the agency’s use of video hearings is evaluated. The costs and benefits of EOIR’s use of video hearings are also briefly summarized.

**i. General Background On The Types Of Hearings Conducted By EOIR**

EOIR administers the nation’s immigration court system.<sup>90</sup> EOIR primarily decides whether non-U.S. citizens (also known as “aliens”) who are charged by DHS with violating immigration law should be ordered removed from the United States and whether they should be granted relief or protection from removal and be permitted to remain in this country. Removal proceedings against an alien are initiated when the Department of Homeland Security (“DHS”) files the Notice to Appear (“NTA”) with the Immigration Court.<sup>91</sup> On the NTA, the DHS will lodge the charge of removability against the alien. Removal proceedings begin with a “master calendar” hearing, where the Immigration Judge (“IJ”) ensures the individual understands the alleged immigration law violations. The IJ also provides information on available free legal representation resources in the area and an opportunity to acquire counsel at no expense to the government. Then, generally, the IJ will schedule an “individual” hearing, where both the government and the respondent alien present the merits of the case to the Immigration Judge. The outcome of many removal proceedings depends on whether the individual is eligible for relief from removal. Immigration law provides relief from removal to individuals who meet specific criteria. In most removal proceedings, individuals admit that they are removable, but then apply for one or more forms of relief. In such cases, individuals must prove that they are eligible for some form of relief under law, such as cancellation of removal, adjustment of status, asylum, and protection under the Convention against Torture or other remedies provided by immigration law.

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<sup>90</sup> General information provided in this section of the report is from the “EOIR At A Glance” Factsheet published by the agency on December 14, 2009 and *available at* <http://www.justice.gov/eoir/press/09/EOIRataGlance121409.pdf>.

<sup>91</sup> NTAs can be issued either by U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement or U.S. Customs and Border Protection.

In addition to removal proceedings, EOIR also conducts the following types of hearings:

- Bond Redetermination Hearings – to determine whether to lower or eliminate the amount of a bond set by DHS for an individual detained by DHS. The detained individual makes a request for a bond redetermination hearing to the IJ. These hearings are generally informal and are not part of the removal proceedings.
- Rescission Hearing – to determine whether a lawful permanent resident should have his/her residency status rescinded because he/she was not entitled to it when it was granted.
- Withholding-Only Hearing – to determine whether an individual who has been ordered removed is eligible for withholding of removal under Section 241(b)(3) of the Immigration and Nationality Act or under the Convention Against Torture.
- Asylum-Only Hearing – to determine whether certain individuals who are not entitled to a removal hearing (crewmen, stowaways, Visa Waiver Pilot Program beneficiaries, and certain aliens removable on security grounds) but claim a well-founded fear of persecution in their home country are eligible for asylum.
- Credible Fear Review – to determine whether an individual in expedited removal has a credible fear of persecution or torture.
- Reasonable Fear Review – to determine whether an individual in expedited removal, who has been previously removed from the United States, has a reasonable fear of persecution or torture.
- Claimed Status Review – to determine whether an individual in expedited removal has a valid claim to U.S. citizenship, lawful permanent residency, refugee or asylum status, when the individual claims under oath to have such status.
- In Absentia Hearing – to determine whether an individual who does not appear for a scheduled hearing may be ordered removed in his/her absence. The IJ will order an individual removed in absentia if DHS establishes by clear, unequivocal and convincing evidence that the individual is removable, and that DHS served the individual with a written notice to appear for the hearing that included information on the consequences of being absent for a hearing.

## **ii. General Background On The Use Of Video Hearings At EOIR**

Use of video teleconferencing technology at EOIR began to increase after the 1996 amendments to the INA, which explicitly authorized the use of video teleconferencing in removal proceedings.<sup>92</sup> However, prior to the 1996 amendments, EOIR, in collaboration with what was then Immigration and Naturalization Services (“INS”), conducted a test of video teleconferencing technology for a pilot project with the Federal Bureau of Prisons in Lexington, Kentucky in December 1993.<sup>93</sup> The pilot project was assessed by EOIR in 1994 and after internal discussion within the agency; the agency issued a proposed rule regarding using VTC technology to conduct hearings at EOIR.<sup>94</sup> After receiving comments from practitioners, judges and the general public, a final rule governing the use of VTC was adopted in 1995 and EOIR immigration courts began using video teleconferencing for hearings on a pilot basis that year.<sup>95</sup>

The use of VTC technology was initially piloted in three locations that conducted hearings of respondents who were being held in a DHS detention facility and previously had to travel to a hearing location to appear before an IJ. The goal of using VTC was to advance EOIR’s mission to conduct immigration hearings efficiently and fairly.<sup>96</sup> Initially, video hearings were only used for master calendar hearings, which are the first opportunity for individuals to be heard on immigration-related charges and for individuals held at detention facilities. However, as VTC technology improved and IJs gained experience with the video teleconferencing equipment, the use of VTC was expanded to cover individual hearings and certain non-detained immigration proceedings as well. Per the agency’s regulations, all types of EOIR proceedings may be heard by VTC, the scheduling of hearings by video is done by EOIR, and hearings by video are mandatory if scheduled by the agency.<sup>97</sup>

EOIR conducts removal proceedings, including master calendar (pleadings, issue identification, and scheduling) and individual hearings through VTC. EOIR also conducts bond

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<sup>92</sup> See 8.U.S.C. § 1129a(b)(2)(A)(iii).

<sup>93</sup> Interview with officials from EOIR on February 14, 2011 at EOIR Headquarters in Falls Church, Virginia. A list of the interview questions and the name and job title of the individuals interviewed is Appendix “D” to this report and is on file with the Conference.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See 8 C.F.R. § 1003.25(c)(2004).

hearings for detained aliens using VTC. EOIR uses VTC to project the judge into multiple remote detention facilities at the same time with split screens at the projector in the court for master calendar hearings. While one detainee is involved in a hearing at one location, facilities staff at another location can escort detainees into another location so that little time is lost in waiting for detainees to be escorted into a room. According to EOIR officials, the ability to do this increases efficiency and cuts down on travel time and costs. The strategy for scheduling and coordinating video hearings is primarily conducted by the Office of the Chief Immigration Judge and the court administrators of EOIR's 59 immigration courts, in consultation with various other components within the agency. As of 2009, VTC technology was available at 40 immigration courts across the country, 77 other facilities (including DHS detention facilities) and at EOIR Headquarters in Falls Church, Virginia, which is a full-time video court that began operation in July 2004.<sup>98</sup> Today, VTC is available or being installed in all 59 of EOIR's immigration courts. The VTC court located at the EOIR Headquarters has three judges permanently assigned and is generally solely engaged in VTC hearings. However, most other immigration courts around the country conduct primarily in-person hearings and use VTC only as a necessary supplement for conducting hearings at more than 100 active remote hearing locations.

### **iii. Technology Used By EOIR For Video Hearings**

Although there are several VTC vendors in the marketplace, EOIR selected the VTC units it uses based on its requirements and needs, including size, audio & video quality, initial purchase cost, long-term maintenance cost, and vendor support.<sup>99</sup> Most of the video hearings conducted by EOIR are conducted through two-way video teleconferencing units which consist of two VTC machines, two installed and dedicated ISDN lines, 2 NTI ACE3 ISDN Interfaces, and two high resolution 32-inch color monitors with S-Video and two monitor carts.<sup>100</sup>

The technology used by EOIR is installed by government contractors and troubleshooting of any technological problems is generally handled by court staff and/or a DHS Administrator assigned to assist the court. In addition, if a minor or common technological issue arises, officials located at the DHS detention center are trained to address it (if the issue is with a VTC

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<sup>98</sup> *Id.*

<sup>99</sup> *See also supra* note 93.

<sup>100</sup> *See also supra* note 93.

unit at a detention facility).<sup>101</sup> For advanced troubleshooting, EOIR has IT consultants available on call or to come visit the facility.<sup>102</sup>

A Conference staff visit to the EOIR's Immigration Court in Arlington Virginia in February 2011 included an opportunity to examine the advanced technology used by EOIR.<sup>103</sup> Based on this visit, Conference staff was able to observe a removal proceeding where video teleconferencing technology and equipment was used. In the proceeding viewed, the IJ was in a courtroom in Arlington, Virginia with a monitor directly in front of him where he could see the respondent, who was at a DHS detention facility during the hearing. The screen resolution appeared to be clear and the volume was normal. The IJ could adjust the camera at the respondent's location as well as the volume with a remote control. There appeared to be a short (approximately one to three seconds) lag time on the screen when the respondent spoke.<sup>104</sup> However, it appeared the respondent could see and hear the IJ as well as his interpreter, who was sitting in the courtroom to the right of the IJ.

#### **iv. A Summary Of How An EOIR Video Hearing Is Conducted**

A Conference staff visit to the EOIR's Immigration Court in Arlington, Virginia in February 2011 included an opportunity to examine an EOIR hearing.<sup>105</sup> During that visit, Conference staff was able to observe a removal proceeding where video teleconferencing was used. When the proceeding began, the IJ was at his bench and the interpreter was seated to the right of the judge at the table designated for respondent's counsel. The respondent did not have counsel and was appearing pro se. Counsel for the government was present and seated at the table to the left of the IJ. To the right of the IJ, and to the left of both the government's counsel and the interpreter was a monitor which projected the detained respondent's face. The IJ began the proceedings and conducted them in line with how removal proceedings are conducted in-

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Conference staff visited the EOIR Arlington Immigration Court for a tour of the office and its video hearing equipment and to witness a video hearing before an EOIR Immigration Judge on February 16, 2011.

<sup>104</sup> An EOIR official who regularly conducts hearings noted that proceedings often occur without any lag time and that in his experience, when there is a lag time, it has not lasted up to three seconds. The official also noted that lag times can exist from time to time but they vary depending on the proceeding held and the VTC equipment used.

<sup>105</sup> *Id.*



person. Conference staff observed that only the face of the detained respondent could be seen in the courtroom and he appeared to be looking straight ahead at the interpreter when he responded to the IJ's questions regarding the removal proceeding. The interpreter looked at the respondent on the monitor when listening and to the judge when interpreting the respondent's words to the IJ. The IJ initially appeared intent on determining whether the respondent would be removed but after some questioning, the IJ ultimately decided to continue the respondent's case until October 2011. Overall, during observation by Conference staff, the video hearing equipment appeared to work well and there were no technological issues during the hour long hearing.

#### **v. Employee Training On EOIR Video Hearing Technology**

According to an EOIR official, when EOIR first began to use video teleconferencing, training of IJs on the use of the technology was done on a relatively ad hoc and informal basis through the Office of the Chief Immigration Judge.<sup>106</sup> Similarly, the Office of the Chief Clerk at EOIR Headquarters facilitated the training of court administrators and administrative staff on an informal basis.<sup>107</sup> According to an EOIR official, the training on video hearings and the use of VTC technology has improved substantially over the years.<sup>108</sup> Now, each new Immigration Judge receives a brief training in the use of video teleconferencing equipment as a matter of course during their five-week training program.<sup>109</sup> This training includes written documents about the history of the use of video hearings at EOIR, the statutory and regulatory authority for the use of video teleconferencing technology, the policy and procedure for the use of video hearings, the advantages and disadvantages of the use of video, how to use video hearing equipment and how to conduct a hearing by video.<sup>110</sup> IJs also have an opportunity to view various video hearings during their training program and can ask other IJs who conduct video

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<sup>106</sup> See supra note 93.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

hearings questions about the process.<sup>111</sup> Similarly, court staff is also formally trained on their role and how to assist in handling the video equipment.<sup>112</sup>

#### **vi. Costs And Benefits Of EOIR's Use Of Video Hearings**

EOIR officials maintain that it is difficult to estimate the exact costs and benefits of the use of video hearings by the agency. However, one EOIR official noted that the greatest benefit of the use of video hearings is that they assist the agency in achieving its goal of adjudicating cases in a timely and efficient manner while also ensuring due process and fair treatment for all parties.<sup>113</sup> EOIR officials maintain that ensuring fair and timely hearings is especially important given EOIR's performance goals for 2010 and 2011. On July 14, 2010, the Office of the Chief Immigration Judge issued an internal memorandum stating that one of the Department of Justice's Office of the Attorney General's high priority performance goals for EOIR is to have 85 percent of the agency's immigration cases where respondents are detained completed within 60 days of the initial case filing.

In line with the agency's goal, an EOIR official noted that the use of VTC technology to hold hearings is a force multiplier that is a tool of efficient caseload management used by the agency as a way to respond flexibly and efficiently to the demands of its high caseload.<sup>114</sup> When asked, one EOIR official noted that VTC technology has significant advantages over in-person hearings such as convenience, safety, flexibility in scheduling hearings and increasing efficiency in administration by, in effect, projecting Immigration Judges into various DHS detention facilities where respondents scheduled to appear before an IJ on immigration related charges are being held.<sup>115</sup>

According to EOIR officials, the use of video hearings also has cost-savings value for the agency. A memorandum by EOIR's Office of the Controller states that the estimated Fiscal Year 2010 costs-savings value of video hearings is \$2,342,382.<sup>116</sup> The memorandum stated that the "Cost Methodology Savings Description" for this figure is a savings offset, calculated by

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *See supra* note 93.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> A copy of the memorandum is Appendix "E" to this report and is on file with the Conference.

estimating the amount it would have cost in detail travel if the IJs and court staff were not able to handle hearings via VTC.<sup>117</sup> The memorandum does not provide further detail about what factors were used to arrive at the cost-savings figure provided.

As noted in EOIR's calculation of cost-savings, the use of video teleconferencing technology has significantly reduced travel by EOIR personnel. VTC has allowed EOIR to conduct hearings in remote locations and in multiple locations on the same day or week, without having to move the respondent and without moving the judge. This has made EOIR's courts more flexible and timely in addressing remote caseloads, has increased productivity by saving travel time for judges and support staff, and has allowed a reduction in the level of security measures necessary to conduct the hearings.<sup>118</sup> One EOIR official interviewed noted that during times of budget shortfall or understaffing, the use of the VTC equipment has been critical in allowing the agency's courts to administer justice in remote locations in ways that would not have been possible prior to the use of VTC technology.

Other benefits of EOIR's use of video hearings include the fact that the use of VTC in detention locations saves DHS money by reducing detainee movement, which also enhances security.<sup>119</sup> VTC also allows immigration courts to quickly cover dockets in other courts, detention centers and detail locations as needs arise and in a court where there is only one IJ, VTC makes it easier to schedule personnel leave while still holding hearings on that judge's docket or in that location. Accordingly, VTC aids EOIR in accomplishing its goal of effective case management and timely hearing processing.<sup>120</sup>

The costs of EOIR's use of video hearings includes both the fiscal cost of the equipment and the non-fiscal costs associated with conducting video hearings instead of in-person hearings. With respect to fiscal costs, EOIR was able to provide some cost estimates for the purchase and maintenance costs for each VTC unit. Accordingly, EOIR officials provided the following cost estimate for informational purposes only. In Fiscal Year 2010, EOIR purchased 57 VTC units at

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<sup>117</sup> *Id.*

<sup>118</sup> *See supra* note 93.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

approximately \$22,500 each (totaling \$1,282,500 in FY 2010).<sup>121</sup> EOIR officials also noted that there are also other cost considerations with respect to the use of video hearings, such as annual maintenance costs and communications costs. EOIR estimates that for each VTC unit, it pays \$846 in a one-time VTC unit installation cost, \$2,160 per year in communication costs associated with the cost of the ISDN lines needed to use VTC and maintenance costs of approximately \$1,866 annually. Accordingly, to operate and maintain each VTC unit, EOIR pays approximately \$4,800 in the first year and \$3,950 annually in subsequent years.<sup>122</sup>

EOIR has also recognized that there are certain non-fiscal costs associated with the use of video hearings which have been identified by attorneys, academics and even the federal courts.<sup>123</sup> Specifically, the American Bar Association's Commission on Immigration issued a report in 2010 entitled "Reforming the Immigration System," which specifically noted the non-fiscal costs of video hearings.<sup>124</sup> The report notes that problems with video conferencing include many complaints lodged by attorneys who have noted that translators are often in a separate location, worsening the difficulty and accuracy of translating for detainees who do not speak English; that poor equipment and sound quality exacerbate the problem of hearing respondents who do not speak English; and that it is harder to use, present and address evidence in a video hearing. Moreover, the report notes that the lack of nonverbal communication, specifically the inability to use and closely observe body language makes it difficult for the parties to truly understand one another. The report also notes that practicing immigration law attorneys have stated that video hearings make it more difficult to establish credibility and connect emotionally with the judge, thereby making it more difficult for respondents to argue their cases.<sup>125</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See American Bar Association's Commission on Immigration Report entitled "*Reforming the Immigration System*" (2010), pp. 2-26-2-27.

<sup>125</sup> Conference staff also contacted the American Immigration Lawyers Association to obtain the organization's perspective on the use of video hearings by EOIR but phone calls to the Association's headquarters were unreturned at the time research for this report was completed.

The impact that the use of video hearings has on credibility (particularly demeanor credibility) assessment of a respondent by an IJ has also been specifically noted in federal court decisions. In *Rusu v. INS*, 296 F.3d 316 (4th Cir. 2002), the Fourth Circuit expressed concerns that video may negatively impact the IJ's ability to make credibility determinations and assess demeanor. In that same case, the Fourth Circuit also expressed concerns regarding a respondent's access to counsel when a hearing is conducted by video. Specifically, the opinion states that "[b]ecause video conferencing permits the petitioner to be in one location and an IJ in another, its use results in a 'Catch 22' situation for the petitioner's lawyer. While he can be present with his client; thereby able to confer privately and personally assist in the presentation of the client's testimony; he cannot, in such a circumstance, interact as effectively with the IJ or his opposing counsel. Alternately, if he decides to be with the IJ, he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option." Ultimately, the court held that the use of video did not violate the respondent's due process rights and that video hearings used by EOIR did provide "a meaningful opportunity to be heard" under the standard set forth by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

When interviewed, EOIR officials noted that since the *Rusu* decision, the agency has invested in significant technological improvements to try to improve the use of video hearings. Moreover, while EOIR officials recognize that critics are of the opinion that the use of video impairs a decision-maker's ability to judge a respondent's credibility, they maintain that the only type of credibility that could possibly be impacted by the use of video would be the ability to judge demeanor credibility. To this point, EOIR officials note that the agency's IJs are told that judging credibility by demeanor (whether at a video hearing or an in-person one) is the agency's least preferred method and that it should not be used when other methods of judging credibility are available to an IJ. EOIR officials also noted that in a recent case from the Seventh Circuit, the court did not find that the use of VTC violated a respondent's constitutional rights. In *Raphael v. Mukasey*, 533 F.3d 521 (7th Cir. 2008), the court examined the use of VTC where a respondent claimed her rights were violated since she was unable to examine a document that was in issue in her case because the hearing was by VTC and the document was located at the judge's chambers. In *Raphael*, the court determined that while the use of VTC itself did not violate the respondent's rights, the respondent's right to examine evidence was violated. The

court noted that the IJ who heard the respondent's case could have continued the hearing to allow the respondent an opportunity to receive and view the document or could have faxed the document to the respondent's location.

EOIR officials interviewed said that they are aware of the non-fiscal costs of video hearings and are doing everything they can to minimize such costs while also realizing the benefits of the use of video.<sup>126</sup> When asked to identify things the agency is doing to minimize non-fiscal costs, officials at EOIR cited the agency's internal policies and guidance on encouraging and facilitating pro bono representation of respondents who appear before immigration courts. EOIR officials stated that the agency recognized external studies which showed that respondents with representation have hearing outcomes more favorable to them than those without representation and stated that their efforts are aimed at increasing representation in video hearings and more generally in immigration court proceedings.<sup>127</sup> Accordingly, EOIR particularly noted a March 10, 2008 memorandum from the agency's Office of the Chief Immigration Judge to all immigration courts and IJs which specifically notes that with respect to video hearings "judges should be mindful of the difficulties and burdens facing pro bono representatives. Accordingly, judges should be flexible when a pro bono representative seeks to appear telephonically or through video conferencing [and] [w]here EOIR video conferencing is available in conjunction with a scheduled hearing and the request to use the equipment is reasonable, courts may allow [pro bono] representatives to use EOIR video conferencing equipment to communicate briefly with respondents."<sup>128</sup>

#### **vii. Evaluation Methods And Strategies Used To Evaluate Use Of Video Hearings At EOIR**

EOIR officials maintain that the agency regularly evaluates the cost-effectiveness of the use of VTC as compared to in-person hearings, which often require IJs to conduct extensive travel.<sup>129</sup> EOIR's Office of the Controller regularly reviews the cost-savings value of the use of

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<sup>126</sup> See supra note 93.

<sup>127</sup> See supra note 124.

<sup>128</sup> See EOIR Memorandum entitled "Operating Policies and Procedures Memorandum 08-01: Guidelines for Facilitating Pro Bono Legal Services," dated March 10, 2008, available at <http://www.justice.gov/eoir/efoia/ocij/oppm08/08-01.pdf>

<sup>129</sup> *Id.*

video hearings and issues an internal memorandum detailing its findings.<sup>130</sup> EOIR maintains that it also internally monitors the effectiveness of the VTC technology it uses and its need for maintenance and connectivity issues.<sup>131</sup> EOIR is also currently conducting an internal review on the use of VTC technology at one of its Texas courts and the results of that review are currently pending.<sup>132</sup> As a part of its evaluation process, EOIR also regularly considers the many letters, comments, and studies that it receives expressing government and private counsel perspectives about the use of video hearings. In addition, the Office of the Chief Immigration Judge makes it a point to ensure that the needs of respondents (such as detainees) and their attorneys in individual cases have been accommodated by IJs.<sup>133</sup> An EOIR official noted that sometimes VTC arrangements are actually requested by respondents' attorneys for their convenience in avoiding frequent travel to distant locations.

However, when interviewed about evaluation processes at the agency, an EOIR official noted that the agency does not keep or analyze evaluative data regarding outcomes of video hearings verses in-person hearings.<sup>134</sup> This may be problematic given that an external study analyzing 500,000 EOIR decisions concluded that there are differences in outcomes in certain types of immigration cases.<sup>135</sup> Indeed, the study opined that the use of video teleconferencing nearly doubles the likelihood that an asylum applicant will be denied asylum.<sup>136</sup> The study notes that the difference in denial rates where video teleconferencing is used is still significant even if controlled for the higher incidence of unrepresented aliens seeking asylum through the use of video hearing since data shows alien respondents who do not have representation are denied asylum applications more often regardless of what type of hearing they have. However, it is likely that other factors not considered in the study contribute to the disparity between asylum

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<sup>130</sup> See supra note 116.

<sup>131</sup> See supra note 93.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See 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, 271 (2008).

<sup>136</sup> See *id.*

denial rates for video hearings and the rates for in-person hearings. For example, EOIR's strategy to assign more cases involving respondents held at DHS detention centers to video hearings as a way to save travel costs and minimize security risks may skew the denial rate because some cases where respondents are detained are cases involving facts often weighing against the granting of an asylum application and factors which disqualify the respondent from eligibility for asylum such as a conviction for a particularly serious crime.

As a part of its evaluation process, EOIR has also sought the opinions of its IJs who have adapted to the use of video hearings over time. EOIR first provided IJs an opportunity to comment on the proposed rule governing the use of VTC in 1994. One EOIR official interviewed acknowledged that there was some resistance by a small minority of judges during the initial roll-out of use of video hearings. However, the official noted that most IJs have since recognized the advantages of being able to conduct multiple hearings in multiple locations on the same day, or week-long details to remote sites, without leaving their courtroom.<sup>137</sup> Further, the use of video teleconferencing has since been expressly authorized as statutorily equivalent to in-person hearings (as set forth in Section 240(b)(2)(A)(3) of the INA). Currently, although there is no formal evaluation process for IJs to voice their concerns about the use of video hearings, an EOIR official stated that the agency facilitates concerns as they arise.<sup>138</sup> According to that EOIR official, channels of communication concerning VTC equipment occur through comments to supervisors which are moved up the supervisory chain.<sup>139</sup> In addition, IJs may directly bring their concerns to the court administrator or to the Assistant Chief Immigration Judge who is their immediate supervisor.

### **III. Part Two : Recommendations Regarding The Possibility Of Expansion Of The Use Of Video Hearings By Federal Agencies**

#### **A. Federal Agencies With High Volume Caseloads Who Should Consider The Use Of Video Hearings**

The focus of part one of this report was to study the use of video hearings by ODAR and BVA with the goal of making recommendations for the possibility of expanding the use of video

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<sup>137</sup> See supra note 93.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*



hearings by other federal agencies. In order to make such recommendations, agencies with high volume caseloads that currently do not use video hearings regularly must be identified. Such agencies are focused on in the second part of this report because they are more likely to have the budget to invest in video conferencing technology and because the model use for video hearings as examined in the first part of this report is by agencies with high volume caseloads. Accordingly, while it is noted that there may be benefits to the use of video hearings by federal agencies generally, the agencies with high volume caseloads may best be able to utilize the best practices advice set forth in Section III.C of this report.

Accordingly, the following agencies are identified as agencies with high volume caseloads that do not currently use video hearings as a regular practice in their adjudicatory proceedings and may benefit from implementing the use of video hearings on a regular basis:<sup>140</sup>

- The U.S. Department of Agriculture's National Appeals Division<sup>141</sup>
- The U.S. Department of Defense's Armed Services Board of Contract Appeals Decisions<sup>142</sup>
- The U.S. Department of Defense's Office of Hearings & Appeals<sup>143</sup>

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<sup>140</sup> The agencies listed above are merely provided as examples and it is important to note that this list is not intended to be exhaustive. Accordingly, each agency (including ones not listed) should conduct a reasonable analysis to determine whether video hearings would be beneficial to that agency as a way to reduce costs and/or increase efficiency.

<sup>141</sup> The NAD is responsible for all administrative appeals arising from program activities of assigned Agencies, as well as such other administrative appeals arising from decisions of Agencies of USDA designated by the Secretary. NAD appeals involve program decisions of the Farm Service Agency, Risk Management Agency, Natural Resources Conservation Service, Rural Business-Cooperative Development Service, Rural Housing Service, and the Rural Utilities Service. See NAD website *available at* [http://www.nad.usda.gov/about\\_nad.html](http://www.nad.usda.gov/about_nad.html).

<sup>142</sup> The ASBCA is a neutral, independent forum whose primary function is to hear and decide post-award contract disputes between government contractors and the Department of Defense; the National Aeronautics and Space Administration; and the Central Intelligence Agency. See ASBCA website *available at* <http://www.asbca.mil>.

<sup>143</sup> DOHA is the largest component of the Defense Legal Services Agency. It provides hearings and issues decisions in personnel security clearance cases for contractor personnel doing classified work for all DOD components and 20 other Federal Agencies and Departments; conducts personal appearances and issues decisions in security clearance cases for DOD civilian employees and military personnel; settles claims for uniformed service pay and allowances, and claims of transportation carriers for amounts deducted from them for loss or damage; conducts hearings and issues decisions in cases involving claims for DOD School Activity benefits, and TRICARE/CHAMPUS payment for medical services; and functions as a central clearing house for DOD alternative dispute resolution activities and as a source of third party neutrals for such activities. See DOHA website *available at* <http://www.dod.gov/dodgc/doha/>.

- The National Labor Relations Board<sup>144</sup>
- The U.S. Equal Employment Opportunity Commission<sup>145</sup>
- The U.S. Department of Interior's Office of Hearings & Appeals<sup>146</sup>
- The U.S. Department of Labor's Office of Administrative Law Judges<sup>147</sup>
- The U.S. Occupational Safety and Health Review Commission<sup>148</sup>

**B. Criteria Federal Agencies Should Consider When Determining Whether To Use Video Hearings**

Having conducted the case studies of ODAR and BVA that are focused upon in this report and having identified those agencies with high volume caseloads that may potentially benefit from the use of video hearings, this section of the report recognizes that there are certain criteria agencies should consider before determining whether they should use video hearings.

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<sup>144</sup> The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions. The NLRB also conducts administrative hearings as when complaints of Unfair Labor Practices issued by regional directors do not lead to settlement, they typically result in a hearing before an NLRB Administrative Law Judge. *See* NLRB website *available at* <http://www.nlr.gov/>.

<sup>145</sup> The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. Where a charge of discrimination is made against a federal employer (*i.e.* federal agencies), a request for a hearing before an EEOC Administrative Judge may be made through the EEOC's federal sector hearing process. *See* EEOC website *available at* <http://www.eeoc.gov/>.

<sup>146</sup> The OHA exercises the delegated authority of the Secretary of the Interior to conduct hearings and decide appeals from decisions of the bureaus and offices of the Department of the Interior. OHA provides an impartial forum for parties who are affected by the decisions of the Department's bureaus and offices to obtain independent review of those decisions. OHA also handles the probating of Indian trust estates, ensuring that individual Indian interests in allotted lands, their proceeds, and other trust assets are conveyed to the decedents' rightful heirs and beneficiaries. *See* OHA website *available at* <http://www.o.ha.doi.gov/>.

<sup>147</sup> Administrative law judges from the United States Department of Labor's Office of Administrative Law Judges preside over formal hearings concerning many labor-related matters. The office's mission is to render fair and equitable decisions under the governing law and the facts of each case. Hearings concerning black lung benefits and longshore workers' compensation constitute the largest part of the office's work. The Department's administrative law judges, however, also hear and decide cases arising from over 80 labor-related statutes and regulations, including, civil rights, whistleblower complaints, minimum wage disputes and alien labor certifications. *See* DOL OALJ website *available at* <http://www.oalj.dol.gov/>.

<sup>148</sup> OSHRC is an independent Federal agency created to decide contests of citations or penalties resulting from Occupational Safety and Health Act inspections of American work places. The Review Commission, therefore, functions as an administrative court, with established procedures for conducting hearings, receiving evidence and rendering decisions by its ALJs. *See* OSHRC website *available at* <http://www.oshrc.gov/>.

The use of video hearings is not ideal for every agency and every agency should conduct its own in-depth analysis of the costs and benefits of video hearings to determine whether video hearings would be beneficial to the agency by increasing efficiency and/or reducing costs. However, based on the information learned through the case studies of ODAR and BVA and the other research conducted for part one of this report, the following criteria are offered as factors an agency should consider when determining whether to use video hearings:

- Whether the agency's use of video teleconferencing technology is legally permissible under its organic legislation and other laws;
- Whether the nature and type of administrative hearings and other adjudicatory proceedings conducted by the agency are conducive to the use of video teleconferencing technology;
- Whether video teleconferencing technology can be used without having negatively affecting the outcome of cases heard by the agency;
- Whether the agency's budget would allow for investment in the most appropriate and most secure technology needed given the costs of video teleconferencing technology;
- Whether the use of video teleconferencing technology would create fiscal cost savings, such as the savings associated with reductions in the amount of personnel travel, non-fiscal cost savings, such as the savings associated with increased productivity resulting from reductions in personnel time spent on travel, and other benefits such as the reduction in the amount of wait time for an administrative hearing;
- Whether users of video teleconferencing technology, such as administrative law judges, hearing officers and other court staff, parties, witnesses and attorneys (or other party representatives), would find the use of such technology beneficial;
- Whether the agency's facilities and administration, both national and regional (if applicable), can be equipped to handle the technology and administration required for use of video teleconferencing technology;
- Whether the use of video teleconferencing technology would adversely impact the representation of a party at an administrative hearing or other adjudicatory proceeding and/or the communication between the various individuals present at a

hearing or proceeding (including parties, witnesses, judges, hearing officers and other agency staff, translators and attorneys (or other party representatives)).

### **C. Best Practices For Federal Agencies Considering The Use of Video Hearings**

Officials at ODAR and BVA were asked to give best practices advice to agencies considering the use of video hearings. Officials at ODAR and BVA provided a range of advice which covered both the technical and logistical aspects of using video hearings. Much of their best practices advice overlapped so the advice provided is summarized below and repetition of similar advice is omitted. The best practices advice below is intended to be general guidance to other agencies based on the experience and knowledge of officials at agencies who have gone through the process of using video hearings. Any agency reviewing this advice should utilize it only after it has done a thorough analysis of the costs and benefits of using video hearings and determined that video hearings would be beneficial to the agency. Accordingly, agencies with high volume case loads who decide to use video teleconferencing technology to conduct hearings should consider the following best practices advice:

- Agencies should consider using video teleconferencing technology on a voluntary basis and allowing a party to have an in-person hearing or proceeding if the party chooses to do so;
- Agencies should periodically evaluate the use of video teleconferencing technology to make sure that the use is outcome-neutral (*i.e.* does not affect the decision rendered) and that the use is meeting the needs of its users;
- Agencies should solicit feedback and comments (possibly through the notice-and-comment rulemaking process) about the use of video teleconferencing technology from those who would use it regularly (e.g. administrative law judges, hearing officers and other administrative staff, parties, witnesses and attorneys (or other party representatives));
- Agencies should thoroughly investigate which types of video teleconferencing technology would be most appropriate for case management needs and invest in the most adequate, secure, and up-to-date technology;
- Agencies should begin with a pilot program which uses the video teleconferencing technology on a smaller scale within the agency and then evaluate the pilot program before moving to wider use;

- Agencies should have structured training at the outset of implementation of the use of video teleconferencing technology and should have technical support available for troubleshooting and implementation questions;
- Agencies should consult the staff of the Administrative Conference of the United States and/or officials at other agencies that have used video teleconferencing technology for best practices, guidance, advice, and the possibilities for shared resources and collaboration.

#### ***IV. Conclusion***

Through the Conference's in-house research project detailed in the report, the Conference set out to examine both the current use of video hearings by federal agencies and the possibilities for the expansion of the use of video hearings. As detailed in part one of the report, the Conference was able to examine the current use of video hearings through focused case studies of the use of video hearings at ODAR, EOIR and BVA. Moreover, as detailed in part two of the report, the Conference was able to examine possibilities for expansion of the use of video hearings by taking the information learned through the course of conducting research for this project and using it to formulate appropriate recommendations. It is the Conference's hope that agencies will find the report useful.