



Policy Brief: Use of Virtual Hearings in Removal Proceedings*
May 3, 2022

Contents

I. Introduction and Executive Summary 1
II. Current Problems with EOIR’s VTC Hearings 3
 (a) Convenience is Often Prioritized Over Respondent Rights 3
 (b) Failure to Distinguish Between Merits Hearings and Master Calendars 4
 (c) Need for Caution in Making Credibility Determinations Based on VTC Hearings 5
 (d) Flawed Approach to VTC Hearings Hurts Detained and Pro Se Respondents 6
 (e) Inconsistent Policies Varying by IJ Lead to Confusion and Disparate Treatment 7
 (f) Interpretation Challenges Often Negatively Impact VTC Hearings 8
III. Social Security Hearings: Comparison 9
IV. Recommendations 11

I. Introduction and Executive Summary

Immigration attorneys face a myriad of serious challenges to representing their clients in removal proceedings. Attorneys navigate language barriers and can struggle to obtain necessary evidence, especially when relevant events take place abroad. Statutory deadlines, long backlogs, cultural differences, and the need for conversations on sensitive topics also frequently make representation more difficult. The two-year-long pandemic has exacerbated such regular obstacles and imposes another major concern for counsel and respondents alike: the Executive Office for Immigration Review’s (EOIR) large-scale expansion of mandatory video teleconferencing (VTC). VTC has recently become prevalent in immigration proceedings,

* Contact Kate Voigt, Senior Associate Director of Government Relations, American Immigration Lawyers Association, kvoigt@aila.org, or Jorge Loweree, Director of Policy, American Immigration Council, jloweree@immcouncil.org.

though EOIR has employed VTC, to a lesser extent, for more than 25 years.¹ However, EOIR must meet this surge of VTC with necessary planning and evaluation.

Before the pandemic, EOIR was already moving with concerning speed toward the widespread use of VTC hearings. The agency even deployed virtual hearings in early 2020 for children's cases, despite concerns from stakeholders. According to the American Bar Association, "[t]he risk of misunderstanding and confusion during hearings conducted by VTC is very high for children, who may not understand that an immigration judge (IJ) who appears on a television screen is presiding over the child's hearing."² For adults as well, misunderstanding and confusion are often real, traumatic, and can only be properly mitigated using a respondent-centered approach. The American Immigration Lawyers Association (AILA) and the American Immigration Council (Council) believe that the ultimate decision whether to proceed virtually should be made by respondents because it is their rights and futures at stake.

While remote hearings to implement pandemic public-health restrictions are necessary,³ EOIR has expanded VTC well beyond emergency use.⁴ Guardrails to ensure due process through consistent and fair policies are missing, in part because AILA members and other stakeholders have not been adequately consulted in its expansion or even had an opportunity to voice concerns. As one AILA member with over 30 years' experience explained, "I understand WebEx is a necessity in the time of COVID, but it will never be a replacement for a real courtroom setting. The clues humans use to communicate become muted and/or nonexistent." Along with a formalized permanent system to elicit participant feedback and ensure quality control, EOIR should set metrics and collect, assess, and publish data to measure VTC's impacts.

AILA and the Council present this policy brief with recommendations to spur change and optimize VTC use in immigration proceedings. We are guided by the core principle that fairness to respondents and ensuring their due process rights should be the immigration courts' primary and irrevocable commitment. We believe the policy recommendations below are necessary for successful VTC hearings, which have clear logistical advantages when properly employed—

¹ See generally Admin. Conf. of the U.S., *Memorandum on the History of Agency Video Teleconferencing Adjudications* (Nov. 26, 2014),

https://www.acus.gov/sites/default/files/documents/VTC%20Hearing%20History_FINAL.pdf.

² American Bar Association, "Comments on EOIR Operating Policies and Procedures Memoranda and Policy Memoranda." (May 20, 2021), 12,

https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-comments-on-eoir-policy-memos-5-20-21.pdf.

³ Fredric I. Lederer & the Ctr. of Legal & Ct. Tech., *Analysis of Administrative Agency Adjudicatory Hearing Use of Remote Appearances and Virtual Hearings 3-4*, Report to the Admin. Conf. of the U.S., (June 3, 2021) <https://www.acus.gov/report/virtual-hearings-agency-adjudication-final-report>.

⁴ See James R. McHenry III, Director, PM 21-03, *Immigration Court Hearings Conducted by Telephone and Video Teleconferencing* (Nov. 6, 2020), <https://www.justice.gov/eoir/eoir-policy-manual/OOD2103/download>.

conveniences and cost savings that many attorneys and clients prefer. In the words of an AILA member, if EOIR makes the right policy choices, WebEx can be “a blessing for those of us so far removed from the court with jurisdiction over the cases.” Otherwise, and all too frequently in current conditions, flawed hearings can have a negative impact on respondents, create complications for all parties, and reduce confidence in the adjudication system as a whole.

This policy brief describes the most challenging problems with the use of VTC and draws upon detailed feedback offered by practitioners in several jurisdictions nationwide. Next, the brief examines how the Social Security Administration approaches VTC and draws lessons from that agency’s safeguards. The brief concludes with recommendations for needed agency standards and guidance and suggests that EOIR inaugurate two pilots to assess opt-out and opt-in approaches that center respondents’ autonomy and informed decision-making. These core principles are already reflected in the INA’s approach to telephonic hearings.⁵

It is important to note that this policy brief focuses on challenges and recommendations related to the use of virtual hearings generally. We are not explicitly covering exigent policies that may be used or considered during the COVID pandemic, for example. However, the principles described here can and should be used to guide how decision-making should be approached during public-health and other emergencies. At a minimum, EOIR should be clear with both stakeholders and judges about which virtual hearing policies are in place because of public-health concerns, continually seek input to transparently reevaluate them on a regular basis, and provide clear end dates as early as possible. Expiration dates on pandemic-related measures are important to prevent them from being indefinite and can be reconsidered or extended if necessary.

II. Current Problems with EOIR’s VTC Hearings

(a) Convenience is Often Prioritized Over Respondent Rights

EOIR recently stated that “the use of VTC is determined principally by operational need.”⁶ Apart from pandemic exigencies, examples given are: “to reach locations where no permanent immigration court is located; to increase convenience and accessibility for respondents; to reduce

⁵ 8 USC §1229a(b)(2)(B) (“An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through video conference.”). We believe this provision should be read to support two points of legislative intent: (1) Congress differentiated merits hearings, which deserve heightened protection, from other hearing types; and (2) Congress recognized respondents’ autonomy in choosing how to proceed. Although the consent requirement does not textually apply directly to VTC hearings, the provision was intended to promote respondents’ consent to methods other than in-person hearings.

⁶ PM 21-03, *supra*, 4 & n.4.

travel costs; to consolidate and manage dockets; to ensure timely adjudication of cases, especially detained cases or cases subject to statutory or regulatory deadlines; [and] to reduce ‘dark’ unused courtrooms in order to help ensure that [a noncitizen] receives an opportunity to be heard in a timely manner.”⁷

We are concerned that these factors are not prioritized to rank first and foremost the interests of fairness—as perceived by respondents—and due process. When multiple factors are not aligned, for instance where institutional concerns favor VTC, but an objecting respondent perceives it not “to increase convenience and accessibility,” EOIR should require IJs to accede to the respondent’s request for an in-person hearing. Immigration judge autonomy and prerogatives in managing courtrooms are important but should not extend to having individual VTC policies or practices that hinder a fair hearing or respondents’ perceptions of a fair hearing.

(b) *Failure to Distinguish Between Merits Hearings and Master Calendars*

EOIR does not distinguish among the types of proceedings that may be more or less amenable to VTC, and has minimized the possibly harmful differences between VTC and in-person proceedings: “the evidence and applicable law determine the outcome of a case, not the hearing medium.”⁸ To the contrary, more widespread use of VTC hearings during the pandemic has augmented concerns about hearing fairness. For example, a recent Colorado Court of Appeals decision reversed the denial of a continuance for a hearing where parental rights were terminated, holding that a father’s request to continue due to his technical difficulties participating in the termination hearing should have been granted.⁹

Indeed, much of the expert commentary on VTC has correctly separated “procedural and undisputed cases,” for which “videoconference hearings seemed to work very well,”¹⁰ from complex and merits-determining hearings. EOIR’s external consultants recommended in 2017 that the agency “[l]imit the use of VTC to procedural matters.”¹¹ AILA and the Council endorses this bifurcation as well; while we recognize that master calendar hearings could be scheduled using VTC as a default along with an opt-out option for respondents, we believe the reverse

⁷ *Id.* at 4.

⁸ *Id.* at 3 n.3.

⁹ *People in Int EB* (Col. App. Jan. 6, 2022),

https://www.courts.state.co.us/Courts/Court_of_Appeals/Opinion/2022/21CA0346-PD.pdf.

¹⁰ See Lorne Sossin and Zimra Yetnikoff, *I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources*, Windsor Yearbook of Access to Justice (Aug. 5, 2007), <https://ssrn.com/abstract=1205123>.

¹¹ Booz Allen Hamilton, Legal Case Study: Summary Report, 23 (Apr. 6, 2017) (redacted version), <https://www.aila.org/infonet/foia-response-booz-allen-hamilton-report>.

should apply to merits hearings: Unless a respondent requests VTC, hearings should be in person.¹²

(c) *Need for Caution in Making Credibility Determinations Based on VTC Hearings*

Certain aspects of merits hearings present greater challenges for effective VTC proceedings than others. Immigration law, in common with other adjudications, relies on indicia such as demeanor to assess a respondent's credibility.¹³ Indeed, the REAL ID Act of 2005 codified that "a trier of fact may base a credibility determination on the demeanor . . . of the applicant or witness."¹⁴ While the Administrative Conference has correctly recognized that, overall, "[s]cientific studies have cast doubt on whether judges or jurors actually can determine truth-telling by demeanor evidence,"¹⁵ even assuming demeanor's ongoing relevance, it is impossible to be confident in VTC's indistinguishability from in-person hearings. When a factor like eye contact is available to IJs to make possibly life-or-death credibility decisions, the smallest distortion by technology can be outcome determinative.

The American Bar Association has underscored that "[d]uring virtual hearings, immigration judges [lack] the ability to closely observe nonverbal communication, such as body language. This can make it more difficult for a respondent to establish credibility and connect with the judge, making it harder for respondents to argue their cases. This concern is particularly acute for trauma survivors, who may not be able to articulate through oral testimony the full weight of their experience."¹⁶ This point is reinforced by EOIR's external consultants, who concluded that "[i]t is difficult for judges to analyze eye contact, nonverbal forms of communication and body language over VTC."¹⁷

One incident well illustrates the perils of relying on nonverbal indicia during video hearings. An immigration judge raised concerns about a respondent being "noncooperative" and "extremely difficult" by refusing to answer her questions.¹⁸ These could easily have become grounds for an adverse credibility determination; indeed, the IJ threatened to deport the respondent based on the lack of forthcoming information. Law students who were virtually present pointed out that the

¹² AILA Position on the Use of Virtual Hearings in Immigration Removal Proceedings (Oct. 20, 2021), <https://www.aila.org/infonet/use-of-virtual-hearings-in-removal-proceedings->

¹³ See, Karen Elizabeth Smeda, Truth or Dare: A Framework for Analyzing Credibility in Children Seeking Asylum, 50 Cornell Int'l L.J. 307, 312 (2017) (empirically, "nonverbal behavioral cues, such as smiles, accents, and eye contact, are strong determinants of an asylum applicant's credibility").

¹⁴ 8 USC §1158(b)(1)(B)(iii).

¹⁵ Lederer, *supra*, 9.

¹⁶ American Bar Association Comments, *supra*, at 12.

¹⁷ Booz Allen Hamilton Report, *supra*, at 23.

¹⁸ Professor Sarah Sherman-Stokes, Twitter thread (Nov. 18, 2021), <https://twitter.com/sshermanstokes/status/1461344803749339137?s=20>.

video appeared frozen because the detained respondent hadn't blinked in more than two minutes; the judge demurred at that explanation: "[H]e's just a dot on my screen, so [I] didn't notice."

This microcosm of misunderstanding speaks volumes about the dangers of relying on parallel adjudication rules without taking into account the differences and glitches inherent in VTC hearings. As an AILA member aptly described, "WebEx is like holding a hearing in the deep end of a swimming pool. The client's energy, affect, and credibility get blurred and communication is difficult, awkward, and hard to assess."

(d) *Flawed Approach to VTC Hearings Hurts Detained and Pro Se Respondents*

EOIR has never to AILA's knowledge isolated for specific VTC analysis whether a respondent is detained or represented. While the agency's policy guidance cites Professor Ingrid Eagly's pioneering work on VTC in immigration proceedings,¹⁹ the excerpt used focuses on statistical outcomes rather than her key observation that "the existing debate does not consider the potential of televideo to shape the assertion of rights by the litigant subjected to the procedure. . . . This lack of participation matters because, with less attorney involvement and claimmaking by immigrants, televideo cases are more likely to result in deportation."²⁰

There is no indication that EOIR has grappled with the key statistical disparities identified by Professor Eagly in 2015: "When compared to similarly situated detained televideo respondents, detained in-person respondents were a remarkable 90% more likely to apply for relief [and] 35% more likely to obtain counsel."²¹ AILA members are likewise concerned about pro se respondents' ability to make informed choices about the potential drawbacks of a VTC hearing, particularly if the alternative is to wait longer for a desired hearing. EOIR must differentiate and study both detained and unrepresented cases—with special attention to when they coexist—and take into account their particular complexities when making policy decisions on VTC hearings.

There is empirical evidence that detained cases are treated less favorably when an in-person hearing is requested. In Chicago, for example, AILA members reported that detained respondents are always denied in-person hearings but when "[w]e requested a WebEx hearing in Chicago non-detained court, it was denied as we were told that there was no urgent public health reason to permit a WebEx appearance." And, nationwide, technical problems during detained hearings are almost impossible for respondents to raise to EOIR supervisory authorities in real time or even afterward. In general, it is harder administratively to solve common technology errors in a WebEx situation than for in-person hearings, meaning that specially trained onsite personnel and centralized support must be in place to troubleshoot in real time.

¹⁹ PM 21-03, at 3 n.3.

²⁰ Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 N.W. U. L. Rev. 933, 937, 941 (2015).

²¹ *Id.* at 938.

For pro se respondents, EOIR does not allow WebEx hearings because of potential technical difficulties. But even in these circumstances IJs can preside remotely. Both for equal-access purposes and due to the added importance of IJs' roles in cases without counsel, this categorical exclusion of pro se VTC hearings, while nevertheless permitting remote adjudication by judges, is fraught with problems.

(e) *Inconsistent Policies Varying by IJ Lead to Confusion and Disparate Treatment*

The most common concern expressed by AILA members about VTC hearings is their effects on respondents' rights. Another major concern, however, is the inconsistencies between immigration courts in policies and procedures. These IJ-specific rules have led to inconsistent, and sometimes diametrically opposed, scheduling of hearings based on the particular adjudicator's preferences. It is important to note that EOIR has since suspended all standing orders, though concerns around inconsistent policies remain.²² The following examples illustrate some of the disparate treatment respondents and their attorneys have had to grapple with in the recent past. For example:

- In cases assigned to Immigration Adjudication Centers (IACs),²³ it is difficult or impossible to know in advance the IJ's policies and preferences given that there is no local liaison or engagement with stakeholders and no community of stakeholders regularly appearing in front of the IJs that could share information.
- In Boston, an AILA member reported that "the court ha[d] standing orders but IJs ha[d] developed their own policies, which [was] confusing." Respondents' understanding, needs, and perceptions of fairness, all indispensable components of due process, get short shrift.
- In New York City, AILA members were perpetually on edge because the immigration court "often [did] not tell us whether it [was] live or WebEx until the day of the hearing or a day before, making it very hard to scramble and set up an office space." As of 2021, out of 14 judges, 6 required motions for a remote hearing while 8 did not. Seven used the Open Voice system, 5 WebEx, and 2 both.

²² AILA, *EOIR Announces Suspension of All Standing Orders Through January 31, 2022* (January 11, 2022), <https://www.aila.org/infonet/eoir-announces-suspension-of-all-standing-orders>.

²³ See generally AILA and the American Immigration Council (AIC), *Lawsuit Seeks to Uncover Secretive Expansion of Judicial Black Sites for Immigration Cases* (Oct. 30, 2020), <https://www.aila.org/advocacy/press-releases/2020/lawsuit-seeks-to-uncover-secretive-expansion>.

- In Cleveland, three IJs conduct represented hearings only by WebEx. Contrary to what we understood to be general EOIR protocol, the judges specified for months that represented respondents and witnesses must conduct remote hearings at their counsel’s office or DHS counsel’s office. Eventually this policy was rescinded, though the standing order remained in place for some time after, causing confusion.²⁴ Moreover, standing orders required all evidence to be received 10 days prior to the scheduled hearing and stated that no late evidence would be considered, an unacceptable variation from regular procedures.
- In Chicago, an email to the AILA chapter announced that three IJs would hold exclusively WebEx hearings going forward. A judge also moved to another state, so respondents who requested and were granted in-person hearings had them significantly postponed.
- In San Francisco, clients were required in some cases to sit beside their attorney during the VTC hearing, which according to our membership “often undermine[d] the flexibility WebEx offers.”

EOIR has not prescribed how IJs should assess motions for or opposing VTC hearings, or when IJs should adjourn VTC hearings due to technical difficulties. The guidance states: “Nothing in this PM requires immigration judges to decide any motion for a VTC appearance in any particular way, though the record should reflect a clear decision on any such motion filed. As in all cases, immigration judges ‘exercise their independent judgment and discretion,’ subject to applicable law, when deciding motions to appear by VTC. 8 C.F.R. § 1003.10(b).”²⁵ While individual IJs rightly have autonomy in their substantive decision-making, EOIR should, after consultation, centralize and produce uniform guidance on the use of WebEx and other virtual technologies. These patchwork rules are a disservice to respondents and should be replaced by respondent-centered guidance from headquarters as described in the recommendations below.

(f) *Interpretation Challenges Often Negatively Impact VTC Hearings*

²⁴ On January 11, 2022, EOIR tweeted: “Practitioners and respondents who are appearing for hearings by phone or online do not need to be physically present in one location. Plans to appear from separate locations do not require special arrangements with the immigration court.”
https://twitter.com/DOJ_EOIR/status/1480947958392700947?s=20.

²⁵ PM 21-03, at 4.

Accuracy of interpreters is greatly reduced when they are not in person.²⁶ Remote interpretation eliminates the ability for simultaneous interpreting, and consecutive interpreting lengthens hearings. Telephonic interpreters also inhibit confidential attorney-client interaction when it requires using the interpreter. Apparently, for these and other reasons, EOIR’s consultants recommended that the agency “[f]ind a technological or logistical solution to simultaneous interpretation over VTC, leveraging and assessing several proposed by interpreters.”²⁷ We are not aware of such a solution being implemented.

AILA members report recurring issues stemming from interpretation difficulties at VTC hearings. One member recalled that “the sound on my microphone was overlapping, making it really difficult for the interpreter and the IJ to understand me. We changed interpreters three times because the call kept getting disconnected.” Interpretation is an excellent example of where our recommended stakeholder meetings—here to include EOIR, immigration judges, practitioners, and interpreters—are vital to establish and uphold VTC best practices as well as troubleshoot problem areas.

III. Social Security Hearings: Comparison

EOIR’s external consultants recommended that the agency “initiate dialogue with other agencies that use VTC in similar adjudicatory settings to learn about their infrastructure, practices, and training.”²⁸ The Social Security Administration (SSA) provides a different model that preserves some individual autonomy while still making extensive use of VTC: “When hearing offices receive a request for a hearing, they send an acknowledgement notice to the claimant and any representative. With the acknowledgement, a form is provided to the claimant/representative with the opportunity to object to appearing by VTC, or to ‘opt out of’ a video hearing, within 30 days of receiving the notice (or later if good cause is found).”²⁹

EOIR has frequently relied on SSA’s experience to bolster its case favoring VTC hearings.³⁰ Yet a deeper dive into SSA’s procedures reveals safeguards that are absent from immigration court rules even though immigration cases frequently present issues that are even more critical to litigants’ physical safety and well-being. Safeguards in the SSA context are instructive but nowhere near sufficient to protect the distinct needs of immigration respondents, particularly those proceeding pro se who may not have full information to assess whether to opt out.

²⁶ See Nat’l Ass’n of Judicial Interpreters & Translators; NAJIT Position Paper, *Telephone Interpreting in Legal Settings* (Feb. 27, 2009); Laura Abel, *Language Access in Immigration Courts*, Brennan Ctr. for Justice at NYU School of Law, 9 (2011).

²⁷ Booz Allen Hamilton Report, at 25.

²⁸ *Id.* at 23.

²⁹ SSA, *Video Hearing (VH) Opt-Out Numbers and Rates for Hearing Requests Received FY 2021* (Sept. 2021), https://www.ssa.gov/appeals/DataSets/A01_VH_Opt-Out.html.

³⁰ See PM 21-03 at 3 n.3.

The principal SSA safeguard is this opt-out option for claimants desiring in-person hearings. Fiscal year (FY) 2021 statistics show that of almost 400,000 SSA hearing requests, 21% of claimants opted out of VTC hearings (with a slightly lower rate at the end of FY21 than at the beginning, which was pre-vaccine).³¹ This compares with FY15 and FY17 figures of 30% and 32% respectively.³²

The opt-out feature is consistent with a longstanding recommendation from the Administrative Conference of the United States for all agencies,³³ and was maintained in 2019 despite a proposed SSA rule to the contrary.³⁴ In December 2019, SSA stated that, “in response to the overwhelming preference expressed by public commenters in response to the NPRM, we are retaining the existing option for a party to a hearing to opt out of appearing by VTC at the ALJ hearing level.”³⁵

SSA has operated under a VTC policy³⁶ since 2017 that includes these additional safeguards with applicability to the EOIR context:

- Claimants agreeing to proceed via VTC sign and return a statement prior to the hearing stating: “I know that I may have an in-person hearing. I voluntarily elect to have my disability hearing conducted by video teleconferencing equipment.”³⁷
- An explicit instruction to hearing officers that they “should terminate any hearing conducted via VTC equipment and schedule an in-person hearing if the [hearing officer] believes that he or she cannot effectively conduct the hearing, or believes that the beneficiary or recipient is not able to present his or her claim effectively, due to the video format.”

³¹ SSA, *Video Hearing*, *supra*.

³² SSA, *Setting the Manner for the Appearance of Parties and Witnesses at a Hearing*, 83 Fed. Reg. 57368, 57370 (2018).

³³ ACUS Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48789, 48796 (2011), <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>.

³⁴ SSA, *Setting the Manner*, *supra*, 83 Fed. Reg. 57371 (2018) (“Under the proposed rules, we would not permit individuals to opt out of or object[] to appearing by the manner of hearing we chose.”).

³⁵ SSA, *Setting the Manner for the Appearance of Parties and Witnesses at a Hearing*, 84 Fed. Reg. 69298, 69299 (2019).

³⁶ DI 33025.080, *Using Video teleconferencing (VTC) Equipment to Conduct Hearings* (Dec. 13, 2017), <https://secure.ssa.gov/poms.nsf/lnx/0433025080>.

³⁷ AILA and the Council do not endorse including this last sentence about outcomes—“I understand that having my hearing conducted by video teleconferencing equipment will not affect the outcome of my claim.”—because, aside from impossibly predicting the future, it projects an unattainable level of certainty about past hearings.

This uniform mandate contrasts with frequent reports from AILA members that in some cases, despite serious technical problems, IJs have not adjourned those hearings; for example, in a Richmond IAC case, an AILA member reported: “You can’t even see the judge’s face; DHS jumps off and on; and you don’t know who is on the screen.” Indeed, statistics show that glitches are common; despite technology improvements, external consultants to EOIR reported in 2017 that “[f]aulty VTC equipment especially issues associated with poor video and sound quality can disrupt cases to the point that due process issues may arise. 29 percent of staff reported that VTC caused a meaningful delay in their ability to proceed with their daily responsibilities.”³⁸ This finding is supported by accounts from attorneys nationwide and documented by media reports.³⁹

- An SSA employee, contractor, or other personnel is always at government-office sites for remote hearings alongside SSA claimants to facilitate the hearing process, e.g., “by ensuring that the VTC, facsimile machines, etc., are operating properly.”

It bears repeating that there are significant differences between Social Security hearings, which are, importantly, nonadversarial, and immigration hearings—in both substantive respects and in the demographics of respondents. For these reasons, procedural safeguards must be augmented in the immigration context. Other context matters as well; for instance, SSA will reimburse claimants who wish to travel to an in-person hearing more than 75 miles from their location, helping to equalize access and respect claimants’ perceptions of fairness.⁴⁰

IV. Recommendations

(i) EOIR should limit the default use of virtual hearings to procedural matters. Individual merits hearings should not be held virtually unless requested by a respondent. Immigration judges should inform respondents of their right to have an in-person hearing through an advisal promulgated by EOIR headquarters after stakeholder input, and other pre-hearing advisals should also be considered as additional means to elicit respondents’ informed preferences.

(ii) EOIR should withdraw PM 21-03, *Immigration Court Hearings Conducted by Telephone and Video Teleconferencing*, and replace it on an interim basis with the two pilots recommended

³⁸ Booz Allen Hamilton Report, *supra*, at 23.

³⁹ *Id.* Kelan Lyons, *Technical Difficulties*, Salt Lake City Weekly (Oct. 10, 2018); Beth Fertig, *Do Immigrants Get a Fair Day in Court When It's by Video?*, WNYC News (Sept. 11, 2018); Camila DeChalus, *Immigration attorneys face courtroom challenges amid pandemic: Hearings conducted by phone or video have posed technical challenges, as well as concerns about due process*, Roll Call (June 17, 2020).

⁴⁰ Social Security Handbook, §2009.3 (“The Government will pay travel expenses to you and reasonably necessary witnesses only if travel over 75 miles is required. The Government may pay a representative for travel expenses to attend a hearing.”).

below while they are conducted and analyzed. In the withdrawal memo, EOIR should (a) make clear that due process and fairness to respondents are the most important, mandatory considerations in its design of new VTC protocols; and (b) formalize a permanent system to elicit participant feedback and ensure quality control.

(iii) Immigration judges, after consultation, should promptly receive clear guidance and training on when they must adjourn a virtual hearing due to technological difficulties. In parallel, EOIR should work toward guaranteeing that an IT specialist is on site in government offices for the full duration of all VTC hearings. Serious problems with functioning audio and interpretation should automatically require adjournment, and IJs should be required to consult with supervisors before continuing any hearing where other major issues arise.

(iv) EOIR should retain independent experts to interview stakeholders and begin a process of designing and implementing two pilots that: (a) frame metrics; (b) solicit relevant qualitative feedback from participants; and (c) collect extensive data to measure the efficacy of VTC hearings and their impacts on respondents.⁴¹ Special attention should be paid to respondents' perspectives, including their understanding of proceedings and their detention and representation statuses.

One pilot should present respondents with the opt-out option along the lines of SSA's model. That pilot should be compared with a second pilot that implements AILA and the Council's preferred option of an opt-in where respondents must request a VTC merits hearing. The expert report should be made public as soon as it is complete.

(v) EOIR should use in-person interpreters whenever possible for in-person hearings, particularly for merits hearings. In addition, EOIR should report on progress made toward its consultants' recommendation that all VTC interpretation be simultaneous.

(vi) All virtual hearings must be made available to the public in accordance with 8 CFR. §1003.27, subject to applicable privacy exceptions that necessitate a closed hearing.

(vii) EOIR should ensure that VTC or in-person hearing choices have no effect on respondents' Employment Authorization Documents by "stopping the clock."

(viii) EOIR should analyze and prepare guidance on its Rehabilitation Act responsibilities to provide reasonable accommodations to respondents with disabilities who choose a VTC hearing.

⁴¹ Although not independent, SSA's Office of Quality Control in September 2017 conducted an analogous analysis of Administrative Law Judge Hearing Decisions.

(ix) EOIR should commit to detailed annual reporting on VTC from both statistical and evaluative standpoints. In the report, EOIR should, inter alia, analyze whether incentives like faster hearing dates are skewing respondents' choice of whether to accept VTC hearings and act to rebalance factors such as comparative wait times.

(x) EOIR should establish a representative and diverse working group composed of stakeholders, independent experts, and adjudicators to address issues of concern and promulgate uniform guidance. Examples of issues appropriate for this type of sustained collaborative discussion are:

- Evaluating, with the goal of classifying as permissible or proscribed, various VTC configurations including locations and modes of participation of the attorney, client, judge, DHS counsel, and interpreter.
- Choice of law: In 2007, EOIR proposed but has not acted on a regulatory change to address choice-of-law issues in the context of VTC and telephonic hearings.
- Attorney-client communications if in different locations.
- Rules for records of proceedings in VTC cases, including how to remedy incomplete ROPs expeditiously.
- Presentation of evidence, including emergency and late-filed evidence deadlines, timely transmission of filings to IJs, and technology such as screen-sharing.
- Special challenges presented by detention, including facility configurations and technology management, as well as lack of representation.
- Policies for last-minute judge substitutions and their notification.
- Camera angles and screen representation of multiple participants.
- Best practices for training IJs and courtroom personnel.

(xi) EOIR should, on an urgent basis, be transparent and intentional with stakeholders and IJs about which virtual hearing policies are in place because of public-health concerns. The agency should attach and publicize expiration dates for pandemic-related measures subject to reconsideration or extension if necessary.