

ELECTRONIC TECHNOLOGY IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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INTRODUCTION

The United States Court of Appeals for Veterans Claims (CAVC)¹ is a federal court, organized under Article I of the United States Constitution, with exclusive jurisdiction to review decisions of the Board of Veterans' Appeals ("Board").² The Board is not a court, but is part of the Department of Veterans Affairs (VA), and conducts the final administrative review of claims of veterans for benefits arising from military service³; if the Board denies the claim, the veteran then has the right to appeal to the CAVC.⁴ This distinction is not insignificant as the CAVC is often thought to be an arm of VA, not an independent judicial body. This confusion in the minds of veterans is exacerbated to some degree by VA's self initiated regulation, permitting the Board to depart from the statutory title "member" to the term "Veterans Law Judge."⁵

1. The CAVC must not be confused with "veterans courts" created in various states and patterned after drug courts. *See Veterans Courts Resource Guide*, NAT'L CTR. FOR ST. CTS., <http://www.ncsc.org/Topics/Alternative-Dockets/Problem-Solving-Courts/Veterans-Court/Resource-Guide.aspx> (last visited Nov. 20, 2017).

2. 38 U.S.C. §§ 7251–52(a) (2012).

3. *Id.* § 7104(a).

4. *See id.* § 7252(a).

5. *Contrast* 38 U.S.C. § 7101(a) (2012) ("The Board shall consist of . . . such number of members as may be found necessary in order to conduct hearings . . ."), *with* 38 C.F.R. § 19.2(b) (2017) ("A member of the Board (other than the Chairman) may also be known as a Veteran's Law Judge. An individual designated as an acting member pursuant to 38 U.S.C. 7101(c)(1) may also be known as an acting Veterans Law Judge."); *see* *Watson v. Shinseki*, 23 Vet. App. 352, 352–53 (2010) (Non-dispositive Order).

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Unlike most state and federal courts across the country, the CAVC does not currently have its own formal policy or rule of practice and procedure regarding the use of electronic devices in the courtroom. The Clerk of the Court provides an informal document to counsel, regarding conduct at oral argument that contains some information regarding use of cell phones and availability of Wi-Fi in the courtroom; should a rule be adopted, the Clerk's document would have to be conformed to the rule.⁶

Although the CAVC is one of the busiest federal courts in the United States,⁷ many lawyers—indeed, even many of the country's judges and most veterans—do not know of its existence. Those who do often believe that the CAVC is part of the Department of Veterans Affairs, a misconception that frustrates to no end the judges of the court. For this reason, we begin this article with a brief history of the CAVC.

I. THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Because the focus of this article is the use of video technology as it might be used at the CAVC, it is first important to understand the nature of that court, its creation, its organization, and its authority.

A. *Creation of the Court*

Although government benefits accorded to military veterans and their survivors (veterans) have existed since the Revolutionary War,⁸ judicial enforcement of those benefits has not. From the Supreme Court decision in *Hayburn's Case*, federal courts have steadfastly eschewed any role in enforcing the payment of veterans' disability compensation benefits, or the payment of benefits to the survivors of veterans.⁹ In some cases, the courts have done so by asserting the separation of powers doctrine, but in the case of veterans it has been by a clear statutory bar¹⁰

6. See Gregory O. Block, Guide for Counsel In Cases to Be Argued Before the United States Court of Appeals for Veterans Claims 1–2 (2016), https://www.uscourts.cavc.gov/documents/OAGuide_for_Counsel_05May16.pdf.

7. For reference, in 2016, a total of 7,599 cases (appeals, petitions for mandamus, and applications for EAJA costs and fees) were filed with the CAVC. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT ¶ 4(A) (2016) [hereinafter 2016 CAVC Report], <https://www.uscourts.cavc.gov/documents/FY2016AnnualReport.pdf>. Of those, 2,099 were decided by the nine judges of the court; the remainder were resolved without referral to a judge. *Id.* ¶ 4(B)–(D).

8. Fed. Research Div. of the Library of Cong., *Veterans Benefits and Judicial Review: Historical Antecedents and Development of the American System* 21–62 (1992) (summarizing the history of veterans' benefits in courts throughout American history).

9. 2 U.S. 409, 409 (1792); *Nat'l Treasury Emps. Union v. Fed. Labor Relations Auth.*, 30 F.3d 1510, 1518 (D.C. Cir. 1994) (Sentelle, J., dissenting) (citing *Chi & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

10. 38 U.S.C. § 211(a) (1982) (repealed 1991) (“[T]he decisions of the Administrator on

as well as a severe limitation on the fee that could be charged for assisting a veteran to prosecute a claim.¹¹ As if that was not enough, a violation of the statute limiting fees was a crime.¹² This left military veterans as, probably, the only group of individuals without access to independent, judicial review when the government denied an application for federal benefits. That unfortunate circumstance, which many might call unfair, or even un-American, was remedied in 1988 when Congress created the United States Court of Veterans Appeals with the enactment of the Veterans Judicial Review Act, commonly referred to the VJRA.¹³ The

any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.”).

11. Barton F. Stichman, *The Impact of The Veterans' Judicial Review Act on the Federal Circuit*, 41 AM. U. L. REV. 855, 867 n.73 (1992).

In 1862, Congress set a \$5 cap on the fee an agent or attorney could charge certain military personnel in applying for a pension, bounty, or other allowance. Act to Grant Pensions, §§ 6–7, 12 Stat. 566, 568 (1862). Two years later, this limitation was raised to \$10. Act of July 4, 1864, §§ 12–13, 13 Stat. 387, 389. Until Congress passed the VJRA in 1988, the fee cap remained at \$10. 38 U.S.C. § 3404(c)(2) (1982) (stating that agent's fee shall not exceed \$10 for any one claim), *repealed by* Pub. L. No. 100–687, § 104, 102 Stat. 4108 (1988). *See generally* HOUSE COMM. ON VETERANS AFFAIRS, 100TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE TEN DOLLAR ATTORNEY FEE LIMITATION IN CLAIMS OF VETERANS' BENEFITS (Comm. Print No. 8, 1987) (reviewing fee limitations enacted between 1862 and 1936 and concluding that Congress has consistently wanted to protect claimants from rapacious attorneys).

Id.; *see* Marguerite Caruso, Comment, *The Ten Dollars Fee Limit for Attorneys Who Represent Veterans in Veterans Benefits Proceedings—An Anachronism?*, 29 SANTA CLARA L. REV. 973, 976 (1989) (discussing the history of attorney's fees in representing veterans). *See generally* STAFF OF H. COMM. ON VETERANS AFFAIRS, 100TH CONG., LEGISLATIVE HISTORY OF THE TEN DOLLAR ATTORNEY FEE LIMITATION IN CLAIMS FOR VETERANS' BENEFITS (Comm. Print. 1987) (reviewing fee limitations enacted between 1862 and 1936 and concluding that Congress has consistently wanted to protect claimants from rapacious attorneys).

12. 38 U.S.C. § 5905 (2012). Prior to the VJRA, any fee paid to attorneys had to be determined by the Secretary and could not exceed ten dollars on any one claim. Act of Sept. 2, 2958, Pub. L. No. 85-857, § 3404, 72 Stat. 1105, 1239 (codified as amended in scattered sections of 38 U.S.C.). Anyone who violated this fee limitation was subject to a maximum fine of five hundred dollars and imprisonment “at hard labor” for a maximum of two years. *Id.* § 3405.

13. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified as amended at 38 U.S.C. § 5904(c), (d) (2012)). Similar legislation elevated the Veterans Administration to a department of the United States, the head of which became the Secretary of Veterans Affairs and sits on the President's Cabinet. Department of Veterans Affairs Act, Pub. L. No. 100-527, § 2, 102 Stat. 2635, 2635 (1988) (codified as amended at 38 U.S.C. § 101 (2012)). It also inserted “[t]he Department of Veterans Affairs as a department of the executive branch of the United States.” *Id.*

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CAVC was created as the “U.S. Court of Veterans Appeals,” often referred to as the CVA.¹⁴ In an attempt to better identify the new court as a judicial body that is independent of the Department of Veterans Affairs, the court’s name was changed by Congress in 1998 to the “U.S. Court of Appeals for Veterans Claims,” or CAVC.¹⁵

As might be suspected, legislation changing almost a century of veterans’ claims adjudication was met with mixed opinions. However, eventually the concept of judicial review gained almost universal support.¹⁶ There was, however, no unanimity among those supporting the CAVC’s creation regarding the form that the new court should take. One model would have elevated the sixty-five member BVA to the status of a court, converting that intra-agency appellate body to an independent trial court at which testimony and evidence could be received and considered along with that already in the VA’s adjudication record.¹⁷ A second model called for appeals from final VA decisions (i.e., by the Board) regarding veterans benefits to be handled by district courts throughout the nation.¹⁸ The model finally adopted was the creation of a court composed of a chief judge and six¹⁹ additional judges, organized under Article I of the Constitution, and holding exclusive authority to consider appeals by veterans²⁰ when VA denied their claims.²¹

B. Nature of the Court

The operative words in the name of the court, both initially and now, are “Court of Appeals.” The court cannot find facts on its own, but may

14. *History*, U.S. CT. APPEALS FOR VETERANS CLAIMS, <http://www.uscourts.cavc.gov/history.php> (last visited Nov. 20, 2017).

15. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511, 112 Stat. 3315, 3341 (codified as amended in scattered sections of 38 U.S.C.) (“The United States Court of Veterans Appeals is hereby renamed as, and shall hereafter be known and designated as, the United States Court of Appeals for Veterans Claims.”).

16. *See, e.g., History, supra* note 14.

17. The Proposed Veterans’ Administration Adjudication Procedure and Judicial Review Act: Hearing on S. 11 and S. 2292 Before the Comm. on Veterans’ Affairs, 100th Cong. 746 (1988).

18. *See id.* at 418.

19. 38 U.S.C. § 7253(a) (2012). The total number of judges has twice been temporarily expanded from seven to nine to accommodate the active term ends of judges and an anticipated increase in the number of appeals. *Id.* § 7235(h)–(i).

20. *Id.* §§ 7251–52(a). Unless otherwise indicated, the term “veteran’s benefits” refers to any benefit provided by the United States and that flows from the military service. This includes, for example, benefits to survivors of a veteran.

21. *Id.* § 7252(a); *see* 134 Cong. Rec. S16632–36 (daily ed. Oct. 18, 1988) (explanatory Statement by Sen. Cranston); 134 Cong. Rec. 31772–79 (daily ed. Oct. 19, 1988) (statement of Rep. Montgomery).

only review the fact finding of the Board under the clearly erroneous standard of review.²² Further, even if the court finds a clearly erroneous factual error, it must take due account of the rule of prejudicial error.²³ The court is specifically prohibited from conducting a trial de novo.²⁴

The most far-reaching characteristic of the court, however, is that it has *exclusive* jurisdiction over disputes regarding the final denial of veterans' benefits by the agency.²⁵ Because of this feature of jurisdictional exclusivity, the court may sit anywhere in the United States.²⁶ However, the principal office of the court (and its permanent courtroom) must be located "in the Washington, D.C., metropolitan area"²⁷ and all active judges must reside within fifty miles of the Washington, D.C. metropolitan area.²⁸ As discussed below, the court's fixed location compared to the location of veterans and their counsel begs the question of whether advancement in technology should be adopted by the court to make the court's hearings more easily available to appellants, counsel, and the public regardless of their geographic location. Our hope is that this article will provide compelling reasons to adopt rules regulating the use of electronic devices, permitting some and prohibiting others.

As further background for our suggestions, the article summarizes the existing policies of the Judicial Conference of the United States, federal district and appellate courts, state courts, and the rationale for their adoption. Because the CAVC is a federal appellate court dealing solely with civil matters,²⁹ our emphasis will be on policy in appellate courts.

C. Representation of Veterans

The ability of veterans to retain representation in their quest for benefits is a story unto itself. Until the passage of the VJRA, it was a federal crime to accept more than ten dollars to assist a veteran to obtain

22. See 38 U.S.C. § 7261(a)(1), (4), (c).

23. *Id.* § 7261(b)(2).

24. *Id.* § 7261(c).

25. *Id.* § 7252(a).

26. *Id.* § 7255(a).

27. 38 U.S.C. § 7255(a).

28. *Id.* § 7255(c)(1).

29. *Kelly v. Nicholson*, 463 F.3d 1349, 1354–55 (Fed. Cir. 2006) (citing *Former Emps. of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1365 (Fed. Cir. 2003)) (holding that the claimant who successfully appealed the denial of that claim by the Department of Veterans Affairs was prevailing party in his civil action).

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benefits.³⁰ This, as a practical matter, meant that almost no lawyers represented veterans for this purpose.³¹ This statutory limitation on fees withstood a challenge by veterans' advocates in the United States Supreme Court in *Walters v. National Ass'n of Radiation Survivors*.³² This pre-VJRA case explains and bases its decision in part on evidence that veterans received adequate representation by well-trained, nonlawyer employees of veterans service organizations and county and state officials, both commonly called "service officers," during the adjudication of their claims by VA officials within VA.³³ Even today, the vast majority of veterans are represented by service officers at the regional office and the Board levels of the VA's administrative claims adjudication.³⁴

With the passage of the VJRA, the ten-dollar fee limitation was eliminated.³⁵ Instead, the new statute provided that *no* fee could be charged to a veteran until the first, final decision of the Board in a veteran's claim, after which a representative could charge a reasonable fee.³⁶ However, that restriction meant that a lawyer could not charge for any work during the stage of adjudication in which evidence was gathered by VA or could be submitted by the veteran;³⁷ a significant hindrance considering that review at the CAVC was limited to record review. Further, if a lawyer represented a veteran before the final decision of VA and the lawyer was successful in helping the veteran obtain benefits, the lawyer could charge no fee.³⁸ The result was that there was no incentive for lawyers to represent veterans until VA had issued its final decision denying the veteran benefits.³⁹ This resulted in a delay of what often was

30. Compare 38 U.S.C. § 3404(2)(c) (1982) ("The Administrator shall determine and pay fees to agents or attorneys . . . [s]uch fees . . . shall not exceed \$10 with respect to any one claim."), with Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108-09 (1988) (codified as amended at 38 U.S.C. § 5904(c), (d) (2012)) (providing for fee agreements between a veteran and an attorney and striking out section 3404(c)).

31. Charles L. Cragin, *The Impact of Judicial Review on the Department of Veterans Affairs' Claims Adjudication Process: The Changing Role of the Board of Veterans' Appeals*, 46 ME. L. REV. 23, 26 (1994).

32. 473 U.S. 305, 335 (1985).

33. *Id.* at 311, 366.

34. U.S. DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS' APPEALS ANNUAL REPORT 25 (2016), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2016AR.pdf.

35. Veterans' Judicial Review Act, Pub. L. No. 100-687, § 104, 102 Stat. 4105, 4108-09 (1988) (codified as amended at 38 U.S.C. § 5904(c), (d) (2012)) ("Section 3404 of title 38, United States Code, is amended by striking out subsection (c)[.]").

36. *Id.* at 4108.

37. *Id.* (stating that the fee agreement shall be filed at the time the appeal is filed).

38. *See id.*

39. Cragin, *supra* note 31, at 26.

many years for a deserving veteran to obtain benefits and a like period that VA would continue to devote to processing the case through the various stages of appeal until the veteran reached the CAVC, where, for the first time, the lawyer could charge a fee.⁴⁰ This situation was clearly demonstrated by CAVC statistics which show that in 1998, a full seventy-seven percent of veterans filed their notice of appeal without a representative.⁴¹

D. Court Funded Pro Bono Program and the Availability of Attorney Fees

Lawyer representation has been significantly increased by two events occurring six years apart but early in the life of the court—the establishment of a government-funded pro bono program⁴² and an amendment to 28 U.S.C. § 2412.⁴³

In 1992, Congress—working with the CAVC and the Legal Services Corporation—passed legislation that permits the CAVC’s budget to include funds for pro bono representation of veterans at the court.⁴⁴ The Legal Services Corporation periodically issues a request for proposals seeking grantees that will fulfill the program’s requirement to recruit and train lawyers to represent veterans for no fee.⁴⁵ The second event was the 1998 amendment to the Equal Access to Justice Act (EAJA)—a fee shifting statute requiring the United States to pay costs and reasonable attorney fees to a successful plaintiff in certain civil litigation against the United States.⁴⁶ That amendment made it clear that a case in the CAVC is a civil action against the United States that qualifies for the payment of fees and costs under the EAJA.⁴⁷ Of importance to veterans is that if the requirements of EAJA are met, fees and expenses must be paid even if a

40. *Id.* at 33.

41. U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORTS (2007) [hereinafter 2007 CAVC Report], https://www.uscourts.cavc.gov/documents/Annual_Reports_2007.pdf.

42. *See* Joint Resolution of Dec. 12, 1991, Pub. L. No. 102-229, 105 Stat. 1701-10.

43. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 512, 112 Stat. 3315, 3341-42 (codified as amended at 28 U.S.C. § 2412 (2012)).

44. Joint Resolution of Dec. 12, 1991, 105 Stat. at 1710; *About Us: Our History*, THE VETERANS CONSORTIUM PRO BONO PROGRAM, <https://www.vetsprobono.org/about> (last visited Nov. 21, 2017). The legislation does not authorize use of program funds for representation at VA. *See* Joint Resolution of Dec. 12, 1991, 105 Stat. at 1710.

45. *Veterans Appeals Pro Bono Grant Program*, LEGAL SERVS. CORP., <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/veterans-appeals-probono-grant-program> (last visited Nov. 21, 2017).

46. Veterans Programs Enhancement Act of 1998 § 512 (codified as amended at 28 U.S.C. § 2412(a)(1)-(b)).

47. *Id.* (codified as amended at 28 U.S.C. § 2412(d)(2)(F)).

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litigant is represented pro bono.⁴⁸ Because veterans seeking benefits generally do not have the means to pay the market rate for a lawyer's services, the opportunity to obtain some fee and to recover costs is an added incentive to lawyers seeking pro bono opportunities.

The confluence of these two events meant that lawyers began to be actively recruited and trained to assist veterans at the CAVC and those who volunteered to represent a veteran, won the case, and met the requirements of the EAJA could collect a fee.⁴⁹ Accordingly, the number of veterans who face the CAVC without professional legal assistance has been drastically reduced. As discussed above, in 1998, only twenty-three percent of appellants filed their notice of appeal with the aid of a lawyer.⁵⁰ By 2016, that number was increased to seventy-two percent at filing the notice of appeal; this number increased still further at the time of conclusion of the case, by which point eighty-eight percent of veterans were represented.⁵¹

Subsequent amendments to the VJRA permit lawyers to charge veterans a reasonable fee to represent a veteran for work performed at any time after the veteran first formally objects to an adverse decision on the claim.⁵² (This point in time is determined by the veteran's submission to VA of a written "notice of disagreement.")⁵³ Although representation in the initial administrative adjudication does not qualify for fees under the EAJA, the law does permit lawyers to receive a limited percent of the veteran's retroactive compensation should the lawyer be successful.⁵⁴ Thus, lawyers can now charge fees before the claim moves out of the regional office.⁵⁵ This permits lawyers representing veterans to gather and present additional evidence to support their client's claim and present argument based thereon at the very beginning of the appellate process when fact finding is still permitted. Even if the represented veteran is unsuccessful at the agency, the veteran has had a lawyer—someone trained in the legal aspects of elements of proof and the relative value of

48. *Ed A. Wilson, Inc. v. Gen. Servs. Admin.*, 126 F.3d 1406, 1409 (Fed. Cir. 1997) (citing *Watford v. Heckler*, 765 F.2d 1562, 1567 n.6 (11th Cir. 1985)) ("[C]ourts have awarded attorney fees under EAJA and similar fee-shifting statutes requiring that fees be 'incurred' when the prevailing party is represented by a legal services organization or counsel appearing pro bono.").

49. *Id.*; *About Us: Our History*, *supra* note 44.

50. 2007 CAVC Report, *supra* note 41.

51. 2016 CAVC Report, *supra* note 7, ¶¶ 1–2.

52. 38 U.S.C. § 7263(c)–(d) (2012).

53. *Id.* § 7105(a).

54. *See id.* § 5904(a)(5).

55. *See id.*

evidence to help the veteran make the record that will be reviewed by the CAVC and, if necessary, beyond.

As might be expected, the ability to charge a reasonable fee to represent a veteran in the quest for benefits quite naturally began to draw lawyers to this area of the law. As the number of lawyers in the CAVC's bar has grown, some lawyers or firms have developed a particular expertise in the law of veterans' benefits.⁵⁶ The result, as explained above, was a drastic reduction of pro se veterans appearing before the CAVC.

II. RECORDING, BROADCASTING, AND PHOTOGRAPHY—A SURVEY OF CAMERAS IN THE COURTROOM

Despite nearly three decades of veterans' representation before the CAVC, no formal internal rule or policy has yet materialized to govern the use of electronic devices in appellate argument before the court.⁵⁷ Federal policy on electronic technology in court as a whole is promulgated by the Judicial Conference of the United States, which serves as the central policy-making authority for the federal courts.⁵⁸ The Judicial Conference directly supervises the Administrative Office of the United States Courts (AOUSC), which in turn serves as the implementing authority for the policies enacted by the Judicial Conference.⁵⁹ The CAVC, however, has independent authority to establish its own rules of practice and procedure as well as its own administrative policies.⁶⁰ Accordingly, although the CAVC looks to the federal rules of procedure issued by the Supreme Court and policies promulgated by the Judicial Conference for guidance in appropriate cases, neither are strictly binding on the CAVC.⁶¹

The current policy of the Judicial Conference reads:

A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive,

56. See generally *Public List of Practitioners*, U.S. CT. APPEALS FOR VETERANS CLAIMS, https://www.uscourts.cavc.gov/public_list.php (last visited Nov. 21, 2017) (providing extensive lists of practitioners across the country, who are members of the court's bar, and are willing to assist in veterans' appeals).

57. See BLOCK, *supra* note 6, at 1–2.

58. *About the Judicial Conference*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (last visited Nov. 21, 2017).

59. *Id.*

60. 38 U.S.C. §§ 7264(a), 7287 (2012).

61. *Id.* § 7264 (“The proceedings of the Court of Appeals for Veterans Claims shall be conducted in accordance with such rules of practice and procedure as the Court prescribes.”). See generally RULES OF PRACTICE AND PROCEDURE (CT. APP. VETERANS CLAIMS 2016).

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naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:

- 1) for the presentation of evidence;
- 2) for the perpetuation of the record of the proceedings;
- 3) for security purposes;
- 4) for other purposes of judicial administration;
- 5) for the photographing, recording, or broadcasting of appellate arguments; or
- 6) in accordance with pilot programs approved by the Judicial Conference.

When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will:

- 1) be consistent with the rights of the parties,
- 2) not unduly distract participants in the proceeding, and
- 3) not otherwise interfere with the administration of justice.⁶²

Although this policy is generally applicable to the federal courts, courts across the country vary widely as to their policies regarding cameras in the courtroom. Court proceedings have traditionally been open to the public, including to members of the media wishing to report on the proceedings.⁶³ However, the advent of cameras and other recording devices has forced courts to consider whether the use of cameras in court is permissible and consistent with the underlying principles and protections of court proceedings.

Most concerns regarding the use of electronic devices in criminal matters do not apply to the CAVC. However, a survey of those rules—both federal and state—provides important context for our suggestions regarding adoption of policies and rules regarding the use of various electronic devices in the CAVC.

A. Federal Criminal Proceedings

Electronic recording, broadcasting, and photography have been banned from federal criminal proceedings since Federal Rule of Criminal

62. *History of Cameras in Courts*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/cameras-courts/history-cameras-courts> (last visited Nov. 21, 2017).

63. *See Visit a Federal Court*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/federal-courts-public/visit-federal-court> (last visited Nov. 21, 2017).

Procedure 53 (“Rule 53”) was adopted in 1946.⁶⁴ The Rule states that “except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”⁶⁵ This Rule is binding on both federal district and appellate courts, which lack the inherent authority to promulgate procedural rules that contravene the Federal Rules of Criminal Procedure.⁶⁶

A number of cases have developed the parameters of Rule 53. The Supreme Court engaged in a vigorous discussion of its concerns about “telecasting” from the courtroom in *Estes v. Texas*,⁶⁷ which involved a highly publicized criminal trial that saw throngs of media personnel and their recording devices crowding the courtroom during the pretrial hearings.⁶⁸ The Court determined that the risks of improper jury influence, diminished integrity of witness testimony, undue pressure on the trial judge, and psychological impact on the defendant caused by the presence of cameras in the courtroom were excessive and reversed the defendant’s conviction.⁶⁹ These concerns, as the Court noted, were the same that had motivated the enactment of Rule 53 nearly two decades prior.⁷⁰

Rule 53 has been extended to apply to audio recordings as well. In *United States v. McVeigh*, a district court prohibited the release of tape recordings of court proceedings.⁷¹ The court held that an audio recording made for a purpose other than creating the official record cannot be released to the public because it constitutes “the functional equivalent” of a public broadcast, which is prohibited under Rule 53.⁷²

The use of audiovisual recording equipment in court by members of the public and press is a privilege that is not constitutionally protected. In *United States v. Hastings*, the Eleventh Circuit applied Rule 53 to affirm a district court’s denial of an application by several news organizations

64. FED. R. CRIM. P. 53; 321 U.S. 821 (1945); *History of Cameras in Courts*, *supra* note 62.

65. Fed. R. Crim. P. 53.

66. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996) (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–55 (1988)) (holding that a district judge could not grant a motion that conflicted with Federal Rule of Criminal Procedure 29(c)).

67. *See* 381 U.S. 532, 541 (1965).

68. *Id.* at 536.

69. *Id.* at 545–52.

70. *See id.* at 550 (“[The Court’s concerns regarding televised proceedings] are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure.”).

71. 931 F. Supp. 753, 756 (D. Colo. 1996).

72. *Id.* at 755–56.

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to use audiovisual recording in a criminal trial proceeding.⁷³ The court ruled that the press does not have a cognizable First Amendment interest in recording or broadcasting court proceedings⁷⁴ and that the defendant's constitutional right to a public trial was not implicated by barring the press from recording the proceedings because such a prohibition does not enjoin the press from attending the proceedings and reporting through nonelectronic means.⁷⁵

The prohibition set forth in Rule 53 has encountered little resistance over the years, although its scope has been altered to some extent. In September 1994, the Judicial Conference rejected a proposed amendment to Rule 53 that would have opened the door to cameras in federal criminal proceedings.⁷⁶ Subsequently, in 1996, Congress enacted a law carving out a narrow exception to Rule 53 that allowed victims of crime to remotely view trial proceedings through closed-circuit television (CCTV).⁷⁷ Otherwise, as the law currently stands, the use of electronic recording devices in federal criminal proceedings remains firmly prohibited.

B. Federal Civil Proceedings

Federal policy has been more amenable to cameras in civil proceedings, although the Judicial Conference has been exceedingly cautious in expanding the authority of courts to implement policies on cameras in the courtroom due to concerns over the logistical burdens and practical downsides of the practice. In 1972, the Judicial Conference adopted a blanket prohibition on “broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto.”⁷⁸ However, in September 1990, the Judicial Conference struck

73. 695 F.2d 1278, 1279–80 (11th Cir. 1983).

74. *Id.* at 1283–84; *accord* *Westmoreland v. Columbia Broad. Sys.*, 752 F.2d 16, 17, 23–24 (2d Cir. 1984) (holding that the general public's First Amendment right to observe trials did not create a constitutional interest for a cable television news network to electronically record and broadcast court proceedings); *see* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558, 580 (1980) (holding that the First Amendment guarantees the public and press the right to attend criminal trials).

75. *Hastings*, 695 F.2d at 1280, 1284; *accord* *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (5th Cir. 1978) (“[T]he Sixth Amendment [does not] require that the trial—or any part of it—be broadcast live or on tape to the public . . . a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.”).

76. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 67 (Sept. 1994) [hereinafter SEPT. 1994 JUDICIAL CONFERENCE REPORT], http://www.uscourts.gov/sites/default/files/1994-09_0.pdf.

77. Antiterrorism and Effective Death Penalty Act of 1996, Pub. Law. No. 104-132, § 235, 110 Stat. 1214, 1246–47 (codified at 42 U.S.C. § 10608 (2012)).

78. *History of Cameras in Courts*, *supra* note 62.

the prohibition and adopted a new policy that appeared to permit federal judges to authorize such activities in civil proceedings.⁷⁹

Although the language of the 1990 policy did not impose specific restrictions on either federal district or appellate courts,⁸⁰ the Judicial Conference's subsequent policies for each of the two court systems quickly diverged. On one hand, discretion over courtroom recording is not extended to the federal district courts.⁸¹ Despite an initial three-year pilot project that was administered from 1991 to 1994, the Judicial Conference determined that the potential harm of cameras in civil trial proceedings was excessive and declined to expand camera coverage to civil trials before federal district courts.⁸²

The Judicial Conference implemented a second pilot project from July 2011 to July 2015, with fourteen district courts participating in the four-year experiment.⁸³ Of the 1,512 proceedings before which the parties were given notice of the opportunity to record, the parties gave consent in 228 cases; 158 were ultimately held and posted online as of July 8, 2015.⁸⁴ The pilot project yielded largely positive results, with a majority of the participating judges (seventy-two percent) favoring video recording of courtroom proceedings and making the recordings publicly available.⁸⁵ Likewise, fifty-seven of sixty-four judges (eighty-nine percent) would permit video recording of civil proceedings if the Judicial Conference were to permit the practice.⁸⁶ A large majority of the attorneys answering the same questions tended to find that the ill effects of video recordings were negligible, with many reporting that they did not notice the recordings in progress.⁸⁷

Despite generally positive feedback from the pilot program's participants, the Judicial Conference Committee on Court Administration and Case Management ("the Committee") responded negatively to the program's outcome and recommended continuing the ban on cameras in

79. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 104 (Sept. 1990), http://www.uscourts.gov/sites/default/files/reports_of_the_proceedings_1990-09_0.pdf.

80. *See id.*

81. *See* SEPT. 1994 JUDICIAL CONFERENCE REPORT, *supra* note 76, at 47.

82. *Id.*; *History of Cameras in Courts*, *supra* note 62.

83. Molly Treadway Johnson, Carol Krafka & Donna Stienstra, Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project vii, 1 (2016) [hereinafter Pilot Project Report].

84. *Id.* at 20 tbl.6.

85. *Id.* at 33.

86. *Id.* at 36 tbl.13.

87. *Id.* at 37–41.

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federal district courts.⁸⁸ The Committee cited, inter alia, the likelihood of cameras making witnesses distracted or nervous, low interest among judges and parties, and excessive cost to expand the program to all of the federal district courts.⁸⁹ Currently, with the exception of three district courts extending the program to provide long-term data,⁹⁰ cameras remain presumptively banned in federal district courts.⁹¹

On the other hand, the federal circuit courts are fully empowered to enact local procedures for electronic recording. In March 1996, the Judicial Conference authorized the circuit courts to devise their own policies for electronic recording in appellate proceedings.⁹² Subsequent to this resolution, the Second,⁹³ Third,⁹⁴ and Ninth⁹⁵ Circuit Courts of Appeals have authorized camera usage in the courtroom.

Although the circuit courts have generally been slow to adopt the idea of cameras in court, the Ninth Circuit in particular has found considerable success in its implementation of the practice. That circuit, which spans a massive geographic area encompassing Alaska, Hawaii, the Northern Mariana Islands, Guam, and seven western states in the continental United States, is currently the only federal circuit court to live-stream its arguments through its official website, as well as on the popular video-sharing website YouTube.⁹⁶ A number of the Ninth

88. Sam Hananel, *Judges Give Negative Reviews to Cameras in Courts Project*, AP NEWS (Mar. 15, 2016), <https://www.usnews.com/news/politics/articles/2016-03-15/judges-give-negative-reviews-to-cameras-in-courts-project>.

89. *Id.*

90. Judicial Conference of the U.S., Report of the Proceedings of the Judicial Conference of the United States 6 (Mar. 2016).

91. See Michael Lambert, *Courtroom Camera Pilot Program Grounded*, REPS. COMMITTEE FREEDOM PRESS, <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2016/courtroom-camera-pilot-prog> (last visited Nov. 23, 2017).

92. Judicial Conference of the U.S., Report of the Proceedings of the Judicial Conference of the United States 17 (Mar. 1996).

93. CAMERAS IN THE COURTROOM—SECOND CIRCUIT GUIDELINES (1996), <http://www.ca2.uscourts.gov/Docs/CE/Cameras.pdf>.

94. In January 2017, the Third Circuit announced that it would make video recordings of certain oral arguments available on its official website. Press Release, U.S. Court of Appeals for the Third Circuit, U.S. Court of Appeals for the Third Circuit to Make Oral Argument Videos Available to the Public (Jan. 13, 2017), http://www.ca3.uscourts.gov/sites/ca3/files/Video_Press_Release_011317.pdf.

95. U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, GUIDELINES FOR BROADCASTING, RECORDING, AND STILL PHOTOGRAPHY IN THE COURTROOM (2014), https://cdn.ca9.uscourts.gov/datastore/uploads/news_media/camera.guidelines.pdf; Bonnie Eslinger, *9th Circ. Chief Favors Cameras to Promote Trust in Courts*, LAW360 (Mar. 27, 2017), <https://www.law360.com/articles/906731/9th-circ-chief-favors-cameras-to-promote-trust-in-courts>.

96. *What is the Ninth Circuit?*, U.S. CTS. FOR NINTH CIR., https://www.ca9.uscourts.gov/judicial_council/what_is_the_ninth_circuit.php (last visited Nov. 23, 2017); Jeff

Circuit's cases have received significant public attention, with some cases attracting tens of thousands of viewers.⁹⁷ Perhaps most notably, the recent hearing regarding President Donald Trump's travel ban on foreign travelers from seven Muslim-majority nations attracted 137,000 live viewers on the court's website and another 1.5 million viewers when the recording was subsequently broadcast on CNN News.⁹⁸ The Ninth Circuit's apparent successes in incorporating cameras into its proceedings, as a whole, are encouraging when one considers the potential for future expansion of the practice to other courts.

Finally, the Supreme Court maintains a strict ban on camera use during its proceedings.⁹⁹ However, the Court routinely makes audio recordings of all oral arguments, which are thereafter posted online.¹⁰⁰ Since 2010, audio recordings of Supreme Court oral arguments have been released within a week of the proceedings.¹⁰¹ Additionally, in 2013, the Court's full archive of oral argument audio recordings (dating back to 1955) was made publicly available and is now accessible through the Court's website.¹⁰²

C. State Proceedings

In state courts, there is no general prohibition on the use of cameras in either civil or criminal proceedings at both the trial and appellate levels. In *Chandler v. Florida*, the Supreme Court departed from its prior decision in *Estes* in holding that states could permit broadcasting and still photography of criminal proceedings.¹⁰³ The Court determined that *Estes* did not establish a general constitutional prohibition on cameras in the courtroom and that, barring an independent constitutional violation for permitting camera coverage in a particular case, the Supreme Court has no supervisory authority over state courts by which it could impose a

Overley, *Camera-Shy Justices Watch as Courts OK Video Coverage*, LAW360 (June 3, 2016), <https://www.law360.com/articles/802388/camera-shy-justices-watch-as-courts-ok-video-coverage>.

97. Eslinger, *supra* note 95.

98. *Id.*

99. Debra Cassens Weiss, *50 State Supreme Courts Allow Cameras, but not the US Supreme Court; is it a 'Fragile Flower'?*, ABA JOURNAL (Oct. 28, 2013), http://www.abajournal.com/news/article/50_state_supreme_courts_allow_cameras_but_not_the_us_supreme_court_is_it_a/.

100. *Argument Audio*, SUP. CT. U.S., https://www.supremecourt.gov/oral_arguments/argument_audio.aspx (last visited Nov. 23, 2017).

101. *Once Under Wraps, Supreme Court Audio Trove Now Online*, NAT'L PUB. RADIO (Apr. 24, 2013), <http://www.npr.org/sections/itsallpolitics/2013/04/25/178660998/Once-Under-Wraps-Supreme-Court-Audio-Trove-Now-Online>.

102. *Id.*

103. 449 U.S. 560, 573–74 (1981).

prohibition on cameras in state proceedings.¹⁰⁴

Currently, all fifty state supreme courts permit cameras in the courtroom to some extent.¹⁰⁵ The parameters of such policies can widely vary by each court, and a review of these policies reveals several distinct trends. For one, most states require consent by all involved parties.¹⁰⁶ Consistent with the general principle that judges should represent the ultimate authority in their courtrooms, judges accordingly retain the authority to deny recording in their courtrooms.¹⁰⁷ However, some states establish limitations on this authority; for example, Arizona permits judges to limit or prohibit electronic coverage only where the likelihood of harm outweighs the benefit to the public.¹⁰⁸

In most states, individuals or organizations—including news media and the parties themselves—seeking to use cameras during court proceedings must submit formal requests for coverage prior to the start of the proceedings to be recorded.¹⁰⁹ Although some states require only that coverage requests be submitted in a “timely” manner,¹¹⁰ most have established fixed deadlines that range from a day to a week or more prior to the start of proceedings.¹¹¹ Many state courts also impose a limitation on the number of video and still cameras that may be operated in the courtroom at once, with a two-camera maximum appearing to be the most common standard.¹¹²

D. Concerns over Cameras in Court

Critics have questioned the actual value of televised or recorded court proceedings in educating the public on the inner workings of courts.

104. *Id.* at 573–74, 582–83.

105. Weiss, *supra* note 99.

106. *See, e.g.*, S.D. CODIFIED LAWS § 15-24-6(j) (2017). *See generally* *Cameras in the Courts: State by State Guide*, RADIO TELEVISION DIGITAL NEWS ASS’N, https://www.rtdna.org/content/cameras_in_court (last visited Jan. 2, 2018) (describing state laws allowing or disallowing cameras in the courtroom).

107. Shelly Rosenfeld, Will Cameras in the Courtroom Lead to More Law and Order? A Case for Broadcast Access to Judicial Proceedings, 6 AM. U. CRIM. L. BRIEF 12, 13 (2010).

108. *See, e.g.*, AZ. SUP. CT. R. 122(d)(1).

109. *See, e.g., id.*

110. *See, e.g.*, HAW. SUP. CT. R. 5.2(a)(3).

111. *See, e.g.*, ALASKA CT. R. ADMIN. 50(b)(1) (one day); ARIZ. SUP. CT. R. 122(c)(2)(A) (seven days); CAL. R. CT. 1.150(e)(1) (five days); LA. CODE JUD. CONDUCT, Canon 3, Appx. IV (twenty days); TENN. SUP. CT. R. 30(A)(2) (two days); RULES REGARDING THE ELECTRONIC COVERAGE OF CRIMINAL COURT PROCEEDINGS BY THE MEDIA 2–3, http://www.jud.ct.gov/external/media/camera_rules_010112.pdf (Conn. 2012) (three days).

112. *See, e.g.*, R.I. SUP. CT., Art. VII, Canon 4(a) (permitting no more than two cameras in appellate proceedings and no more than one camera in trial proceedings); S.C. JUD. DEP’T. R. 605(f)(3)(i) (permitting a maximum of two cameras in any proceedings).

For one, the press might present to the public a misleading or incomplete portrayal of court proceedings in the interest of securing high audience numbers or advancing political biases.¹¹³ Additionally, members of the general public casually tuning in to certain court proceedings may not fully grasp and understand the implications of what they see and hear, especially since many might not be motivated to listen to and digest the proceedings in their entirety; Justice Antonin Scalia once lamented that “for every [ten] people who sat through our proceedings, gavel to gavel, there would be [ten thousand] who would see nothing but a [thirty]-second take-out from one of the proceedings.”¹¹⁴

The presence of cameras may also have a chilling or otherwise deleterious effect on witnesses, jurors, attorneys, and judges alike.¹¹⁵ Critics have questioned whether the presence of cameras would unduly alter the behavior of participants; as the *Estes* Court aptly pointed out, witnesses “may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.”¹¹⁶ This is particularly true in high-profile cases likely to be broadcast to large audiences, which would carry an even greater effect on in-court participants under the all-seeing lens of the camera.¹¹⁷ Additionally, both criminal and civil cases can involve sensitive topics such as proprietary business information including trade secrets and confidential business records,¹¹⁸ as well as intimate personal information such as financial or medical records.¹¹⁹ These issues, which naturally require discretion in public disclosure, would need to be handled with caution in a virtually-connected courtroom.¹²⁰

113. Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L. J. 1489, 1526–27 (2012).

114. Ariane de Vogue, *Cameras in the Supreme Court: Why the Justices Are Skeptical*, ABC NEWS (Mar. 16, 2012), <http://abcnews.go.com/blogs/politics/2012/03/cameras-in-the-supreme-court-why-the-justices-are-skeptical>.

115. *Schoeps v. Museum of Modern Art*, 599 F. Supp. 2d 532, 534 (S.D.N.Y. 2009) (declining to permit broadcasting in a civil trial proceeding due to the “very sensitive issues” involved and potential compromise to jury impartiality); *United States v. Moussaoui*, 205 F.R.D. 183, 186 (E.D. Va. 2002).

116. *See Estes v. Texas*, 381 U.S. 532, 547 (1965).

117. Marder, *supra* note 113, at 1517–18.

118. *See generally* William Lynch Shaller, *Protecting Trade Secrets During Litigation: Policies and Procedures*, 88 ILL. BAR J. 260, 260 (2000) (discussing the issues relating to confidential business information that arises in litigation).

119. *See Fed. R. Civ. P.* 5.2.

120. *See Hollingsworth v. Perry*, 558 U.S. 183, 198–99 (2010) (determining that concerns over the risks of “broadcasting in high-profile, divisive cases” overrode the district judge’s

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Another considerable concern is the burden that administering or supervising broadcasts might exact on courts' resources. Courts implementing broadcasting procedures have had to retain dedicated information technology (IT) staff to manage recording equipment throughout the course of court proceedings, especially since judges require effective control over recording equipment to avoid conflict with the parties' privacy interests.¹²¹ Additionally, many courtrooms need to be specially outfitted to accommodate recording and broadcasting equipment.¹²²

E. Congress and Proposed Legislation

While the courts have grappled with policies on cameras in the courtroom, Congress has meanwhile sought to shape judicial policy on the matter by implementing procedural rules of its own.¹²³ To that end, several proposed Acts of Congress have sought to implement blanket rules permitting the use of cameras in federal court proceedings.

On March 15, 2017, the Sunshine in the Courtroom Act was reintroduced in the 115th Congress.¹²⁴ The bill seeks to permit all federal judges to authorize "the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides" subject to the discretion of the presiding judge and except where such recording would violate a party's due process rights.¹²⁵ The Act specifies that the presiding judge may order the image and voice of an individual to be obscured if such recording or broadcasting threatens the individual's safety, the security of the court, or future or ongoing law enforcement operations.¹²⁶ Although roughly falling in line with the concerns underlying Rule 53, the Act would effectively override the Rule's mandate insofar as cameras would find their way into federal criminal proceedings.

Another piece of legislation, the Cameras in the Courtroom Act, was

limited authority to authorize electronic broadcasting of the case); *Moussaoui*, 205 F.R.D. at 186 (declining to grant right of access for public broadcasting due to "[s]ignificant concerns about the security of trial participants and the integrity of the fact finding process.").

121. PILOT PROJECT REPORT, *supra* note 83, at 47–48.

122. *Id.* at 47.

123. The Rules Enabling Act of 1934, which conferred statutory authority upon the Judicial Conference to draft and revise federal procedural rules prior to final approval by the Supreme Court, simultaneously reserved congressional authority to modify such rules. 28 U.S.C. § 2072 (2012).

124. Sunshine in the Courtroom Act of 2017, S. 643, 115th Cong.

125. *Id.* § 2(b)(1).

126. *Id.* § 2(b)(2)(C).

reintroduced in the House in January 2017.¹²⁷ This bill exclusively requires the Supreme Court to permit televised proceedings in all open Court sessions except where coverage would violate the due process rights of any parties involved.¹²⁸ The proposition, however, has encountered mixed receptions among the Justices of the high court itself.¹²⁹ While some Justices have supported camera coverage of the Court's proceedings,¹³⁰ others have approached the issue with some trepidation, cautioning that any introduction of cameras into the Supreme Court should be done after adequate research and with due caution.¹³¹ Others still have opposed the concept altogether, asserting that cameras at the court pose too great a risk of negatively altering the nature of the proceedings; perhaps the most memorable critic among the Justices has been Justice David Souter, who once infamously declared that “the day you see a camera come into our courtroom, it’s going to roll over my dead body.”¹³²

In contrast to the mixed opinions expressed by the Justices on the issue as a whole, these bills have enjoyed solid bipartisan support in both houses of Congress.¹³³ Senators Chuck Grassley (R-IA) and Amy Klobuchar (D-MN), the principal sponsors of the Sunshine in the Courtroom Act, assert that introducing cameras into the courtroom “would contribute to a better understanding of, and appreciation for, the American judicial system” and “promote a well-informed and well-

127. Cameras in the Courtroom Act, H.R. 464, 115th Cong. (2017).

128. *Id.* § 2(a); Amy Howe, *Congress Tries to Put Cameras in the Courtroom—Again*, SCOTUSBLOG (Jan. 16, 2017), <http://www.scotusblog.com/2017/01/congress-tries-put-cameras-courtroom/>.

129. Howe, *supra* note 126.

130. See Matt Sundquist, *Cameras and the Supreme Court*, SCOTUSBLOG (Apr. 29, 2010), <http://www.scotusblog.com/2010/04/cameras-and-the-supreme-court/> (referencing a statement of Justice Alito).

131. See *id.* (referencing statements of Justice Ginsburg and Chief Justice Roberts); Gavin Broady, *Kagan, Sotomayor Backtrack on Cameras in the Courtroom*, LAW360 (Feb. 2, 2015), <https://www.law360.com/articles/617541/kagan-sotomayor-backtrack-on-cameras-in-the-courtroom>.

132. *On Cameras in Supreme Court, Souter Says, ‘Over My Dead Body’*, N.Y. TIMES (Mar. 30, 1996), <http://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html>.

133. See Press Release, Sen. Chuck Grassley, Grassley & Klobuchar Lead Bipartisan Bill to Allow Cameras in Federal Courtrooms (Mar. 15, 2017), <https://www.grassley.senate.gov/news/news-releases/grassley-klobuchar-lead-bipartisan-bill-allow-cameras-federal-courtrooms> [hereinafter Sunshine Act Press Release]; Press Release, Sen. Chuck Grassley, Durbin, Grassley Bill Will Require Supreme Court to Allow Cameras in the Courtroom (Mar. 16, 2017), <https://www.grassley.senate.gov/news/news-releases/durbin-grassley-bill-will-require-supreme-court-allow-cameras-courtroom> [hereinafter Cameras Act Press Release].

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functioning democracy.”¹³⁴ Likewise, Senator Dick Durbin (D-IL) asserts that the Cameras in the Courtroom Act would provide the American public with the level of access to the Supreme Court that it deserves.¹³⁵

The ideals of public transparency and judicial accountability that these bills espouse reflect a growing public interest in permitting the practice. Proponents of camera use in court argue that recordings and broadcasts can help to increase public participation in the judicial process, which fosters public understanding of court proceedings.¹³⁶ This is evidenced by the viewer demographics from the 2011–2015 district court pilot project, as the majority of viewers who responded to the project survey were students, educators, librarians, and members of the general public.¹³⁷ In other words, cameras can be useful in providing a window into the courtroom for the greater public to engage in and learn about court proceedings.

III. MOBILE PHONES AND PERSONAL ELECTRONIC DEVICES

Mobile phone use is an ubiquitous element of modern life; as of late 2016, ninety-five percent of all Americans owned a mobile phone, with seventy-seven percent owning smartphones.¹³⁸ The run-of-the-mill mobile phone will, at a minimum, usually feature capabilities for voice calling and text messaging.¹³⁹ Smartphones are considerably more functional; these phones generally come equipped with cameras and mobile applications that grant easy access to web browsers, email, and social media platforms such as Facebook and Twitter.¹⁴⁰ Regardless of type, the functionality of mobile phones makes their use in court a contentious issue that courts across the country must consider in

134. Sunshine Act Press Release, *supra* note 133 (statements of Sen. Chuck Grassley, Chairman, S. Comm. on the Judiciary, and Sen. Amy Klobuchar, Member, S. Comm. on the Judiciary).

135. *See* Cameras Act Press Release, *supra* note 133 (statement of Sen. Richard Durbin, Member, S. Comm. on the Judiciary).

136. *See* Perry v. Schwarzenegger, 630 F.3d 898, 906 (9th Cir. 2011) (Reinhardt, J., concurring) (“Oral argument before this court was viewed on television and the Internet by more people than have ever watched an appellate court proceeding in the history of the Nation, and by innumerable law students across the country.”); *see also* Stephanie Abrutyn, *Courts, Let the Cameras In*, CNN (Feb. 15, 2017), <http://www.cnn.com/2017/02/15/opinions/courtroom-cameras-public-benefit-abrutyn/index.html>.

137. PILOT PROJECT REPORT, *supra* note 83, at 51.

138. *Mobile Fact Sheet*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/mobile/>.

139. Scott Cornell, *Smartphone vs. Regular Phone*, CHRON, <http://smallbusiness.chron.com/smartphone-vs-regular-phone-54279.html> (last visited Nov. 23, 2017).

140. *Id.*

implementing policies on electronic devices.

A. Federal and State Court Mobile Phone Policies

The Judicial Conference has recognized that cell phones and other personal electronic devices require some central guidance for their use. In June 2017, the Judicial Conference's Committee on Court Administration and Court Management (CACM), with the concurrence of the Committee on Information Technology on Judicial Security, proposed the adoption of several considerations to guide federal district and appellate courts in developing their own policies on the use of portable communication devices in courthouses and courtrooms. This document was adopted by the Judicial Conference.¹⁴¹

Federal courts differ on their stances regarding mobile phones in court. Several federal courts entirely bar the possession or use of mobile phones in the courtroom.¹⁴² Many courts offer personal storage lockers placed near the courthouse entrances, allowing court observers to stow their mobile phones and other personal electronic devices prior to entering any courtroom within the courthouse.¹⁴³ The federal courts that do allow electronic devices into their courtrooms have adopted policies limiting the use of such devices. Some permit only select courtroom attendees (i.e., jurors, members of the court's bar, credentialed members of the press) to use personal electronic devices.¹⁴⁴ Some courts require that the phone lack audio and video recording capability,¹⁴⁵ or at least that device owners either refrain from utilizing such functions or turn off their devices.

For the most part, state court policies on electronic device use in the courtroom mirror those of the federal courts. Where mobile phones are allowed into the courtroom, they must be turned off or otherwise remain

141. Press Release, U.S. Courts, Judicial Conference Approves Courthouse Construction Priorities; Courthouse Guidelines for Portable Communication Devices (Sept. 12, 2017), <http://www.uscourts.gov/news/2017/09/12/judicial-conference-approves-courthouse-construction-priorities-courthouse>.

142. See, e.g., *Electronic Device Policy*, U.S. CT. APPEALS FOR FOURTH CIR. (Jan. 7, 2013), <http://www.ca4.uscourts.gov/oral-argument/visiting-the-court/electronic-device-policy>.

143. See, e.g., *Use of Cell Phones, Laptops, and Other Electronic Devices by Visitors*, U.S. CT. APPEALS FOR D.C. CIR., <https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Courthouse+-+Cell+Phones+Laptops+and+Other+Electronic+Devices> (last updated Dec. 6, 2016).

144. See *id.*

145. See *id.*; see also *Visiting the Court: Etiquette*, SUP. CT. U.S., <https://www.supremecourt.gov/visiting/etiquette.aspx> (last visited Nov. 23, 2017).

unused throughout the proceedings.¹⁴⁶ Some states have state-wide rules prohibiting mobile phones in all courts of the state.¹⁴⁷ In other states, however, court rules can even vary between the different counties of the state.¹⁴⁸

B. Risks and Concerns over Mobile Phones in Court

The functionality of modern mobile phones presents a significant risk to the decorum and sanctity of court proceedings. For one, mobile phone usage in the courtroom is not as readily subject to the judge's control in the same manner as conventional recording devices are. As previously mentioned, the legislation and policies that permit the use of recording equipment in court proceedings generally do so with the caveat that all such recording is subject to the judge's discretion, preserving the judge's ultimate authority to restrict or altogether bar electronic recording in their courtrooms.¹⁴⁹ From a practical standpoint, policing the behavior of courtroom observers on their personal electronic devices while proceedings are underway would pose an additional arduous burden on the court's attention and resources.

The introduction of social media into the courtroom can also be problematic. Mirroring the Supreme Court Justices' concerns as to cameras in the court, the use of personal devices to record court proceedings could result in portions of argument or questioning being taken out of context and misunderstood by the cyber audience tuning in to the social media user's reports.¹⁵⁰ Additionally, there is the ever-present concern that mobile phones may distract from the decorum of court proceedings.¹⁵¹ Although courts that permit mobile phone use in the courtroom generally require that the devices be silenced, such a policy cannot keep a user from failing or forgetting to properly silence the device. While this issue is relatively inane, it nevertheless remains a legitimate factor when weighing whether to allow the use of mobile phones and other personal electronic devices in the courtroom.

146. See, e.g., Patrick L. Carroll III, *The Use and Possession of Electronic Devices in Superior Court Facilities*, CONN. JUD. BRANCH (Mar. 3, 2014), https://www.jud.ct.gov/ElectronicDevices_superior.pdf.

147. See, e.g., Kan. Sup. Ct. R. 1002; Me. Sup. Jud. Ct. Admin. Or. JB-05-16 (A. 5-08).

148. Compare IND. L. ADMIN. R. 78-AD-4.3 (Switzerland County, Indiana local rule permitting limited use of electronic devices in court), with IND. L. ADMIN. R. 76-AR-3 (Steuben County, Indiana local rule banning all electronic devices in the courtroom).

149. See, e.g., Sunshine in the Courtroom Act of 2017, S. 643, 115th Cong.

150. de Vogue, *supra* note 114.

151. See, e.g., KAN. SUP. CT. R. 1001(a).

IV. REMOTE PROCEEDINGS

Numerous courts across the country offer audioconferencing and videoconferencing capabilities, which serve as bridges for judges and litigants—who might otherwise be separated by vast swathes of land or sea—to engage in proper, “in-person” court proceedings.

A. Videoconferencing in Appellate Arguments

In 2006, the Federal Judicial Center¹⁵² conducted a survey of several federal circuit courts that used videoconferencing to conduct appellate oral argument.¹⁵³ The report’s findings show that the frequency with which videoconferencing is actually practiced varies. The Second Circuit hears approximately two to three oral arguments per week (ten percent of its weekly caseload) via videoconference, while the Tenth Circuit hears about six per month.¹⁵⁴ Several circuits rarely or never use videoconferencing procedures despite having the means to do so; the Third Circuit usually only hears one argument a month via videoconference, while the Fifth Circuit has not used videoconferencing since 2001.¹⁵⁵

In addition to the frequency of use, procedures for videoconferencing themselves vary among the circuit courts. Certain courts have both litigators appear in the same remote location—generally, a local courtroom—although it is also possible to conduct videoconferenced oral argument with one party physically present in the court and the other appearing via live video stream.¹⁵⁶ The angle and scope of the cameras’ line of sight can also vary, with some only showing the litigator at the podium and others offering a wider view to the courtroom and the judges.¹⁵⁷

For their differences, however, the use of videoconferencing to conduct oral argument offers common benefits in facilitating the appellate process. Attorneys can remotely participate in court proceedings from more geographically-convenient locations, which can dramatically offset the cost and time consumption associated with

152. “The Federal Judicial Center is the research and education agency of the judicial branch of the U.S. government. The Center was established by Congress in 1967 (28 U.S.C. §§ 620–629).” FED. JUD. CENTER, <https://www.fjc.gov/> (last visited Nov. 23, 2017).

153. MEGHAN DUNN & REBECCA NORWICK, REPORT OF A SURVEY OF VIDEOCONFERENCING IN THE COURTS OF APPEALS 1 (2006) [hereinafter VIDEOCONFERENCE SURVEY REPORT].

154. *Id.* at 5–6.

155. *Id.* at 5.

156. *Id.* at 6.

157. *Id.*

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traveling to conduct oral argument.¹⁵⁸ This benefit is especially important since appellate oral argument rarely lasts longer than one hour in total, making travel to faraway courtrooms just to argue in person particularly onerous for litigators.¹⁵⁹

There are relatively few concerns associated with the use of videoconferencing in appellate oral argument. For one, many of the concerns regarding videoconferencing in trial proceedings are inapplicable to appellate oral argument. Courts of appeal are not called upon to determine credibility or weigh evidence, nor must they govern juries or witnesses requiring particularized privacy considerations.¹⁶⁰ Unlike broadcasting, videoconferencing does not expand the audience that operates under the purview of the camera; the interaction remains strictly between the judges and litigants alone, thus preserving the integrity of the proceedings.

Notwithstanding the advantages, there exist several legitimate concerns that arise from the practical implementation of videoconferencing in appellate oral argument. In the Federal Judicial Center's 2006 Videoconference Survey Report, judges cited technical difficulties such as audio delay and unstable video feeds as a potential cause for concern.¹⁶¹ A few judges indicated that they experienced some difficulty personally connecting with litigants,¹⁶² and some found it more difficult to interrupt a litigant's argument to ask a question.¹⁶³ Indeed, audio or video feed delay could easily cause litigants to fail to discern when a judge has begun to ask a question, causing the litigant to continue speaking over the judge.¹⁶⁴ Overall, however, most judges responding to the survey—especially those with more extensive experience on the bench—found the potential downsides of videoconferencing to be negligible.¹⁶⁵

Videoconferencing is also tremendously helpful to appellate courts. In addition to allowing for remote oral arguments, videoconferencing allows judges—again, particularly those serving courts of broad geographic scope—to discuss cases and other judicial matters without incurring the additional cost and burden of physically traveling to

158. VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 8.

159. *Id.* at 9.

160. *Id.* at 2–3.

161. *Id.* at 11.

162. *Id.* at 10.

163. VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 11.

164. *Id.*

165. *Id.* at 16.

convene.¹⁶⁶

For several reasons, we believe that use of videoconferencing would have great benefit to the CAVC. Although the court has begun using some videoconferencing for internal communication, it has not yet embraced the concept of using videoconferencing for court proceedings. Some of the unique aspects of the CAVC make videoconferencing for oral arguments ripe for serious consideration by the court's Board of Judges.

B. Location of Veterans and Veterans' Advocates

In 2015, there were 18,931,395 living veterans.¹⁶⁷ Veterans, of course, are not restricted as to the location of their residence and, indeed, many may have had several residences from time to time. VA keeps statistics of the location of veterans by state.¹⁶⁸ As might be expected, veterans are widely disbursed. For example, the five states having the highest number of veteran residents in 2015 were California (1,802,446), Texas (1,675,262), Florida (1,558,441), Pennsylvania (916,638), and New York (862,805).¹⁶⁹ As one can see, except for certain parts of the states of Pennsylvania and New York, none of these states are close enough to Washington, D.C. to permit a veteran to hear an argument in the veteran's own case without incurring the expenses related to an overnight stay in Washington.

As of the writing of this article, the CAVC's bar numbered over 5,000.¹⁷⁰ Of that number, over 2,100 permit their name to be provided to the public upon request or for representation.¹⁷¹ The list of the latter is on the court's website.¹⁷² Through its successful recruitment and training efforts, the court's pro bono program has placed cases with lawyers in every state of the union and in the Commonwealth of Puerto Rico and the U.S. Virgin Islands.¹⁷³ The widely respected professional training programs produced by the National Organization of Veterans' Advocates have also assisted in increasing the number of lawyers seeking to

166. *Id.* at 15.

167. NAT'L CTR. FOR VETERANS ANALYSIS & STATISTICS, PROFILE OF VETERANS: 2015, at 1, 4 (2017), https://va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2015.pdf.

168. *See id.* at 18.

169. *Id.*

170. Email Exchange between Gregory Block, Clerk of the Court, to Judge Hagel (Dec. 27, 2017) (on file with author) (confirming that as of December 2017, there were over 5,000 members of the CAVC's bar).

171. *Public List of Practitioners*, *supra* note 56.

172. *Id.*

173. *See id.*

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represent veterans before the CAVC.¹⁷⁴ As a result, lawyers who represent veterans are themselves widely disbursed.

V. APPLICATION OF STATE AND FEDERAL COURT POLICIES RE:
ELECTRONIC TECHNOLOGY AT THE U.S. COURT OF APPEALS FOR
VETERANS CLAIMS

Currently the CAVC has no rules regarding the use of electronic media, and we believe that it is now time—indeed, past time—for the court to give thought to this matter. What follows is our opinion regarding the use and restrictions on various electronic devices and means of communication at this unique court. These suggestions have at their core two absolutes: 1) any rule or policy must preserve the dignity of a judicial setting; and 2) the presiding judge must retain control of the courtroom: to maintain the decorum of the court and to enforce the court’s rules by applying its contempt authority,¹⁷⁵ and to deal with matters not contemplated by any policy or rule it chooses to establish.

As described above, electronic communication takes many forms. We will address each form separately.

A. Communication by Participants and Nonparticipant Attendees

We believe that the CAVC should adopt a policy prohibiting the use of any means of real-time audio or video transmission or recording of court proceedings by counsel or attendees. This type of communication can result in truncated or selective transmission of statements or questions asked by the participating judges or lawyers that, when taken out of context, provide an inaccurate view of the court proceedings.¹⁷⁶ For example, a judge’s question at oral argument: “Let’s assume that VA denies emergency medical treatment to a veteran, under what provision of the law do you believe it has the authority to do so?” could be broadcast as “Judge X stated at oral argument that VA denies emergency medical treatment to a veteran.”

In the extreme case, sensitive or classified topics may arise during argument and thus become inappropriately exposed to the public.¹⁷⁷ For example, almost all cases at CAVC involve medical injury or disease incurred in or aggravated by military service. This might include issues of disfigurement, injury to private parts of the body, loss or impairment

174. *Mission Statement*, NAT’L ORG. VETERANS’ ADVOCES., <https://vetadvocates.org/about-nova/mission-statement/> (last visited Nov. 23, 2017).

175. 38 U.S.C. § 7265(a) (2012).

176. *See, e.g.*, PILOT PROJECT REPORT, *supra* note 83, at 32–33.

177. *See, e.g., id.* at 54.

of bodily functions, or sexual assault. For some appellants, dissemination of this personal information through social media or other unchecked broadcasting from inside the courtroom could be deeply embarrassing. It should be noted that the CAVC, in practice, does make the official audio transcript available on its website. There is, however, a self-imposed twenty-four-hour delay of posting. This permits counsel to petition the court or the court sua sponte to redact portions of the record or to seal it at the completion of any oral argument.¹⁷⁸

B. Real-Time Video Transmission

Although real-time video transmission of court proceedings does not bear the same concerns regarding selective transmission, it does nonetheless still leave open the possibility of sensitive information being needlessly and widely published. This situation is one of the recurring concerns cited by attorneys who participated in the Judicial Conference pilot project on video transmission of federal trial proceedings.¹⁷⁹

We recognize that Judicial Conference policy currently permits each circuit to develop its own rules regarding contemporary video transmission and that some circuits, notably the Ninth Circuit, have adopted the practice of real-time video transmission of oral arguments. The adoption of real-time transmission would have the benefit of permitting the veteran, regardless of location, to view the argument via the internet.¹⁸⁰ Likewise, interested members of the public could also become acquainted with the CAVC by viewing its proceedings.¹⁸¹

The ability for counsel to request to appear for oral argument at a location other than Washington, D.C., we believe, is a policy that should be adopted as soon as possible. There are several factors that we believe warrant adoption of a rule giving a lawyer representing a veteran the option to appear before the court from a location other than the court's permanent facility in Washington, D.C.

C. Inapplicability of Concerns Expressed by the Judicial Conference

Because the CAVC is an appellate court where review is on the record, there is no issue regarding the visual identification of witnesses, victims, or jurors, or overdramatization by counsel.¹⁸² Video appearance

178. See 38 U.S.C. § 7268(b)(1)–(2) (2012); U.S. VET. APP. R. 6(a); U.S. VET. APP. R. 48(a).

179. PILOT PROJECT REPORT, *supra* note 83, at 54.

180. See *id.* at 41.

181. *Id.*

182. VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 2–3.

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in an appellate court such as CAVC merely mirrors a normal in-person appearance by a lawyer. The process consists of lawyers arguing legal issues to judges; there is no reason for lawyers to grandstand. Most significantly, the Judicial Conference's concerns specifically permit federal appellate courts to use this method of appearance and, as discussed above, some federal appellate courts provide this opportunity.¹⁸³

The CAVC has sufficient protection regarding the exposure of sensitive information by both law and rule.¹⁸⁴ Thus, such information can, we believe, be edited from the argument's recording in a manner sufficient to maintain the availability of the record as needed.

Because of the adoption of electronic filing by the CAVC and the march to that method by all federal courts, all federal courts have—or will soon have—the staff and equipment means to conduct video proceedings. Indeed, the CAVC currently employs an experienced IT staff and has during a recent renovation of its courtroom incorporated some of the infrastructure requirements needed to conduct video arguments.

D. Why the Court Should Permit Video Appearance

Although the CAVC considers a very narrow scope of the law, its reach is expansive. The exclusivity of the jurisdiction of the court combined with the worldwide location of potential appellants and the lawyers who would represent them should drive the CAVC, we believe, to adopt a rule permitting advocates for veterans to appear remotely using electronic means. Over one hundred of the lawyer volunteers that represent veterans through the court's pro bono program were lawyers with a solo practice or with small law firms.¹⁸⁵ Further, the pro bono program has lawyers from each of the fifty states and the Commonwealth of Puerto Rico who have qualified to represent veterans by participating in the program's daylong training class.¹⁸⁶ For lawyers who have a solo practice or who are members of small firms distant from the court, travel to Washington D.C. poses a considerable financial burden.¹⁸⁷ For example, the current (conservative) estimated cost for a lawyer from Los Angeles, California to travel to the court for oral argument is

183. *Id.* at 2.

184. 38 U.S.C. § 7268(b)(1) (2012); VET. APP. R. P. 6; VET. APP. R. P. 48.

185. *See* VETERANS CONSORTIUM PRO BONO PROGRAM, ANNUAL REPORT 12–15 (2015), <https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf>.

186. *See id.* at 13–15.

187. *See* VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 9.

\$1,347.00.¹⁸⁸ This figure does not consider the related factor of absence from the lawyer's other practice responsibilities and the associated loss of revenue.¹⁸⁹ Further, if veterans retain lawyers located near to them, the opportunity for a veteran to be present at an argument in the veteran's case is significantly increased. As the number of lawyers accepting veterans benefit cases continues to expand, the co-location of client and lawyer, at least within the same federal judicial district, is no longer an impossibility.¹⁹⁰ Further, remote appearance may well encourage more lawyers to seek oral argument, which the CAVC's Internal Operating Procedures provide should be conducted by a panel of judges, something championed by members of the bar.¹⁹¹

Among the observations listed in the Videoconferencing Survey Report overview section were that the Second, Third, Eighth, Ninth and Tenth Circuit Courts of Appeal use videoconferencing to conduct oral arguments, and most of the judges surveyed believed that even with minor technical issues, the benefits of videoconferencing outweighed the disadvantages.¹⁹² For these reasons, we simply see no defensible reason not to adopt appearance by video.

VI. CONSIDERATIONS TO BE RESOLVED AND DECISIONS TO BE MADE IN THE ADOPTION OF VIDEO APPEARANCE OR SIMULCAST

A. *Judicial Setting*

We think it important that a judicial setting be preserved should video appearance be adopted by the court. Although this is no problem for the CAVC, it will be more challenging to ensure such a setting for appellant's counsel. We believe video appearance works best when the remote counsel appears in a formal, judicial environment, which will preserve the dignity of the process. As mentioned above, many federal district courts already possess the necessary equipment and expertise to conduct remote sessions. Consequently, if the appropriate agreement

188. According to Travelocity, airfare reservations sixty days in advance cost approximately \$625.00. Lodging for two nights costs approximately \$462.00 based on the government-lodging rate for Washington, D.C.; meals cost approximately \$210.00 based on the government per diem rate for Washington D.C., and local transportation costs approximately \$50.00.

189. See VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 9.

190. See *id.*

191. See CT. VET. APP. INTERNAL OPERATING P. IV(a); VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 9; James D. Ridgway, Barton F. Stichman & Rory E. Riley, *Not Reasonably Debatable: The Problems with Single-Judge Decisions by the U.S. Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 55 (2016).

192. VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 1.

could be reached, either as a policy matter with the AOUSC or with a particular federal district court, the remote counsel could appear in the federal district court in the counsel's judicial district. This would be no different from any case that counsel would have in federal court.

In this regard, the court has conducted one pilot argument in the non-precedential case of *Pirkl v. Shulkin*, Docket No. 14-430.¹⁹³ In that case, the CAVC arranged for appellant's counsel to appear in the U.S. District Court in Topeka, Kansas, while the CAVC judge sat in the U.S. District Court in Washington, D.C.¹⁹⁴ Spectators showing interest in this case were present in both courtrooms. As the judge hearing this case, I can report that there was no meaningful difference between an oral argument in person and one in which the appellant appeared by video and found it perfectly adequate.

B. Location of VA Counsel

The location of VA counsel is a matter that must be addressed. Discussed above, some courts require both counsel to appear remotely while others require the non-remote counsel to appear in person.¹⁹⁵ In the CAVC's test case mentioned above, VA counsel appeared in the same courtroom as the judge.¹⁹⁶ Appellant's counsel agreed to this arrangement prior to the argument.¹⁹⁷ The advantage of this arrangement is twofold: it reduces the complication that might occur when attempting to link three video systems,¹⁹⁸ and it also makes it easier for the senior panel judge to control the argument and questions by the other judges on the panel, by recognizing the speaker, thus eliminating the problem of one person speaking simultaneously with another.¹⁹⁹

C. Reliability of Communication

Comments recorded in the Videoconference Survey Report emphasized the need for reliable communications. The argument must start on time and continue uninterrupted.²⁰⁰ Consequently, it is essential that the video and audio connections be reliable. This means that the equipment must be tested close in time to the beginning of the argument and the video and audio connection must be maintained throughout the

193. 2017 U.S. App. Vet. Claims LEXIS 329, at *1 (Mar. 7, 2017).

194. *Id.*

195. See VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 5–6.

196. *Pirkl*, 2017 U.S. App. Vet. Claims LEXIS 329, at *1.

197. *Id.*

198. See VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 7.

199. See *id.* at 2.

200. See generally *id.*

court session.²⁰¹ This requirement also emphasizes the need for qualified staff to monitor these proceedings and react quickly to any interruption of transmission.²⁰² One issue mentioned in the Videoconference Survey Report was the gap or delay between the audio and video transmissions.²⁰³ However, judges reported that as time went on this became less of a problem and that judges with more experience on the bench had virtually no problem with the delay.²⁰⁴ Another issue was the difficulty at times to isolate the speaker, that is, to prevent both judges and counsel from speaking over one another.²⁰⁵ This was judged to be a minor issue, however²⁰⁶; it will become even less so as judges and counsel gain more experience and technology continues to improve. Both the reliability of the equipment and the acclimation of judges and counsel, however, remain key things to consider when deciding whether to adopt video appearance.

D. Burden on Other Personnel

It is the responsibility of CAVC to provide the normal support in its own courtroom. For example, court security officers, the Clerk of the Court, and the Deputy Clerk are responsible for timekeeping and recording and other assistance as needed.²⁰⁷ Consequently, there is no additional burden for the CAVC when conducting remote oral argument. However, the location at which appellant's counsel appears must provide the same support at its location for a proceeding that is not within that court's jurisdiction. Without cooperation from a remote court, this will be an issue that must be addressed by the CAVC Clerk. This, however, at least at present, would not appear to be a significant issue as the CAVC has averaged only eighteen oral arguments per year over the last five years.²⁰⁸ We assume that most counsel would, if reasonably possible,

201. *Id.* at 7.

202. *See id.*

203. VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 11.

204. *Id.*

205. *Id.*

206. *Id.* at 11.

207. *See* Catherine D. Perry, From the Bench, Lessons Learned as a New Chief Judge, 38 LITIG. 14, 14–15 (2011).

208. U.S. COURT OF APPEALS OF VETERANS CLAIMS, ANNUAL REPORT 44 (2012), <https://www.uscourts.cavc.gov/documents/FY2012AnnualReport.pdf>; U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 44 (2013), <https://www.uscourts.cavc.gov/documents/FY2013AnnualReport.pdf>; U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 4 (2014), <https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf>; U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT 44 (2015), <https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf>; 2016 CAVC Report, *supra* note 7, ¶ 10.

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continue to appear at the CAVC's own courtroom in Washington, D.C.

E. Control of the Courtroom

The senior judge on the panel must have the means and develop a system to control the argument prior to the argument, and instructions regarding this method should be explained to counsel prior to argument and by rule of Practice and Procedure. It would behoove the judges to become familiar with the use of the equipment and means of control before conducting a hearing in an actual case. Such preparation will provide for a smoother hearing and place the judge in a position to establish and retain control of the argument.

F. Choice of Location

Counsel for the appellant must retain the choice of appearing in person at CAVC. We see video appearance as an opportunity to permit counsel to argue remotely only if counsel so chooses. Thus, the court would need to modify its Rules of Practice and Procedure to require a counsel desiring to appear from a remote location to file a motion for remote argument and a time limit by which the motion must be filed. The court will also need to review its Rules of Practice and Procedure to determine which, if any, other procedural rules, Internal Operating Procedures, or memoranda must be modified or adopted to accommodate video oral argument.

VII. ADDITIONAL BENEFITS TO CAVC FOR THE USE OF VIDEO TECHNOLOGY

There are many other benefits to judges and the public for the court to establish reliable video technology. For example, judges are often asked to appear at various conferences to make presentations.²⁰⁹ Although some conferences—because of their importance or for other reasons—favor personal appearance by judges, others do not.²¹⁰ Reliable video technology would permit judges to appear and make presentations at conferences that they would otherwise not attend due to cost or for other reasons. Thus, the use of video technology would make the court more accessible to the public and increase knowledge of the court, its jurisdiction and proceedings. Video technology would also be used to

209. See, e.g., VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 9.

210. See *id.* See generally ROBERT J. NIEMIC, FEDERAL JUDICIAL CENTER, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS (2006), <https://www.fjc.gov/sites/default/files/2012/MediCon2.pdf> (explaining conference programs in the federal courts of appeals).

permit judges to attend remotely educational activities sponsored by the Federal Circuit's and the CAVC's bar associations dealing with veterans and universal procedural matters, and to conduct meetings with groups such as the court's historical society.

The Videoconferencing Survey Report conveys that the Second, Third, Eighth, Ninth and Tenth Circuit Courts of Appeal used videoconferencing to conduct court business such as committee or other court meetings.²¹¹ However, because all the CAVC judges must live within relatively close proximity to the court and are regularly present in their chambers,²¹² we anticipate that videoconferencing would not likely be routinely used for purposes such as attending meetings of the Board of Judges or meetings of members of a panel. It would, of course, be available should circumstances dictate. Only the imagination of judges limits the use of video technology.

CONCLUSION

We conclude that the CAVC must devise policies and procedural rules to permit and regulate the use of electronic technology in the courtroom. The availability of electronic, especially video, technology has been proven successful by other federal courts of appeals and provides great benefit to the CAVC's bar, to appellants, and to the court itself.²¹³ Not only can technology be of benefit for formal court proceedings, but there are many ancillary uses for the implementation of video technology, such as an expanded means of making presentations to the court's bar and to the public in general. However, the use of electronic media in the courtroom by spectators and counsel must be clearly defined to maintain the dignity of judicial proceedings.

211. VIDEOCONFERENCE SURVEY REPORT, *supra* note 153, at 1.

212. 38 U.S.C. § 7255(c)(1) (2012).

213. *See id.* at 2, 9.