

# ZZP *Int*

## Zeitschrift für Zivilprozess International

---

Jahrbuch des Internationalen Zivilprozessrechts

24. Band 2019

*Sonderdruck*

Herausgegeben von

Professor Dr. Christoph Althammer, Regensburg

Professor Dr. Alexander Bruns, LL.M. (Duke Univ.), Freiburg

Professor Dr. Dres. h. c. Dieter Leipold, Freiburg

Professor Dr. Astrid Stadler, Konstanz

Professor Dr. Dres. h. c. Rolf Stürner, Freiburg

in Verbindung mit der

Wissenschaftlichen Vereinigung für

Internationales Verfahrensrecht e. V.

Professor Dr. Burkhard Hess, Luxemburg

Professor Dr. Ulrich Haas, Zürich

Carl Heymanns Verlag

# ZZPInt

## Zeitschrift für Zivilprozess International Jahrbuch des Internationalen Zivilprozessrechts

Zitiervorschlag:

Verfasser ZZPInt Band (Jahrgang), Seite(n)

Esplugues ZZPInt 24 (2019), 3 ff., 12

© Copyright by Wolters Kluwer Deutschland GmbH,

Köln, 2020

ISBN 978-3-452-29671-9

ISSN 1434-8888

---

### *Schriftleitung*

Professor Dr. Alexander Bruns, LL.M. (Duke Univ.), Universität Freiburg, Institut für deutsches und ausländisches Zivilprozessrecht, Abt. 2, Werthmannstraße 4, 79098 Freiburg, e-mail: izpr2@jura.uni-freiburg.de. Zuschriften werden an die Schriftleitung oder an die zuständigen Mitarbeiter erbeten.

### *Manuskripte*

Beiträge werden nur zur Alleinveröffentlichung angenommen. Die Annahme zur Veröffentlichung muss schriftlich erfolgen. Mit der Annahme erwirbt der Verlag vom Verfasser alle Rechte zur Veröffentlichung, insbesondere auch das Recht der weiteren Vervielfältigung zu gewerblichen Zwecken im Wege fotomechanischer oder anderer Verfahren.

Für Manuskripte, die unaufgefordert eingesandt werden, wird keine Haftung übernommen. Die Rücksendung ist nur möglich, wenn Rückporto beigelegt war.

Es wird davon ausgegangen, dass die zur Veröffentlichung eingesandten Entscheidungen von Instanzgerichten nicht auch anderen Zeitschriften angeboten werden.

### *Urheber- und Verlagsrechte*

An den veröffentlichten Beiträgen bleiben alle Urheber- und Verlagsrechte vorbehalten. Die vorbehaltenen Urheber- und Verlagsrechte erstrecken sich auch auf die veröffentlichten Gerichtsentscheidungen und ihre Leitsätze; sie sind vom Einsender oder von der Schriftleitung bearbeitet oder redigiert. Der Rechtsschutz gilt auch gegenüber Datenbanken oder ähnlichen Einrichtungen. Sie bedürfen zur Auswertung ausdrücklicher Einwilligung des Verlages.

### *Nachdruck und Vervielfältigung*

Nachdrucke, auch von Auszügen, sowie fotomechanische Vervielfältigungen, auch von Teilen des Sammelwerkes,

gleichgültig in welcher Anzahl, auch für innerbetrieblichen Gebrauch, und die Einspeicherung und Ausgabe von Daten des Inhalts des Sammelwerkes in Datenbanken und ähnlichen Einrichtungen sind nicht gestattet.

### *Erscheinungsweise*

Die ZZP International erscheint einmal jährlich als komplett gebundener Band.

### *Bezugsbedingungen*

Nähere Informationen zu allen Bänden sowie die Bezugsbedingungen sind erhältlich unter Tel. 0 26 31/8 01-22 22 oder e-mail: info-wkd@wolterskluwer.com.

### *Adressenänderung*

Es wird gebeten, bei der Mitteilung von Adressenänderungen außer dem Titel des Jahrbuchs die neue und die alte Adresse anzugeben.

### *Satz*

Newgen Knowledge Works (P) Ltd., Chennai

### *Druckerei*

Williams Lea Tag GmbH, München.

### *Verlag*

Wolters Kluwer Deutschland GmbH, Carl Heymanns Verlag, Wolters-Kluwer-Straße 1, 50354 Hürth, Telefon 0 22 33/37 60-60 00, e-mail: info-wkd@wolterskluwer.com, <http://www.carl-heyman.de>

## VI. USA

# COVID-19 and Judicial Process: Interim Report from the United States

*Prof. Helen Hershkoff and Prof. Arthur R. Miller, New York University School of Law<sup>1</sup>*

1. COVID and the Federal Response
  2. Federal and State Judicial Responses to COVID
  3. Judicial Experience with Technology before the Pandemic
  4. The Supreme Court and COVID-19's Disruption of Life outside the Courthouse
  5. Judicial Commissions, Lessons Learned, and Questions Still to Ask
- Conclusion

Richard Marcus, an astute observer of procedural developments in the United States, reported in this journal in 2018 “that those seeking procedural reform in the US are ‘treading water’ – staying afloat but not moving very far.”<sup>2</sup> But that was before COVID-19, a lethal virus, had appeared. By the time we completed this manuscript and submitted it for publication, the virus had caused more than 142,000 deaths in the United States. Today, as we finish work on the proof of these pages, not quite a month later, the death toll in the United States is about to reach 200,000 and approaching seven million cases, and, on average, over one thousand are dying each day.<sup>3</sup> Indeed,

---

1 Helen Hershkoff is the Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties at New York University School of Law. Arthur R. Miller is a University Professor at New York University and the former Bruce Bromley Professor of Law at Harvard Law School. They thank Edward Eisenman, William Hughes, Michael Kowiak, Leah Motzkin, Yujung Iris Ryu, and Sabrina Solow for research assistance; Gretchen Feltes for library support; and Ian Brydon and Kristin Silberman for administrative support. Professor Hershkoff acknowledges financial support from the D’Agostino Faculty Research Fund in the preparation of this essay.

2 Richard Marcus, *Treading Water? Current Procedural Issues in America*, ZZPInt 23, p. 183 (2018).

3 The fatality number of 142,000 is as of July 15, 2020. See Centers for Disease Control and Prevention, *Coronavirus Disease 2019, Cases and Deaths in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/us-cases-deaths.html> (reporting 773 new deaths and a total of more than 3.4 million cases). As of September 21, 2020, the fatality number was 199,024 as reported to the centers. See *United States COVID-19 Cases and Deaths by State*, [https://covid.cdc.gov/covid-data-tracker/?utm\\_source=morning\\_brew#cases](https://covid.cdc.gov/covid-data-tracker/?utm_source=morning_brew#cases). See also Kaiser Health News, *In Just Three Months, COVID-19 Rises to No. 3 Cause of Death in U.S.* (Aug. 18, 2020), <https://khn.org/morning-breakout/in-just-8-months-covid-19-rises-to-no-3-cause-of-death-in-u-s/>; Sheryl Gay Stolberg, *Trump Administration Strips C.D.C. of Control of Coronavirus Data*, *N.Y. Times* (July 15, 2020), <https://www.nytimes.com/2020/07/14/us/politics/trump-cdc-coronavirus.html> (reporting that the Trump Ad-

COVID now is believed to be the third leading cause of death in our Nation.<sup>4</sup> This catastrophe has jumpstarted unprecedented changes in United States judicial procedure. Whether these changes to the United States court system are expedient and transient, or permanent and seismic, remains uncertain. This essay presents an interim report on the United States judicial response to COVID-19 – interim because the situation is dynamic, subject not only to the indefinite lifespan of the pandemic, but also to political, social, and economic events following in its wake.

We begin by providing some background to the COVID-19 crisis in the United States. The United States is a federal system, without a national program of health care, and although the states are the front-line providers of public health services, the enormity of the COVID-19 crisis necessitated coordination and resources from the federal government. In Part 1, we discuss the Executive’s response to the crisis – a response marked by what the Brookings Institution has called “massive failures,” with the White House denying the existence of the problem, delaying the development of a coherent containment policy, and depriving states and localities of critical resources.<sup>5</sup> These failures generated a domino effect of problems outside the courthouse that indirectly affected the courts: a lack of necessary health-care equipment, widespread unemployment, reduced state tax revenues, hastily designed federal financial assistance programs, and tension between the states and Washington, D.C.

As the numbers of confirmed COVID-19 cases and the fatality rate mounted, uncertainty remained about the virus’s mode of transmission, America’s courts faced a public health crisis that threatened the very concept of “open court.” In Part 2, we discuss judicial responses to the pandemic. It is important to emphasize that the judiciary in the United States is not a unitary institution; the national government has a court system established under Article III of the federal Constitution and federal

---

ministration will no longer permit the Centers for Disease Control and Prevention to receive data from hospitals about COVID-19 patients, a shift in policy that “has alarmed experts who fear the data will be politicized or withheld from the public”); Antonia Noori Farzan, Jennifer Hassan, Lateshia Beachum, Miriam Berger, Kim Bellware, John Wagner, Hamza Shaban, Reis Thebault, & Hannah Knowles, U.S. averages more than 1,000 coronavirus-related deaths for ninth day in a row, *Wash. Post* (Aug. 4, 2020), <https://www.washingtonpost.com/nation/2020/08/04/coronavirus-covid-live-updates-us/>.

- 4 See ShaCamree Gowdy, COVID-19 is now the third leading cause of death in the U.S., former CDC director says, *Microsoft News* (Aug. 20, 2020), <https://www.msn.com/en-us/health/medical/covid-19-is-now-the-third-leading-cause-of-death-in-the-us-former-cdc-director-says/ar-BB18efuE>; Justine Coleman, COVID-19 now No. 3 cause of death in US, *The Hill* (Aug. 17 2020), <https://thehill.com/policy/healthcare/512427-covid-19-now-no-3-cause-of-death-in-us>.
- 5 Brookings, Philip A. Wallach & Justus Myers, Report, The federal government’s coronavirus response – Public health timeline (March 31, 2020), <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/> (stating that “it is obvious to everyone seeking to understand the United States’ response to the novel coronavirus (officially SARS-CoV-2) that there were massive failures of judgment and inaction”). See, e.g., Greg Myre, With Trump’s Coronavirus Response, U.S. Forfeits Global Leadership Role (April 30, 2020), <https://www.npr.org/2020/04/30/848179346/pandemic-fuels-debate-trumps-america-first-or-u-s-global-leadership>.

statutes, and each state and territory likewise has its own judicial system, separate from the federal.<sup>6</sup> Drawing from federal and state examples, we sketch the sequence and content of judicial responses to the pandemic and how they relied upon elements of electronic practice to keep the courts open to civil matters. The different judicial systems worked fast to devise emergency responses that were, by necessity, at times makeshift and left gaps in the system that inevitably affected legal rights and judicial protection. In Part 3, we show how the judiciary's responses drew from the courts' existing experience with technology, investments in electronic infrastructure, changes in legal education, and procedural rules that facilitated a quick transition from traditional to virtual practice. Throughout this process, the judiciary emphasized the need to ensure the safety and health of those who worked or practiced in the courthouse, while providing an essential service to the country. In tandem, the pandemic also disrupted life outside the courthouse – particularly the lives of Black, Brown, and poor Americans – and raised profound questions about the legal system's treatment of voters, immigrants seeking health care, and prison inmates, which we examine in Part 4. Part 5, which concludes, looks forward, focusing on the numerous state and federal commissions that have been established to consider the short- and long-term impact of COVID on the courts and legal process.

The after-effects of the pandemic will demand attention long after it has ended and the death toll known. Undoubtedly, courts in the United States will play an important role in addressing problems that COVID has created or magnified, recalling Tocqueville's insight about the significance of litigation to American society – “There is hardly any political question in the United States that sooner or later does not turn into a judicial question.”<sup>7</sup> But we emphasize: the courts themselves will need repair and reform, and there is no assurance that their emergency response to COVID is the appropriate one for a post-COVID society.

### *1. COVID and the Federal Response*

COVID-19 is a novel and highly contagious virus that by the end of June 2020 had caused a half million deaths worldwide, and 80,000 more two weeks later.<sup>8</sup> Reports

---

6 See Administrative Office of the U.S. Courts, *The Federal Court System in the United States: An Introduction for Judges and Judicial Administrators in Other Countries* (4th ed. 2016), <https://www.uscourts.gov/sites/default/files/federalcourtsystemintheus.pdf> (providing overview of the federal court system); National Center for States Courts, *State Court Web sites*, <https://www.ncsc.org/information-and-resources/state-court-websites> (providing judicial branch links for each state).

7 Alexis de Tocqueville, *Democracy in America*, I, 2, ch. 8 (1835).

8 See Worldometers, *COVID-19 Coronavirus Pandemic* (updated June 28, 2020), <https://www.worldometers.info/coronavirus/> (reporting 502,471 deaths worldwide and 128,201 deaths in the U.S.). By July 15, 2020, the number of worldwide deaths had risen to 582,000, with 138,000 deaths in the U.S. See Johns Hopkins University, *Coronavirus Resource Center, Mortality Analyses* (July 15, 2020), <https://coronavirus.jhu.edu/data/mortality>.

date its emergence in Wuhan, China to November 2019, and the United States apparently became aware of the outbreak a month later. By January 2020, the President's Daily Brief had begun to include warnings about the potentially cataclysmic impact of the virus, and that same month the United States announced its first confirmed case, coinciding with the Chinese government's formal acknowledgment of virus-related deaths and the enforced quarantine of the 11 million residents of Wuhan.<sup>9</sup> Around this time, medical experts began to recognize that asymptomatic carriers of the virus could infect others by human-to-human transmission.<sup>10</sup> Outside of the United States, nations began working briskly to try to contain the virus, through such measures as mandatory or recommended quarantines and other forms of "social distancing," government acquisition of protective equipment (such as nose-and-mouth coverings) for health-care workers, investment in medical research, and the announcement (and in some countries a mandate) of safety protocols for public spaces (such as the wearing of masks in public spaces).<sup>11</sup>

By contrast, the United States was slow to develop anything that could be called a national coordinated response or even to accord significance to the virus. Several factors were in play. The President – battling impeachment since December 2019<sup>12</sup> – notoriously cast COVID as a public relations event, dismissing warnings about its potentially cataclysmic effects as so-called fake news concocted by his opponents in

- 
- 9 Just Security, an online forum based at the Reiss Center on Law and Security at New York University School of Law, has constructed a detailed timeline of the pandemic and the lack of response by the United States, and this paragraph draws extensively from its report. Information in this paragraph is largely drawn from Ryan Goodman & Danielle Schulkin, *Timeline of the Coronavirus Pandemic and U.S. Response*, Just Security (May 7, 2020), <https://www.justsecurity.org/69650/timeline-of-the-coronavirus-pandemic-and-u-s-response/> [*hereinafter*, *Just Security*].
- 10 See John Bacon, *5 US coronavirus cases now confirmed; infection can spread before symptoms show*, USA Today (Jan. 26, 2020), <https://www.usatoday.com/story/news/nation/2020/01/26/coronavirus-third-us-patient-diagnosed-california/4580804002/>.
- 11 See The Commonwealth Fund, Roosa Tikkanen, Gabriella N. Aboulaflia, & Reginald D. Williams II, *How the U.S. Compares to Other Countries in Responding to COVID-19: Populations at Risk, Health System Capacity, and Affordability of Care* (April 7, 2020), <https://www.commonwealthfund.org/blog/2020/how-us-compares-other-countries-responding-covid-19-populations-risk-health-system>. See also Max Matza, *Coronavirus: Could the US do what Italy has done?*, BBC News (Mar. 11, 2020), <https://www.bbc.com/news/world-us-canada-51804664>.
- 12 In addition to his persistent refusal to acknowledge the significance of the health crisis, the President later defended his inaction by stating that impeachment had "distracted" him from formulating policy. See David Jackson, *Trump says impeachment 'probably' distracted him from fighting coronavirus*, USA Today (Mar. 31, 2020); updated April 1, 2020, <https://www.usatoday.com/story/news/politics/2020/03/31/coronavirus-trump-says-impeachment-distracted-him-coronavirus/5100694002/>.

the Democratic Party.<sup>13</sup> Less sensationally, even before COVID emerged, the White House had embraced policies that seriously undermined the country's preparedness for dealing with a pandemic. This is not the occasion to rehearse all of the Administration's misguided activities that set the stage for the judiciary's later emergency actions.<sup>14</sup> They included a regulatory assault on scientific research, illustrated by the 2017 ban on the use of the terms "evidence-based" and "science-based" by the Centers for Disease Control ("CDC");<sup>15</sup> the refusal to acknowledge or implement the National Security Council's 2016 guidebook for "coordinating a complex U.S. Government response to a high-consequence emerging disease threat anywhere in the world" – the so-called pandemic "playbook";<sup>16</sup> the elimination of \$1.35 billion in funding for Prevention and Public Health Fund at the CDC,<sup>17</sup> on top of earlier budget cuts that reduced the government's ability to protect against medical supply shortages;<sup>18</sup>

---

13 See Maggie Haberman & Noah Weiland, *Inside the Coronavirus Response: A Case Study in the White House Under Trump*, N.Y. Times (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/us/politics/kushner-trump-coronavirus.html>. See also Tracy Connor, *Trump: Democrats' Coronavirus Criticism a 'New Hoax,'* Daily Beast (Feb. 28, 2020), <https://www.thedailybeast.com/trump-calls-democrats-coronavirus-criticism-a-new-hoax>.

14 See Just Security, *supra* note 9.

15 Jon Cohen, *CDC word ban? The fight over seven health-related words in the president's next budget*, Science (Dec. 18, 2017), <https://www.sciencemag.org/news/2017/12/fight-over-seven-health-related-words-president-s-next-budget>.

16 Office of the President, *Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents*, <https://assets.documentcloud.org/documents/6819268/Pandemic-Playbook.pdf> (marked "Not for Public Distribution"). A link to the document appeared in a tweet by Ronald Klain, who coordinated the Obama Administration's response to Ebola following Senator Mitch McConnell's statement that the Trump Administration received no guidance about pandemics from the former Executive. See Victoria Knight, *Evidence Shows Obama Team Left A Pandemic 'Game Plan' for Trump Administration*, Kaiser Health News (May 15, 2020), <https://khn.org/news/evidence-shows-obama-team-left-a-pandemic-game-plan-for-trump-administration/view/republish/>. See also Abigail Tracy, *How Trump Gutted Obama's Pandemic-Preparedness Systems*, Vanity Fair (May 1, 2020), <https://www.vanityfair.com/news/2020/05/trump-obama-coronavirus-pandemic-response>.

17 Bipartisan Budget Act of 2018, H.R. 1892, as amended (Feb. 9, 2020), <https://www.congress.gov/115/bills/hr1892/BILLS-115hr1892eas2.pdf>. See Katie Keith, *New Budget Bill Eliminates IPAB, Cuts Prevention Fund, And Delays DSH Payments Cuts*, Health Affairs Blog (Feb. 9, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180209.194373/full/> ("Public health advocates and state and local officials have repeatedly raised concerns that cuts . . . have significant negative effects on public health preparedness, the public health workforce, and core health programs that keep Americans safe and healthy.").

18 See Yeganeh Torbati & Isaac Arnsdorf, *How Tea Party Budget Battles Left the National Emergency Medical Stockpile Unprepared for Coronavirus*, ProPublica (Apr. 3, 2020), <https://www.propublica.org/article/us-emergency-medical-stockpile-funding-unprepared-coronavirus>.



the denigration of the World Health Organization;<sup>19</sup> and the elimination of a federal public health position specifically designed to detect disease outbreaks in China.<sup>20</sup>

With grim effects, the Executive failed at an early stage (or even months later) to invoke regulatory powers or to take emergency action that might have contained or at least curtailed the developing crisis.<sup>21</sup> Given the usual allocation of authority for social services in the United States, the states were the natural front-line defenders against COVID; the United States has no national health care system, and of the more than 6,000 hospitals in the country, only about 200 are federal.<sup>22</sup> However, various federal institutions exist to deal with national emergencies that cross

---

19 See Michael D. Shear, *Urged On by Conservatives and His Own Advisers, Trump Targeted the W.H.O.*, N.Y. Times (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/politics/trump-coronavirus-who.html?action=click&module=RelatedLinks&pgtype=Article> (“Mr. Trump’s decision on Tuesday to freeze nearly \$500 million in public money for the W.H.O. in the middle of a pandemic was the culmination of a concerted conservative campaign against the group.”); Katie Rogers & Apoorva Mandavilli, *Trump Administration Signals Formal Withdrawal From W.H.O.*, N.Y. Times (July 7, 2020), <https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html> (“Health experts widely condemned the departure, which brings an end to threats President Trump had been making for months.”). The negative effects of these activities were exacerbated by the President’s promotion of untested therapies that appear to have no or very little therapeutic value or worse. See, e.g., Ariana Eunjung Cha & Laurie McGinley, *Antimalarial drug touted by President Trump is linked to increased risk of death in coronavirus patients, study says*, Wash. Post (May 22, 2020), <https://www.washingtonpost.com/health/2020/05/22/hydroxychloroquine-coronavirus-study/>; William J. Broad & Dan Levin, *Trump Muses About Light as Remedy, but Also Disinfectant, Which Is Dangerous*, N.Y. Times (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/health/sunlight-coronavirus-trump.html>.

20 See Isaac Scher, *The Trump administration cut a CDC position in China meant to detect disease outbreaks months before the coronavirus pandemic*, Business Insider (Mar. 23, 2020), <https://www.businessinsider.com/us-cdc-cut-health-expert-job-china-months-before-coronavirus-2020-3>.

21 Elaine Kamarck, *Brookings, In a national emergency, presidential competence is crucial* (Mar. 30, 2020), <https://www.brookings.edu/blog/fixgov/2020/03/20/in-a-national-emergency-presidential-competence-is-crucial/>. Even after the World Health Organization had declared COVID to be a “public health emergency, the President continually downplayed the severity of the virus during his press briefings, interviews, and on his personal Twitter account. See 54 times Trump downplayed the coronavirus, Washington Post (May 6, 2020), [https://www.washingtonpost.com/video/politics/the-fix/54-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c\\_video.html](https://www.washingtonpost.com/video/politics/the-fix/54-times-trump-downplayed-the-coronavirus/2020/03/05/790f5afb-4dda-48bf-abe1-b7d152d5138c_video.html). During a rally in Michigan in January 2020, the President announced that “[the United States] ha[s] [coronavirus] very well under control. We have very little problem in this country at this moment – five. And those people are all recuperating successfully.” David Leonhardt, *A Complete List of Trump’s Attempts to Play Down Coronavirus*, N.Y. Times (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/opinion/trump-coronavirus.html>.

22 See American Hospital Association, *Fast Facts on U.S. Hospitals, 2020*, <https://www.aha.org/statistics/fast-facts-us-hospitals>.



state boundaries, and, lessons learned from the failures of the Federal Emergency Management Agency in the aftermath of Hurricane Katrina in 2005, made clear the importance of fact-fathering, preparedness, and coordination.<sup>23</sup> Nevertheless, the Executive did not learn from these prior mistakes and states did not receive the benefit of agency expertise or resources until later stages in the crisis.

Incompetence and apparent indifference were compounded by partisanship as a driver of Executive policy. The virus more quickly circulated in urban hubs, which were densely populated, and cities like New York and Los Angeles bore the early brunt of the infection – while medical supplies ran out, the public health system became overwhelmed, and grotesque make-shift morgues had to be devised in refrigerator trucks parked on streets.<sup>24</sup> Early-impacted states tended to be “blue states” – states where the majority of voters are aligned with the Democratic Party and more voters are Black or Brown – and only later spread to states that form the bulk of the President’s electoral base.<sup>25</sup> Black, Brown, and low-income persons who worked in the health care and service industries, jobs considered “essential,” continued to work throughout the pandemic even as others sheltered at home, and they frequently were not permitted by employers to socially-distance at work and did not have necessary protective gear.<sup>26</sup>

As death rates rose, the President, together with the leaders of a Republican-dominated Senate, consistently shifted responsibility and blame for the crisis onto “blue” states. Because of local variation and a deep rooted tradition of federalism, it was natural for the states initially to devise plans that took account

---

23 See Chris Edwards, Hurricane Katrina: Remembering the Federal Failures, Cato Institute (Aug. 27, 2015), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures> (posting that “Katrina exposed major failures in America’s disaster preparedness and response systems,” including “[c]onfusion,” “[f]ailure to [l]earn,” “[c]ommunications [b]reakdown,” “[s]upply [f]ailures,” “[i]ndecision,” and “[f]raud and [a]buse.”). These same problems impeded the federal COVID response, compounded by decisions made opportunistically for partisan political gain without regard to public health concerns.

24 Alan Feuer & William K. Rashbaum, ‘We Ran Out of Space’: Bodies Pile Up as N.Y. Struggles to Bury Its Dead, N.Y. Times (July 10, 2020), <https://www.nytimes.com/2020/04/30/nyregion/coronavirus-nyc-funeral-home-morgue-bodies.html>. (discussing use of refrigerator trailers in New York for lack of space in hospital morgues, funeral homes, and cemeteries and crematories).

25 William H. Frey, COVID-19 continues spreading in counties with strong Trump support, Brookings (May 20, 2020), <https://www.brookings.edu/blog/the-avenue/2020/05/07/as-states-reopen-covid-19-is-spreading-into-even-more-trump-counties/> (providing demographic trends).

26 See John Eligon, Audra D.S. Burch, Dionne Searcey, & Richard A. Opiel Jr., Black Americans Face Alarming Rates of Coronavirus Infection in Some States, N.Y. Times (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html> (stating that public health experts explain disparate death rates as “the result of longstanding structural inequalities”).

of the pandemic's actual impacts.<sup>27</sup> However, as the crisis worsened, the federal government essentially abdicated responsibility and left each state to fend for itself in developing health care protocols, addressing business concerns, and acquiring personal protective equipment critical for basic safety in a process that resulted in each state bidding against the other and sometimes even against the federal government.<sup>28</sup>

In the first two months of 2020, the Executive took weak and ineffective actions to contain the virus, such as barring entry to visitors from the People's Republic of China.<sup>29</sup> The World Health Organization declared COVID to be a pandemic on March 11, 2020,<sup>30</sup> and two days later the White House took the important and symbolic step of declaring a national emergency due to COVID-19; but that was six weeks after the United States Department of Health and Human Services had declared a public health emergency under the Public Health Service Act.<sup>31</sup> The Presidential proclamation was unique in that it declared an emergency under two separate

---

27 See Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?*, 23 *N.Y.U. J. Legis. & Pub. Pol'y* (forthcoming 2020) (discussing localism and its shortfalls during the pandemic).

28 See, e.g., Andrew Jacobs, Matt Richtel, & Mike Baker, 'At War with No Ammo': Doctors Say Shortage of Protective Gear is Dire, *N.Y. Times* (Mar. 19, 2020), <https://www.nytimes.com/2020/03/19/health/coronavirus-masks-shortage.html?auth=login-email&login=email> (quoting President Trump stating that "[t]he federal government's not supposed to be out there buying vast amounts of items and then shipping" and said that it was the job of governors to address the problem); Andrew Soergel, *States Competing in 'Global Jungle' for PPE*, *U.S. News* (Apr. 7, 2020), <https://www.usnews.com/news/best-states/articles/2020-04-07/states-compete-in-global-jungle-for-personal-protective-equipment-amid-coronavirus>. See also Michael Greenberg, *Emergency Responder*, *N.Y. Rev. of Books* (May 14, 2020), at p. 9 (reporting that the President "wouldn't be distributing aid [to states] but meting out 'favors' based on his relationship with particular governors," and calling the President's response "a patronage system that required Molière-like flattery ... with thousands of lives on the line").

29 Proclamation on Suspension of Entry as Immigrants and Nonimmigrants of Persons who Pose a Risk of Transmitting 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-persons-pose-risk-transmitting-2019-novel-coronavirus/>.

30 U.S. Dept. of Health & Hum. Servs., Secretary Azar Delivers Remarks on Declaration of Public Health Emergency for 2019 Novel Coronavirus (Jan. 31, 2020), <https://www.hhs.gov/about/leadership/secretary/speeches/2020-speeches/secretary-azar-delivers-remarks-on-declaration-of-public-health-emergency-2019-novel-coronavirus.html>.

31 Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

statutes for the same threat.<sup>32</sup> However, assistance authorized to the states through the Federal Emergency Management Agency (FEMA) was limited to what are known as emergency protective grants and did not include individual assistance grants. Moreover, the assistance provided was mired in bureaucratic complexity; indeed, because one of the statutes had never been invoked in connection with a pandemic, no regulations existed to carry out assistance, with inevitable delay and confusion.<sup>33</sup>

Five days after issuing the emergency proclamation, on March 18, the President issued a separate Executive Order under the Korean War-era Defense Production Act,<sup>34</sup> but delayed until April to exercise those powers to deal with the serious shortages of medical equipment.<sup>35</sup> On March 19, the President designated FEMA as the lead agency in the COVID-19 emergency response efforts, a designation previously held by the Department of Health and Human Services. That week, the United States stock market “bottomed out,”<sup>36</sup> and more than 3 million Americans lost their jobs – with the number rising in May to 38 million unemployed Americans<sup>37</sup> – 14.7 percent of the

---

32 Congressional Research Service, L. Elaine Halchin & Elizabeth M. Webster, *Presidential Declarations of Emergency for COVID-19: NEA and Stafford Act* (Mar. 19, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11264> (explaining the unprecedented simultaneous invocation of the National Emergencies Act, 50 U.S.C. §§ 1601 et seq., and the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 et seq., for the same emergency).

33 See National Conference of State Legislatures, *President Trump Declares State of Emergency for COVID-19* (Mar. 25, 2019), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx> (describing available relief and terms for accessing by the states).

34 Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19 (Mar. 18, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/>.

35 See Council on Foreign Relations, Anshu Siripurapu, *What Is the Defense Production Act?* (Apr. 29, 2020), <https://www.cfr.org/in-brief/what-defense-production-act>. See also Jacobs, Richtel, & Baker, *supra* note 28.

36 See Michael Steinberger, *What Is the Stock Market Even for Anymore?*, N.Y. Times (May 26, 2020), <https://www.nytimes.com/interactive/2020/05/26/magazine/stock-market-coronavirus-pandemic.html>.

37 U.S. Bureau of Labor Statistics, *Unemployment rate rises to record high 14.7 percent in April 2020* (May 13, 2020), <https://www.bls.gov/opub/ted/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm> [hereinafter, Bureau of Labor Statistics]. In May 2020, unemployment among white workers was 12.4 per cent; among Black, 16.8 per cent; among Latinx, 17.6 per cent; and Asians 15.0 percent. A year prior the numbers were reported as 3.3 per cent (white); 6.2 per cent (Black); 4.2 per cent (Latinx); and 2.5 percent for Asian Americans. See Pew Research Center, Rakesh Kochhar, *Unemployment rose higher in the first three months of the COVID-19 crisis than it did in two years of the Great Recession* (June 11, 2020), <https://www.pewresearch.org/fact-tank/>

workforce.<sup>38</sup> By then, the United States was deep into an economic recession as well as a health crisis, because the need to contain the virus by limiting social contact negatively impacted the economy without a protective federal backstop.<sup>39</sup> All this amounted to a lot of talk but virtually no action.

While the national government failed or refused to coordinate a national response to COVID, states adopted their own pandemic plans, addressing such matters as social distancing, limiting in-travel by out-of-state residents, tax filing extensions, expanding capacity of healthcare facilities, and regulating business openings and closings.<sup>40</sup> The result was a crazy quilt of 50 state variations. To be sure, the federal government enacted three major relief packages – with extraordinarily high price tags, poor accountability, and relief that was mismatched with the problem. The first package authorized about \$1 billion for state and local health responses; the second authorized \$40 billion in additional Medicaid funds; the third, known as the CARES Act – The Coronavirus Aid, Relief, and Economic Security Act – authorized an unprecedented \$2.2 trillion.<sup>41</sup> Of that amount, the CARES Act created a \$150 billion Coronavirus Relief fund for states, localities, territories, and tribal governments. The Treasury Department issued guidance on the permissible uses of the

---

2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/; The Economic Toll of the Coronavirus, N.Y. Times (Apr. 23, 2020), at B-1 (“[T]he number of jobs lost in five weeks is roughly the equivalent of the working populations of 25 states.”).

38 See Tony Romm, Nearly every state had historic levels of unemployment last month, new data shows, Wash. Post (May 22, 2020), <https://www.washingtonpost.com/business/2020/05/22/state-unemployment-rate-april/>.

39 See Congressional Research Service, Grant A. Drissen, The Coronavirus Relief Fund (CARES Act, Title V): Background and State and Local Data (updated Aug. 25, 2020), <https://crsreports.congress.gov/product/pdf/R/R46298> (stating that “[t]he sudden decline in economic output following the [COVID-19] outbreak has significantly altered the fiscal outlook for state and local governments” and “the COVID-19 economic shock will have a notable impact on state and local budgets”); Hub Staff Report, COVID-19’s Historic Economic Impact, in the U.S. and Abroad, Johns Hopkins University (Apr. 16, 2020), <https://hub.jhu.edu/2020/04/16/coronavirus-impact-on-european-american-economies/>.

40 See Stateside, State Snapshot: A COVID-19 Report (updated Aug. 26, 2020), <https://www.stateside.com/blog/2020-state-and-local-government-responses-covid-19>.

41 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116–136, 134 Stat. 281 (Mar. 27, 2020). For an official summary by the U.S. Treasury Department, see The CARES Act Works for All Americans, U.S. Department of the Treasury (Mar. 2020), <https://home.treasury.gov/policy-issues/cares>. See also Erica Gellerman, The CARES Act: A Simple Summary, Bench (Apr. 23, 2020), <https://bench.co/blog/operations/cares-act/>. For information about federal judicial appropriations under CARES, see Jacqueline Thomsen, Judiciary Prepares for Gradual Reopening During COVID-19, but Tells Courts to Heed Local Officials, National Law Journal (Apr. 27, 2020), <https://www.law.com/nationallawjournal/2020/04/27/judiciary-prepares-for-gradual-reopening-during-covid-19-but-tells-courts-to-heed-local-officials/>.

funds,<sup>42</sup> and effectively barred states and localities from offsetting COVID-related revenue losses with CARES grants.<sup>43</sup> According to one think-tank, the standards for distributing the funds “generated significant confusion” given such matters as overlapping jurisdictions which are typical of governance in the United States.<sup>44</sup> CARES also authorized targeted funds for education, mass transit, and child care. However, the amounts allocated to states and localities were dwarfed by the fiscal implications of the pandemic, which surpassed the immediate additional costs of unbudgeted virus-related expenses.<sup>45</sup>

CARES also directed assistance to individual workers and certain tenants. Specifically it authorized payments to individuals through enactment of one-time payments of \$1,200 to taxpayers with adjusted gross income of up to \$75,000 and \$500 for each eligible child under age 17.<sup>46</sup> Other CARES provisions were directed at unemployment and expanded eligibility and benefit levels for Unemployment Insurance, subject to time-limits. CARES extended federally funded unemployment insurance by 13

---

42 For a summary of the uses, see U.S. Dept. of the Treasury, *The CARES Act Provides Assistance for State, Local, and Tribal Governments*, <https://home.treasury.gov/policy-issues/cares/state-and-local-governments>, stating that the payments may “only be used to cover expenses that:

1. are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19);
2. were not accounted for in the budget most recently approved as of March 27, 2020 (the date of enactment of the CARES Act) for the State or government; and
3. were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.”

43 Michael Leachman, *How Should States, Localities Spend CARES Act’s Coronavirus Relief Funds?*, Center on Budget and Policy Priorities (May 28, 2020), <https://www.cbpp.org/blog/how-should-states-localities-spend-cares-acts-coronavirus-relief-fund> (explaining that the bar on revenue offsets presents “a serious problem since state, local, and tribal revenues have dropped precipitously”).

44 Jared Walczak, *State and Local Funding Totals Under the CARES Act*, Tax Foundation (Apr. 1, 2020), <https://taxfoundation.org/federal-coronavirus-aid-to-states-under-cares-act/> (explaining how the money is allocated and state-locality sharing formulas).

45 See, e.g., Tracy Gordon & Richard C. Auxier, *Congress Must Do More To Help States and Localities Respond to COVID-19*, Tax Policy Center (Mar. 30, 2020), <https://www.taxpolicycenter.org/taxvox/congress-must-do-more-help-states-and-localities-respond-covid-19> (detailing fiscal pressures on states and localities given reduced tax revenue, balanced budget requirements, and increased demand for social services).

46 Internal Revenue Service, *Economic Impact Payment Information Center*, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center>. Distribution of the funds was held up a bit to enable the checks to be embossed with the President’s name. See Ariel Shapiro, *Mnuchin Says Putting Trump’s Name On Stimulus Checks Was His Idea*, *Forbes* (Apr. 19, 2020), <https://www.forbes.com/sites/arielshapiro/2020/04/19/mnuchin-says-putting-trumps-name-on-stimulus-irs-checks-was-his-idea/#d320e7424fda> (reporting that the decision to put the President’s name on the stimulus checks was “widely criticized” for its potential to “delay their distribution”).

weeks; it increased state benefits by \$600; and it authorized unemployment benefits for certified part-time, self-employed, and gig economy workers, despite their temporary employment status.<sup>47</sup> Relatedly, CARES authorized a 120-day moratorium from eviction on behalf of tenants who rent from owners with federally-backed mortgages, and owners must provide 30 days' notice prior to eviction.<sup>48</sup> CARES also authorized \$349 billion of government-guaranteed loans to certain small businesses.<sup>49</sup>

CARES further directed new funding to different federal agencies to be distributed and used for COVID-related activities. For example, the United States Department of Justice received appropriations of \$850 million to respond to law enforcement activity; the Centers for Disease Control and Prevention received funding of \$4.3 billion of which \$1.5 billion was committed for State and Local Preparedness Grants.<sup>50</sup> But above all, CARES primarily authorized stimulus payments and interest-free loans for businesses and non-profit organizations. One condition was that the funds be used "to the greatest extent practicable" to preserve jobs, a provision that was called "toothless" by the Economic Policy Institute and others.<sup>51</sup>

Analysts were mixed in their assessment of CARES. To be sure, it provided federal funding at a time when the economy needed a stimulus – in part, because the federal government had failed to prepare for the likely fiscal and employment effects of the pandemic. However, some commentary emphasized that despite the size of the package, CARES functioned more as a relief bill, than as stimulus, and also failed to provide assistance to many economically vulnerable persons, including, for example, those who failed to earn enough income in the prior tax year.<sup>52</sup> Also there is enough evidence that some funds were siphoned off by entities and individuals who did not need assistance.

---

47 Chad Stone, CARES Act Measures Strengthening Unemployment Insurance Should Continue While Need Remains, Center on Budget and Policy Priorities (June 9, 2020), <https://www.cbpp.org/research/federal-budget/cares-act-measures-strengthening-unemployment-insurance-should-continue>.

48 See Congressional Research Service, Maggie McCarty & David H. Carpenter, CARES Act Eviction Moratorium (Apr. 7, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11320> (describing the provisions and raising questions about the scope of coverage, information gaps in tenant knowledge about the source of their landlord's mortgage, and whether fees continue to accrue during the moratorium).

49 The authorization was later increased to \$659 billion. See Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116–139, § 101(a), 134 Stat. 620 (2020).

50 See The U.S. Conference of Mayors, CARES Act Resource Center, <https://www.usmayors.org/issues/covid-19/cares-act/>.

51 Josh Bivens & Heidi Shierholz, Despite some good provisions, the CARES ACT has glaring flaws and falls short of fully protecting workers during the coronavirus crisis, Economic Policy Institute (Mar. 25, 2020), <https://www.epi.org/blog/despite-some-good-provisions-the-cares-act-has-glaring-flaws-and-falls-short-of-fully-protecting-workers-during-the-coronavirus-crisis/>.

52 See Grace Enda, William G. Gale, & Claire Haldeman, Careful or careless? Perspectives on the CARES Act, Brookings (Mar. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/03/27/careful-or-careless-perspectives-on-the-cares-act/>.



Certainly CARES did not meet the fiscal shortfalls that many states and localities faced in the wake of COVID. Economic expansion in 2019 had produced higher state revenues, relieving some fiscal pressure – but budgetary problems remained due to increasing Medicaid costs, historic gaps in funding for public pensions,<sup>53</sup> and in some states, declining energy prices and reduced sales tax collections.<sup>54</sup> Budget gaps in some states affected the courts and the delivery of social services.<sup>55</sup> The pandemic escalated declining revenues, and a \$615 billion shortfall across states is anticipated in fiscal year 2021.<sup>56</sup> According to New York’s Division of Budget, the state’s tax revenues will fall by \$12 billion in 2021 and by \$16 billion in 2022.<sup>57</sup> California’s Department of Finance expects revenues to decline by \$32 billion in 2021.<sup>58</sup> As states must balance their budgets yearly, without new federal appropriations, they most likely will have to cut social programming, education, and health care, and cause mass layoffs, which may worsen the economy and trigger or exacerbate a recession.<sup>59</sup>

---

53 PEW, Fiscal 50: State Trends and Analysis, States Posted Healthy Tax Gains in First Half of Budget Year (Apr. 28, 2020), <https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50#ind0>.

54 National Center for State Courts, Budget Resource Center, <https://www.ncsc.org/information-and-resources/resource-centers/resource-centers-items/budget-resource-center> (reporting on the 2017/2018 survey of the Conference of State Court Administrators on the impact on 33 states of economic conditions over 9-year-period).

55 *Id.* (reporting that 20 % of surveyed state courts were in worse financial shape in 2017/2018 than in the prior year). See also Michael Leachman & Jennifer Sullivan, *Some States Much Better Prepared Than Others for Recession*, Ctr. on Budget & Pol’y Priorities (Mar. 20, 2020), <https://www.cbpp.org/research/state-budget-and-tax/some-states-much-better-prepared-than-others-for-recession> (“[E]very state likely will face significant budget gaps in the coming months, even those best prepared for the downturn, and will need aggressive help from the federal government.”) (emphasis removed).

56 *States Grappling With Hit to Tax Collections*, Ctr. on Budget & Pol’y Priorities (June 15, 2020), <https://www.cbpp.org/research/state-budget-and-tax/states-grappling-with-hit-to-tax-collections> (“[Center on Budget and Policy Priorities] estimates that state budget shortfalls will ultimately reach almost 10 percent in the current fiscal year (which ends on June 30 in most states) and over 20 percent in the current fiscal year (2021) based on recent economic projections.”). See also Council on Foreign Relations, Anshu Siripurapu & Jonathan Masters, *How the Coronavirus Will Harm State and City Budgets* (May 15, 2020), <https://www.cfr.org/background/how-coronavirus-will-harm-state-and-city-budgets>.

57 Jimmy Vielkind, *Coronavirus Could Cut New York State Revenue by Up to \$15 Billion, Cuomo Aide Warns*, *Wall St. J.* (Mar. 24, 2020), <https://www.wsj.com/articles/coronavirus-crisis-could-cut-new-york-state-revenue-by-up-to-15-billion-cuomo-aide-warns-11585056388?mod=searchresults&page=1&pos=1>.

58 California Department of Finance, *Fiscal Update 2020–21 May Revision* (May 7, 2020), [http://www.dof.ca.gov/Budget/Historical\\_Budget\\_Publications/2020-21/documents/DÓF\\_FISCAL\\_UPDATE\\_POWERPOINT-MAY-7th.pdf](http://www.dof.ca.gov/Budget/Historical_Budget_Publications/2020-21/documents/DÓF_FISCAL_UPDATE_POWERPOINT-MAY-7th.pdf).

59 Elizabeth McNichol & Michael Leachman, *States Continue to Face Large Shortfalls Due to COVID-19 Effects*, Ctr. on Budget & Pol’y Priorities (June 15, 2020), <https://www.cbpp.org/research/state-budget-and-tax/states-continue-to-face-large-shortfalls-due-to-covid-19-effects>.



Indeed, by June 2020, Governors already had begun considering and implementing budget cuts.<sup>60</sup> Nevertheless, the Administration still refused to provide critical funding to states and localities (funding that remains unavailable as we write).<sup>61</sup> Relatedly, the Administration worsened problems for the states by claiming authority to countermand state stay-at-home orders, and urging supporters to protest shelter-in-place rules promulgated by Democratic governors; also, proposals for additional funding have been blocked in the Congress by partisan divisions associated with the presidential election in November.<sup>62</sup>

---

Federal Reserve economists project that unemployment – which averaged 14 percent in April and May according to the Bureau of Labor Statistics – will peak this quarter and still be at 6.5 percent at the end of 2021, a year and a half from now. CBO’s [The Congressional Budget Office’s] projection is grimmer – unemployment will remain at 11.5 percent in the last quarter (October-December) of 2020 and stand at a still-quite-high 8.6 percent at the end of 2021, it says. Both economic projections take into account the aid that the federal government has already enacted for businesses, individuals, and state and local governments.

60 Jeremy Pelzer, Ohio Gov. Mike DeWine Will Freeze State Government Hiring, Seek Big Spending Cuts Amid Coronavirus Crisis, *Cleveland.com* (Mar. 23, 2020), <https://www.cleveland.com/coronavirus/2020/03/ohio-gov-mike-dewine-will-freeze-state-government-hiring-seek-big-spending-cuts.html>.

61 See Samuel Stebbins & Evan Comen, Coronavirus relief: How federal funding failed to match each state’s coronavirus crisis, *USA Today* (June 15, 2020), <https://www.usatoday.com/story/money/2020/06/15/how-federal-funding-failed-to-match-each-states-covid-outbreak/111939982/>. The President’s explanation was uncharacteristically clear: providing funding to states hit by the pandemic would be unfair to Republicans “because all the states that need help – they’re run by Democrats in every case.” Christina Wilkie, Trump Says Coronavirus ‘Bailouts’ for Blue States are Unfair to Republicans, *CNBC* (May 5, 2020), <https://www.cnbc.com/2020/05/05/coronavirus-trump-says-blue-state-bailouts-unfair-to-republicans.html>. See also Adam Edelman, Trump: Government shouldn’t rescue states and cities struggling under pandemic, *NBC News* (Apr. 27, 2020), <https://www.nbcnews.com/politics/donald-trump/trump-federal-govt-shouldn-t-rescue-states-cities-struggling-under-n1193351> (quoting the President’s statement, “[w]hy should the people and taxpayers of America be bailing out poorly run states (like Illinois, as example) and cities, in all cases Democrat run and managed, when most of the other states are not looking for bailout help?”).

62 See Emily Cochrane & Nicholas Fandos, House Democrats Unveil \$3 Trillion Pandemic Relief Proposal, *N.Y. Times* (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/politics/democrats-coronavirus-relief-proposal.html>; Richard Cowan & Susan Cornwell, U.S. House passes \$3 trillion coronavirus aid bill opposed by Trump, *Reuters* (May 15, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-congress/house-passes-3-trillion-coronavirus-aid-bill-opposed-by-trump-idUSKBN22R1G9>. The negotiations remained at a standstill when the Senate recessed for Labor Day, see Manu Raju & Ted Barrett, Congressional action on new relief package likely to wait until September -- at least, *CNN* (Aug. 13 2020), <https://www.cnn.com/2020/08/13/politics/congress-stimulus-delay-september/index.html>. For discussion of proposals still pending as we revised these pages, see, e.g., Council for Exceptional Children, Action Alert: Pared Down COVID-19 Relief Package Could be Voted on After Labor Day (Sept. 3, 2020), <https://exceptionalchildren.org/blog/action-alert-pared-down-covid-19-relief-package-could-be>

The federal judiciary was not immune from fiscal and other pressures. Federal court funding in 2019, before the pandemic, was mired in a politically contentious appropriations process that had resulted in a “shut down” of the United States government and reliance on a series of temporary legislative agreements known as continuing resolutions.<sup>63</sup> A budget agreement finally was reached in December 2019, appropriating \$8.29 billion for the federal judiciary, a mere .02 percent of the total budget.<sup>64</sup> The final budget left important issues unresolved, including funding for additional judgeships considered by the Administrative Office of the United States Courts to be critical to “the ability of the federal courts to administer justice in a swift, fair, and effective manner.”<sup>65</sup> CARES allotted a mere \$7.5 million to the federal judiciary – necessitating further requests for funding – and authorized judges temporarily to use video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings, but the authorization lapses

---

voted-after-labor-day. See also Michael D. Shear & Sarah Mervosh, *Trump Encourages Protest Against Governors Who Have Imposed Virus Restrictions*, N.Y. Times (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/us/politics/trump-coronavirus-governors.html?auth=login-email&login=email> (quoting the President’s tweet that individuals in Michigan and Minnesota should “LIBERATE” and protest stay-at-home orders); J. Edward Moreno, *Protesters, anti-quarantine groups call for end to coronavirus closures*, The Hill (April. 14, 2020), <https://thehill.com/homenews/state-watch/492693-protesters-call-for-an-end-to-coronavirus-closures>. See generally Congressional Research Service, Jared P. Cole, *Federal and State Quarantine and Isolation Authority* (Oct. 9, 2014), <https://fas.org/sgp/crs/misc/RL33201.pdf>.

63 See U.S. Courts, *Funding/Budget – Annual Report 2019, Fiscal Year 2020 Funding for the Judiciary*, <https://www.uscourts.gov/statistics-reports/fundingbudget-annual-report-2019> (“After more than a month without new appropriations, the Judiciary had exhausted nearly all available resources and was poised for an orderly shutdown of operations.”).

64 Congressional Research Service, Barry J. McMillion, *Judiciary Appropriations, FY 2020* (updated May 18, 2020), <https://fas.org/sgp/crs/misc/R45965.pdf>. As was typical, Justices of the Supreme Court appeared at public hearings before Congress to discuss funding for the courts. At the 2019 subcommittee, questions were posed about making the Supreme Court’s oral arguments open to the public through video recording. *Id.*, citing Congressman Mike Quigley, “Chairman Quigley Statement at Hearing on Supreme Court’s FY2020 Budget Request,” March 7, 2019, at <https://appropriations.house.gov/news/statements/chairman-quigley-statement-at-hearing-on-supreme-courts-fy-2020-budget-request>. Justice Samuel A. Alito expressed the view that public access should not come “at the expense of damaging the decision-making process.” *Id.*, citing Testimony of Justice Samuel A. Alito, “House Appropriations Subcommittee on Financial Services and General Government Holds Hearing on Supreme Court Budget,” CQ Transcriptions, March 7, 2019. Justice Elena Kagan raised similar concerns about public misperceptions of the decision-making process. *Id.*, citing Testimony of Elena Kagan, “House Appropriations Subcommittee on Financial Services and General Government Holds Hearing on Supreme Court Budget,” CQ Transcriptions, March 7, 2019.

65 *Id.*, citing House Appropriations Committee, H. Rept. 116–122, p. 41.

30 days after the end of the crisis.<sup>66</sup> In late April, the Judicial Conference of the United States asked Congress to appropriate an additional \$36.6 million to “address emergent needs such as enhanced cleaning of court facilities, health screening at courthouse entrances, [and] information technology hardware and infrastructure costs associated with expanded telework and video conferencing.”<sup>67</sup>

Finally, the COVID crisis exacerbated deep inequalities of race and class in the United States. As infection rates mounted and deaths rose, analysts noted a persistent but clear trend: Black, Brown, and poor people were unequally suffering the fatal or long term damaging effects of the virus, as measured by mortality rates,<sup>68</sup> unemployment rates,<sup>69</sup> rates of continued employment but without protective covering,<sup>70</sup> and the numbers of people who could not socially distance because of crowding in the workplace and inadequate housing or utter lack of housing.<sup>71</sup> The

---

66 See United States Courts, Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic (Mar. 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>.

67 Congressional Research Service, Barry J. McMillion, Overview of Recent Responses to COVID-19 by the Judicial Conference of the United States, Administrative Office of the U.S. Courts, and Select Courts Within the Federal Judiciary (updated June 11, 2020), <https://crsreports.congress.gov/product/pdf/IN/IN11292> [hereinafter, *Congressional Research Service, Overview*].

68 See Tiffany Ford, Sarah Reber, & Richard V. Reeves, Race gaps in COVID-19 deaths are even bigger than they appear, Brookings (June 16, 2020), <https://www.brookings.edu/blog/up-front/2020/06/16/race-gaps-in-covid-19-deaths-are-even-bigger-than-they-appear> (discussing race gaps in mortality rates).

69 See, e.g., Testimony of Michele Evermore, National Employment Law Project, Unemployment Insurance During COVID-19: The CARES Act and role of UI During the Pandemic (June 9, 2020), <https://www.nelp.org/publication/unemployment-insurance-covid-19-cares-act-role-ui-pandemic> (reporting disproportionate impact of unemployment on Black and Brown individuals).

70 See, e.g., Annie Palmer, ‘They’re putting us all at risk’: What it’s like working in Amazon’s warehouses during the coronavirus outbreak, CNBC (Mar. 26, 2020), <https://www.cnbc.com/2020/03/26/amazon-warehouse-employees-grapple-with-coronavirus-risks.html> (reporting lack of protective gear for warehouse workers); Jennifer Valentino-DeVries, Denise Lu, & Gabriel J.X. Dance, Location Data Says It All: Staying at Home During Coronavirus Is a Luxury, N.Y. Times (Apr. 3, 2020), <https://www.nytimes.com/interactive/2020/04/03/us/coronavirus-stay-home-rich-poor.html> (“Concerns about getting infected have incited protests and strikes by workers in grocery stores, delivery services and other industries who say their employers are not providing them with enough protection or compensation to counter the increased health risks, even as their jobs have been deemed essential.”).

71 See, e.g., Josefa Velasquez, Ann Choi, Claudia Irizarry Aponte, & Ese Olumhense, COVID Sends Public Housing-Zone Residents to Hospitals at Unusually High Rates, The City (May 14, 2020), <https://www.thecity.nyc/2020/5/14/21270844/covid-sends-public-housing-zone-residents-to-hospitals-at-unusually-high-rates> (“Public health researchers say longstanding disadvantages ... made the city’s roughly 400,000 public housing residents especially susceptible to the virus.”); Giselle Routhier & Shelly Nortz, Coalition for

CARES Act specifically excluded undocumented immigrants from assistance; indeed, it excluded from assistance anyone who lives in a household with a member who files taxes using an Individual Taxpayer Identification Number, rather than a Social Security number – at least 8 million United States citizens, of which 5.9 million are citizen children.<sup>72</sup> Then, three months after the first-reported COVID-related deaths in the United States,<sup>73</sup> another death took place: that of an unarmed Black man, George Floyd, who was suffocated by police officers during a police stop.<sup>74</sup> The harrowing event, captured on video, highlighted a parallel pandemic – what the *New York Times* called “parallel plagues ravaging America: The coronavirus. And police killings of black men and women.”<sup>75</sup> Widespread protest followed in the wake of Floyd’s death, and the political – and multiple societal – consequences are still unfolding.<sup>76</sup>

## *2. Federal and State Judicial Responses to COVID*

The White House’s response to COVID-19 utterly failed to provide any timely, coordinated, and centralized plan to deal with the pandemic; failed to provide the public with access to accurate information about the scope of the pandemic and the method of infection; failed to mandate or encourage health protocols, inclu-

---

the Homeless, COVID-19 and Homelessness in New York City: Pandemic Pandemonium for New Yorkers without Homes (June 2020), <https://www.coalitionforthehomeless.org/wp-content/uploads/2020/06/COVID19HomelessnessReportJune2020.pdf> (“As of June 1st, the overall New York City mortality rate due to COVID-19 was 200 deaths per 100,000 people. For sheltered homeless New Yorkers, it was 321 deaths per 100,000 people – or 61 percent higher than the New York City rate. This means that many more homeless people have died from COVID-19 than would have been expected if they were dying at the same rate as all NYC residents.”).

72 See Whitney L. Duncan & Sarah B. Horton, Serious Challenges and Potential Solutions for Immigrant Health During COVID-19, *Health Affairs* (Apr. 18, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200416.887086/full/>.

73 Thomas Fuller & Mike Baker, Coronavirus Death in California Came Weeks Before First Known U.S. Death, *N.Y. Times* (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-first-united-states-death.html> (reporting when first COVID death occurred in the U.S.).

74 Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis, & Robin Stein, How George Floyd Was Killed in Police Custody, *N.Y. Times* (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> (“Seventeen minutes after the first squad car arrived at the scene, Mr. Floyd was unconscious and pinned beneath three police officers, showing no signs of life.”).

75 Jack Healy & Dionne Searcey, Two Crises Convulse a Nation: A Pandemic and Police Violence, *N.Y. Times* (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-protests-coronavirus.html>.

76 See A timeline of the George Floyd and anti-police brutality protests, *Aljazeera* (June 11, 2020), <https://www.aljazeera.com/news/2020/06/timeline-george-floyd-protests-200610194807385.html>.

ding social distancing, that could have contained the virus at an earlier stage; failed to provide sufficient funding to states and localities that found themselves fiscally strained to meet the economic crisis that accompanied the health crisis; and failed to provide any real, let alone, timely leadership or resources to the judiciary. On July 21, the President announced – after six months of delay and more than 142,000 deaths – that his administration would develop a plan to meet the pandemic. Probably motivated by political expediency,<sup>77</sup> he admitted that the nation’s COVID crisis would likely “get worse before it gets better” and endorsed the wearing of masks.<sup>78</sup> Against this background, the judiciary’s responses to COVID – although imperfect – provide a study in contrast to the “massive failures” of the White House.

As background, the judiciary is an independent branch of the federal government and of each of the states. The court systems of each state have no legal connection with those of other states or with that of the federal system, although certain decisions by state courts are reviewable by the Supreme Court of the United States. In the space of a short essay, and the context of an ever changing situation, we cannot present a comprehensive account of the varied and various judicial responses to the challenge of maintaining essential functions consistently with health and safety.<sup>79</sup> Rather, in this section we identify how courts prepared for the emergence of the pandemic and the processes they used to devise and implement responses to it; the basic principles that influenced the changes; and provide illustrative or important examples of these efforts.

*Preparing to Respond to the Threat* – Despite the absence of a formal centralized mechanism for coordinated action, the federal and state courts worked through or in tandem with established institutions that have long standing and deep expertise about the judiciary. Across the judiciaries, courts worked with different government agencies and officials to devise coherent approaches that took account of local

---

77 See Peter Baker, Trump, in a Shift, Endorses Masks and Says Virus Will Get Worse, N.Y. Times (July 21, 2020), <https://www.nytimes.com/2020/07/21/us/politics/trump-coronavirus-masks.html> (remarking on the “dawning realization” among the President’s team “that the virus not only is not going away but has badly damaged his standing with the public heading into the election in November”).

78 Nikki Carvajal, Trump says coronavirus pandemic will probably “get worse before it gets better,” CNN (July 21, 2020), [https://www.cnn.com/world/live-news/coronavirus-pandemic-07-21-20-intl/h\\_7b4c14102421ee45dbbd2ea81b50bb01](https://www.cnn.com/world/live-news/coronavirus-pandemic-07-21-20-intl/h_7b4c14102421ee45dbbd2ea81b50bb01). See Andrew Naughtie, Trump promotes masks as “patriotic” before mingling without one at event, Independent (July 21, 2020), <https://www.independent.co.uk/news/world/americas/trump-coronavirus-face-mask-patriotic-fundraiser-washington-a9629966.html>.

79 See United States Courts, Court Orders and Updates During COVID-19 Pandemic (last updated Aug. 26, 2020), <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (providing daily updates about court orders in response of COVID, but cautioning that “the situation in local courts may change rapidly” and so the latest information may not be posted); National Center for State Courts, Coronavirus and the courts, <https://www.ncsc.org/newsroom/public-health-emergency> (providing updated website of state court responses to COVID).

conditions. In some instances, courts were able to build upon “continuity of operations” and “pandemic/public health” plans (developed earlier to deal with threats such as 9/11, biohazards, and pandemic influenza).<sup>80</sup> Past practice had emphasized the importance of leadership in taking pro-active steps to deal with a potential but known crisis, as well as leadership after a crisis to maintaining trust, capacity, and prioritization of threats and actions; as important were the ability and willingness to communicate information to different stakeholders, including the public and litigants.<sup>81</sup> These lessons proved to be important guideposts in the judicial responses to COVID.

On the federal side, the judiciary worked with federal agencies to collect information, monitor developments, and set in place a plan of operations given the health risks of maintaining the great tradition of “open courts” as that term has been historically used. By February 2020, the Administrative Office of the United States Courts, which manages the functioning of the federal courts, had organized a task force to ensure a steady and up-to-date exchange of information pertinent to the judiciary; the task force membership expanded to include judges, court officials, and representatives of the General Services Administration, the United States Marshals Service, and the Federal Protective Service.<sup>82</sup> Likewise, the Judicial Conference of the United States, comprised of the Chief Justice of the United States, the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional judicial circuit, played a leadership role in devising an emergency approach.<sup>83</sup> Many local federal district courts likewise coordinated with state and local officials to keep current about the pandemic. At the state level,

---

80 See Congressional Research Service, R. Eric Peterson, *Emergency Preparedness and Continuity of Operations (COOP) Planning in the Federal Judiciary* (updated Sept. 8, 2005). See also National Center for State Courts, *State Court Pandemic/Public Health Plans; 2007 COOP Planning Guide*, <https://www.ncsc.org/services-and-experts/areas-of-expertise/emergency-planning-and-security/planning-guide> (compiling state plans and setting out guidelines to develop a plan “if faced with an emergency that threatens continuation of normal operations”).

81 See Thomas A. Birkland & Carrie A. Schneider, *Emergency Management in the Courts: Trends After September 11 and Hurricane Katrina*, 28 *Justice System J.* 20 (2013).

82 See United States Courts, *Federal Judiciary Confronts Coronavirus Spread: Judicial Conference Acts on Court Administration Matters* (Mar. 17, 2020), <https://www.uscourts.gov/news/2020/03/17/federal-judiciary-confronts-coronavirus-spread-judicial-conference-acts-court>. For a description of the Administrative Office, see Administrative Office of U.S. Courts, *Judicial Administration*, [www.uscourts.gov/about-federal-courts/judicial-administration](http://www.uscourts.gov/about-federal-courts/judicial-administration) (describing the Administrative Office as “the agency within the judicial branch that provides a broad range of legislative, legal, financial, technology, management, administrative, and program support services to federal courts”).

83 See United States Courts, *About the Judicial Conference*, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference>.



the National Center for State Courts, an information clearinghouse and research center on judicial administration, was a source of expertise.<sup>84</sup>

The federal courts at every level of jurisdiction provided an essential service by devising ways to “do justice” even as the pandemic made the usual mode of operation dangerous for litigants, lawyers, witnesses, court personnel, and judges to conduct business in-person.<sup>85</sup> Although the overall judicial response was completely decentralized, best practices quickly emerged that were adapted throughout the country. These practices, beginning around early March, included, but were not limited to closing courthouses to the general public, delaying filing requirements, adapting rules that normally apply to pro se litigants, hearing oral argument and conducting judicial conferences by telephone or virtually, and suspending of paper filing requirements.

*The Federal Judicial Response:* On March 12, 2020, the federal court system made public its plan for “Judiciary Preparedness for Coronavirus (COVID-19).” The plan was provisional and flexible, and was adapted in light of changing conditions.<sup>86</sup> On March 17, the Northern District of California, which embraces San Francisco, became the first district to close federal courthouses to the public.<sup>87</sup> The judicial leadership declined to take a “one size fits all” approach, recognizing the varied pressures that different localities, states, and regions would face as a result of COVID. Nevertheless, decision-makers in all federal courts received important information and guidance; on March 19, the Administrative Office of the United States announced guidelines with specific recommendations:

- Permit as many employees as is practicable to telework.
- Postpone all courthouse proceedings with more than 10 people, such as naturalization ceremonies.

---

84 See National Center for State Courts, Mission & History, <https://www.ncsc.org/about-us/mission-and-history>.

85 See, e.g., National Center for State Courts, Coronavirus and the courts, Statement of Texas Chief Justice Nathan Hecht, Co-chair, of the national Pandemic Rapid Response Team, <https://www.ncsc.org/newsroom/public-health-emergency> (“Since the onset of the pandemic, courts throughout the country have determined to stay open to deliver justice without faltering, no matter the adjustments and sacrifices demanded, but also to protect staff ... and the public from the risks of disease. We are learning new technology and practices together.”) (ellipsis in original).

86 Congressional Research Service, Overview, *supra* note 67 (reporting that the Administrative Office of the U.S. Courts emphasized local option and flexibility in light of variation “across judicial districts in whether communities are experiencing a sustained downward trend in COVID-19 cases, the status of state or local orders related to individual movement and shelter-in-place, and whether there have been recent confirmed or suspected cases of COVID-19 in a court facility”).

87 General Order No. 72–2 In re: Coronavirus Disease Public Health Emergency (N.D. Cal. March 16, 2020), [https://www.cand.uscourts.gov/wp-content/uploads/general-orders/abrogated-general-orders/GO\\_72-2\\_4-30-2020.pdf](https://www.cand.uscourts.gov/wp-content/uploads/general-orders/abrogated-general-orders/GO_72-2_4-30-2020.pdf).



- Conduct in-person court proceedings only when absolutely necessary. Utilize videoconferencing or audioconferencing capabilities where practicable.
- Conduct jury proceedings only in exceptional circumstances.
- Limit the number of family members who attend proceedings.
- Stagger scheduling of critical court proceedings to reduce the number of people in seating galleries, wells of courtrooms, conference rooms, and public waiting areas; and
- Limit staff at critical courtroom proceedings to fewer than 10 people, and ensure that they are at least six feet apart.<sup>88</sup>

Later, the Administrative Conference updated its guidelines in light of on-going developments, setting out a phased approach to operating virtually and reopening in real-time, again taking account of local conditions and of guidance from the Centers for Disease Control.<sup>89</sup>

*Supreme Court of the United States* – Looking first to the United States Supreme Court the building has remained open throughout the pandemic, although closed to the public, and the Clerk’s Office has continued to operate with staff permitted to telework.<sup>90</sup> The Supreme Court’s initial announcement, on March 16, took the step of postponing oral arguments that were scheduled through April 1.<sup>91</sup> (Historical precedent supported postponement – similar action had been taken with respect to the Spanish flu epidemic in October 1918 and to yellow fever outbreaks in August 1793 and August 1798.)

The March 16 order did not extend filing deadlines, under Supreme Court Rule 30.1. However, three days later<sup>92</sup> – coinciding with a 40 per cent uptick in COVID infections in the United States<sup>93</sup> – the Court adapted Rules 13.1 and 13.3, and ordered that the deadline to file a petition for a writ of certiorari be extended 150 days from the date of the lower court judgment, the order denying discretionary review,

---

88 United States Courts, Judiciary Preparedness for Coronavirus (COVID-19) (March 20, 2020 Update), <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19>.

89 See Administrative Office of the United States, Memorandum from James C. Duff re: Updated Guidance Regarding Judiciary Response to COVID-19 (Apr. 24, 2020), [https://georgiacourts.gov/wp-content/uploads/2020/05/Directors-Memo-and-Guidelines\\_4.24.20\\_Media.pdf](https://georgiacourts.gov/wp-content/uploads/2020/05/Directors-Memo-and-Guidelines_4.24.20_Media.pdf).

90 Supreme Court of the United States, Office of Clerk, Scott S. Harris, Guidance Concerning Clerk’s Operation (Apr. 17, 2020), [https://www.supremecourt.gov/announcements/COVID-19\\_Guidance\\_April\\_17.pdf](https://www.supremecourt.gov/announcements/COVID-19_Guidance_April_17.pdf).

91 *Id.*

92 Supreme Court of the United States, Order (Mar. 19, 2020), [https://www.supremecourt.gov/orders/courtorders/031920zr\\_d1o3.pdf](https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf).

93 Eliza Mackintosh & Nick Thompson, What you need to know about coronavirus on Thursday, March 19, CNN (Mar. 19, 2020), <https://www.cnn.com/2020/03/19/world/coronavirus-newsletter-03-19-20/index.html>.

or the order denying a timely petition for rehearing.<sup>94</sup> The Court clarified that motions for an extension under Rule 30.4 would “ordinarily be granted by the Clerk as a matter of course” if the grounds are related to COVID-19 and the length of the extension requested is “reasonable under the circumstances.”<sup>95</sup> Likewise, the Court ordered that notwithstanding Rules 15.5 and 15.6, the Clerk would “entertain” motions for the delay in filing a reply if the motion is received at least two days prior to the date for distributing the case’s briefs to the Justices, and such a motion “ordinarily” will be granted if the grounds for the delay are “difficulties relating to COVID-19,” and the length of the extension requested is “reasonable under the circumstances.”<sup>96</sup>

The Supreme Court also adjusted its procedures regarding paper filing. Although the Court already permitted electronic filing, paper filing remains the official method of filing. Paper filing posed significant health difficulties for lawyers and related personnel working in states with stay-at-home orders; it also put pressure on law offices trying to minimize the days that staff were required to work in-person.<sup>97</sup> Initially, the Court invited counsel to send paper copies by mail or private carrier, rather than by in-person delivery, announcing that all hand-delivered copies were to be “directed first offsite for screening” before being delivered to the Clerk’s office; moreover, the Court temporarily suspended the practice of allowing filings to be delivered in an open container.<sup>98</sup>

Then, on April 3, the Supreme Court postponed oral arguments scheduled for the April session, stating it would “consider a range of scheduling options and other alternatives if arguments cannot be held in the Courtroom before the end of the Term.”<sup>99</sup> The Court’s initial longstanding resistance to live cameras and audio

---

94 Supreme Court of the United States, Order (Mar. 19, 2020), [https://www.supremecourt.gov/orders/courtorders/031920zr\\_d1o3.pdf](https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf).

95 Supreme Court of the United States Office of Clerk, Scott S. Harris, Guidance Concerning Clerk’s Operation (Apr. 17, 2020), [https://www.supremecourt.gov/announcements/COVID-19\\_Guidance\\_April\\_17.pdf](https://www.supremecourt.gov/announcements/COVID-19_Guidance_April_17.pdf).

96 Supreme Court of the United States, Order (Mar. 19, 2020), [https://www.supremecourt.gov/orders/courtorders/031920zr\\_d1o3.pdf](https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf).

97 See Marcia Coyle, US Supreme Court Is Urged to Suspend Paper Filing Requirement, *National Law Journal* (Apr. 10, 2020), <https://www.law.com/nationallawjournal/2020/04/10/us-supreme-court-is-urged-to-suspend-paper-filing-requirement/>.

98 Supreme Court of the United States, Delivery of Documents to the Clerk’s Office, <https://www.supremecourt.gov/deliveryofdocuments.aspx>; see also Supreme Court of the United States, Delivery of Documents to the Clerk’s Office, <https://www.supremecourt.gov/docket/deliveryofdocuments.aspx> (discussing open container rule).

99 Supreme Court of the United States, Order (Apr. 3, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-03-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20).

recordings elicited criticism.<sup>100</sup> Ten days later, the Court remarkably announced that it would hear some of the previously postponed arguments by telephone, and that it would provide a “live audio feed” to various news outlets (FOX News, the Associated Press, and C-SPAN), and that the transcript and audio of the argument would be posted on the Court’s website.<sup>101</sup> (Traditionally, Supreme Court oral arguments “typically last an hour, but [the first virtual session] went over by about 15 minutes.”)<sup>102</sup> These deviations from what has been immutable practices do not appear to have had untoward consequences.

As the pandemic continued, on April 15, 2020, the Court modified its paper-filing requirements.<sup>103</sup> The Court encouraged parties to reach agreement to serve filings electronically to avoid the need for paper service. The order distinguished between documents that, if filed through the Court’s electronic filing system, need not be filed in paper at all, and those that require submission of one paper copy (consistent with formatting requirements set out in the Court’s rules).

---

100 See Janna Adelstein & Douglas Keith, Initial Court Responses to Covid-19 Leave a Patchwork of Policies, Brennan Center for Justice (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies> (reporting that the Court’s initial “lack of a decision on this matter sparked criticism from legal experts who believe that not only should the Court hold future arguments remotely, but that it should make these proceedings available to the public live,” and citing a poll that 72 percent of those polled “were in favor of the Court convening virtually for the duration of the pandemic”), citing Fix The Court, Americans Want the Supreme Court to Function Remotely, and that Includes Hearing Arguments (Apr. 8, 2020), <https://fixthecourt.com/2020/04/americans-want-supreme-court-function-remotely-includes-hearing-arguments/>.

101 Media Advisory Regarding May Teleconference Argument Audio, Supreme Court of the United States Press Release (Apr. 30, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-30-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20). See Greg Stohr, Supreme Court Bows to Crisis With Arguments Via Telephone, Bloomberg Law (Apr. 13, 2020), <https://news.bloomberglaw.com/us-law-week/supreme-court-to-hear-arguments-by-telephone-conference?context=article-related> (observing that “[i]t’s an extraordinary step for the tradition-bound court, whose arguments are normally steeped in ritual and devoid of all but the most basic technology”).

102 Adam Liptak, Supreme Court Hears First Arguments via Phone, N.Y. Times (updated May 12, 2020), <https://www.nytimes.com/2020/05/04/us/politics/supreme-court-coronavirus-call.html>.

103 Supreme Court of the United States, Order (Apr. 15, 2020), [https://www.supremecourt.gov/orders/courtorders/041520zr\\_g204.pdf](https://www.supremecourt.gov/orders/courtorders/041520zr_g204.pdf). See also Supreme Court of the United States Office of Clerk, Scott S. Harris, Guidance Concerning Clerk’s Office Operations (Apr. 17, 2020), [https://www.supremecourt.gov/announcements/COVID-19\\_Guidance\\_April\\_17.pdf](https://www.supremecourt.gov/announcements/COVID-19_Guidance_April_17.pdf). Filings that require no paper submission include motions for an extension of time under Rule 30.4, waivers of the right to respond to a petition under Rule 15.3, blanket consents to the filing of amicus briefs under Rules 37.2(a) and 37.3(a), and motions to delay distribution of a petition for certiorari under the Court’s order of March 19, 2020.

*United States Courts of Appeals* – The federal Courts of Appeals for the different circuits devised separate responses to COVID taking into account regional variation,<sup>104</sup> but their emergency plans bear important similarities.<sup>105</sup> As examples, we report on the Ninth Circuit Court of Appeals (with district courts in the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as the territories of Guam and the Northern Mariana Islands), and the Tenth Circuit Court of Appeals (with district courts in the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming). Both circuits are large, but contain district courts in states of very divergent demographics and economies. The states within the circuits also so far have been differentially impacted by COVID.

California (in the Ninth Circuit) has the largest population of any state in the United States (more than 39,500,000), and the population is 36.5 percent white alone (not Latinx);<sup>106</sup> as of July 13, it reported 327,676 cases of COVID and 7,043 COVID-related deaths (and, on September 4, those numbers had risen to 727,220 cases and 13,500 deaths).<sup>107</sup> California declared a state of emergency on March 4; on March 19, the Governor issued an executive order mandating that residents, other than essential workers, shelter in place;<sup>108</sup> on May 4, the Governor began lifting some of these restrictions;<sup>109</sup> and, on July 13, as confirmed cases and deaths again began to rise, reinstated restrictions on public gatherings.<sup>110</sup> Wyoming (in the Tenth Circuit) has the smallest population of any state in the United States (less

---

104 See Brad Kutner, Regional Appeals Courts Differ in Responses to COVID-19, *Courthouse News Service* (Mar. 12, 2020), <https://www.courthousenews.com/regional-appeals-courts-differ-in-responses-to-covid-19/>.

105 Federal court orders are collected in: Court Orders and Updates During COVID-19 Pandemic, *United States Courts* (May 21, 2020), <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>.

106 U.S. Census Bureau, Quick Facts: California, <https://www.census.gov/quickfacts/CA>.

107 The numbers of cases and deaths basically had doubled since mid-July. See California Corona Map and Case Count, *N.Y. Times* (July 13, 2020), <https://www.nytimes.com/interactive/2020/us/california-coronavirus-cases.html>. See Cal. Dept. of Public Health, COVID-19 Updates (July 11, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx>. For the September 2020 data, see California Corona Map and Case Count, *N.Y. Times* (Sept. 8, 2020), <https://www.nytimes.com/interactive/2020/us/california-coronavirus-cases.html>.

108 State of California, Executive Order N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>.

109 State of California, Executive Order N-60-20 (May 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20.pdf>.

110 See Joshua Bote, More than half of all states, including California and Michigan, pause reopening or take steps to halt the spread of COVID-19, *USA Today* (July 16, 2020), <https://www.usatoday.com/story/news/health/2020/07/16/covid-19-states-including-california-michigan-try-halt-spread/5444903002/>.

than 580,000), and the population is 83.7 percent white alone (not Latinx);<sup>111</sup> as of July 13, it reported 1,862 cases and 21 deaths and, on September 4, the numbers had risen to 3,939 cases and 41 deaths.<sup>112</sup> On March 13, the Governor proclaimed a state of emergency, but resisted issuing a state-wide stay-at-home order,<sup>113</sup> instead ordering temporary suspension of the administration of the state driving test (in late March);<sup>114</sup> the Wyoming Department of Health in July issued orders and guidance limiting public gatherings of certain sizes and requiring restaurants and other places of public accommodations offering food to enforce capacity and social-distance rules.<sup>115</sup>

The circuits also differ in terms of their past experience with court technology. The Ninth Circuit, which embraces Silicon Valley, on the southern shores of San Francisco Bay, was an early adopter of electronic practices – as early as 2003, it began streaming oral argument audio to the public, and in 2010 the circuit established a YouTube channel for oral arguments.<sup>116</sup> The Tenth Circuit in January 2018 amended its court rules to provide that audio recording of oral arguments would be posted on the court’s website within 48 hours; the circuit also was experimenting with oral argument by remote video transmission.<sup>117</sup>

---

111 U.S. Census Bureau, Quick Facts: Wyoming, <https://www.census.gov/quickfacts/WY>.

112 Wyoming Coronavirus Map and Case Count, N.Y. Times (July 13, 2020), <https://www.nytimes.com/interactive/2020/us/wyoming-coronavirus-cases.html>. See Maria L. La Ganga, Think the most isolated corners of the U.S. are safe from coronavirus? Think again, L.A. Times (Mar. 19, 2020), <https://www.latimes.com/california/story/2020-03-19/coronavirus-wyoming-covid-19-casper-idaho> (“Wyoming, which has fewer people than any other U.S. state, reported its first COVID-19 case on the evening of March 11.”). Statistics from the Wyoming Dept. of Health indicate 1,506 lab confirmed cases, 356 probable cases, and 21 deaths. See Wyo. Dept. of Health, Infectious Disease Epidemiology Unit, <https://health.wyo.gov/publichealth/infectious-disease-epidemiology-unit/disease/novel-coronavirus/covid-19-map-and-statistics/>. For the September 2020 data, see Wyoming Coronavirus Map and Case Count, N.Y. Times (Sept. 8, 2020), <https://www.nytimes.com/interactive/2020/us/wyoming-coronavirus-cases.html>.

113 State of Wyoming, Executive Order 2020–2 (Mar. 13, 2020), [https://drive.google.com/file/d/19mX3feCje2NKRrKi\\_GPiKvwckGVoVBh/view](https://drive.google.com/file/d/19mX3feCje2NKRrKi_GPiKvwckGVoVBh/view).

114 State of Wyoming, Executive Order 2020–4 (Mar. 24, 2020), [https://drive.google.com/file/d/12OH6\\_PTzT6Aj06K3BLDoqZYKtjQ0cRko/view](https://drive.google.com/file/d/12OH6_PTzT6Aj06K3BLDoqZYKtjQ0cRko/view).

115 Wyoming Department of Health, Wyoming Public Health Orders and Guidance (July 13, 2020), <https://health.wyo.gov/publichealth/infectious-disease-epidemiology-unit/disease/novel-coronavirus/covid-19-orders-and-guidance/>.

116 Press Release, Tech Savvy Ninth Circuit Leading the Way During the COVID-19 Pandemic, Public Information Office, United States Courts for the Ninth Circuit (May 1, 2020), [http://cdn.ca9.uscourts.gov/datastore/ce9/2020/05/01/Tech\\_Savvy\\_Ninth\\_Circuit\\_Leading\\_the\\_Way\\_During\\_COVID-19.pdf](http://cdn.ca9.uscourts.gov/datastore/ce9/2020/05/01/Tech_Savvy_Ninth_Circuit_Leading_the_Way_During_COVID-19.pdf).

117 See Practitioner’s Guide to the United States Court of Appeals for the Tenth Circuit (Ninth Revision, Jan. 2019), <https://www.ca10.uscourts.gov/sites/default/files/clerk/2019PracGuideUpdateCorrected-3-12-2019.pdf>.

*Ninth Circuit Court of Appeals:* On the heels of the President’s emergency proclamation, the Ninth Circuit immediately announced its response to the COVID crisis: On March 12, the public was informed that federal courthouses would operate with reduced personnel and that inquiries should be by e-mail and not telephone.<sup>118</sup> Four days later, the circuit closed designated courthouses to the public; announced that public hearings, if any, would be livestreamed; encouraged litigants who were required to file paper copies to send them by mail or other delivery service, rather than by hand; authorized pro se litigants who did not have electronic access likewise to send print copies by mail; and required that in-hand filing use a designated drop box at the courthouse during specified hours.<sup>119</sup> Because of disruptions, the circuit extended non-jurisdictional filing deadlines automatically for 60 days (and, on June 29, announced that automatic extensions would no longer be granted based solely on a Notice Request, and that requests would require a motion and a showing of cause).<sup>120</sup> As of July, remote appellate hearings were anticipated through August 2020.<sup>121</sup>

*Tenth Circuit Court of Appeals:* The Tenth Circuit adopted many of the same emergency responses – the courthouse was closed to the public, staff began teleworking, inquiries were to be by e-mail, oral arguments were to be conducted remotely by telephone – but the pandemic also provided the occasion for the court to experiment with new technological approaches to the court’s practices. Thus, for example, on April 30, the Tenth Circuit announced that it would be “testing a method” to provide the public with access to telephonic oral arguments, and would make recordings of them available on the courthouse website.<sup>122</sup> In addition, the Tenth Circuit

---

118 United States Courts for the Ninth Circuit, Announcements (Mar. 12, 2020), [https://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000001035](https://www.ca9.uscourts.gov/content/view.php?pk_id=0000001035).

119 United States Courts for the Ninth Circuit, Order (Mar. 16, 2020), [http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/building\\_closure\\_order.pdf](http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/building_closure_order.pdf).

120 See Robert Loeb, Katie Kopp, & Melanie Hallums, The Federal Courts Begin to Adapt to COVID-19, *Lawfare* (Mar. 18, 2020), <https://www.lawfareblog.com/federal-courts-begin-adapt-covid-19>; United States Court of Appeals for the Ninth Circuit: COVID-19 Update (June 29, 2020), <http://cdn.ca9.uscourts.gov/datastore/general/2020/06/29/covid%20update%20june%2025.pdf>.

121 United States Court of Appeals for the Ninth Circuit: COVID-19 Update (June 29, 2020), <http://cdn.ca9.uscourts.gov/datastore/general/2020/06/29/covid%20update%20june%2025.pdf>.

122 United States Court of Appeals for the Tenth Circuit, Remote Public Access to April 30, 2020 Oral Arguments, <https://www.ca10.uscourts.gov/clerk/news/remote-public-access-april-30-2020-oral-arguments>. Initially the recordings were made available through YouTube. See United States Court of Appeals for the Tenth Circuit, Remote Public Access to May 5–7, 2020 Oral Arguments, <https://www.ca10.uscourts.gov/clerk/news/remote-public-access-may-5-7-2020-oral-arguments>; United States Court of Appeals for the Tenth Circuit, Remote Public Access to August 25, 2020 Oral Arguments, <https://www.ca10.uscourts.gov/clerk/news/remote-public-access-august-25-2020-oral-arguments>.



resumed many pre-COVID activities earlier than the Ninth. In an order adopted on June 12, the circuit announced that as of June 15, the courthouse would reopen to those with pending business subject to restrictions governing building access, face coverings, and social distancing, and on July 1, the circuit opened the courthouse to the general public on the same terms.<sup>123</sup> Staff were still strongly encouraged to work remotely.<sup>124</sup> As an important marker of pre-COVID practice, the circuit reinstated rules about the submission of paper copies,<sup>125</sup> and reopened the employee gym.<sup>126</sup> However, the next posted dates on the Oral Argument Calendar were August 25, 2020 and September 25, 2020, both of which are listed to be held by video conference.<sup>127</sup>

*District Courts* – In many ways, the federal district courts faced greater challenges that either the Supreme Court or the circuit courts in their adaptation to COVID. These challenges flow from the nature of first-instance courts: the frequency of motion practice, case management conferences, discovery, and trials – including one of the exceptional features of United States first instance practice, the right to a civil jury trial in certain monetary damages cases.

The Central District of California (covering Los Angeles, Riverside, and Santa Ana), in the Ninth Circuit, is the most densely populated judicial district in the country.<sup>128</sup> The district took early action in March 2020 to limit entry into the courthouses, as well as to restrict access to probation and pretrial services offices,

---

123 Byron White Reopening Protocol (effective June 15, 2020), <https://www.ca10.uscourts.gov/sites/default/files/clerk/Short%20BWCH%20Reopening%20Protocol%20%28Revised%20June%2015%2C%202020%29.pdf>.

124 To enter the building, staff must give prior notice to a unit executive, specifying the date and time, and are subject to standard restrictions of not having a temperature of above 100.4, not having exposure to someone with COVID-19, and wearing masks at all times. See *In re: Rescission of Restrictions on Public Access to the Byron White United States Courthouse and Temporary Suspension of Paper Copy Requirements*, (10th Cir. 2020), [https://www.ca10.uscourts.gov/sites/default/files/clerk/ReopeningGeneralOrderFiledJune12%2C2020\\_0.pdf](https://www.ca10.uscourts.gov/sites/default/files/clerk/ReopeningGeneralOrderFiledJune12%2C2020_0.pdf).

125 United States Court of Appeals for the Tenth Circuit, Operational Response to COVID-19 Pandemic (updated June 22, 2020), <https://www.ca10.uscourts.gov/clerk/news/operational-response-covid-19-pandemic>.

126 Byron White Reopening Protocol (effective June 15, 2020), <https://www.ca10.uscourts.gov/sites/default/files/clerk/Short%20BWCH%20Reopening%20Protocol%20%28Revised%20June%2015%2C%202020%29.pdf> (“Gym use will be limited to one person at a time. Employees must reserve gym time using the Outlook calendar and wipe down machines and/or weights before and after every use[.]”).

127 Oral Argument Calendar, The United States Court of Appeals for the Tenth Circuit, <https://www.ca10.uscourts.gov/calendar> (last visited July 12, 2020).

128 See Ballotpedia, United States District Court for the Central District of California, [https://ballotpedia.org/United\\_States\\_District\\_Court\\_for\\_the\\_Central\\_District\\_of\\_California](https://ballotpedia.org/United_States_District_Court_for_the_Central_District_of_California) (“The court serves about seventeen million people in southern and central California, making it the largest federal judicial district by population.”).



but otherwise proceedings were to continue as usual with the exception of a temporary suspension of jury service. Entry-restrictions were placed on persons diagnosed, or in close contact with a person diagnosed, with COVID-19; persons who had been asked to self-quarantine by a hospital, doctor, or health agency; persons who had been in countries with high numbers of COVID-reported cases – at the time, China, Italy, Iran, Japan, and South Korea – during the preceding 14 days; and persons with COVID-related symptoms, including shortness of breath, fever, or severe cough. Jurors, in both civil and criminal trials, were provisionally not to be called until April 13 for service; courtroom proceedings and filing deadlines were to remain in place; judges were given the option of continuing to hold hearings, bench trials, and conferences; criminal matters before a Magistrate Judge were to continue as usual; and grand juries were to continue to meet.<sup>129</sup>

The district adopted more restrictive measures effective March 23 through May 1, when it activated its Continuity of Operations Plan, requiring the closing of all courthouses (other than for a few criminal proceedings); suspension of all hearings other than on emergency civil matters to proceed telephonically; calling for the electronic filing of documents (with mailing instructions for pro se litigants without electronic access and attorneys required to file documents manually); and requiring telephonic hearings before the Bankruptcy Court.<sup>130</sup> By further measure, the district extended the courthouse closing to June 1; keeping filing deadlines in place; holding only video or telephone conferences; and not calling civil or criminal jurors to service.<sup>131</sup>

Then, on May 29, the district by Amended General Order, announced a phased approach to the resumption of court activities: Phase 1, authorizing the return of certain staff for limited in-court hearings; Phase 2, to begin no earlier than June 22, calling for the reopening of the courthouse for limited in-person hearings; and Phase 3, authorizing the resumption of jury trials, “implemented at a date to be determined.”<sup>132</sup> On June 1, the Chief Judge ordered that generally all persons entering the courthouse “must wear face coverings in all spaces,” with exceptions for age and

---

129 U.S. District Court, Central Dist. of Cal., Visitor Restrictions (Mar. 12, 2020), <https://www.cacd.uscourts.gov/news/visitor-restrictions>; Protective Measures Taken in Response to Coronavirus in the Central District of California, <https://www.cacd.uscourts.gov/news/protective-measures-taken-response-coronavirus-central-district-california>. See Congressional Research Service, Overview, *supra* note 67.

130 U.S. District Court, Central Dist. of Cal., Activation of Continuity of Operations Plan, <https://www.cacd.uscourts.gov/news/activation-continuity-operations-plan>; COVID-19 Notice, <https://www.cacd.uscourts.gov/news/covid-19-notice>.

131 U.S. District Court, Central Dist. of Cal., Further Measures Taken in Response to COVID-19 Pandemic (Apr. 13, 2020), <https://www.cacd.uscourts.gov/news/further-measures-taken-response-covid-19-pandemic>.

132 U.S. District Court, Central Dist. of Cal., Phased Resumption of Operations (May 29, 2020), <https://www.cacd.uscourts.gov/news/phased-resumption-operations>.

medical condition, and allowing individual judges to decide their own anti-virus policies for their chambers and courtrooms.<sup>133</sup>

On March 16, the District of Wyoming adopted many of the same restrictions as did the California district courts, emphasizing “the significant number of identified and projected cases of COVID-19 in the surrounding states, and the severity of the risk posed to the public should local widespread community transmission occur.”<sup>134</sup> After the CARES Act was enacted, the district authorized the use of video and telephone conferencing for certain criminal matters, and on June 26, the Chief Judge issued an administrative order continuing the use of video and teleconferencing for another 90 days.<sup>135</sup> On May 20, the district provided updated guidance announcing that in-person hearings would resume June 1. The courthouse would be open to the public, subject to some restrictions; judicial personnel would answer telephone calls; filings would be accepted electronically, by mail, and in person; and drop boxes for filing would be stationed outside the courthouse. In addition, masks were required of any person (whether an attorney, litigant, witness, juror, or a member of the public) wanting to enter the courthouse and in the courtroom if social distancing is not possible. The guidance further specified spatial rules for courtroom practice, including the requirement of masks at sidebar discussions, reducing the number of chairs at counsel’s table to four; and limiting gallery seating. In addition, the guidance laid out the protocol for the prescreening of jurors, jury selection, and seating of jurors. Additional attention was given in the guideline to placement in the courthouse of hand sanitizer and to the cleaning of “high-touch surfaces” in the courthouse.<sup>136</sup>

*State Judicial Systems* – State judicial systems likewise had to find ways to conduct legal business while avoiding the face-to-face contacts that are typical to courtroom activity. In many ways, the challenges of state judiciaries were even greater than those of the federal. State judiciaries include state-wide, local courts, and specialized courts (such as family, probate, and traffic courts); they handle exponentially more disputes than do the federal courts; and their resources are more limited. Moreover, state judiciaries are responsible for certifying admission to the Bar of their states.

---

133 U.S. District Court, Cent. Dist. of Cal, Use of Face Coverings in Court Facilities (June 1, 2020), <https://www.cacd.uscourts.gov/news/use-face-coverings-court-facilities>.

134 U.S. District Court, Dist. of Wyo., General Order No. 20–01, In the Matter of: Restrictions on Courthouse Entry during the Coronavirus (COVID-19) (Mar. 16, 2020), <https://www.wyd.uscourts.gov/sites/wyd/files/EntryOrderCovid%20WY.pdf>.

135 U.S. District Court, Dist. of Wyo., General Order No. 20–08, General Order Extending and Reauthorizing Video or Telephone for Criminal Proceedings (June 26, 2020), <https://www.wyd.uscourts.gov/sites/wyd/files/General%20Order%2020-08%20%20Extending%20%26%20Reauthorizing%20Video%20or%20Telephone%20For%20CR%20Proceedings.pdf>.

136 U.S. District Court, Dist. of Wyo., Updated Notice Regarding District Court Clerk’s Office Change in Operations Due to COVID-19 (May 20, 2020), [https://www.wyd.uscourts.gov/sites/wyd/files/Notice\\_to\\_Bar\\_May%2020.pdf](https://www.wyd.uscourts.gov/sites/wyd/files/Notice_to_Bar_May%2020.pdf).

*California State Judiciary:* On the heels of the President’s emergency order, California’s Chief Justice announced the state’s emergency plan to deal with COVID-19. At that point in time, local courts had authority to suspend or modify their operations, and already had exercised that authority, for such matters as the extension of filing deadlines.<sup>137</sup> Local courts had authority to petition the Chief Justice for relief measures, including those that touched upon the extension of temporary restraining orders and the adjustment of dates for filing deadlines.<sup>138</sup> The California Supreme Court suspended in-person oral arguments on March 16, but made clear that remote sessions would continue to be livestreamed to the public;<sup>139</sup> two days later it announced the expansion of electronic filing of documents;<sup>140</sup> and on March 20, extended deadlines by 30 days for specified proceedings.<sup>141</sup> Three days later, the Chief Justice issued an order suspending all jury trials for 60 days, permitting an earlier trial upon a showing of good cause or through the use of remote technology.<sup>142</sup>

The California judiciary’s response continued to unfold on an almost daily basis. By March 26, that state’s Judicial Council had prepared and made public a draft revision of its 2006 plan, *Epidemics and the California Courts*, explicitly recognizing that epidemics are different from other disasters which may cause disruption “from weeks to months,”; the pandemic had the potential to disrupt court ope-

---

137 California Courts – The Judicial Branch of California, New Release, Chief Justice Issues Statement on Emergency Response in California Court (Mar. 13, 2020), <https://newsroom.courts.ca.gov/news/chief-justice-issues-statement-on-emergency-response-in-california-courts>.

138 California Courts – The Judicial Branch, New Release, California Chief Justice Issues Guidance to Expedite Court Emergency Orders (Mar. 16, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-issues-guidance-to-expedite-court-emergency-orders>. See also California Courts – The Judicial Branch, New Release, Court Emergency Orders (Aug. 27, 2020), <https://newsroom.courts.ca.gov/news/court-emergency-orders-6794321> (collecting all local requests and emergency orders).

139 Cal. Sup. Ct., Admin. 2020–03-12, Order Suspending In-Person Oral Argument and Setting All Argument Sessions at the Court’s San Francisco Headquarters (Mar. 16, 2020), [https://newsroom.courts.ca.gov/internal\\_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/supreme%20court%20order.pdf](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/supreme%20court%20order.pdf).

140 California Courts – The Judicial Branch, News Release, California Supreme Court Expands Electronic Filing in Response to COVID-19 Pandemic (Mar. 18, 2020), <https://newsroom.courts.ca.gov/news/california-supreme-court-expands-electronic-filing-in-response-to-covid-19-pandemic>.

141 Cal. Sup. Ct., Admin. 2020–03-20, Order Extending the Deadline for any Action Required or Permitted under the California Rules of Court in All Supreme Court Proceedings, [https://newsroom.courts.ca.gov/internal\\_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Supreme%20Court%20Order%203.20.20.pdf](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Supreme%20Court%20Order%203.20.20.pdf).

142 Judicial Council of California, Statewide Order by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council (Mar. 23, 2020), [https://newsroom.courts.ca.gov/internal\\_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-23-2020.pdf](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-23-2020.pdf).

rations “from months to several years,” necessitating a public health response in partnership with many different groups.<sup>143</sup> Two days later – by then, California had 5,000 confirmed cases and more than 100 deaths – the Chief Justice issued an order implementing actions approved by the Judicial Council and clarified that its prior order suspending jury trials for 60 days ran from the original trial date.<sup>144</sup>

April and May saw additional activity, which we selectively describe to illustrate the range of issues that the state judiciary addressed with care and speed: new rules to lower the jail population (including zero bail for misdemeanors and lower-level felonies), to suspend evictions, and to suspend mortgage forecloses;<sup>145</sup> to mandate electronic service in most civil cases;<sup>146</sup> to give judges discretion to make support orders effective upon mailing rather than filing with the court;<sup>147</sup> to extend the deadline to hold criminal trials by 90 days;<sup>148</sup> and to revise emergency rules on statutes of limitations and statutes of repose.<sup>149</sup> By June, the Judicial Council, having convened a Pandemic Continuity of Operations Working Group in May, developed a 75-page resource guide for courts, on environmental matters such as screening visitors, spacing jurors, and placing glass screens between people. A week later, the Judicial Council and the Chief Justice announced the end of some emergency mea-

---

143 Judicial Council of California, Administrative Division, Epidemics and the California Courts (Mar. 26, 2020 revised), at p. 6 & p. 13 [https://www.ncsc.org/\\_\\_data/assets/pdf\\_file/0028/19387/redacted\\_epidemics\\_and\\_the\\_california\\_courts\\_handbook.pdf](https://www.ncsc.org/__data/assets/pdf_file/0028/19387/redacted_epidemics_and_the_california_courts_handbook.pdf).

144 Judicial Council of California, Statewide Order by Hon. Tani G. Cantil-Sakauye, Chief Justice of California and Chair of the Judicial Council (Mar. 30, 2020), [https://newsroom.courts.ca.gov/internal\\_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-30-2020.pdf](https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20202/Statewide%20Order%20by%20the%20Chief%20Justice-Chair%20of%20the%20Judicial%20Council%203-30-2020.pdf).

145 California Courts – Judicial Branch, News Release, Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures (Apr. 6, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-to-lower-jail-population-suspend-evictions-and-foreclosures>.

146 California Courts – Judicial Branch, News Release, Judicial Council Mandates Electronic Service of Documents in Most Civil Cases (Apr. 17, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-mandates-electronic-service-of-documents-in-most-civil-cases>.

147 California Court – Judicial Branch, News Release, Council Makes It Easier for Parties to Request Changes to Support Orders Amid Pandemic (Apr. 20, 2020), <https://newsroom.courts.ca.gov/news/council-makes-it-easier-for-parties-to-request-changes-to-support-orders-amid-pandemic>.

148 California Court – Judicial Branch, News Release, California Chief Justice Extends Criminal Trial Deadlines (Apr. 29, 2020), <https://newsroom.courts.ca.gov/news/california-chief-justice-extends-criminal-trial-deadlines>.

149 California Courts – Judicial Branch, News Release, Judicial Council Revises Emergency Rule on Statutes of Limitations in Civil Cases (May 29, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-revises-emergency-rule-on-civil-filing-deadlines>.

tures, related to bail and arraignments, as California began to reopen.<sup>150</sup> However, by July 13, California experienced a spike in COVID-19 cases, and the Governor reinstated social-distancing requirements and numerous closings, which, at the time of this writing, had not yet led to revised court rules.<sup>151</sup>

*Wyoming State Judiciary:* Wyoming quickly put into place – on March 11, even before the President’s emergency order – a Respiratory Disease Pandemic Plan, based on consultation with the Department of Health. The plan sensibly distinguished a pandemic from other kinds of emergencies, such as a tornado or flood, given its “severity and longevity.” The plan carefully outlined levels of response – alert, standby, activate, deceleration, and resolution – as guidance for the different categories of courts within the state system, with the goal of providing a protocol with “the most effective response based on where the pandemic is occurring.”<sup>152</sup> The Chief Justice in coordination with the Wyoming Department of Health was tasked with activating the appropriate level taking account of geography and the severity of the outbreak. The Plan was set for review before July 15,<sup>153</sup> and later was amended five times in light of updated information about the health risks of COVID-19; the current plan runs through October 5.<sup>154</sup> At least until that date, the judiciary has directed judges to work remotely, to conduct no jury trials, and to suspend all in-person proceedings (except for certain emergency measures); encouraged judges to grant continuances to parties; and advised parties to make use of a drop box, if possible, for filings. Oral arguments are being conducted through use of Microsoft

---

150 California Courts – Judicial Branch, New Release, Judicial Council, Chief Justice End Some Emergency Measures as California and Courts Expand Reopening (June 10, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-chief-justice-end-some-emergency-measures-as-california-and-courts-expand-reopening>.

151 See Mary Williams Walsh, *With Washington Deadlocked on Aid, States Face Dire Fiscal Crises*, N.Y. Times (Sept. 7, 2020), <https://www.nytimes.com/2020/09/07/business/state-budgets-coronavirus-aid.html>; Allison Prang & Tawnell D. Hobbs, *California Pulls Back on Reopening Amid Surge in Coronavirus Cases*, Wall St. J. (July 13, 2020), <https://www.wsj.com/articles/coronavirus-latest-news-07-13-2020-11594628843>. The first California state court jury trial apparently encountered some predictable logistical difficulties. Nonetheless the remote jury was able to render a verdict. See Dorothy Atkins, *Calif. Jury Clears Honeywell In Zoom Asbestos Trial*, Law360 (Sept. 3, 2020, 4:41 PM EDT), <https://www.law360.com/productliability/articles/1307341>; Amanda Bronstead, *First Virtual Asbestos Trial Ends in Defense Verdict*, Law.com (Sept. 3, 2020, 5:18 PM EDT), <https://www.law.com/therecorder/2020/09/03/first-virtual-asbestos-trial-ends-in-defense-verdict>; John O’Brian, *Honeywell claims victory in \$70M asbestos trial held on Zoom*, Legal Newsline, (Sept. 3, 2020), <https://legalnewsline.com/stories/552825594-honeywell-claims-victory-in-70m-asbestos-trial-held-on-zoom>.

152 Wyoming Judicial Branch, *Respiratory Disease Pandemic Plan Version 1* (March 11, 2020) <https://www.courts.state.wy.us/wp-content/uploads/2020/03/Wyoming-Judicial-Branch-Interim-Pandemic-Plan-03.11.2020.pdf>.

153 *Id.*, at 4.

154 Supreme Court of Wyoming, *Order Extending COVID-10 Emergency Procedural Order to October 5, 2020*, Wyo. (July 24, 2020), <https://www.courts.state.wy.us/wp-content/uploads/2020/07/Covid-19-ProceduralOrder-7.24.2020.pdf>.

Teams, which requires counsel to have email, an Internet connection, and access to a camera and microphone.<sup>155</sup>

*Admission to the Bar:* COVID up-ended traditional arrangements throughout the country for certifying admission to the Bar. Bar admission is a decentralized process that is regulated by each state. To practice, the applicant must separately apply for admission to each state in order to practice in that state. Each state has a board of examiners that sets standards for admission. In some states, the board is a part of the state's highest court, but in some it is a part of the state's bar association. Admission typically depends on meeting two broad sets of qualification: legal competence and character and fitness. Competence is demonstrated by having achieved the required academic degree (most often, the Juris Doctor), and by securing a passing grade on a substantial special examination. The Bar examination in almost all states consists of an in-person written examination that spans two days. The trend in most states is to include questions that are state-specific, as well as so-called "multistate" topics (that cover seven areas – Civil Procedure, Constitutional Law, Contracts, Criminal Law, Evidence, Real Property, and Torts) and a separate examination on the rules governing professional responsibility.<sup>156</sup> Examinations throughout the country usually take place in February and in July, and most applicants sit for the July test a few months after their graduation from law school.

The need for social-distancing as a viral containment policy created untold logistical problems for administering the summer 2020 Bar examination, especially in states that had large numbers of confirmed COVID cases and fatalities. Depending on local conditions, states considered different options: to postpone the examination, to hold the examination but to limit the number of test-takers, to develop an online remote examination, to schedule additional but later sittings of the examinations, to grant "diploma privileges," meaning, to allow Bar admission to students who hold degrees from in-state or certain other law schools, and to allow temporary practice privileges (for example, if the applicant holds a J.D. and works under the supervision of an admitted attorney).<sup>157</sup> Generally, the Bar examiners were slow to make a decision, and as of this writing the situation is still uncertain in many states, with recent law graduates still not knowing when the examination will go forward.<sup>158</sup>

---

155 Supreme Court of Wyoming, August Oral Argument Guidance, <https://www.courts.state.wy.us/wp-content/uploads/2020/07/August-Oral-Argument-Guidance.pdf>.

156 National Conference of Bar Examiners, Multistate Bar Examination, <http://www.ncbex.org/exams/mbe/preparing/> (listing topics). See also American Bar Association, Bar Admissions Basic Overview (June 26, 2018), [https://www.americanbar.org/groups/legal\\_education/resources/bar\\_admissions/basic\\_overview/](https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/).

157 See Colleen Flaherty, Law Schools and Coronavirus: Bar Exemptions and More, *Inside Higher Ed* (Apr. 8, 2020), <https://www.insidehighered.com/news/2020/04/08/law-schools-and-coronavirus-bar-exemptions-and-more>.

158 See, e.g., Letter from Fifteen New York Law School Deans to the Governor of New York and Others (July 17, 2020) (on file with authors) (noting that "excessive delay" in decisions whether to provide an online Bar examination in New York has caused a burden on recent law graduates and professional disruption).



California and Wyoming, like other states, rely on a two-day, in person, written examination to assess the legal competence of applicants. On April 27 the California Supreme Court ordered that the July sitting of the Bar examination be postponed until September 9–10 and directed that the state take steps to administer the test online.<sup>159</sup> On April 10, the Wyoming Supreme Court issued an order temporarily authorizing a person who had registered for the summer Bar examination and graduated from law school to practice pending admission to the Bar should the summer examination be postponed because of the pandemic. The order allows an applicant to practice under the supervision of a licensed member of the Wyoming Bar while examination results are pending. The examination in that state scheduled to take place at the end of July apparently has been rescheduled for September 30 and October 1.<sup>160</sup>

### *3. Judicial Experience with Technology before the Pandemic*

Containment of COVID-19 depends on quarantine and social-distancing, both of which are incompatible with traditional law practice in open court or a judge's chambers. In order to avoid a total shut down of judicial operations, federal and state courts throughout the United States authorized counsel to practice from remote locations with court participation facilitated through technology. As the previous section detailed, courts issued orders permitting and mandating the electronic filing of papers, requiring oral argument by telephone or video, and allowing judicial personnel to work electronically from home. By its nature, the practice of law is conservative – adhering to tradition and past practice.<sup>161</sup> The rapidity of the federal court's COVID-related changes was able to build upon the judiciary's decades-long process of considering the best uses of technology in court practice. These prior efforts involved such mundane but essential developments as securing funding to upgrade courthouses to give them technological capacity, which allowed the court to do electronic research, to use closed-circuit television, to accept electronic filing, and to access audio or video recordings from remote distances. In some parts of the

---

159 California Courts – Judicial Branch, News Release, California Supreme Court Orders Bar Exam Delayed, Administered Online (Apr. 27, 2020), <https://newsroom.courts.ca.gov/news/california-supreme-court-orders-bar-exam-delayed-administered-online> (including California Supreme Court's letter of approval to state Bar Examiners). See also Sahil Venkatesan, Uncertainty and delays plague California Bar Examination, *Stanford Daily* (July 7, 2020), <https://www.stanforddaily.com/2020/07/07/uncertainty-and-delays-plague-california-bar-examination/>.

160 Supreme Court of Wyoming, Order Adopting Rule 203 of the Rules and Procedures Governing Admission to the Practice of Law (July 17, 2020), <https://www.wyomingbar.org/wp-content/uploads/Order.pdf>.

161 Michael Thomas Murphy, Just and Speedy: On Civil Discovery Sanctions for Luddite Lawyers, 25 *Geo. Mason L. Rev.* 36 (2017) (referring to U.S. lawyers as technological Luddites).



country, technological upgrades required courts to increase court fees to pay for the improvements.<sup>162</sup> In addition, law schools adapted their curriculum to train lawyers in certain forms of electronic practice, starting with basic research tools. The courts amended their rules of procedure to authorize and even mandate that counsel use electronic rather than manual modes of practice.<sup>163</sup>

*Judicial Technology before COVID:* The judiciary's approach to technology prior to the COVID crisis was slow and careful, maturing with new information, and at times contentious. We trace some of these developments as a context for better appreciating the federal judiciary's emergency responses.

To start, consider the federal judiciary's system for filing, maintaining, and accessing court files. The National Archives house the federal judiciary's court records – almost two hundred years of documents, and about 2.2 billion “textual pages” of court materials.<sup>164</sup> A switch to electronic filing required the establishment of electronic systems in courthouses that were not built to deal with the latest developments in technology and, indeed, still depended on print libraries without access to electronic research. A large part of the motivation to adapt judicial process to new technology stemmed from cost-cutting measures that were designed to reduce space and other upkeep costs.<sup>165</sup> In 1988, the Judicial Conference of the United States established a service known as PACER – Public Access to Court Electronic Records – and in the early 1990s put in place an electronic case management system.<sup>166</sup>

---

162 See, e.g., Wyoming raises court fees for courtroom technology updates, *Billings Gazette* (Aug. 5, 2017), [https://billingsgazette.com/news/state-and-regional/wyoming/wyoming-raises-court-fees-for-courtroom-technology-updates/article\\_17b7612e-0f87-57a9-a539-59a80a0a288b.html](https://billingsgazette.com/news/state-and-regional/wyoming/wyoming-raises-court-fees-for-courtroom-technology-updates/article_17b7612e-0f87-57a9-a539-59a80a0a288b.html).

163 State judiciaries underwent similar revision processes, and some were based on federal experience. See, e.g., Brian C. Vick & Neil C. Magnuson, *The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules*, 34 *Campbell L. Rev.* 233 (2012) (discussing North Carolina rule revisions pertaining to electronically stored information).

164 National Archives, *National Archive Court Records*, <https://www.archives.gov/research/court-records>.

165 U.S. Cong., House Comm. On Transportation and Infrastructure. Subcomm. On Economic Development, Public Buildings, and Emergency Management. *The Future of the Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligations: Hearing Before the Subcommittee on Economic Development, Public Buildings, and Emergency Management of the Committee on Transportation and Infrastructure, House of Representatives*, 109 Cong., 2d Sess. (June 22, 2006), vol. 4, p. 125, <https://play.google.com/books/reader?id=sK9az42RA2UC&hl=en&pg=GBS.PA3> (reporting that “[m]any courthouses were built prior to the widespread use of electronic research for legal sources” and conversion from print to electronic research would reduce space needs).

166 United States Courts, *25 Years Later, PACER, Electronic Filing Continue to Change Courts* (Dec. 9, 2013), <https://www.uscourts.gov/news/2013/12/09/25-years-later-pacer-electronic-filing-continue-change-courts> (recounting establishment of PACER and electronic case management).

In 2001, the Federal Rules of Civil Procedure were amended to permit electronic filings upon consent of the parties.<sup>167</sup> In 2004, the Committee on Court Administration and Case Management requested that those Federal Rules (and other civil process rules) be amended on an expedited basis to authorize the adoption of local rules to mandate electronic filing, emphasizing attendant cost savings.<sup>168</sup> Bar associations and others opposed such an amendment, urging exceptions for parties who did not have access to personal computers, and the amended rule that the Judicial Conference recommended in 2005 acted on this recommendation.<sup>169</sup> As a practical matter, by 2012, all federal courts accepted electronic filing.<sup>170</sup> In 2018, amendments to the Federal Civil Rules mandated electronic filing (unless good cause is shown or local rules allow otherwise), and eliminated the requirement of a certificate of service when papers are electronically filed through the court's system (a certificate of service "within a reasonable time after service" is required when paper is served "by other means").<sup>171</sup> Unrepresented parties need permission to file electronically and may be required to do so by court order or local rule.<sup>172</sup>

The incorporation of technology into the courthouse occurred in tandem with the incorporation of technology into law-practice modalities and civil procedure rules. Consider the basic act of service of process, critical for the commencement of a lawsuit and the fair proceeding of an action. The traditional mode of service is, of course, the handing of papers to the defendant personally or leaving the papers with a responsible person at the defendant's dwelling.<sup>173</sup> In 1983, the service-of-process

---

167 Currently, Fed. R. Civ. P. 5(b)(2)(E). See generally 4B Charles A. Wright, Arthur R. Miller, & Adam N. Steinman, *Fed. Prac. & Proc. Civ.* § 1147 (4th ed.) (discussing amendments to Federal Rule 5(b) and changes in the manner of service).

168 See generally United States Courts, *Judiciary Continues Cost Savings, Closes Court Facilities* (Sept. 11, 2012), <https://www.uscourts.gov/news/2012/09/11/judiciary-continues-cost-savings-closes-court-facilities> ("Cost containment, a Judiciary-wide initiative dating back to 2004, has resulted in a close examination of nearly every Judiciary function and activity to determine if it is necessary, and if so, how it can be done more efficiently and at less cost.").

169 See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 2–3 (Sept. 2005), [https://www.uscourts.gov/sites/default/files/fr\\_import/ST09-2005.pdf](https://www.uscourts.gov/sites/default/files/fr_import/ST09-2005.pdf).

170 United States Courts, *All Federal Courts Now Accepting Electronic Filing* (May 17, 2012), <https://www.uscourts.gov/news/2012/05/17/all-federal-courts-now-accepting-electronic-filing> ("The DC-based U.S. Court of Appeals for the Federal Circuit has begun accepting electronic filings via the judiciary's Case Management-Electronic Case Files (CM/ECF) system, joining every other federal appellate, district, and bankruptcy court in doing so.").

171 Fed. R. Civ. P. 5(d)(1).

172 Fed. R. Civ. P. 5(d)(3).

173 Fed. R. Civ. P. 4(e).

rule was amended to permit service by first-class mail,<sup>174</sup> overcoming critics' concerns that process might be lost in the mail, discarded with "junk" mail, deliberately ignored by the defendant, or go astray because of typographical errors<sup>175</sup> (these concerns today are amplified by the precarious financial position of the United States Postal Service which puts the quality of its service – and, indeed, very existence – into jeopardy).<sup>176</sup> Amendments adopted in 2001 permitted service by electronic means with the consent of the party served.<sup>177</sup>

Likewise, the Federal Rules pertaining to discovery, that exceptional feature of United States civil practice, have been amended to account for fax machines, e-mail, social media, and other nontraditional ways in which information is now exchanged and retained by individuals and businesses.<sup>178</sup> In 2006, the Federal Rules underwent a series of important revisions – more than a decade in the making – to incorporate "electronically stored information" (ESI) to the categories of information that are discoverable by the parties to a litigation,<sup>179</sup> updating language, introduced in 1970, that permitted the discovery of information in the form of "data compilations from which information can be obtained."<sup>180</sup> These changes in some ways

---

174 Fed. R. Civ. P. 4(d).

175 Ann Varnon Crowley, *Rule 4: Service by Mail May Cost You More Than a Stamp*, 61 *Ind. L.J.* 217 (1986).

176 Jory Heckman, *Postal regulation nominees: USPS faces 'very real threat' to long term viability*, *Federal News Network* (July 17, 2019), <https://federalnewsnetwork.com/agency-oversight/2019/07/postal-regulation-nominees-usps-faces-very-real-threat-to-long-term-viability/>. See also *U.S. Postal Service Retreats from Dire Financial Forecast*, *Linn's Stamp News* (June 25, 2020), <https://www.linns.com/news/postal-updates/u.s.-postal-service-retreats-from-dire-financial-forecast> (reporting concerns by Democratic Representatives that the U.S. Postal Service could be financially disabled by March 2021).

177 Now, Fed. R. Civ. P. 5(b)(2)(E).

178 The Judicial Conference gathered information about electronic discovery in 1996, began "intensive work" on the amendment process in 2000, and in 2004 published proposed amendments, reviewing comments from 250 individuals and groups. See *E-Discovery Amendments to the Federal Rules of Civil Procedure Go into Effect Today*, K&L Gates (Dec 1, 2006), <https://www.ediscoverylaw.com/2006/12/e-discovery-amendments-to-the-federal-rules-of-civil-procedure-go-into-effect-today/>.

179 Fed. R. Civ. P. 26(a)(1)(B).

180 See Fed. R. Civ. P. 33(d) (permitting production of ESI in response to an interrogatory given comparative costs to the parties); Fed. R. Civ. P. 34(a) (permitting requesting party to "test or sample" ESI); Fed. R. Civ. P. 34(b) (permitting requesting party to specify the form for producing ESI); Fed. R. Civ. P. 37(f) (creating a safe harbor such that sanctions may not be imposed on a party failing to produce ESI "lost as a result of the routine, good-faith operation of an electronic information system"); Fed. R. Civ. P. 45 (conforming procedures for subpoenas to other discovery rules). See generally 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, *Fed. Prac. & Proc. Civ.* § 2003.1 (3d ed.) (discussing post-1970 amendments to the Federal Rules that relate to discovery).

codified best practices that had developed in the lower federal courts on a case-by-case basis.<sup>181</sup>

Similarly, in 1998 the Administrative Office of the United States began a pilot program for the establishment of an “Electronic Courtroom”; that re-imagined courtroom enabled access to the Internet, installed video-conferences, and placed document cameras and display monitors throughout the space.<sup>182</sup> “Courtroom 575” of the United States District Court for the Northern District of Ohio, located in Akron, Ohio, as an early adopter, established a Digital Evidence Presentation System, described by its Chief Judge as allowing counsel “to switch from displaying exhibits, realtime transcripts, video recording or multi-media presentations with the push of a button.”<sup>183</sup> Proponents defended these trends as a fair and effective way to deal with caseload concerns, reduce costs, and enhance jury deliberation<sup>184</sup> Critics argued that even this then-limited (although high profile) use of technology to present evidence contributed to “the deterioration of the trial system’s integrity.”<sup>185</sup> In 1996, Federal Rule of Civil Procedure 43(a) was amended to deal with the admissibility of remote testimony.<sup>186</sup> The Advisory Committee note to that amendment emphasized that live testimony remained the presumption, and that remote testimony, facilitated by new forms of technology, should be permitting only in “compelling circumstances,” with “appropriate safeguards,” and not casually and as a matter of convenience.<sup>187</sup> Concerns about allowing remote testimony included prejudice to the opposing party, the inability of the court or jurors to assess demean-

---

181 Courts and commentators paid special attention to the trial court’s approach to electronic discovery in *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003), a highly publicized gender discrimination lawsuit.

182 See Nicole J. De Sario, *Merging Technology with Justice: How Electronic Courtrooms Shape Evidentiary Concerns*, 50 *Clev. St. L. Rev.* 57 (2002–2003). For an overview of available technology in this period, see, e.g., Donald F. Parsons, Jr. & Lisa K. W. Crossland, *Technological Tools for Civil Litigation*, 14 *Del. Lawyer* 33 (1996), [http://delawarebarfoundation.org/delawyer/Volume14\\_Number4\\_Winter1996.pdf](http://delawarebarfoundation.org/delawyer/Volume14_Number4_Winter1996.pdf).

183 Chief Justice Paul R. Matia, *The United States District Court Northern District of Ohio Announced Electronic Courtrooms at its U.S. Court Houses* (pamphlet n.d.), quoted in De Sario, *supra* note 182, at 57.

184 See Report to Congress on the Optimal Utilization of Judicial Resources, *Achieving Savings and Efficiencies through Automation and Technology*, 57–68 (1998).

185 See Jonathan D. Kissane-Gaisford, *The Case for Disc-Based Litigation: Technology and the Cyber Courtroom*, 8 *Harv. J. L. & Tech.* 471 (1995) (noting idea that use of technology has negative impact on courtroom dynamics).

186 Federal Rule 43(a) provides “[a]t trial, the witnesses’ testimony must be taken in open court ... . [But for] good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.”

187 Fed. R. Civ. P. 43(a), advisory committee’s note to 1996 amendment. See generally 9A Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2414 (3d ed.) (discussing the preference for oral testimony).

nor testimony, the dangers of collusion, and the threat of lying.<sup>188</sup> Specific uses of remote testimony (particularly uses outside the scope of Federal Rule 43(a), as, for example, the use of closed-circuit arraignments in criminal proceedings), elicited further concern.<sup>189</sup> Since 1996, the quality of electronic forms of testimony has improved, judges and lawyers have more experience with technology, and courtrooms have been upgraded to permit transmission and viewing.<sup>190</sup>

Finally, changes in legal education should not be overlooked as a factor that enabled the judiciary's quick adaptations during the pandemic – lawyers asked to pivot from traditional to electronic practice were, in the colloquial phrase, “practice ready,” even if not experienced in the particular practice mode. These developments have been assisted by an institutional commitment to experimenting with technology in the classroom through such projects and organizations as the Center for Computer-Assisted Legal Instruction, established in 1982,<sup>191</sup> and the Berkman Klein Center for Internet and Society, at Harvard University.<sup>192</sup> But law schools now routinely provide students with training in electronic research; they increasingly assign casebooks that use digital formats; even traditional lectures incorporate access to videos and other forms of digital information; and some schools have resources that integrate technology into clinical education, allowing for such experiential exercises as video recorded simulated arguments or depositions, which then are subject to critique by the teacher and other students.<sup>193</sup> Law schools quickly transitioned

---

188 See Christopher Forbes, *Rule 43(a): Remote Witness Testimony and a Judiciary Resistant to Change*, 24 *Lewis & Clark L. Rev.* 299, 321 (2020) (recognizing criticisms of testimony given remotely).

189 See, e.g., Ronnie Thaxton, *Injustice Telecast: The Illegal Use of Closed-Circuit Television Arraignments and Bail Bond Hearings in Federal Court*, 79 *Iowa L. Rev.* 175, 190 (1993) (arguing “that the use of closed-circuit television does not satisfy the constitutional requirement of ‘presence.’”).

190 The impact of the pandemic and the use of technology on the rights of the criminally accused is beyond the scope of this essay, which focuses on civil procedure and civil actions. We note only that technological advances of course do not by themselves resolve important constitutional questions of the right of the criminally accused not to be tried in absentia, see Eugene L. Shapiro, *Examining an Underdeveloped Constitutional Standard: Trial in Absentia and the Relinquishment of a Criminal Defendant's Right to Be Present*, 96 *Marq. L. Rev.* 591 (2012), and whether they sufficiently protect the right of the criminally accused to a trial by jury. See Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 *Santa Clara L. Rev.* 373 (2012).

191 The Center for Computer-Assisted Legal Instruction (CALI), <https://www.cali.org/>.

192 Berkman Klein Center for Internet & Society at Harvard University, <https://cyber.harvard.edu/>.

193 See, e.g., *Using Virtual Reality Technology to Train New Courtroom Lawyers*, *Legal Skills Prof Blog* (Aug. 6, 2019), [https://lawprofessors.typepad.com/legal\\_skills/2019/08/using-virtual-reality-technology-to-train-new-courtroom-lawyers.html](https://lawprofessors.typepad.com/legal_skills/2019/08/using-virtual-reality-technology-to-train-new-courtroom-lawyers.html); Marcus Smith,

in the spring of 2020 to remote instruction in those states where shelter-in-place was mandated or encouraged because of the virus.<sup>194</sup> Admittedly, the American Bar Association, which accredits law schools in the United States, has been reluctant to accept “virtual” law schools that provide instruction only online.<sup>195</sup> As a result, law schools had to seek temporary waivers of this ban to avoid shutting down during the pandemic.<sup>196</sup> But the resistance to online education and the remote classroom is likely to dissipate somewhat going forward.

*Responding to the Crisis* – During the COVID-19 crisis, the judiciary was able to draw from this prior experience – including its years of studying technological innovation, investment in electronic infrastructure, revisions to procedural rules, and changes in legal education – in developing localized emergency responses that were critical for maintaining “open courts” on a virtual basis. As one example, Federal Rule 43(a) offered a ready-made procedural framework within which trial judges could endorse remote testimony on the view that the pandemic itself was an exceptional circumstance overcoming the presumption of live testimony. Thus, in *In re RFC & ResCap Liquidating Tr. Action*,<sup>197</sup> the defendant requested on March 10 of the pandemic that the court reschedule the final two days of trial, having learned that a witness had tested positive for COVID-19. (Recall that federal courts had not yet closed their doors to the public or to litigants at this point.) The district court in Minnesota instead ordered that the bench trial go forward by videoconference, noting that the uncertainty of the pandemic argued in favor of

---

Integrating Technology in Contemporary Legal Education, Taylor & Francis Online (Aug. 1, 2019), <https://www.tandfonline.com/doi/full/10.1080/03069400.2019.1643647?scroll=top&needAccess=true>.

194 See William Nash, Legal Education and Remote Learning: Law Schools in the State of Pandemic, U. Richmond J. of Law & Technology (Mar. 28, 2020), <https://jolt.richmond.edu/2020/03/28/legal-education-and-remote-learning-law-schools-in-the-state-of-pandemic/>. For a discussion of our own law school’s transition to remote learning to deal with COVID, see NYU Law News, Responding to COVID-19, NYU Law community continues online (Apr. 6, 2020), <https://www.law.nyu.edu/news/coronavirus-covid19-distance-learning-online>.

195 In 1997, the American Bar Association Accreditation Committee issued Temporary Distance Education Guidelines, expressing a “disfavor” for remote learning that was consistent with ABA Standard 304(g), which bars credit for “correspondence” study. See Anna Williams Shavers, The Impact of Technology on Legal Education, 51 J. Legal Educ. 407, 410 (2001), [www.jstor.org/stable/42893713](http://www.jstor.org/stable/42893713). See also Blake A. Klinkner, Will Online Law Degrees be the Future of Legal Education?, 39 Wyo. Law 48 (2016) (discussing reluctance of the American Bar Association to accredit online law schools that offer instruction only through remote instruction).

196 See, e.g., NYU Law News, NY State Court of Appeals grants NYU Law Request for Distance Learning Waiver, Students Maintain Bar Eligibility (Mar. 20, 2020), <https://www.law.nyu.edu/news/distance-learning-waiver-students-bar-exam-coronavirus>.

197 *In re RFC & ResCap Liquidating Tr. Action*, No. 0:13-cv-3451 (SRN/HB), 2020 WL 1280931 (D. Minn. Mar. 13, 2020).

“the use of contemporaneous remote video testimony” over any delay in the scheduling and completion of the trial. In *Vitamins Online, Inc. v. HeartWise, Inc.*,<sup>198</sup> the Utah district court likewise opted for expert testimony by videoconference, rather than postpone a trial, scheduled to begin July 16, a month away, in a federal Lanham Act suit that had been on-going for seven years. Rejecting defendant’s claim of prejudice, the court realistically found that the “COVID-19 pandemic constitutes ‘good cause and compelling circumstances’” under Rule 43(a) to hold a bench trial through remote videoconference technology.<sup>199</sup> Pointing to the uncertainty of the pandemic’s duration, the court emphasized that even after “court operations have resumed,” and in-person trials became possible, “the court would potentially be required to postpone the bench trial even further in order to accommodate crucial criminal matters.”<sup>200</sup>

By contrast, in *Graham v. Dhar*,<sup>201</sup> a district court in West Virginia denied defendant’s motion to permit an expert’s live testimony by remote electronic transmission. The expert was a Boston-based cardiologist and, as the defendant explained, was “currently dealing with a backlog of surgical cases” such that “traveling from Boston to Charleston, West Virginia to testify at trial in late July” would be “extremely difficult” for the doctor and would put his “patients at risk by further postponing” their surgical treatment. The presiding judge relied on the Rules Advisory Committee’s comment that remote testimony was to be exceptional, and expressed his own “strong preference for live testimony.” In the court’s view, the proffered showing was that of mere inconvenience and not compelling. To be sure, the judge observed, COVID-19 has caused “difficulties” and put a “strain” on the nation’s health care system. Although other courts had permitted remote testimony,

---

198 *Vitamins Online, Inc. v. HeartWise, Inc.*, No. 2:13-cv-00982-DAK, 2020 WL 3452872 (D. Utah June 24, 2020).

199 The court relied upon other district court cases reaching the same conclusion, and emphasized that some of these cases involved complex patent issues and the trials were expected to run for at least three weeks. See *Vitamins Online, Inc. v. HeartWise, Inc.*, 2020 WL 3452872, at \*9, citing, among others, *Argonaut Ins. Co. v. Manetta Enters., Inc.*, No. 19-CV-00482-PKC-RLM, 2020 WL 3104033 (E.D.N.Y. June 11, 2020) (“[T]he Court exercises its discretion under FRCP 43(a) to order that the bench trial in this matter be conducted via video-conference. However, in light of Defendant’s concerns ... and ... to allow ... additional time to prepare ..., the Court adjourns trial until August 24, 2020.”); *In re RFC & ResCap Liquidating Tr. Action*, 2020 WL 1280931; *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, No. 2:18CV94, 2020 WL 3411385 (E.D. Va. Apr. 23, 2020) (concluding that the court would move forward with the bench trial being done exclusively by videoconference technology).

200 *Vitamins Online, Inc. v. HeartWise, Inc.*, 2020 WL 3452872, at \*9.

201 *Graham v. Dhar*, No 1:18–00274, 2020 WL 3470507 (S.D.W. Va. June 25, 2020).



they did so because of unusual circumstances such as an on-going trial. By contrast, defendant's expert, the court posited, had "adequate time" given a July 29 trial date to schedule his activities in light of the need to testify in person.<sup>202</sup>

The admissibility at trial of testimony generated electronically from a witness physically outside the courthouse is hardly the only deviation from traditional procedure necessitated by the pandemic. Two others that have come into common practice are of particular interest because they are central to two of the most distinctive aspects of American civil procedure. The first is conducting depositions remotely through an electronic medium, such as FaceTime, Zoom, or closed circuit television. This phenomenon is obviously closely parallel to the generation of remote trial testimony and usually is arranged by agreement among the lawyers in the case. The second is conducting pre-trial conferences, which is a critical element of the extensive pre-trial judicial management that today is a basic characteristic of cases, particularly large or complex cases, in the federal courts. In many instances, the conference is centered in the judge's chambers with a dozen or more lawyers located in many different parts of the United States. Although these two procedures generally are executed without controversy, it is still far too early to apprise what long term effects they will have on how lawyers and judges perform their professional duties and on the nature of American civil litigation.

#### *4. The Supreme Court and COVID-19's Disruption of Life outside the Courthouse*

COVID-19 has caused unprecedented disruption to American life and, not surprisingly, these disruptions have resulted in litigation. The previous section described the responses of United States courts to the pandemic, as they urgently sought to protect judicial staff, jurors, parties, and lawyers entering the courthouse from the risk of viral infection. This sense of urgency, however, does not consistently describe the response of the United States Supreme Court when faced with public law cases resulting from the profound health emergency that COVID produced. These lawsuits required a careful balancing of the threat that COVID-19 posed to public health and individual mortality against other legal interests. What follows is not a comprehensive overview of the Court's decisions in cases involving circumstances impacted by the pandemic. Certainly critics will present counter-examples. But the cases we feature – affecting important constitutional rights and public institutions – suggest an unsettling discounting or inadvertence by the Supreme Court of COVID's devastating impact on the lives and rights of Black, Brown, and poor persons and their need for constitutional protection. We acknowledge that the Court plays a specific role in

---

202 *Id.* at \*1. Of course, every procedural ruling in a lawsuit is a mere snapshot, and does not provide insight about prior party conduct or other aspects of the litigation. In a previous ruling, the court had denied plaintiff's request for a discovery sanction against the defendant, but criticized its corporate representatives for their lack of preparation and failure to seek a protective order prior to refusing to answer questions. See *Graham v. Dhar*, No. 1:18-00274, 2019 WL 6999688 (S.D. W. Va. Dec. 19, 2019).

the American system of separation of powers, and that it is constrained by constitutional and statutory mandates. But the Court also enjoys a broad range of discretion in the cases it chooses to hear, its review of district court equitable remedies, and its ability to interpret law in light of changing circumstances. As already discussed, the Administrative Conference of the United States Courts in its earliest Guidance recommended that the federal judiciary take steps to protect health and safety in the courts.<sup>203</sup> The Court's decision-making did not consistently manifest these concerns when asked to protect the legal rights of voters, prisoners, and immigrants from the uncertain but predictable negative effects of COVID exposure.

*The Right to Vote:* In a per curiam decision issued on April 6, 2020, the Supreme Court – sitting remotely to avoid exposure to COVID – granted a stay and overturned a preliminary injunction issued by a federal district court extending the deadline by which the state of Wisconsin would be required to count absentee ballots (i.e., ballots mailed in, rather than placed by hand in the ballot box) received within six days after the scheduled primary election even if not postmarked by the date of the election. The dangers of in-person voting had convinced many people to make timely requests for absentee ballots, leading to a back-log in processing and consequent delay.<sup>204</sup> The Court's grant of a stay of the injunction left voters with an unfortunate choice: vote by mail and face disenfranchisement, or vote in person and face the possibility of infection and death.<sup>205</sup> The racial impact of refusing to count the ballots was manifest: Black voters disproportionately were put in harm's way or disenfranchised.<sup>206</sup> The slim five-member majority of the Supreme Court placed great emphasis on the fact that plaintiffs had not specifically requested the extension in the form ordered by the district court and that it crafted in the context of an evolving health crisis – and at a time when the federal courts themselves were adapting their rules of practice to meet a dynamic and uncertain emergency.

After the election, a contact-tracing analysis by the Wisconsin Department of Health Services identified more than fifty confirmed cases associated with in-per-

---

203 United States Courts, Judiciary Preparedness for Coronavirus (COVID-19) (updated June 3, 2020), (quoting James Duff), <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19>.

204 Republican Nat'l Comm. v. Democratic Nat'l Comm., 140 S. Ct. 1205, 2020 WL 1672702 (2020).

205 See Jim Rutenberg & Nick Corasaniti, How a Supreme Court Decision Curtailed the Right to Vote in Wisconsin, N.Y. Times, Apr. 13, 2020, <https://www.nytimes.com/2020/04/13/us/wisconsin-election-voting-rights.html> (reporting that “[w]hen the state released its final vote tallies on Monday, it was clear that the decision – arrived at remotely, so the justices would not have to brave the Covid-19 conditions – had resulted in the disenfranchisement of thousands of voters”).

206 Kevin Townsend, Voter Suppression by Pandemic, The Atlantic (Apr. 11, 2020), <https://www.theatlantic.com/politics/archive/2020/04/the-ticket-coronavirus-voter-suppression/609883/> (discussing ballot rules in Wisconsin as having “its roots as a tool of white supremacy”).

son voting, including among poll workers.<sup>207</sup> A later study by researchers at the University of Wisconsin and Ball State University found a 17.7 percent increase in positive infection rates due to in-person voting, equal to about 700 COVID-19 cases in Wisconsin during the relevant period, or about 7.7 percent of the total number of confirmed cases.<sup>208</sup> It is somewhat ironic that during this period, social distancing was mandated at the state's courthouses to curtail the virus.<sup>209</sup> In March, the Wisconsin Supreme Court issued two administrative orders, the first, suspending most in-person hearings and ordering that they be held remotely (the order was extended with clarified exceptions on April 15, 2020, until further order); the second, to limit the number of persons in the courthouse, and temporarily suspending jury trials. On May 22, the Wisconsin Supreme Court extended these orders.<sup>210</sup>

---

207 See Scott Bauer, 52 who worked or voted in Wisconsin election have COVID-19, *The Columbian* (Apr. 29, 2020), <https://www.columbian.com/news/2020/apr/29/52-who-worked-or-voted-in-wisconsin-election-have-covid-19/> (discussing number of coronavirus cases subsequent to election on April 7).

208 Chad D. Cotti, Bryan Engelhardt, Joshua Foster, Erik Nesson, & Paul Niekamp, *The Relationship Between In-Person Voting and Covid-19: Evidence from the Wisconsin Primary* (NBER Working Paper No. w27187, May 2020), SSRN: <https://ssrn.com/abstract=3603818>.

209 The Court's refusal to protect Wisconsin voters is of a piece with its refusal, on July 16, to vacate a stay, pending appeal, entered by the Eleventh Circuit in a Florida action that had the effect of blocking thousands of otherwise eligible voters from registering to vote days before the state deadline. The Court gave no reasons for its decision. The lawsuit challenged Florida's law barring convicted felons who were no longer incarcerated from voting until they paid outstanding "financial obligations" to the state – so-called "pay to vote" rules. The district court had entered a preliminary injunction barring enforcement of the statute a year earlier, and, following an eight-day video trial in April and May 2020, declared the scheme unconstitutional. *Jones v. DeSantis*, --- F. Supp. 3d ---, 2020 WL 2618062 (N.D. Fla. 2020). See Southern Poverty Law Center, *In a Victory for Voting Rights, Federal Court Rules That Florida's Pay-to-Vote System is Unconstitutional* (May 24, 2020), <https://www.splcenter.org/presscenter/victory-voting-rights-federal-court-rules-floridas-pay-vote-system-unconstitutional>. Justice Sotomayor, joined by Justice Ginsburg and Justice Kagan, dissenting from the denial to vacate the stay, drew a sharp contrast with the Court's Wisconsin ruling, and put the problem in plain terms: "This Court's inaction continues a trend of condoning disenfranchisement." *Raysor v. DeSantis*, 591 U.S. ---, 2020 WL 4006868 (2020) (Sotomayor, J., dissenting). See also *Merrill v. People First of Ala.*, --- S. Ct. ---, 2020 WL 3604049 (July 2, 2020) (granting stay of preliminary injunction to stop enforcement of certain Alabama voting restrictions against voters who are at risk of becoming seriously ill or dying because of COVID-19).

210 See *In Re The Matter Of The Extension Of Orders And Interim Rule Concerning Continuation Of Jury Trials, Suspension Of Statutory Deadlines For Non-Criminal Jury Trials, And Remote Hearings During The Covid-19 Pandemic* (Wis. 2020), <https://www.wicourts.gov/news/docs/jurytrials2.pdf>; *In Re The Matter Of The Final Report Of The Wisconsin Courts Covid-19 Task Force* (Wis. 2020), <https://www.wicourts.gov/news/docs/taskforcefinalreport.pdf>; *In Re The Matter Of The Extension Of Orders Concerning Remote Administration Of Oaths At Depositions, Remote Hearings In Appellate Courts, Filing Of Documents In Appellate Courts, And Appellate Court Operations During The Covid-19 Pandemic* (Wis. 2020), <https://www.wicourts.gov/news/docs/remotoathshearingaccount.pdf>.

*Prison Conditions:* In a two-line opinion, the Supreme Court, still working remotely and subject to emergency rule changes, refused to vacate the stay of a district court injunction ordering a Texas geriatric prison to take health and safety measures at the facility during the pendency of an appeal.<sup>211</sup> The stayed order required prisoners be provided with masks, hand soap, hand sanitizer, and tissues for personal use, and bleach-cleaning supplies to disinfect prison spaces.<sup>212</sup> The intermediate appeals court vacated the injunction on the ground of changed circumstances; a concurring circuit judge wrote “to underscore that holding these elderly, ill inmates jammed together in their dormitories, unable to socially distance as the virus continues to rapidly spread, is nothing short of a human tragedy.”<sup>213</sup> The Supreme Court’s order was issued on May 14. Although there were no COVID cases at the prison on March 30, on April 13 an inmate died; two days later it was confirmed to be due to COVID, and within the month, positive cases had increased to 267 with deaths rising to eighteen two weeks later.<sup>214</sup> This trend was consistent with nationwide information indicating that COVID infection was pervasive in the federal prison system (then 12 percent over capacity), impacting about 172,000 prisoners, of whom 45 percent have underlying health conditions.<sup>215</sup> In addition, the scientific consensus was that people over age sixty (as many in prison are) were more susceptible to COVID.<sup>216</sup>

The Court’s majority offered no explanation for refusing to vacate the stay; admittedly the grounds for a vacating a stay are high. Quite likely, as Justice Sotomayor pointed out in a “statement,” joined by Justice Ginsburg, the grounds for the Court’s refusal were procedural: the failure of the prisoner-plaintiffs to have first sought administrative relief through the prison grievance system as required under

---

211 *Valentine v. Collier*, 140 S. Ct. 1598, 206 L.Ed.2d 930 (2020).

212 *Valentine v. Collier*, No. 4:20–CV–1115, 2020 WL 1899274, at \*1 (S.D. Tex. Apr. 16, 2020).

213 *Valentine v. Collier*, 960 F.3d 707, 708 (5th Cir. 2020).

214 *Valentine v. Collier*, No. 4:20–CV–1115, 2020 WL 3491999 (S.D. Tex. Apr. 16, 2020).

215 Congressional Research Service, Nathan James & Michael A. Foster, *Federal Prisoners and COVID-19: Background and Authorities to Grant Release* (updated Apr. 23, 2020), <https://crsreports.congress.gov/product/pdf/R/R46297> (providing overview of ways in which federal prisons could release certain inmates).

216 World Health Org., *Older People & COVID-19*, <https://www.who.int/teams/social-determinants-of-health/covid-19> (stating that older adults “are at [a] higher risk of developing severe forms of COVID-19”). See generally Rachel E. Lopez, *The Unusual Cruelty of Nursing Homes Behind Bars*, 32 Fed. Sent. R. 264, 2020 WL 3884411 (June 2020) (discussing disproportionate numbers of elderly inmates, their high risk of medical problems, and their low risk of criminality).

a federal statute that explicitly seeks to limit prisoner use of the federal courts.<sup>217</sup> For many reasons the exhaustion requirement poses a significant barrier to securing judicial protection: as one commentator observed in 2018, prior to the pandemic, “It is foolish to think that prisoners will abide by a procedural rule that they do not know exists.”<sup>218</sup> Moreover, to the extent the Supreme Court implicitly treated the exhaustion requirement as a bar to relief, it ignored its own precedents on the distinction between statutory filing conditions that are “claim processing rules” – waivable and can be excused – and jurisdictional rules that go to the court’s power.<sup>219</sup> In addition, the Court also would have ignored precedent holding that exhaustion is to be excused if a prison grievance procedure is not available to the prisoner, and there was no evidence that an emergency process to deal with COVID was in fact offered.<sup>220</sup> Nevertheless, the Court simply turned a blind eye toward the district

---

217 See Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (specifying that “[n]o action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.”). In *Ross v. Blake*, 136 S. Ct. 1850, 195 L. Ed. 2d 117 (2016), the Court held that the statute ousts courts of discretion to waive the administrative exhaustion requirement in “special circumstances,” but that a “prisoner need not exhaust remedies if they are not ‘available.’” *Id.*, at 1855.

218 Elana M. Stern, *Completely Exhausted: Evaluating the Impact of Woodford v. Ngo on Prisoner Litigation in Federal Courts*, 166 U. Pa. L. Rev. 1511, 1538 (2018) (attempting to explain uptick in prisoner filings of unexhausted claims despite supposed tightening of standards by citing “knowledge gap” between what is required of pro se prisoner litigants and legal awareness).

219 See 14 Charles Wright, Arthur R. Miller, & Helen Hershkoff, *Fed. Prac. & Proc. Juris.* § 3655 (4th ed.) (discussing the distinction). Some lower federal courts have issued individual orders of compassionate release. See *Compassionate Release*, fd.org, <https://www.fd.org/coronavirus-disease-2019-covid-19/compassionate-release> (collecting cases). But others have refused to reach the merits and instead have denied relief on the procedural ground of failure to exhaust administrative remedies. Thus, for example, in *United States v. Baye*, --- F. Supp. 3d ---, 2020 WL 2857500 (D. Nev. June 27, 2020), the Nevada federal district court refused to grant compassionate release on the ground that the prisoner had not exhausted his administrative remedies, treating the requirement as a jurisdictional bar even though it is subject to waiver and other federal courts have accorded it claim-processing status, and further demanding that the prisoner exhaust “each extraordinary and compelling reason,” even when the warden had “failed to recognize the disease as an extraordinary and compelling reason.” No consideration was given to the effects of COVID on prison staffing or the prison’s ability to process a COVID-related complaint in a timely way.

220 *Valentine v. Collier*, 960 F.3d 707, 708 n.2 (Davis, J., concurring). Subsequent to filing, plaintiff sought to exhaust the administrative process. The claim was still pending as of June 5, 2020. See *Valentine v. Collier*, No. 4:2-CV-1115, 2020 WL 3491999, at \*6-\*7 (S.D. Tex. 2020) (finding that the prison grievance process “was ‘not capable of use to obtain some relief’ from COVID [because] . . . it did not fit the problem Plaintiffs were facing”).

court's unrefuted testimony about conditions in the prison, which Justice Sotomayor's statement described in grim detail.<sup>221</sup>

*Immigrants and Public Health Care:* In August 2019, almost six months before the emergence of COVID-19, the Trump Administration changed the national rule governing when a non-citizen will be deemed ineligible for admission to the United States or for an adjustment of status to be able to work in the United States on the ground that the person is "likely to become a public charge" and dependent upon government benefits.<sup>222</sup> The rule redefined "public charge" to mean "an alien who receives one or more public benefits," defining benefits to include Medicaid – federal health care assistance – subject to exceptions. Public health advocates expressed concern that this change would discourage immigrants from seeking health care, leaving children without vaccines and families without essential treatment.<sup>223</sup> A number of lawsuits were filed in different jurisdictions across the United States, including one in the federal court in New York City by New York State and other states challenging the legality of the rule change. In January 2020, a New York federal district court issued a nationwide preliminary injunction barring the rule's enforcement, and the Trump Administration sought a stay of the order pending appeal. In response, the Supreme Court vacated the injunction, allowing the rule to be enforced.<sup>224</sup> COVID was only just appearing on the scene at this point, although we now know that at least one virus-related death already had taken place in the United States. In April, plaintiffs moved in the district court to modify the stay, pointing

---

221 *Valentine v. Collier*, 140 S. Ct. at 1599–1600 (reporting the district court's "factual findings that the prison had inexplicably discarded its own rules, and in doing so, evinced deliberate indifference to the medical needs of its inmates"). At least two federal courts of appeals have reversed preliminary injunction orders on behalf of plaintiffs in COVID-related prison cases finding that they were unlikely to be able to meet the constitutional standard, which requires a showing that the government defendants are deliberately indifferent to the prisoners' medical needs. See *Wilson v. Williams*, 961 F.3d 829 (6th Cir. 2020) (reversing preliminary injunctive habeas relief for a sub-class of medically vulnerable prisoners, despite evidence of bunking conditions that made social distancing impossible, and six deaths thus far); *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020) (vacating preliminary injunctive habeas relief despite evidence that infections were dramatically increasing and that social distancing was impossible; the district court failed to consider the burdens "with which the injunction would saddle" prison officials, by having to comply with a judicial order).

222 See *Inadmissibility on Public Charge Grounds, Final Rule*, 84 Fed. Reg. 41292 (Aug. 14, 2019). For an overview of the public charge rule, see Helen Hershkoff & Stephen Loffredo, *Getting By: Economic Rights and Legal Protections for People with Low Income*, 400–401 (2019).

223 See Wendy E. Parmet, *Immigration Law as a Social Determinant of Health*, 92 Temp. L. Rev. 931, 940–942 (2018) (discussing the chilling effect that the public charge rule was likely to have on immigrant access to health care).

224 *Dept. of Homeland Security v. New York*, 140 S.Ct. 599, 206 L. Ed. 2d 115 (2020).

to the health crisis,<sup>225</sup> and soon thereafter the Supreme Court was presented with an emergency motion. On April 24, the Court denied the request to vacate the stay in a two-sentence order.<sup>226</sup> Even before the pandemic, the Trump Administration's public-charge rule discouraged immigrant individuals from seeking health benefits for which they were eligible out of concern that they would become ineligible to work in the United States.<sup>227</sup> The Court's written order showed no regard to the health consequences of the stay; by May, the highest death rates in New York were in ten Brooklyn neighborhoods that are populated largely by Black, Brown, and immigrant households.<sup>228</sup> Justice Gorsuch's concurring opinion focused on procedure, and raised concerns about the district court's entry of a nationwide injunction,<sup>229</sup> but was silent on the unusual nature of the Solicitor General's request for a stay pending appeal – typically treated as “extraordinary relief”<sup>230</sup> – which the Court nevertheless granted with alacrity despite manifest dangers to public health.

### *5. Judicial Commissions, Lessons Learned, and Questions Still to Ask*

We said at the outset that the COVID-19 crisis presents a dynamic situation in the United States, and that our report and analysis could, at best, be only provisional and tentative. Indeed, as we write, the pandemic seems to have no clear end-date.

---

225 *New York v. U.S. Department of Homeland Security*, No. 1:19-cv-07777 (S.D.N.Y. Apr. 28, 2020). See *New York and Other States Request a Pause to Public Charge During COVID*, 22 No. 10 *Immigr. Bus. News & Comment NL* 22 (May 15, 2020).

226 Motion by Government Plaintiffs to Temporarily Lift or Modify the Court's Stay of the Orders Issued by the United States District Court for the Southern District of New York, *Dept. of Homeland Security v. New York*, --- S. Ct. ---, 2020 WL 1969276, 206 L.Ed.2d 847 (Apr. 13, 2020).

227 Hamutal Bernstein, Dulce Gonzalez, Michael Karpman, & Stephen Zuckerman, *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019*, *Urban Inst.* (May 18, 2020), <https://www.urban.org/research/publication/amid-confusion-over-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-2019>.

228 See *Brooklyn ZIP Code Has N.Y.C's Highest Death Rate*, *N.Y. Times* (updated May 19, 2020), <https://www.nytimes.com/2020/05/18/nyregion/coronavirus-new-york-update.html> (discussing areas of Brooklyn that were hardest-hit by the virus).

229 *Dept. of Homeland Security v. New York*, 140 S. Ct. 599, at 600, 206 L.Ed.2d 115 (Gorsuch, J., concurring) (“The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them.”).

230 *Barr v. East Bay Sanctuary Covenant*, 140 S. Ct. 3, 5, 204 L. Ed. 2d 1189 (2019) (Sotomayor, J., dissenting from grant of stay pending appeal) (quoting *Williams v. Zbaraz*, 442 U.S. 1309 (1979) (Stevens, J., in chambers)). See Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 *Harv. L. Rev.* 123, 125 (2019) (“To take one especially eye-opening statistic, in less than three years, the Solicitor General has filed at least twenty-one applications for stays in the Supreme Court. ... During the sixteen years of the George W. Bush and Obama Administrations, the Solicitor filed . . . [an average of] one every *other* Term.”).



By mid-May, there seemed to be light at the end of the tunnel; every state that had imposed a shelter-in-place recommendation or mandate had taken steps to lift the restriction and “open up” life.<sup>231</sup> Yet two months later, some of those states again shuttered, faced with record-breaking numbers of confirmed COVID-19 cases and deaths – on one day, 75,600 new cases.<sup>232</sup> Changing conditions have brought new problems, and although the Executive branch has remained partisan, counter-productive, and provocative in its response, the judicial branch has been pro-active in studying the pandemic and alert to exigencies requiring the revision of past responses.

A number of court-created working groups and task forces now are in place addressing aspects of the pandemic as it affects law and the courts. Some of these groups were charged with short-term and immediate goals, dealing with specific issues such as when to reopen the courthouse to the public or to resume jury trials. Thus, for example, in April, the Administrative Office of the United States Courts created a working group, made up of chief judges and court executives “to develop protocols for how to safely resume grand jury and trial jury proceedings.”<sup>233</sup> The Administrative Office, gathering information from other agencies and from the courts throughout the pandemic, also distributed guidelines for reopening courthouses in order to facilitate local decisionmaking in light of local conditions.<sup>234</sup> Similarly, as California began its plans to reopen, the California Judicial Council created the Pandemic Continuity of Operations Working Group comprised of 22 volunteer judges and court executives,<sup>235</sup> and later released a guidance document setting out issues to consider and technical recommendations (such as screening methods and devising walking paths to ensure safe distancing).<sup>236</sup>

---

231 See Alaa Elassar, *This Is Where Each State Is During Its Phased Reopening*, CNN (May 27, 2020), <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/> (providing overview of approaches on state-by-state basis).

232 U.S. Reports More Than 70,000 New Coronavirus Cases for the Second Time, *N.Y. Times* (updated July 24, 2020), <https://www.nytimes.com/2020/07/17/world/coronavirus-updates.html>.

233 United States Courts, *Courts Begin to Consider Guidelines for Reopening* (Apr. 27, 2020), <https://www.uscourts.gov/news/2020/04/27/courts-begin-consider-guidelines-reopening>.

234 See Congressional Research Service, *Overview*, *supra* note 67.

235 See California Courts, *Judicial Council Launches Working Group to Aid Courts in Pandemic Recovery*, Cal. Courts Newsroom (May 12, 2020), <https://newsroom.courts.ca.gov/news/judicial-council-launches-working-group-to-aid-courts-in-pandemic-recovery>.

236 California Courts, *Council Working Group Releases Pandemic Recovery Resource Guide for Courts*, Cal. Courts Newsroom (June 3, 2020), <https://newsroom.courts.ca.gov/news/council-working-group-releases-pandemic-recovery-resource-guide-for-courts>.

Other working groups were established to take a long term perspective on COVID-19 and to study, evaluate, and assess its broader implications for court reform, such as the use of electronic proceedings, as well as larger areas in need of reform. These groups are focusing on gathering information and collecting experiences in order to identify problems, to devise solutions, and to prepare for future emergencies. Among the law groups that have been convened, the American Bar Association established The ABA Coronavirus (COVID-19) Task Force, headed by the former Director of the Legal Services Corporation and composed of 20 members with diverse expertise.<sup>237</sup> So far, the Task Force, using survey instruments, has identified judicial accessibility as a major concern (20 percent of the 449 survey respondents to a question asking, “What legal needs have you seen arising from the COVID-19 pandemic?” pointed to procedural issues around the accessibility of courts)<sup>238</sup> – a problem that predated the pandemic but has become exacerbated since the crisis began.

State professional organizations also have created working groups to study the impact of COVID on the legal profession and legal needs. The Connecticut Bar Association for example, established the 2020 COVID-19 Pandemic Task Force comprised of judges, lawyers, and other professionals to address the legal issues that have arisen as a result of the pandemic, touching on executive-legislative power; the judiciary; state and federal judicial liaison; legal aid; “the public at large”; the legal profession, especially the financial impact of COVID on practice; technology; and law students and legal education.<sup>239</sup>

From the procedural perspective, the current health crisis is testing the limits of “the day in court ideal”; during a period of quarantine and “social distancing,” being in court can occur – and sometimes only occur – remotely, outside the physical space of a bricks-and-mortar courthouse.<sup>240</sup> The shift to electronic process facilitated on a short-term basis the continued operation of the courts through virtual forms of

---

237 “The task force includes experts in disaster response; health law; insurance; legal needs of families to protect basic human needs such as food, shelter, medical and employment benefits; criminal justice; domestic violence; civil rights and social justice.” The ABA Coronavirus (COVID-19) Task Force, American Bar Association, <https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem/>.

238 These issues included limited access to courts, limitations on remote access, trial delay, and delay in other proceedings. See Task Force on Legal Needs Arising out of the 2020 Pandemic, Summary Report: Survey Regarding Legal Needs Arising from the COVID-19 Pandemic 3, American Bar Association (2020), <https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Aascds%3AUS%3A4f7c11ac-fc44-428a-88a9-6c1b0d101b80#pageNum=1>.

239 2020 COVID-19 Pandemic Task Force, Connecticut Bar Association (last visited July 12, 2020), <https://www.ctbar.org/members/sections-and-committees/task-forces/2020-covid-19-pandemic>.

240 See Arthur R. Miller, Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure, 88 N.Y.U. L. Rev. 286 (2013) (considering whether the federal court system as currently structured still offers a fair and accessible forum for resolution of legal disputes).

lawyering. But the transition, and decisions to continue in this mode, or aspects of it, raise important concerns about the fairness and integrity of the virtual proceedings, in ways that are both large and small and some yet to reveal themselves.

Litigants do not have equal access to technology, and technology is not yet sufficiently advanced to substitute seamlessly for in-person interaction.<sup>241</sup> Lawyers out of the court's viewing must resist the urge to coach witnesses for desired answers.<sup>242</sup> Jurors, lawyers, and judges must learn to assess demeanor testimony when witnesses are uncomfortable or inexperienced with the tele-mode,<sup>243</sup> are wearing masks, or transmission problems intrude.<sup>244</sup> Courts must ensure that technological snafus do not count against time limits set by rule for information exchange through depositions,<sup>245</sup> and must take steps to protect fair and open hearings for parties and witnesses for whom English is not a primary language when simultaneous translation is not available and time lags have the potential to generate misperceptions and misunderstanding.<sup>246</sup> Lawyers must develop new rhetorical methods for ad-

---

241 See The Aspen Institute, #Disconnected: COVID-19 & the Digital Divide, <https://www.aspeninstitute.org/events/disconnected-covid-19-the-digital-divide/>.

242 See Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 *UCLA L. Rev.* 185, 217 (2000) (discussing witness coaching, and concluding that “[b]y giving the competing attorneys free rein to present remote witnesses in a manner that serves their clients’ self-interests, unregulated videoconferencing can serve the values of adversarialism,” assuming “the fact finder will have the opportunity to evaluate the credibility of a remote witness based on the demeanor evidence each party chooses to emphasize”).

243 For example, Chief District Judge Rodney Gilstrap in the Eastern District of Texas issued a Standing Order for his civil cases stating that “depositions of witnesses may need to be conducted remotely with all participants separated,” even as it acknowledged that the process “especially for first-time witnesses unfamiliar with the process, may be an uncomfortable experience.” See *Standing Order Regarding Pretrial Procedures in Civil Cases Assigned to Chief District Judge Rodney Gilstrap During The Present Covid-19 Pandemic* (2020), [www.txed.uscourts.gov/sites/default/files/judgeFiles/COVID19%20Standing%20Order.pdf](http://www.txed.uscourts.gov/sites/default/files/judgeFiles/COVID19%20Standing%20Order.pdf).

244 See Fredric I. Lederer, *The Potential Use of Courtroom Technology in Major Terrorism Cases*, 12 *Wm. & Mary Bill Rts. J.* 887, 919 (2004) (discussing concerns of assessing demeanor when remote testimony used).

245 The Illinois Supreme Court amended Supreme Court Rule 206 to facilitate remote depositions. The deponent is no longer required to be physically present in the same place as the officer administering the oath and recording the deposition, and “[t]ime spent at a remote electronic means deposition in addressing necessary technology issues shall not count against the time limit for the deposition. ...” *Illinois Courts Response to COVID-19 Emergency/Impact On Discovery* (2020), <https://courts.illinois.gov/SupremeCourt/Announce/2020/042920.pdf>.

246 See, e.g., Emily Ngo, *How City Courts Are Operating Remotely During the Pandemic*, *Spectrum News – NY1* (Apr. 15, 2020), <https://www.ny1.com/nyc/all-boroughs/news/2020/04/14/city-courts-operating-remotely-during-pandemic> (discussing technological barriers to simultaneous translation).

vocacy that is mediated through technology and there is the ever-present problem that the telephone will disconnect or the video monitor will crash.<sup>247</sup> Courts must not allow default judgments to be entered against pro se litigants who do not but cannot appear at remote electronic hearings because they are unemployed and their phone service has been cut off for nonpayment or they lack access to the Internet or laptops.<sup>248</sup> And the profession must assure that those who need legal representation can connect with counsel who are trustworthy and competent.<sup>249</sup>

Moreover, the shift from in-person to remote proceedings is not simply about courtroom practice. To the contrary, it puts into question some of the fundamental assumptions of United States civil procedure. Examples are: the notion that a court's power is limited to its territorial compass, or perhaps a state or a county;<sup>250</sup> that a forum might be inconvenient because documents and witnesses are located in a different state or country;<sup>251</sup> and that a corporate defendant may resist a court's juris-

---

247 See Hon. Mark A. Drummond (Ret.), *Advocacy Through the Computer Screen: Best Practices for Effective Remote Advocacy*, American Bar Association (May 2, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/advocacy-through-computer-screen/> (providing tips for how lawyers can adapt to practicing remotely); Alaina Lancaster, 'I Kind of Prefer it Now': Lawyers Say Virtual Civil Trial Might Be More Efficient, *The Recorder* (July 17, 2020), <https://www.law.com/therecorder/2020/07/17/i-kind-of-prefer-it-now-lawyers-say-virtual-civil-trial-might-be-more-efficient/> (reporting that "[t]he first 15 minutes or so of San Mateo County Superior Court's second virtual bench trial got off to a bit of a rocky start, technologically speaking").

248 See, e.g., Emily Mieure, *Making Online Justice Work in Wyoming During Pandemic*, RocketMiner.com (Apr. 29, 2020), [https://www.rocketminer.com/news/state/making-online-justice-work-in-wyoming-during-pandemic/article\\_9b9d71b9-f42d-585f-a0ba-cf24ab1ce4c6.html](https://www.rocketminer.com/news/state/making-online-justice-work-in-wyoming-during-pandemic/article_9b9d71b9-f42d-585f-a0ba-cf24ab1ce4c6.html) (discussing litigants' lack of access to phone, Internet, and computers).

249 See, e.g., American Bar Association, *Web Portal Connects Lawyers to Those in Need During Pandemic* (Mar. 23, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/free-legal-answers-milestone/>; Texas Advocacy Project, *Virtual Legal Clinics Since 2007*, <https://www.texasadvocacyproject.org/free-legal-services/virtual-legal-clinics>.

250 The foundational case in the U.S. is *Pennoyer v. Neff*, 95 U.S. 714 (1878), holding that a court's adjudicative authority over the defendant is based on the presence of the defendant or the defendant's property in the territory of the forum. That limitation has evolved and been broadened considerably, although it has retroacted in recent years, as described in 4A Charles Alan Wright, Arthur R. Miller, & Adam N. Steinman, *Fed. Prac. & Proc. Civ.* §§ 1068–1073 (4th ed.).

251 The doctrine of *forum non conveniens*, although not recognized in many non-U.S. legal systems, is an entrenched feature of American law and allows a court with power to decline jurisdiction when adjudication in another forum would better serve the convenience and interests of the courts and the parties. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (assessing convenience in terms of the location of evidence and witnesses and the competing interests of the original forum and the alternative forum).

diction because it is not incorporated within the state.<sup>252</sup> Jurisdictional barriers traditionally fixed by geography lose their import when technology can hurdle them – necessitating a profound rethinking about choice of law and the extra-territorial effect of legislation.<sup>253</sup> At the same time, the pandemic – which resulted in a complete even if temporary suspension of the civil jury right – highlights the fragility of a constitutional protection said to be a basic part of democratic education.<sup>254</sup> Can jury trial survive in a remote environment? How can jurors socially distance one from another? How can they deliberate in that world? How can lawyers who must pick jurors or examine and cross-examine witnesses – two of the most important aspects of the jury process – do so if they are wearing masks or facial covering or behind a glass barrier?

The pandemic also has had other, and less obvious, effects on the United States civil justice system. Adjudication is a public function, and the courts are government offices. The judiciary is subject to constitutional as well as statutory limits, and among them, they are required to respect the privacy of individuals and to ensure the security of proceedings. In the rush to adapt to the pandemic, law offices, universities, and some courts have become dependent upon private Internet servers, private telephone service providers, and private communication apps (like “Zoom”). The pandemic did not create the “Zoom bomb,” but it has multiplied the number of virtual interactions that are vulnerable to uninvited participants.<sup>255</sup> And although privatization is assumed to bring cost savings to government, the evidence often is to the contrary especially if service quality is held constant.<sup>256</sup> Moreover, out-sourcing creates new opportunities for corruption and self-dealing, and often

---

252 See *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (basing jurisdiction over the corporation on the state in which it is incorporated).

253 See Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 *Notre Dame L. Rev.* 1057, 1063 (2009) (suggesting revision of the way in which states employ “extraterritoriality [concepts] as they have evolved in choice-of-law principles and in legislation”).

254 See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1132 (1991) (discussing the role of the jury “to create an educated and virtuous electorate”).

255 See Kate O’Flaherty, *Beware Zoom Users: Here’s How People Can “Zoom-Bomb” Your Chat*, *Forbes* (Mar. 27, 2020), <https://www.forbes.com/sites/kateoflahertyuk/2020/03/27/beware-zoom-users-heres-how-people-can-zoom-bomb-your-chat/#63d67286618e> (advising how to prevent uninvited guests from joining video conferences).

256 See, e.g., Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 *Cardozo L. Rev.* 2211, 2214 (2013) (reporting that cost savings from privatization “[o]ften come at the expense of service quality”); Dru Stevenson, *Privatization of State Administrative Services*, 68 *La. L. Rev.* 1285, 1312 (2008) (reporting that at the local level privatization has not consistently yielded cost savings); Darrell A. Fruth, *Economic and Institutional Constraints on the Privatization of Government Information Technology Services*, 13 *Harv. J.L. & Tech.* 521, 522 (2000) (positing that “privatizing public information technology will likely not generate the costs savings governments expect”).

without the benefits of public oversight.<sup>257</sup> If nothing else, the Coronavirus Aid, Relief, and Economic Security Act's insufficient accountability mechanism is a terrible road map that future reform should not follow.

Finally, COVID's health and economic effects have exacerbated deep and pervasive racial and economic inequalities in American society. As already discussed, they have generated profound constitutional disputes, including how to protect the health and safety of voters during a presidential election year; they also have raised disturbing questions about the vulnerability of persons in state and federal detention, including immigrants and prisoners, who more often than not are Black, Brown, or poor. As is clear, the political aftershocks of the pandemic have coincided with a parallel pandemic – what widely now is characterized to be America's “pandemic of racism,”<sup>258</sup> made plain in the harrowing video of an unarmed Black man being suffocated to death by a police officer.<sup>259</sup> In this context, too, the current crisis interrogates fundamental features of United States constitutional law: an aggressive rejection of the present government's duty to the poor,<sup>260</sup> its frequent disregard of the continuing racism in private and public life,<sup>261</sup> and the casual giving of immunity to public-sanctioned violence.<sup>262</sup>

---

257 See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 *Wm. & Mary L. Rev.* 507, 549 (2011) (raising questions, in the context of contractual procedure, whether privatization produces “faithless agents whose interests are misaligned with public goals”).

258 BBC News, *George Floyd: “Pandemic of Racism” Led to His Death, Memorial Told* (June 5, 2020), <https://www.bbc.com/news/world-us-canada-52928304> (discussing briefly how Floyd's death both followed after, and forces reflection upon, previous cases of police violence).

259 See Shawn Hubler & Julie Bosman, *A Crisis That Began With an Image of Police Violence Keeps Providing More*, *N.Y. Times* (updated July 8, 2020), <https://www.nytimes.com/2020/06/05/us/police-violence-george-floyd.html> (“A protest movement that was ignited by a horrific video of police violence – a white police officer pressing his knee against the neck of George Floyd, a black man, for nearly nine minutes – has now prompted hundreds of other incidents and videos documenting violent tactics by police.”).

260 See Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 *U. Pa. L. Rev.* 1277, 1278 (1993) (contending that the “Supreme Court's use of the rationality standard in areas that affect poor people” is problematic given “political powerlessness” of the poor, and should be replaced by use “of enhanced judicial protection”).

261 See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *Stan. L. Rev.* 1111, 1148 (1997) (examining how the Court's “interpretation of equal protection [has] justified status-enforcing state action,” contributing to the perpetuation of inequalities related to gender and race).

262 See Congressional Research Service, *Whitney K. Novak, Policing the Policy: Qualified Immunity and Considerations for Congress* (updated June 25, 2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10492> (discussing the doctrine of qualified immunity and explaining that “[i]n the wake of unrest arising from George Floyd's death on May 25, 2020, after a Minneapolis police officer pressed a knee into his neck, broader questions have arisen with regard to how existing law regulates the conduct of local police officers”).

## *Conclusion*

We are both professors of American civil procedure, and the rules that we use as a model – the Federal Rules of Civil Procedure – emerged against the background of the Great Depression. Those Rules were designed to instantiate the democratic ethos of President Franklin D. Roosevelt’s New Deal, reflecting a conception of litigation not only as a private legal act, but also as a public act that promotes the country’s shared welfare.<sup>263</sup> Many scholars have discussed the possible end of the New Deal spirit in the United States and the ways in which civil procedure has undergone deformation from its democratic origin.<sup>264</sup> At the same time, technological innovation, initially welcomed as a way to increase citizen participation, improve government transparency, and afford greater workplace autonomy, instead has become a major threat to democracy, through its distortion of political discourse, dilution of privacy, limiting access to civil justice, and exacerbation of racial and economic inequalities.<sup>265</sup> In this moment of national crisis, we argue that any plan for court reform and for changes to the Federal Rules must resist treating the judiciary’s emergency response to COVID as the appropriate, let alone the necessary way to conceptualize a post-COVID judicial system. If there are any lessons to be learned from the current pandemic, they show the need for enlarging the discussion from a focus on technological capacity, to ensuring that deep structural inequalities in American society not be allowed to undermine the fairness, integrity, equality, and accessibility of courts and legal protection throughout the United States.

---

263 See Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 *A.B.A. J.* 1648 (1981) (discussing the influence of the New Deal on the Federal Rules of Civil Procedure).

264 See Miller, *supra* note 240; Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 *Iowa L. Rev.* 1269 (1997) (discussing how the end of the New Deal is likely to affect revision of the Federal Rules). See also Helen Hershkoff & Rolf Stürner, *Managerial Judging and Procedural Convergence: Judicial Role as Democratic Practice* (unpublished manuscript on file with the authors) (comparing the democratic potential of the German judicial mandate of “hints and feedback” with judicial case management under the Federal Rules in the United States).

265 See Janna Anderson & Lee Rainie, *Many Tech Experts Say Digital Disruption Will Hurt Democracy*, Pew Research Center (Feb. 21, 2020), <https://www.pewresearch.org/internet/2020/02/21/many-tech-experts-say-digital-disruption-will-hurt-democracy/> (discussing concerns about democracy in the digital age).



