

**Federal Courts, Crises, and the Novel Coronavirus:
How America's Courts Respond to Exigent Circumstances***
By Blake N. Humphrey[†]

Introduction

Article III of the U.S. Constitution¹ is the federal judiciary's oracle of authority:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

While many elements of American life have changed since the founding era, generally, U.S. federal courts have faithfully followed Article III's core provisions. But during times of challenge, crisis, or pandemonium, does this claim hold true? In this context, we can refer to these unique inflection points as "exigent circumstances." How does the federal judiciary respond to exigent circumstances outside of the courts' own power, dominion, and control?

This article explains and answers this precise question. Indeed, throughout American history, the federal judiciary has been faced with hardship and adversities, all while being tasked with maintaining its cornerstone and fundamental obligation—protecting and preserving civil liberties and constitutional rights. The novel coronavirus ("COVID-19") has fueled a global health pandemic, shuttering the normal, day-to-day life of cities and countries. Normalcy has been engulfed, and lawyers are not immune; this overwhelming crisis has sent reverberating

*Given the dynamic and ever-changing situation of the COVID-19 pandemic, the author would like to state that every attempt possible was made to ensure that the information contained in this article is both accurate and up to date as of the time of submission or publication. If there are any mistakes or errors contained in this work related to substantive or technical content, they are the author's mistakes and errors alone.

[†]Blake N. Humphrey is a second-year student at the West Virginia University College of Law in Morgantown, W. Va.

¹See U.S. CONST. art. III.

shockwaves into the life of the legal community. At a time when federal courts play an active role in America’s body politic,² history demonstrates that while the federal judiciary has faced countless crises that threaten the ability of the courts ensure that civil liberties and constitutional rights are protected, federal courts are resilient and responsive in times of crisis.

This article provides the following points for consideration:

- A discussion of significant historical events related to the U.S. federal court system and “exigent circumstances.”
- An overview of more modern examples of U.S. federal courts facing crises in the 19th and early 20th centuries.
- Background on the coronavirus pandemic and analysis and assessment of select federal courts’ individual responses to COVID-19.
- How the present-day responses of U.S. federal courts have been consistent with history’s learned lessons.

U.S. Federal Court System

Article III of the U.S. Constitution provides for the creation of a Supreme Court, and Congress has the power under Article I to craft additional courts as needed.³ The federal judges presiding over these courts must be appointed by the president “by and with the advice and consent of the Senate” and hold their offices “during good behavior[.]”⁴ In many regards, the Judiciary Act of 1789 set the courts in motion.⁵ Currently, there are four Article III-designated courts: the Supreme Court of the United States, the U.S. courts of appeals, the U.S. district courts, and the U.S. Court of International Trade.⁶ As noted by the Federal Judicial Conference, “[s]ince the mid-twentieth century, Congress has occasionally authorized temporary or specialized courts or

²*Supreme Court Plays Crucial Role in US Society*, VOA NEWS (Oct. 29, 2009, 2:21 PM), <https://www.voanews.com/archive/supreme-court-plays-crucial-role-us-society>.

³U.S. CONST. art. I, sec. 8.

⁴U.S. CONST. art. III.

⁵RUSSELL R. WHEELER & CYNTHIA E. HARRISON, *CREATING THE FEDERAL JUDICIAL SYSTEM* (3d ed. 2005).

⁶*See Courts: A Brief Overview*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/courts/courts-brief-overview> (last visited May 5, 2020).

adjudicatory bodies staffed by judges from existing Article III courts.”⁷ Currently, there are 13 federal appellate courts and 94 federal judicial districts.⁸

Further, the Judicial Conference of the United States (“Judicial Conference”) provides national-level policymaking for the federal court system.⁹ Title 28, Section 331 of United States Code outlines the role and responsibilities of the Judicial Conference, including surveying the business conditions of U.S. courts, assigning judges to or from courts of appeals or district courts, promoting uniform court management, and “study[ing] the operation and effect of the general rules of practice and procedure in the federal courts, as prescribed by the Supreme Court pursuant to law.”¹⁰ The Judicial Conference supervises the director of the Administrative Office of the U.S. Courts (AOUSC).¹¹

Federal Courts and Historical Crises

In the seminal case of *Marbury v. Madison*,¹² Chief Justice John Marshall famously proclaimed that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹³ Like a genie in a bottle, this pronouncement by the chief justice unleashed a “hidden power” found within Article III; the power of the Supreme Court of the United States—and federal courts—to say what the law is.¹⁴ Fueled by the birth of “judicial review” comes a long line of famous—and infamous—post-*Marbury* decisions of the U.S. Supreme Court.¹⁵ On one hand, the

⁷*Id.*

⁸*Court Website Links*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links> (last visited May 5, 2020).

⁹*See Governance & the Judicial Conference*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference> (last visited May 5, 2020).

¹⁰*Id.*; *see also* 28 U.S.C. § 331 (West 2020).

¹¹28 U.S.C. § 604 (West 2020).

¹²5 U.S. 137 (1803).

¹³5 U.S. at 177. “The judicial power of the United States is extended to all cases arising under the constitution.” *Id.* at 178.

¹⁴Nicandro Iannacci, *Marbury v. Madison: The Supreme Court Claims its Power*, CONSTITUTION DAILY (Feb. 24, 2019), <https://constitutioncenter.org/blog/marbury-v-madison-the-supreme-court-claims-its-power>.

¹⁵*See, e.g., McCulloch v. Maryland*, 17 U.S. 316 (1819); *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Educ.*, 347 U.S.

power of “judicial review” has been construed as a force for good,¹⁶ but on the other hand, critics decry the modern power of the Supreme Court and federal courts.¹⁷

But a contagious virus, ravaging war, or global disaster—unlike a “case in controversy”¹⁸ as defined under Article III, Section 2, Clause 1—are not “judicially controllable.” How do federal courts exercise their dominion and control to resolve these types of extrinsic problems? Simply put, they cannot. Despite competing theories of jurisprudence, one can state with substantial confidence that originalism, textualism, and purposivism can agree on the following proposition: the tempest that is a “virus” or an exigent circumstance does not heed to Chief Justice Marshall’s conception of “judicial review” under Article III. As explained in detail below, throughout the course of American history, the federal judiciary has faced exigent circumstances and challenges, both internal and external to the political process. The following subsections will provide brief overviews of select topics related to the federal judiciary and historical situations in which various federal courts have been faced with crises.

President Lincoln’s Suspension of the Writ of Habeas Corpus

Article I, Section 9, Clause 2 of the U.S. Constitution states, “[t]he privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public

483 (1954); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Loving v. Virginia*, 388 U.S. 1 (1967); *Roe v. Wade*, 410 U.S. 113 (1973); *United States v. Nixon*, 418 U.S. 683 (1974); *Bush v. Gore*, 531 U.S. 98 (2000); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010); *National Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁶Suzanna Sherry, *A Summary of Why We Need More Judicial Activism*, VANDERBILT L. (2014), <https://law.vanderbilt.edu/news/a-summary-of-why-we-need-more-judicial-activism/>.

¹⁷Ryan McMaken, *The Supreme Court Is Much Too Powerful*, MISES INST. (Jul. 10, 2018), <https://mises.org/wire/supreme-court-much-too-powerful>.

¹⁸See U.S. CONST. art. III, sec. 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this CONSTITUTION, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

safety may require it.”¹⁹ *Habeas corpus*, which is a legal writ requiring a person under arrest to be brought before a judge or into court, especially to secure the person’s release unless lawful grounds are shown for their detention,²⁰ is enshrined in the federal Constitution.²¹ While frequently used in the modern era by prisoners challenging the validity of their sentences or the conditions of confinement,²² during the Civil War, it was a lightning rod of controversy for President Abraham Lincoln, the U.S. Supreme Court, and Congress. For background,

[a]fter Virginia seceded from the Union on April 17, 1861, the only lines for overland supplies, troop movements, transportation, and communication to Washington, D.C., ran through Maryland, with the railroads running through Baltimore. Baltimore was a rough city for the Union, and Maryland an uncertain ally. . . . Confederate sympathizers in Maryland were numerous, organized, and sometimes violent. The Maryland legislature was of questionable loyalty, prompting Lincoln to monitor its April 26 session and, later, to order the arrest of a number of its members.

Determined to keep the Maryland lines open, . . . Lincoln issued an order to General Winfield Scott authorizing him to **suspend the writ of habeas corpus**, at or near any military line between Philadelphia and Washington if the public safety required it.²³

Subsequently, “federal troops arrested John Merryman in Cockeysville, Maryland, for recruiting, training, and leading a drill company for Confederate service.”²⁴ Although he was sitting under Section 14 of the Judiciary Act of 1789, Chief Justice Roger Taney’s writ of *habeas corpus* was disregarded by a Union officer.²⁵ Enter the prolific case of *Ex parte Merryman*. In *Merryman*, Chief Justice Taney held that the power to suspend the writ of *habeas corpus* lies exclusively with

¹⁹U.S. CONST. art. III, sec. 9, cl. 2.

²⁰*Habeas Corpus*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/habeas-corpus> (last visited May 5, 2020).

²¹U.S. CONST. art. III, sec. 9, cl. 2.

²²*Habeas Corpus: The Process of the Writ*, LEGAL INFORMATION INST., <https://www.law.cornell.edu/constitution-conan/article-3/section-1/habeas-corpus-the-process-of-the-writ> (last visited May 5, 2020).

²³James A. Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM LINCOLN ASS’N 47–66 (2008) (emphasis added).

²⁴*Id.*

²⁵17 F. Cas. 144 (C.C.D. Md. 1861)

Congress.²⁶ However, President Lincoln did not comply with the chief justice’s direction. In his subsequent message transmitted to Congress, President Lincoln articulated that

[t]he whole of the laws which were required to be faithfully executed were being resisted and failing of execution in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen’s liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated? To state the question more directly, Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that “the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it” is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion or invasion, the public safety does require it. It was decided that we have a case of rebellion and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with this power; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it can not be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.²⁷

At bottom, although President Lincoln had a persuasive argument for why it was necessary to suspend *habeas corpus*,²⁸ the *Merryman* decision and its progeny set the stage for subsequent controversy over the power of the writ of *habeas corpus*—and likewise, the courts’ power.

²⁶*Id.*

²⁷See Abraham Lincoln, *July 4 Message to Congress (July 4, 1861)*, archived at <https://web.archive.org/web/20150320123159/https://millercenter.org/president/speeches/speech-3508> (last visited May 5, 2020).

²⁸For example, as Dueholm notes, “In early 1862, Horace Binney published an article that provided strong scholarly support for Lincoln’s claim to a constitutional power to suspend the writ of habeas corpus.” James A. Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, 29 J. ABRAHAM

LINCOLN ASS'N 47–66 (2008) (emphasis added); *see also* HORACE BINNEY, THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS UNDER THE CONSTITUTION 9–14, 47–48, 51–52 (Philadelphia: C. Sherman & Son 2d ed. 1862).

Examples of Judicial Crises

Now understanding the executive prerogative as illustrated by President Lincoln’s actions during the Civil War, other periods of history also underscore the federal judiciary’s reaction to crises. While much of the scholarly work on this front discusses the response of federal courts to the actions of other government actors during times of war,²⁹ operationally, federal courts must still respond to those underlying crises. Do they shutter, mothball, and close the federal court system when war, pathogen, or havoc break out? As described below, history reveals that temporarily closing the courts during times of crisis is not without precedent.

First, and rather analogous to the current coronavirus pandemic, the Supreme Court shortened its calendar in 1793 and 1798 because of another virus—yellow fever.³⁰ This period of history is well-documented by judicial historians.³¹ For example, Alexander J. Dallas, an American statesman who served as the U.S. treasury secretary under President James Madison, pointed out the following regarding the Supreme Court’s August 1793 term: “The Malignant Fever, which during this year, raged in the City of Philadelphia, dispersed the great body of its inhabitants, and proved fatal to thousands, interrupted, likewise, the business of the Courts; and I cannot trace that any important cause was agitated in the present Term.”³² In October 1793, a Boston newspaper reported that Justice John Blair “of the supreme Court of the United States, arrived in this town,

²⁹See William C. Banks, *The Role of the Courts in Time of War*, 160 WASH. & LEE L. REV. ONLINE 170 (2014); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573 (2006); Amanda L. Tyler, *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens During World War II and Their Lessons for Today*, 107 CALIF. L. REV. (2019); Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005); David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-1873*, 51 U. CHI. L. REV. 131, 133–39 (1984).

³⁰Ryan Lucas, *Federal Courts Scramble to Adapt to Disruptions from Coronavirus Pandemic*, NPR (Mar. 16, 2020, 2:23 PM), <https://www.npr.org/2020/03/16/816501308/federal-courts-scramble-to-adapt-to-disruptions-from-coronavirus-pandemic>.

³¹MAEVA MARCUS, *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800* (1985).

³²*Id.*; see also Mark Walsh, *Outbreaks of disease have shuttered the Supreme Court going back more than 2 centuries*, AM. BAR ASSOC. J. (Mar. 19, 2020, 9:10 AM), <https://www.abajournal.com/web/article/outbreaks-have-shuttered-the-supreme-court-going-back-more-than-two-centuries>.

from the southward, after an examination at the entrance by the health-officer.”³³ Despite this hiatus, yellow fever reemerged in 1798.³⁴ Justice James Iredell wrote his wife, Hannah, that “[t]here being some appearances of the Yellow Fever in Waterstreet, between the Bridge and Walnut Street, the lawyers agreed to continue most of the Causes, and our Court broke up yesterday.”³⁵

Fast forward about a century. When the Spanish flu emerged in the early days of the 19th century, federal courts were once again faced with the threat of a vicious—and extremely lethal—virus.³⁶ Amidst the throngs of death associated with World War I, the Spanish flu infected approximately 500 million people worldwide.³⁷ Because of unsophisticated medical recordkeeping at the time, estimates of the death toll are varied. Conventionally, it is estimated that 20 million to 50 million people worldwide were killed by the Spanish flu, but other estimates are closer to 100 million victims.³⁸ While the first wave of this virus in the spring of 1918 was mild and isolated,³⁹ a more severe strain appeared late in the summer of 1918.⁴⁰

As the second wave of Spanish flu ravaged the world, deaths started to increase in the District of Columbia.⁴¹ In response, the U.S. House of Representatives and the U.S. Senate both

³³See Walsh, *supra* note 32.

³⁴*Id.*

³⁵*Id.*

³⁶Katie Bart & Kalvis Golde, *Supreme Court’s closure could be first disease-related shuttering in a century*, SCOTUSBLOG (Mar. 12, 2020, 5:27 PM), <https://www.scotusblog.com/2020/03/supreme-courts-closure-could-be-first-disease-related-shuttering-in-a-century/>.

³⁷See *Spanish Flu*, HISTORY (Mar. 27, 2020), <https://www.history.com/topics/world-war-i/1918-flu-pandemic>.

³⁸*Id.*

³⁹Katie Canales, *Photos show how San Francisco emerged from a lockdown too soon during the 1918 Spanish flu pandemic, leading to an even deadlier 2nd wave that rampaged through the city*, BUSINESS INSIDER (Apr. 21, 2020, 6:23 PM), <https://www.businessinsider.com/what-san-francisco-can-learn-spanish-flu-pandemic-coronavirus-1918>.

⁴⁰*Spanish Flu*, *supra* note 37.

⁴¹*The Closure of the House Public Galleries During the 1918 Influenza Pandemic*, UNITED STATES HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1901-1950/The-closure-of-the-House-public-galleries-during-the-1918-influenza-pandemic/> (last visited May 5, 2020) (“Washington, D.C., swollen by an influx of government workers during the First World War, was particularly hard hit. Medical facilities were stretched beyond capacity. Four hundred deaths were reported in the District of Columbia during the second week of October; 730 were reported the following week.”).

closed their chambers to public viewing and spectators.⁴² Soon thereafter, the Supreme Court followed suit, and on Oct. 8, 1918, the Court suspended and postponed all arguments.⁴³ Nearly a month later, on Nov. 2, 1918, the Court’s interrupting hiatus came to an end, and arguments before the Court resumed soon thereafter.⁴⁴ In terms of the jurisprudential impact linked with this specific period, as one expert notes, the Court’s cases that were related to—and followed—the wake of the Spanish flu did not leave a “significant mark on American constitutional law, at least not because of their connection to influenza.”⁴⁵

Third, turning to another exigent circumstance—and although a situation markedly different from a virus or contagion—during the Cold War between the United States and the Soviet Union, the federal government even made plans to covertly relocate some federal courts and judges.⁴⁶ These efforts were aimed at ensuring continuity in government—also known as continuity of operations plan (COOP)—in the event of a nuclear attack on the United States.⁴⁷ Appropriately, under Cold War-era COOPs for federal courts, those plans aimed to “preserve” security of senior level judicial officers—namely, the chief justice and associate justices of the Supreme Court—by relocating them to a secure location in the event of “nuclear fallout.”⁴⁸

Fourth, following the Al-Qaeda terrorist attacks of Sept. 11, 2001, the federal judiciary responded to the heightened threat of terrorism in the United States.⁴⁹ Prior to September 2001,

⁴²Bart & Golde, *supra* note 36.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵Mark Jensen, *The 1918 Flu Pandemic and High Court Jurisprudence*, LAW360.COM (Mar. 27, 2020, 3:16 PM), <https://www.law360.com/articles/1257426/the-1918-flu-pandemic-and-high-court-jurisprudence>.

⁴⁶See Jess Bravin, *Supreme Court to Close to Public Indefinitely*, WALL STREET J. (Mar. 12, 2020, 9:28 PM), <https://www.wsj.com/articles/supreme-court-to-close-to-public-indefinitely-11584047990>.

⁴⁷See R. Eric Petersen, *Emergency Preparedness and Continuity of Operations (COOP) Planning in the Federal Judiciary*, CONGRESSIONAL RESEARCH SERV. (Sept. 8, 2005), <https://fas.org/sgp/crs/secretcy/RL31978.pdf>.

⁴⁸*Id.*

⁴⁹*Id.*

security of federal courts came in the form of recommendations and guidance from the AOUSC.⁵⁰ However, post-September 11th, federal courts were faced with a host of possible threats and security issues. Accordingly, the AOUSC took steps to enhance the federal judiciary’s security. Notably, the AOUSC created the Office of Emergency Preparedness to help develop “crisis response and COOP plans.”⁵¹ This included testing of federal courthouses for biological and chemical hazards, such as anthrax.⁵²

Fifth, weather can also hinder court operations. On Aug. 29, 2005, disaster struck the Gulf Coast of the United States when Hurricane Katrina pummeled Louisiana, Mississippi, and Alabama.⁵³ In response to this monumental storm, federal courts in New Orleans, Mobile, and Gulfport were “rendered inoperable due to the effects of the storm.”⁵⁴ Because of this catastrophic damage, the Judicial Conference “asked Congress ... to pass emergency legislation to allow courts to shift court proceedings temporarily into adjacent judicial districts when emergency circumstances require it and again in September following Hurricane Katrina.”⁵⁵

Accordingly, House Resolution 1751 of the 109th Congress, also known as the “Secure Access to Justice and Court Protection Act,” would have “authorize[d] the appropriation of \$409 million over the 2006-2010 period to provide increased court security through the U.S. Marshals Service and to provide grants to states to increase the security of courts and protect witnesses.”⁵⁶ Moreover, at the time, “CBO estimate[d] that it would authorize additional appropriations of \$25 million a year over the 2006-2009 period for grants to states to create threat assessment

⁵⁰*Id.*

⁵¹*See* Petersen, *supra* note 47.

⁵²*Id.*

⁵³Sarah Gibbens, *Hurricane Katrina, Explained*, NAT’L GEOGRAPHIC (Jan. 16, 2019), <https://www.nationalgeographic.com/environment/natural-disasters/reference/hurricane-katrina/>.

⁵⁴*See* Petersen, *supra* note 47.

⁵⁵*Id.*

⁵⁶*See H.R. 1751 Secure Access to Justice and Court Protection Act of 2005*, CONGRESSIONAL BUDGET OFFICE (Nov. 7, 2005), <https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/costestimate/hr1751hjud0.pdf>.

databases.”⁵⁷ Despite the potential investment in court security and permitting federal courts to sit outside of their districts in exigent circumstances, interest groups such as the American Civil Liberties Union diametrically opposed H.R. 1751, stating that the bill “would create a 30-year mandatory minimum sentence for second-degree murder in federal criminal cases, add numerous other discriminatory mandatory minimum sentences as well as expand the number of crimes eligible for the federal death penalty.”⁵⁸ However, no action was taken on the bill.⁵⁹

But Katrina was not a “black swan” event; courts have buckled under Mother Nature’s impact. For example, in October 2012, many federal courts on the U.S. Eastern Seaboard shuttered in preparation for “Superstorm Sandy.”⁶⁰ This included closures of the U.S. Supreme Court, the U.S. Court of International Trade, the U.S. Courts of Appeals for the District of Columbia, and the Second and Third Circuits, as well as various district and bankruptcy courts.⁶¹

Sixth, and finally, as recent as the early part of 2019, another risk emerged that exposed the operational security and stability of the federal judiciary—a prolonged, unprecedented government shutdown.⁶² This historical shutdown was a byproduct of fierce infighting between President Donald J. Trump and Congressional Democrats.⁶³ At one point in late December, the

⁵⁷*Id.*

⁵⁸See Caroline Fredrickson & Jesselyn McCurdy, *ACLU Letter to the House of Representatives Opposing H.R. 1751, The Secure Access to Justice and Court Protection Act of 2005*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/letter/aclu-letter-house-representatives-opposing-hr-1751-secure-access-justice-and-court-protection> (last visited May 5, 2020).

⁵⁹*All Information (Except Text) for H.R.1751 – Court Security Improvement Act of 2006*, CONGRESS.GOV, <https://www.congress.gov/bill/109th-congress/house-bill/1751/all-info> (last visited May 5, 2020).

⁶⁰*Inclement Weather Closes Federal Courts*, UNITED STATES COURTS (Oct. 28, 2012), <https://www.uscourts.gov/news/2012/10/28/inclement-weather-closes-federal-courts>; see also *Emergency Preparedness*, United States Courts, <https://www.uscourts.gov/topics/emergency-preparedness> (last visited May 5, 2020) (noting the various weather-related incidences that federal courts have been faced with).

⁶¹*Id.*

⁶²See Thomas Kaplan, *Federal Courts, Running out of Money, Brace for Shutdown*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/politics/courts-money-government-shutdown.html>.

⁶³Mihir Zaveri et al., *The Government Shutdown Was the Longest Ever. Here’s the History.*, N.Y. TIMES (Jan. 25, 2019), <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html>.

AOUSC proclaimed that federal courts would simply “run out of money” by February 1, 2019.⁶⁴

Prior to the start of this shutdown, the AOUSC provided critical guidance that

[i]f the shutdown were to continue past three weeks and exhaust the federal Judiciary’s resources, the courts would then operate under the terms of the Anti-Deficiency Act, which allows work to continue during a lapse in appropriations if it is necessary to support the exercise of Article III judicial powers. Under this scenario, each court and federal defender’s office would determine the staffing resources necessary to support such work.⁶⁵

Accordingly, if federal courts do ever reach a point where the Anti-Deficiency Act is invoked, the judiciary would operate with “skeleton crews” for the purpose of handling “matters deemed essential under U.S. law, including many criminal cases,”⁶⁶ and “[i]ndividual courts and judges will then decide how to fulfill those critical functions.”⁶⁷

Furthermore, the 2019 government shutdown threatened the operations of the courts for another reason: federal judicial vacancies.⁶⁸ In December 2018, there were approximately 119 judicial vacancies,⁶⁹ a factor that would underscore and enhance logjammed, suspended civil cases as a result of a federal government shutdown—particularly with furloughed Department of Justice civil attorneys.⁷⁰ As is evident from this situation, while “exigent circumstances” typically come

⁶⁴See Caitlin Emma, *Shutdown Expected to Hit Federal Judiciary on Feb. 1 as Cash Runs Low*, POLITICO (Jan. 22, 2019, 7:28 PM), <https://www.politico.com/story/2019/01/22/federal-courts-government-shutdown-1119974> (“No further extensions beyond Feb. 1 will be possible,” the Administrative Office of the U.S. Courts said today. “Most of the measures are temporary stopgaps, and the Judiciary will face many deferred payment obligations after the partial government shutdown ends.”).

⁶⁵*Judiciary Operating During Shutdown*, UNITED STATES COURTS (Dec. 22, 2018), <https://www.uscourts.gov/news/2018/12/22/judiciary-operating-during-shutdown>.

⁶⁶*Federal Courts Run Out of Cash Next Friday. Here’s What Happens Then*, FORTUNE (Jan. 5, 2019, 9:03 AM), <https://fortune.com/2019/01/05/government-shutdown-federal-courts/> [*hereinafter Run out of Cash*].

⁶⁷*Id.* (quoting David Sellers, a spokesman for U.S. Courts).

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Id.* (“A loss of funding for civil cases would exacerbate a problem that’s already made it harder for companies to get their day in court, said Russell Wheeler, a visiting fellow at the Brookings Institution and a former deputy director at the Federal Judicial Center in Washington.”).

in the form of adverse weather events, wars, or public health crises, sometimes the emergencies that the courts face come from the political system itself.⁷¹

At bottom, despite the historical plethora of exigent circumstances that federal courts have faced over the years, the courts' important work carries on without significant hindrance.

2020 Novel Coronavirus (COVID-19) Pandemic

The start of 2020 was viewed with a sense of optimism and hope—both for a new year and decade.⁷² However, this new year was off to a turbulent start; the cloud of the nation's third presidential impeachment lingered,⁷³ basketball great Kobe Bryant was killed in a helicopter crash,⁷⁴ and the battle for the 2020 Democratic presidential nomination intensified.⁷⁵ Underlying it all, and quietly lurking in the world's shadow, a monumental catastrophe was on the horizon.

Background on COVID-19

Coronavirus disease 2019 (“COVID-19”) is a highly infectious disease caused by *severe acute respiratory syndrome coronavirus 2* (SARS-CoV-2).⁷⁶ On Feb. 11, 2020, the World Health Organization (WHO) announced the name “COVID-19” for the disease that originated in Wuhan,

⁷¹*Courts Without Judges*, N.Y. TIMES (Apr. 6, 2013), https://www.nytimes.com/2013/04/07/opinion/sunday/federal-courts-without-judges.html?_r=0 (“The Halligan filibuster got some Democratic senators talking about a bolder strategy, including revisiting filibuster reform and making it harder for senators to torpedo or delay nominations to judicial vacancies in their home states.”).

⁷²Frederick Kempe, *Here are Six Reasons to be Optimistic About 2020*, CNBC (Dec. 21, 2019, 8:55 AM), <https://www.cnbc.com/2019/12/20/here-are-six-reasons-to-be-optimistic-about-2020.html>.

⁷³Emma Bowman & Heidi Glenn, *How Trump's Impeachment Unfolded, in the Words of Those Who Administered it*, NPR (Feb. 8, 2020, 2:51 PM), <https://www.npr.org/2020/02/08/803807713/how-trumps-impeachment-unfolded-in-the-words-of-those-who-administered-it>.

⁷⁴Alan Blinder et al., *N.B.A. Star Kobe Bryant Dies in California Helicopter Crash*, N.Y. TIMES (Jan. 27, 2020), <https://www.nytimes.com/2020/01/26/sports/basketball/kobe-bryant-dead.html>.

⁷⁵*Highlights from the Campaign Trail, as Pete Buttigieg Drops Out and Rivals Sprint Toward Super Tuesday*, N.Y. TIMES (Mar. 2, 2020, 1:38 PM), <https://www.nytimes.com/live/2020/south-carolina-2020-democratic-primary-03-01>.

⁷⁶*Frequently Asked Questions*, CENTERS DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html#covid19-basics> (last visited May 5, 2020).

China.⁷⁷ While uncorroborated theories have emerged that COVID-19 was “lab engineered”⁷⁸ or related to the acceleration of 5G cellular service,⁷⁹ scientific research initially suggests that COVID-19 has “natural origins,”⁸⁰ but that exact origin is still unknown.⁸¹ In November 2019, the virus slammed China,⁸² and then European countries were impacted.⁸³

Eventually, the virus reached the United States.⁸⁴ The effects of COVID-19 have been both drastic and widespread; state governments have issued “stay-at-home” orders,⁸⁵ national social distancing guidelines from the White House and CDC have been enacted,⁸⁶ international travel

⁷⁷*Id.* (“On February 11, 2020 the World Health Organization announced an official name for the disease that is causing the 2019 novel coronavirus outbreak, first identified in Wuhan, China. The name of this disease is coronavirus disease 2019, abbreviated as COVID-19. In COVID-19, ‘CO’ stands for ‘corona,’ ‘VI’ for ‘virus,’ and ‘D’ for disease. Formerly, this disease was referred to as “2019 novel coronavirus” or “2019-nCoV.””).

⁷⁸Max Fisher, *Why Coronavirus Conspiracy Theories Flourish. And Why It Matters.*, N.Y. TIMES (Apr. 8, 2020, 8:55 AM), <https://www.nytimes.com/2020/04/08/world/europe/coronavirus-conspiracy-theories.html>.

⁷⁹Lee Brown, *John Cusack is Latest Star to Push Conspiracy Theory Linking 5G to Coronavirus*, N.Y. POST (Apr. 8, 2020, 10:17 AM), <https://nypost.com/2020/04/08/john-cusack-is-latest-star-to-push-5g-conspiracy-theory/>.

⁸⁰Kristian G. Andersen et al., *The Proximal Origin of SARS-CoV-2*, NATURE MED. (Mar. 17, 2020), <https://www.nature.com/articles/s41591-020-0820-9>;

⁸¹Lauren M. Sauer, *What is Coronavirus?*, JOHNS HOPKINS MED., <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus> (last updated Apr. 9, 2020).

⁸²*Timeline: How the New Coronavirus Spread*, ALJAZEERA (Apr. 9, 2020), <https://www.aljazeera.com/news/2020/01/timeline-china-coronavirus-spread-200126061554884.html>.

⁸³*Id.*

⁸⁴Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, NEW ENGLAND J. MED. (Mar. 5, 2020), <https://www.nejm.org/doi/full/10.1056/NEJMoa2001191>.

⁸⁵Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>. As of April 7, 2020, every state except Arkansas, Iowa, Nebraska, South Dakota, and North Dakota had either a full or partial “stay at home” or “safer at home” order. *Id.* Accordingly, “[t]his means at least 316 million people in at least 42 states, three counties, nine cities, the District of Columbia and Puerto Rico are being urged to stay home.” *Id.*

⁸⁶*Social Distancing, Quarantine, and Isolation*, CENTERS DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last visited May 5, 2020); see also Michael D. Shear, *Trump Extends Social Distancing Guidelines Through End of April*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/03/29/us/politics/trump-coronavirus-guidelines.html>.

bans to much of the world are in place,⁸⁷ and schools⁸⁸ and universities⁸⁹ have closed for the time being. The evolution of this virus is rapid, and its unconventional nature has proven difficult for public health experts and researchers seeking a cure or virus. However, positive signs of developing a vaccination—in record-breaking time⁹⁰—are sporadically being reported.⁹¹

Meanwhile, nursing homes⁹² and ICUs⁹³ are hotspots for both treatment⁹⁴ and community spread.⁹⁵ The day-to-day lives of Americans transformed in the blink of an eye, as workers were

⁸⁷Andrea Salcedo et al., *Coronavirus Travel Restrictions, Across the Globe*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/article/coronavirus-travel-restrictions.html>; see also Nicquel Terry Ellis, *Coronavirus Travel Restrictions Around the World: A Country-by-Country List*, USA TODAY (Apr. 4, 2020, 9:14 AM), <https://www.usatoday.com/story/travel/news/2020/03/17/coronavirus-travel-bans-countries-impose-travel-restrictions/5058513002/>.

⁸⁸Laura Meckler, *Seven States, D.C. Order all Schools Closed in Effort to Prevent Spread of Covid-19*, WASH. POST (Mar. 13, 2020, 3:30 PM), https://www.washingtonpost.com/local/education/ohio-maryland-order-all-schools-closed-in-effort-to-prevent-spread-of-covid-19/2020/03/12/e4078b3a-6499-11ea-845d-e35b0234b136_story.html. Cf. *School Closures Will Have Little Impact on COVID-19 Control, Review Finds*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/reuters/2020/04/06/world/asia/06reuters-health-coronavirus-schools.html> (“Data on the effects of school closures on COVID-19 are limited as the pandemic is still under way, but researchers at University College London said evidence from flu epidemics and outbreaks caused by other coronaviruses suggests their impact on the spread of the disease will be small.”).

⁸⁹See Nell Gluckman, *Campus Zero*, CHRONICLE OF HIGHER EDUC. (Apr. 7, 2020), <https://www.chronicle.com/interactives/covid-closures-part-1>; see also Jeff Jenkins, *WVU Students Test Positive for Coronavirus*, W. VA. METRONews (Apr. 8, 2020, 11:48 PM), <http://wvmetronews.com/2020/04/08/wvu-students-test-positive-for-coronavirus/>.

⁹⁰Tomi Kilgore, *BioNTech, Pfizer Stocks Rally After First Participants in U.S. Trial of COVID-19 Vaccine were Dosed*, MARKETWATCH (May 5, 2020, 6:57 AM), <https://www.marketwatch.com/story/biontech-pfizer-stocks-rally-after-first-participants-in-us-trial-of-covid-19-vaccine-were-dosed-2020-05-05>; see also Susan Athey et al., *In the Race for a Coronavirus Vaccine, We Must Go Big. Really, Really Big.*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/04/opinion/coronavirus-vaccine.html> (“Now is the time to go on the offensive. The United States has tremendous strengths: We are the world’s most innovative economy and we have powerful resources in our government, business and civil sectors. An advance market commitment to support vaccine development is a critical component of a timely plan to defeat the virus, reopen the economy and return to normal life stronger and more resilient.”).

⁹¹See Laurel Wamsley, *Antiviral Drug Remdesivir Shows Promise for Treating Coronavirus in NIH Study*, NPR (Apr. 29, 2020, 6:20 PM), <https://www.npr.org/sections/health-shots/2020/04/29/848034963/antiviral-drug-remdesivir-shows-promise-for-treating-coronavirus-in-nih-study?fbclid=IwAR0CGnKIHuKv-vpfjydOQlrO517470J3NMzA5tvcfSENhmNGIOFggX43qg>.

⁹²Howard Gleckman, *The COVID-19 Nursing Home Nightmare*, FORBES (Apr. 6, 2020, 10:09 AM), <https://www.forbes.com/sites/howardgleckman/2020/04/06/the-covid-19-nursing-home-nightmare/#a30deb060acf>.

⁹³Sheri Fink, *‘Code Blue’: A Brooklyn I.C.U. Fights for Each Life in a Coronavirus Surge*, N.Y. TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/nyregion/coronavirus-hospital-brooklyn.html>.

⁹⁴*Id.*

⁹⁵Suzu Khimm & Laura Strickler, *Nursing Homes Overwhelmed by Coronavirus: ‘It is Impossible for us to Stop the Spread.’* NBC NEWS (Apr. 2, 2020, 7:59 PM), <https://www.nbcnews.com/news/us-news/nursing-homes-overwhelmed-coronavirus-it-impossible-us-stop-spread-n1174171>.

advised to “telecommute” when possible⁹⁶ and airports turned into “ghost towns.”⁹⁷ Alarming, nearly 16 million Americans filed jobless—or unemployment—claims in a three week period,⁹⁸ and the unemployment rate stands somewhere around 15%, according to some estimates.⁹⁹

As the CDC’s represents, the number of reported cases increases daily.¹⁰⁰ Even in the midst of authoring this post under the fog of West Virginia’s “stay at home” and “safer at home” orders,¹⁰¹ the global crisis is still unfolding and everchanging. While original CDC estimates projected approximately 100,000 deaths related to COVID-19 and “millions of cases,”¹⁰² social distancing and public health guidelines aim to “flatten the curve.”¹⁰³ On April 9, 2020, a breakthrough announcement was made by Dr. Anthony Fauci of the Centers for Disease Control; 60,000 Americans are expected to die from COVID-19, a significant decrease from original estimates.¹⁰⁴ But as states start to “reopen,” scientific models are projecting a sharp rise in coronavirus deaths.¹⁰⁵ And consequently, scientists and medical professionals have been racing to

⁹⁶*Teleworking and the COVID-19 Outbreak*, NAT’L L. REV. (Mar. 12, 2020), <https://www.natlawreview.com/article/teleworking-and-covid-19-outbreak>.

⁹⁷Chris Bryant, *The World’s Airports are Fast Becoming Ghost Towns*, YAHOO FINANCE (Mar. 26, 2020), <https://finance.yahoo.com/news/worlds-airports-fast-becoming-ghost-071011666.html>.

⁹⁸Catherine Thorbecke, *6.6 Million More Americans File for Unemployment Amid COVID-19 Financial Crisis*, ABC NEWS (Apr. 9, 2020, 9:38 AM), <https://abcnews.go.com/Business/66-million-americans-file-unemployment/story?id=70061717>.

⁹⁹Stephanie Aaronson & Francisca Alba, *The Unemployment Impacts of COVID-19: Lessons from the Great Recession*, BROOKINGS (Apr. 15, 2020), <https://www.brookings.edu/blog/up-front/2020/04/15/the-unemployment-impacts-of-covid-19-lessons-from-the-great-recession/>.

¹⁰⁰*Cases in the United States*, CENTERS DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited May 5, 2020).

¹⁰¹See Mervosh, *supra* note 85.

¹⁰²Taylor Hatmaker, *Fauci: US can Expect More than 100,000 COVID-19 Deaths, Millions of Cases*, TECH CRUNCH (Mar. 29, 2020, 1:02 PM), <https://techcrunch.com/2020/03/29/fauci-how-many-coronavirus-deaths-in-us-estimate/>.

¹⁰³Joel Achenbach, *As Social Distancing Shows Signs of Working, What’s Next? Crush the Curve, Experts Say.*, WASH. POST (Apr. 8, 2020, 5:11 PM), https://www.washingtonpost.com/national/health-science/as-social-distancing-shows-signs-of-working-whats-next-crush-the-curve-experts-say/2020/04/08/3c720e06-7923-11ea-b6ff-597f170df8f8_story.html.

¹⁰⁴Kathleen Miller & Jennifer Jacobs, *Fauci Slashes U.S. Death Projection, Raising Hope for Reopening*, BLOOMBERG (Apr. 9, 2020, 10:31 AM), <https://www.bloomberg.com/news/articles/2020-04-09/fauci-says-u-s-virus-deaths-may-be-60-000-halving-projections?srnd=premium>.

¹⁰⁵*Models Project Sharp Rise in Deaths as States Reopen*, N.Y. TIMES (May 5, 2020, 6:00 AM), <https://www.nytimes.com/2020/05/04/us/coronavirus-live-updates.html> (“As President Trump presses for states to reopen their economies, his administration is privately projecting a steady rise in the number of coronavirus cases and

find a cure for the disease, including existing or new medical treatments.¹⁰⁶ President Trump is also eager to reopen the U.S. economy.¹⁰⁷ This call for reopening comes amidst a flagging U.S. economy,¹⁰⁸ record-high unemployment claims, and President Trump’s 2020 re-election against former Vice President Joe Biden, the Democrat Party’s presumptive nominee.¹⁰⁹

Preliminary Response of U.S. Federal Courts

During this widespread pandemic, the federal judiciary marches onward. In an ideal world, a doctrine of “pandemic judicial immunity” from the coronavirus would allow for federal courts to function normally. As one can imagine, such a doctrine is nonexistent—and it will *likely* never exist.¹¹⁰ Instead, federal courts are facing a crisis that requires comprehensive COOPs, proactive communication, and reasonable administrative discretion on a case-by-case basis.

Despite the well-established hierarchy and structure of the federal judiciary and emergency provisions of the Anti-Deficiency Act,¹¹¹ not much is “centralized” because courts are given wide

deaths over the next several weeks. The daily death toll will reach about 3,000 on June 1, according to an internal document obtained by The New York Times, a 70 percent increase from the current number of about 1,750.”)

¹⁰⁶Knvul Sheikh, *More Coronavirus Vaccines and Treatments Move Toward Human Trials*, N.Y. TIMES (Apr. 9, 2020, 10:44 AM), <https://www.nytimes.com/2020/04/08/health/coronavirus-vaccines.html>; see also Wamsley, *supra* note 89.

¹⁰⁷Peter Baker & Michael D. Shear, *Trump Says States Can Start Reopening While Acknowledging the Decision Is Theirs*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/us/politics/coronavirus-trump-guidelines.html>; see also Quint Forgey & Joshua Gerstein, *Trump: It’s My Decision, not Governors’, to Reopen Country*, POLITICO (Apr. 13, 2020, 2:36 PM), <https://www.politico.com/news/2020/04/13/trump-governors-decision-reopen-183405> (“The president’s reassertion of his authority runs counter to the views of legal scholars, who say the federal government lacks the power to directly order states to reopen their economies.”).

¹⁰⁸Anneken Tappe, *America’s Economy just had its Worst Quarter Since 2008*, CNN BUSINESS (Apr. 29, 2020, 11:03 AM), <https://www.cnn.com/2020/04/29/economy/us-economy-downturn-coronavirus/index.html>.

¹⁰⁹See, e.g., Alison Durkee, *Report: Trump’s Reelection Polls Aren’t Good—and He’s Melting Down Over It*, VANITY FAIR (Apr. 30, 2020), <https://www.vanityfair.com/news/2020/04/trump-reelection-polls-arent-good-and-hes-melting-down-parscale>; see also Jeremy Diamond, *Trump Erupts at Campaign Manager as Reelection Stress Overflows*, CNN (Apr. 30, 2020, 9:40 AM), <https://www.cnn.com/2020/04/29/politics/donald-trump-brad-parscale-campaign-coronavirus/index.html>.

¹¹⁰Through the course of law school studies, the Author has, however, learned to never say never.

¹¹¹See 31 U.S.C.A. § 1341(c)(2) (West 2020) (“Each employee of the United States Government or of a District of Columbia public employer furloughed as a result of a covered lapse in appropriations shall be paid for the period of the lapse in appropriations, and each excepted employee who is required to perform work during a covered lapse in appropriations shall be paid for such work, at the employee’s standard rate of pay, at the earliest date possible after the lapse in appropriations ends, regardless of scheduled pay dates, and subject to the enactment of appropriations Acts ending the lapse.”).

latitude in times of crisis; “discretion” is the guiding lodestar. As one commentator notes, “[b]eyond the Supreme Court, the federal judiciary is highly decentralized, both geographically and administratively. The courts are dependent on executive branch agencies for the provision of office and courtroom space, and physical security.”¹¹² And, in the event of a widespread national emergency, “[o]n an operational level, the Court [Supreme Court] reportedly maintains emergency preparedness contingency plans to safeguard its facilities and personnel.”¹¹³

Coronavirus is—unsurprisingly—no different. The response of the federal court system to COVID-19 was described by one legal commentator as “a patchwork of accommodations,”¹¹⁴ and the actual responses are varied from district to district or circuit to circuit.¹¹⁵ “Most appellate courts are limiting or avoiding in-person hearings ... [b]ut other than broadly canceling in-person hearings and arguments, the courts are still operating.”¹¹⁶ And, while the “new normal” is a far cry from normal, as mentioned previously, it is not entirely unprecedented.¹¹⁷ Context and perspective are key. In light of the COVID-19 pandemic, the CARES Act, and other factors, the following subsections will describe the response of select courts in responding to this global health crisis.

U.S. Supreme Court

The U.S. Supreme Court is notorious for braving the elements and pushing ahead with the Court’s important business, even during blizzards and wars.¹¹⁸ However, COVID-19 poses a unique threat to courtroom activity because the virus is transmitted through respiratory droplets

¹¹²See Petersen, *supra* note 47.

¹¹³*Id.*

¹¹⁴Christopher Cole, *One Thing Virus Won’t Change: Deadlines to File Appeal*, LAW360.COM (Apr. 8, 2020, 7:51 PM), <https://www.law360.com/articles/1257154/one-thing-virus-won-t-change-deadlines-to-file-appeal>.

¹¹⁵See Robert Loeb et al., *The Federal Courts Begin to Adapt to COVID-19*, LAWFARE (Mar. 18, 2020, 1:29 PM), <https://www.lawfareblog.com/federal-courts-begin-adapt-covid-19>.

¹¹⁶*Id.*

¹¹⁷See Lucas, *supra* note 30.

¹¹⁸See Loeb et al., *supra* note 115 (“The U.S. Supreme Court . . . has remained open and has expected counsel to meet the court’s schedule for more than 100 years, through blizzards and times of national emergency and war.”).

and contact routes.¹¹⁹ Not only can COVID-19 threaten the health and well-being of the advocates, but it also poses a threat to the justices. As noted, “[s]ix of the nine justices are 65 and older, and at higher risk of getting very sick from the illness, according to the Centers for Disease Control and Prevention. Justices Ruth Bader Ginsburg, 87, and Stephen Breyer, 81, are the oldest members of the court.”¹²⁰

The Supreme Court’s March 19, 2020 Order List¹²¹ was relatively brief, but impactful:

In light of the ongoing public health concerns relating to COVID-19, the following shall apply to cases prior to a ruling on a petition for a writ of certiorari:

IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. See Rules 13.1 and 13.3.

IT IS FURTHER ORDERED that motions for extensions of time pursuant to Rule 30.4 will ordinarily be granted by the Clerk as a matter of course if the grounds for the application are difficulties relating to COVID-19 and if the length of the extension requested is reasonable under the circumstances. Such motions should indicate whether the opposing party has an objection.

IT IS FURTHER ORDERED that, notwithstanding Rules 15.5 and 15.6, the Clerk will entertain motions to delay distribution of a petition for writ of certiorari where the grounds for the motion are that the petitioner needs additional time to file a reply due to difficulties relating to COVID-19. Such motions will ordinarily be granted by the Clerk as a matter of course if the length of the extension requested is reasonable under the circumstances and if the motion is actually received by the Clerk at least two days prior to the relevant distribution date. Such motions should indicate whether the opposing party has an objection.

¹¹⁹*Modes of Transmission of Virus Causing COVID-19: Implications for IPC Precaution Recommendations*, WORLD HEALTH ORG. (Mar. 29, 2020), <https://www.who.int/publications-detail/modes-of-transmission-of-virus-causing-covid-19-implications-for-ipc-precaution-recommendations>.

¹²⁰See Mark Sherman, *U.S. Supreme Court Postpones Arguments Through Early April Due to COVID-19*, TIME (Mar. 16, 2020), <https://time.com/5803949/supreme-court-postpones-arguments-coronavirus/>.

¹²¹For a PDF copy of the Order List regarding COVID-19, see Miscellaneous Order, 589 U.S. ____ (2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf [*hereinafter* Miscellaneous Order].

IT IS FURTHER ORDERED that these modifications to the Court’s Rules and practices do not apply to cases in which certiorari has been granted or a direct appeal or original action has been set for argument.

These modifications will remain in effect until further order of the Court.¹²²

The last case argued prior to the Order List was *June Medical Services v. Gee*,¹²³ an important abortion rights case out of the Fifth Circuit Court of Appeals. On April 3, 2020, the Supreme Court made another landmark announcement; the Court postponed all oral arguments scheduled for the April session, or April 20–22 and April 27–29.¹²⁴ Litigators set to appear in front of the Supreme Court have since sought even more relief, pointing to “the massive disruptions the ongoing COVID-19 crisis has caused for client consultations and remote work.”¹²⁵

Naturally, important cases have been impacted as a result of the Supreme Court’s March 19 Order List and the postponing of April’s oral arguments, and rescheduling nearly 20 arguments before the end of the term in July seems like a heavy lift.¹²⁶ For example, in-person oral argument was set for the case *Tanzin v. Tanvir*,¹²⁷ an appeal arising out of the Second Circuit addressing whether the Religious Freedom Restoration Act (RFRA) of 1993 permits suits seeking money damages against individual federal employees.¹²⁸ Similarly, the Ninth Circuit case *Our Lady of Guadalupe School v. Morrissey-Berru*¹²⁹ was slated for in-person oral argument in April, an

¹²²*Id.*

¹²³905 F.3d 787 (5th Cir. 2019), *cert. granted*, 140 S. Ct. 35 (2019).

¹²⁴See Supreme Court Press Release, Office of Public Information, (Apr. 3, 2020), <https://www.scotusblog.com/wp-content/uploads/2020/04/Press-Release-Postponing-April-Session.pdf>.

¹²⁵See Jimmy Hoover, *Citing COVID-19, High Court Litigators Seek Extensions*, LAW360.COM (Apr. 8, 2020, 3:01 PM), <https://www.law360.com/articles/1261652>.

¹²⁶*Id.*

¹²⁷140 S. Ct. 550 (2019) (writ of certiorari granted).

¹²⁸See Debra Cassens Weiss, *Supreme Court to Consider Whether FBI Agents can be Sued for Money Damages for Religious Freedom Violation*, AM. BAR. ASSOC. J. (Nov. 25, 2019, 11:41 AM), <https://www.abajournal.com/news/article/supreme-court-to-consider-whether-fbi-agents-can-be-sued-for-money-damages-for-religious-freedom-violation>.

¹²⁹140 S. Ct. 679 (2019) (certiorari granted).

opportunity for the Court to resolve “[w]hether the First Amendment’s religion clauses prevent civil courts from adjudicating employment-discrimination claims brought by an employee against her religious employer, when the employee carried out important religious functions.”¹³⁰

On another front, in the Court’s first March postponement, a significant case concerning President Trump’s tax returns was delayed,¹³¹ as well as two cases regarding congressional subpoenas.¹³² For April’s term, *Chiafalo v. Washington*¹³³ and *Colorado Department of State v. Baca*¹³⁴ were postponed, a consolidated appeal seeking to determine whether members of the Electoral College can be subjected to either penalization or removal from office if they do not vote for the presidential candidate that was selected by their state’s voters. In a 5-4 decision,¹³⁵ the Supreme Court said that Wisconsin could not collect absentee ballots postmarked after Tuesday, April 7, 2020—allowing Wisconsin’s primary to proceed in the midst of the COVID-19 pandemic after Governor Tony Evers (D-WI) announced a delay for the vote.¹³⁶

Additionally, in response to the Court’s decision to postpone oral argument yet continue the Court’s private conferences (with some justices convening in person and others joining via teleconference), transparency advocates argue that now is the right time for the Court to switch to

¹³⁰See *Our Lady of Guadalupe School v. Morrissey-Berru*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/our-lady-of-guadalupe-school-v-morrissey-berru/> (last visited May 5, 2020).

¹³¹Bob Egelko, *Supreme Court Postpones Hearings for this Term, Including Trump Tax Case*, S.F. CHRONICLE (Apr. 7, 2020, 4:57 PM), <https://www.sfchronicle.com/nation/article/Supreme-Court-postpones-hearings-for-this-term-15185165.php>.

¹³²Josh Gerstein, *Supreme Court Postpones More Arguments Amid Coronavirus Outbreak*, POLITICO (Apr. 3, 2020, 6:37 PM), <https://www.politico.com/news/2020/04/03/supreme-court-postpones-more-arguments-due-to-virus-164000>.

¹³³193 Wash. 2d 380 (2019), *cert granted*, 140 S. Ct. 918 (2020).

¹³⁴935 F.3d 887 (10th Cir. 2019), *cert granted*, 140 S. Ct. 918 (2020).

¹³⁵*Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 589 U.S. ___ (2020).

¹³⁶See Nick Corasaniti et al., *Wisconsin Is Set to Vote on Tuesday After Court Overrules Governor’s Postponement*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/wisconsin-primary-election-postponed-coronavirus.html>.

virtual teleconferencing or videoconferencing to proceed with arguments.¹³⁷ Of course, this squarely contradicted the longstanding position—of what appears to be a majority of the Court—that publicly facing technology platforms (e.g., C-SPAN) and Court business ought not mix.¹³⁸ But, like the unpredictable time society now finds itself in, on April 13, 2020, the traditional paradigm regarding the Court and technology was summarily turned on its head.¹³⁹ The Court announced for the first time in its history that oral arguments will take place telephonically on May 4, 5, 6, 11, 12, and 13 “in a limited number of previously postponed cases.”¹⁴⁰

And, for the most diligent of observers, Monday, May 4, 2020, was a historical day in the life of the U.S. Supreme Court; justices heard oral arguments telephonically in *Booking.com B.V.*¹⁴¹ And Justice Clarence Thomas—known for being methodically silent during in-person oral argument¹⁴²—peppered the litigants with two questions related to the case.¹⁴³

In light of this drastic shift, what guidance was provided to lower federal courts in terms of court operations and the use of technology? Relatively speaking, not much.¹⁴⁴ For a system

¹³⁷See Gerstein, *supra* note 132 (“‘This is getting ridiculous. If the Supreme Court can conduct its weekly conferences remotely, which it has been doing for weeks, it can conduct its remaining arguments remotely and allow the public to listen in,’ said Gabe Roth, executive director of the website Fix the Court.”).

¹³⁸Jeff John Roberts, *The Supreme Court has Shunned Technology: Could Coronavirus Change That?*, FORTUNE (Mar. 22, 2020, 10:00 AM), <https://fortune.com/2020/03/22/coronavirus-supreme-court-cameras-streaming-video-technology/>.

¹³⁹Josh Gerstein, *Virus Threat Prompts Supreme Court to Set Phone Arguments*, POLITICO (Apr. 13, 2020, 10:58 AM), <https://www.politico.com/news/2020/04/13/coronavirus-supreme-court-183223>; Todd Ruger (@ToddRuger), TWITTER (Apr. 13, 2020, 10:02 AM) <https://twitter.com/toddruger/status/1249699547246362625?s=12>.

¹⁴⁰See *April 13, 2020 Press Release*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20 (last visited May 5, 2020).

¹⁴¹Lawrence Hurley & Andrew Chung, *U.S. Supreme Court Hears First Case by Teleconference; Thomas Asks Questions*, REUTERS (May 4, 2020, 9:04 AM), <https://www.reuters.com/article/us-usa-court-booking-hldg/u-s-supreme-court-kicks-off-first-hearing-by-teleconference-idUSKBN22G1L6>.

¹⁴²*Id.* (“Emphasizing the unique nature of the proceedings, Thomas, a conservative justice who almost never asks questions during arguments, embraced the new format . . .”).

¹⁴³*Id.*

¹⁴⁴In comparison, the State of West Virginia’s Supreme Court of Appeals declared an ongoing “judicial emergency” that is applicable to all 55 counties. See Brad McElhinny, *Judicial Emergency Declared in West Virginia, Delaying all but Essential Hearings*, W. VA. METRONews (Mar. 22, 2020, 10:32 PM), <http://wvmetronews.com/2020/03/22/judicial-emergency-declared-in-west-virginia-delaying-all-but-emergency-hearings/>.

rooted in hierarchy and precedent, the federal courts’ response has involved wide discretion.

U.S. Court of Appeals for the Fourth Circuit

In response to the COVID-19 pandemic, the Fourth Circuit first issued a notice regarding court operations on March 17, 2020.¹⁴⁵ In its advisory notice, the Fourth Circuit placed restrictions on courthouse visitors and suspended the “requirement of paper copies of formal briefs and appendices” being submitted to the court “until further notice.”¹⁴⁶ Finally, oral arguments slated for late March and early April were postponed, but the court noted that these hearings may either be “heard at a later session, heard by teleconference or video-conference, or submitted on the briefs, at the direction of the assigned panels.”¹⁴⁷ Subsequently, on March 23, 2020, Chief Judge Roger L. Gregory signed an Order temporarily suspending the oral argument requirement for published opinions.¹⁴⁸ On April 7, 2020, the Court amended its March 23, 2020, Order and added, “Accordingly, cases ... tentatively calendared for oral argument in May 2020, but not presented at oral argument may be decided by published opinion with the unanimous consent of the panel.”¹⁴⁹

Lower courts within the Fourth Circuit quickly followed suit. In a more localized context—and absent direct guidance for lower courts from either the Supreme Court or corresponding appellate courts—an interesting case study is the subtle differences in COVID-19 responses between the U.S. District Court for the Northern District and Southern District of West Virginia.

¹⁴⁵See *Public Advisory Regarding Operating Procedures in Response to COVID-19*, United States Court of Appeals for the Fourth Circuit (Mar. 17, 2020), <http://www.ca4.uscourts.gov/docs/pdfs/publicadvisorycovidoperatingprocedures.pdf?sfvrsn=4> [*hereinafter* Public Advisory].

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸See Standing Order 20-01 (4th Cir. 2020), <http://www.ca4.uscourts.gov/docs/pdfs/noticestandingorder20-01.pdf?sfvrsn=8> (“To enable the court to continue to issue opinions in accordance with its publication standards and in response to the need for social distancing to contain the novel coronavirus, the court temporarily suspends its oral argument requirement for published opinions.”).

¹⁴⁹See Amended Standing Order 20-01 (4th Cir. 2020), <https://www.ca4.uscourts.gov/docs/pdfs/amendedstandingorder20-01.pdf?sfvrsn=0>.

The approaches of these two district courts demonstrate how courts can act with discretion to accommodate for their own unique circumstances in light of this pandemic.

U.S. District Court for the Northern District of West Virginia

In the Northern District of West Virginia, first, on March 10, 2020, Chief U.S. District Judge Gina M. Groh entered Standing Order 3:20-MC-21, which restricted certain visitors to the federal courthouses in Martinsburg, Elkins, Clarksburg, and Wheeling.¹⁵⁰ On March 13, 2020, Chief Judge Groh issued the following Order with respect to detainees: “The Court hereby directs that, until further notice, the West Virginia Division of Corrections and Rehabilitation’s regional jails, correctional centers, and correctional facilities screen all detainees who are scheduled to appear in the Northern District of West Virginia to determine their body temperature.”¹⁵¹ On March 20, 2020, a “Public Advisory” was issued,¹⁵² modeled similarly after the Fourth Circuit’s March 17 public advisory on the same subject.¹⁵³ Finally, on March 30, 2020, Chief Judge Groh entered another Order, this time dealing with the CARES Act.¹⁵⁴ As discussed in detail below, the CARES Act made changes to court practices regarding civil and criminal hearings. However, the March 30 Order from Chief Judge Groh did not *per se* postpone, delay, or cancel any hearings; instead, each district judge was given discretion on docket management, scheduling court proceedings, and Chamber operations.

U.S. District Court for the Southern District of West Virginia

¹⁵⁰See Standing Order 3:20-MC-00021-GMG (N.D. W. Va. Mar. 10, 2020), <https://www.wvnd.uscourts.gov/sites/wvnd/files/3%2020%20mc%2021%20Order%20re%20Restrictions%20on%20Visitors%20to%20Courthouses.pdf>.

¹⁵¹See Standing Order 3:20-MC-00024-GMG (N.D. W. Va. Mar. 13, 2020), <https://www.wvnd.uscourts.gov/sites/wvnd/files/order.detainee.screening.procedures.pdf>.

¹⁵²See *Public Advisory Regarding Operating Procedures in Response to COVID-1*, United States District Court for the Northern District of West Virginia (Mar. 20, 2020), <https://www.wvnd.uscourts.gov/sites/wvnd/files/Public%20Advisory%20March%202020.pdf>.

¹⁵³See *Public Advisory*, *supra* note 145.

¹⁵⁴In re Criminal Case Operations Due to COVID-19 Response, 3:20-MC-00028-GMG (N.D. W. Va. Mar. 30, 2020), <https://www.wvnd.uscourts.gov/sites/wvnd/files/3%2020%20mc%2028.pdf>.

The Southern District of West Virginia’s response was slightly different. On March 13, 2020, Chief U.S. District Judge Thomas E. Johnston issued a General Order regarding court operations and coronavirus. Chief Judge Johnston ordered a variety of responsive measures, including a general continuance of all civil and criminal jury trials in the Southern District, a continuance of all grand jury proceedings, and an exclusion of said continued periods from counting under the Speedy Trial Act because “the best interests of the public and any defendant’s right to a speedy trial”¹⁵⁵ At the time, Chief Judge Johnston ordered that the courthouses would stay open.¹⁵⁶ On March 18, 2020, General Order #2 was entered that imposed certain restrictions upon entry to federal courthouses in the district. However, on March 23, 2020, the winds of the coronavirus pandemic had already changed. Chief Judge Johnston wrote,

[a]t the time the court issued its first General Order relating to exigent circumstances in light of the COVID-19 pandemic, there were no confirmed cases in West Virginia. That is no longer the case, and in fact there has been a confirmed diagnosis of an individual who has significant access to a judicial building of the state court system, triggering that building to be closed on March 21, 2020.¹⁵⁷

And on March 30, 2020, in accordance with President Trump’s national emergency declaration, Governor Justice’s state of emergency declaration for West Virginia, and the Judicial Conference’s finding of “emergency conditions” arising out of the coronavirus pandemic, Chief Judge Johnston implemented a 90-day Order permitting videoconferencing in criminal cases.¹⁵⁸

¹⁵⁵In re Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, 2:20-MC-00052, (S.D. W. Va. Mar. 13, 2020), <https://www.wvsd.uscourts.gov/pdfs/ads/General-Order-Continuing-Jury-Matters-March-13-2020.pdf>; *see also* 18 U.S.C. § 3161(h)(7)(A) (West 2020).

¹⁵⁶*Id.*

¹⁵⁷In re Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, 2:20-MC-00052, (S.D. W. Va. Mar. 23, 2020), <https://www.wvsd.uscourts.gov/pdfs/generalorders/covid19/Gen%20Order%203%20with%20header.pdf>.

¹⁵⁸In re Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic, 2:20-MC-00052, (S.D. W. Va. Mar. 30, 2020), <https://www.wvsd.uscourts.gov/pdfs/generalorders/covid19/General%20Order%204%20with%20header.pdf>.

Judicial Proceedings

As mentioned previously, the question of whether federal courts can conduct certain hearings via video or audio teleconferencing has made its way back into the forefront in light of the Coronavirus pandemic. Generally, federal judges use teleconference lines for various hearings in civil cases. For example, civil pre-trial conferences or scheduling conferences—for the purpose of ease and efficiency—are regularly conducted via teleconference. But prior to March 30, 2020, video teleconferencing was only permitted in criminal cases as authorized by the Federal Rules of Criminal Procedure. The following subsections will explain (1) the pre-coronavirus state of play with respect to the use of courtroom technology for judicial proceedings and (2) post-CARES Act authorization for federal courts to utilize technology to conduct court business in certain criminal proceedings.

Pre-Coronavirus Judicial Proceedings

The Seventh Circuit’s holding in *Thompson* is informative on the pre-coronavirus status of using video- or teleconferencing for criminal proceedings. In *United States v. Thompson*,¹⁵⁹ the Seventh Circuit was faced with the question of whether holding a supervised-release revocation hearing by videoconference violated Federal Rule of Criminal Procedure 32.1(b)(2), which states in relevant part:

(2) *Revocation Hearing.* Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

- (A) written notice of the alleged violation;
- (B) disclosure of the evidence against the person;
- (C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

¹⁵⁹599 F.3d 559 (7th Cir. 2010).

(D) notice of the person’s right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.¹⁶⁰

Accordingly, the *Thompson*¹⁶¹ court found that Rule 32.1(b)(2) provides that “before revoking a defendant’s supervised release, the court must give the defendant ‘an opportunity to appear’ for purposes of presenting evidence, questioning witnesses, arguing in mitigation, and making a statement to the court.”¹⁶² Undertaking a historical analysis of the meaning of the word “appear,” the Seventh Circuit’s understanding of traditional definitions “suggested that the ‘appearance’ required by this rule occurs only if the defendant comes into the physical—not virtual—presence of the [district] judge.”¹⁶³ The “defendant’s appearance in court is the means by which he effectuates the other rights conferred by the rule[,]” and “without [the] personal interaction between the judge and the defendant—which the videoconferencing cannot fully replicate—the force of the other rights guaranteed by Rule 32.1(b)(2) is diminished.”¹⁶⁴ At bottom, while other portions of the Federal Criminal Rules expressly permit videoconferencing in certain circumstances, the Seventh Circuit expressly held that this “is the exception to the rule, not the default rule itself” because other rules of procedure¹⁶⁵ permit such technology “only pursuant to a specifically enumerated exception *and* with the defendant’s consent”¹⁶⁶

¹⁶⁰FED. R. CRIM. P. 32.1(b)(2).

¹⁶¹This particular topic—along with a discussion of similar situations involving parole—is discussed at length in a recent law review article. Kacey Marr, *The Right to “Skype”: The Due Process Concerns of Videoconferencing at Parole Revocation Hearings*, 81 U. CINC. L. REV. 1515 (2013).

¹⁶²*Thompson*, 559 F.3d at 599.

¹⁶³*Id.*

¹⁶⁴*Id.* at 599–600.

¹⁶⁵*See, e.g.*, FED. R. CRIM. P. 5(f) (expressly permitting video teleconferencing for initial appearances if the defendant consents to video teleconferencing in lieu of an in-person hearing).

¹⁶⁶*Id.* at 600–01 (emphasis added).

Other federal and state courts have taken a different approach in determining that videoconferencing for a probation revocation hearing violates the Sixth Amendment right to counsel. For example, in *Schiffer v. State*, a Florida court held that a defendant’s participation by video or audio arrangement during a probation revocation proceeding violated his right to counsel because the defendant had no means by which he could confer privately with counsel.¹⁶⁷ On an analogous front, with respect to sentencing hearings, circuit courts have routinely and repeatedly held that an electronic “presence” by videoconferencing at sentencings does not satisfy the procedural requirements set forth in Federal Rule of Criminal Procedure 43(a).¹⁶⁸

Moreover, this precise issue was addressed in a preliminary draft for a June 2009 Report to Standing Committee for the Criminal Rules Advisory Committee.¹⁶⁹ There, the Judicial Conference recommended that Rule 32.1 be amended to include the phrase that “upon defendant’s request, allowing the defendant to participate in proceedings concerning the revocation or modification of probation or supervised release by video teleconference.” The comments to this proposed amendment are insightful; “[t]his Amendment will be most useful when a defendant is alleged to have violated conditions of probation or supervised release while located in a district that lacks jurisdiction over the original sentence.” As of March 30, 2020, Rule 32 was not amended to reflect the proposed changes of the Advisory Committee.¹⁷⁰

Post-CARES Act Judicial Proceedings

¹⁶⁷*Schiffer v. State*, 617 So. 2d 357 (Fla. Dist. Ct. App. 4th Dist. 1993).

¹⁶⁸*See United States v. Torres–Palma*, 290 F.3d 1244, 1248 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001); *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999); *United States v. Williams*, 641 F.3d 758 (6th Cir. 2011).

¹⁶⁹*See* Report to Standing Committee, Criminal Rules Advisory Committee, <https://books.google.com/books?id=rMdPAQAIAAJ&pg=PA51&lpg=PA51&dq=revocation+supervised+release+video+teleconference&source=bl&ots=wJIexiOa37&sig=ACfU3U0zL-T3SxspqPYHaFQrmoUkGN9XNA&hl=en&sa=X&ved=2ahUKewj-m4jtrPoAhVSsZ4KHfSpCoMQ6AEwAHoECAkQAQ#v=onepage&q=revocation%20supervised%20release%20video%20teleconference&f=false> (last visited May 5, 2020).

¹⁷⁰*See* FED. R. CRIM. P. 32 *et. seq.*

In a sharp turn toward permitting criminal proceedings to take place electronically, on Tuesday, March 31, 2020, the Judicial Conference temporarily approved¹⁷¹ the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 pandemic.¹⁷² Under the CARES Act,¹⁷³ “this [new] finding allows chief district judges, under certain circumstances and with the consent of the defendant, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings during the COVID-19 national emergency.” Accordingly, based on the authorization found in the CARES Act, the chief judge of a federal district court may authorize the following hearings to be held via video teleconference upon motion of the attorney general (or his designee) or of the judge or justice:

- Detention hearings under 18 U.S.C. § 3142;
- Initial appearances under Rule 5 of the Federal Rules of Criminal Procedure;
- Preliminary hearings under Rule 5.1 of the Federal Rules of Criminal Procedure;
- Waivers of indictment under Rule 7(b) of the Federal Rules of Criminal Procedure;
- Arraignments under Rule 10 of the Federal Rules of Criminal Procedure;
- Probation and supervised release revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure;
- Pretrial release revocation proceedings under 18 U.S.C. § 3148;
- Appearances under Rule 40 of the Federal Rules of Criminal Procedure;
- Misdemeanor pleas and sentencings as described in Rule 43(b)(2) of the Federal Rules of Criminal Procedure; and
- Proceedings under 18 U.S.C. § 403 “Federal Juvenile Delinquency Act” hearings, except for contested transfer hearings and juvenile delinquency adjudication or trial proceedings.¹⁷⁴

¹⁷¹The authorization will cease after the emergency declaration is rescinded.

¹⁷²Ann E. Marimow, *Federal Courts Shuttered by Coronavirus can Hold Hearings by Video and Teleconference in Criminal Cases*, WASH. POST (Mar. 31, 2020, 5:59PM), https://www.washingtonpost.com/local/legal-issues/federal-courts-shuttered-by-coronavirus-can-hold-hearings-by-video-and-teleconference-in-criminal-cases/2020/03/31/9c831814-7372-11ea-87da-77a8136c1a6d_story.html.

¹⁷³Coronavirus Aid, Relief, and Economic Security Act of 2020, S. Bill 3548, 116th Cong. (2020).

¹⁷⁴*Id.*; see also Anthony Marcum, *How the CARES Act Impacts the Federal Judiciary*, R STREET (Apr. 2, 2020), <https://www.rstreet.org/2020/04/02/how-the-cares-act-impacts-the-federal-judiciary/> (“District and circuit courts have been largely proactive in responding to the COVID-19 pandemic. With courthouse doors now mostly closed around the nation, these lower courts have committed to using technology to continue their core operations and maintain public access.”).

Furthermore, similar to the process outlined above, felony pleas under Rule 11 of the Federal Rules of Criminal Procedure and felony sentencings under Rule 32 of the Federal Rules of Criminal Procedure may be conducted via video teleconference if the district judge finds “for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice, the plea or sentencing in that case may be conducted by video teleconference.”¹⁷⁵ But this authorization is not limitless or the proverbial “new normal.” According to the Judicial Conference’s interim guidance, this authorization will end 30 days after the date on which the president formally ends the national emergency.¹⁷⁶

The Federal Judiciary’s Reopening

In late April 2020, state governments began easing restrictions on measures enacted to prevent the spread of Coronavirus, even though death tolls were starting to peak around the same time that states were reopening their economies.¹⁷⁷ On April 24, 2020, AOUSC Director James C. Duff sent all federal judges an extensive memorandum outlining the process for federal courts to gradually “reopen.”¹⁷⁸ Director Duff’s memorandum acknowledges a stark reality; while some federal courts are in a stable position to reopen in light of their surrounding communities, other federal courts are “not close to this process yet as the pandemic continues to have severe impact in their communities.”¹⁷⁹ Director Duff’s memorandum addresses a broad swath of issues,

¹⁷⁵*Id.*

¹⁷⁶*Id.*

¹⁷⁷See Sophia Ankel, *The US Records its Highest Daily Death Toll as Almost 20 States Ease Lockdown Restrictions*, *WHO Reports*, BUSINESS INSIDER (May 3, 2020), <https://www.businessinsider.com/us-records-highest-daily-death-toll-states-start-reopening-economy-2020-5>.

¹⁷⁸See Memorandum from Dir. James C. Duff to Fed. Judges, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (Apr. 24, 2020), https://drive.google.com/file/d/1grRbykWGerscEaYu3D2xKFARWoV_rWlX/view [*hereinafter* Duff Memorandum].

¹⁷⁹*Id.*; see also Jacqueline Thomson, *Judiciary Prepares for Gradual Reopening During COVID-19, but Tells Courts to Heed Local Officials*, LAW.COM (Apr. 27, 2020, 7:32 PM), <https://www.law.com/nationallawjournal/2020/04/27/judiciary-prepares-for-gradual-reopening-during-covid-19-but-tells-courts-to-heed-local-officials/?slreturn=20200403111257#>.

including jury trials, court proceedings, facility actions, COVID-19 testing, human resource considerations, and additional funding for beleaguered federal courts.¹⁸⁰ However, the director also makes an unembellished observation; “[i]f conditions significantly worsen or there is a resurgence of local COVID-19 cases, consider ... reimplementing full social distancing measures as necessary.”¹⁸¹ At the time of publication, most federal courts are in “Phase I.”¹⁸² As courts begin moving toward Phases II and III of the AOUSC’s new guidance, the outcome of whether or not this reopening plan is entirely successful is still unknown.¹⁸³ Time shall tell.

Discussion

The novel coronavirus continues to disrupt virtually every aspect of day-to-day life around the world and in the United States—including the life of our federal court system here in the United States. While the coronavirus pandemic carries on, historical and contemporary inflection points teach important lessons about how the federal courts respond in times of crisis. As Article III dictates, it is the courts that must arbitrate legal disputes, but courts can only fulfill this obligation by remaining open. So far, the coronavirus has not brought an end to this practice.

First, this situation is not unprecedented. As noted above, both yellow fever and the Spanish flu caused the work of the courts to be disrupted. In one instance, with yellow fever, reemerging strains of the virus led the Supreme Court to suspend its work on two separate occasions—once in 1793 and again in 1798. More analogous to the modern threat of the coronavirus, the Spanish flu also disrupted many aspects of American life. Closer to home, it was recently noted that the responses of the city of Morgantown, W. Va., and West Virginia University to the Spanish flu and

¹⁸⁰See Duff Memorandum, *supra* note 178.

¹⁸¹*Id.* at 6.

¹⁸²Paul LeBlanc & Ariane de Vogue, *Federal Courts Begin to Consider Guidelines for Reopening Amid Pandemic*, CNN (Apr. 27, 2020, 10:30 PM), <https://www.cnn.com/2020/04/27/politics/federal-courts-reopening-coronavirus/index.html>.

¹⁸³*Id.*

coronavirus are “strikingly similar.”¹⁸⁴ As explained, so is the case with federal courts. And while the Supreme Court and lower federal courts have been making history by either using previously unused technology¹⁸⁵ or altering the rules to permit videoconferencing capabilities in criminal cases,¹⁸⁶ the idea of a disrupting event upsetting the norm is not a singular anomaly with respect to the coronavirus pandemic. Instead, what is markedly different from pandemics in 1798 or 1918 is the rapid rise and increase in the use of modern-day technologies, global transportation, and mass communication.

Accompanying this thought, the second lesson we can learn is that in an ever-changing world that is ever-connected by the rise of modern technology and social media, clear and effective communication from the federal court system is essential for managing the influx and deluge of information that is submitted to both the public and parties. One way that the AOUSC has aided in this effort is by maintaining a presence on social media sites such as Twitter, thereby keeping litigants apprised of changes in various district practices in response to COVID-19.¹⁸⁷ Furthermore, when visiting the AOUSC’s website, one is immediately met with a home page that provides a direct link to information relating to judicial preparedness and the coronavirus.¹⁸⁸ This webpage also provides circuit- and district-level information related to court operations, filings, deadlines, and other administrative matters in light of the coronavirus pandemic.¹⁸⁹ Because the

¹⁸⁴Michael Carvelli, *2020 Pandemic in Morgantown Closely Resembles 1918 Pandemic in Morgantown*, W. VA. UNIV. MAG., <https://magazine.wvu.edu/stories/2020/04/15/2020-pandemic-in-morgantown-closely-resembles-1918-pandemic-in-morgantown> (last visited May 5, 2020).

¹⁸⁵For example, the Supreme Court is planning to use telephonic conferences for upcoming oral arguments. *See* Gerstein, *supra* note 139.

¹⁸⁶Marimow, *supra* note 172.

¹⁸⁷United States Courts (@uscourts), TWITTER, <https://twitter.com/uscourts> (last visited May 5, 2020).

¹⁸⁸*See generally* Judiciary Preparedness for Coronavirus (COVID-19), UNITED STATES COURTS, <https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19> (last visited May 5, 2020).

¹⁸⁹*Id.*

courts have unique, distinctive responses to the coronavirus, agglomerating this information in a “user-friendly” format eases the burden placed upon parties appearing in various federal courts.

The third lesson is that COOPs play an important role in guiding federal courts through exigent circumstances by focusing on emergency preparedness, safeguarding the courts, and ensuring that people have access to justice even during times of crisis. As previously noted, efforts—both successful and unsuccessful—have been made to bolster and support the courts during times of emergency. As the AOUSC explains, there have been a variety of efforts made by the judiciary to improve emergency preparedness and disaster response.¹⁹⁰ In testing “business continuity and emergency preparedness plans,” the judiciary has invested resources into security improvement measures¹⁹¹ and acted upon COOPs in response to Hurricane Sandy,¹⁹² and holds periodical judicial preparedness workshops on this topic. Furthermore, various resources exist for courts to use as guides, such as the National Center for State Courts’ emergency and security planning COOPs.¹⁹³ Legal scholarship also covers this topic extensively,¹⁹⁴ but at bottom, the

¹⁹⁰*Overseeing Facilities, Safeguarding the Courts, and Preparing for Emergencies*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/overseeing-facilities-safeguarding-courts-and-preparing-emergencies> (last visited May 5, 2020).

¹⁹¹*Id.* (“*Capital Security Improvement Funded*: The FY 2012 appropriations bill included \$20 million in funding to the General Services Administration (GSA) for a new Judiciary Capital Security Program (CSP), which will help the Judiciary and GSA improve security conditions of existing federal court facilities in locations that are unlikely to be considered for new courthouse construction in the near future. Four CSP projects were endorsed for FY 2012 and are underway: Brunswick, Georgia; Benton, Illinois; Lexington, Kentucky; and San Juan, Puerto Rico.”).

¹⁹²*Id.* (“In the storm’s aftermath, U.S. courthouses in New Jersey, the Court of International Trade in New York City, and the Manhattan locations of the Southern District of New York and the Bankruptcy Court for the Southern District closed for a period of time. Lack of power and transportation to court facilities hampered recovery, along with physical damage to some facilities. As the Southern District of New York activated its COOP, some staff worked from the district’s White Plains facility. Those who could, teleworked. Courthouses with power offered temporary workspace for displaced court employees and other federal agencies. Courts, such as the Court of International Trade, continued to receive electronic case filings and to handle all emergency matters.”).

¹⁹³*See Emergency Planning and Security*, NAT’L CTR. STATE COURTS, <https://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Emergency-planning-and-security.aspx> (last visited May 5, 2020).

¹⁹⁴*See, e.g., A Framework for Improving Cross-Sector Coordination for Emergency Preparedness and Response*, MCKING CONSULTING CORP. (July 2008),

<https://www.americanbar.org/content/dam/aba/images/disaster/framework.pdf> (prepared for the Centers for Disease Control and Prevention (CDC), the U.S. Department of Justice (DOJ), and the Public Health/Law Enforcement Emergency Preparedness Workgroup); George B. Huff Jr., *Planning for Disasters Emergency Preparedness, Continuity Planning, and the Federal Judiciary*, 45 AM. BAR ASSOC. J. 1 (2006); *Disaster Recovery Planning for*

coronavirus has taught the courts once again that despite preparation, unforeseen and unmitigable challenges can arise spontaneously and without notice.

Fourth, providing individual federal districts and circuits with flexibility and discretion seems to be a positive force, but this discretion should come with boundaries, especially with regard to the physical plant operations of the courts. For example, even the responses between the Northern and Southern Districts of West Virginia show that each Chief Judge approached the Coronavirus pandemic to meet the distinct needs of their courts and judges. In the “interests of justice,” the courts may take discretionary measures to help parties by suspending PACER fees, deadlines, relocate courts, or by placing court employees on administrative leave.¹⁹⁵

Fifth, it is evident that even in light of a pandemic, natural disaster, or war, there is a fierce need—and *desire*—to protect civil rights and liberties, even as the debate endures about “how far is too far” in terms of government responses to the coronavirus.¹⁹⁶ Snubbing “stay at home orders,”

Courts: A Guide to Business Continuity Planning, NAT’L ASSOC. COURT MGM’T, https://www.americanbar.org/content/dam/aba/images/disaster/disaster_nacm.pdf (last visited May 5, 2020).

¹⁹⁵*Resources for Courts*, AM. BAR ASSOC.,

https://www.americanbar.org/groups/committees/disaster/resources/resources_for_courts/ (last visited May 5, 2020).

Topically, and relevant to the Coronavirus pandemic, the United States Department of Justice’s Bureau of Justice Assistance commissioned a paper titled “Justice System Response to a Pandemic: Addressing Human Resources Issues.” See *Justice System Response to a Pandemic: Addressing Human Resources Issues*, U.S. DEP’T OF JUSTICE, https://www.americanbar.org/content/dam/aba/images/disaster/Justice_system_response_Pandemic_HR_Issues.pdf (last visited May 5, 2020). This report outlines steps and recommendations regarding the planning process to ensure that the justice system’s workforce is maintained in the case of a pandemic or public health emergency. *Id.* at 4.

¹⁹⁶Christina Farr, *The Covid-19 Response Must Balance Civil Liberties and Public Health—Experts Explain How*, CNBC (Apr. 18, 2020, 10:15 AM), <https://www.cnbc.com/2020/04/18/covid-19-response-vs-civil-liberties-striking-the-right-balance.html>; Eli Lake, *When Tracking the Virus Means Tracking Your Citizens*, BLOOMBERG (Mar. 30, 2020, 6:00 PM), <https://www.bloomberg.com/opinion/articles/2020-03-30/covid-19-tracking-threatens-civil-liberties-after-coronavirus>; Brett Milano, *Restricting Civil Liberties Amid the COVID-19 Pandemic*, HARV. L. TODAY (Mar. 21, 2020), <https://today.law.harvard.edu/restricting-civil-liberties-amid-the-covid-19-pandemic/> (“While Harvard Law School faculty members Charles Fried and Nancy Gertner agree that the coronavirus situation is distressing on numerous levels, both say the restriction on individual freedom is largely appropriate for the circumstance.”). As Professor Fried argues, “Most people are worrying about restrictions on meetings—that’s freedom of association. And about being made to stay in one place, which I suppose is a restriction on liberty. But none of these liberties is absolute; they can all be abrogated for compelling grounds. And in this case the compelling ground is the public health emergency.” *Id.*

some protestors have actively resisted the state governments' responses to the virus,¹⁹⁷ and President Trump tweeted his support for these movements.¹⁹⁸ All the while, as the pandemic persists, federal courts remain open to hear and arbitrate the legal disputes surrounding COVID-19, including cases about alleged infringements on civil liberties under the U.S. Constitution.¹⁹⁹

Finally, meaningful assessment and analysis about the federal court system's response to this public health crisis is difficult to conduct at this time because the situation is ongoing and the target evermoving. As noted, current uncertainties of the coronavirus make risk analysis "nearly impossible."²⁰⁰ Somewhere down the road, legal experts can analyze and determine whether federal courts acted in the most efficient, prudent, and effective manner in implementing COOPs.

¹⁹⁷Sara Burnett & Brian Dlodysko, *Pro-Trump Protesters Push Back on Social Distancing, Coronavirus Stay-at-Home Orders*, TIME (Apr. 17, 2020), <https://time.com/5823670/coronavirus-lockdown-protests-photo/>.

¹⁹⁸Michael 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>.

¹⁹⁹Emily McNamara, *WVU Professors Speak About Religious Freedoms Being Impacted by COVID-19*, WBOY (May 4, 2020, 10:11 PM), <https://www.wboy.com/news/wvu-professors-speak-about-religious-freedoms-being-impacted-by-covid-19/> ("Anne Lofaso and John E. Taylor are constitutional experts and both have released statements expressing the importance of continuing to honor human rights, according to the first amendment of the constitution, while practicing social distancing rules so the community and country can remain safe."). Cf. *Attorney General William P. Barr Issues Statement on Religious Practice and Social Distancing; Department of Justice Files Statement of Interest in Mississippi Church Case*, U.S. DEP'T OF JUSTICE (Apr. 14, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-issues-statement-religious-practice-and-social-distancing-0> ("But even in times of emergency, when reasonable and temporary restrictions are placed on rights, the First Amendment and federal statutory law prohibit discrimination against religious institutions and religious believers. Thus, government may not impose special restrictions on religious activity that do not also apply to similar nonreligious activity. For example, if a government allows movie theaters, restaurants, concert halls, and other comparable places of assembly to remain open and unrestricted, it may not order houses of worship to close, limit their congregation size, or otherwise impede religious gatherings. Religious institutions must not be singled out for special burdens.").

²⁰⁰"Not only do years of data give us reliable projections about risk from those threats, but we can take steps to reduce our personal risk—get a flu vaccine or drive more safely." See Bryan Walsh, *Why the Coronavirus Feels so Risky*, AXIOS (Apr. 29, 2020), https://www.axios.com/risk-analysis-coronavirus-77e51ad2-163d-4b2a-9820-5d3633663d49.html?utm_source=facebook&utm_medium=social&utm_campaign=organic&utm_content=1100.

Conclusion

The story of America’s federal courts operating during times of crisis is indeed a colorful and varied one. History provides both context and insight about how our nation’s leading lawyers have responded in times of crisis, both man-made and natural, to keep the wheels of justice spinning in unison. Even though the coronavirus brings with it an engulfing wave of abnormality and unrest, generally speaking, the federal courts have responded in a timely and reasonable fashion. While most courthouses remain closed for business and staff “work from home,” the courts’ substantive business carries on behind the scenes, thanks to the advent of modern-day technology. In line with history’s teachings, U.S. federal courts remain ever ready.

Preparedness is a never-ending venture. The federal court system makes planning for emergencies—including pandemics—a top priority, even when other branches of government seem to have abandoned the idea of government preparedness.²⁰¹ Moving forward, when the fog of coronavirus does lift—and with unexpected and uncertain crisis all but a certainty sometime in the future—federal courts should remain vigilant and prepare for the next crisis. 100 years from now, the lessons arising from the 2020 COVID-19 pandemic will likely inform the federal court system’s response to a similar crisis. We started with a discussion about President Lincoln and the suspension of the writ of *habeas corpus* during the Civil War. In the spirit of preparedness and planning, it is fitting that we end with a quote frequently attributed to President Lincoln; “Give me six hours to chop down a tree and I will spend the first four sharpening the axe.”

²⁰¹See Emily Baumgaertner & James Rainey, *Trump Administration Ended Pandemic Early-Warning Program to Detect Coronaviruses*, L.A. TIMES (Apr. 2, 2020, 4:35 PM), <https://www.latimes.com/science/story/2020-04-02/coronavirus-trump-pandemic-program-viruses-detection>.