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The AOC in the Age of COVID—Pandemic Preparedness Planning in the Federal Courts

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ARTICLE

THE AOC IN THE AGE OF COVID— PANDEMIC PREPAREDNESS PLANNING IN THE FEDERAL COURTS

ZOE NIESEL*

Abstract. The 2020 COVID-19 pandemic created a crisis for American society—and the federal courts were not exempt. Court facilities came to a grinding halt, cases were postponed, and judiciary employees adopted work-from-home practices. Having court operations impacted by a pandemic was not a new phenomenon, but the size, scope, and technological lift of the COVID-19 pandemic was certainly unique.

Against this background, this Article examines the history and future of pandemic preparedness planning in the federal court system and seeks to capture some of the lessons learned from initial federal court transitions to pandemic operations in 2020. The Article begins by examining pandemic planning efforts by the federal courts starting in the early 1900s and traces pandemic response measures in the courts regarding the Spanish flu and H1N1. These historical pandemics show the importance of consistent action in the federal courts regarding pandemic planning and emergency operations. The types of pandemic plans in place before COVID-19 also illustrate a largely untested system.

The Article then examines the measures taken during COVID-19 to keep courthouse doors open, including the approach by the Administrative Office of the Courts (AOC) and an analysis of district court and circuit court approaches. The data shows disparate early responses, with many federal courts later coalescing around the use of remote hearings for at least some types of

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proceedings. Later guidance from the Administrative Office of the Courts more effectively created a tiered system that could guide courts using local considerations. As such, this Article concludes that initial federal court responses to the COVID-19 pandemic could be improved during future emergencies by identifying appropriate underlying data sets, using consistent technological approaches, and creating consistency in geographic regions.

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I. INTRODUCTION

The spring of 2020 proved to be one of the most disruptive and shocking in modern history.¹ The spread of the COVID-19 virus and its deadly unfurling into a global pandemic changed countless aspects of American life and did not spare the federal court system.² With over a year passing since the early spread of COVID-19 in spring 2020, it seems appropriate to examine what the early response of the federal court system means for the future of litigation.

1. See generally Lora Jones et al., *Coronavirus: How the Pandemic Has Changed the World Economy*, BBC NEWS (Jan. 24, 2021), <https://www.bbc.com/news/business-51706225> [https://perma.cc/8JUR-YL9M] (evaluating the virus' effect on job seekers, unemployment, and the world economy).

2. See, e.g., Jessica Gresko, *Chief Justice Praises Work of Federal Courts During COVID-19*, AP NEWS (Dec. 31, 2020), <https://apnews.com/article/technology-coronavirus-pandemic-us-supreme-court-john-roberts-courts-a726125db5749a5a9402dc80c404ad82> [https://perma.cc/EER4-GN2J] (“By April, judges around the country were guiding critical court functions from their home offices—or their kitchen tables Hearings of all sorts went virtual. Judges quickly (or at least eventually) learned to use a wide range of available audio and video conferencing tools.” (quoting Chief Justice Roberts)).

The United States Center for Disease Control and Prevention (CDC) defines a pandemic as a disease “epidemic that has spread over several countries or continents”³ By March 2020, COVID-19 was easily classified as a pandemic, stretching across the world and inflicting alarming numbers of deaths and general disruption.⁴ The move to social distancing, remote work, and quarantine to contain the spread of the pandemic uprooted American life.⁵ Businesses and schools closed, states required those in public to wear masks and remain six feet apart, and “Zooming” became a verb referring to the widespread use of web conferencing for remote work.⁶

As the fabric of American society strained under the realization that modern society, medical practices, and technology cannot insulate us from an ancient biological enemy, the realization that COVID-19 will impact the justice system for years to come seems clear.⁷ Actors within our judicial system, including judges, attorneys, civil liberties advocates, and scholars, have realized the federal court system cannot continue with business as usual in light of the pandemic and sweeping responses, including using new technology to conduct litigation.⁸ Indeed, the spring of 2020 saw significant

3. *Principles of Epidemiology in Public Health Practice, Third Edition an Introduction to Applied Epidemiology and Biostatistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section11.html> [<https://perma.cc/MR94-4URZ>].

4. *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [<https://perma.cc/ZTN9-2AZ5>]; see Yen-Chin Liu et al., *COVID-19: The First Documented Coronavirus Pandemic in History*, 43 *BIOMEDICAL J.* 328, 331 (2020) (“[T]he COVID-19 pandemic has spread globally and consequently resulted in at least 772,296 deaths worldwide as of August 18, 2020.”).

5. Ari Levy, *Working from Home Is Here to Stay, Even When the Economy Reopens*, CNBC (May 11, 2020, 1:01 PM), <https://www.cnbc.com/2020/05/11/work-from-home-is-here-to-stay-after-coronavirus.html> [<https://perma.cc/E984-NN8K>]; see, e.g., *Court Coronavirus Information*, TEX. JUD. BRANCH, <https://www.txcourts.gov/court-coronavirus-information/electronic-hearings-zoom/> [<https://perma.cc/9AEL-66PN>] (illustrating the novel introduction of electronic hearings to facilitate court access to the general public).

6. See Levy, *supra* note 5 (“[I]ndustries that can successfully function over internet lines are choosing to keep their people home. Long commutes have been replaced with heavy Zoom use . . . [and] kids are likely to be at home . . .”).

7. See, e.g., *Pandemic Disrupts Justice System, Courts*, AM. BAR ASS'N (Mar. 16, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system/> [<https://perma.cc/JWN8-FUCR>] (“Measures taken to address the dangers of the coronavirus are expected to exacerbate the significant backlog of cases in state and federal courts, not to mention immigration courts that have a backlog of more than 1 million cases.”).

8. See Jennifer Lapinski et al., *Zoom Jury Trials: The Idea Vastly Exceeds the Technology*, LAW (Sept. 29, 2020, 4:13 PM), <https://www.law.com/texaslawyer/2020/09/29/zoom-jury-trials-the-idea->

disruptions to orderly proceedings, including the discontinuation of jury trials, delay in cases, problems with telework for judges and court staff,⁹ and illness.¹⁰

Beginning in March 2020, dozens of federal courts closed and delayed proceedings, including the United States Supreme Court suspending arguments for March and April.¹¹ The Court also issued an accompanying order extending deadlines, including the deadline to file any petition for a writ of certiorari to 150 days from the lower court judgment, and noted that motions for extension of time would be granted as a matter of course if related to difficulties surrounding the COVID-19 outbreak.¹² These steps were nearly unprecedented—the Court had often remained open when the rest of Washington closed, including holding oral arguments during Hurricane Sandy in 2012.¹³ For lower federal courts that remained open, many were limiting hearings to fewer than ten people, allowing staff to work from home, and utilizing videoconferencing to the extent possible.¹⁴

It seems clear that a “new normal” is firmly on the horizon. While the move to remote hearings, depositions, and, in some cases, e-service, has been disruptive, there is now the opportunity for capitalization on this

vastly-exceeds-the-technology/ [https://perma.cc/6F58-A8XG] (addressing the pitfalls and difficulties of using technology to conduct hearings).

9. In the midst of Spring 2020, Texas Supreme Court Justice Nathan Hecht noted the need of the court system to adopt additional best practices in technology, stating, “We’re going to have to completely rethink how much has to be done in person, how much can be done using technology—that whole issue that we’ve just never paid much attention to We’re just going to have to rethink doing justice in the 21st century in confronting these difficulties” Alexander Mallin et al., *How Coronavirus Is Crippling Courts and Raising Concerns Among Civil Liberties Advocates*, ABC NEWS (Mar. 24, 2020, 3:06 AM) (internal quotation marks omitted), <https://abcnews.go.com/US/coronavirus-crippling-courts-raising-concerns-civil-liberties-advocates/story?id=69757862> [https://perma.cc/JC8Y-729G].

10. For example, in March 2020 near the start of the pandemic, the Middle District of Pennsylvania, the Northern District of Georgia, and the District of Delaware were all closed over concerns that someone within the court had contracted COVID-19. *Id.*

11. Press Release, Sup. Ct. of the U.S. (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20 [https://perma.cc/C4Q2-JJ5Y].

12. Order List, 589 U.S. (2020), https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf [https://perma.cc/R7PR-VCJK].

13. Debra Cassens Weiss, *As Hurricane Sandy Closes Many East Coast Courts, Supreme Court Stays Open on Monday*, A.B.A.J. (Oct. 29, 2012, 11:38 AM), <https://www.abajournal.com/news/article/as-hurricane-sandy-closes-many-east-coast-courts-supreme-court-plans-to-sta> [https://perma.cc/BCW8-GPHU].

14. Mallin et al., *supra* note 9.

potential long-term.¹⁵ Indeed, remote appearances can be cheaper, faster, and more efficient, decreasing the cost of litigation and moving business through the courts at a faster rate.¹⁶ There is certainly a place for these practices going forward, and the COVID-19 pandemic may have accelerated the legal profession's use of remote technology.¹⁷ Indeed, scholars and advocates have long been articulating that the profession should embrace new ways of doing business to decrease the cost and travel burden of litigation.¹⁸

However, before some of these new changes can firmly take hold, the first place to look must be backwards—at what happened in the initial months of the pandemic regarding keeping justice moving.¹⁹ In examining the responses of the federal district courts and circuit courts, a clear split emerges—courts that immediately adopted new techniques to keep justice flowing, and courts that either delayed or left the decision on remote appearance up to the individual judges or parties.²⁰ This disparate approach created discrepancies in how the pandemic impacted cases in different parts

15. Randy Kessler, *Zoom Court, The Future Is Now*, LINKEDIN (May 25, 2020), <https://www.linkedin.com/pulse/zoom-court-future-now-randy-kessler> [https://perma.cc/CAB5-NGH4] (expanding on the unexpected benefits technology provided courts and discussing why it is here to stay); see, e.g., *Judges Discuss Pros and Cons of Virtual Litigation*, TENN. STATE CT.'S (Jan. 19, 2021), <http://www.tsc.state.tn.us/news/2021/01/19/judges-discuss-pros-and-cons-virtual-litigation> [https://perma.cc/8RQU-RTMM] (“[T]he ease of appearing remotely has resulted in fewer scheduling conflicts with people who have court business. . . . One unforeseen advantage of the Zoom format for Judge Hurd has to do with witnesses. When she is on the bench, she is used to observing witnesses from the side as they sit at the witness stand. Zoom has allowed her to see witnesses face to face, giving her a better perspective of their demeanor.”).

16. Kessler, *supra* note 15; *Judges Discuss Pros and Cons of Virtual Litigation*, *supra* note 15.

17. See Kessler, *supra* note 15 (“The use of video and other technology will play an incredible role in the evolution of our system of justice.”).

18. *Id.*; see, e.g., Herbert B. Dixon Jr., *Technology and the Courts: A Futurist View*, 52 JUDGES J. 36, 36 (2013) (highlighting predictions of the possible advantages and disadvantages of technology in courts).

19. See Janna Adelstein & Douglas Keith, *Initial Court Responses to Covid-19 Leave a Patchwork of Policies*, BRENNAN CTR. FOR JUST. (Apr. 14, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies> [https://perma.cc/EXT5-KFFL] (noting a vast majority of courts in April 2020 had taken steps to respond to the pandemic while a few district courts continued holding in-person proceedings); see also, *In re Order for Court Operations During Pandemic* (Utah Mar. 13, 2020), <https://www.guardianship.org/wp-content/uploads/2020/04/Utah-Order.pdf> [https://perma.cc/2QPY-5WKM] (showing the Utah Supreme Court's response to the varying orders being issued by courts throughout the state).

20. Adelstein & Keith, *supra* note 19 (“All of the appeals courts, meanwhile, have either postponed oral arguments or are holding arguments by phone or video conference. Several of them have given assigned judges the discretion to continue to hold hearings in person.”).

of the country, despite all cases being in the same federal system.²¹ The reason for this divide relates to the ability of each court to set its own individual response plan.²² As such, while bodies like the Administrative Office of the Courts (AOC) have generally given guidance or rough outlines on emergency responsiveness planning, individual emergency planning is conducted by each individual district or circuit.²³ As a result of this individual discretion, responses can vary widely, even within a federal circuit's geographic borders.²⁴

With the above as background, this Article seeks to examine the initial court and litigant response to COVID-19. The long and cyclical history of American pandemics, which have always impacted justice proceedings, informs part of this response.²⁵ Part I thus examines the history of pandemic responsiveness in the justice system, looking particularly at the Spanish flu of 1918 and the H1N1 pandemic.²⁶ The Spanish flu case study shows the response of an earlier and less sophisticated justice system.²⁷ In contrast, the H1N1 pandemic shows a more developed and prepared court system response, one which had already engaged in analyzing what a pandemic would do to court operations.²⁸ Part II then builds on these lessons by examining preparedness plans that developed post-H1N1, and

21. See generally Tania Sourdin et al., *Court Innovations and Access to Justice in Times of Crisis*, 9 HEALTH POLY & TECH. 447, 447–50 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7456584/pdf/main.pdf> [<https://perma.cc/9Y9H-EB4R>] (reporting on the world-wide problems the justice system experienced during the pandemic, including the inability of some U.S. courts to respond and “shift to online modes of delivery”).

22. See Stephanie Wylie, *The Supreme Court's Failed Response to the Coronavirus Pandemic*, CTR. FOR AM. PROGRESS (Aug. 7, 2020, 9:00 AM), <https://www.americanprogress.org/issues/democracy/news/2020/08/07/488938/supreme-courts-failed-response-coronavirus-pandemic/> [<https://perma.cc/R39W-X9QR>] (“In 2012, there were several emergency preparedness summits for the federal courts, yet none seemed to have focused on pandemic-specific emergency preparedness. As a result, the judiciary’s response to the coronavirus was largely reactionary.”).

23. *Id.*

24. See, e.g., *COVID and the Courts: Reopening Plans*, CROWELL MORING (June 10, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/COVID-and-the-Courts-Reopening-Plans> [<https://perma.cc/MDN7-7KVG>] (“Predictably, federal courts’ responses to the ongoing novel coronavirus pandemic vary across the country.”).

25. See generally Mark Walsh, *Outbreaks of Disease Have Shuttered the Supreme Court Going Back More Than 2 Centuries*, A.B.A. 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> [<https://perma.cc/8G92-V7VK>] (examining the U.S. Supreme Court’s historical responses to pandemics).

26. See *infra* Part I.

27. See *infra* Part I.

28. See *infra* Part I.

were thus fully or partially in place at the time of COVID-19.²⁹ Part III then examines the federal courts' actual response to COVID-19 in March and April 2020, tracking the first months and initial orders that set out how justice would operate.³⁰ The accompanying charts easily highlight the disparities in approaches.³¹ Finally, Part IV examines the framework that should guide the new normal.³² In particular, this Article suggests greater national pandemic response planning that provides a template for action in the early stages of a pandemic to limit geographic disparities and confusion.³³ While the COVID-19 pandemic will end, the business of the courts will not—and history reveals another pandemic is always on the horizon.³⁴ Lessons learned from this time should provide guidance not just for pandemic preparedness but also for embracing cost and time-saving litigation measures in general.

II. PREVIOUS PANDEMIC RESPONSIVENESS AND THE COURTS

It is no question that global pandemics feel like wholly unique events for those living through them. As individuals watch themselves and their families succumb to illness, or the fear and uncertainty, it can feel like such a situation is an inimitable and singularly terrifying moment in time.³⁵

However, pandemics are as old as the version of human society that is centered around agriculture and the domestication of animals.³⁶ Skeletons recovered from humans living in pre-agricultural hunter-gatherer societies show very few markers of infectious disease,³⁷ while skeletons from the

29. See *infra* Part II.

30. See *infra* Part III.

31. See *infra* Chart 1–2.

32. See *infra* Part V.

33. See *infra* Part V.

34. Walsh, *supra* note 25 (recognizing pandemics are a reoccurring event).

35. See, e.g., Carmen Reinicke, *For Families with Multiple Generations Under One Roof, the Pandemic Has Brought Unique Challenges*, CNBC (Nov. 27, 2020, 9:30 AM), <https://www.cnbc.com/2020/11/27/covid-19-brought-unique-challenges-for-multigenerational-families.html> [<https://perma.cc/3SWC-9DCH>] (describing the life-altering changes and challenges for families cohabiting with extended family members, especially those who are high-risk individuals).

36. See *Pandemics That Changed History*, HIST. (Jan. 30, 2020), <https://www.history.com/topics/middle-ages/pandemics-timeline> [<https://perma.cc/755S-PAAF?type=image>] (noting the earliest recording of pandemics can be traced back to as early as 430 B.C.).

37. Indeed, this may be one reason author, Jared Diamond, labelled the invention of agriculture as humanity's great mistake “from which we have never recovered.” Jared Diamond, *The Worst Mistake in the History of the Human Race*, DISCOVER MAG. (May 1, 1999, 12:00 AM), <https://www.discovermagazine.com/planet-earth/the-worst-mistake-in-the-history-of-the-human-race> [<https://perma.cc/GL5Z-QNSB>].

time period after agriculture was adopted show significant indicators of diseases passed to humanity through our close contact with populations of domesticated animals.³⁸ The reason for these startling findings is that many communicable diseases have roots in human contact with domesticated animals, or they rely on humans living in close quarters for transmission.³⁹

For the diseases and their underlying microbial or viral agents, dense human societies and accompanying human trade are great boons.⁴⁰ Indeed, global trade has historically enabled diseases to achieve global spread.⁴¹ The famous Bubonic Plague was the product of the so-called “Silk Road,” which allowed the disease to journey with trade goods and spices to wreak havoc on Europe.⁴² Smallpox and measles decimated human societies in the Americas thanks to the sailors manning the ships that discovered the “New World.”⁴³

In more modern times, the interconnected nature of global life has allowed diseases like Ebola, SARS, and H1N1 (swine flu) to jump out of local communities and onto the national or international stage.⁴⁴ And certainly, none of these modern pandemics were as successful as COVID-19, which escaped its time living off of bats to spread to just about every continent on Earth.⁴⁵

38. *Id.* (confirming pandemics were facilitated during the agricultural revolution 10,000 years ago “when in different parts of the world[,] people began to domesticate plants and animals”).

39. JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 206–07 (1997) (identifying human diseases and their animal sources—smallpox from cattle, measles from cattle, and influenza from pigs and birds).

40. *See, e.g.*, Hannah Kuchler & Andrew Edgecliffe-Johnson, *How New York's Missteps Let COVID-19 Overwhelm the US*, FIN. TIMES (Oct. 21, 2020), <https://www.ft.com/content/a52198f6-0d20-4607-b12a-05110bc48723> [<https://perma.cc/JR62-54F3>] (“Genetic research has found that most US Covid-19 infections have been of the European strain that landed in New York, not the Chinese strain of the first west coast cases. . . . Instead, the city circulated it like ‘Grand Central station.’”).

41. *Pandemics That Changed History*, *supra* note 36.

42. Patrick J. Kiger, *How the Black Death Spread Along the Silk Road*, HIST. (Apr. 23, 2020), <https://www.history.com/news/silk-road-black-death> [<https://perma.cc/AB66-UNAP>].

43. Michael S. Rosenwald, *Columbus Brought Measles to the New World. It Was a Disaster for Native Americans*, WASH. POST (May 5, 2019), <https://www.washingtonpost.com/history/2019/05/05/columbus-brought-measles-new-world-it-was-disaster-native-americans/> [<https://perma.cc/47KU-77F8>].

44. *See generally* Julia Ries, *Here's How COVID-19 Compares to Past Outbreaks*, HEALTHLINE (Mar. 12, 2020), <https://www.healthline.com/health-news/how-deadly-is-the-coronavirus-compared-to-past-outbreaks> [<https://perma.cc/6QWV-6E5M>] (reviewing statistics on the SARS, H1N1, and Ebola outbreaks on a national level).

45. *See* A. Wilder-Smith, *COVID-19 in Comparison with Other Emerging Viral Diseases: Risk of Geographic Spread via Travel*, 7 TROPICAL DISEASES, TRAVEL MED. & VACCINES 1, 2–4 (2021),

Pandemics offer an unsettling insight into the wheels of justice. Justice, at its heart, depends on access to the judicial branch—“[a]t the most fundamental level, court access is a reality only when the courthouse doors are open and the courts are operational. If a court has to be shut down in response to a disaster of any sort—whether nature-inflicted or human-generated—then court access, and thus justice, is denied.”⁴⁶ Previous pandemics, both historical and more modern, give some peek into the business of justice during these crises.⁴⁷ As such, this section examines two previous pandemics and the judiciary’s response. This discussion should contextualize the judiciary’s preparedness concerning the 2020 COVID-19 outbreak.

A. *The Spanish Flu of 1918*

1918 was a difficult and determinative year in America, and one in which both bullets and germs claimed significant human casualties.⁴⁸ At the time, the United States and much of the world were still involved in World War I, which has the chilling distinction of being the deadliest human war to date.⁴⁹ But the bullets and trenches of World War I were quickly replaced by one of humanity’s oldest enemies—the flu.⁵⁰ In 1918, a collection of influenza viruses now dubbed the “Spanish flu”⁵¹ reached across borders

<https://tdtmvjournal.biomedcentral.com/articles/10.1186/s40794-020-00129-9> [<https://perma.cc/F9YQ-DYJ2>] (“The higher asymptomatic rate, further compounded by pre-symptomatic transmission has made containment much harder for COVID-19 than for SARS” and other previous outbreaks).

46. FLA. CT. EDUC. COUNCIL’S PUBL’NS COMM., PANDEMIC INFLUENZA BENCHGUIDE: LEGAL ISSUES CONCERNING QUARANTINE AND ISOLATION, at vi (2019), https://www.flcourts.org/content/download/218114/file/pandemic_benchguide.pdf [<https://perma.cc/UHG2-7SKJ>].

47. See, e.g., Wylie, *supra* note 22 (analyzing the Supreme Court’s closures during previous viral outbreaks, such as the 1918 Spanish flu).

48. See *Viewpoint: The Deadly Disease that Killed More People than WW1*, BBC (Oct. 13, 2014), <https://www.bbc.com/news/magazine-29541235> [<https://perma.cc/HP73-JF7S>] (“[In] 1918, the world was already fighting another battle. It was in the grip of Spanish Influenza, which went on to kill almost three times more people than the 17 million soldiers and civilians killed during WW1.”).

49. CHARLES RIVER EDITORS, *THE 1918 SPANISH FLU PANDEMIC: THE HISTORY AND LEGACY OF THE WORLD’S DEADLIEST INFLUENZA OUTBREAK* (2014).

50. See *Viewpoint: The Deadly Disease that Killed More People than WW1*, *supra* note 49 (“Within months Spanish Flu had killed more people than any other illness in recorded history.”).

51. The name the “Spanish flu” is misleading—the disease, or collection of diseases, did not originate in Spain. Rather, the name’s origin is in how shocked the populace was to see the way the disease attacked people from all walks of life—young and old, rich and poor. It was shocking to see Spain’s king suffering from the disease, and with early news reports coming out of Madrid about an outbreak, the name “Spanish flu” was born. CHARLES RIVER EDITORS, *supra* note 50. Indeed, a contemporaneous report prepared by then-Surgeon General Rupert Blue indicated that the identical

to kill “as much as 5% of the world’s population.”⁵² Dubbed the “mother of all pandemics,”⁵³ the presence of the Spanish flu in the United States was first recorded in March 1918 when a mess cook at a U.S. Army training camp in Kansas reported flu-like symptoms.⁵⁴ By the afternoon on the same day, 107 soldiers were sick, and “[f]ive weeks later, more than 1,000 [were] infected and 47 were dead.”⁵⁵ This new strain, which was much more deadly than previous iterations of the virus, confounded doctors.⁵⁶

The virus we call the Spanish flu was an H1N1 virus, meaning it originated in bird populations before making the jump to humans.⁵⁷ This jump of an infectious microbe from animals to humans is called “zoonosis.”⁵⁸ The version of H1N1 known as the Spanish flu was a damaging disease, most lethal for young children and those in the prime of life (ages 15–40), although adults over 65 were also exceptionally affected.⁵⁹ The reasons for the virus’s deadly nature were largely shrouded in mystery, with even modern, twenty-first-century scientists relatively stumped by its origins and makeup.⁶⁰ In June 2000, a paper entitled *Characterization of the*

disease was called the “Chinese influenza” when it spread from China to Russia in the late 1800s, the “Russian influenza” when it later spread from Russia to Europe, “European influenza” when it crossed from Europe to the United States, and finally the “American influenza” when it later appeared in Japan.
Id.

52. *Id.*

53. If the Spanish flu was the mother of all pandemics, then modern life is surely the father. Christopher Klein, *Why October 1918 Was America's Deadliest Month Ever*, HIST. (Oct. 5, 2018), <https://www.history.com/news/spanish-flu-deaths-october-1918> [<https://perma.cc/9SR2-FYF9>].

54. *Id.*

55. *Id.*

56. *Id.*

57. *History of 1918 Flu Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm> [<https://perma.cc/82C3-BF7A>].

58. *See Zoonoses*, WORLD HEALTH ORG. (July 29, 2020), <https://www.who.int/news-room/fact-sheets/detail/zoonoses> [<https://perma.cc/8FVN-BWD9>] (“[Z]oonosis is any disease or infection that is naturally transmissible from vertebrate animals to humans.”); *see also Zoonotic Diseases*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/onehealth/basics/zoonotic-diseases.html> [<https://perma.cc/UM8N-UD27?type=image>] (“[A]nimals can sometimes carry harmful germs that can spread to people and cause illness—these are known as zoonotic diseases or zoonoses. Zoonotic diseases are caused by harmful germs like viruses, bacteria[], parasites, and fungi. These germs can cause many different types of illnesses in people and animals, ranging from mild to serious illness and even death.”).

59. *History of 1918 Flu Pandemic*, *supra* note 58.

60. *See, e.g.,* Klein, *supra* note 54 (“The [1918] outbreak confounded . . . fellow doctors. . . . Some saw an enemy hand at work. Rumors spread that the Kaiser’s U-boats had released poison clouds in American ports and that German pharmaceutical company Bayer had tainted its aspirin tablets.”).

1918 ‘Spanish’ *Influenza Virus Neuraminidase Gene* described the DNA sequence of the virus’s neuraminidase gene that codes for a protein required for the virus to infect cells.⁶¹ In their analysis, the researchers noted the virus’s origins were avian in nature but could not determine a “unique” feature explaining why the virus was so severe or deadly.⁶² Additional research of the total genome of the virus found that no single trait or gene was responsible for the strain’s enhanced virulence; rather, it was a combination of eight genes together, and that the strain showed exceptional virulence over other influenza viruses impacting humans.⁶³

It is worth noting, in addition to its natural properties, the Spanish flu was entirely helped by the world in which it existed (which is the case, as well, for the remaining case studies discussed below).⁶⁴ For example, World War I likely exacerbated the worldwide nature of the pandemic, which involved the huge movement of military personnel, close contact in military bases and camps, and the deployment of approximately 30% of U.S. physicians to military service.⁶⁵ Further, there was very limited understanding of the disease’s origins, with most health experts attributing the flu to a bacterium, not a virus.⁶⁶

Initially a springtime disease, the Spanish flu receded in the summer of 1918, only to reemerge with a vengeance in the fall.⁶⁷ In October 1918, American life came to a standstill in the deadliest month of the pandemic, which would also be the deadliest month in American history.⁶⁸ With no federal Center for Disease Control and Prevention in existence at the time, individual municipalities were largely in charge of the response.⁶⁹ Containment measures included:

61. Ann H. Reid et al., *Characterization of the 1918 “Spanish” Influenza Virus Neuraminidase Gene*, 97 PROC. NAT’L ACAD. SCI. U.S. AM. 6785, 6785 (2000).

62. *Id.* at 6789.

63. Douglas Jordan et al., *The Deadliest Flu: The Complete Story of the Discovery and Reconstruction of the 1918 Pandemic Virus*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/reconstruction-1918-virus.html> [<https://perma.cc/W6VK-AKZH>].

64. *See id.* (“Besides the properties of the virus itself, many additional factors contributed to the virulence of the 1918 pandemic.”).

65. *Id.*

66. *Id.* (“No diagnostic tests existed at the time that could test for influenza infection.”).

67. *See Pandemics That Changed History*, *supra* note 36 (“Wire service reports of a flu outbreak in Madrid in the spring of 1918 led to the pandemic being called the ‘Spanish flu.’”).

68. Klein, *supra* note 54.

69. *Id.*

- In San Francisco, fining or jailing citizens that did not wear a mask in public.⁷⁰
- In New York City, staggering opening and closing of businesses and factories to minimize the number of people on public transit during rush hours.⁷¹ Additional measures included criminalizing spitting in public, advising citizens to kiss only through a handkerchief, and quarantining ships that arrived in port.⁷²
- Excavating mass graves using steam shovels in Philadelphia, which suffered a catastrophic outbreak after the city's Public Health Director refused to cancel a city parade.⁷³ The decision had repercussions—deaths and illness were so severe in Philadelphia that it was “on the verge of a total collapse as a functioning city.”⁷⁴

By the time the Spanish flu finally abated in 1920, it had killed over 675,000 Americans.⁷⁵ It was deadlier than the contemporaneous World War I (and all previous military engagements in history), and the underlying virus infected in total “a third of the planet's population.”⁷⁶

The judiciary's response to the Spanish flu was mixed.⁷⁷ At the highest level of the court system, the Supreme Court of the United States, the response was swift.⁷⁸ Due to the risk of illness, the Court postponed arguments scheduled for October 1918.⁷⁹ Although surprising, there was precedent.⁸⁰ The Court had shortened its calendar in August 1793 and

70. *Id.*

71. *Id.*

72. KENNETH C. DAVIS, MORE DEADLY THAN WAR: THE HIDDEN HISTORY OF THE SPANISH FLU AND THE FIRST WORLD WAR 77–78 (2018).

73. Klein, *supra* note 54.

74. *Id.*

75. *Id.* (“Yet for all the lives lost and changed forever, the Spanish flu quickly faded from public consciousness.”).

76. *Id.*

77. *Id.*

78. See Walsh, *supra* note 25 (explaining how “in keeping with public health precautions” the Supreme Court felt the need to act with urgency).

79. *Id.*

80. See *id.* (“When the U.S. Supreme Court announced . . . that its March sitting of oral arguments would be postponed . . . the statement included some historical references for support—going back as far as 227 years ago.”); see also *Two Centuries of Law Guide Legal Approach to Modern Pandemic*, A.B.A. (Apr. 2020), <https://www.americanbar.org/news/abanews/publications/youraba/2020/your-aba-april-2020/law-guides-legal-approach-to-pandemic/> [<https://perma.cc/B5LD-EG49>] (“Under the U.S. Constitution's 10th Amendment and U.S. Supreme Court decisions over nearly 200 years,

August 1798 due to yellow fever outbreaks.⁸¹ Further, the postponement was probably a practical necessity. The Supreme Court at the time was in the Old Senate Chamber at the Capitol, and the House and Senate galleries had both already closed on October 7, and the Court followed suit on October 8.⁸²

And, in some ways, a single early adjournment seemed light compared to the massive death toll that the pandemic had on the country. Additionally, despite the decision to postpone arguments for October 1918, the Court still managed to hand down 229 opinions during its total term, an increase from the previous term.⁸³

Justice Holmes captured the decision to shutter the Court in 1918 in his letters to longtime friend and journalist Sir Edward Pollock.⁸⁴ Holmes focused on the morality of the decision not to require lawyers to travel to Washington, D.C., during the outbreak, noting:

I have been here I have got nothing out of such leisure as my duties left me except to finish up a few odd jobs and tuck in some loose ends. We have been adjourned on account of the epidemic as it was not thought right to require lawyers to come, often across the continent, to a crowded and infected spot⁸⁵

Holmes also commented on how he passed the time, noting, “The Congressional Library, even, has been shut. I profited by my position I suppose, in getting them to let me in to go to the print rooms and wallow in potentialities. I could have a very good looking young lady . . . produce any portfolio I called for”⁸⁶ Luckily for Holmes, the Court reopened by November 4 to resume business as usual.⁸⁷

state governments have the primary authority to control the spread of dangerous diseases within their jurisdictions.”)

81. Walsh, *supra* note 25.

82. *Id.*

83. WALTER F. PRATT, JR., *THE SUPREME COURT UNDER EDWARD DOUGLAS WHITE, 1910–1921*, at 206 (1999).

84. OLIVER WENDELL HOLMES JR. & FREDERICK POLLOCK, *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874–1932*, at 270 (Mark DeWolfe Howe ed., Harvard Univ. Press 2d ed. 1961); Walsh, *supra* note 25.

85. HOLMES & POLLOCK, *supra* note 85.

86. *Id.*

87. *See* Walsh, *supra* note 25 (“The court took up arguments on Nov. 4, and appears to have added some argument days in mid-November to help make up for the postponed October cases . . .”).

At more local levels, justice continued, albeit strangely. In San Francisco, court sessions were still held, but outside in public squares.⁸⁸ Presumably, decisions like this one were fueled by government entities like the U.S. Naval Bureau of Sanitation, which reported that the Spanish flu was easily contained by “[f]resh air and sunshine,” which would “kill the germ in a few minutes.”⁸⁹ But the business of the courts was likely occupied by the focus on San Francisco’s chief health measure to protect its citizens—requiring the wearing of masks in public.⁹⁰ Hundreds of people were arrested for not following the ordinance instituting the requirement to wear masks in public and were fined either \$5 or confined to jail for thirty days for their disobedience.⁹¹ Indeed, anti-mask protests began in the San Francisco area, with individual citizens openly flouting their refusal to comply with the order while the beleaguered justice system struggled to keep up with the imposition of fines.⁹²

B. *The H1N1 Pandemic of 2009*

If we fast-forward from the Spanish flu into modern times, jumping about 90 years, we arrive at another flu pandemic, the H1N1 pandemic of 2009 and 2010.⁹³ Although there is truly no “theme” to pandemics, the widespread social focus on a possible influenza pandemic appears driven by the Spanish flu’s troubling death toll and modern concerns about novel influenza strains.

In November 2005, President George W. Bush released a National Strategy for Pandemic Influenza, noting that “we must be ready to respond at the federal, state[,] and local levels in the event that a pandemic reaches our shores.”⁹⁴ For the judiciary at the federal, state, and local levels,

88. Klein, *supra* note 54.

89. BUREAU OF MED. & SURGERY, DEP’T OF THE NAVY, EPIDEMIOLOGICAL AND STATISTICAL DATA, U.S. NAVY, 1918, at 447 (1920), <https://play.google.com/books/reader?id=hBpFAQAAMAAJ&hl=en&pg=GBS.PA349> [<https://perma.cc/PF76-WBEX>]; Klein, *supra* note 54.

90. ALFRED W. CROSBY, AMERICA’S FORGOTTEN PANDEMIC: THE INFLUENZA OF 1918, at 104–05 (2d ed. 2003).

91. *Id.* at 105; Klein, *supra* note 54.

92. See Klein, *supra* note 54 (“‘Obey the laws, and wear the gauze,’ urged public service posters.”).

93. See generally *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html> [<https://perma.cc/R9ST-HN8P>] (expanding on the 2009 pandemic that primarily affected children and young adults).

94. *President Outlines Pandemic Influenza Preparations and Response*, THE WHITE HOUSE (Nov. 1, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/11/20051101->

responsiveness planning is critical to keeping the doors to justice open.⁹⁵ The frequency of a pandemic is estimated to occur every 35 years,⁹⁶ and each individual pandemic poses the risk of a lengthy period of social distancing, significant illness or death, and economic disruption.⁹⁷ Following President Bush's National Strategy for Pandemic Influenza, the Department of Health and Human Services issued an accurate prediction regarding the facets of an individual pandemic situation:

The ability of the virus to spread rapidly worldwide; [t]he fact that people may be asymptomatic while infectious; [s]imultaneous or near-simultaneous outbreaks in communities across the U.S., thereby limiting the ability of any jurisdiction to provide support and assistance to other areas; [e]normous demands on the healthcare system; [d]elays and shortages in the availability of vaccines and antiviral drugs; and [p]otential disruption of national and community infrastructures⁹⁸

These fears would play out a few years later as a novel influenza strain made it into the popular consciousness.⁹⁹

1.html [https://perma.cc/EAS9-F7LB]; see *National Strategy for Pandemic Influenza*, HOMELAND SEC. COUNCIL (Nov. 2005), <https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-strategy-2005.pdf> [https://perma.cc/4KDA-R4LK] (recognizing the importance of response to and containment of pandemics).

95. PANDEMIC INFLUENZA BENCHGUIDE: LEGAL ISSUES CONCERNING QUARANTINE AND ISOLATION, *supra* note 46, at vi (advancing the policy goal of keeping courts open to ensure the public has access to justice).

96. *Id.* at 1.

97. “We can predict now twelve to eighteen months of stress, of watching loved ones die, of potentially not going to work, of wondering if you’re going to have food on the table the next day. Those are all things that are going to mean that we’re going to have to plan unlike any other kind of crisis that we’ve had in literally the last 80-some years in this country.” Interview by Susan Dentzer with Michael Osterholm, *The NewsHour with Jim Lehrer*, in Tallahassee, Fl. (Nov. 1, 2005); *Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic*, FLA. STATE CTS. 3 (Mar. 29, 2006), https://www.flcourts.org/content/download/219222/file/panflu_strategy.pdf [https://perma.cc/WVN3-F4PD].

98. *HHS Pandemic Influenza Plan*, U.S. DEP’T OF HEALTH & HUMAN SERVS. 5 (Nov. 2005), <https://www.cdc.gov/flu/pdf/professionals/hhspandemicinfluenzaplan.pdf> [https://perma.cc/25Q4-2GWS].

99. See *An HHS Retrospective to the 2009 H1N1 Influenza Pandemic to Advance All Hazards Preparedness*, PUB. HEALTH EMERGENCY, at ii (June 15, 2012), <https://www.phe.gov/Preparedness/mcm/h1n1-retrospective/Documents/h1n1-retrospective.pdf> [https://perma.cc/R8EN-YU8S] (“The 2009 H1N1 influenza pandemic, which was declared by the World Health Organization (WHO) in June 2009 and officially ended in August 2010, provided an important test of our nation’s preparedness activities and our ability to respond and adapt to a large-scale, protracted public health emergency with the potential for enormous health consequences.”).

Epidemics of seasonal influenza are a yearly occurrence, generally appearing in the winter months (November-March) and resulting in thousands of deaths per year in the United States, mostly in people over 65 or with underlying health conditions.¹⁰⁰ The primary method of containing the spread of seasonal influenza is with a yearly vaccine, especially for health care workers and those whose jobs require significant in-person interactions.¹⁰¹

In contrast to seasonal influenza, pandemic influenza is another matter.¹⁰² Pandemic influenza occurs when a new strain of the flu virus enters the human population such that humans have no natural immunity to the virus.¹⁰³ This lack of natural immunity results in increased rates of illness and death.¹⁰⁴ As such, “[a]n influenza pandemic can be defined as a global epidemic of influenza and it occurs when a new influenza virus (i.e.[,] an influenza virus subtype that is not circulating widely in human beings) emerges and starts spreading in a similar way to normal influenza[.]”¹⁰⁵ These modes of transmission generally include coughing, sneezing, and personal contact with infected people and surfaces.¹⁰⁶

This lack of natural immunity to a novel strain of influenza resulted in the 2009 H1N1 swine flu pandemic.¹⁰⁷ H1N1 had a famous grandparent—it

100. THOMAS H. WILSON, OSHA GUIDE FOR HEALTH CARE FACILITIES § 550 (2011), 2006 WL 3437355 (“Epidemics of seasonal influenza virus typically occur during the winter months in temperate regions and are responsible for approximately 36,000 deaths per year in the United States, according to CDC.”).

101. *Cf. id.* at § 551 (“CDC’s Advisory Committee on Immunization Practices (ACIP) regularly updates its seasonal influenza vaccine recommendations in response to medical advances . . .”).

102. *Id.* at § 550.

103. *Id.*

104. *Id.*

105. *Information About Pandemic Influenza*, WORLD HEALTH ORG. REG’L. OFF. FOR EUR. (2009), http://www.euro.who.int/influenza/20080618_20 [<https://perma.cc/VD7N-XW2Z>]; see also WILSON, *supra* note 101 (describing how pandemics, or global epidemics, may occur). See generally *Types of Influenza Viruses*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/about/viruses/types.htm> [<https://perma.cc/9RDL-7W7Q>] (“Influenza A viruses are the only influenza viruses known to cause flu pandemics, i.e., global epidemics of flu disease.”).

106. *Information About Pandemic Influenza*, *supra* note 106; Rajiv Dhand & Jie Li, *Coughs and Sneezes: Their Role in Transmission of Respiratory Viral Infections, Including SARS-CoV-2*, 202 AM. J. RESPIRATORY CRITICAL CARE MED. 651, 653, 657 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7462404/pdf/rccm.202004-1263PP.pdf> [<https://perma.cc/3SSK-HGZ2>] (“Virus-laden droplets (generated by coughing, sneezing, or talking) are propelled from an infected person directly onto the mucosal surfaces of a host.”).

107. See *Influenza Virus (Flu)*, BAYLOR COLL. OF MED., <https://www.bcm.edu/departments/molecular-virology-and-microbiology/emerging-infections-and-biodefense/specific-agents/influenza>

was composed of certain key genes from the virus that resulted in the 1918 Spanish flu¹⁰⁸—and had additional genes from flu viruses that circulate in pigs, as well as genes from flu viruses that circulate in birds and humans.¹⁰⁹ Like the Spanish flu, H1N1 was deadly to the young and those in the prime of life.¹¹⁰

The H1N1 flu strain initially appeared in Mexico during March 2009, resulting in additional incidents of infection and death in that country through the spring.¹¹¹ Mexican authorities noticed in April 2009 a rise in pneumonia and influenza deaths, both pointing to a virulent flu strain working its way through the population.¹¹² At the end of April, there were seven confirmed cases in the United States, with the first death occurring on April 27, 2009, in a young boy who left Mexico City to visit Brownsville, Texas.¹¹³

New York City quickly became an epicenter, with large spikes in the number of people seeking emergency room care compared to the previous flu season.¹¹⁴ In June, the World Health Organization declared the H1N1 virus a global pandemic, and America braced for a possible significant outbreak during the fall.¹¹⁵ The Obama Administration released a “Declaration of National Emergency” regarding the spread of the H1N1

-virus-flu [https://perma.cc/HW78-3ANR] (“When novel viruses like this emerge, natural immunity is usually limited or nonexistent in humans.”).

108. Jeffery K. Taubenberger & David M. Morens, *1918 Influenza: The Mother of All Pandemics*, 12 EMERGING INFECTIOUS DISEASES 15 (2006), https://wwwnc.cdc.gov/eid/article/12/1/05-0979_article [https://perma.cc/87PE-U7XS].

109. See *2009 H1N1 Flu (“Swine Flu”) and You*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 10, 2010, 5:00 PM), <http://www.cdc.gov/h1n1flu/qa.htm> [https://perma.cc/7M2P-SZ8Y] (explaining scientists call viruses like this “quadruple reassortant” viruses).

110. See *id.* (“CDC laboratory studies have shown that no children and very few adults younger than 60 years old have existing antibody to the 2009 H1N1 flu virus”); see also *Influenza-Like Illness in the United States and Mexico*, WORLD HEALTH ORG. (Apr. 24, 2009), https://www.who.int/csr/don/2009_04_24/en/ [https://perma.cc/5QJL-Y4B6] (“The majority of these cases have occurred in otherwise healthy young adults.”).

111. Michelle Kaplan, *The 2009 H1N1 Swine Flu Pandemic: Reconciling Goals of Patents and Public Health Initiatives*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 991, 1015–16 (2010).

112. Christopher Eddy et al., *Pandemic Influenza H1N1 2009: Public Health Emergency Response*, 15 GEO. PUB. POL’Y REV. 63, 64 (2010).

113. Kaplan, *supra* note 112, at 1016.

114. *Id.* at 1017.

115. *Id.* at 992; Donald G. McNeil, Jr., *Obama Warns of Return of Swine Flu in the Fall*, N.Y. TIMES (July 9, 2009), <https://www.nytimes.com/2009/07/10/health/10flu.html> [https://perma.cc/K5PL-FLN9] (“At the flu’s peak in May, Mr. Duncan noted, 726 schools were closed across the United States.”).

virus in October 2009.¹¹⁶ Health officials implemented a widespread campaign promoting hand-washing and covering coughs in an attempt to slow the spread of a virus already dispersed throughout the country.¹¹⁷

However, the spring and summer months provided ample time for medical science to do its work.¹¹⁸ A vaccine was developed to reduce the spread of H1N1 that was released in October 2009.¹¹⁹ Once the H1N1 vaccine became widely available, hospitalization and deaths in the United States decreased.¹²⁰ The pandemic was, however, a global disaster.¹²¹ By November 2009, there were 482,300 infected persons, with over 6,000 deaths.¹²²

Ultimately, the spread of H1N1 was less than initially predicted.¹²³ However, the “near miss” was considered to be an early warning for what a possible pandemic could look like, including “the inability of companies to

116. Press Release, Barack Obama, President of the U.S. of Am., Declaration of a National Emergency with Respect to the 2009 H1N1 Influenza Pandemic, The White House (Oct. 24, 2009), <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0> [<https://perma.cc/V8XP-YWUW>].

117. See Wendy E. Parmet, *Pandemics, Populism and the Role of Law in the H1N1 Vaccine Campaign*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 113, 120 (2010) (emphasizing the ineffectiveness of border closings, quarantines, and distribution of antiviral medications to slow the spread of the virus, forcing health officials “to rely on widely promulgated appeals for hand-washing and respiratory etiquette” to stymie the spread).

118. *Id.* at 121 (“In May 2009, the federal government set aside \$1 billion for vaccine development.”).

119. Kaplan, *supra* note 112, at 1019, 1026 (detailing how “[t]he FDA granted approval to five separate pharmaceutical companies—Novartis Vaccines and Diagnostics Ltd., MedImmune LLC, CSL Ltd., Sanofi Pasteur, Inc., and ID Biomedical Corporation of Quebec—to market their version of the 2009 H1N1 vaccine in the United States” and that “antiviral medications, such as Tamiflu or Relenza, are also available to both out-patients and to those hospitalized with either confirmed or suspected cases of swine flu”); *Influenza A (H1N1) 2009 Monovalent Vaccines Composition and Lot Release*, FOOD & DRUG ADMIN., <https://www.fda.gov/vaccines-blood-biologics/lot-release/influenza-h1n1-2009-monovalent-vaccines-composition-and-lot-release> [<https://perma.cc/JY5M-RSVK>] (listing the five manufacturers with H1N1 vaccines approved by the FDA, to be made “using the established manufacturing processes for their seasonal influenza vaccines”); Omudhome Ogbu, *Swine Flu (H1N1 Influenza A Virus) Antiviral Treatment*, RXLIST, https://www.rxlist.com/antiviral_treatment_swine_flu_h1n1_influenza_a_drug-class.htm [<https://perma.cc/R95F-7XSF>] (recognizing antiviral medications, such as Tamiflu or Relenza, “prevent, shorten, and reduce the severity of flu”).

120. WILSON, *supra* note 101, at § 552.

121. *Influenza Virus (Flu)*, *supra* note 108 (discussing how the H1N1 outbreak infected an estimated 60 million Americans from April 2009 to April 2010).

122. Eddy et al., *supra* note 113, at 64.

123. Maria Greco Danaher et al., *Emergency Preparedness: What Did We Learn from the H1N1 Scare?*, 3 J. HEALTH & LIFE SCI. L. 117, 119 (2010); cf. *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, *supra* note 94 (observing that the impact of H1N1 on the global population was less severe than those of previous pandemics).

manufacture and deliver their goods, severe limitations on the part of hospitals and physicians to deal with the number of patients affected, and perhaps even closure of international borders.”¹²⁴ Chillingly, such predictions came true just ten years later during the spread of COVID-19 in spring 2020.¹²⁵ In total, about 12,000 Americans died from H1N1, a concerning number for its disproportionate impact on people under age 45 and pregnant women.¹²⁶

The justice system and society that confronted the H1N1 pandemic was much more sophisticated than what existed during the Spanish flu pandemic in 1918. At the national level, institutions like the Supreme Court remained open and functioning during the spring, summer, and fall of 2009.¹²⁷ Indeed, the Court heard scheduled arguments during the period, continuing business as normal.¹²⁸

Lower courts, however, took more direct approaches to the pandemic.¹²⁹ The Supreme Court of Florida was particularly on top of the situation,

124. Maria Greco Danaher et al., *supra* note 124, at 119–20; see Ian Leslie, *Sars, Ebola and Mers Were Near Misses That Led Us to Believe COVID-19 Would Pass Us by Too*, NEWSTATSMAN (May 27, 2020), <https://www.newstatesman.com/international/coronavirus/2020/05/sars-ebola-and-mers-were-near-misses-led-us-believe-covid-19-would> [<https://perma.cc/EY22-9876>] (“To learn from a near miss, you first have to [recognize] it as one. In the past 20 years, there have been a series of viral outbreaks: Sars in 2002–03, H5N1 (bird flu) in 2006, H1N1 (swine flu) in 2009, Ebola in 2013, Mers in 2015. Each briefly threatened to become a pandemic, before subsiding. . . . Learning from near misses also means accepting that just because a risk can’t be measured does not mean it is not real.”).

125. *Cf.* Leslie, *supra* note 125 (explaining how previous pandemics that subsided left governments without an appropriate response. In fact, “[w]estern governments acted late on Covid-19 in part because, without a visceral intuition of danger, they coolly awaited more information. It took the steeply rising death tolls of near [neighbors] to jolt them into action”).

126. *2009 H1N1 Pandemic (H1N1pdm09 Virus)*, *supra* note 94; Kristen A. Swedish et al., *First Season of 2009 H1N1 Influenza*, 77 MT. SINAI J. MED. 103, 108 (2010).

127. See, e.g., Katie 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/> [<https://perma.cc/FHA6-BJUN>] (describing how the Supreme Court’s 2020 closure was “the only time the current Supreme Court building has closed to the public due to an epidemic” since the 1918 Spanish flu).

128. See generally *Argument Transcripts*, SUP. CT. OF THE U.S. (2009), https://www.supremecourt.gov/oral_arguments/argument_transcript/2008#list [<https://perma.cc/HG7Y-Y8QL>] (listing available transcripts of oral arguments heard during the H1N1 pandemic).

129. See, e.g., *In re Response of the Florida State Courts System to Influenza A(H1N1)*, No. AOSC09-20 (Fla. May 8, 2009), <https://www.floridasupremecourt.org/content/download/240699/file/AOSC09-20.pdf> [<https://perma.cc/QKX7-K4WR>] (illustrating the Florida Supreme Court’s directive to take preventive measures against the H1N1 virus by permitting the purchase of emergency preparedness supplies).

having engaged in widespread planning even before the pandemic began.¹³⁰ Perhaps due to a brief international scare with the H5N1 virus in 2005,¹³¹ the Florida Office of the State Courts Administrator published a benchguide beginning in 2007 for pandemic influenza preparation and a strategy document in 2006 for keeping the courts open during pandemic influenza.¹³²

Indeed, Florida seems to have been particularly ahead of the curve with respect to pandemic planning.¹³³ The 2006 strategy guide¹³⁴ was drafted at a moment when pandemic influenza was being widely discussed.¹³⁵ In predicting another pandemic event, the strategy document noted it was preparing for an event that could last one to three years, “come in a series of [waves] . . . estimated to last from four to eight weeks,” and infect up to 35% of the population (10% of which were predicted to need hospitalization).¹³⁶ Based on this model, the strategy guide proposed a plan for keeping the courts open during a lengthy period characterized by individual isolation and quarantine, restrictions on travel, and cancellation of public gatherings, school, and work.¹³⁷ This model was designed to meet two important goals:

130. See FLA. CT. EDUC. COUNCIL'S PUBL'NS COMM., *supra* note 46, at iv–vii (noting the Florida Court Benchguide to prepare for pandemics was first published in 2007, two years before H1N1 pandemic began).

131. Sandra Yin, *Avian Flu and Influenza Pandemics*, PRB (Jan. 1, 2006), <https://www.prb.org/avian-flu-and-influenza-pandemics/> [https://perma.cc/8XXY-UNTJ] (“The World Health Organization (WHO) began counting human cases of H5N1 in 2003, when three laboratory-confirmed cases in Vietnam all ended in deaths. By early 2006, WHO had linked 78 deaths to the virus out of 147 reported cases of H5N1 bird flu in humans.”).

132. FLA. CT. EDUC. COUNCIL'S PUBL'NS COMM., *supra* note 46, at vi–vii–7; *Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic*, *supra* note 98, at 3. Indeed, the 2019 version of the benchguide identified a number of previous public health scares that necessitated planning—“SARS in 2002–2003, swine flu (which achieved pandemic proportions) in 2009–2010, the H7N9 strain of avian flu that began spreading in China in early 2013, the West African Ebola epidemic of 2013–2016, and the July 2019 WHO declaration of the Ebola outbreak in the Democratic Republic of the Congo” FLA. CT. EDUC. COUNCIL'S PUBL'NS COMM., *supra* note 46, at vi–vii.

133. See generally *Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic*, *supra* note 98, at 11–18 (outlining a plan for keeping Florida courts operating during a pandemic).

134. *Id.*

135. See *Summary of the 2006–2007 Influenza Season*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/flu/pastseasons/0607season.htm> [https://perma.cc/2U7W-REGK] (reporting the extensive flu activity occurring between October 1, 2006 and May 19, 2007).

136. *Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic*, *supra* note 98, at 4–5.

137. *Id.* at 5.

1. “We must deal with crises in a way that protects the health and safety of everyone at the court facilities; and
2. We must keep the courts open to ensure justice for the people.”¹³⁸

To meet these lofty goals, a list of seven tasks were identified, including updating Court Technology Continuity and Disaster Recovery plans.¹³⁹ Pursuant to this task, the strategy guide advised a pandemic might severely limit face-to-face interactions, and video conference and teleconference infrastructure should be considered.¹⁴⁰ To bring that to fruition, the strategy guide indicated identifying infrastructure components and training opportunities should be started immediately.¹⁴¹ The strategy guide went on to identify a number of other important tasks, including educating court personnel about pandemic safety and operations, improving communications, and considering how to manage summoning jurors and having jurors report for service during a pandemic.¹⁴²

In 2007, the strategy guide was updated¹⁴³ with an interesting example technology plan coming from Florida’s Fifteenth Circuit.¹⁴⁴ In order to provide other Florida courts with a template guide to technology planning, the 2007 strategy guide outline highlighted the Fifteenth Circuit’s three-phase operations plan:

1. Phase I presumes the continued access to existing Court facilities owned by the county for limited hearings. Hardware for Video conferencing and data access can be moved to designated sites with existing infrastructure

138. *Id.* at 8 (internal quotation marks omitted) (highlighting the main goals of pandemic preparedness for Florida courts).

139. *Id.* at 14 (identifying the need to support judicial IT infrastructure necessary for performing judicial functions).

140. *Id.*

141. *Id.* at 25–26 (establishing the importance of availability and awareness of media training prior to a public health emergency).

142. *Id.* at 15–17.

143. See generally Office of the State Courts Administrator, *Best Practices from the Pandemic Influenza COOP Planning in the Florida State Courts*, FLA. STATE CTS. (May 21, 2007), <https://www.flcourts.org/content/download/219225/file/Best-Practices-Pandemic-Planning.pdf> [<https://perma.cc/6TEZ-K6ZB>] (providing a best practices document for preparing Florida courts to advance judicial goals during a pandemic).

144. *Id.* at 1–3 (providing an example for keeping courts operating during a pandemic).

2. Phase II integrates a web conference component to allow dynamic decentralized participation by court officers and parties mixed with limited county facility use.
3. Phase III provides a completely decentralized model, a “Virtual Courtroom” providing a Call-in phone number for parties to be queued and when the time is appropriate be transferred into the virtual courtroom¹⁴⁵

Florida’s Sixth Circuit also laid out a technology-based pandemic-responsiveness plan, noting its use of technology-based reductions in face-to-face contact would be necessary to keep the court operational and was the primary infection control precaution being put into place.¹⁴⁶ As such, Florida’s Sixth Circuit proposed using a teleworking policy for its employees and videoconferencing for court business to keep employees safe while continuing court operations.¹⁴⁷

The follow-up document to the strategy guide is the benchguide, a highly detailed document, with its 2019 version totaling over 160 pages.¹⁴⁸ Inspired by historical pandemics, including the 1918 Spanish flu, the Supreme Court of Florida noted an influenza pandemic “could conceivably disrupt court operations for [eighteen] months or longer,” and the primary concern for the judiciary would be absenteeism.¹⁴⁹ To tackle this problem and provide guidance to keep court operations flowing during a lengthy pandemic, the benchguide proposed a strategy relying on remote audio/video communications systems to keep the caseload of the Florida courts moving.¹⁵⁰ The benchguide noted numerous areas of concern that could be the subject of emergency rules that would evolve in response to the situation, including:

1. Computation of time
2. The form of pleadings and motions

145. *Id.* at 2.

146. *Id.* at 3–4.

147. *Id.* at 4.

148. *See generally* FLA. CT. EDUC. COUNCIL’S PUBL’NS COMM., *supra* note 46 (delineating strategies to deal with Pandemic Influenza).

149. *See id.* at vii–3 (estimating up to one third of judges and court staff could be unavailable during an influenza pandemic).

150. *Id.* at vii.

3. Service and filing of court documents
4. Continuances
5. Recording of proceedings
6. Confrontation rights
7. Open sessions of court
8. Form of the court record
9. Use of communication equipment.¹⁵¹

In addition to awaiting emergency orders, the Supreme Court of Florida laid out a tactical plan to continue operations.¹⁵² First, it identified that the goal in the first 90 days of a given influenza pandemic would be to maintain mission essential functions in a manner meant to limit face-to-face contact, placing greater focus on handling emergency matters relating to quarantine and isolation of individuals or cases initiated by public health authorities.¹⁵³ Beyond the 90-day mark, the goal would be to have “the capacity to conduct jury trials” and handle emergency civil matters while continuing with limitations on face-to-face contact.¹⁵⁴

To ensure these strategic timelines could be met, the benchguide proposed procedures involving isolation and sanitation—including wearing protective garments, increased hand-washing, and training on sanitary methods of document handling.¹⁵⁵ Additionally, the benchguide suggested moving to a paperless document system, mandating fax or electronic filing of documents, and encouraging employees to stay home if they are exposed to illness or experiencing symptoms.¹⁵⁶

Especially in light of COVID-19, the benchguide is particularly interesting in its section on “Last Lines of Defense.”¹⁵⁷ In a truly devastating pandemic situation, the benchguide suggests more radical

151. *Id.* at 83.

152. *See id.* at 84–87 (providing “short-term and long-term tactical objectives” to keep Florida courts operational during an influenza pandemic).

153. *Id.* at 84–86 (“This document provides that the ‘short-term tactical objectives are augmentations of existing [circuit/local] continuity of operations plans (COOP).’”).

154. *Id.* at 85 (detailing the importance of beginning to limit any face-to-face contact in the early stages of pandemic preparation).

155. *Id.* at 88.

156. *Id.* at 88–89.

157. *See id.* at 90 (indicating these recommendations are for when other plans for prevention have failed).

changes to the handling of judicial functions.¹⁵⁸ First, it recommended reducing court business to essential operations by postponing civil actions to prioritize public health matters and any petitions for habeas relief from individuals isolated or in quarantine.¹⁵⁹ Second, the document recommended the courts pursue a judicial “islands” strategy or extreme isolation of judges and their families to ensure courts could continue functioning.¹⁶⁰ The benchguide was apparently inspired by reports of personnel at isolated military bases avoiding SARS and previous U.S. pandemics because of extreme isolation.¹⁶¹ Pursuant to the benchguide, this concept could be imported to judicial functions by asking judges to stay in strict isolation.¹⁶² Strangely, the guide did not seem to consider the possibility of using remote technologies to maintain judicial isolation.¹⁶³ Instead, it referenced the use of airtight courtrooms with internal air filtration systems and partitions separating the judges from the public.¹⁶⁴ The guide hardly mentioned videoconferencing; for example, in noting that judges and court staff should be extremely cautious if dealing with an appearance by a person charged with disobeying quarantine, and social distancing precautions could include handling the appearance by video conference.¹⁶⁵

One of the final “Last Line of Defense” suggestions is rooted in ancient practice—riding the circuit.¹⁶⁶ To the extent that court operations totally ceased in some areas due to absenteeism, the benchguide proposed permitting Florida judges to travel to different locations to reopen incapacitated courts.¹⁶⁷ Wisely, the guide noted, “This solution does not address the prevention of illness but, instead, is a response to an isolated total incapacitation of a court.”¹⁶⁸

158. *Id.*

159. *Id.*

160. *Id.* at 91.

161. *Id.*

162. *Id.*

163. *See generally id.* (discussing the viability of strict isolation to further judicial functions but omitting the benefits of remote technologies in furthering this goal).

164. *Id.*

165. *Id.* at 52.

166. *Id.* at 92 (permitting judges from different circuits to travel to other locations within Florida and carry out essential judicial functions).

167. *Id.*

168. *Id.*

Florida's final H1N1 preparedness document addressed court staffing, as both the strategy document and the benchguide expressed deep concerns about absenteeism and employee safety.¹⁶⁹ As such, the Office of the State Court Administrator published the "Pandemic Staffing Guide" to manage employee presence during the course of a pandemic.¹⁷⁰ The staffing guide increased predictions about absenteeism to 40%, noting there could also be the "need for social distancing in order to limit the number of" people present in the workplace.¹⁷¹ To mitigate these issues and keep justice moving, the staffing guide proposed the use of flexible scheduling and teleworking for court employees during pandemic situations.¹⁷²

Considering the extensive pandemic planning undertaken in Florida, the 2009 H1N1 outbreak caused relatively little disruption in justice in the state.¹⁷³ On May 8, 2009, Chief Justice Peggy Quince signed an Administrative Order in response to the H1N1 public health emergency declared by the Florida Surgeon General.¹⁷⁴ In the Order, Chief Justice Quince noted the extensive planning already undertaken by the Florida courts, and ordered:

All chief judges of the district and circuit courts shall continue ongoing planning and take such precautions as may be necessary in the event of any influenza outbreak, including an immediate review of their emergency preparedness plans and personnel policies All such planning shall be consistent with the policy of mitigating the impact of Influenza A(H1N1) while keeping the courts open to the fullest extent consistent with public safety¹⁷⁵

As part of this Order, mitigating measures were identified to include (1) social distancing plans to eliminate face-to-face contact, (2) sanitary procedures for court property, and (3) "developing methods of using

169. See generally *Pandemic Staffing Guide Ensuring Staffing and Administering Attendance and Leave During a Pandemic*, FLA. STATE CTS. 3 (Aug. 2009), <https://www.flcourts.org/content/download/219223/file/pandemic-staffing-guide.pdf> [<https://perma.cc/QJ49-KVA4>] (preparing Florida courts for the possibility of a 40% absentee rate).

170. *Id.*

171. *Id.* at 3.

172. *Id.* at 7.

173. See *In re* Response of the Florida State Courts System to Influenza A(H1N1), *supra* note 130, at 2–3 (ordering Florida courts to comply with mitigating measures and developing methods to maintain court operations).

174. *Id.* at 1, 5.

175. *Id.* at 2.

technology, electronic documents, electronic communications, and electronic ways of conducting court business to mitigate the spread of the virus, consistent with law, including a reduction in the use of paper.”¹⁷⁶

The Florida justice system was not the only entity to engage in pandemic influenza preparedness planning ahead of the H1N1 pandemic.¹⁷⁷ The Bureau of Justice Assistance prepared a Road Map for Courts thinking about Pandemic Emergency Preparedness Planning.¹⁷⁸ The document noted a number of critical issues, including potential loss of staff, disruption in the supply of necessary equipment, restriction in access to the courts, and the need to consolidate cases in order to keep justice moving.¹⁷⁹ Interestingly, the document did not take on the question of video appearance in a significant way.¹⁸⁰ The document posited the question as to whether preliminary hearings should be held through video conferencing, but it did not answer the question or provide additional guidance.¹⁸¹ Additionally, the report referred to the use of paperless systems, like electronic filing, but did not discuss the item in detail.¹⁸² Generally, it recommended, “Consideration of technological and other capabilities needed to continue operations, including possible measures that will need to be instituted to limit face-to-face interactions and rules that will need to be drafted to provide for remote proceedings.”¹⁸³ It was apparently used to success in Texas to mitigate the impact of the H1N1 pandemic on state court operations.¹⁸⁴

176. *Id.* at 3.

177. *See* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., GUIDELINES FOR PANDEMIC EMERGENCY PREPAREDNESS PLANNING: A ROAD MAP FOR COURTS 1 (Mar. 2007), <https://www.txcourts.gov/media/1353181/PandemicRoadMapFINAL-031407.pdf> [<https://perma.cc/LBT6-7E8K>] (indicating the assembly of this task force to ensure that local and state courts have a guide for pandemic planning).

178. *Id.*

179. *Id.* at 10–11, 13.

180. *See id.* at 14 (limiting video technology discussion to “booking” of inmates and “offsite magistrate or bail hearings”).

181. *Id.* at 20.

182. *Id.* at 14.

183. *See id.* at 14–15 (summarizing necessary measures to ensure courts effectively carry out their judicial functions).

184. *See Task Force on Judicial Emergency Preparedness*, TEX. JUD. BRANCH, <https://www.txcourts.gov/organizations/policy-funding/task-force-on-judicial-emergency-preparedness/jrite-resource-archives/> [<https://perma.cc/5H4Q-NQPM>] (listing the Bureau of Justice Assistance's Guidelines among the Texas Task Force's resource archives).

Other states also engaged in pre-H1N1 pandemic preparedness planning.¹⁸⁵ For example, Michigan published the Public Health Law Bench Book for Michigan Courts in 2007,¹⁸⁶ and Indiana published the Public Health Law Bench Book for Indiana Courts in 2005.¹⁸⁷

At the federal level, the Administrative Office of the Courts reported in 2009 its success in assisting the federal courts during emergency preparedness efforts relating to the H1N1 outbreak.¹⁸⁸ This success involved ensuring federal courts had a pandemic influenza preparedness annex as “part of their continuity of operations plans” and conducting a telework test to ensure that the agency could work remotely during a pandemic in order to provide support to the judiciary.¹⁸⁹

III. OTHER PREPAREDNESS PLANS

The H1N1 crisis gave courts a chance to test the waters of serious preparedness planning.¹⁹⁰ Indeed, this type of testing happened under otherwise tough circumstances—there was a change in presidential administration during the crisis, and the country was suffering from a severe economic downturn, making resources at the public and private levels scarce and uncertain.¹⁹¹ In its 2012 retrospective on the H1N1 crisis, the Department of Health and Human Services noted:

The 2009 H1N1 influenza pandemic, which was declared by the World Health Organization (WHO) in June 2009 and officially ended in August 2010, provided an important test of our nation’s preparedness activities and our

185. Mike Cox et al., *Public Health Law Bench Book for Michigan Courts*, MICH. OFF. OF THE ATT’Y GEN. (Oct. 2007), https://www.michigan.gov/documents/ag/Michigan_Public_Health_Bench_Book_221936_7.pdf [<https://perma.cc/QHU5-GUJ5>].

186. *Id.*

187. Amy R. Schofield & Linda L. Chezem, *Public Health Law Bench Book for Indiana Courts*, CTR. FOR PUB. HEALTH L. P’SHPIS (2005), <http://www.nfpca.org/Legal/bench/IN/INBenchBook.pdf> [<https://perma.cc/ZQM3-WCX3>].

188. James C. Duff, *Annual Report of the Director*, ADMIN. OFF. OF THE U.S. CTS. 21–22 (2009), <https://www.uscourts.gov/sites/default/files/annualreport2009.pdf> [<https://perma.cc/987G-842R>] (discussing the agency’s success in educating courts on pandemic response plans).

189. *Id.* at 22.

190. See generally *An HHS Retrospective on the 2009 H1N1 Influenza Pandemic to Advance All Hazards Preparedness*, PUB. HEALTH EMERGENCY, at ii (June 15, 2012), <https://www.phe.gov/Preparedness/mcm/h1n1-retrospective/Documents/h1n1-retrospective.pdf> [<https://perma.cc/7PM5-T9C8>] (discussing and analyzing the effectiveness of the United States’ preparedness and response to the 2009 H1N1 influenza pandemic).

191. *Id.*

ability to respond and adapt to a large-scale, protracted public health emergency with the potential for enormous health consequences. For the first time since 1968, we faced the prospect of a pandemic influenza virus that could have had an enormous impact on morbidity and mortality, as well as on our nation's economy.¹⁹²

Perhaps it is not surprising the judiciary took notice, and additional preparedness plans came online in the 2010s.¹⁹³

In July 2017, the Supreme Court of Virginia published a Pandemic Influenza Bench Book, a document similar in scope to the Florida benchguide.¹⁹⁴ A critical section included operations in the Virginia courts during a pandemic influenza and asked local outfits to develop a prioritization system for court operations, distinguishing between Mission Critical Functions, which must remain in effect, and Mission Essential Functions, which can be resumed once the court has the necessary capacity.¹⁹⁵ Additionally, the Bench Book listed the applicable Virginia laws allowing the use of technology to minimize in-person contact or the exchange of documents.¹⁹⁶ Regarding civil litigation, the Bench Book identified six existing Virginia statutes allowing remote hearings or the use of special rules of procedure.¹⁹⁷ For example:

- Va. Code § 16.1-93.1¹⁹⁸ and Va. Code § 17.1-513.2.¹⁹⁹ Use of telephonic communication systems or electronic video and audio

192. *Id.*

193. Indeed, preparedness plans came online at a number of governmental levels. For example, the Illinois Department of Public Health published a Pandemic Influenza Preparedness and Response Plan in May 2014 analyzing the phases of a pandemic. There is a proposition of a basic plan providing a framework for federal, state, local, private sector, and nongovernmental entities to prepare for the disruption of a pandemic outbreak and discusses the roles and responsibilities of the State government, nongovernmental and volunteer organizations and the private sector. *Pandemic Influenza Preparedness and Response Plan*, ILL. DEPT. OF PUB. HEALTH (May 2014), http://www.idph.state.il.us/pandemic_flu/Illinois_Pandemic_Flu_Plan.pdf [https://perma.cc/YVC7-XKBE].

194. Virginia's Pandemic Influenza Bench Book states it was written with "two purposes in mind: to serve as a reference tool for Virginia's judges, and as a planning tool for Virginia's courts . . ." This resource is meant to serve as a plan for any pandemic response to help courts stay open during a pandemic. *Pandemic Influenza Bench Book for Virginia's Court System*, S. CT. OF VA., at ix (July 2017), <http://www.courts.state.va.us/programs/pfp/benchbook.pdf> [https://perma.cc/C9VU-WV7U].

195. *See id.* at 7-1 (highlighting the importance of categorizing judicial functions to ensure courts remain operational).

196. *Id.* at 7-5-7-14.

197. *Id.* at 7-8-7-9.

198. *Id.* at 7-8 (citing VA. CODE ANN. § 16.1-93.1).

199. *Id.* (citing VA. CODE ANN. § 17.1-513.2).

communication systems to conduct hearing. This section allows a general district court [or circuit court] to conduct any civil proceeding, in which a party or witness is incarcerated or when otherwise authorized by the court, using telephonic communication or electronic audio and video communication system to provide for the appearance of any parties and witnesses.²⁰⁰

- Va. Code § 20-88.59.²⁰¹ Special rules of evidence and procedure. This section provides that “[i]n a proceeding under this chapter, a tribunal of the Commonwealth shall permit a party or witness residing outside the Commonwealth to be deposed or to testify under penalty of perjury by telephone, audiovisual means, or other electronic means at a designated tribunal or other location. A tribunal of the Commonwealth shall cooperate with other tribunals in designating an appropriate location for the deposition or testimony.”²⁰²

Other states ultimately had or adopted pandemic response measures as well, and most focused on the idea that the pandemic would be influenza.²⁰³ For example, such guides include the Judicial Council of Georgia published the *Georgia Pandemic Influenza Bench Guide*,²⁰⁴ the North Carolina Administrative Office of the Courts published the *Pandemic Emergency Bench Book for Trial Judges*,²⁰⁵ and the Ohio Supreme Court published the *Public Health Preparedness Bench Book: A Guide for the Ohio Judiciary & Bar on Legal Preparedness for Public Health Emergencies & Routine Health Cases*.²⁰⁶ While

200. *Id.* (citation omitted).

201. *Id.* (quoting VA. CODE ANN. § 20-88.59).

202. *Id.* (quoting VA. CODE ANN. § 20-88.59).

203. JUD. COUNCIL OF GA., ADMIN. OFF. OF THE CTS. OF GA., GEORGIA PANDEMIC BENCH GUIDE 2018 (2018) [hereinafter GEORGIA PANDEMIC BENCH GUIDE 2018], <https://georgiacourts.gov/wp-content/uploads/2019/09/Pandemic-Bench-Guide-Final.pdf> [<https://perma.cc/8W67-XGC9>]; PAUL REINHARTSEN, N.C. ADMIN. OFF. OF THE CTS., PANDEMIC EMERGENCY BENCH BOOK FOR TRIAL JUDGES (2009), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/PandemicEmergencyBenchBook_Dec2009.pdf [<https://perma.cc/KZM2-VHMU>]; ROBERT P. RINGLAND, PUBLIC HEALTH PREPAREDNESS BENCH BOOK: A GUIDE FOR THE OHIO JUDICIARY & BAR ON LEGAL PREPAREDNESS FOR PUBLIC HEALTH EMERGENCIES & ROUTINE HEALTH CASES, <http://www.supremecourt.ohio.gov/Boards/courtSecurity/PandemicPrepareGuide.pdf> [<https://perma.cc/C26C-NNXR>].

204. *See* GEORGIA PANDEMIC BENCH GUIDE 2018, *supra* note 204, at 8 (emphasizing Georgia courts must deal with a pandemic by “protect[ing] the health and safety of everyone” at court facilities and keeping courts open to facilitate justice for the people).

205. *See* REINHARTSEN, *supra* note 204, at 3 (providing North Carolina judges with guidance on isolation/quarantine order during a pandemic).

206. *See* RINGLAND, *supra* note 203, at 2 (providing judicial personnel and attorneys with guidance on dealing with a pandemic).

some of these benchguides discussed the impact of a pandemic on court operations, many focused on broader public health law issues concerning a pandemic.²⁰⁷ For example, the 2018 version of the Georgia Pandemic Bench Guide examined issues like “[i]nvoluntary [t]reatment for [c]ommunicable [d]isease,” searches of property, and habeas corpus.²⁰⁸ However, it also discussed the continuity of operations plans for the court system.²⁰⁹ Specifically, it identified the impacts of the pandemic scenario, including a possible increase in “emergency matters and case filings generated due to issues associated with quarantine;” that one-third of court personnel and jurors would be unavailable due to illness or death; that “[f]ace-to-face contact between judges, attorneys, parties, clerks and deputy clerks, sheriffs and deputy sheriffs, court administrators and staff, state and local public health officials, jurors, etc., necessary to perform mission essential functions may be dramatically limited or unavailable;” and that court facilities may be impacted by lack of staffing.²¹⁰ Assuming such issues would continue for a twelve- to eighteen-month time period, the Georgia plan asked its courts to develop a plan for the first ninety days that would allow the continuation of mission essential functions (to be defined in each court’s continuity of operations plan) and to keep capacity to deal with emergency matters brought on by quarantine and public health issues.²¹¹

IV. PLANNING IN ACTION—THE FEDERAL COURTS AND THE 2020 COVID-19 PANDEMIC

In February 2007, two years before the H1N1 pandemic, the U.S. Department of Health and Human Services’ Centers for Disease Control and Prevention (CDC) issued documentary guidance on measures that could be taken to reduce deaths during an influenza pandemic.²¹² This

207. GEORGIA PANDEMIC BENCH GUIDE 2018, *supra* note 204, at 51 (“Georgia bears primary responsibility for preventing and responding to threats to the public’s health.”) (citations omitted); *see also* REINHARTSEN, *supra* note 204, at 7 (enforcing public health laws via criminal prosecutions or, alternatively, via civil actions); RINGLAND, *supra* note 204, at 35 (discussing the role of state governments in enacting and enforcing public health laws).

208. GEORGIA PANDEMIC BENCH GUIDE 2018, *supra* note 204, at 14, 29, 41.

209. *Id.* at 8–9.

210. *Id.*

211. *Id.* at 9.

212. *See generally* Press Release, Ctrs. for Disease Control & Prevention, HHS Unveils Two Efforts to Advance Pandemic Flu Preparedness (Feb. 1, 2007), <https://www.cdc.gov/media/pressrel/2007/r070201a.htm> [<https://perma.cc/Q3RG-9N3X>] (announcing measures which may reduce the spread of infection and deaths during a pandemic).

included a Pandemic Severity Index²¹³ proposed to help officials adopt nonpharmaceutical measures, like isolation and quarantine, to contain the spread of a pandemic.²¹⁴ It ranks the severity of a pandemic by the number of fatalities it causes, ranging from a Category One pandemic (less than 90,000 deaths) to a Category Five pandemic (more than or equal to 1.8 million deaths).²¹⁵ With its color-coded recommendations, it is a now timely document encouraging isolation, quarantine, and modifying public gatherings and work schedules to decrease the chance of overburdening the hospital system during a pandemic and decreasing the risk of illness and death.²¹⁶

Commenting on this Pandemic Severity Index, the Task Force on Pandemic Preparedness Planning for the Courts noted it showed the importance of early planning for potential public health emergencies.²¹⁷ The planning is particularly important in the federal courts, which are administratively decentralized and give the authority for preparedness planning to local judicial officials.²¹⁸ There is no question the courts play an important role in emergency situations, but there is no specific constitutional or statutory mandate discussing the operations of federal courts during prolonged periods of emergency.²¹⁹ As such, every federal court is ultimately responsible for the continued operation of the court during a pandemic event while working with administrative agencies like the Administrative Office of the Courts.²²⁰ And while it is difficult to plan in advance for a black swan event like a pandemic, upfront planning provides the greatest chance for court operations to continue. Florida's advanced planning and its experience during the H1N1 pandemic is a potent

213. See *Mitigation Slides*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/media/pdf/MitigationSlides.pdf> [<https://perma.cc/59B6-A3M8>] (identifying recommended community planning strategies according to potential pandemic fatality rates).

214. *Id.*

215. *Id.*

216. *Id.*

217. R. ERIC PETERSON, CONG. RSCH. SERV., RL31978: EMERGENCY PREPAREDNESS AND CONTINUITY OF OPERATIONS (COOP) PLANNING IN THE FEDERAL JUDICIARY (2005), <https://fas.org/sgp/crs/secrecy/RL31978.pdf> [<https://perma.cc/5JTR-Z38L>].

218. *Id.* at 2.

219. *Id.* at 9 (noting the lack of constitutional or statutory authority governing the judiciary during prolonged emergency periods).

220. *Id.* at 2.

example.²²¹

In the Executive Branch, it is the Administrative Office of the Courts, an executive agency, that provides guidance to the federal courts regarding disaster and emergency preparedness.²²² Generally, the Administrative Office of the Courts “provides a broad range of legislative, legal, financial, technology, management, administrative, and program support services to federal courts.”²²³ Within the Administrative Office of the Courts, the Office of Emergency Preparedness helps courts develop crisis response plans.²²⁴ For example, post-September 11, 2001, the Administrative Office of the Courts supplied courts with guidelines for handling mail potentially contaminated with anthrax and arranged for testing courthouses for biological and chemical hazards.²²⁵

With the guidelines of the Administrative Office of the Courts, individual components of the federal judiciary develop Continuity of Operations Plans (COOP) in order to continue the essential operations of the entity during an emergency situation.²²⁶ Generally, such planning involves phases that will guide operations during specified time periods or situations and addresses items like the safety of employees, what are considered essential operations (and how to continue essential operations without significant interruption), and how to return to full operations as quickly as possible.²²⁷

The federal courts' COOP planning was put to the test in the early spring of 2020.²²⁸ COVID-19, a novel coronavirus that had been rapidly spreading in Asia and Europe, was first identified in the United States in

221. See generally *In re* Response of the Florida State Courts System to Influenza A(H1N1), *supra* note 130 (instituting measures concerning pandemic preparedness in response to H1N1 influenza); see also *supra* note 131 and accompanying text.

222. PETERSON, *supra* note 218, at 2.

223. *Judicial Administration*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration> [<https://perma.cc/5ZBN-C9JJ>].

224. PETERSON, *supra* note 218, at 3.

225. *Id.*; see *The Threat of an Anthrax Attack*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/anthrax/bioterrorism/threat.html> [<https://perma.cc/NL5B-SYZ8>] (“Anthrax makes a good weapon because it can be released quietly and without anyone knowing.”).

226. PETERSON, *supra* note 218, at 1.

227. *Id.* at 5.

228. *Federal Courts, Crises, and the Novel Coronavirus: How America's Courts Respond to Exigent Circumstances*, FED. BAR ASSOC. (May 21, 2020), <https://www.fedbar.org/blog/federal-courts-crises-and-the-novel-coronavirus-how-americas-courts-respond-to-exigent-circumstances/> [<https://perma.cc/Q2R3-LR72>].

January 2020.²²⁹ The virus was highly contagious and spread through person-to-person contact by respiratory droplets.²³⁰ Initially considered particularly dangerous for the elderly and individuals with pre-existing health conditions, especially conditions relating to the immune system, COVID-19 proved dangerous to all segments of the population.²³¹ Initial efforts at lowering fatalities and minimizing chances of an overburdened hospital system included social distancing, disinfecting high-touch surfaces, and using cloth face masks when in public.²³²

By March 2020, the World Health Organization had classified COVID-19 as a global pandemic, and the United States was in a state of emergency.²³³ This prompted significant societal changes²³⁴—what was once seen as a news story in Asia and Europe was now an American reality. Businesses closed their doors, schools moved to online learning, and some workers transitioned rapidly to a work-from-home model.²³⁵ States also

229. *First Travel-Related Case of 2019 Novel Coronavirus Detected in United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 21, 2020), <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html> [<https://perma.cc/X2EN-V2RU>].

230. *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> [<https://perma.cc/XWE3-NQ88>].

231. Denise Chow, *Coronavirus Is Hard on Older People—and Scientists Aren't Sure Why*, NBC NEWS (Mar. 10, 2020, 4:00 AM), <https://www.nbcnews.com/science/science-news/coronavirus-hard-older-people-scientists-aren-t-sure-why-n1153701> [<https://perma.cc/3972-HTB2>].

232. *See Considerations for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> [<https://perma.cc/PKX6-HU8H>] (suggesting the use of masks when you are unable to maintain social distance); *see also Cleaning and Disinfecting Your Facility*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html> [<https://perma.cc/ARN5-2KNL>] (“Generally, the more people who touch a surface, the higher the risk. Prioritize cleaning high-touch surfaces at least once a day.”).

233. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020), *available at* <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf> [<https://perma.cc/5NVR-G2UD>].

234. *See, e.g., Considerations for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> [<https://perma.cc/PKX6-HU8H>] (providing guidance to individuals concerning effectively wearing masks).

235. Anne Sraders & Lance Lambert, *Nearly 100,000 Establishments that Temporarily Shut Down Due to the Pandemic Are Now Out of Business*, FORTUNE (Sept. 28, 2020, 9:25 AM), <https://fortune.com/2020/09/28/covid-buisnesses-shut-down-closed/> [<https://perma.cc/D5HB-DQ6N>]; Vicky Valet, *Working from Home During the Coronavirus Pandemic: What You Need to Know*, FORBES (Mar. 12, 2020, 4:30 PM), <https://www.forbes.com/sites/vickyvalet/2020/03/12/working-from-home-during-the-coronavirus-pandemic-what-you-need-to-know/?sh=2efc66a71421> [<https://perma.cc/33LG-GXSZ>]; Lara Fishbane & Adie Tomer, *As Classes Move Online During COVID-19, What*

began to limit the number of people that could be present during any in-person gathering.²³⁶

These changes were based on sound epidemiological principles.²³⁷ The COVID-19 virus is spread primarily through respiratory particles inhaled by others in the vicinity of an infected person.²³⁸ As such, one of the best ways to contain the spread of the virus is to reduce in-person contact and ensure that as few people as possible are exposed to the “cloud” of particles that emanate from human noses and mouths during normal interactions.²³⁹ Americans are now familiar with the phrase “social distancing,” which captures the idea that limiting in-person contact and staying six feet apart from other people in public places, is an effective way to decrease potential exposure to respiratory droplets containing the virus.²⁴⁰ This is particularly important when a virus, like COVID-19, turns some people into asymptomatic carriers that can spread the virus to others, even though the spreader does not feel sick.²⁴¹

Beginning in early March, federal district and circuit courts began to activate their COOP plans.²⁴² A good example comes from the Central

Are Disconnected Students to Do?, BROOKINGS (Mar. 20, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/20/as-classes-move-online-during-covid-19-what-are-disconnected-students-to-do/> [https://perma.cc/QAH6-J6EK].

236. Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP, <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> [https://perma.cc/4NX4-B4E7].

237. *Principles of Epidemiology in Public Health Practice, Third Edition an Introduction to Applied Epidemiology and Biostatistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/csels/dsepd/ss1978/lesson1/section1.html> [https://perma.cc/SVF4-S35M].

238. *Transmission of SARS-CoV-2: Implications for Infection Prevention Precautions*, WORLD HEALTH ORG. (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions> [https://perma.cc/2WH3-8XF3].

239. *Social Distancing*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [https://perma.cc/4KDT-HT5R].

240. *Id.*

241. Pien Huang, *What We Know About the Silent Spreaders of COVID-19*, NPR (Apr. 13, 2020, 4:43 PM), <https://www.npr.org/sections/goatsandsoda/2020/04/13/831883560/can-a-coronavirus-patient-who-isnt-showing-symptoms-infect-others> [https://perma.cc/W58G-HSY6].

242. *See Court Operations During COVID-19: 50-State Resources*, JUSTIA, <https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/> [https://perma.cc/RRM4-2HG7] (summarizing how state court systems “altered their operations in response to the coronavirus pandemic”).

District of California, in an order dated March 19, 2020.²⁴³ The Order notes that the state of California was under a declaration of emergency, that in-person gatherings should not exceed ten people, and that COVID-19 infections in the district were expected to rise.²⁴⁴ As such, the district closed the courthouses for public hearings, limited emergency civil matters to telephonic hearing only, and provided judges with discretion to employ telephonic hearings in criminal matters (with in-person matters directed to a single location within the district).²⁴⁵ Judicial chambers' staff were also directed to telework.²⁴⁶

The approach employed by the Central District of California is among the most common of early responses to COVID-19 in the federal courts.²⁴⁷ It provides a mix of virtual and in-person options, with a key element being judicial discretion.²⁴⁸ Under the Order, even criminal actions are given a telephonic hearing option based on the discretion of the underlying judge.²⁴⁹

Other courts revealed a more immediate adoption of remote proceedings.²⁵⁰ On March 13, 2020, the Northern District of Alabama issued an order referencing the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which authorized the use of video and telephone conferencing for criminal matters on motion of the court.²⁵¹ The district also noted the rapid spread of COVID-19 cases in Alabama and authorized the use of video teleconferencing or audio teleconferencing in several criminal case events, with the consent of the

243. *In re* Coronavirus Public Emergency Activation of Continuity of Operations Plan, No. 20-042, 1 (C.D. Cal. Mar. 19, 2020), https://www.cacd.uscourts.gov/sites/default/files/documents/Order_20-042.pdf [<https://perma.cc/3LBY-JCWF>].

244. *Id.* at 1–2.

245. *Id.* at 2–3.

246. *Id.* at 3.

247. *See id.* at 2 (activating district's continuity of operations plan to maintain performance of essential functions).

248. *Id.* at 2–3.

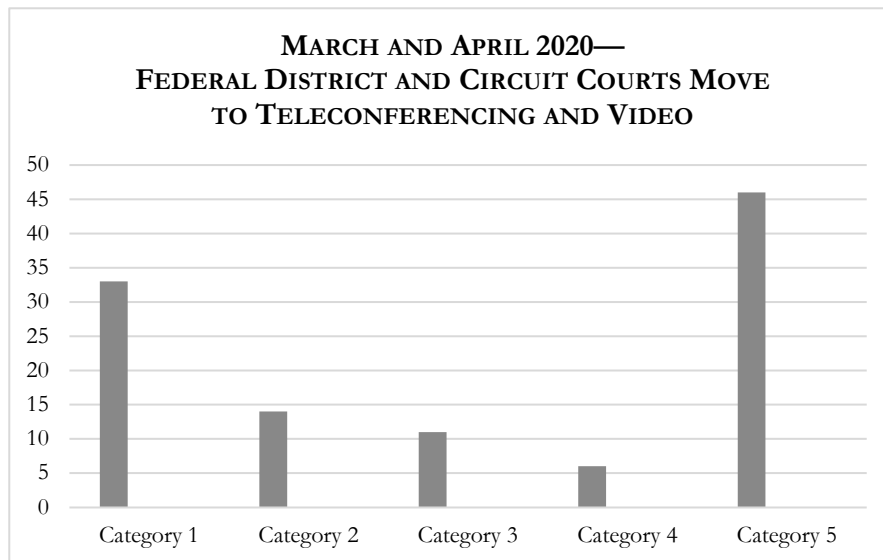
249. *Id.* at 3.

250. *See, e.g., In re* The National Emergency Declared on March 13, 2020, No. 2020-03 Authorizing Use of Video and Audio to Conduct Criminal Proceedings (N.D. Ala. Mar. 30, 2020), <https://www.alnd.uscourts.gov/sites/alnd/files/General%20Order%202020-03%20-%20Authorizing%20Use%20of%20Video%20and%20Audio%20to%20Conduct%20Criminal%20Proceedings%20effective%20March%2030%2C%202020.pdf> [<https://perma.cc/EM5Q-2Y7K>] (authorizing remote-teleconferencing for criminal cases under the CARES Act).

251. *Id.*

Defendant.²⁵² The Northern District of Florida also issued an order showing a preference for remote appearance—the district issued equipment to all staff to allow them to telework, and “[i]n-person hearings, when possible, [were] converted to telephonic or video conference hearings.”²⁵³

The chart below shows the wide disparity in responses to the early spread of the COVID-19 pandemic in the federal district and circuit courts, with a focus on individual courts’ decisions to adopt videoconferencing or teleconferencing to continue with their docket²⁵⁴:



252. *Id.*

253. *In re* Court Operations Under the Exigent Circumstances Created by COVID-19, No. 4:95mc40111, 1–2 (N. D. Fla. Mar. 23, 2020), http://www.flnd.uscourts.gov/sites/default/files/general-orde/20200323_AdminOrder_COVID19_Summary_Fina.pdf%5B87%5D.pdf [https://perma.cc/B2ZV-K76Q].

254. *Court Orders and Updates During COVID-19 Pandemic*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> [https://perma.cc/XV42-B47U].

Category 1: Immediate teleconferencing/ videoconferencing response or no continuances	Category 2: Postponed or had in-person hearings then proceeded to teleconferencing in less than a month	Category 3: Postponed or had in-person hearings for over a month then proceeded to teleconferencing	Category 4: Postponed or continued all hearings and did not use teleconferencing/ videoconferencing	Category 5: Postponed or continued unless the judge or parties requested teleconferencing or videoconferencing
<ol style="list-style-type: none"> 1. First Circuit 2. Second Circuit 3. Fifth Circuit 4. Seventh Circuit 5. Eleventh Circuit 6. Federal Circuit 7. Alabama Northern 8. Alabama Southern 9. District of Columbia 10. Florida Northern 11. Georgia Middle 12. Georgia Southern 13. Illinois Central 14. Illinois Northern 15. Kentucky Eastern 16. Kentucky Western 17. Michigan Western 18. Mississippi Northern 19. Missouri Eastern 20. Nebraska 21. New Hampshire 22. New York Northern 23. New York Southern 	<ol style="list-style-type: none"> 1. Tenth Circuit 2. Alabama Middle 3. Arkansas Eastern 4. Colorado 5. Hawaii 6. Idaho 7. Louisiana Eastern 8. Louisiana Middle 9. Maine 10. Michigan Eastern 11. Pennsylvania Middle 12. Puerto Rico 13. Tennessee Western 14. Wisconsin Eastern 	<ol style="list-style-type: none"> 1. Sixth Circuit 2. Eighth Circuit 3. Alaska 4. California Northern 5. Hawaii 6. Indiana Northern 7. Missouri Western 8. Oklahoma Northern 9. Oregon 10. Vermont 11. West Virginia Southern 	<ol style="list-style-type: none"> 1. Kansas 2. Maryland 3. Nevada 4. Oklahoma Eastern 5. Oklahoma Western 6. Wisconsin Western 	<ol style="list-style-type: none"> 1. Third Circuit 2. Fourth Circuit 3. Ninth Circuit 4. District of Columbia Circuit 5. Arizona 6. Arkansas Western 7. California Central 8. California Eastern 9. California Southern 10. Connecticut 11. Delaware 12. Florida Middle 13. Florida Southern 14. Georgia Northern 15. Guam 16. Illinois Southern 17. Indiana Southern 18. Iowa Northern 19. Iowa Southern 20. Louisiana Western 21. Massachusetts 22. Minnesota 23. Mississippi Southern 24. Montana 25. New Jersey 26. New Mexico 27. New York Eastern 28. New York Western 29. North Carolina Eastern 30. North Carolina Eastern

24. North Carolina Western				31. North Carolina Middle
25. Northern Mariana Islands				32. Ohio Southern
26. Ohio Northern				33. Oregon
27. Rhode Island				34. Pennsylvania Eastern
28. Tennessee Eastern				35. Pennsylvania Western
29. Utah				36. South Carolina
30. Virginia Western				37. South Dakota
31. West Virginia Northern				38. Tennessee Middle
32. Wisconsin Eastern				39. Texas Eastern
33. Wyoming				40. Texas Northern
				41. Texas Southern
				42. Texas Western
				43. Virgin Islands
				44. Virginia Eastern
				45. Washington Eastern
				46. Washington Western

As the chart above illustrates, there was a disparate response to the early stages of the pandemic. Indeed, even within individual circuit courts' geographic areas, individual district courts took various approaches.

In some ways, this flexibility is a good thing—although the COVID-19 pandemic is and was a national event, its early impact was vastly different by geographic region.²⁵⁵ At the time of initial responses, cases of the virus were higher in the American Northeast, thus necessitating different measures for that area.²⁵⁶ However, the disparate approaches did create confusion.²⁵⁷ Local bar associations, private firm websites, and legal

255. See Stephanie Bialek et al., *Geographic Differences in COVID-19 Cases, Deaths, and Incidence—United States, February 12–April 7, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 465, 464–66 (2020) (“Cumulative COVID-19 incidence varied substantially by jurisdiction, ranging from 20.6 cases per 100,000 in Minnesota to 915.3 in NYC.”).

256. See Sarah Mervosh & Julie Bosman, *The Northeast Held the Virus in Check. Now Cases Are Inching Up Again*, N.Y. TIMES (Oct. 9, 2020), <https://www.nytimes.com/2020/10/09/us/northeast-coronavirus-cases.html> [<https://perma.cc/TP7W-Q3FH>] (discussing the devastation experienced by the Northeast due to COVID-19 in Spring 2020).

257. See, e.g., Elise Schmelzer, *Uneven Response to Coronavirus in Colorado Courts Leads to Confusion, Differing Outcomes for Defendants* (Mar. 21, 2020), <https://www.denverpost.com/2020/03/21/colorado-courts-coronavirus-judges/> [<https://perma.cc/4M3Z-7YPC>] (stating varying approaches to conducting criminal hearings during the pandemic has led to confusion and unpredictability).

research providers became critical for providing up-to-date information about court operations and requirements.²⁵⁸

Additionally, whether or not jury trials were allowed varied significantly by court.²⁵⁹ For example, the Western District of Texas continued with jury trials and grand jury proceedings until November 2020, when it determined that it was unsafe to continue to do so based on positivity rates and hospitalization rates.²⁶⁰ The District of Maryland showed the same kind of behavior—although it was re-starting jury trials in August 2020—by November 2020, all in-person proceedings were suspended.²⁶¹

Other federal courts located in cold-weather states made the same move, noting concerns about increased infection rates in the winter season.²⁶² For example, the Western District of Pennsylvania, the District of Colorado, and the Northern District of New York decided to suspend jury trials in order to protect the health and safety of court staff and litigants.²⁶³ Judges also noted reluctance on the part of potential jurors to participate in in-person proceedings, thus impacting the ability of courts to gather a sufficient cross-section of the population when seating a jury.²⁶⁴

Following the March 2020 early responses by federal courts, the Administrative Office of the Courts issued a gating strategy in April 2020 to help provide courts with benchmarks on how to reopen or lift restrictions.²⁶⁵ The main analysis under the gating strategy was to use local data to determine what types of in-person functions were appropriate in a given geographic area.²⁶⁶ Like its previous COOP strategies, the gating

258. See, e.g., *COVID19 Response Resources*, SAN ANTONIO BAR ASS'N, available at <https://sanantoniobar.org/?pg=COVIDRESOURCE> [<https://perma.cc/LF97-ALYX>] (providing updates and notices regarding federal, state, and local courts in the San Antonio metro area).

259. See generally *Court Operations During COVID-19: 50-State Resources*, *supra* note 243 (summarizing varied approaches to jury trials during COVID-19 pandemic).

260. Angela Morris, *Amid COVID-19 Spike, 25 Federal Courts in 21 States Are Quitting Jury Trials Again*, LAW (Nov. 20, 2020, 2:22 PM), <https://www.law.com/texaslawyer/2020/11/20/amid-covid-19-spike-25-federal-courts-in-21-states-are-quitting-jury-trials-again/?sreturn=20210219154204> [<https://perma.cc/C5YZ-3ECX>].

261. *Courts Suspending Jury Trials As COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge?utm_campaign=usc-news&utm_medium=email&utm_source=govdelivery [<https://perma.cc/SWK2-UYTS>].

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

strategy was heavily reliant on local control and decision-making.²⁶⁷ Central was employee safety, with the AOC noting:

The health and welfare of each Judiciary employee, contractor, and member of the public that enters our facilities should be paramount in the decisions that are made as these guidelines are implemented. Because each state and municipality is in a different posture in the fight against COVID-19, each circuit and district will have to make local decisions on operational status based on the jurisdiction's current COVID-19 case count and local stay-at-home and quarantine orders.²⁶⁸

The actual gating plan is divided into four phases, with the phase level determined by a locality's "total population[,] population density[,] population over 60[,] availability of ICU beds[,] stress on the hospital system, and confirmed cases of COVID-19."²⁶⁹ Gating criteria include what exposure has occurred at the court facilities, whether there is a "[s]ustained downward trend of cumulative daily COVID-19 case counts over a 14-day period," and if local and state authorities have restricted movement or issued shelter-in-place orders.²⁷⁰ Courts were also directed to consider their phase selection in conjunction with the phase being announced by local public health and safety agencies.²⁷¹ The critical steps of each phase are laid out by sub-sections impacting employees, the judges/court, human resources, and facilities.²⁷² For example, regarding court operations, Phase One (the most restrictive phase) states that in-person court proceedings should:

[C]ontinue to be minimized (critical cases only) using video- and teleconferencing to the greatest extent possible. Those who must conduct face-to-face meetings should limit gatherings to no more than 10-people, adhere to strict social 6-foot distancing and hygiene protocols (to include wearing of

267. *Courts Begin to Consider Guidelines for Reopening*, U.S. CTS. (Apr. 27, 2020), <https://www.uscourts.gov/news/2020/04/27/courts-begin-consider-guidelines-reopening> [<https://perma.cc/2ZD2-8FPI>].

268. *Federal Judiciary COVID-19 Recovery Guidelines*, U.S. CTS. 2 (May 7, 2020), <https://www.americanbar.org/content/dam/aba/publications/GAO/federal-judiciary-covid-19-recovery-guidelines.pdf> [<https://perma.cc/D8MU-2243>].

269. *Id.* at 5.

270. *Id.* at 3.

271. *Id.* at 3, 5.

272. *Id.* at 9–13.

face coverings or masks), and make every attempt to “prescreen” supervisees and clients to ensure they are asymptomatic for COVID-19.²⁷³

Phase Four, the least restrictive phase of the plan, is to be used after a public health announcement stating that “COVID-19 has been suppressed within the United States.”²⁷⁴ At that point, there would be unrestricted staffing of the federal courthouses, and “full, unrestricted operations and activities.”²⁷⁵

V. NEXT STEPS AND LESSONS LEARNED

In analyzing the early stage of pandemic responsiveness in the federal courts, a few items stand out as lessons for the future: the impact on court caseloads, the preference for in-person proceedings, the use of new technology, and the importance of clear, preemptive planning. There is certainly no question that COVID-19 will breed a new generation of COOP plans, state judicial bench guides, and guidance from the Administrative Office of the Courts. History continues to show that court planning becomes stronger and more effective after each pandemic touchpoint. For example, H1N1 ushered in a huge wave of operations planning and pandemic responsiveness in the state and federal courts.²⁷⁶ There is no doubt that COVID-19 will and should do the same.

In March 2021, the Administrative Office of the Courts published the annual *Report of the Director* to discuss the business of the judiciary in 2020.²⁷⁷ Unsurprisingly, COVID-19 featured heavily in the report, as did a discussion of court operations considering the pandemic.²⁷⁸

The report showed an interesting statistic—case filings in the federal district courts were up by 39%.²⁷⁹ The largest increase is from civil filings, which were up 58% in 2020.²⁸⁰ However, some of that increase can be attributed to a single item of multidistrict litigation in one district court,

273. *Id.* at 10.

274. *Id.* at 25.

275. *Id.* at 26.

276. *See supra* Part II.

277. *Judiciary Releases Annual Report and Judicial Business 2020*, U.S. CTS. (Mar. 16, 2021), <https://www.uscourts.gov/news/2021/03/16/judiciary-releases-annual-report-and-judicial-business-2020> [https://perma.cc/7XTP-NFX3].

278. *Id.*

279. *Id.*

280. *Id.*

without which total civil filings would have otherwise decreased by 10%.²⁸¹ This suggests that court activity was actually relatively flat or decreased in 2020, with criminal filings dropping 20%, bankruptcy proceedings falling 21%, and filings in the court of appeals declining less than 1%.²⁸² Against this background, public perception that the wheels of justice slowed during the pandemic is not inaccurate.²⁸³ Future years may show an increased appetite for justice as lessening pandemic restrictions and a return to relative normalcy cause some to pick up on business that lay fallow during 2020.

Looking back on the early federal court responses to COVID-19, perhaps most intriguing is how quickly the pandemic required courts to move to new technologies.²⁸⁴ The Supreme Court of the United States is a particularly bad offender in adopting new technology—it did not even accept online filings until 2018 (when other courts had been doing so for decades).²⁸⁵ The COVID-19 pandemic forced the court to hear remote arguments by telephone for the first time, with live audio streaming available to the outside world.²⁸⁶ This may indicate less reluctance for the Court moving forward to adopt audio or video streaming to increase access to its proceedings.

Similarly, other courts embraced technology never before considered to conduct court business and retain public access to justice. In September 2020, 86 out of 94 district courts and all the federal circuit courts of appeal were conducting some hearings through remote technology—a far cry from initial local orders, which showed very disparate views of the use of remote proceedings.²⁸⁷

281. *Judicial Business 2020*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judicial-business-2020> [<https://perma.cc/A8R2-URCR>].

282. *Id.*

283. *See, e.g.*, Melissa Chan, 'I Want This Over.' For Victims and the Accused, Justice Is Delayed As COVID-19 Snarls Courts, *TIME* (Feb. 22, 2021), <https://time.com/5939482/covid-19-criminal-cases-backlog/> [<https://perma.cc/37V8-XVDM>] (highlighting cancellations or scaled back proceedings due to the spread of the virus).

284. *See, e.g.*, James Mayse, *Video Hearings Could Become Permanent After Pandemic Is Over*, *MESSENGER-INQUIRER* (May 6, 2020), https://www.messenger-inquirer.com/community/video-hearings-could-become-permanent-after-pandemic-is-over/article_7bdbc9f4-c0fd-5cb5-9871-6ba366408022.html [<https://perma.cc/9TSQ-4BRU>] (welcoming the push to use technology because it has previously been contemplated).

285. Mark Sherman & Jessica Gresko, *You've Reached the Supreme Court. Press 1 for Live Arguments*, *AP NEWS* (Apr. 22, 2020), <https://apnews.com/article/19b82f029deb760dc7f0c644472192fb> [<https://perma.cc/Q58E-YRPZ>].

286. *Id.*

287. Janna Adelstein, *Courts Continue to Adapt to COVID-19*, *BRENNAN CTR. FOR JUST.* (Sept. 10, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/courts-continue-adapt-covid-19> [<https://perma.cc/QD6Q-3X7Z>].

Although video and audio proceedings seem to be working (at least in some ways), there is no question that there is still a strong preference for in-person hearings.²⁸⁸ In September 2020, almost one-third of the federal district courts had entered orders for in-person jury trials to resume.²⁸⁹ These orders came with a host of safety requirements, such as social distancing, deep cleaning courtrooms, and the use of plexiglass shields.²⁹⁰ As noted above, many of these orders were subsequently pulled back in November 2020 to accommodate increasing COVID-19 and hospitalization rates, as well as fears concerning a spike in cases during the cold-weather months.

The preference for in-person hearings makes sense, especially set against a background of research showing that remote appearances can change the outcome or course of proceedings. For example, the National Center for State Courts released a study in 2010 that found 37% of state courts that were using remote appearance technology did not have a way for a client to communicate privately with their attorney during the course of proceedings.²⁹¹ Another study conducted in Cook County, Illinois, determined that judges tended to impose higher bail amounts when a defendant appeared by video rather than in person.²⁹² The study authors posited this could be from a lack of direct eye contact and difficulty in the client communicating with their attorney during the proceeding.²⁹³ This type of negative assessment is contrasted against calls for the increased use of remote proceedings even beyond the pandemic because it allows low-income litigants a less burdensome way to access the courtroom.²⁹⁴ Further, certainly during the pandemic, remote proceedings allowed at least

288. *Id.* (acknowledging a preference for in-person proceedings but noting remote proceedings have garnered support).

289. *Id.*

290. *Id.*

291. Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1893 n.96 (2021) (citing Eric T. Bellone, *Private Attorney-Client Communications and the Effect of Videoconferencing in the Courtroom*, 8 J. INT'L COM. L. & TECH. 24, 44–45 (2013)).

292. Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court> [<https://perma.cc/MN5R-YBLX>].

293. *Id.*

294. *Id.*

some cases to continue instead of stalling all courthouse business for the year.²⁹⁵

In 2016, the National Association of Presiding Judges and Court Executive Officers released a *Study of State Trial Courts Use of Remote Technology*.²⁹⁶ The report noted, “State trial courts for decades now have embraced and expanded the use of a variety of technology innovations designed to improve court operations[,] . . . including the use of video conferencing.”²⁹⁷ The report also noted the legal basis for this use—while remote proceedings had been used in state courts, they were also subject to certain constitutional constraints.²⁹⁸ For example, the right of confrontation, due process, and right to be present were all active considerations in any given case for remote hearings, and video conferencing is considered permissible for initial non-adversarial criminal proceedings.²⁹⁹ Outside the criminal context, states showed even more widespread adoption of remote appearance technologies.³⁰⁰

With this type of history, it seems that the use of video conferencing technologies in civil cases and non-adversarial criminal proceedings could remain in place even after the COVID-19 pandemic ends. While there was larger interest in remote proceedings before the pandemic, the closing of courthouses has now forced judges and court staff to acclimate to this new way of doing business.³⁰¹ Remote proceedings allow for increased efficiency, reduced travel time, decreased need for inmate transports, and cost savings.³⁰²

However, even if remote proceedings do not become the new normal in a world after COVID-19, there is no question that they will become an

295. Chan, *supra* note 284 (noting “[s]ince COVID-19 was declared a national emergency in March 2020, every state and Washington, D.C., has canceled or scaled back in-person criminal court proceedings to stem the spread of the virus. The snarled justice system has left hundreds of thousands of families waiting for trials and other resolutions . . .”).

296. Mike L. Bridenback, *Study of State Trial Courts Use of Remote Technology*, STATE JUST. INST., at i (Apr. 2016), <https://napco4courtleaders.org/wp-content/uploads/2016/08/Emerging-Court-Technologies-9-27-Bridenback.pdf> [<https://perma.cc/CU54-IIE3U>].

297. *Id.* at 1.

298. *Id.* at 2.

299. *Id.* at 3–6.

300. *Id.* at 6.

301. Angela Morris, *Judges Rush to Learn Video Conferencing As Shelter-In-Place Orders Spread Across Texas Metros*, LAW (Mar. 24, 2020), <https://www.law.com/texaslawyer/2020/03/24/judges-rush-to-learn-video-conferencing-as-shelter-in-place-orders-spread-across-texas-metros/> [<https://perma.cc/MYC5-E8NU>].

302. Mayse, *supra* note 285.

important part of pandemic preparedness planning. Before mass facility closures in March 2020, the federal judiciary and the AOC established a task force to assess the impact of the virus and help coordinate response efforts.³⁰³ This body produced guidance on pandemic-related issues, including “bankruptcy administration, budgets, court interpreting, court reporting, facilities and security, finance and internal control, financial disclosure, human resources and benefits, information technology, jury duty, naturalization ceremonies, probation and pretrial services, procurement, and telework.”³⁰⁴ The AOC ultimately produced the gating strategy discussed above, which provided guidelines for courts on reopening.³⁰⁵

While these are laudable steps during a shocking year, they also highlight the importance of preemptive emergency planning. Before H1N1 ever materialized, some courts did significant preemptive planning for a flu outbreak.³⁰⁶ It is unsurprising that these courts, such as those within the Florida state court system, then faced few delays or hiccups in administering justice.³⁰⁷ Post-H1N1 saw a significant rise in preemptive pandemic planning, especially regarding facilities and possible legal issues (such as the relationship between due process and habeas corpus with quarantine).³⁰⁸ These pre-COVID plans had a number of things in common: discussion of quarantine and isolation legal issues, the emergency powers provided to various government branches in a pandemic situation, how to handle criminal matters (such as arrests, warrants, and investigatory stops), and how to continue with court functions.³⁰⁹ Sections on court functions centered around how to triage essential legal issues (such as preferencing habeas matters over civil trials) and how to communicate effectively with court

303. *Court Operations and Pandemic Response—Annual Report 2020*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/court-operations-and-pandemic-response-annual-report-2020> [<https://perma.cc/QM49-B2LY>].

304. *Id.*

305. *Id.*

306. *See, e.g.*, FLA. CT. EDUC. COUNCIL’S PUBL’NS COMM., *supra* note 46, at vi–viii (“In 2006, in anticipation of such a prospect [of an influenza pandemic], the CEMG presented the Supreme Court with a report entitled *Florida State Courts Strategy for Pandemic Influenza: Keeping the Courts Open in a Pandemic*.”).

307. *See In re* Response of the Florida State Courts System to Influenza A(H1N1), *supra* note 130 (acknowledging Florida’s extensive pandemic preparedness planning and ordering continued adherence to and development of such planning).

308. FLA. CT. EDUC. COUNCIL’S PUBL’NS COMM., *supra* note 46, at 18, 29.

309. *Id.* at 57–61, 84.

staff. While some pre-COVID documents did delve into the possibility of telework or remote hearings, this was a less common approach.³¹⁰

Now in looking back, with the benefit of additional guidance over the course of the last year, it seems there are a few items that must be included in pandemic planning in the future. These additions come from the unfolding guidance that developed from March 2020-November 2020, showing various aspects that were missing or of less attention in previous planning documents.

First, pandemic preparedness plans should identify appropriate underlying data sets for determining court closures and re-openings. The AOC used this approach in its gating strategy for reopening—courts would consider the locality's "total population[,] population density[,] population over 60[,] availability of ICU beds[,] stress on the hospital system, and confirmed cases of COVID-19 in deciding the level of court operations that would be appropriate for a given area."³¹¹ This pulls from other documents that are used to assess pandemic severity; for example, the CDC's 2007 Pandemic Severity Index³¹² uses a color-coded index based on underlying data points to identify containment measures for a pandemic situation. A similar color-coded system in place for federal court planning purposes could help districts and circuits act more consistently in deciding how to handle pandemic conditions.

Next, now that the COVID-19 technological push has occurred, pandemic preparation plans should consider how to create consistent technological approaches. Early data from March 2020 shows that the federal courts were vastly different in how they responded to courthouse closures and the need for social distancing.³¹³ More concrete planning surrounding what hearings and procedures can be conducted remotely, what technology will be used, and how that technology will be accessed will keep early responses more consistent and easier for the public and legal profession to navigate. Further, it will also let attorneys advise clients who may be uncertain about their physical safety.

Finally, additional consistency in a geographic region, to the extent it is consistent with underlying pandemic data, would also increase transparency and help lawyers and litigants navigate various courthouse orders. During

310. *Id.* at vii.

311. *Federal Judiciary COVID-19 Recovery Guidelines*, *supra* note 269, at 5.

312. *Mitigation Slides*, *supra* note 214.

313. *See supra* Chart 1–2.

the COVID-19 pandemic, court orders were often disparate (as seen in the chart above) and could vary even within the same geographic region. For example, North Carolina's three judicial districts split in approach in the earliest parts of the pandemic.³¹⁴ So too did the federal districts in Wisconsin and Illinois.³¹⁵ While some of these discrepancies could be due to the difference between population centers, increased consistency would make it more efficient and consistent for attorneys and the public.

Ultimately, the federal courts have a long history of resilience in the face of emergency situations. Even during previous pandemics, there has always been a strong commitment to keeping the courthouse doors open to the public. COVID-19 has not changed that spirit—it has only highlighted new ways of doing business. In 2021 and beyond, as new pandemic preparedness measures are considered, valuing consistency and communication should allow future emergency events to be handled in an even smoother and more transparent manner.

314. *Id.*

315. *Id.*