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Statutory and Constitutional Hurdles Confronting the Judicial System During the COVID-19 Pandemic

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INTRODUCTION

The Chief Federal District Judge in the Northern District of Texas signs a "Special Order" on March 13, 2020, effectively halting the judicial process in its tracks. "[A]ll grand jury proceedings between now and through May 1, 2020, are continued. All deadlines are suspended and tolled for all purposes, including the statute of limitations, from today through May 1, 2020."[1] Shortly thereafter, the remaining federal district court judges for the three other federal districts in Texas hand down similar orders, all using similar language and each one citing data and reports from the Center for Disease Control ("CDC").[2] The CDC guidelines highlight the rapid spread of a novel viral influenza, known simply as the coronavirus.

Thousands of miles away, the Chief Judge in the Northern District of Vermont is taking equally widespread precautions, and a "General Order" is signed into law on March 16, 2020. The order states in paragraph 1, "[a]ll civil and criminal matters scheduled for in-court appearance before any district or magistrate judge or bankruptcy judge in the District of Vermont are postponed pending further order of the court. This includes all jury trials."[3] Meanwhile, Donald J. Trump, the President of the United States, declares a state of emergency as information regarding the coronavirus begins to spread faster than the virus itself, which with over 1,600 confirmed cases in the U.S. since the first confirmed case just three months prior, is spreading rather rapidly.[4]

Down in Florida, the state's Supreme Court is trying to address the spread of coronavirus through its judicial system. Facing the difficult challenge of balancing the protection of a defendant's right to a speedy trial versus the interest of justice, the Florida Supreme Court decides the latter is of more importance during this time, declaring "[a]ll time periods involving the speedy trial procedure, in criminal and juvenile court proceedings, are suspended from the close of business on Friday, March 13, 2020, until the close of business on Monday, March 30, 2020, or as provided by subsequent

[1] *See* Special Order No. 13-5 (N.D. Tex. Mar. 13, 2020).

[2] *See* Special Order H-2020-6 (S.D. Tex. Mar. 17, 2020) (same); General Order, No. 20-03 (E.D. Tex. Mar. 16, 2020); Additional Order Regarding Grand Jury Proceedings Under the Exigent Circumstances Created by the Covid-10 Pandemic (W.D. Tex. Mar. 16, 2020) [hereinafter "Texas District Court Orders"].

[3] *See* General Order No. 85 (D. Vt. Mar. 16, 2020).

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

order."[5] Indeed, subsequent orders would follow.[6]

In Texas federal courts, Florida state courts, and just about every other court in the United States, subsequent orders would continue to be drafted and signed into law as the coronavirus spread throughout the nation. In each one, judges would address the uphill battle facing the judicial system as dockets continued to pile up, motion hearings continued to be postponed, statutes of limitations continued to be tolled, and defendants continued to await their day in court. With each passing day, and with each subsequent order, watchful and observant litigators began to recognize worthy arguments that will surely find their way into courtrooms once they reinitiate their regular proceedings.

Under what authority can courts toll statutes of limitations over a defendant's objection? How will a defendant's right to a speedy trial be affected by the nation's sudden halt in judicial proceedings? With regards to jury trials, how will courts guarantee a defendant's right to a fair and impartial panel without potentially exposing jurors, court employees, and others to the spread of the coronavirus? This comment seeks to answer some of those questions through an in-depth analysis of the legal system's response to previous mass pandemics. Arguments are also drawn in from similarities between what is currently affecting the United States and previous instances when the nation was at war with foreign enemies or dealt with other natural disasters. As will become clear, the effects of the novel coronavirus have had a profound impact on the American judicial system. The nation may very well indeed be at war with an invisible enemy, combatting another natural disaster.

How courts respond to this pandemic will shape the future of the judicial system in the United States. Beyond subsequent orders, both general and special, federal and state courtrooms will determine how litigation is handled for the near future. Fortunately there is some precedent for these seemingly unprecedented times, and although history may not provide all the answers, a close inspection of some of this country's past judicial stoppages is an informative starting point.

[5] *See* Supreme Court of Florida Administrative Order No. AOSC20-13, Emergency Procedures in Florida State Courts (Fla. Mar. 13, 2020).

[6] *See* Supreme Court of Florida Administrative Order No. AOSC20-23, Comprehensive COVID-19 Emergency Measures for the Florida State Courts (Fla. Mar. 18, 2020); *See also* Amendment 1 (Fla. May 4, 2020); Amendment 2 (Fla. May 21, 2020); Amendment 3 (Fla. June 8, 2020).

I. BACKGROUND OF COURT CLOSURES

Even the Supreme Court of the United States looked to the past when announcing its postponement of oral arguments due to the COVID-19 outbreak. On the Court's official website, a press release was published on March 16, 2020. The statement read "[t]he Court's postponement of argument sessions in light of public health concerns is not unprecedented. The Court postponed scheduled arguments for October 1918 in response to the Spanish flu epidemic. The Court also shortened its argument calendars in August 1793 and August 1798 in response to yellow fever outbreaks."[7] However, though it may be reassuring to know this isn't the Supreme Court's first closure in response to a global pandemic, the Court's press release does not instruct lower courts on how they should proceed. Rather, individual courts have been left to make their own decisions regarding closures, postponements, and tolling decisions. These decisions have attempted to balance the interests of parties who have waited days, months, sometimes years for their hearings, some of which are legally mandated, against the health of judges, clerks, courtroom deputies, staff, lawyers, jurors, and defendants all present within the courtroom. Many courts do not have the luxury of looking back to 1793 and their system's reaction to yellow fever. Instead, some are learning on the fly how difficult it can be to handle such a roadblock in their docket.

But mass pandemics are not the only source of guidance on this issue. Court closures are not new. In fact, many states have already enacted legislation specifically to address and mitigate a disaster's effects on the ability of litigants to file documents and proceed with their cases despite an inaccessible courtroom. For example, a California statute entitled "Government Code Section 68115" vests the Judicial Council's chair with wide-ranging powers to handle such mitigation.[8] These powers might arise during war, insurrection, pestilence, public calamity, the destruction of a courthouse, or when mass arrests threaten orderly court operations.[9]

This section covers some of those instances that led to court closures, including a look at the pandemic most frequently compared to the ongoing coronavirus outbreak, the Spanish flu outbreak in the early 20th century.

A. Previous Pandemics

The CDC estimates that the Spanish flu epidemic took 675,000 lives

[7] Press Release, Supreme Court of the United States (Mar. 16, 2020), available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20.

[8] Cal. Gov't Code §68115(a), (b).

[9] *Id*.

throughout the United States and 50 million worldwide.[10] Approximately one-third of the entire global population was suspected of becoming infected with the virus, a strain of H1N1 with avian origin.[11] In Washington D.C., where the Supreme Court had just issued their postponement of arguments at the start of its 1918-1919 term by about a month, more than 33,000 Washington residents would fall ill between October 1, 1918 and February 1, 1919. Of that number, roughly 2,895 would wind up dying from the disease according to the Influenza Encyclopedia of the University of Michigan Center for the History of Medicine.[12]

As previously mentioned, the Court had dealt with mass pandemics just two decades before, when they declared similar postponements.[13] Those decisions came back when the Supreme Court was responding to outbreaks of yellow fever, another severe virus believed to be transmitted mainly through mosquitos. In those prior instances, the Court was laying the foundation for what circumstances warranted stoppages of high-profile court proceedings. The Court was tasked with balancing the dangers of an outbreak in Philadelphia, then the nation's capital, versus the interests of justice. "There being some appearances of the Yellow Fever in Waterstreet, between the Bridge and Walnut Street, the lawyers agreed to continue most of the Causes, and our Court broke up yesterday," Justice James Iredell wrote on Aug. 8, 1798.[14] "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 spot," Justice Oliver Wendell Holmes wrote.[15]

Despite over 200 years in separation, the same concerns raised by Justice Holmes are the ones confronting litigators and law firms today. When asked to comment on the Supreme Court's recent postponement of oral arguments, Michael W. McConnell, a Stanford University law professor and senior of counsel to Wilson Sonsini, who was to argue on March 25th in *Carney v. Adams* representing Delaware in defending its judicial selection system, had this to say - "I am in California, where my county has issued a

[10] *See* Centers for Disease Control and Prevention, National Center for Immunization and Respiratory Diseases (NCIRD), *1918 Pandemic (H1N1 virus)* (Mar. 20, 2019), available at https://www.cdc.gov/flu/pandemic-resources/1918-pandemic-h1n1.html.

[11] *Id.*

[12] District of Columbia Health Officer, *Annual Report of the Commissioners of Columbia Year Ended June 30, 1919, Vol. III, Report of the Health Officer*, 18 (1919), available at http://hdl.handle.net/2027/spo.1430flu.0014.341. (The mortality figure also includes 680 deaths due to pneumonia brought on by influenza).

[13] Mark Walsh, *Outbreaks of Disease Have Shuttered the Supreme Court Going Back More Than 2 Centuries*, ABA Journal (Mar. 19, 2020), available at https://www.abajournal.com/web/article/outbreaks-have-shuttered-the-supreme-court-going-back-more-than-two-centuries.

[14] *Id.*

[15] *Id.*

'shelter-in-place' order, . . . I can't say I was looking forward to a trans-continental plane ride in the midst of this virus."[16]

And in addition to the litigators traveling to the highest court in the land, the very justices who issue decisions themselves cannot be discounted either. Justice Ruth Bader Ginsburg turned 87 in March, while Justice Stephen G. Breyer is 81. Three other members of the court are also at an age considered to be at the highest risk of death from coronavirus: 65 or older. Chief Justice John G. Roberts Jr. and Justices Clarence Thomas and Samuel A. Alito Jr. all fall within this at-risk age group. With so much at stake for these justices, it's no surprise that they would seek to take every precaution necessary to ensure the safety of everyone involved in oral arguments before the Supreme Court. Rather, what is more surprising is the extent of the extreme circumstances in which the Court has decided to postpone arguments. In general, very few instances have risen to this level of severity, and seldom have they led to total court closures.

B. Other Court-Closing Occurrences

In 2005, a tropical storm formed over the southeastern part of the Bahamas. It gained intensity as it hovered over warm Atlantic waters, but actually weakened as it passed over the state of Florida as a Category 1 storm. Once reaching the Gulf of Mexico, however, Hurricane Katrina would quickly become the most powerful and devastating storm ever to hit the state of Louisiana. Twenty courthouses in southeastern Louisiana alone were damaged or rendered inoperable. Of those damaged buildings was that of the Louisiana Supreme Court, which closed due to the mandatory evacuation of the city and the loss of basic services such as water and electricity.[17] Following the destruction, legal and administrative issues stemming from the lack of access to the courts and the mass displacement of the legal community stifled the progress of any judicial proceedings. In response to these issues, New Orleans native and Chief Justice of the Louisiana Supreme Court, Pascal F. Calogero, Jr., in conjunction with the six other associate justices, instituted a number of efforts to assist in the recovery of the legal system.[18]

Among those efforts was ensuring the safety and welfare of judicial employees, as well as the planning for temporary court accommodations so that proceedings could begin as quickly as possible.[19] Indeed, less than a

[16] *Id.*

[17] Greg G. Guidry, *The Louisiana Judiciary: In the Wake of Destruction*, 70 La. L. Rev. 1145, 1153 (2010), https://digitalcommons.law.lsu.edu/lalrev/vol70/iss4/5.

[18] *Id.* at 1155.

[19] Judicial Administrator's Office, The Supreme Court of Louisiana, *Justice at Work: The State of Judicial Performance in Louisiana 2005-2006*, 9 (2006), available at

week after Hurricane Katrina made landfall, the court had set up interim offices at the Louisiana First Circuit Court of Appeal courthouse.[20] Flexible leave policies were established to meet the needs of those unable to return to work, either because of destruction to their homes or the inability to navigate through flooded streets.[21]

Other states quickly took notice of the steps Louisiana was taking to mitigate the harm caused by this natural disaster. Soon, other jurisdictions were issuing their own disaster relief plans, making it known that they would be prepared for any potential court closures. Meanwhile, litigators inspected those newly developed disaster plans, in addition to those already in place, looking for guidance should another natural disaster affect them.

In California, for example, courts and lawyers needed to be prepared for any number of natural disasters that could affect deadlines – earthquakes, wildfires, and landslides to name a few – as well as the possibility of man-made disruptions – power failures, terrorist attacks, and riots. California's Government Code Section 68115 vests the power to gauge the impact of any of these occurrences in the state's Judicial Council.[22] Section B of that statute states "[u]pon a finding by the court that extreme or undue hardship would result unless the case is transferred for trial, a pending civil case may be transferred to any superior court in an adjacent county or to any superior court within 100 miles of the border of the county in which the court impacted by the emergency is situated."

The obvious difference between these solutions and any available to the current judicial system's attempt to address the ongoing coronavirus pandemic is the overarching purpose for the court closures. In 2005, Louisiana had a shortage of amenities, as many of the state's courthouses in the hardest hit areas had been destroyed by flooding and Katrina's winds. There was, however, a majority of undamaged courthouses, as well as the possibility of establishing temporary offices. In the California statute, it is assumed that there exist courtrooms outside the area in which "the court impacted by the emergency is situated." These are issues rooted in a lack of courtroom space. These disasters are easily traced. Now, however, there is no such shortage of courtrooms, and the disaster is much more difficult to track. Courtrooms across the United States are not damaged. They have not closed their doors because of flooding, fires, or landslides. Rather, it is the people who fill the courtrooms who carry the potential for imminent harm.

https://www.lasc.org/press_room/annual_reports/reports/2005_06_jp. [hereinafter "Judicial Performance 2005-2006"].

[20] *Id.* at 8.

[21] *Id.* at 7.

[22] Cal. Gov't Code §68115(a), (b).

C. The Justice Systems Initial Response to this Pandemic

The response to the ongoing COVID-19 pandemic has been widespread, but it has not necessarily been uniform. Across the United States, federal districts and state judiciaries have formulated an extensive range of temporary solutions to address the inability to convene in a court room. Obviously, the discrepancies across state lines will soon become the topic of litigation in the upcoming months, but before delving into the future of litigation post-COVID-19, it's important to highlight those discrepancies as they were enacted during the first few days, weeks, and months of the coronavirus outbreak. Therefore, what follows is a brief highlighting of notable orders regarding the pandemic from a range of jurisdictions both federal and state and covering matters both criminal and civil.

Beginning with the jurisdictions first mentioned in the introduction, the four federal districts in Texas each signed "general" or "specific" orders using similar language and purporting to toll the deadlines under the federal criminal statutes of limitations concerning matters pending before federal grand juries in view of the COVID-19 pandemic.[23] Each of those four orders came between March 13, 2020 and March 17, 2020.

In the Northern District of Vermont, that federal court used differing language but ultimately came to the same conclusion as the Texas federal courts. General Order No. 85 effectively postponed all civil and criminal matters pending further order from the court. Like the Texas federal court decisions, the Northern District of Vermont issued this order relatively close in time to the declaration of a state of emergency, which came on March 13, 2020, and like the Texas federal court decisions, Vermont chose to toll statutes of limitations for the time-being. A little over a month later, however, the Northern District of Vermont would highlight how certain matters would be treated differently under the new rules. Specifically, General Order No. 89, filed on April 28, 2020, would outline how the court would handle criminal cases differently than civil cases. Paragraph 4 under Section 1 states "[c]ourt-ordered deadlines in criminal cases will need to be revised in many cases. Counsel shall communicate and submit revised scheduling orders on a case-by-case basis as appropriate. Scheduling orders now in place remain in effect until further order of the court."[24] In contrast, the court was far more blunt about civil matters, ordering all civil trials to be postponed except as specifically scheduled by the court.[25]

In referring back to the initial order, the Northern District of Vermont also addressed obvious concerns of criminal defendants wondering how their right

[23] Texas District Court Orders, *supra* notes 1 and 2.
[24] *See* General Order No. 89 (D. Vt. Apr. 28, 2020).
[25] *Id.*

to a speedy trial would be affected by the court's order. The court stated in Paragraph 9 under Section 1, "[a]s previously ordered in ¶ 4 of General Order No. 85, the time period of the postponements implemented by this Order will be excluded under the Speedy Trial Act, as the court specifically finds that the ends of justice served by ordering the postponements outweighs the best interests of the public and any defendant's right to a speedy trial, pursuant to 18 U.S.C. § 3161(h)(7)(A)."[26] Although this issue is discussed in further detail in the "Right to a Speedy Trial" section later on, it's important to begin to think about the court's reasoning and justification here. The same logic would be implemented by district courts across the nation, subjecting criminal defendants to extended periods of incarceration that might otherwise violate their Sixth Amendment right to a speedy trial.

For example, in the Northern District of Florida, the same "ends of justice" language was used by Chief District Judge Mark E. Walker in Administrative Order No. 349. In addition to all grand jury proceedings from April 1, 2020 to April 30, 2020 being cancelled, the Order held "[f]or the reasons stated above and those set forth in Administrative Order 345, which are incorporated herein, the Court finds that the ends-of-justice are served by suspending the 30-day statutory speedy trial time period set forth in 18 U.S.C. § 3161(b), resetting the 30-day period to begin anew on the date this Court permits grand juries in the Northern District of Florida to resume meeting, and excluding the period of time between the date on which a Defendant is arrested and the date on which this Court first permits grand juries in the Northern District of Florida to resume meeting, for all Speedy Trial Act purposes."[27] Under what authority can this court simply suspend the 30-day statutory speedy trial time period set forth by Congress, and how can these decisions, which seem to have been handed down in federal jurisdictions across the nation, be contested? As mentioned, these questions are the subject of discussion later on in this comment.

But aside from a defendant's right to a speedy trial, the general orders being handed down by federal district courts have brought to light other obvious hurdles that the judicial system must face during this ongoing pandemic. Statutes of limitations, clearly, have been the subject of many of these orders, but so too have been one of the more basic fundamental pillars of the U.S. judicial system – jury trials.

Switching from the federal system but remaining in the Sunshine State, an analysis of some of Florida's Supreme Court orders paint a descriptive picture. On March 13, 2020, Florida Supreme Court Justice Charles T. Canady issued an Administrative Order (AOSC20-13) suspending all jury

[26] *Id.*
[27] *See* Administrative Order No. 349 (N.D. Fla. Apr. 1, 2020).

trials in Florida's court system for a two-week period.[28] At the time, it seemed as if a two-week suspension would be all that was necessary to combat the pandemic. Clearly, that would soon prove to be inaccurate. On March 24, 2020, Florida's Supreme Court issued an additional Administrative Order (AOSC20-17), extending the suspension of all jury trials in Florida's court system through Friday, April 17, 2020.[29] On April 6, 2020, a third Administrative Order (AOSC20-23) extending the suspension of all jury trials in Florida's court system through Friday, May 29, 2020 was handed down.[30] Then on May 4, 2020, Justice Canady issued Amendment 1 to Administrative Order (AOSC20-23) expanding the list of court proceedings to be held remotely during the coronavirus pandemic, and extending the suspension of all jury trials in Florida's court system once again through Thursday, July 2, 2020. What litigators and their respective clients were seeing was the court's inability to predict exactly when jury trials would be able to resume in their original form. Instead, many jurisdictions are now attempting to implement some modified jury processes to ensure *some* cases can continue.

In Florida, that means "establish[ing] the framework and identify[ing] the logistics of trying cases remotely."[31] Subsequently, the state's Supreme Court authorized a pilot program for remote jury trials, specifying that the program was limited to civil cases and would be authorized in only up to five of the state's twenty judicial circuits.

In California state courts, remote video technology is being used at least to some capacity in both civil and criminal cases, as demonstrated by the Superior Court of California in the County of Sacramento. On March 30, 2020, that court issued its general Order entitled "Arraignments and Preliminary Hearings - Remote Video Technology," providing that "all in-custody arraignments and preliminary hearings shall be accomplished through the use of interactive video technology to minimize the physical proximity of all participants as specified therein."[32] Notably, that Order required the consent of the defendant to conduct the proceeding remotely and

[28] *See supra* note 5, Supreme Court of Florida Administrative Order No. AOSC20-13, Emergency Procedures in Florida State Courts (Fla. Mar. 13, 2020).

[29] *See* Supreme Court of Florida Administrative Order No. AOSC20-17, COVID-19 Emergency Measures in the Florida State Courts (Fla. Mar. 24, 2020).

[30] *See* Supreme Court of Florida Administrative Order No. AOSC20-23, Comprehensive COVID-19 Emergency Measures for the Florida State Courts (Fla. Apr. 6, 2020).

[31] *See* Supreme Court of Florida Administrative Order No. AOSC20-31, Remote Civil Jury Trial Pilot Program (Fla. May 21, 2020).

[32] *See* Superior Court of California, County of Sacramento, Order Arraignments and Preliminary Hearings - Remote Video Technology (Cal. Mar. 30, 2020).

in compliance with local emergency rules.[33] As for civil cases, the court continues to use video conferencing for preliminary matters

Meanwhile, in Massachusetts, that state's Supreme Court is allowing more flexibility and less judicial interference with regards to civil cases, where "due to the continuing challenges of conducting in-person depositions during the COVID-19 pandemic, the Supreme Judicial Court, pursuant to its superintendence and rule-making authority. . ." issued the following order: "[1] Any deposition taken in a civil case pursuant to Mass. R. Civ. P. 30 and 30A, and pursuant to Court Department rules and standing orders, may be conducted remotely (remote deposition), that is, in a manner that allows for the deponent, all other persons entitled to attend (e.g., the parties, counsel for the parties, counsel for the deponent), and all other necessary persons (e.g., the officer/court reporter) to participate without attending the deposition in person. [2] Neither a stipulation of the parties nor a court order is required to conduct a remote deposition."[34]

To dig through each state and federal court order and analyze the ramifications would take far more time than the orders themselves are effective for. Many of these rulings contain within them clear deadlines for when they should expire, or otherwise contain language that insists rules will change "pending further court order." The above examples simply highlight some of the statutory and constitutional hurdles confronting the judicial system moving forward during the spread of the COVID-19 pandemic – mainly, issues regarding statutes of limitations, jury trials, and criminal speedy trials. With each judicial order handed down, a plethora of questions stem from the effects on litigants. In taking each topic and looking towards the authority these courts have to implement such rules, plaintiffs and defendants, prosecutors and defense attorneys, will learn what the future of litigation in the United States will look like in a post-COVID-19 world. Each topic deserves specific attention. Therefore, this comment begins with perhaps the most novel – statutes of limitations and their enforcement beyond a defendant's objection in light of COVID-19.

II. TOLLING STATUTES OF LIMITATIONS

In 2010, Justice Stephen Breyer issued the majority opinion for *United States v. Comstock*, in which the Supreme Court held, among other things, that Congress undoubtedly had the power to enact legislation altering the

[33] *Id.*

[34] *See* Massachusetts Supreme Judicial Court Orders, Supreme Judicial Court order regarding remote depositions (Mass. May 26, 2020).

federal criminal statutes of limitations.[35] This power came from the U.S. Constitution's Necessary and Proper Clause, Breyer reasoned. "[T]he Necessary and Proper Clause grants Congress broad authority to enact federal legislation."[36] Along with that authority came the power to create and define crimes. It followed, then, that Congress could define limitations periods with regards to those crimes. Indeed, Breyer noted in the *Comstock* opinion that "the Constitution, which nowhere speaks explicitly about the creation of federal crimes beyond those related to counterfeiting, [t]reason, or Piracies and Felonies committed on the high Seas or against the Law of Nations, nonetheless grants Congress broad authority to create such crimes."[37] Shortly thereafter, lower courts began to solidify that notion. In 2013, the United States District Court for the District of Nebraska held that "[j]ust as Congress [is] empowered to define the crime, including the statute of limitations, [Congress is also] empowered to provide for tolling of the statute of limitations."[38]

Clearly, there is precedent for criminal statutes of limitations to be postponed, extended, and tolled so long as Congress passes some sort of statute covering the issue. The problem facing U.S. court systems now, however, lies in the fact that criminal statutes of limitations have not been extended by any Congressional action at this point in time. Rather, most of the judicial system has taken it upon themselves to issue their own general and specific orders. From a separation of powers perspective, this means that as these limitations periods expire, the Government may lose the ability to prosecute individuals who's alleged crime occurred near that limitations threshold.

For civil cases, additional issues arise. Many court orders either specify that civil cases will fall in priority to criminal matters, or don't specify how those matters will be handled at all. Civil litigants are keeping a watchful eye of new orders that are handed down, patiently awaiting their opportunity to file their lawsuit, yet fully aware that time is ticking and a backlogged docket does not favor their claim.

How will litigators respond to these novel issues? A likely solution will be the Doctrine of Equitable Tolling. Another, at least for purposes of criminal litigation, may be the Wartime Suspension of Limitations Act. An explanation of both is necessary in order to understand how each will be utilized in the courtroom over the upcoming months.

[35] *United States v. Comstock*, 560 U.S. 126, 133 (2010).
[36] *Id*.
[37] *Id*. at 135 [internal citations and quotations omitted].
[38] *United States v. Arrington*, 2013 WL 5963140, at *7 (D. Neb. Nov. 7, 2013).

A. Issue

The purpose of any criminal statute of limitations is to reflect "a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict."[39] In both criminal and civil contexts, statutes of limitations are meant to protect parties from having to defend themselves from the government or opposing parties "when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past."[40]

In the days after the declaration of a state of emergency, when courtrooms were announcing their closures for periods of roughly two weeks, it was not expected that statutes of limitations would soon become a ground for debate. However, as time has shown, the severity of the COVID-19 pandemic has prevented courts from reopening, or at least severely limited their capacity to move cases along. As days turned into weeks and weeks turned into months, it became clear that statutes of limitations, both criminal and civil, would need to be addressed by prosecutors and plaintiffs. When defendants proffer a statute of limitations defense, it is the burden of the opposing party to establish compliance, showing either that the cause of action occurred within the limitations period or that an exception to the limitations period exists.[41]

B. The Wartime Suspension of Limitations Act

Generally, federal law provides that non-capital criminal offenses must be brought against defendants no later than five years after the alleged crime.[42] Certain crimes may warrant extended limitations periods, such as ten years for bank fraud, as defined in 18 U.S. Code § 3293, or six years for securities fraud, covered in 18 U.S. Code § 3301. A number of circumstances, however, may warrant the extension of a limitations period under the general statute – offenses against children, certain terrorist offenses, fugitives from the law to name a few. Notably absent from that list, however, are public health crises.

But one such circumstance is defined in 18 U.S. Code § 3287 and is commonly referred to by its abbreviated name, the "Suspension Act." The Wartime Suspension of Limitations Act provides for a suspension of the statute of limitations for certain specified offenses "[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the

[39] *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting Stogner v. California, 539 U.S. 607 (2003)).

[40] *Id.* (quoting *Toussie v. United States*, 397 U.S. 112 (1970)).

[41] *Musacchio v. United States*, 136 S.Ct. 709, 718 (2016).

[42] *See* 18 U.S.C. § 3282(a).

Armed Forces." The statute only applies to criminal actions, and therefore it likely won't be used by civil litigants in the near-future when attempting to rebut limitations defenses. That caveat stems from a Supreme Court decision in which Justice Samuel Alito issued an opinion holding that "[t]he 1921 and 1942 versions of the [Wartime Suspension of Limitations Act] were enacted to address war-related fraud during, respectively, the First and Second World Wars. Both extended the statute of limitations for fraud offenses 'now indictable under any existing statutes.' Since only crimes are 'indictable,' these provisions quite clearly were limited to criminal charges."[43]

Further, the Suspension Act only tolls a set list of federal crimes, not all federal crimes. Though *Kellogg Brown & Root Services, Inc. v. U.S. ex rel. Carter* made the Wartime Suspension of Limitations Act prospectively applicable to future wartime frauds rather than merely applicable to past frauds as earlier versions had held, the list of crimes covered under the Suspension Act remained finite. The current version of the Suspension Act reads as follows:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

18 U.S.C. § 3287. In reading the statute, it's clear that Congress intended for the Suspension Act to be triggered under only one of two routes: (1) when the United States is at war or (2) when Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution.

[43] *Kellogg Brown & Root Servs., Inc. v. United States., ex rel. Carter*, 135 S.Ct. 1970 (2015).

The conditions are black and white, and it seems as if there is no way for the Government to successfully meet those requirements. Yet, during this time of unprecedented viral spread, it's possible that prosecutors will need to argue that the Wartime Suspension of Limitations Act is the best way of tolling statutes of limitations when the facts of the case even remotely line up with the crimes listed in the statute.

The more likely option will be to argue the first triggering mechanism, that the "United States is at war." Frankly, it seems unlikely at this point in time that Congress would enact any specific authorization for the use of Armed Forces to combat the spread of COVID-19. The most encompassing piece of legislation addressing the pandemic, the "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act," makes no suggestion of the possibility of an armed combative response.[44] The only other option warrants at least some discussion.

Though not officially declared one by Congress, the COVID-19 pandemic has certainly made many Americans feel like the United States is at war. Frontline medical workers have been referred to as warriors as they've battled the pandemic. The President of the United States even tweeted that the world was "at war with a hidden enemy."[45] Regardless, the President's tweets and the frontline workers' grit is not sufficient to trigger the Suspension Act. Rather, at least some federal courts have used a factors-test to determine whether or not the country was at war.[46] In *United States v. Prosperi*, the District Court of Massachusetts listed the following four factors that a court should consider in deciding whether the United States is "at war" for purposes of the Act: (1) the extent of the authorization given by Congress to the President to act; (2) whether the conflict is deemed a "war" under accepted definitions of the term and the rules of international law; (3) the size and scope of the conflict including the cost of the related procurement effort; and (4) the diversion of resources that might have been expended on investigating frauds against the government. Other jurisdictions that have used this factors-test include the Southern District of Mississippi and the Western District of Texas.[47]

Subjecting the spread of COVID-19 to the *Prosperi* factors leads to an inconclusive result, which at the very least, poses an interesting problem for

[44] *See* Public Law 116-136, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) (enacted March 27, 2020) [hereinafter "The CARES Act"] .

[45] Donald J. Trump (@realdonaldtrump), Twitter (Mar. 17, 2020, 3:31 PM), https://twitter.com/realDonaldTrump/status/1239997820242923521.

[46] *United States v. Prosperi*, 573 F. Supp. 2d 436, 449 (D. Mass. 2008).

[47] *United States v. Pearson*, 2010 WL 3120038, at *1 (S.D. Miss. Aug. 4, 2010). (holding that U.S. was "at war" for purposes of Suspension Act during military actions in Iraq and Afghanistan); *United States v. Barrera*, 2009 WL 10680035, at *7 (W.D. Tex. Nov. 9, 2009).

judges deciding on the issue. First, a court would examine the extent of the authorization given by Congress to the President to act. At this time, Congress has not authorized the President to use armed force, but the CARES Act does provide for some of the effects of the President's declaration of a state of emergency. For example, Section 1109 authorizes the Department of the Treasury to establish criteria for insured depository institutions to participate in a small business interruption loans program to provide loans under section 7(a) of the Small Business Act (15 U.S.C. 636(a)) until the date on which the national emergency declared by the President expires.[48] Other sections of the act provide guidance on protected health information during the declared state of emergency and the authorization for the Secretary of Education to waive certain statutory or regulatory provisions during the same.[49] Clearly, the extent of the authorization given by Congress to the President to act is, at the very least, traceable. Moving to the second factor, "[d]efinitions rather emphasize the element of armed conflict, whether among States or between States and insurrectionary forces."[50] By this standard, the pandemic likely falls short of meeting the threshold for being "at war." However, the final two prongs of the *Prosperi* test may suffice to surpass that bar. The third factor, specifically, weighs in favor of the COVID-19 global health crises being deemed a war for purposes of the act. The size and scope of this conflict is like nothing the United States has faced in the last century. Surely, the death count paints a picture reminiscent of times of war in the United States. Finally, the diversion of resources that might have been expended on investigating frauds against the government is another factor weighing in favor of an "at war" determination. The federal government has made great expenditures in trying to combat the spread of COVID-19, including sending stimulus checks to Americans, purchasing large quantities of health and medical equipment, and putting more money into finding a long-term vaccine to stop any further spread.

Yet, some courts have disagreed with the *Prosperi* analysis entirely, pointing specifically to the Supreme Court's holding that "the [Suspension Act] should be 'narrowly construed' and 'interpreted in favor of repose.'"[51] It makes far more sense that the term "at war" be interpreted as only those instances when Congress has officially declared so.[52] Under this more rigid standard, the ongoing global health pandemic falls flatly short of triggering

[48] The Cares Act §1109(a) United States Treasury Program Management Authority *supra* note 44.

[49] *Id*. at §4223; *Id*. at §4511.

[50] *Prosperi*, 573 F. Supp. 2d at 451 *supra* note 46.

[51] *Kellogg Brown & Root Servs., Inc.*, 135 S.Ct. at 1978 (2015) *supra* note 43 (quoting *Bridges v. United States*, 346 U.S. 209 (1953)).

[52] *United States v. Western Titanium, Inc*., 2010 WL 2650224, at *3 (S.D. Cal. July 1, 2010).

the Wartime Suspension of Limitations Act. In jurisdictions that follow this standard as opposed to the *Prosperi* test, what other methods might prosecutors use to effectively toll a statute of limitations over a defendant's objection? One potential answer has to do with equitable tolling.

C. The Doctrine of Equitable Tolling

Equitable tolling is a common law principle based on the idea that certain extraordinary circumstances warrant the pausing or temporary suspension of the statute of limitations. The Supreme Court has held that "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.[53] Importantly, Justice Alito held in *Menominee Indian Tribe of Wisconsin v. United States* that these conditions were "elements", not merely factors that the court considered.[54] This doctrine may seem like a useful tool for prosecutors seeking to bring charges against criminal defendants during the ongoing pandemic. One would hope that most U.S. Attorneys were diligently pursuing their cases, and it is hard to doubt that the wide array of court closures stand in their way. However, for most of its history, the doctrine of equitable tolling has mainly been used in civil litigation. Therefore, an analysis of the civil statutes at play are most relevant.

For civil cases, time limitations on the commencement of actions arising under Acts of Congress are established by 28 U.S. Code § 1658, which states "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.[55] As for state judicial systems, the statutes of limitations on filing civil actions vary by jurisdiction and by the cause of action. For example, California's statute of limitations is generally governed by Cal. Civ. Proc. Code § 312, which requires litigants file their lawsuit within four years for written contract disputes, three years for property damage, and two years for personal injury. Contrast these statutes of limitations with those in Florida, where Fla. Stat. Ann. § 95.011 governs and requires litigants to file their lawsuits within five years of written contract disputes, four years for property damage, and four years for personal injury.

This isn't to say that civil litigation will be only recipient of equitable tolling arguments. However, courts lack uniformity on whether the doctrine can or should be applied in criminal cases. At least some jurisdictions have

[53] *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).
[54] *Menominee Indian Tribe of Wisc. v. United States*, 136 S.Ct. 750, 756 (2016).
[55] *See* 28 U.S.C. § 1658.

debated the issue. Although it is most typically applied in civil actions, "there is no reason to distinguish between the rights protected by criminal and civil statutes of limitations," held the United States Third Circuit Court of Appeals.[56] That court would even double down on that holding, later reaffirming that "we have never foreclosed the possibility that equitable tolling applies to criminal statutes of limitations."[57] But, prosecutors should not jump on the bandwagon too eagerly. In *United States v. Atiyeh*, the Third Circuit specified that the doctrine should only be invoked "sparingly," and that only under very narrow circumstances would it consider the argument.[58]

So what is considered the proper "extraordinary" circumstances to invoke the doctrine of equitable tolling, and does the COVID-19 global pandemic meet those standards? Referring back to *Menominee Indian Tribe of Wisconsin*, the United States District Court for the District of Columbia held, and the Supreme Court affirmed, that finding extraordinary circumstances required "a litigant seeking tolling to show an 'external obstacl[e]' to timely filing, i.e., that 'the circumstances that caused a litigant's delay must have been beyond its control.'"[59] But that alone isn't the only consideration. The Supreme Court has also held that "[t]he doctrine of equitable tolling, as applied to federal statutes of limitations, extends an otherwise discrete limitations period set by Congress. Thus, whether tolling is available is fundamentally a question of statutory intent."[60] Put into clearer terms, the statutes of limitations drafted by Congress are presumed to be subject to equitable tolling, unless such equitable tolling would be inconsistent with the statutory text.[61] Taken together, the availability of equitable tolling depends on the statute of limitation imposed by Congress and the extraordinary circumstances that prevent a diligent litigant from pursuing the proper course of action.

But there are even more considerations that will complicate matters further as litigators attempt to navigate this unchartered territory. As far as state judicial systems go, whether a federal court sitting in diversity would consider tolling orders controlling substantive state law in the absence of binding state case law is up in the air. As has been shown above, many state courts differ in their handling of court closures – some tolling statutes of limitations and others leaving them untouched. In this regard, equitable tolling may be applied and misapplied across various jurisdictions. This of course assumes that the pandemic even satisfies the "extraordinary

[56] *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir. 1998).
[57] *United States v. Atiyeh*, 402 F.3d 354, 367 (3d Cir. 2005).
[58] *Id*.
[59] *Menominee Indian Tribe of Wisc. v. United States*, 136 S.Ct. 750, 756 (2016).
[60] *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014).
[61] *Young v. United States*, 535 U.S. 43 (2002).

circumstances" required to invoke the doctrine.

However the alternative seems equally if not more likely. There has not been any clear indication that the spread of COVID-19 will be a circumstance sufficient to allow litigants to win their equitable tolling argument. In the past, the Supreme Court has held that "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants."[62] It's unclear whether the Supreme Court would hold the same for state orders preventing access to federal or state courts, considering the doctrine of equitable tolling is supposed to applied "sparingly."[63]

For some context, it helps to look at some instances when equitable tolling was deemed acceptable given the "extraordinary circumstances." *Hanger v. Abbot* saw the Supreme Court approve of equitable tolling in the midst the Civil War "during which the courts in Arkansas were closed on account of the rebellion."[64] *Osbourne v. United States* held that equitable tolling applied when a plaintiff was unable to assert their rights while he was held as a prisoner in Japan during World War II.[65] In a callback to Louisiana courts dealing with rain damage, *Murray v. Cain*, though not related to Hurricane Katrina, allowed equitable tolling to be applied when a Louisiana State Penitentiary was under a state of emergency due to flooding, causing the petitioner to be evacuated from the prison and delaying his filing.[66]

Whether the spread of COVID-19 rises to the level of "extraordinary circumstances" displayed in the above examples will likely be the result of skilled litigation. If prosecutors and plaintiffs are faced with a defendant's statute of limitation defense, it will be upon them to show the hardships they faced at no fault of their own during the court closures caused by this global pandemic.

III. RIGHT TO A SPEEDY TRIAL

In the United States, all criminal defendants are ensured the right to a speedy trial. This right may arise by statute, through a state's constitution, or under the Sixth Amendment of the U.S. Constitution. The federal Speedy Trial Act was enacted to help establish some guidelines to determine when a violation of that right to a speedy trial occurred. These guidelines often placed a time limit on when the prosecution had to bring a defendant to trial after

[62] *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).
[63] *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002).
[64] Hanger v. Abbot, 73 U.S. 532 (1867).
[65] *Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947).
[66] Murray v. Cain, 2019 WL 1417442, at *3-4 (M.D. La. Mar. 5, 2019).

they had been arraigned or indicted. In the individual states, further guidelines were established. In some, the guidelines were clear, allowing the prosecution a specified number of days before a violation could be brought to the court's attention. In others, the guidelines were less clear, allowing the court more flexibility in determining violations. Regardless, a state may offer a defendant greater speedy trial rights than are required by the U.S. Constitution, but may not reduce those rights. If shown, a violation of the Speedy Trial Act meant a defendant could have their charges dismissed had the case not yet reached trial, and if it had, the conviction and sentence wiped out.

The justification for the Speedy Trial Act is obvious – a defendant should not be forced to face unreasonable lengths of confinement before he or she has had the chance to defend their innocence. Often defendants are held in custody after being denied bail or being unable to pay the amount set. In these cases, the right to a speedy trial ensures those innocent until proven guilty do not spend months under incarceration.

An additional justification stems from the quality of evidence over the passage of time and the defendants right to present that evidence at trial. The Speedy Trial Act guarantees a defendant the ability to gather and present evidence while it is still relatively fresh. Witnesses may struggle to recall important details about a case, harms committed years in the past may lose their sting, and punishment for those harms may seem unjust if lengthy amounts of time have already passed.

Despite the justifications for the right to a speedy trial, criminal defendants still have the ability to waive this right. Should a defendant choose to bring a claim on the grounds that their speedy trial right was violated, courts often look to whether that defendant raised the proper objection at an earlier time. This failure to raise the issue can also be viewed in conjunction with any benefit that the defendant received as a result of the delay. Viewed in totality, a court may find sufficient reason to deny a defendant's claim that their right to a speedy trial was violated.

Whether the COVID-19 pandemic rises to that level will undoubtedly be the subject of litigation in the coming months. On the federal level, the coronavirus outbreak has forced courts to reschedule, or outright cancel, everything form grand jury hearings to arraignments and indictments. Motions hearings, trials, and sentencing have all likewise been pushed further and further back on dockets throughout the federal system. As state judicial systems continue to hand down similar, yet more jurisdictionally specific orders, the backlog of criminal cases continues to grow and the clock on each defendant's speedy trial countdown continues to tick.

To better understand the problems facing speedy trial rights moving forward through this pandemic, an analysis of the validity of those federal

and state court orders is helpful. The following section takes a look at some of those new rules implemented in the judicial system and determines whether they will be the subject of future debate in courtrooms once they reopen.

A. Issue

The effects of the COVID-19 pandemic have forced state and federal courts to balance public interest and safety against the rights of criminal defendants to a speedy trial. The need for social-distancing in response to the pandemic has made it difficult, if not impossible, for courtrooms to operate on schedule. That, in turn, has made compliance with the Speedy Trial Act a new hurdle for the government in criminal cases.

The blanket orders that federal and state courts have enacted which effectively toll the right to a speedy trial have been applied generally and not on a case-by-case basis. Without looking at the factors of each defendant's case, numerous objections can be raised questioning the validity of these orders. The U.S. Constitution, along with previous Supreme Court decisions, establish a number of factors that must be considered when denying a defendant's speedy trial rights. Simply asserting that the court closures serve the ends of justice, without more, will cause an up-rise in speedy trial challenges, leading to the dismissal of more charges and wiping out more convictions and sentences.

B. The Speedy Trial Act

As previously mentioned, the Speedy Trial Act establishes maximum time periods for the different stages of a federal criminal prosecution.[67] The time period between an arrest and indictment cannot exceed thirty days.[68] The time period between arraignment and trial cannot exceed seventy days.[69] Failure to comply with either of those time limits necessarily results in a dismissal of all charges, either with or without prejudice.[70] There are, however, a number of permissible extensions for each of those time periods under certain circumstances. Some of those permissible extensions are relevant in addressing speedy trials during the COVID-19 pandemic.

Under Section 3161(b), if a grand jury was not convened in the district during the original 30-day period, then "the period of time for filing of the indictment shall be extended an additional thirty days." A number of federal

[67] 18 U.S.C. §§ 3161-3174.
[68] 18 U.S.C. § 3161(b).
[69] 18 U.S.C. § 3161(c).
[70] 18 U.S.C. § 3162.

districts have used this portion of the statute to grant extensions. The U.S. District Court for the District of Vermont, previously discussed in this comment, was one such jurisdiction.[71] Another was the U.S. District Court for the District of Maine, which cited Section 3161(b), just one day after Vermont did, when announcing that "[d]ue to the unavailability of a grand jury in this District in May 2020, the 30-day time period for filing an indictment is tolled as to each defendant until this General Order terminates."[72] The U.S. District Court for the District of Utah's order used similar language as well.[73]

But a problem arises with the use of Section 3161(b), as many states – Vermont, Maine, and Utah for example – have realized. That section provides for only a thirty day extension, and many jurisdictions soon acknowledged that these court closures were doomed to last longer than the statute provided relief for. With grand juries being suspended for more than the thirty day extension, courts needed another justification for their closures. Vermont's General Order 89 provided that alternate justification for the tolling of speedy trials, stating "[a]s previously ordered in ¶ 4 of General Order No. 85, the time period of the postponements implemented by this Order will be excluded under the Speedy Trial Act, as the court specifically finds that the ends of justice served by ordering the postponements outweighs the best interests of the public and any defendant's right to a speedy trial, pursuant to 18 U.S.C. § 3161(h)(7)(A)."[74]

Section 3161(h)(7)(A) has been the provision of the Speedy Trial Act that the majority of federal jurisdictions have fallen back on, at least for extending the time period between arrest and indictment. One explanation for why this section has proven more useful is simple – in at least some jurisdictions, the delay has no set deadline. Section 3161(h)(7)(A) covers "[a]ny period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Circuits have split on how to determine a limit to the length of any such extension. For example, the Third Circuit held that "open-ended continuances to serve the ends of justice are not prohibited if they are reasonable in length."[75] At least the Fifth and Tenth Circuits have entirely endorsed the

[71] *See* General Order No. 89 (D. Vt. Apr. 28 2020) *supra* note 24.
[72] *See* General Order 2020-05 (D. Me. Apr. 29 2020).
[73] *See* General Order 20-012 (D. Utah Apr. 28 2020).
[74] *See supra* note 24, 72.
[75] *United States v. Lattany*, 982 F2d 866 (3d Cir. 1993).

Third Circuit's reasoning as well.[76] Contrast this with the Ninth Circuit, which has a more rigid analysis of the "ends of justice" extension in its application of the "Definite Duration" approach.[77] This test, adopted by the Ninth Circuit in *United States v. Pollack*, requires an "ends of justice" continuance to be limited in duration, whether through the specification of a set number of days or a fixed end date.[78]

Despite the location, however, federal courts from all across the nation have used the "ends of justice" provision to continue to push back court openings and further toll defendants' right to a speedy trial. Take for example the Western District of Washington, where pursuant to Section 3161(h)(7)(A), Chief United States District Judge Ricardo S. Martinez found that "the ends of justice served by ordering the continuance outweigh the best interests of the public and any defendant's right to a speedy trial."[79] The U.S. District Court for the Central District of Illinois similarly looked towards Section 3161(h)(7)(A) "given the need to protect the health and safety of defendants, their counsel, prosecutors, court staff, and the public by reducing the number of in-person hearings to the fullest extent possible."[80] In the U.S. District Court for the Eastern District of Virginia, the court declared pursuant to Section 3161(h)(7)(A) that "the ever-expanding risk of exposure to COVID-19 … causes it to be practically impossible to seat a jury and/or obtain a quorum of grand jurors while maintaining compliance with the current public health and safety recommendations from the [Centers for Disease Control and Prevention] and the President."[81]

Yet, despite this sample of federal courts using the "ends of justice" justification, few seem to go into further detail about how they've weighed the defendant's right to their speedy trial, as required by Section 3161(h)(7)(A).[82] Rather, the "ends of justice" approach has mainly been used to effectively declare all defendants equal in their assertion of speedy trial rights. The problem with that, of course, is that no two cases are the same. District court orders wiping all defendants' claims under one general

[76] See Greg Ostfeld, Comment, *Speedy Justice and Timeless Delays: The Validity of Open-Ended "Ends of Justice" Continuances Under the Speedy Trial Act*, 64 U. Chi. L. Rev. 1037, 1042-52 (Summer 1997).

[77] *Id*. at 1042.

[78] *United States v. Pollack*, 726 F2d 1456 (9th Cir. 1984).

[79] *United States v. Hughes*, 2020 WL 1331027, at *1 (W.D. Wash. 2020).

[80] *See* Second Amended General Order No. 20-01, (C.D. Ill. Apr. 30, 2020).

[81] *See* General Order No. 2020-06, (E.D. Va. March 23, 2020); *see also* General Order No. 2020-12, (E.D. Va. Apr. 10, 2020) ") (citing reasons set forth in Order No. 2020-06 to exclude time between May 2, 2020 and June 10, 2020 under Speedy Trial Act).

[82] For one exception, see the Eastern District of Virginia Order, *supra* note 81, which requires the U.S. Attorney for the Eastern District of Virginia to file a motion and proposed order in each criminal case in which an indictment would be delayed, or purportedly delayed, due to the absence of a grand jury.

umbrella means that those cases that could have been pursued but were unnecessarily delayed along with all other matters would be subject to challenge.

And still, some courts are finding even other ways to toll speedy trials. Under Section 3174, federal courts have one more justification for the temporary suspension or further delaying of a defendant's demand for a speedy trial. Primarily, Section 3174(e) states that "[i]f the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a)."[83] By taking this route, district court judges face the same thirty-day restriction they face under Section 3161(b), however 3174(e) allows them to then apply to the judicial council of the circuit court for approval, where the judicial council may then agree to declare a judicial emergency based on "calendar congestion resulting from a lack of resources."[84] If "no remedy for such congestion is reasonably available," it may suspend the seventy-day time limit between arraignment and trial for the length of the judicial emergency, or up to one year, although trials must commence within 180 days of the indictment.[85]

Chief Judge Kimberly J. Mueller from the Eastern District of California did exactly that on April 8, 2020, when she signed the Eastern District of California's Request for Suspension of Speedy Trial Act Deadlines.[86] The request itself was a seven-page letter describing the District's struggle in complying with Speedy Trial Act guidelines. "The COVID-19 pandemic has exacerbated our pre-existing emergency such that there simply are no other options for alleviating our calendar congestion, despite the many steps we have been taking to manage the current crisis since its onset," the letter says.[87] Both the Southern and Central Districts of California submitted similar requests to the Ninth Circuit's judicial council.[88] Subsequently, the Ninth Circuit approved of all three District Courts' requests, citing various ways in which COVID-19 worsened already strenuous conditions in California federal courts.

What's interesting about each approval is that the Ninth Circuit does not

[83] *See* 18 U.S.C. §3174(e).

[84] *See* 18 U.S.C. §3174(a).

[85] *See* 18 U.S.C. §3174(b).

[86] *See* In re Approval of the Judicial Emergency Declared in the Eastern District of California, Judicial Council of the Ninth Circuit, (E.D. Cal. Apr. 16, 2020).

[87] *Id*.

[88] *See* Order of the Chief Judge No. 18, (S.D. Cal. Mar. 17, 2020); In re Approval of the Judicial Emergency Declared in the Central District of California, Judicial Council of the Ninth Circuit (C.D. Cal. Apr. 9, 2020).

attempt to define what constitutes an emergency. In fact, the Council highlights that the Speedy Trial Act itself does not clarify it either: "[t]he statute does not specify what qualifies as an emergency or what factors to assess before determining that there is 'no reasonably available remedy.' In the legislative history of the [Speedy Trial Act], many members of Congress commented on the importance of a court's resources to be able to comply with the Act's time limits, and the ability to suspend time limits if a court could not meet those requirements."[89]

Whether courts should consider Congressional intent when reading into the Speedy Trial Act's application to the COVID-19 pandemic will surely be a litigated issue moving forward. The focus of the statute is based on a lack of resources available for court procedures to continue. COVID-19 does not pose any sort of court congestion problem, at least not while courtrooms remain closed. Rather, courthouses possess all the resources they had in the past, only now those resources are being directed elsewhere. In the next section, more on that shift in resources will be discussed in detail. For now, however, there are other important considerations that need to be addressed with regard to a defendant's right to a speedy trial.

C. Additional Concerns

1. COVID-19 within Jail and Prison Facilities

Perhaps the segment of the U.S. population most at-risk for contracting COVID-19 is jail and prison inmates and detainees. Correctional and detention facilities are unique in the challenges they face when trying to combat infectious diseases. Those who spend time in these facilities, both inmates and employees, share confined environments for long periods of time, and buildings are often overcrowded. Combine this with the constant turnover of employees clocking in and out and the steady flow of new inmates entering the confines of the facility, and it becomes easy to see how rapidly a virus such as COVID-19 can spread.

The numbers highlight just how serious the problem can be within correctional facilities. From April 22, 2020 until April 28, 2020, the CDC collected aggregate data from thirty-seven state and territorial health department jurisdictions analyzing the severity of the outbreak. "Thirty-two (86%) jurisdictions reported at least one laboratory-confirmed case from a total of 420 correctional and detention facilities. Among these facilities, COVID-19 was diagnosed in 4,893 incarcerated or detained persons and

[89] *See* Judicial Council Approval of Southern District Emergency Declaration; Judicial Council Approval of Central District Emergency Declaration ; Judicial Council Approval of Eastern District Emergency Declaration.

2,778 facility staff members, resulting in 88 deaths in incarcerated or detained persons and 15 deaths among staff members."[90] These numbers, collected over the course of only six days, show the staggering amount of risk detainees face while still awaiting their day in court. Though the CDC recommends "[p]rompt identification of COVID-19 cases and consistent application of prevention measures, such as symptom screening and quarantine. . ." to protect incarcerated and detained persons and staff members, the simple fact is that it's nearly impossible to screen each and every individual who enters a facility for the virus. "[C]rowded dormitories, shared lavatories, limited medical and isolation resources, daily entry and exit of staff members and visitors, continual introduction of newly incarcerated or detained persons, and transport of incarcerated or detained persons in multiperson vehicles for court-related, medical, or security reasons" all contribute to the rapid spread of COVID-19 within jails and prisons.[91]

But besides following CDC guidelines to the best of their ability, how else are federal and state courts and correctional facilities monitoring and handling the safety of their prison populations? In New York, some federal judges are ordering the Wardens of local correctional facilities to provide, in writing, "a status report concerning the incidence of infection of COVID-19 at each facility and the measures undertaken to mitigate the spread of COVID-19 within each facility. . ."[92] This order was handed down in response to three defendants filing and continuing to file applications for release on the basis that their continued confinement, combined with additional information particular to each defendant's case, subjected them to the risk of contracting the virus.

In *United States v. Martin*, more federal courts are seen taking similar steps.[93] In Maryland, the *Martin* court found it was necessary to lay some context before addressing the legal matters at issue, stating "[b]efore addressing the arguments of the parties and the evidence . . ., it is important to recognize the unprecedented magnitude of the COVID-19 pandemic."[94] At issue was whether a drug conspiracy defendant, who suffered from asthma, high blood pressure, and diabetes, and was thus particularly at risk if he contracted coronavirus, should have had the decision to detain him without bail reversed. The Government argued that state correction officials at Chesapeake Detention Facility had established comprehensive health

[90] Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities — United States, February–April 2020*, Morbidity and Mortality Weekly Report (MMWR) (May 15, 2020) available at http://dx.doi.org/10.15585/mmwr.mm6919e1.

[91] *Id.*

[92] *See* Administrative Order No. 2020-14 (E.D.N.Y. Apr. 2, 2020).

[93] *United States v. Martin*, 2020 WL 1274857 (March 17, 2020).

[94] *Id.* at *2.

measures to avoid a COVID-19 outbreak. Ultimately, the district court agreed with the Government's assertions that Martin was a danger to the community, and that his interests in avoiding the risk of contracting coronavirus were insufficient to overcome the presumption of detention.[95]

Despite the decision to keep Martin in detention, however, the Maryland court made great efforts to highlight the unprecedented nature of the COVID-19 pandemic. The court stated "[w]hile correctional officials at [Chesapeake Detention Facility] and other facilities in Maryland may successfully have dealt with past viruses and outbreaks of communicable diseases, they pale in scope with the magnitude and speed of transmission of COVID-19."[96] Additionally, the court made clear that Due Process, along with the Fourth and Fifteenth Amendments, may be implicated if defendants awaiting trial could demonstrate that they were being subjected to conditions of confinement that could subject them to exposure to serious illness. This would apply to both state and federal detainees, but might realistically only benefit those defendants that were elderly or suffered from more serious illnesses and conditions.[97]

What has been made clear throughout the pandemic is that temporary release for defendants will not be given "based solely on generalized COVID-19 fears and speculation.[98] Instead, some federal courts are looking to a factors test, established in *United States v. Clark* to determine whether defendants should be entitled to temporary release. "In making this determination, factors the district court may consider include "(1) the original grounds for the defendant's pretrial detention, (2) the specificity of the defendant's stated COVID-19 concerns, (3) the extent to which the proposed release plan is tailored to mitigate or exacerbate other COVID-19 risks to the defendant, and (4) the likelihood that the defendant's proposed release would increase COVID-19 risks to others."[99] Courts are not required to weigh each factor equally, however, so whether relief is granted is essentially left entirely up to the discretion of the district court.

At this time, there are no definitive indications of how federal courts are determining which criminal detainees deserve temporary release. The issue

[95] *Id*. at *4.

[96] *Id*. at *2.

[97] *Id*.; *See also Bell v. Wolfish*, 441 U.S. 520 (1979) ("In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law").

[98] *United States v. Clark*, 2020 WL 1446895 (D. Kan. 2020).

[99] *United States v. Davis*, 2020 WL 1951652 (N.D. Ind. 2020) (quoting *United States v. Clark*, 2020 WL 1446895, at *3 (D. Kan. 2020)).

varies in complexity when looking at state judicial and correctional systems. For example, the Judicial Council of California voted 17-2 to "rescind, effective June 20, the COVID-19 temporary bail schedule that set presumptive bail at $0 for people accused of lower-level crimes," a measure the state had initially taken to curb the spread of COVID-19 in jails and surrounding communities.[100] In contrast, New York's Governor Andrew Cuomo ordered the release of certain "eligible" inmates from state and local facilities.[101] In this more virus-combative method, over one-thousand parole violators were subsequently released after they were deemed incarcerated for "non-serious offenses."[102] Across the fifty states and other U.S. territories, different strategies are being used to effectively prevent the spread of COVID-19 in jails and prisons.

But generally speaking, the tests which have been developed in the past few months point towards the use of the Due Process Clause and the Fifth and Fourteenth Amendments for federal and state detainees, respectively. Certainly, arguments made on behalf of the elderly and medically vulnerable will prove to be more effective than those made for younger and healthier defendants. The systems currently in play may favor those who need it most, but it's impossible to ignore the inequities of their application. During this pandemic, however, inequities seem unavoidable. As Judge Kimberly J. Mueller wrote, "[a]s we are adjusting to work in new and imperfect physical circumstances, we are beginning to see a rising stream of new motions and petitions seeking immediate release from confinement in light of COVID-19, for which no established law guides the resolution and there often are no easy answers, particularly given the equitable considerations implicated."[103]

2. The Effects of Backlogging on Criminal versus Civil Litigation

Because the right to a speedy trial is reserved strictly for criminal matters pursuant to the Speedy Trial Act and the Sixth Amendment to the U.S. Constitution, the COVID-19 pandemic has already and will continue to force civil matters further back in court dockets across the nation. The American

[100] News Release, Judicial Council, Chief Justice End Some Emergency Measures as California and Courts Expand Reopening (June 10, 2020), available at https://newsroom.courts.ca.gov/news/judicial-council-chief-justice-end-some-emergency-measures-as-california-and-courts-expand-reopening .

[101] Bernadette Hogan, Cuomo Orders 1,100 Parole Violators Released from Jails Over Coronavirus Concerns, New York Post (March 27, 2020), available at https://nypost.com/2020/03/27/cuomo-orders-1100-parole-violators-released-from-jails-over-coronavirus-concerns/.

[102] *Id.*

[103] *See* In re Approval of the Judicial Emergency Declared in the Eastern District of California, Judicial Council of the Ninth Circuit, *supra* note 86.

Bar Association has already begun to inform litigators of this imminent backlog, stating "[m]easures 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."[104]

Once restrictions are lifted, court dockets will be forced to handle criminal matters that are nearing deadlines – either through statutes of limitations or demands for speedy trials. Defendants that are currently incarcerated will likely take priority, as jails and prisons will need to free up space and limit the number of potential COVID-19 carriers and spreaders. White-collar matters are likely to be considered last on the list of priorities, and so it can be expected that litigators will push for plea bargains to assist in lightening the backlog of cases. As one California District Court noted, "[b]y now it almost goes without saying that we should not be adding to the prison population during the COVID-19 pandemic if it can be avoided."[105] In this regard, white-collar criminal defendants may take comfort in knowing that home confinement appears to be the more appropriate solution, while white-collar civil defendants may understand that it could be years before they're ever forced to show up in court.

Regardless, courts will need to implement new methods of hearing cases moving forward to combat the extreme backlog of both criminal and civil cases that were halted by sudden closures and a nationwide shutdown. The American judicial system will be forced to welcome in a new age of digital and remote courtroom proceedings, which will undoubtably come with technical glitches and errors, as well as a plethora of new issues to be litigated. More on these issues is discussed below.

IV. RIGHT TO A JURY TRIAL

The right to a jury trial is a fundamental pillar of the American judicial system. The Sixth Amendment outlines the rights to a speedy, impartial, jury trial in criminal cases and the Seventh Amendment preserves the right to jury trials in civil cases. In the individual states, most jurisdictions have codified the right to a jury either in their individual constitutions or in statutes passed by their legislatures. For example, in Colorado, the state's constitution provides "[t]he right of trial by jury shall remain inviolate in criminal cases"

[104] Pandemic Disrupts Justice System, Courts, American Bar Association (Mar. 16, 2020), available at https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/coronavirus-affecting-justice-system/.

[105] *United States v. Garlock*, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020).

under Article II, Section 23.[106] In civil actions, the right to a jury trial is derived from the Colorado Rules of Civil Procedure's Rule 38 "in actions wherein a trial by jury is provided by constitution or by statute."[107] Similarly, Indiana's constitution provides for the right to a jury in civil actions in its constitution, stating in Article I, Section 20 "[i]n all civil cases, the right of trial by jury shall remain inviolate."[108]

States throughout the nation codify and recognize the significance of jury trials. They remain a powerful tool for criminal defendants, civil litigators, and every entity in between, allowing issues of fact to be decided not by the judges who hear arguments every day, but rather by their peers who, at least in theory, can more closely relate to the matters at hand. Historically, only one issue has been determinative for whether a jury trial is available to civil litigants – distinctions between cases at common law or suits in equity.

However, the ongoing global pandemic has forced courts to suspend jury trials, both in federal and state courtrooms, for reasons other than that historical distinction. Today, one of the most recognized tools of American jurisprudence has become a main reason why regular court proceedings haven't been able to resume. This is because putting together a jury requires bringing together strangers and confining them in close quarters to hear arguments over the course of hours, sometimes days. The early stages of jury selection requires bringing together hundreds of people who are simply answering their call to civic duty, yet the process in which they're organized violates dozens of CDC guidelines.

As an initial response, state and federal courts are currently finding new ways to call juries to hear cases. The new methods, however, are imperfect to say the least, and pose major constitutional problems if more intricately scrutinized. Taking a look at some of the issues confronting American courts in the upcoming months paints a picture of unprecedented times for litigants, both civil and criminal.

A. Issue

The most obvious issue confronting the judicial system during the COVID-19 pandemic is the simple task of bringing together a jury. State and federal courts will need to address jurors' concerns about protecting their health from the earliest stages of the process. While hearing a case, jurors should be focused only on hearing and weighing facts and evidence, not worrying about their risk for contracting the virus. To ensure the safety of jurors, courts will need to develop sanitation and social-distancing procedures

[106] Co. Const. Art. 2, § 23.
[107] Kaitz v. District Court, 650 P.2d 553 (Colo. 1982).
[108] In. Const. Art. 1, § 20.

that minimize the potential for viral spread. In the meantime, however, many courts have begun using alternative methods for hearing cases, mainly through the use of virtual communication platforms that will be discussed in more detail below.

Those non-face-to-face methods will pose other hurdles to litigants, mainly in the realm of Confrontation Clause issues. It is well established law that a criminal defendant has the right to confront witnesses testifying against them in court, but whether Zoom virtual conference calls satisfy that requirement will surely be a hotly debated topic in the coming months.

Finally, when juries will be able to return to the courtroom is another question with unclear answers. Obviously, a wide variety of operational differences and varying levels of the coronavirus's impact in different regions of the country will affect re-openings. Courts will need to balance the need to resume jury trials in their communities with their responsibility to ensure the safety of court personnel – jurors, court employees, and litigants alike.

Unlike previous issues posed in this paper, there is an extremely limited amount of precedent for a total shutdown of jury trials. The methods being used to continue court proceedings virtually, though technologically superior to anything used in the past, create completely novel problems for the judicial system. The future is highly speculative, and any solutions will surely be criticized, modified, and litigated as COVID-19 continues to affect the nation.

B. When and How Courtrooms Return

The COVID-19 Judicial Task Force recently published a report on the reimplementation of jury trials in federal courts across the country.[109] In it, the task force, which is made up of federal trial judges, court executives, and representatives from the federal defender community and the Department of Justice, offers suggestions for courts to consider when restarting jury trials. Notably, the task force makes clear that *when* jury trials should continue will be entirely up to individual states, districts, and perhaps even divisions, based on the differing locations, stage of recovery, funding, and respective opinions on the appropriate steps necessary to ensure safety.[110]

As for the *how*, the task force goes through the jury selection process and explains what steps should be taken throughout each phase of the timeline. First, individual courts should determine the level of personal protective

[109] *See* "Conducting Jury Trials and Convening Grand Juries During the Pandemic," COVID-19 Judicial Task Force (June 4, 2020), available at https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf [hereinafter "COVID-19 Judicial Task Force Report"].

[110] *Id*. at 2.

equipment (PPE) required by those entering the courthouse. Whether PPE will be provided to jurors, or if they need to bring their own, will be up to the individual jurisdictions. If jurors are required to bring their own PPE, however, courts should recognize the risk involved, including: "1) contaminated/un-sanitized PPE brought into the courthouse and courtroom; 2) jurors failing or refusing to bring their own PPE; and 3) political statements or otherwise controversial or inciteful personalized masks."[111]

Next, the task force explains ways of communicating to jurors the steps the court is taking to ensure their safety. Surely, COVID-19 may empower some potential jurors to use the pandemic as an excuse to avoid jury duty altogether. Each of the 94 federal district courts maintains its own jury procedures and policies regarding excuses from jury service, and The Jury Act also allows courts to excuse a juror from service at the time he or she is summoned on the grounds of "undue hardship or extreme inconvenience."[112] The task force's report attempts to offer courts suggestions on preventing the misuse of the juror hardship excuse. Even so, the report acknowledges that courts should "[p]lan for a lower yield from the jury pool during the pandemic. Even healthy jurors not considered particularly vulnerable to COVID-19 may hesitate to serve for a variety of reasons.[113]

Finally, the report highlights important social distancing and sanitation practices for the actual jury selection and voir dire process. Main points include placing signage at courthouse entrances explaining the court's response and reminding individuals to maintain proper social distancing, placing tape marks on floors for proper distancing, having free-standing hand sanitizer stations, and even bypassing the jury assembly area completely by bringing jurors directly into the courtroom to view orientation and the Chief Judge video.[114]

The report also points towards the possibility of remote jury selection and the differences between the handling of civil and criminal matters. "Some courts might consider in civil cases, or in criminal cases with consent, virtual voir dire with prospective jurors participating from home via videoconferencing technology."[115]

All these suggestions, though helpful in preventing the spread of COVID-19, pose a number of hurdles for litigators and court staff. One potential ramification of the variable timetable is the increase in forum shopping amongst litigants. It's likely that civil plaintiff's set on demanding a trial by jury will seek out those areas less affected by the COVID-19 pandemic when

[111] *Id*. at 3.
[112] *See* 28 U.S.C.A. § 1866(c)(4).
[113] *See*, COVID-19 Judicial Task Force Report, *supra* note 109 at 5.
[114] *Id*. at 6-7.
[115] *Id*. at 9.

possible. On a more basic level, masks may prevent effective voir dire as attorneys struggle to pick up on changes in emotion from jurors – smirks, giggles, clenched teeth, all patterns that may show bias or disinterest in the case. Perhaps the most critical issue has to do with maintaining a fair cross-section of the community. Certain groups such as African-Americans, Latinos, and the elderly, have been disproportionately affected by the coronavirus. It's possible that we see challenges based on these issues in the months to come.

To dodge these issues, many courts have turned to experimenting with remote jury trials. Zoom, the leading teleconferencing service throughout this pandemic, has begun gaining traction in state and federal court proceedings. A Collin County court in Texas held the nation's first Zoom jury trial on May 18, 2020, where despite some technical issues, twenty-six potential jurors called in on devices such as laptops, iPhones, and tablets, to go through the jury selection process and ultimately hear a one-day civil proceeding with a non-binding verdict. The experiment has since been the inspiration for dozens of other similar proceedings.

Florida's Supreme Court, for example, recently called for a pilot program "to establish the framework and identify the logistics of trying cases remotely."[116] The pilot program is limited to civil cases and will be authorized in only up to five of the state's 20 judicial circuits, but frankly, the added expense and effort of connecting with jurors remotely might make settling more attractive to plaintiffs. In a state where COVID-19 is having devastating effects, jury trials in civil cases may simply not be worth the risk.

Criminal defendants, on the other hand, will surely continue to invoke their right to a jury trial. Although virtual court proceedings are beginning to make their way into criminal courts, mainly though preliminary appearances and arraignments, the challenges that prosecutors face with regards to jury trials are not as easily solved with Zoom teleconferences.

C. Confrontation Clause Problems

The Confrontation Clause guarantees a "face-to-face encounter" between a defendant and his accusers in criminal matters.[117] Justice Scalia, in writing the majority opinion for the Supreme Court in *Coy v. Iowa*, explained the rationale for this constitutional requirement: "[t]he perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it. A witness may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting

[116] *See* Supreme Court of Florida Administrative Order AOSC20-31, Comprehensive Covid-19 Emergency Measures For The Florida State Courts (May 21, 2020).

[117] *Coy v. Iowa*, 487 U.S. 1012, 1017 (1988).

or mistaking the facts. He can now understand what sort of human being that man is."[118] Notably, the Supreme Court commented on the literal interpretation of that "face-to-face" confrontation, describing it as "irreducible."[119]

In the concurring opinion, Justice O'Connor described how some situations might warrant an exception to that rule, explaining that when it was deemed necessary, certain case-specific trial procedures could help protect important public policy interests. The interest Justice O'Connor was referring to in *Coy* was the protection of a child witness testifying against their abuser. However, it's possible that future litigants will argue the COVID-19 pandemic may trigger the exception as courts seek to protect the important public interests of safety and prevention of further spread of the virus.

Shortly after *Coy*, the Supreme Court revisited confrontation clause issues in *Maryland v. Craig*. Justice O'Connor's "necessity" argument was referenced to permit the use of a one-way, closed-circuit television system, making it possible for a child witness to testify in a sexual assault case pursuant to a state statute allowing for such remote testimony.[120] Despite the Supreme Court appearing to depart from the importance of maintaining face-to-face confrontation, *Craig* actually doubled down on the significance of that requirement. The court stated that "[t]he combined effect of these elements of confrontation – physical presence, oath, cross-examination, and observation of demeanor by the trier of fact – serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings."[121]

That section, highlighting that the "observation of demeanor by the trier of fact" serves an important part of confrontation clause analysis, is a key reason why Zoom trials should not find their way into the criminal court system. The simple fact is this – it is impossible to ensure that jurors will remain attentive when sitting on a jury from the comfort of their homes, workplaces, or anywhere other than the jury box. One could argue that there is no way of ensuring that attentiveness even from within the courtroom, but the differences are like night and day. Inside a courtroom, jurors get a sense of the significance of their role through the many environmental stimuli present around them. The silence in the courtroom as they enter their jury box speaks louder than anything they can experience from home. The presence of the bailiff, court reporter, and judge all paint a picture of the serious nature of proceedings. The wood benches, the attorneys navigating the well, and the

[118] *Id*. at 1019 (internal citations and quotations omitted).
[119] *Id*. at 1021.
[120] *Maryland v. Craig*, 497 U.S. 836, 842 (1990).
[121] *Id*. at 846.

sound of the gavel as it strikes down all trigger feelings of importance in the courtroom.

If virtual jury trials were to be allowed in criminal cases, all of those features of the standard courtroom would be lost. In its place would be the sound of the neighbor's lawn mower, the racket of children playing in the room next door, and the temptation of a cell phone buzzing within a pocket. Judges can attempt with the best of intentions to limit these outside distractions, but their attempts simply won't rise to the level they achieve when given under the curtain of an official courtroom setting.

More than a decade after *Coy* and *Craig*, the Supreme Court revisited the importance of a defendant's right to confront a witness in a face-to-face setting in *Crawford v. Washington*. The Court rejected any argument that the State can satisfy the Confrontation Clause by alternative procedures that produce "reliable" evidence.[122] Although Zoom may offer jurors the ability to keep a watchful eye on defendants, witnesses, and attorneys alike, it simply doesn't match the quality of an in-person courtroom proceeding – nor does it matter. *Coy*, *Craig*, and *Crawford* all establish that a defendant has a constitutional right to confront and cross-examine the prosecution's witnesses face-to-face in the courtroom with the jury present.

V. CONCLUSION

The problems highlighted in this comment are intended to give litigators a sense of how the ongoing COVID-19 pandemic will affect future courtroom proceedings. Despite many of the issues having some form of precedent – either through past court closures, relevant case law, or statutory text – the severity and intensity of this virus makes predicting the future a difficult task. As it stands, COVID-19 continues to affect previously enacted court orders, further exacerbating the problems associated with statutes of limitations, speedy trials, and jury trials.

How these problems are dealt with is largely in the hands of the attorneys who face them in the upcoming months. They are the ones who will lay the groundwork for future generations of litigators who find themselves dealing with global pandemics, natural disasters, and other catastrophic events. Viruses like COVID-19 are always evolving, and they will continue to derail every-day life along with the systems developed during their lulls. However, the guidance established during this time will prove to be critical when the next group of litigators seeks answers for their problems.

For now, those who deal with the statutory and constitutional hurdles

[122] *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

posed by COVID-19 should know that, despite the seemingly unprecedented nature of the virus, there are arguments to be made that are rooted in history. Zealous and effective advocates will use the tools they have been given to challenge the orders tolling limitations periods. Vigilant attorneys will understand the dangers of standing idly by as their clients await their day in court, especially if they face incarceration or are already incarcerated. Savvy litigators will weigh the pros and cons of demanding their client's right to a jury trial, a decision with greater implications now than ever before. These issues are novel, yes, but they are not inexplicable.

It's a challenging time to be a trial attorney in the United States. In addition to the difficulties of preparing coherent and effective arguments, trial attorneys are now tasked with being experts on a vast new range of issues stemming from this pandemic. Hopefully, this comment provides useful guidance as courts continue to reopen, and cases continue to be litigated.

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