

EXPANDING ELECTRONIC ACCESS TO THE FEDERAL COURTS: THE UNEXPECTED OPPORTUNITY

PRESENTED BY THE COVID-19 PANDEMIC

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Chairman Johnson and Ranking Member Roby:

My name is Jeremy Fogel. Since September 2018, I have served as the Executive Director of the Berkeley Judicial Institute (BJI), a center at Berkeley Law School whose mission is to build bridges between judges and academics and to promote an ethical, resilient and independent judiciary. Before that, I was a judge of the California state and federal trial courts for thirty-seven years. From 2011 to 2018, I was the Director of the Federal Judicial Center (FJC) here in Washington. The FJC is responsible for both professional education and applied research on behalf of the federal judiciary. Its governing board is chaired by the Chief Justice of the United States.

The COVID-19 pandemic has had a dramatic disruptive effect on our federal and state judicial systems. Courthouses have been closed; legal proceedings have been conducted with minimal staffing, held remotely, or postponed for months; and court personnel have scrambled to work effectively from home. The federal courts, which long have been resistant to electronic access and virtual proceedings, have been forced to implement emergency measures to facilitate them.

The federal judiciary deserves much credit for its ongoing efforts to deal with this unprecedented situation. It has recognized the severity of the challenge and has faced it with

its customary competence and care. But it would be disappointing if the measures it has taken simply were abandoned wholesale when the current emergency has passed. While it goes without saying that their primary concern must be the health and safety of their users and personnel, the courts also have an unexpected and unprecedented opportunity to study the costs and benefits of new ways of doing their work.

History teaches us that a crisis often can be the catalyst of innovations that endure long after the crisis itself has ended. The emergency programs that were implemented to mitigate the worst effects of the Great Depression permanently transformed our understanding of the role of government, and in so doing they left a legacy ranging from rural electrification to economic guardrails to Social Security. It is doubtful that any of these changes would have occurred, at least when and how they did, had the disruption of our nation's economy been less severe.

Even in this politically polarized age, our federal courts are widely respected for their independence, the professionalism of their judges and staff, and the seriousness with which they approach their work. Social and partisan controversies aside, in my experience the great majority of federal judges do their best to decide the great majority of cases on the basis of competent evidence and applicable legal principles. This is not true in much of the rest of the world.

The federal courts also are a "small c" conservative institution. The same seriousness that inspires federal judges to produce high-quality work also leads them to be reflexively cautious about structural change. Always concerned (and properly so) about the unintended consequences of different ways of doing things, the federal judiciary tends to consider new

ideas infrequently, at great length and in granular detail. Even the pilot projects it occasionally undertakes to study potential innovations tend to be carefully limited in scope and to produce modest, incremental results.

Such caution can have great value in normal times, but a disruption on the scale of the COVID-19 pandemic changes everything. The public access to court proceedings guaranteed by the Constitution has been impossible, at least in a physical sense, in the context of shelter-in-place orders and the potential risks to court users and staff. Jury trials and in-person oral arguments have been impracticable, movement of in-custody criminal defendants is fraught with logistical problems, and public visits to courtrooms and court clerk's offices have not been a realistic option. Even the United States Supreme Court, which long has refused to permit any real-time transmission of its proceedings, now has conducted telephonic hearings and has provided a live feed of those hearings to the news media and thus to the public. Most would agree that the importance of the remaining cases on the Court's docket made such a step necessary. And while some of the dynamics of oral argument have changed, the Court's forced experiment has not had the negative impact on the dignity of the Court's proceedings that some had feared.

On March 31, the Administrative Office of the United States Courts (AO) issued detailed guidance enabling circuit, district and bankruptcy courts to use video and audio technology to provide court users and the public with remote access in non-criminal matters. On April 2, the AO published additional guidance permitting electronic access to most criminal proceedings notwithstanding Federal Rule of Criminal Procedure 53, which prohibits such access. Both directives stressed that these departures from normal practice are intended to be temporary

and will terminate once the current national emergency has passed. This limitation was understandable, as only limited authority to bypass existing rules was granted by Congress under the CARES Act.

Unfortunately, while courts and other services have begun a slow process of reopening in some parts of the country, it likely will be many more months before full court operations can resume safely nationwide. In the meantime, the expanded implementation of electronic access to court operations already has produced—and will continue to produce—a bounty of illuminating data concerning each of the principal areas of concern that have been cited in the past to support judicial reservations about greater use of virtual proceedings.

One of those areas of concern is privacy. Understandably, courts are reluctant to see images of witnesses, parties, lawyers, jurors and judges appearing widely on the internet or on social media. The exigencies of the present situation have required courts to think about practical ways of balancing these privacy interests with the transparency provided by virtual public access. The AO's April 2 guidance for criminal matters touched on this issue by making clear that while certain proceedings may be seen or heard over dedicated electronic media, full internet streaming is not authorized. Interestingly, at least some of the virtual platforms with which courts have experimented since then actually can be configured to ensure more privacy than is possible in many in-person proceedings.

A related area of concern is security. Even in normal times, when physical public access to courthouses essentially is unrestricted, courts still routinely use metal detectors to screen visitors, and the identity of certain witnesses—usually cooperating witnesses in criminal cases—can be shielded from public disclosure after appropriate findings by a judge. The

experience of the current emergency already has helped courts improve their ability to secure their electronic portals and to prevent harmful or unauthorized access to sensitive proceedings or information.

Public access to the courts is not the only Constitutional right implicated by the greater use of virtual technologies. At the outset of the pandemic, California's state courts struggled with the question of whether a defendant may be arraigned remotely on a criminal charge without waiving his or her right to be personally present; a majority of the state's Judicial Council concluded that even under the present exigent circumstances, a defendant may insist on an in-person proceeding. Although no published decision has addressed the issue, it is extremely doubtful that a remotely-conducted criminal jury trial would satisfy the Constitution's right of confrontation, at least without the informed consent of everyone involved. That said, the current situation has given the federal courts an opportunity to think broadly and concretely about the Constitutional requirements and limitations relevant to remote proceedings.

Federal judges also worry about impact of virtual court operations on the nature and quality of their own day-to-day work. They have expressed concern that lawyers who appear remotely will be less candid than they would be in person, and that judges' ability to assess parties' and lawyers' non-verbal cues such as facial expressions and body language will be diminished. Perhaps influenced by their experience with other proceedings that occur away from the courthouse, such as depositions in civil cases, they fear that lawyers will have less incentive to cooperate and act professionally when not in the immediate presence of the judge and each other. And for appellate judges, who sit on panels with other judges, there is

trepidation about the impact of virtual hearings on collaboration and collegiality. The restrictions resulting from the COVID-19 pandemic have created a situation in which the validity of these apprehensions is being tested. And so far, while trial court judges report that some proceedings are more amenable to virtual platforms than others, most appellate judges seem reasonably comfortable with working and collaborating remotely. Some have suggested that continued use of virtual hearings would make them more efficient by reducing travel between places of holding court.

The importance of the data that has been and will continue to be generated with respect to these questions is not academic. For at least a decade, the federal courts have recognized that the costs associated with civil litigation are unacceptably high and have skewed access to justice in favor of well-funded parties. Thoughtfully designed and carefully implemented procedures for virtual proceedings (most likely other than jury trials) could reduce that cost substantially by limiting the time lawyers and parties spend attending and traveling to and from in-person proceedings or waiting for a judge to get through a crowded docket. The experience of the state courts suggests strongly that parties in cases with smaller amounts of money at issue actually may prefer having the ability to appear virtually. And on the criminal side, recognizing that many defendants will choose to waive their right to be physically present at hearings that affect neither their custodial status nor the disposition of their case, virtual proceedings could result in substantial savings in inmate transportation costs and a reduced burden on the U.S. Marshals and other law enforcement officers who are responsible for the security of in-person hearings.

There also is the overarching issue of public trust and confidence in the courts. While the federal courts consistently do better than the other branches of government in public opinion polls, a closer look at the polling data shows that confidence in the courts has declined in recent years and that relatively few people outside the legal profession understand what judges actually do. There is a widespread (and mistaken) perception that judges simply decide every case on the basis of their political inclinations. There also are significant differences in the level of confidence among different socio-economic groups.

An obvious antidote to such negativity is greater transparency. As noted earlier, the federal courts are a strong, value-centered institution with a good story to tell. Virtual technologies have potential not only for court users but also in the critically important role of public education. While it certainly may make more sense to put some types of proceedings on line than others, treating courthouse walls as an outer boundary for obtaining real-time information is increasingly hard to justify in this digital age.

Finally, despite this generally positive view of the potential benefits of greater use of virtual proceedings in the federal courts, I would be remiss if I did not acknowledge the fundamental importance of procedural justice. It is important that litigants not only be heard but also that to the extent possible they feel heard, that they were listened to well and treated with respect. As we are learning from the experience of the state courts, litigants in some types of proceedings actually have a more positive experience with virtual proceedings than they have had previously with in-person court appearances. But there also are indications that a person's physical presence at some types of proceedings—for example, bail and detention hearings—clearly works to their benefit. Some litigants lack the resources to take full

advantage of virtual platforms. And there are some matters, such as sentencing hearings in criminal cases, in which, quite apart from Constitutional considerations, the experience of in-person communication adds an important sense of immediacy and gravity to the event.

The leadership of the federal courts should take full advantage of the opportunity that its response to the COVID-19 pandemic has presented. It should conduct a thorough review of its experience over the course of the present emergency and act boldly, creatively and thoughtfully on the basis of what it learns. I encourage your subcommittee to explore legislation that will encourage and facilitate that effort, including authorization of relevant research and extension of the courts' authority to conduct and provide public access to virtual proceedings.

Thank you very much for inviting me to be here today.