

The Courts and COVID-19

March 30, 2020

The spread of the respiratory disease [COVID-19](#) has prompted [far-reaching responses](#) affecting many areas of American life. As Americans strive to practice [social distancing](#) to limit the spread of the novel coronavirus that causes the disease, the United States federal courts have implemented [various measures](#) designed to protect litigants, jurors, court personnel, and members of the public, and to reduce the obstacles to litigation arising from the pandemic. As this Sidebar discusses in more detail, the courts generally possess significant discretion to modify their procedures in response to the COVID-19 pandemic, but there are some areas where further changes would require congressional action.

Federal Court Actions to Prevent the Spread of COVID-19

The federal courts have taken a [variety of approaches](#) to mitigating the risks of COVID-19. At the trial court level, for example, the U.S. District Court for the Southern District of New York announced on March 13, 2020, that it would [postpone new civil and criminal jury trials](#). While the court allowed existing grand jury proceedings and jury trials already in progress to continue, it encouraged the use of telephone or video conferencing for hearings and status conferences. Likewise, on March 17, 2020, the U.S. District Court for the Western District of Washington [postponed civil and criminal hearings and trials requiring oral argument](#). Judges in that court may still conduct proceedings by telephone and video conference when possible, or resolve motions that do not require oral argument. Overall, as of March 18, 2020, according to the American Bar Association, [more than 25 district courts had suspended jury trials](#). In addition, many courts have restricted access to court buildings, with some allowing entry only by people with [official business](#) before the court and others [limiting access](#) by individuals believed to pose a higher risk of COVID-19 transmission. While many district courts appear to have proactively initiated these changes, courts in [at least four districts](#) have closed after court personnel or individuals practicing before the court were diagnosed with COVID-19.

At the appellate level, a majority of the U.S. Courts of Appeals have also taken steps to respond to the COVID-19 pandemic. For example, on March 13, 2020, the U.S. Court of Appeals for the Ninth Circuit, which serves [states including California and Washington](#) that have seen [many cases of COVID-19](#), issued an [order restricting public access](#) to several courthouses within the circuit during weeks when court is not in session, encouraging litigants to submit filings electronically or by mail, and directing individuals filing in person to use a drop box rather than delivering materials directly to the clerk's office. The same day, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) [restricted access to the courthouse](#) to court employees, members of the media, and individuals with official business before the court. In

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addition, on March 17, 2020, the D.C. Circuit issued a [standing order](#) suspending all in-person on-site oral argument until further notice. Pending cases may be argued via teleconference, decided without argument, or postponed. The D.C. Circuit conducted oral arguments by phone for the first time on Friday March 20, 2020. While technical issues with the first such argument led D.C. Circuit Judge Thomas Griffith to quip that the telephone proceeding was “[kind of a mess](#),” the second argument experienced fewer difficulties.

The United States Supreme Court has also changed its operating procedures in an effort to limit the spread of the novel coronavirus. On March 12, 2020, the Court published a notice on its website stating that the Supreme Court building would [close to the public](#) while remaining open for official business. In addition, on March 16, 2020, the Court [indefinitely postponed oral argument](#) in cases scheduled for argument during its March 2020 sitting.

In general, the [administration of the federal courts](#) is delegated to the local courts, with the chief judges for each district or circuit overseeing policy for their jurisdictions. 28 U. S. C. § 2071 provides that “the Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business,” and the Federal Rules of [Civil](#), [Criminal](#), and [Appellate Procedure](#) authorize the district and appellate courts to adopt their own local rules. The Supreme Court has [explained](#) that “a district court has discretion to adopt local rules that are necessary to carry out the conduct of its business,” as long as such rules are “‘consistent with’ the ‘rules of practice and procedure prescribed by the Supreme Court.’” As a result, and as the foregoing examples illustrate, to date, the federal courts have worked independently to determine how to respond to the COVID-19 pandemic, and the measures they have implemented are not necessarily uniform. On March 19, 2020, the director of the Administrative Office of the U.S. Courts (the judicial branch agency that provides various forms of administrative support to the federal courts) [issued guidance](#) urging all courts to take certain steps to mitigate the effects of the coronavirus. Those steps include permitting employees to telework if practicable, postponing courthouse proceedings with more than 10 people, conducting in-person court proceedings only when absolutely necessary, conducting jury proceedings “only in exceptional circumstances,” implementing measures to reduce the number of people gathering in courthouse public areas, and using videoconferencing or audioconferencing when practicable. Nonetheless, at the time of writing not all of the federal courts had taken action in response to the COVID-19 pandemic. However, the situation remains in flux in the courts, as it does elsewhere, and it is likely that courts will continue to adapt their approach to the pandemic. The Administrative Office of the U.S. Courts has published a [webpage](#) tracking the different courts’ responses, which it updates daily.

Court closures and the suspension of jury trials could raise constitutional concerns—especially if courts close or reduce operations for weeks or months—because the Constitution protects [certain rights related to access to court](#) for criminal defendants, civil litigants, and members of the public. At this time, however, it remains to be seen how the courts will resolve any tension between the legal right of access to court and the practical public health concerns related to COVID-19.

Reducing the Burden on Litigants—Roles of the Courts and Congress

Court closings and other circumstances arising from the COVID-19 pandemic may impede litigants and their counsel from pursuing cases in a timely manner. Some courts have taken steps to reduce these impediments but, as discussed further below, there are also opportunities for Congress to act in this area.

As background, a number of rules and statutes impose deadlines on all phases of litigation, from the initial filing of a case to the pleadings in a pending proceeding to any eventual appeal or certiorari petition. These deadlines may fall into one of two categories: *jurisdictional rules* and *claim-processing rules*. The Supreme Court has explained that jurisdictional rules directly limit “[a court’s adjudicatory authority](#)”—that is, the power of the court to consider a given case. Claim-processing rules, by contrast,

“seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.”

Courts possess substantial discretion to modify claim-processing rules, including many filing deadlines in pending litigation. Judges often issue such relief on a case-by-case basis in response to requests from individual litigants. But courts may also issue orders that apply to multiple cases when circumstances warrant such relief, and several courts have done so in response to the current public health emergency. For example, on March 16, 2020, the U.S. Court of Appeals for the Second Circuit issued an [order extending all filing deadlines](#) for pending matters by 21 days. Likewise, the U.S. District Court for the Northern District of Alabama issued an order on March 17, 2020, [staying “all unexpired deadlines and briefing schedules” for 14 days](#). The U.S. Court of Appeals for the Ninth Circuit has not issued a blanket extension, but has notified litigants that “[the Court will extend non-jurisdictional filing dates](#) as needed” and provided a process for parties to seek an automatic 60-day extension.

In some cases, courts may also extend the deadline for the initial filing of a lawsuit. While [statutes of limitations](#) generally dictate that civil claims must be brought within a certain amount of time after they accrue (for example, four years under the [default federal statute of limitations](#)), a court may [toll the statute of limitations](#) and allow later filing when “a party ‘has pursued his rights diligently but some extraordinary circumstance’ prevents him from meeting a deadline.” (Equitable tolling is not available in all cases, and the Supreme Court has [held](#) that even some non-jurisdictional deadlines may not be tolled.) At least one commentator has [suggested](#) that the COVID-19 pandemic could constitute an extraordinary circumstance that would warrant equitable tolling, but it remains to be seen how the courts would evaluate such an argument.

On the other hand, courts may *not* extend deadlines that are jurisdictional in nature because those deadlines operate “so that courts are [without power to adjudicate](#) claims filed outside their strict limits.” For instance, [Federal Rule of Appellate Procedure 4](#) provides that a notice of appeal of a district court decision must be filed within 30 days (or 60 days if the United States is a party to the suit). Rule 4(a)(5) provides that the district court may extend or temporarily reopen the time to appeal in some circumstances, but such an extension or reopening is limited to 30 days or less. The Supreme Court has [held](#) that timely filing of a notice of appeal is a jurisdictional requirement, and a court may not extend the time to file beyond the period provided in Rule 4. In addition, [28 U.S.C. § 2101](#) specifies the deadline for petitioning the Supreme Court for a writ of certiorari in a civil case. While that statutory provision allows the Supreme Court to extend the filing deadline by up to 60 days, it permits no further extension. The Supreme Court has therefore held that the certiorari petition filing deadline for civil cases is [mandatory and jurisdictional](#), and the Court has “no authority to extend the period for filing except as Congress permits.” (In criminal cases, by contrast, the deadline for certiorari petitions is [not set by statute](#), and the Court has thus held that it has additional leeway to extend the filing deadline in criminal cases).

On March 19, 2020, the Supreme Court issued an order [extending the deadline](#) for filing “any petition for a writ of certiorari due on or after” that date. While a cert petition must generally be filed no more than [90 days from the date of the lower court judgment](#), pursuant to the March 19 order, the Court will now allow filing within 150 days of the date of the lower court judgment. Under 28 U.S.C. § 2101, the Court may not offer any further extension of the deadline in civil cases.

It is unclear how long the COVID-19 pandemic will last, or what effect the pandemic will have on litigation in the United States. It is possible that the courts’ existing authority to modify their procedures will be sufficient to allow courts and litigants to adapt to the unique demands of this time. However, if Congress wished to provide courts with additional leeway to respond to the current crisis it could enact legislation to relax existing limits on filing deadlines. Such legislation could be tailored to the present [national emergency related to COVID-19](#), or to national emergencies generally. In the alternative, Congress could make general changes to the existing procedural requirements. For example, to resolve any concerns about certiorari petitions, Congress could amend 28 U.S.C. § 2101 to grant the Supreme

Court discretion to extend deadlines for certiorari petitions by more than 60 days whenever the Court feels that such an extension is warranted.

While the foregoing considerations potentially concern all parties litigating in federal court, the COVID-19 pandemic also affects judicial proceedings in ways that pose particular concerns for federal law enforcement. The Department of Justice recently issued a [suite of proposals](#) that aim to address some of those issues. The proposals include, among others, tolling deadlines for antitrust enforcement actions, allowing the suspension of statutes of limitations and exclusion of delays under the [Speedy Trial Act](#) due to a national emergency, and allowing U.S. Attorneys to use teleconferencing for preliminary hearings.

On March 27, 2020, the [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES Act) became law. Among a broad range of provisions designed to mitigate the effects of the coronavirus pandemic in America, the CARES Act includes several provisions related to the judiciary. Notably, the CARES Act allows the chief judges of federal district courts to authorize the use of video or telephone conferencing to conduct certain criminal proceedings, with the consent of the defendant, if the Judicial Conference of the United States finds that the national emergency related to COVID-19 “will materially affect the functioning of either the Federal courts generally or a particular district court of the United States.” More generally, the CARES Act also directs the Judicial Conference of the United States and the Supreme Court to consider amendments to the federal procedural rules under the [Rules Enabling Act](#) “that address emergency measures that may be taken by the Federal courts when the President declares a national emergency under the National Emergencies Act.”

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