

THE CRIMINAL “COURTZOOM”: ACCESS TO JUSTICE IN REMOTE CRIMINAL
HEARINGS AT THE U.S. FEDERAL DISTRICT COURTS

by

KARSON PENNINGTON RAY

(Under the Direction of Teena Wilhelm)

ABSTRACT

The federal courts in the United States are intentionally insulated. Despite numerous congressional attempts at recording and broadcasting court procedures, cameras had historically been banned from the federal courtroom, until 2020. The key player in federal judicial procedure, the Judicial Conference, has maintained a strict stance regarding keeping cameras out of the federal courts. The COVID-19 pandemic presented an opportunity for the federal courts to experiment with technology in criminal cases, as Congress authorized the use of remote proceedings in specified criminal hearings through passage of the CARES Act. The ways in which the federal courts pivoted to a remote setting in order to preserve judicial legitimacy while continuing to hear criminal cases have been previously unexplored. I posit that technology can be used advantageously to benefit all criminal defendants under certain circumstances, akin to the benefits derived from use of legal resources as dictated by Robert A. Kagan’s adversarial legalism theory. Through interviews with sitting district court judges in the United States District Court for the Northern District of Georgia, I reveal the procedures utilized by the bench to protect criminal rights during criminal hearings held remotely from March of 2020 to May of 2021. While judges appreciate the adaptability of remote technology, they overwhelmingly believe that the high stakes in criminal cases demand the formalities of a physical courtroom rather than a “CourtZoom.”

INDEX WORDS: U.S. District Courts, Criminal Justice, Trial Courts, Judicial Behavior,
Federal Judiciary, Remote Proceedings, Criminal Cases

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DEDICATION

In loving memory of my Grandfather, Joseph L. Rice, whom I will always love two hands full.

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CHAPTER 1

INTRODUCTION

“I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.”

Associate Justice David Souter

March 28th, 1996

When asked his opinion before the House Appropriations Subcommittee about the potential of televising Supreme Court of the United States proceedings, Associate Justice David Souter minced no words. A frequent question asked of judicial nominees and one perpetuated throughout justices’ time on the bench, the role that technology can and should play in the federal courtroom has been the center of much judicial scholarship. Congress has historically encouraged the federal judiciary to broadcast court proceedings, while the response from most federal judges remains the same: no cameras in the courtroom and no broadcasting of court proceedings. Alongside the constitutional concerns that arise via the First and Sixth Amendments as they pertain to the protection of criminal defendants and due process, judges maintain that the traditions and norms that formalize the federal judiciary are best observed in person, in the courtroom.

Enter the COVID-19 virus: a global pandemic that disallowed people to be within six feet of one another without fear, halted international trade and thus the worldwide economy, and forced the United States criminal justice system to reevaluate the efficacy of technology in order to keep

the courts open at all. Though introduced not by desire, but by necessity, the integration of remote technology into the criminal justice system provided opportunity for cases to progress despite the uncertain circumstances surrounding day-to-day living. The United States federal court system had been intentionally vague about the use of remote proceedings in criminal cases, prior to the pandemic. Because the consequences of remote proceedings in criminal hearings may include loss of liberty, long sentences, or even cessation of life, it is important to understand how decision making in federal district courts may be impacted by the use of such technology. Analysis of federal court proceedings during the COVID-19 pandemic provide one such opportunity, as technology allowed federal courts to function during the global pandemic when otherwise the courts would have been shut down. If we are interested in providing equal access to justice for all, it is imperative that we consider the impact of increased technology usage in federal criminal proceedings before, during, and after COVID-19.

In this dissertation, I examine technology use in the federal district courts. Specifically, I examine the adoption of video teleconferencing in 2020 via the CARES (Coronavirus Aid, Relief, and Economic Security) Act and its impact on judicial proceedings in these courts. I consider whether such technology is a legal resource that can be beneficial to some criminal defendants. I provide a comprehensive overview of the historical progression of technology use in the federal courts, with an emphasis on the significant role of the Judicial Conference and Congress. Finally, I offer interview data from district court judges that provides their assessment of the impact of technology in court proceedings.

A Unique Opportunity: COVID-19, the CARES Act, and the Criminal Justice System

Our democracy is built on balance. We hold dear to us the idea of separation of powers, granting each governmental branch specific, enumerated rights which are intended to provide a

balanced federal authority. When the COVID-19 pandemic impacted the United States, our three branches of government collaborated to provide the American people with support and to continue essential governmental procedures. With the passage of the CARES Act in March 2020, we saw rare (and speedy) collegiality, especially between Congress and the federal courts. Congress stipulated the circumstances under which the federal courts could continue hearing cases remotely during COVID-19, so as not to increase court backlog more than already exists (McAlister et al 2023). With a strong record of not allowing broadcasting or virtual proceedings at the federal district courts, this act impacted the functioning of the federal courts overnight by allowing specified criminal case hearings the option to be held remotely rather than in person.

The CARES Act was signed into law in March of 2020 and the federal district courts utilized the provisions therein until approximately May of 2021. For a fourteen-month period, the federal district courts were able to host criminal hearings like pretrial detention hearings, plea colloquies, and sentencings on remote technology platforms like Zoom, if criminal defendants waived their right to an in-person trial. Prior to the pandemic, the federal judiciary had been steadfast in its opposition to using cameras of any kind and the broadcast of court proceedings. The Judicial Conference, the policy-making body of the federal judiciary, prohibits the broadcast or streaming of case proceedings.

The interbranch relationship between Congress and the federal courts was tested during the pandemic, as the courts fought to stay open amidst serious health and safety concerns while Congress towed the line between utilizing their legislative authority in a global emergency and continuing their history of deference to the courts. Despite numerous failed attempts to codify requirements for the federal judiciary to record and broadcast court proceedings throughout the early twenty-first century, in 2020 Congress wrote into the CARES Act provisions which gave the

Judicial Conference permission to authorize the use of remote proceedings in specified criminal hearings. While a majority of the CARES Act details the economic relief offered to the American people, a subsection on the federal judiciary opened the realm of possibility for technology to infiltrate the criminal justice system in a prolific and long-lasting way.

The unsuccessful legislative attempts to watch the federal courts demonstrated the constitutional concerns surrounding the broadcast or recording of court proceedings. However, the integration of remote technology as a byproduct of the pandemic provided opportunity to balance due process rights with technological efficacy in the criminal justice system. Where concerns about the protection of defendant rights had always tinged Congress's attempts to put cameras in the courtroom, the inclusion in the CARES Act which requires consent by defendants to waive their rights to an in-person hearing gave ample discretion to defendants, lawyers, and judges to use remote hearings to their advantage, when possible.

Adversarial Legalism: Technology as a Resource

The sudden introduction of technology in the federal district courts presented both challenges and benefits. As the United States operates as an adversarial legal system, technology appears to be yet another legal resource that advantages certain groups and presents conflicts for others. Beyond this, technology raises constitutional concerns for criminal defendants in remote proceedings, such as the right to confront witnesses, right to counsel, and right to a speedy and public trial. These issues culminate into two considerations: (1) How can technology expand upon or diminish access to justice in the adversarial legal system? (2) Does technology usage create benefits for some, or all under the right circumstances, within the criminal justice system? Through use of Robert A. Kagan's adversarial legalism theory, I consider the connection between technology and access to justice in the American criminal justice system.

The adversarial legalism framework situates this research on the advantages technology presents in judicial proceedings held through video conferencing. Adversarial legalism posits that the presentation of competing legal arguments by legal representatives—whom are experts in navigating the complex legal system—before a judge or jury is the best suited mechanism for the truth to emerge. With such competition in a criminal courtroom between two parties represented by legal experts, there exist benefits to one party or the other based upon resources like wealth and education. I find that technology is a legal resource that advantages everyone under certain circumstances. While taking into consideration the nature of the American courtroom, legal resources provide ample advantage to those whose legal representation know how to manipulate them.

Technology offers many benefits while also exhibiting many opportunities for adverse effects on the pursuit of justice. Access to justice may be expanded upon through increased use of remote technology for criminal hearings, whether it be through allowing a lawyer in a different state the option to appear virtually rather than travel to the physical courtroom, saving time and money, or through lessening the burden on public defenders by allowing them to communicate with detained clients without taking the time to travel to the correctional facility. It offers a quick solution to legal disputes between opposing counsel through suggestion of meeting virtually instead of in a judge's chambers. In contrast, the use of remote technology in critical criminal hearings, like sentencings, may not elicit the same psychological connection between judges and criminal defendants that are inherently present in a physical courtroom. Approaching remote technology as a solution to the access to justice complex should be done so cautiously, as it presents opportunity to advantage all under certain circumstances.

The Criminal ‘CourtZoom’

Remote technology offered the federal courts a solution to both procedural and health concerns posed by the COVID-19 pandemic. When the courts were hesitant to shut the physical door to the courtrooms, and the theoretical door to justice, being able to hold specified types of criminal hearings remotely provided relief for criminal defendants seeking resolution. As the district courts mark the starting point for criminal cases at the federal level, the judges on these benches make critical decisions which impact case outcomes. Any deviation from their traditional procedures demands attention, and the newfound ability to host criminal hearings in a remote setting out of necessity during the pandemic provides the opportunity to observe any subsequent effects on judicial decision making.

The ability for remote technology to positively impact civil case proceedings has been studied extensively (Susskind 2021). However, the effect of holding criminal case hearings remotely rather than in person has been much less considered in judicial research. To gauge the influence of remote technology usage in criminal case proceedings, I provide qualitative analysis of interviews with sitting district court judges on the United States District Court for the Northern District of Georgia. District court judges have multiple decision-making opportunities throughout the progression of criminal cases (Boyd 2015). Though jury trials were suspended until health and safety restrictions were lifted, the judges on the district courts continued scheduling and holding criminal hearings remotely during the pandemic. The interviews with the district court judges exemplify the court procedures followed throughout the national emergency as well as the perspectives of the judges on the implications of using remote technology as an option for future criminal proceedings.

At the forefront of each interview were procedural questions regarding the protocols followed by the district courts during remote criminal hearings. Primary amongst observations is the remote hearing script, read by each district court judge at the start of each and every remote proceeding in criminal cases. Within these instructions are questions asked of both defendants and attorneys regarding the waiver of consent to appear for an in-person hearing, as well as acknowledgment of private communication capabilities between counsel and clients and allowances for those who require interpreters to participate in the hearings themselves. The district courts never closed their doors and were only able to continue operation because of remote technology. Many criminal cases progressed, some were completed, and justice was served despite the global pandemic. Whether remote technology presents future opportunity to impact issues like criminal case backlog is less clear, and the personal preference held by a majority of district court judges remains in person proceedings. Still, the readily available and comparatively easily implemented remote technology utilized by the district courts kept the federal courts in operation, and for that, district court judges are grateful.

Overview of Dissertation Chapters

To understand the past and present usage of remote hearings in criminal proceedings within the federal district courts, and the impact of such usage on access to justice, my research provides observational data from interviews with federal district court judges who have observed such usage over time. I diverge from traditional, empirical legal research and provide a more qualitative study. This descriptive effort will provide greater clarity on the complex relationship between technology and justice, which is an essential narrative in today's criminal justice system and current technological age.

Beyond this introductory chapter, the dissertation proceeds as follows. In the second chapter, I compile the historical progression of technology usage within the federal courts alongside a discussion of constitutional concerns existent with criminal hearings which occur through virtual means. I also analyze the historical evidence of the role the Judicial Conference plays in legislation concerning the federal judiciary, inclusive of a discussion of Congress's myriad attempts at placing cameras in the courtroom. Thorough analysis of the CARES Act is included here as well. In the third chapter, I explore technology usage in the courtroom as an advantageous legal resource analogous to wealth. I use the adversarial legalism framework to assess whether technology offers more or less equity in the judicial process, specifically in criminal cases.

In the fourth chapter, I demonstrate how the federal district courts quickly pivoted in March 2020 to an online format for specified criminal case hearings. To determine the impact of these drastic and unprecedented changes, I analyze interview data from sitting district court judges, who provide commentary on the viability of remote proceedings in criminal cases for the future. The fifth and final chapter of this dissertation is a summary of findings and limitations, as well as a consideration of future research possibilities.

CHAPTER 2

TECHNOLOGY IN THE FEDERAL COURTS AND THE CARES ACT

Introduction

“This is an unbelievable Court to watch...Everybody is so prepared, so smart, so obviously deeply concerned about getting to the right answer. I thought, if everybody could see this, it would make people feel so good about this branch of government and how it’s operating. And I thought it’s such a shame actually that only 200 people a day can get to see it and then a bunch of other people can read about it, because reading about it is not the same experience as actually seeing these nine justices.”

Associate Justice Elena Kagan, Supreme Court of the United States

August 24th, 2011

“Life as a Supreme Court Justice” speech at The Aspen Institute

The judiciary is the most secluded branch of American government, and intentionally so. While both the executive and legislative branches rely directly on voters to secure and maintain governmental power, the federal judiciary is dependent upon both the person the American people select as President of the United States and members of Congress for a seat on the bench. Being the only branch of federal government that utilizes public officials not directly voted upon by the American people allows the judiciary a unique privilege: insulation. Federal judges serve for life, on good behavior, pending nomination via the President and confirmation via the Senate. Considering these institutional configurations of the federal judiciary, insulation is natural. At the

same time, a pillar of democracy is undeniably the opportunity for the public to access governmental work. Balancing the ability for the public to access federal court proceedings against a desire to maintain the apolitical and segregated nature of the federal judiciary has been a centuries-long battle, and the introduction of technology into American society has only further complicated the issue.

For as long as the judiciary has been adjudicating civil and criminal cases in the United States, the public has had interest in engaging with court proceedings. Per the First and Sixth Amendments, civil and criminal trial proceedings are open to the public at the federal level. Grand jury proceedings and other pretrial hearings such as detention hearings can be closed or restricted to a limited audience, typically for privacy, safety, or procedural reasons. In general, the public has physical access to federal trial proceedings barring any national security or sensitive juvenile information within the criminal case itself. Limitations do exist, however, for the broadcasting and recording of criminal trials, per Federal Rule of Criminal Procedure 53. Until the COVID-19 pandemic, cameras and broadcasting of criminal trials was prohibited in federal courts; today, broadcasting remains prohibited in federal criminal trials. But, for a brief period beginning in March of 2020 and ending in approximately May of 2021, the federal district courts—through the CARES Act—were allowed to utilize remote technology to host specified criminal hearings.

Before examining the ways in which the federal judiciary pivoted to using technology to its advantage without closing the courts during the COVID-19 pandemic, we must first explore how the federal judiciary historically approached remote technology prior to the pandemic. Despite many attempts at requiring the federal courts to broadcast proceedings, the judiciary has consistently maintained a veil of secrecy around its criminal trials. This chapter considers the intersection of Congress and the federal courts as policymakers regarding public access to court

proceedings via the introduction of remote technology with two key questions: (1) How has Congress historically attempted to publicize federal court proceedings in the name of transparency? (2) What implication does the introduction of remote technology in trial proceedings have on constitutional protections for criminal defendants?

A Brief Note Denoting “Technology” from “Cameras”

Prior to any analysis of historic restrictions on remote technology in federal court proceedings and potential threats to constitutional protections, it is necessary to address differences between “remote technology” and “cameras”. Much of the debate surrounding cameras in the courtrooms is centers on the live broadcast of court proceedings to audiences not physically in the courtroom. The debate is shaped by the argument that the public deserves access to court proceedings, and that broadcast coverage of the courtroom expands access to both the courts and the criminal justice system for the American people. In contrast, the argument against such coverage articulates that the performative nature of recorded or broadcast court proceedings could impact judicial decision making and case outcomes.

Much of judicial scholarship on cameras in the courtroom is focused on live broadcasts. In contrast, this research focuses on remote technology, or technology that utilizes audiovisual capabilities to simultaneously allow virtual communication and congregation from participants in different physical locations through platforms like Zoom. Though linked, the notion of “cameras in the courtroom” insinuates that court proceedings would be broadcast, likely in real time, while “remote technology” refers to the ability of court participants to hold case hearings in an online format rather than in a physical courtroom. In this chapter, I discuss both notions but am specific when referring to either “cameras” or “remote technology.”

The Judicial Conference and Technology Procedures in the Federal Courts

Any analysis of the evolution of technology usage in the federal courtroom would be incomplete without establishing the prominent role of the Judicial Conference in federal judicial procedure. In 1922, Congress created the “Conference of Senior Circuit Judges,” the first national organization of federal judges, at the request of the Chief Justice of the United States Supreme Court (and former President) William Howard Taft. The original intention of this administrative body was to “report on the judicial business of the federal courts and to advise Congress on possible improvements in judicial administration” (Federal Judicial Center). Originally, membership within this organization consisted of the chief justice of the Supreme Court of the United States and the senior most judge of each circuit court.

In its inception, the Judicial Conference was meant to be purely advisory, but with the establishment of the Administrative Office of the United States Courts in 1939 the organization took on a leading role in policy making. The Judicial Conference shifted its focus from a congregate of judges who gathered to discuss the state of affairs within the federal judiciary to a more formal organization which provided concrete evidence and recommendations to both the legislative and executive branches. The group became officially known as the “Judicial Conference” in 1948 through expansion of the Judicial Code. Membership within the Judicial Conference grew to include district court judges in 1957 and the chief judge of the U.S. Court of International Trade in 1986. Today, the body serves as the national policy-making group for the federal courts and communicates vital recommendations to Congress and the executive regarding judicial administration.

As technology advanced, so did the opportunity for judicial proceedings to be recorded and disseminated to the general public, allowing the Judicial Conference the unique opportunity to

shape policies and guidelines revolving judicial behavior. Beginning in 1946, electronic media coverage of criminal proceedings in federal courts was prohibited under Federal Rule of Criminal Procedure 53. Rule 53, in effect today, states:

Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Though multiple official amendments to this provision have been proposed since 1946, the only additional guidelines for use of technology have been a stylistic amendment adopted in 2002. As noted in this amendment, “these changes are intended to be stylistic only, except as noted below...” where the Judicial Conference provided further classification for technological systems. Of significance in this amendment is acknowledgment that other rules could permit video conferencing, which by its very nature is ‘broadcasting.’

In 1972, the Code of Conduct for United States Judges codified a prohibition against “broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent hitherto.” In 1988, the Supreme Court of the United States entered the conversation, as Chief Justice Rehnquist created an Ad Hoc Committee on Cameras in the Courtroom as part of the Judicial Conference. Two years later, the Judicial Conference adopted the committee’s report, which recommended a pilot program allowing electronic media coverage in six district and two appellate courts; however, the only cases to be included in this pilot program were civil proceedings. At this time, the Judicial Conference also rid itself of the 1972 provision from the Code of Conduct, instead electing to create its own policy on cameras, though the sentiment remained the same.

As the Judicial Conference adopted an ‘original’ policy on cameras in the courtroom in 1990, it also authorized the inception of the recommended pilot program for civil cases in select

circuit and district courts. The Judicial Conference codified its stance on cameras by banning the broadcast of proceedings in federal trial courts. More specifically, the Judicial Conference textualized the circumstances under which a judge can authorize broadcasts:

A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only: (a) for the presentation of evidence; (b) for the perpetuation of the record of the proceedings; (c) for security purposes; (d) for other purposes of judicial administration; or (e) in accordance with pilot programs approved by the Judicial Conference of the United States.

Prior to the conclusion of the 1991 pilot program, the Judicial Conference considered a prudent recommendation from one of its committees, the Court Administration and Case Management Committee (CACM). This recommendation encouraged authorization of photographing, recording, and broadcasting of civil proceedings in federal trial and appellate courts. Though this suggestion would have only applied to civil proceedings, the reason for the Judicial Conference's declination of this recommendation applies to criminal proceedings as well. At its September 1994 session, data were presented which demonstrated the possibility for intimidation of witnesses and jurors when cameras are visible in the courtroom. When the Judicial Conference did not adopt the CACM's recommendation for civil proceedings, it also rejected a proposed amendment to Criminal Rule 53 which would have authorized the use of cameras in criminal proceedings so long as they are congruent with the Conference's guidelines.

As the saliency of cameras in the federal courts continued to increase, the Judicial Conference remained steadfast in its disdain for the broadcast of criminal proceedings. After formally editing its policy to authorize each federal appellate court to decide for itself whether to allow the taking of photographs and radio and television coverage of appellate arguments, the Judicial Conference strongly discouraged these circuits to allow the same media coverage of their respective district courts. Not until 2010 did the Judicial Conference again consider recommending

the use of cameras to record proceedings, though yet again, only in civil cases. After the commencement of another three-year pilot study in June of 2011, with fourteen courts participating, the Judicial Conference again decided not to amend its policy in accordance with a recommendation by the CACM.

Federal judicial policy may have remained unchanged, until COVID-19 accelerated the attitudes and perceptions surrounding the use of teleconferencing in criminal trials at the federal level. At the onset of the pandemic, the formal, policy-making judicial body strongly urged the disuse of cameras in criminal proceedings in the federal district courts while maintaining the position that remote proceedings were not the proper channel for criminal hearings to occur. In the beginning of 2020, the Judicial Conference was staunchly against remote criminal proceedings; by mid-March of 2020, teleconference technology was encouraged to provide the public and the media audio access to court proceedings during the pandemic. Almost overnight, the federal district courts were able to hold specific types of criminal proceedings remotely.

Congressional Interference

Despite the primary role of the Judicial Conference in the adjudication of federal courts-related issues, Congress has historically made many attempts to pass legislation requiring the federal courts to broadcast proceedings. Prior to the passage of the key legislation responsible for (temporary) remote hearings in criminal cases, the CARES Act, there were several failed legislative efforts to increase transparency of the federal judiciary through required broadcast of court proceedings. Congress made few attempts to pass legislation regulating the use of cameras in courtrooms, especially in recent years. In 2015 alone, Congressional activity included the Cameras in the Courtroom Act, the Sunshine in the Courtroom Act, the Transparency in Government Act, and the Eyes on the Courts Act (Eckman 2016). These pieces of legislation were

not successful, but their significance should not be underestimated. Examining the CARES Act as a bridge between the judicial and legislative branches will provide a unique opportunity to observe how the two bodies check and balance one another.

Most notably, the Cameras in the Courtroom Act of 2015 (S.783) proposed a requirement for the Supreme Court of the United States to broadcast all open sessions of the court's proceedings. The only exception to this requirement would be in circumstances where a majority of Supreme Court justices determined that the broadcast of a court session would violate one of the party's due process rights. Despite an increasingly partisan Congress, this bill was co-sponsored by Senator Chuck Grassley (R-IA) and Senator Richard Durbin (D-IL). However, even though the bill had bipartisan support, and had a stated goal of increasing public transparency and trust in the federal judiciary, it ultimately failed in the Senate Judiciary Committee before ever making it to the Senate floor for consideration.

There is perhaps no stronger advocate for the broadcast of federal court proceedings, especially those of the Supreme Court of the United States, than Senator Chuck Grassley (R-IA). A member of Congress for over forty years, Senator Grassley introduced the first iteration of the Cameras in the Courtroom Act in 1999, asking then Chief Justice William Rehnquist to release audio recordings of salient cases. The dramatic events of the 2000 election created an immediate opportunity for the Supreme Court to cede to Congress's increasing demand for court transparency, as audio recordings of *Bush v. Gore* (531 U.S. 98) were released immediately following oral argument. Since then, Senator Grassley has continued to encourage Congress to legislate in this policy area and to lobby the courts for greater access to court proceedings. A 2011 feud between Chief Justice John Roberts and Senator Grassley demonstrated the contentious nature of legislative-judicial relations regarding the broadcast of judicial proceedings. Sen.

Grassley recommended that audio and video coverage of federal health care reform cases before the Supreme Court be available to the public, to which Chief Justice Roberts responded that video broadcasting would not be allowed, though the audio recordings and written transcripts would be available each afternoon of the proceedings. In a passionate statement, Senator Grassley expressed discontent at Chief Justice Roberts's decision:

Every American should have the opportunity to see and hear this landmark case as it plays out, not just the select few allowed in the courtroom. The health care reform law has ramifications for the entire country. Video coverage would help with the public's understanding of not only the controversial new law, but also the American judicial system. It's disappointing that the Chief Justice isn't allowing video coverage of the case, but I appreciate his willingness to provide expedited release of the audio and transcript to the American people (Grassley 2011).

Senator Grassley's efforts are more than twenty-five years in the making. In fact, Grassley has proposed a bill requiring cameras in the federal courtrooms at least ten times since 2003; yet, none of the legislation he has proposed has been passed by Congress and the Supreme Court of the United States remains off-limits to all video broadcasting. In fact, audio recordings of oral arguments are released via the Supreme Court's official website at the end of each week during session. Given all this, the question remains: why has so much legislation on cameras in the courtroom failed to cross the finish line in Congress? Throughout each of these legislative failures, justices on the Supreme Court of the United States have consistently maintained their position that technology should not be permitted in the courtroom. The resistance demonstrated by the sitting and former justices of the Supreme Court is a strong signal to Congress that the justices do not want their proceedings to be broadcast live. In 2006 before the Senate Judiciary Committee, Associate Justice Anthony Kennedy eloquently pleaded his concerns before Congress:

Please Senator, don't introduce into the dynamics that I have with my colleagues the temptation, the insidious temptation, to think that one of my colleagues is trying to get a sound bite for the television. We don't want that. Please don't introduce this into our inter-

collegial deliberations—we don't want it. We are judged by what we write (Kennedy 2006).

Congress is not as insulated as the federal judiciary, and often takes cues from federal judges when considering legislation dealing with the federal judiciary in order to preserve interbranch relations (Eckman 2016). Though Congress remains the disputed harbinger of legislation in this area, it maintains its deference to the desires of the justices themselves as well as that of the Judicial Conference. There is perhaps no better demonstration of this deference than its codification of judicial procedure during the COVID-19 pandemic in the CARES Act.

The CARES Act

The COVID-19 pandemic disrupted much of governmental activity in the United States, along with the unshakable social norms it introduced into American life. In the criminal justice system, the pandemic prompted unprecedented procedural adaptations. Courts across the country suspended in-person hearings, delayed trials, and quickly adopted remote technologies to maintain basic judicial procedure and continue upholding due process rights for criminal defendants. Jails and prisons, where physical distance between inmates was practically impossible, became hotspots for virus outbreaks. Law enforcement agencies adjusted norms to reconsider the frequency of low-level arrests to alleviate the burden on correctional facilities, while prosecutors increasingly exercised discretion to delay adjudication until public safety conditions improved. These marked shifts raised complex legal questions about due process, defendant rights, and public safety, while also accelerating conversations about long-term correctional reform and the modernization of the criminal justice system.

On March 27th, 2020, the CARES (Coronavirus Aid, Relief, and Economic Security) Act went into effect (Public Law No. 116-136, 134 Stat. 281). This act allocated \$2.2 trillion for emergency assistance and health care response. Within this federal law, Congress specified the

ways in which the federal judiciary could amend their practices to continue hearing cases throughout the pandemic:

If the Judicial Conference of the United States finds that emergency conditions due to the national emergency declared by the President...will materially affect the functioning of either the Federal courts generally or a particular district court of the United States, the chief judge of a district court covered by the finding...upon application of the Attorney General or the designee of the Attorney General, or on motion of the judge or justice, may authorize the use of video teleconferencing or telephone conferencing if video teleconferencing is not reasonably available, for the following events...

The provisions within the CARES Act that allowed teleconferencing and video appearances in criminal case hearings ended officially on May 10th, 2023 with a grace period that applied only to civil and bankruptcy proceedings ending on September 21st, 2023. At this time, most courts had already ceased the use of teleconferencing for criminal case hearings—an intentional decision made bench-by-bench which ultimately demonstrated the federal judiciary's preference for in-person proceedings to return as quickly as possible. The proper channel for policymaking as it pertains to the operation of the federal courts has been the center of debate in judicial scholarship (Eckman 2016), though Congress has historically been deferential to the Judicial Conference, as the CARES Act clearly demonstrates.

Maintenance of the Criminal Justice System During COVID-19

While much of the CARES Act focuses on providing economic relief for the American people, special provisions pertain to the workings of the federal government during the global pandemic. Of interest for the federal judiciary is Section 15002, which helped ensure continuity of criminal court proceedings without requiring in-person appearances. Specifically, the CARES Act designated the Judicial Conference as the declaratory body to find that emergency conditions materially affected federal court operations. The Judicial Conference declared on March 29, just two days after the passage of the CARES Act, that the COVID-19 pandemic substantially impacted

federal court proceedings, allowing the federal judiciary to utilize applicable provisions within the CARES Act.

Under the CARES Act, each district's chief judge could authorize the use of video or audio conferencing for specified proceedings, only including initial appearances, detention hearings, arraignments, preliminary hearings, waivers of indictment, guilty pleas and sentencings, pretrial release revocation proceedings, probation and supervised release hearings, and misdemeanor pleas and sentencings. For more serious felony cases, the CARES Act denotes that if felony pleas or sentencings cannot be conducted without jeopardizing public health and safety, and if the district judge in a specific case finds that a delay in the plea or sentencing would be antithetical to the interests of justice, the felony plea or sentencing may be conducted through video or audio proceedings. Much discretion was given to the district court judges in criminal proceedings, though it is important to note that no hearings could be held remotely unless the defendant waived consent to appear in person after consultation with counsel. The consent stipulation provided protections to criminal defendants while also allowing an alternative option for those waiting for their courtroom justice. Though difficult, the federal judiciary worked to balance due process rights with public health concerns, ultimately relying upon technology to ease the process.

The provisions within the CARES Act marked a temporary but major departure from normal federal procedure rules, specifically Rule 53 of the Federal Rules of Criminal Procedure. The typical prohibition against broadcasting or remote proceedings within Rule 53 was suspended in the name of justice, allowing the federal judiciary the discretion necessary to pivot during a global pandemic with unforeseen longevity. The significant and unprecedented change in federal criminal procedure cannot be understated. Though these provisions are no longer in effect, the

departure from traditional criminal procedure designated both an agreement and a flexibility within the Judicial Conference, Congress, and the federal judiciary that had previously been nonexistent.

Constitutional Challenges to Technology Use

The COVID-19 pandemic demonstrated a necessity for the federal courts to pivot their procedures for civil and criminal cases. The criminal justice system needed to continue progressing their docket, and remote technology provided the safest forum to do so. Regardless of health and safety concerns that necessitate remote technology for criminal case progression, the potential for hearings to be held virtually poses constitutional concerns for the First and Sixth Amendments. Within the many bills proposed by Congress to address judicial transparency, constitutional concerns are the primary reason that they never made it out of committee or did not receive greater support.

Paramount amongst constitutional concerns is the guaranteed opportunity for attorneys and their clients to communicate freely and privately. In Congress's attempts to pass legislation to allow the broadcasting of court proceedings, arguments have immediately cited the lack of privacy that exists in tandem with live streaming of any kind through cameras in the physical courtroom. With remote technology, concerns center around whether attorneys and their clients can effectively be separated from all court participants to ensure privacy. In both circumstances, private attorney-client communications must be maintained, and neither option—hearings via remote technology or hearings that are broadcast—makes this protection as simple as do in-person court proceedings.

The Sixth Amendment guarantees the right to a speedy and public trial for all criminal cases. While having cameras in the courtroom poses no threat to the speediness of a trial and certainly expand the public's access to said trial, holding hearings remotely could have adverse effects. The natural opportunity for remote technology to improve the speed at which trials are

scheduled and held will be assessed in Chapter 4; here, I only wish to draw comparison upon the manner in which remote technology has transformed the civil side of the law. Especially in pretrial phases of civil cases, the logistical barriers that separate attorneys from their clients, clients from the courtrooms, and the courtrooms from the public have been diminished. In a 2023 study which reported the implications of remote civil proceedings during COVID-19 in Texas, New York, and California, motions and bench trials were found to move faster than they did when primarily in person (Montague 2023). At the same time, jury trials were found to experience more delays and increased procedural complexity. There exists potential for remote technology to increase the speed at which pretrial hearings in criminal cases are completed while also decreasing the logistical barriers that create scheduling difficulties, as is seen in civil cases. Also, while the public is able to attend court proceedings in person at federal courthouses across the country, any person who wants to be present for remote hearings could theoretically ‘join’ from their home, if given the proper credentials.

Constitutional concerns have plagued Congress’s attempts to introduce and pass legislation regarding cameras in the courtroom. Notably, Congress has legislated (and attempted to legislate) far less often on remote hearings in criminal cases. The CARES Act marks a departure from Congress’s traditional legislation in judicial procedure, which up until that point had focused on literal cameras in the courtroom and the broadcasting of court proceedings via television or radio. There is much less congressional commentary on the potential for the federal courts to utilize remote technology in criminal cases, though now that the CARES Act specified hearings in which it could be used, an increase in legislation dealing with remote technology would be unsurprising.

Conclusion

The federal courts have a minimal history with remote technology. Though Congress has tried, and failed, to require the federal courts to broadcast proceedings, the COVID-19 pandemic forced the hand of both Congress and the Judicial Conference to reconsider how technology could be used in an effective way through increased use of remote hearings in criminal cases. At the same time, the allowances made through the CARES Act were in place for a specified, short period of time and were not extended upon expiration, demonstrating a marked desire for most criminal hearings to take place in person at the federal courthouses across the country. Still, Congress remains entangled in this policy debate and continues to encourage the federal courts to open their doors via cameras and remote technology in the name of transparency and access to the criminal justice system.

Constitutional concerns over First and Sixth Amendment rights for criminal defendants have been at the forefront of the judicial-technological revolution. Though the COVID-19 pandemic created both urgency and necessity for the federal courts to embrace remote technology in order to continue hearing criminal cases, the constitutional requirements for defendants to confront witnesses, converse privately with counsel, and have a speedy and public trial are of concern. Partially to blame for the inability for legislation to pass which deals with cameras in the courtroom and today, remote technology use in case hearings, is the consideration of constitutional protections for criminal defendants.

The CARES Act demonstrates a unique pressure point between Congress and the federal judiciary. Though Congress has struggled to pass a piece of legislation to allow for the broadcast of federal court proceedings, the COVID-19 pandemic created the perfect opportunity to test the waters in the name of efficiency. While deferring to the Judicial Conference and ultimately giving

this policymaking body of the federal judiciary the power to dictate whether the procedures laid out in the CARES Act could be utilized by the federal courts, Congress allowed and even encouraged the courts to hold criminal hearings online. Congress gave this opportunity to the federal courts, and the federal courts took advantage of the remote proceeding guidelines out of necessity for approximately fifteen months. However, the federal judiciary reverted to its pre-COVID procedures as soon as was possible, marking a strong preference for traditional, in-person hearings. Despite Congress's attempts to legislate in federal judicial procedure, its impact via the CARES Act was short-lived.

CHAPTER 3

JUSTICE DEFINED, THEORETICALLY AND LEGALLY

Introduction

This chapter considers the costs and effects of introducing new technology in a manner which advantages some within the criminal justice system. Here, I assess the following question: If technology is considered a legal resource much like wealth, who benefits the most from its use in criminal proceedings? Rather than reinvent the wheel in answering this question, this chapter builds on Robert Kagan's analysis of what he calls adversarial legalism, most of which has previously been examined in civil cases. Kagan presents a general theory of how the legal system presents advantages for most and disadvantages for most through efficient use of 'legal resources.' As the United States operates its criminal justice system as an adversarial system, it is imperative to determine whether technology presents itself as a 'legal resource' advantageous to some, but not all, much like wealth, or if instead it could benefit everyone under certain circumstances. The increased use of remote proceedings for criminal cases can create advantages for everyone, under certain circumstances.

The American criminal justice system has multiple goals, with the most important being equal access and just outcomes. Still, many of the practices that have become commonplace within our legal system are antithetical to these goals. Unlike many other developed democracies, the United States uses an adversarial system for both civil and criminal trials. In this system, advocates represent parties in a competitive nature by presenting arguments to a judge or jury. In general, political theorists have argued that the adversarial system is better suited to procuring the truth

(Kagan 1991). The theory assumes that “self-interest will ensure that all relevant material is presented and tested before the court” (Finkelstein 2011) and that because of its competitive nature, the most prominent aspect remaining at the end of an adversarial trial will be the truth. Others, however, have contended that the “gatekeeper” role of judges through actions like allowance of evidence into discovery and other pivotal decisions inherently creates a contradiction that cannot be overcome—truth cannot consistently be sought so long as judges hold bias (Finkelstein 2011).

The framework of adversarial legalism is best described in Robert Kagan’s 2001 book, *Adversarial Legalism: The American Way of Law*. He builds his analysis on the idea that the American legal system is reliant upon competition between parties. Kagan purports that “American law produces compelling morality tales of (occasional) triumph by underdogs over corporate and bureaucratic intransigence, but is so costly, cumbersome, and inefficient that in routine matters it denies justice—and thus is unfair—to most ordinary Americans,” (Epp 2003). In this way, the competitive nature of the American legal system has made the pursuit of legal expertise and consequently, the pursuit of justice, an expensive and inaccessible option for criminal defendants, although advantages exist for those who can afford them. Kagan argues that “compared to the typical defendant, wealthier, better-educated, better-connected defendants enjoy many advantages” (2019: 108). Kagan is among many who contend that our legal system presents advantages for few and disadvantages for most. Kagan’s analyses consider what types of legal resources are available. In this chapter, I build upon this by applying Kagan’s theoretical propositions to technology in the criminal courtroom in the twenty-first century.

In his 1991 piece “Adversarial Legalism and American Government,” Kagan makes a case that adversarial modes of decision making encourage non-production, or a lack of legal conclusion at the end of a case’s journey in the justice system. He provides a powerful example of legal

gridlock in California, where unclear regulatory power sought by the federal government via both Congress and the Environmental Protection Agency and the Army Corps of Engineers for harbor-dredging projects came to a pinnacle in Oakland through a years-long civil dispute in the legal system that was costly and complex. The Oakland Harbor example ultimately demonstrates the outcome effects of adversarial legalism in civil disputes: high monetary costs and procedural delays (Busch et al 1999). Though this example makes a strong point regarding adversarial legalism, it is unclear the extent to which this framework is important in criminal proceedings. While the second edition of Kagan's seminal book explores adversarial legalism in a criminal context, his analysis does not consider the impact of technology within the criminal justice system.

To apply the notion of adversarial legalism to the criminal justice system, it must be demonstrated that an advantage exists for those who have additional resources. Given that the advantages of wealth in the criminal justice system have been well established, I argue that technology should be defined as a "legal resource" in the context of adversarial legalism. Accordingly, I consider the ways in which we define "access to justice." These include institutional-level access, such as agency decision-making within the Office for Access to Justice, as well as individually, with parameters like the Justice Index.

Legal Resources in an Adversarial System

The adversarial legalism framework complicates the truth-justice dichotomy by considering how legal resources can tilt the scales of justice towards the truth alongside the pursuit of justice. Kagan contends that the legal resources at the disposal of litigants today encourage legal advocates to pursue the truth regardless. While legal resources like wealth have been found to play a role in criminal case outcomes through securing better representation, the opportunity for

technology via remote proceedings to act like a legal resource in a way that advantages some, but not all, has not been yet explored.

The role of so-called “legal resources” in criminal case outcomes within the adversarial legalism system cannot be understated. Kagan defines these legal resources as the tools, capabilities, and institutional support available to parties engaged in legal disputes. Legal resources operate like bargaining chips in a bid to receive justice within the American criminal justice system. Some examples of legal resources include greater access to skilled counsel and expert witnesses. The simple crux of Kagan’s argument is this: those with more legal resources are better positioned to achieve desired case outcomes through influence within the case itself.

Legal resources are vitally important considering that the adversarial legalism depends heavily on the ability of each party—prosecution and defense—to effectively advocate for their position within a highly procedural and rule-bound framework. If the idea of fairness is at the heart of adversarial legalism, the significant advantage given to those who utilize legal resources efficiently because they are financially able to do so should be concerning. While this research does not exist to comment on the fairness of the adversarial legal system, it does rely on the notion that legal resources advantage some, but not all. Though the system itself aspires to promote fairness and accountability, the legal resources and the selective (and natural) utilization of such resources creates opportunity for unequal outcomes. Knowing this, the questions remain: how do legal resources play a role in criminal case outcomes, and does the increased use of remote technology in criminal cases operate like a legal resource as defined by Kagan or present an opportunity to even the playing field?

Wealth dictates much of Kagan’s legal resource commentary. Those who have the financial ability to engage in prolonged legal battles and hire experienced legal representation will have a

better chance at achieving their desired outcome, while those who are subject to the legal representation assigned to them by the government place the fate of their future in the hands of those they did not choose themselves. The adversarial legal system naturally favors those who are able to take advantage of legal resources and disadvantages those who are at the mercy of assigned counsel.

Justice in the Adversarial Model

Though Kagan has no singular definition of justice, he does allude that justice in the American criminal justice system can best be understood as the maintenance of individual rights via legal procedures (Kagan 1991). The emphasis Kagan places on due process, alongside equality before the law, demonstrates fairness in procedure as compared to fairness in outcomes. Consider two criminal defendants with “all else equal” criminal charges, criminal histories, and descriptive characteristics. In Kagan’s view of the American model, these two defendants have the same opportunity for procedural justice, including the protection of individual rights throughout their journey in the criminal justice system, and also the ability for these individuals to have their cases heard before a neutral adjudicator. However, these defendants may not receive the same outcome, because of non-judicious factors like quality of legal representation. Here, we can see how wealth, and other legal resources such as technology, can make a difference in the fairness of the criminal justice system.

The inquisitorial and adversarial models are the two primary legal systems used by most advanced democracies. The inquisitorial system, also referred to as bureaucratic legalism, allows for judge-centered justice, where investigations are run almost exclusively by judges and lawyers play a lesser role in questioning witnesses and performing for juries. Alternatively, the adversarial system places pressure on attorneys to navigate the complexity of the legal system for their clients.

Great importance is placed on uncovering the truth through evidentiary investigation in inquisitorial systems, hence the substantial power given to impartial judges in uncovering crucial facts and questioning key witnesses. Within the adversarial system, criminal defendants are entirely dependent upon their advocates. Defendants look to their legal representatives as a map to the American criminal justice system, and expect them to play a significant role in selecting jurors, deciding which witnesses to put on the stand, and when to challenge claims made by the government. The adversarial system became rooted within the American criminal justice system in three ways: the creation of public defense offices, the codification of rules and procedures of criminal law in the Federal Rules of Criminal Procedure, and the rights-based litigation handed down by the Warren Court.

Before considering how the adversarial model became entrenched in the American criminal justice system, it is important to establish the basics of adversarial legalism as they pertain to the pursuit of justice. Kagan denotes several principles that dictate the distinctive way that disputes are resolved in the American legal system; (1) party-controlled litigation, (2) formal procedural rules, (3) aggressive legal advocacy, (4) judicial review and enforcement of rights, (5) individualized justice and legal remedies, and (6) litigation as a tool for policymaking and accountability generally denote the primary facets of adversarial legalism.

In the American criminal justice system, disputing parties drive legal proceedings. They are responsible for initiating cases, gathering evidence, and arguing their positions before judges who serve more as a third-party, neutral adjudicator rather than an investigator (as compared to the inquisitorial system). When parties determine the onset and flow of litigation, the role of legal representatives and resources is exacerbated. This party-controlled litigation is tinged by the formal rules that dictate how individual rights and liberties are to be protected. The existence of

evenly-applied, clear rules and procedures serves to promote fairness and consistency, though Kagan (1991) notes that this crucial component of adversarial legalism presents opportunity for legal complexity and delay—one of the many criticisms of the adversarial model. Considering the determined existence of party-controlled litigation and formal procedural rules, it is intuitive that legal advocacy becomes aggressive in nature. Parties are reliant upon counsel to navigate the complex legal system and depend on legal representatives to utilize their skills and resources in the most effective manner. This is also a facet of adversarial legalism that gives Kagan pause, as legal representation is increasingly expensive and increases the “cost” of justice.

The role of the courts, while different than that in the inquisitorial system, remains integral to the application of justice. The adversarial model utilizes courts to interpret and enforce legal and constitutional rights through the challenging of laws, regulations, and even government actions, which naturally leads to a highly legalistic policy environment under the threat of judicial review. Each outcome is determined on a case-by-case basis in the adversarial system, which creates the notion of “individualized justice” that may not be applied evenly to each criminal defendant. A key component of adversarial legalism, the lack of standardized solutions leads to legal uncertainty and potential for higher costs, given the lengthy criminal justice process. Lastly, the American legal system utilizes litigation as the primary mechanism to hold institutions accountable and influence public policy, as compared to other advanced democracies that use administrative agencies to take this burden off the courts, whose sole focus is dispute resolution amongst citizens. Concurrently, all these principles denote adversarial legalism as a powerful mechanism for the protection of rights while demonstrating the potential for the legal system to be complex, costly, and unequal in its application as compared to the inquisitorial system, which places most discretion in the hands of judges.

Given that adversarial legalism impacts case outcomes in the American criminal justice system, we should consider why adversarial legalism is the norm in the United States compared to the bureaucratic legalism that reigns supreme across advanced democracies in Europe. Adversarial legalism was born from English common law tradition, but like many English traditions within a country aiming to distance itself from its colonial overlord, evolved throughout the 19th and 20th centuries to reflect American ideals and practices. Compared to bureaucratic legalism or the inquisitorial system where judges actively investigate cases, adversarial legalism depends upon procedural rules and advocacy by legal professionals representing opposing parties to uncover the truth. The role of the attorney in the American criminal justice system today cannot be understated and is partially a byproduct of the expansion of individual rights, both through the pure existence of the Bill of Rights and through decisions hailing from the Warren Court within 1953 and 1969. A greater emphasis from the American legal system on due process significantly impacted the effectiveness and development of adversarial legalism (Kagan 2001).

Considering the important role of legal defense in the adversarial model, and that an overwhelming majority of criminal defendants are indigent which requires that the government provide legal representation, the history of public defenders requires brief attention. If we are concerned about the application of justice and making justice available to all, we must consider how legal aid vis-à-vis public defenders is assisted through legal resources. Though public defenders would not become a nationwide requirement until 1963, the idea and early practice of public defense for indigent criminal defendants began in the early 1900s. A central tenet to the adversarial legalism approach is the notion that every criminal defendant deserves a fair trial. The first woman admitted to legal practice in California, Clara Foltz, established the first public defender office in Los Angeles County in 1914. Alongside her advocacy for the segregation of

juvenile offenders from adult offenders, she dedicated her legal career to indigent advocacy (Schwartz et al 1975). Her chief argument for the creation of a public defender office was that if the government was obligated to prosecute the accused, it should also be obligated to provide legal defense for the accused, especially for those who are unable to afford counsel, to ensure a fair trial.

With the creation of public defense offices across the country paired with the expansion of rights-based litigation infiltrating the Supreme Court of the United States during the 20th century, adversarial legalism adapted to further emphasize the prominence of attorneys as advocates and judges as adjudicators in the courtroom. The codification and formalization of criminal procedure occurred through the adoption of the Federal Rules of Criminal Procedure (FRCP) in 1946 by the Supreme Court of the United States. The FRCP further solidified the adversarial structure as a mainstay of American criminal justice adjudication, as it provided a uniform set of rules and procedures for federal criminal cases across the country. Since its creation in 1946, the FRCP has been amended many times. Having clear rules and procedures for criminal cases demonstrates the commitment of the adversarial system to protecting individual rights through expert legal representation.

Further solidification of the adversarial system within the American criminal justice system occurred during the Warren Court era from 1953 to 1969, specifically through the holdings in *Mapp v. Ohio* (367 U.S. 643) in 1961, *Gideon v. Wainwright* (372 U.S. 335) in 1963 and *Miranda v. Arizona* (384 U.S. 436) in 1966. Landmark decisions under Chief Justice Earl Warren significantly broadened constitutional protections under the 4th, 5th, 6th, and 14th amendments for individuals accused of crimes. Through preventing the use of illegal evidence in criminal trials at the state level, requiring that suspects be informed of their rights to remain silent and to have an attorney present prior to interrogation, and guaranteeing the right to legal representation regardless

of wealth status, the Warren Court strengthened the procedural safeguards of the accused. Each of these decisions reinforced the adversarial model by ensuring that individuals have the resources necessary to defend themselves effectively in the American courtroom.

The merits of the inquisitorial and adversarial models have been long debated. A 1978 study concluded that while the adversarial system was more inclined to lead to a just outcome, the inquisitorial system was more likely to lead to truth (Sevier 2014). Vital to the understanding of this study and its implications, Sevier defines ‘just outcomes’ as those that are both procedurally fair and perceived as legitimate by the litigants themselves. He places emphasis on process rather than outcomes, similar to Kagan’s treatment of justice within the adversarial system. For Sevier, ‘just outcomes’ are a byproduct of consistent legal rules that are easily understood by litigants. Given the procedural differences between inquisitorial and adversarial systems, this early conclusion is intuitive. The expectation when an impartial judge leads the investigation through the lens of knowing what evidence will be relevant during trial is as it seems—that the truth will prevail and the correct factual of who is guilty of committing a crime will be apparent. In adversarial systems, one side is rendered a positive outcome and the other is given a negative outcome, allowing one party to feel that justice has been served regardless. By nature, the inquisitorial system is better suited to uncovering the truth without regard for winners or losers, and the adversarial system is more likely to deliver justice.

From Theoretical Access to Justice to Legal Access to Justice

How does justice manifest within the American criminal justice system? The previous discussion demonstrated the prominence of the attorney in the American criminal courtroom, due to the nature of the adversarial system. Here, I consider the ways in which technology use impacts

the decision making of this crucial legal actor. I also explore connections between legal agencies and their dedication to increasing access to justice in practice.

To understand some measure of “access to justice,” it is helpful to consider the institutional measurement currently in place in the federal court system. The Office for Access to Justice (ATJ) exists within the United States Department of Justice as a standalone agency and focuses on recommending policy changes that improve access to justice. The office was established in 2010 in efforts to ensure that the American justice system produces outcomes that are “fair and accessible to all, irrespective of wealth and status,” (U.S. Department of Justice, 2016). Among the priorities of the office are increasing access to counsel and legal assistance as well as serving defendants unable to afford lawyers. Today, the office lists three “guiding principles”: expanding access, accelerating innovation, and safeguarding integrity (U.S. Department of Justice, n.d.). These principles will help to guide the measurement of justice in the following analysis. ATJ considers the first principle, expanding access, to include:

1. Increasing the availability of legal assistance
2. Supporting public defense
3. Eliminating barriers that exclude people based on economic, demographic, or geographic factors

Technology: Improving Access to Justice?

Using the principles outlined by the ATJ as a blueprint for how access to justice can be improved upon within the American criminal justice system, we can consider how technology fits into this narrative. An important question to consider is: does technology, through increased use of remote proceedings in criminal case hearings, have the potential to increase or hinder access to justice?

- I. Increasing the availability of legal assistance

The right to counsel, guaranteed by the Sixth Amendment of the U.S. Constitution, is essential to ensuring that defendants within the criminal justice system have a representative who is well-versed in the law. The legal system in the United States is complex, and the right to counsel demands that all defendants, regardless of socioeconomic status, education, or wealth, will have access to legal representation. The quality of that legal representation is the subject of much debate, as legal scholars have long observed the distinction between the “haves” and the “have nots” when it comes to legal representation (Galanter 1974; Yoon 2010). While litigant wealth and the concordant ability to hire effective legal representation has been a strong predictor of case outcome (Yoon 2010), simple access to attorney time and resources is also a consideration for achieving just outcomes.

By nature of the position, attorneys have limited time. Both governmental and defense attorneys are subject to hourly billing practices that strictly denote how time should be spent or not spent on client matters (Ross 1991). The introduction of technology via increased use of remote proceedings into the billing practices of attorneys may decrease the amount of time and money spent on travel. If travel is not necessary for some stages of litigant defense, attorneys may join hearings from any geographic location, which could increase the number of defense attorneys available to criminal defendants. This would also allow quicker communication between attorneys and clients who have the capability to communicate via remote proceedings. Analyses of the benefits found in equipping correctional facilities with remote technology began prior to the COVID-19 pandemic, as telepsychiatry and remote job opportunities have shown great potential for positive technology usage for detainees (Deslich et al. 2013; Hart 2023; Larsen et al. 2004). Now, the conversation has shifted to whether criminal case hearings could also benefit.

A main obstacle is the installation of remote technology capabilities within correctional facilities across the United States. Some detention facilities have embraced this wholeheartedly¹ with private rooms set up with video and audio capabilities. Others have been less inclined to prioritize the installation of remote technology while other areas of daily living within confinement spaces demand attention. For centuries in American judicial proceedings, criminal cases have been resolved face-to-face in physical courtrooms. The question that the justice system faces is: how many resources should be expended to introduce technology into this sphere that has functioned so well without it? After all, it was not until the COVID-19 pandemic that the convenience of technology use was demonstrated. If we consider that attorney resources may go further toward criminal defense itself without the requirement of travel for hearings, and that litigants' resources may go further with a possibility of greater attorney selection, the resources required to implement remote technology in correctional facilities may provide greater access to justice.

II. Supporting public defense

Related to concerns surrounding increasing access to legal representation, the American criminal justice system recognizes the importance of providing legal defense for indigent defendants. The Sixth Amendment requires that legal representation be provided for all criminal defendants, regardless of their individual ability to pay for such service, and the 1963 landmark Supreme Court decision, *Gideon v. Wainwright* (372 U.S. 335), further required that wealth not be a barrier to justice for criminal defendants. This mandated right for legal assistance is provided in three different forms: public defenders, private defense attorneys, and assigned counsel. Given that at least 80% of criminal defendants are indigent (Primus 2017), the most common form of legal assistance in criminal cases are public defenders. These are some of the most overworked members

¹ This will be explored further in the following chapter through analysis of interviews with sitting federal court judges.

of the legal community, with very little discretion over the cases they take. Public defender workload has been the focus of research over time, which confirms the high number of criminal cases that such offices consistently maintain at any given time (Farole Jr. and Langton 2010).

A study in the early 1970s produced general maximum numbers of case types that public defenders could realistically hear within a single year. These standards were 150 felony cases, 400 misdemeanor cases, 200 mental health cases, 200 juvenile cases, and 25 cases on appeal (Pace et al. 2023). Over the past 50 years, these standards have been highly criticized for being too broad and lacking differentiation within each case category, as different cases and charges demand differing amounts of time from public defenders themselves. A 2023 study of public defense workload delineates between types of felony cases and generally produces a more inclusive picture of the true caseload and time spent per case for public defenders (Pace et al. 2023). Still, one conclusion remains: public defenders are expected to handle approximately five times more cases than the average attorney not practicing criminal defense. A case study in Louisiana in 2017 also revealed the high caseloads of public defenders, including one public defender who had 413 felony cases at one time (Dewan 2019).

When considering the expectations that differing jurisdictions place on public defenders, support for public defense systems is a priority for the Office for Access to Justice. The same 2017 case study found that serious felony cases suffered the most from public defenders who were stretched thin across hundreds of clients; these public defenders were unable to devote similar amounts of time to each case, resulting in unavailability of legal representation and undesirable outcomes (Dewan 2019). Because of the nature of public defense, and the overburden of the system in most states, whether technology could better support public defenders is less clear than some of the other benefits of remote proceedings. Still, it is an important consideration. In some ways, any

time saving mechanism could benefit the public defense system, particularly as public defenders' caseloads are onerous. Any time saved traveling between office and the courthouse or correctional facility could be significant.

Public defenders have become a cornerstone of the American criminal justice system. Public defense work is significant and necessary for the overall goal of achieving justice for all criminal defendants, regardless of socioeconomic status. Remote technology has the potential to decrease time spent and resources expended during travel, both of which are limited for public defenders with such high caseloads. Theoretically, this time savings would be able to increase the attention public defenders are able to give each case, thus increasing the quality of legal representation received by each criminal defendant. For this large group of essential legal actors, who are generally overworked, underpaid, and overwhelmed, the opportunity for remote hearings presents opportunity to improve upon the quality of criminal defense work itself.

III. Eliminating barriers that exclude people based on economic, demographic, or geographic factors

The notion of feeling excluded from the criminal justice system is an obstacle that judges and lawyers alike combat daily when interacting with criminal defendants. The physical courtroom and its strict ambiance can be daunting for those unfamiliar with the legal system. For this reason, remote proceedings may offer a more comfortable setting for some defendants. Still, a more relaxed legal environment has the potential to become a less legitimate view of court proceedings, which is also a challenge judges face in remote proceedings. However, when considering access to justice and expanding the ability to be present during court proceedings, remote proceedings may provide a positive impact on the general accessibility of the courtroom.

It is indisputable that increased use of remote proceedings could eliminate barriers that currently exclude people from the American criminal justice system based on geographic factors.

For defendants located in confinement spaces, courts may be able to decrease transportation costs through utilizing remote technology at the correctional facility for hearings, especially those that are brief. While there are numerous benefits to choosing a lawyer familiar with a certain jurisdiction or judge, defendants would have more choices in attorney selection if remote technology were utilized more often for attorney-client communications as well as case hearings. Especially for those in confinement spaces with no freedom to travel to see their attorneys, or those who need their attorneys to drive to the correctional facility or courtroom for meetings or hearings, remote technology can enhance the feasibility, and even increase the frequency, of attorney-client communications. As attorney-client communications are an essential aspect of maintaining access to legal representatives and legal advice, increasing the frequency of these communications through remote technology regardless of geographic vicinity could increase general access to justice.

Other Benefits to Technology Use in Criminal Hearings

Outside of the ability to connect defendants with their attorneys and to participate in criminal hearings without leaving correctional facilities, other benefits to implementing technology in detention centers include better preparing defendants for life after corrections, allowing detainees greater communication with family members, and access to information regarding their cases (Community Tech Network, 2023). Some correctional facilities that have begun implementing remote technology are using Zoom for family visits, educational classes and training, and telemedicine. Though the cost of equipping correctional facilities with technological communication devices would be high, costs could be reduced by considering the funds saved through taking advantage of telemedicine rather than paying for transportation costs and security risks associated with off-site medical appointments.

Other ways to offset the costs of introducing remote communication to correctional facilities would be to charge fees for video visitation; the Florida Department of Corrections currently offers video visitation at the rate of \$2.95—less than a gallon of gas as of May 2025—per 15-minute session (Florida Department of Corrections, n.d.). For any visitors that utilize more than one gallon of gas to see loved ones in correctional facilities, this paying for video visitation would be the more economical solution. This would save visitors money spent on travel as well as generate revenue for correctional facilities who desire implementation of remote technology, though it should be noted that the Federal Communications Commission voted in July of 2024 to cap the price set for phone and video calls for prisons and jails. Currently, the rate for video calls per minute varies by whether the facility is a prison or a small, medium, or large jail. For reference, the video rate for prisons is \$0.16 per minute (Prison Policy Initiative, 2024). Ultimately, the amount of funds generated by charging for video calls would be limited, though could still offset costs associated with implementing the technology in the first place.

If a main goal of incarceration as a form of punishment is to better prepare those who will reenter society to be functioning, productive, successful members of the community, remote technology could make great strides towards reintegration. The “digital divide” only deepened during the COVID-19 pandemic, when reliance on technology reached an all-time high for many industries as well as social interactions and educational opportunities. Former inmates struggle to reintegrate into a digital society if they were incarcerated for long periods of time, given the rapidity with which the world has changed post-pandemic (Pattavina 2004). Introducing prisoners to remote technology during their incarceration would not only provide benefits related to their criminal standing, but also to their likelihood of success in society upon release.

Downsides to Introducing Remote Technology to Criminal Court Proceedings

While there are great benefits to the use of remote technology in order to eliminate barriers, there are downsides to more technology usage for those without access to technology. A chief complaint about the introduction of remote technology into the courtroom is the cost.

Technology offers a unique opportunity to expand access to the criminal justice system, but only if the American people have the ability to participate through owning the necessary equipment and having access to the internet. Though access to broadband internet is as prolific as ever, 8.8% of Americans do not have internet (Andrews 2023) and thus would have difficulty participating in virtual proceedings. It should be noted that the common procedure for criminal hearings held remotely during COVID-19 was only to pivot to this format when defendants waived their right to appear in person. So, for defendants who do not have broadband internet access, they could simply choose not to waive this right and appear in the courtroom. There are many aspects of remote proceedings that could break barriers for people excluded from the criminal justice system.

Being aware of those held in pretrial detention should be a significant consideration when introducing the potential to hold criminal hearings via remote technology. A 2022 report from the U.S. Commission on Civil Rights found that there was a 433% increase in the number of individuals that had been detained pre-trial between 1970 and 2015, and that 60% of current inmates in custodial detention are being held prior to trial because they cannot afford to post bail (U.S. Commission on Civil Rights, 2022). Given the high number of pretrial detainees and the critical nature of their communications with legal representation prior to and during criminal hearings, correctional facilities must be able to provide the technology necessary for seamless interactions. The Kansas Department of Corrections utilized funding from the CARES Act to

create 60 “Zoom Rooms” which served as learning spaces, provided opportunity for visitation amidst a global pandemic, and created telemedicine patient rooms (Ellis 2021). This creative use of technology has the potential to be implemented in correctional facilities across the country for more than recreational purposes, though widespread access to such technology would be necessary prior to fully considering remote hearings an option which promotes equality and fairness within the criminal justice system. The true cost of implementing and maintaining ideas like “Zoom Rooms” would be high. To purchase the necessary hardware, maintain broadband internet access, invest in the correct servers and software, retain software licenses and security measures, and upkeep all of the above is significant.

A brief note on psychology should be included, as we consider what happens to the human experience when we interact via screens rather than in-person. A major downside of the implementation of remote hearings as compared to in-person courtroom proceedings is the lack of humanity associated with communicating on a screen. Though flexible and convenient, the increased use of remote technology raises concerns about the reduced human connection. A 2022 study found that we pay a significant price for communicating via remote technology, and that participants’ brains synchronized when they were in each other’s physical presence but did not do so when they communicated via a screen (Schwartz et al 2022). In a courtroom, especially in hearings like sentencings, the loss of humanity could ultimately impact decision making. The simple truth is that humans communicate the most effectively when engaging with each other in person, and that remote technology like Zoom provides opportunity to speak with one another but without the synchronization that elicits a human connection. The consequences of transitioning criminal case hearings to online communication platforms could have a large impact on case outcomes.

Who Benefits?

Following the discussion of the benefits and downsides to remote technology use in criminal case proceedings, the question remains: if technology is considered a legal resource, akin to wealth, who benefits the most from its use in criminal proceedings? The short answer is that this is circumstantial. Is it the defendant in front of a judge who does not like utilizing technology, and would rather be in the physical courtroom? Is it the defendant being represented by a defense attorney from a law firm which communicates via remote technology frequently, or by a public defender who is unfamiliar or uncomfortable with representing a client via Zoom? Those familiar and aware of the benefits and downsides of technology use will be most effective in criminal hearings held remotely (see Table 1.1).

To circle back to the three ways in which the ATJ hopes to expand access to justice, the increased use of remote technology to host criminal hearings may check all boxes: increasing the availability of legal assistance, supporting public defense, and eliminating barriers that exclude people based on economic, demographic, or geographic factors. Being able to find and communicate with attorneys from across the country (or even the county) would increase the basic availability of legal assistance, making it easier for criminal defendants to connect with their chosen (or chosen for them) legal representation. Considering the high volume of cases that public defenders, the most common attorneys for criminal defendants, maintain on a regular basis, it seems plausible that having remote hearings scheduled rather than traveling to and from correctional facilities and courthouses would support them in two tangential ways: saving time and money. And, hearings held via remote technology would allow those who cannot attend hearings in person for economic or geographic factors the opportunity to be present for proceedings. The

increased use of remote proceedings for criminal cases can create advantages for everyone, under certain circumstances.

Table 1.1: Benefits and Related Downsides of Technology Usage

Benefits of Technology Usage	Related Downsides of Technology Usage
Ease in scheduling	Increased perception of ‘assembly-line justice’
Decreased travel costs	Diminished interpersonal relationships between attorneys and clients, clients and judges
Increased access to counsel for incarcerated defendants	Increased difficulty in allowing for private communications between attorneys and their clients

Zooming Ahead

If remote technology use offers increased access to justice, the question must be considered: should remote technology be implemented in the criminal justice system? It seems undeniable that remote technology increases accessibility. It allows lawyers to advise clients who are detained without traveling. It provides opportunity for detainees to access telemedicine and conduct family visits without the cost of travel. Yet, the human experience demands connection, which is most effective in person. If remote technology introduces opportunity for variance in case outcomes, is this the equality and justice that adversarial legalism demands?

The impact of technology on access to justice can best be demonstrated in stages. Technology makes a difference in expanding upon access to justice when utilized strategically in preliminary hearings in criminal cases. From the perspective of lawyers and judges, hearings such as plea colloquies demonstrate potential for increasing access to justice, as these can be scheduled quickly and conducted in a brief period, diminishing travel costs for all participants. For hearings like sentencings, with even higher stakes, in person proceedings present the best option for achieving justice. Remote hearings have the greatest potential to increase access to justice when utilized for non-contentious hearings or those dealing with minor procedural disputes, all parties

have reliable and affordable access to technology, and all parties maintain the formalities of in-person proceedings despite the remote setting. In-person hearings have the best potential to increase (or maintain) heightened access to justice when the stakes are the highest such as in sentencings and criminal trials themselves and when defendants feel the need to consult with their legal representatives more frequently due to case complexity.

CHAPTER 4

THE CRIMINAL “COURTZOOM”: UNITED STATES DISTRICT COURTS AND THE
AUTHORIZATION OF REMOTE PROCEEDINGS IN CRIMINAL CASES UNDER THE
CARES ACT

Introduction

“I’ll tell you something, the fact that it worked, the fact that we had cases done as I’m thinking about it now, that was borderline miracle...the hearings would be held on Zoom, but it worked. We got a number of cases done.”

Federal district court judge, Northern District of Georgia

While the efficacy of online courts has been considered in great depth within the context of civil trials (Susskind 2021), criminal trials present uniquely different challenges. Any discussion of virtual proceedings for criminal trials must consider the higher stakes for defendants in these trials. Opportunity for policy influence is tangible in the 94 federal district courts, where they hear approximately 70,000 criminal cases each year (Uscourts.gov). The federal district courts employ Article III judges who go through a similar confirmation process as Supreme Court justices and Circuit Court judges while enjoying life tenure on the bench, given good behavior. The federal district courts have been referred to as “the workhouses of the federal judiciary” (Abraham 1998) given the significant role they play in the inception, and typically cessation, of cases (Carp & Wheeler 1972). Acknowledging the importance of the federal district courts in federal case

processing, these courts present a suitable venue for examination of remote proceedings and their potential impact. And, given that much consideration has been given to the potential for remote technology to positively impact civil case proceedings, the focus of this project will be the implications of remote hearings in criminal case hearings. Though remote hearings may offer faster and easier scheduling for all parties involved in criminal cases, the loss of human connection may offset these possible benefits.

The federal district courts are the courts of first resort. It is here that criminal cases begin through a series of hearings including arraignments, evidentiary and witness inclusion, and jury selection. These important hearings can dictate criminal case outcomes and therefore are an excellent option to observe the potential for technology via remote hearings to impact decision making at the judge level. This chapter considers the implications of remote technology use in crucial criminal hearings with two key questions: (1) How were criminal cases adjudicated during the COVID-19 pandemic? (2) Is access to justice expanded upon or diminished through the use of remote hearings in criminal cases?

The onset of the COVID-19 pandemic provides a unique opportunity to witness judicial discretion, along with the forced technology adoption in the federal district courts. Though most criminal cases end in a plea bargain, judges in the federal district courts exert influence mainly over judicial procedure. Given the high caseload of these courts, a complete shutdown of their operation was not an option during the national emergency declared in mid-March of 2020. The rules of judicial procedure in addition to constitutional protections for criminal defendants were maintained as well as was possible. My intention for this research is to provide a theoretically motivated description of how judges make decisions when technology enters the criminal courtroom. A qualitative analysis of judicial decision-making through interviews with current

sitting judges on the Northern District of Georgia will provide insight into the ways in which the federal district courts approached the impact of the COVID-19 pandemic on active criminal cases. As district court judges have numerous decision-making opportunities in each case they are assigned (Boyd 2015), there is great potential to consider how judges choose to use discretion.

This research project focuses on the ways in which the federal district courts pivoted to the use of video conferencing for criminal case hearings, and how justice was maintained throughout. I report conclusions from 11 one-on-one interviews with federal district court judges. Though many questions and subtopics were covered in each interview, my attention focuses on the responses from four main questions: (1) How were criminal hearings conducted using remote technology, and what challenges or benefits did you encounter in these hearings? (2) How is your decision-making altered, or hampered, in remote settings? (3) How do you see technology as a legal resource? (4) What is your overall impression of the use of technology in criminal proceedings? Together, these questions demonstrate the ways in which judges, lawyers, criminal defendants, and the public engaged with the criminal justice system during the COVID-19 pandemic as well as the devotion of the judicial system to the protection of criminal rights despite the lack of in-person court proceedings.

The chapter proceeds as follows. First, I will provide an overview of historical restrictions on the use of remote proceedings in criminal cases within the federal district courts, as well as the temporary changes made to such policies at the onset of the COVID-19 pandemic. I then summarize the research design and methodology used to assess the efficacy of remote hearings in criminal cases. Next, I present my findings that reflect perspectives from federal judges. Finally, I address limitations of this study and provide insight into future research.

Brief History of Remote Proceedings and Policy Changes During COVID-19

Prior to the COVID-19 pandemic, the use of remote proceedings in criminal cases was primarily restricted by directive from the Judicial Conference of the United States (Judicial Conference). The Judicial Conference is the national policymaking body for the federal courts that was established by Congress in 1922. The most pertinent policy of the Judicial Conference on remote criminal proceedings is found within Federal Rule of Criminal Procedure 53. In this rule, the Judicial Conference limits the ability of the federal courts to conduct criminal hearings via video or audio conference with few exceptions in the form of “the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom”, which are up to the discretion of each district court judge (Administrative Office of the U.S. Courts). While Congress has proposed various legislation to encourage (or require) greater transparency of court proceedings via the use of cameras or broadcasting equipment in the courtroom, the Judicial Conference has maintained a position requiring physical courtrooms open for public access.

The COVID-19 global pandemic was declared a national emergency in the United States on March 13th, 2020. By March 27th, 2020, the CARES (Coronavirus Aid, Relief, and Economic Security) Act was signed into law, which was an economic stimulus bill with specific provisions for the continued functioning of each branch of the federal government. Within this legislation, Congress expanded opportunities for the federal courts to resume operations in criminal cases via remote proceedings—actions that had never before been permitted by Congress or the Judicial Conference. A key provision of the CARES Act gave the Judicial Conference the power to consider whether the emergency conditions created by COVID-19 would “materially affect the functioning” of some or all of the federal district courts. If this were found to be the case, the

Judicial Conference was permitted to allot authority to the chief judge of any district court to allow certain—and specified—criminal proceedings to be conducted via video or audio conference.

On March 29th, just two days after the passage of the CARES Act, the Judicial Conference implemented the provisions authorized by Congress which allowed for remote proceedings in designated criminal hearings. The seriousness of the COVID-19 pandemic significantly altered the ability for the federal district courts to maintain operation, therefore the Judicial Conference took advantage of the CARES Act provisions which detailed how and when remote proceedings could be utilized. Chief judges in each district court were tasked with determining the manner in which criminal hearings would be adjudicated through remote proceedings. The CARES Act also designated that defendants in criminal cases must consent to having their criminal hearings heard through video conferencing, an important and intentional protection of criminal rights.

Congress was explicit in detailing which types of criminal proceedings could be subject to remote hearings through the CARES Act. These included:

1. Initial appearances
2. Detention hearings
3. Arraignments
4. Hearings related to the revocation of pretrial release or revocation of probation or supervised release
5. Misdemeanor pleas and sentencing
6. Proceedings under the Federal Juvenile Delinquency Act

Additionally, the act permitted courts to hold felony plea and sentencing hearings via video or telephone conference, if the chief judge of a district court found that such proceedings could not “be conducted in person without seriously jeopardizing public health and safety, and the district judge in a particular case finds for specific reasons that the plea or sentencing in that case cannot be further delayed without serious harm to the interests of justice” (CRS Insight IN11344). Importantly, Congress did not authorize the use of remote proceedings in criminal jury trials.

In addition to remote operation, the accessibility of proceedings to the public was a prioritized consideration. As the governing body responsible for handling nonjudicial business of the United States courts, the Administrative Office of the U.S. Courts (AO) gave its interpretation of how this would be done under the temporary provisions of the CARES Act. While reiterating that court proceedings were not to be broadcast or livestreamed on the internet, the AO did allow courts to make remote hearings accessible to the media and public by including “the usual participants and observers of such proceedings by remote access” (CRS Insight IN11344).

The judicial provisions of the CARES Act which allowed remote proceedings in criminal cases were formally in effect from March 27th, 2020, to May 10th, 2023. The CARES Act provided that the “covered emergency period” would end 30 days after the date on which the national emergency declaration was terminated (CARES Act). While the CARES Act deadline allowed for remote proceedings through the May 10th, 2023 expiration, the district courts pivoted back to in-person hearings before this end date. This was an intentional decision made by the district courts to transition criminal hearings back to the physical courtroom. Specifically, the CARES Act had given the Judicial Conference discretion to determine which came first: 30 days after the end of the national emergency, or when the emergency no longer materially affected the federal courts.

It is important to consider that the Judicial Conference was intentional in deciding not to permanently amend the Federal Rules of Criminal Procedure. Instead, the governing body opted to permit “interim authorizations” to be able to conduct court business (Administrative Office of the U.S. Courts, 2022). Given that the Judicial Conference had in the past been reticent to consider the use of video conferencing in the criminal courtroom, the hesitation to amend their own rules to allow virtual proceedings as an option stands to reason.

Research Design and Methods

The following discussion summarizes the findings from a series of one-on-one interviews with federal judges. Interviews are a valuable observation mechanism for the study, as members of the federal judiciary are notoriously difficult to reach and seldom speak about the judicial experience. Considering the lack of data available regarding the number of criminal hearings held remotely during COVID-19, interviews are the optimal method for revealing key decision-making processes observed by the district court judges. Interviews provide opportunity to assess the internal reasoning and real-time decision-making of judges (Grey 1967; Glick 1970). Eleven interviews were conducted in a single federal district court, the Northern District of Georgia. Additional information about these interviews and the techniques utilized therein can be found in Appendix B.

Interview Subjects

My study sample, eleven judges with varied levels of experience and tenure on the bench, within one jurisdiction—the Northern District of Georgia—allows for comparison of behavior and perspective at the judge level. In one interview, the judge requested that his longtime clerk sit in to be interviewed as well, as she has extensive experience as a participant of remote hearings during her tenure with the Northern District of Georgia. The ranges of tenure for the judges varied from Clinton appointees to Biden appointees. More than one judge was not a member of the Northern District of Georgia during the pandemic itself; these interviews focused more on the judge’s experience as a practicing attorney during the pandemic, which provided valuable insight into the difficulties of additional legal actors in the pursuit of justice for criminal defendants.

Observations

The primary finding is that the allowance of remote technology in specified criminal case hearings through the enactment of the CARES Act allowed the federal district courts to maintain operations amidst a global pandemic while also prioritizing the protection of constitutional rights. However, a majority of judges were less than enthused to hold hearings such as sentencings through remote means, all citing the inability to make a human connection with someone whose freedom may be taken away. Judges generally are grateful that remote hearings had been authorized so that the courts could make some progress in criminal cases yet feel that criminal hearings are most effectively and fairly held when in the physical courtroom. Given the high stakes of criminal case outcomes, judges were clear in expressing the necessity of a greater sense of legitimacy, which exists naturally in the courtroom rather than the “courtzoom.”

I. Technical Setup

Judges most often participated in remote hearings from their courtrooms, despite the lack of staff presence due to public health and safety concerns. One judge mentioned that they sometimes went weeks without seeing a single other person at the courthouse, yet they still traveled each day to work in their courtroom if a remote hearing were scheduled, citing a desire to maintain the legitimacy of the court and the proceedings. Each judge also reiterated the monumental role of their courtroom deputy clerks in ensuring that remote hearings ran smoothly. Zoom was the primary technology utilized by the district courts. Courtroom deputy clerks would schedule each remote hearing, then on the date would go into the physical courtroom and start the meeting so that all participants other than the judge could join first. Then, judges would enter the courtroom and sit at their bench, with all technology ready to go and court in session, for all intents and purposes. If any issues arose on the part of the court’s technology during the hearing, the courtroom

deputy clerk would first try to fix it themselves, then communicate with the court's IT staff that additional help may be needed. Judges themselves played a small role in the smoothness of the hearing itself in terms of technology.

II. Comfortability with Technology

Judges who utilize technology in their personal lives were more comfortable transitioning to and scheduling remote hearings in criminal cases during the pandemic. Most judges mentioned that they use technology on a regular basis, so when the pivot to technology was necessary in a professional sense, they were able to do so without any major issues. However, judges who more often engaged with technology in their personal lives were still hesitant to feel like technology deserved a permanent place in the courtroom. Personal technology usage did not increase a judge's likelihood of responding in the affirmative when asked about whether technology could positively impact criminal proceedings in the future.

III. Types of Criminal Hearings Held Remotely

No criminal trials were held remotely. As a bench, the Northern District of Georgia decided to suspend both jury and bench trials in criminal cases at the onset of the COVID-19 pandemic through the twelve months that followed, approximately. Beginning in approximately May of 2021, the Northern District of Georgia brought jury and bench trials back in the physical courtroom with ample public safety accommodations. The CARES Act designated specific types of criminal hearings eligible for remote proceedings: initial appearances, detention hearings, arraignments, hearings related to the revocation of pretrial release or revocation of probation or supervised release, misdemeanor pleas and sentencing, and proceedings under the Federal Juvenile Delinquency Act. However, at the Northern District of Georgia, the only types of criminal hearings that were adjudicated through remote proceedings were plea colloquies, revocation hearings, and

sentencings. Still, most judges only heard plea colloquies and revocation hearings through Zoom; very few judges held at least one sentencing hearing through remote proceedings.

During that era, when COVID first started that year, we did no jury trial cases...I don't think I did any bench trials that year, because you had to do it on Zoom, and just the back and forth of a jury trial case is very difficult, even in a bench trial. So if I remember correctly, I know we tried no jury trial cases during that first year on Zoom and then I can't think of any bench trials; a number of hearings, motions, but I can't think of any jury or bench trials we had, particularly in criminal cases. I can't think of a time I've ever done a bench trial in a criminal case in district court, because the charges are very serious, someone's freedom is on the line.

IV. Travel Costs

A frequent argument for the increased use of remote technology in both civil and criminal hearings is the diminished cost of traveling to and from the courtroom for both clients and attorneys (Pew Research 2021). Weighing the indisputable ease and cost effectiveness of appearing virtually in a courtroom against the naturally more-humanistic decision to appear in person is difficult. However, judges felt strongly that given the option between the two, regardless of the cost of travel, appearing physically in a courtroom was the more appropriate option for defendants and attorneys alike.

One of my colleagues may mention this or someone else you research may say, 'what if the defense attorney is in Seattle, Washington and the defendant is here in Atlanta, Georgia. You're going to make that person fly all the way from Seattle, Washington, a five-hour flight, for a one-hour hearing? ... Yes. It's that important.

Judges generally expressed how the costs and logistical difficulties associated with travel could likely be alleviated through increased scheduling for remote hearings, especially those that are brief, though continued to maintain the position that the implications of each hearing were too important to consider holding them on Zoom in criminal cases. Even now, years after the COVID-19 pandemic has ceased to be a national emergency, judges mentioned that attorneys continue to request remote hearings. Some judges were more flexible to the idea that hearings like plea

colloquies and probation revocations could be adjudicated swiftly and cheaply through remote proceedings, while others emphasized a desire to hold all hearings in person, no matter the circumstances or hearing type.

You're going to get that economic argument, 'this isn't sentencing; it's just a plea. Why make that person fly five hours for a plea?' The stakes are that high. What if that plea isn't done right?

V. Attorney-Client Communication & Protection of Criminal Rights

“Nothing, nothing, nothing, one more time—nothing can happen or should happen without the defendant and his lawyer hearing it and seeing it.”

Private communications between defendants and attorneys were a priority to judges adjudicating criminal proceedings remotely. When in a physical courtroom, defendants have great advantages by having their attorney physically next to them. Nonverbal communications are essential to the manner in which attorneys communicate with their client without saying a single word—an elbow bump from an attorney to their client might remind them that they should not speak at any time; a quick glance during the government attorney's argumentation concerning the acceptance of a specified plea might indicate a point of clarification that needs to be made before the judge; an indigent defendant may not fully understand legal terms, and require a quick sidebar from their attorney prior to accepting terms. These examples demonstrate actions that are naturally, unintentionally, and critically lost in hearings which are held through video conferencing.

And so we would make sure that they talked about [waiving the right to appear in person] and they kind of knew what was going to be coming. If not, we would stop, say we can reschedule this hearing, or you can go in the private room and talk about it, and if you talk about it with your lawyer, and if you're still not comfortable, we'll reschedule and do it again.

Judges emphasized their capability to separate clients and their attorneys into separate “Zoom rooms” at any point during remote hearings, and communicated this protection clearly at

the start of each proceeding with the following questions which required verbal affirmation prior to continuation:

1. Do you understand that you have a right to consult with your lawyer during this proceeding?
2. Do you understand that if you wish to speak with your lawyer during the proceeding, you should let us know, and we will make arrangements for the two of you to have a confidential conversation?"

Confidential communications between attorneys and their clients are a necessary and protected action, and simply because a criminal defendant waived their right to appear in person for their hearing does not mean that this right is stripped. While judges maintained prioritization of this essential right, there still existed hardships in ensuring that it was done in a secure and private way. Fewer issues occurred when clients who were not being held in confinement spaces were able to attend virtual proceedings from their attorney's office. In these circumstances, the court would still place the attorney and client into a breakout room on Zoom when confidential conversations were requested, still ensuring privacy in a quick and relatively simple way.

If you have a question, just because your lawyer may be in his or her office and you may be in confinement at 'Lovejoy', we have a mechanism where we can put you in a private room to talk, and the judge can't hear it and the government's attorney can't hear it.

However, many of the criminal cases adjudicated during the pandemic were for those defendants who were being detained at a corrections facility. Many judges detailed circumstances in which participants in a single virtual hearing could be physically located in as many as six locations: judges mostly joined meetings from their courtroom to maintain legitimacy of the criminal justice system; attorneys, governmental and defense, were often in their offices; clients were sometimes with their attorneys but often in a detainment setting; courtroom deputy clerks were often in the federal judicial buildings, but joined the meetings from their offices rather than the courtroom; in revocation hearings, probation officers were typically at home or in their offices;

and, links to join remote proceedings were made available to the public, so friends and family with interest in the case would join from home. In these circumstances, upholding privacy between attorneys and clients presented problems.

When a defendant was located in a confinement space, they would be escorted at the time of their hearing to a private room within the detention facility which was set up with audiovisual capabilities and monitored by a correctional officer. Once the defendant joined the Zoom call, the correctional officer would stand guard outside of the room. However, if a technical issue arose, the officer would be the point person to fix it; judges would have to pause the proceedings while making clear to the participants that they should not discuss hearing specifics and instruct the defendant to get the attention of the officer, who would come in to try and resolve the issue. Issues were often not quickly resolved, and the expectation that a correctional officer would be technologically savvy enough to alleviate any issues was not a reasonable one. Judges were considerably concerned that privacy was not being respected if a guard had to enter the detention room to fix a technical issue, yet this was an unavoidable implication of not having defendants physically appear in court.

If something went wrong with the audio in Zoom, the guards would have to come in and you kept stopping things. The prisoner and lawyer's privacy was not being...I don't want to use the word 'obeyed', that's not the correct word, but maybe 'compromised' by having a guard in there with them. But the guard had to come in sometimes to do things to make sure the communication worked.

A significant consideration when thinking about whether increased use of technology could speed up criminal case proceedings is time. Much time is spent traveling to and from the courthouse, and simply "hopping on a Zoom call" would diminish billable attorneys fees. Yet, unresolved technical issues did result in multiple hearings being rescheduled during the pandemic, most often when the issues were on the part of the defendant or attorney, whose full participation

is demonstrably essential to the hearing itself. Technical problems with the court's technology were swiftly resolved by an active IT staff, though technical issues occurring from the attorney's technology or from the detainment center's setup were not as quickly disseminated. Whether the time lost by technical issues is large enough to offset the travel costs and time associated with in person proceedings is unclear, as judges recognized that time was lost, though perhaps not significantly.

It may have been five, six times over an eight, nine-month period that we said we couldn't correct [technical issues], we'll reschedule. The courtroom deputy clerk will get back in touch with you all with scheduling, so it wasn't significant at all.

VI. Client Access to Internet

"You'd be surprised how many people don't have internet access and things like that, but they can come to the courthouse."

For criminal defendants not in confinement spaces, access to internet and the proper technology to be able to participate in remote hearings is a concern. For criminal defendants in confinement spaces, access to legal counsel was filtered through the prisons themselves. Procedures included placing defendants individually in rooms with a screen and audiovisual capabilities to attend remote proceedings. If technical issues arose, correctional guards standing post outside the rooms had to be summoned to work through the problems. Criminal defendants in confinement spaces were entirely reliant upon the correctional facility's internet access and devices to take part in their own proceedings if held remotely. Access to justice during a remote criminal proceeding requires access to the internet; detained defendants were subject to the technological capabilities of their correctional spaces and 8.8% of United States households did not have broadband internet as of August 2024 (Andrews 2023). Access to the internet interfered with access to justice when remote proceedings were the selected adjudication method, though defendants were not coerced to waive their right to appear in person.

VII. Stakes in Criminal Hearings Subject to Remote Scheduling

“I’ve been a judge since before you were born, and I haven’t found a judge yet that enjoys sentencing people. It’s probably the most, I don’t want to say ‘difficult,’ but one of the things we don’t look forward to doing. No one wants to take all the things people have away, but sometimes you have to. When you’re going to do it, you have to let people know that it’s important, that it’s taken seriously, and that you do everything possible to make sure you’re treating them fairly. I just feel like having it in person, in the courtroom does that.”

Considering the three issue areas in which the Northern District of Georgia continued adjudicating cases during the COVID-19 pandemic—plea colloquies, probation revocations, and sentencings—one area stands out as having the highest implications. Sentencings are a critical component of the American criminal justice system, addressing the goal of punishing offenders for wrongdoing as defined by the law. Transitioning these naturally difficult hearings to remote proceedings amplified the already-existent challenges associated with sentencing:

We would sentence them on Zoom. That was a little nerving because a sentence can result in so much freedom being taken.

Some judges on the Northern District of Georgia completed zero sentencings via remote proceeding. Again referring to the remote hearing instructions each judge read prior to every virtual proceeding, defendants had the choice to determine if they wanted to participate in such an implicative hearing via Zoom. If at any point in remote proceedings a defendant wanted to revoke their waiver of the right to be physically present in the courtroom, judges would halt the hearing and schedule one for in person as soon as they safely do so. More than one judge recalled situations in which defendants were comfortable completing plea colloquies via Zoom, but wanted to appear physically in the courtroom for sentencing proceedings:

I had one person, if I remember correctly, he wanted to do the plea on Zoom, but the sentencing, he did not want to do on Zoom...That makes sense to me. You know, I think he thought ‘woah, I need to be there.’

Judges were intentionally deferential to criminal defendants during this chaotic period. Especially when considering the implications of sentencing hearings, judges understood the immense gravity of their decision-making and communicated the consequences to defendants clearly and consistently.

When you sentence someone to a confinement sentence, you need to be able to look at them and explain to them why you're taking them away from their family, why you're taking their freedom away from them, why you're taking their job, why you're taking their life in a sense away from them for a period of time. You need to be able to look at that person and explain to them, you're not asking them to agree with you, but you need to be able to explain to them why. You need to be able to allow them to ask you a question. It's personal—it is very personal. So sentencing, to me, is—that was a little uncomfortable on Zoom.

VIII. Protection of Rights during Remote Proceedings

“And if a person says no to appearing by video, no problem. But we would explain it to them, it might take a while to be in a situation where we can bring you in person to the courthouse to do this, for your safety...So we had said ‘look, we’re not trying to keep you from having your day in court; we’re trying to protect you health wise and also be fair about it.’”

Perhaps the most important consideration when holding remote hearings in criminal cases is the protection of defendants' rights. Judges on the Northern District of Georgia prioritized this critical aspect by reading a script of instructions inclusive of questions to criminal defendants and attorneys alike at the start of each remote proceeding. The script (Appendix A) made clear in plain language that defendants must waive their right to an in person hearing prior to each individual hearing type; simply because a defendant chose to have their plea heard through Zoom did not mean that they were bound to remote proceedings in future hearings. The script itself was authored by one judge on the Northern District of Georgia and circulated to the entire bench. Though there was no legal requirement for judges to read this script at the start of every hearing, they each read

the script provided by one of the judges in the interviews, or something akin. This was a decision made by the bench with the intention of protecting criminal defendants' rights as much as possible.

The script itself cites the CARES Act as the reasoning for the option of a remote proceeding:

"You have the right to be physically present in open court at your (plea, sentencing, revocation), but you can waive that right. Before I ask whether you intend to waive your right, you should know the following: Today is (Date) and we are experiencing a worldwide epidemic caused by the coronavirus. Congress has passed an emergency statute, the CARES ACT, that permits defendants in criminal cases to appear in court by video or telephone for certain types of proceedings under certain circumstances."

The entire script reiterates this prioritization of defendants' choice in how their proceedings were to be held. While the script clearly states that participation in remote proceedings is entirely voluntary, it does emphasize the difficulty in holding in-person hearings given the global pandemic. In no way does the script coerce defendants to choose remote proceedings due to speed, though it does make clear the circumstantial consequence of choosing in-person hearings during a national emergency.

It says 'to try to minimize the health risk, we are giving defendants who prefer to appear in court by video the option to do so. At this point, it is voluntary.' Again, very important—they did not have to do it. 'You do not have to appear by video. If you choose to appear by video, I will ask you to waive your right to be physically present.' Very, very important, because you know, there's a psychological think I think where some people think standing physically in the courtroom is different than on video.

Judges recognized the differences in legitimacy and respect between remote and in-person hearings and admitted that appearing in the physical courtroom created a more intimate human connection, especially in circumstances where freedom was on the line.

You explain to the defendant, 'you do not have to do this through Zoom; you have a right to come in the courtroom and do this.' And if anyone said, 'I don't want to do this through Zoom,' it stops right there. You have the right to come to the courtroom, look at me, me look at you, and do it, and you know, as we got further down the line with the pandemic especially after the shots were coming out, some people said they wanted to come to the courtroom.'

Ensuring that defendants did not feel compelled to appear remotely and plead guilty just to have their cases finished was a difficulty.

First explaining their rights to them, about the right to a voluntary plea, the right to a trial, jury trial...try to explain a little that just because they have COVID, doesn't mean that at some point in time you still have the right to a jury trial—you don't have to plead guilty.

Many judges expressed potential for remote hearings to speed up the numerous civil cases that contribute to the current federal court backlog. However, considering the high stakes of criminal case outcomes, judges were less likely to feel that technology had potential to decrease the length of criminal cases. As the criminal hearing types subject to remote proceedings were few, and criminal jury and bench trials themselves (which were not authorized to be held remotely) are the procedure that take up most of the court's time, increased remote hearings would not impact the overall time it takes for a criminal case to be completed.

If we had said 'we're not going to do any criminal hearings during the pandemic,' people have a right to have their cases heard as quick as possible in court. In fact, in federal court, you have seventy days after the person is indicted, to try them.

IX. Court Disruptions

Viral videos of "cat lawyers" might lead one to believe that interruptions during court proceedings held remotely were common during the pandemic. However, the federal district courts were steadfast in their preparation to minimize technical disruptions, and the reality is that the proceedings were taken as seriously as they are in the physical courtroom. When asked about whether there was technology support for issues that arose in real time during criminal hearings, judges responded in the affirmative and stated that there were few instances in which technical problems prohibited the proceedings from continuing. It is important to distinguish between technical issues that occurred on the part of the district court and those that were on the part of any other participant in the hearings. When any technical issues on the part of the courts arose,

technology support from district court staff was mostly successful in resolving them quickly in real time so that hearings could continue.

If there was a technical problem here, there was always someone available in the IT department to come in and help. That's why I tried to make sure I did all my criminal cases here at the courthouse.

But, when issues prevented attorneys, both defense and government, as well as defendants from participating in proceedings, judges were tasked with making judgment calls about whether to proceed or reschedule. When asked whether technical issues drained the court's time during these remote proceedings, judges mostly felt that time was lost but that it was not significant.

It may have been five, six times over an eight, nine-month period, that we said we couldn't correct [technical issues], we'll reschedule, the courtroom deputy clerk will get back in touch with you all with scheduling, so it wasn't significant at all.

X. Public Access to Court Proceedings

The Northern District of Georgia never closed its doors during the national emergency. Amidst chaos in many other industries, the federal district courts did all they could to remain in operation and open to the public with added public safety and health measures in place. Many judges emphasized the importance of making court hearings available to the public, something they prioritize during daily operations while in their physical courtrooms, but which posed certain problems when hearings were moved to a remote format.

You had to make sure that the public was available. So what I would do, I would come to the courthouse, go inside the courtroom, and have the doors unlocked, and you made it known that if anyone from the public were to come in, sit and hear it, that's alright. And we were doing it on Zoom, so we had to make it available so that people could see everything. I can't think of one time anyone ever showed up.

Public access to the courts ensures transparency, accountability, and overall confidence in the American criminal justice system. Opening the courtroom doors to the public allows citizens the opportunity to witness justice being administered and increases public trust in the legal system.

The Supreme Court of the United States reiterates this constitutional right in *Richmond Newspapers, Inc. v. Virginia* (448 U.S. 555), where the court found that the right of the public, along with the press, to attend criminal trials is inherent in the First Amendment. The door to justice should always be open, regardless of whether anyone chooses to walk through them.

We had a pandemic, but the public had the right to come see hearings and the courtroom was open. You had to make sure that the courtroom was open for anybody to come in. They didn't have to have any relationship with the case. You have the right to go in any courtroom in America unless there's certain things that you know, the judge decided under the law that they can close the courtroom, which there's very few.

Limitations

In future research, interviewing magistrate judges should be a priority. In more than one interview with the judges of the Northern District of Georgia, a judge reiterated how important the role of the magistrate judges is, especially in adjudicating pre-trial criminal case hearings regarding entrance of evidence and expert testimony. Decisions made in magistrate judge courtrooms have significant impacts on the outcome of criminal cases, so better understanding the ways in which they utilized and were certainly constrained by remote proceedings is pivotal to broader understanding of achievement of justice during this period.

Another key group that would have unique perspective is that of defense attorneys who acted as guides to their clients during the pandemic landscape. Through interviews with district court judges whose tenure on the bench did not begin until after the pandemic, I gained valuable insight into the rationale of attorneys who advised criminal defendants during the lockdown. Considering benefits and drawbacks to having plea colloquies, revocation hearings, or sentencings via remote proceedings are actions held almost exclusively by defense attorneys themselves.

Interviewing judges from multiple federal district courts as well as state trial courts would give greater insight as to how constitutional rights were upheld and communicated to criminal

defendants during remote proceedings. The remote hearing script (Appendix A) provided to the interviewer was created and circulated by one of the judges on the Northern District of Georgia, not the federal government or the Judicial Conference; learning how other benches prioritized the communication of criminal rights is paramount to understanding how criminal rights were protected outside of the NDGA.

Lastly, the unique situations created by the COVID-19 pandemic are not representative of the American criminal justice system as it operates on a regular basis. The need for remote proceedings in criminal cases is considerably less today than it was in March 2020, so the findings here are specific to the observation period. As the provisions within the CARES Act expired without renewal in May of 2023, the opportunity for specified criminal hearings to be held remotely is no longer available. However, the efficacy of remote proceedings in criminal cases presents potential for increased efficiency in scheduling, especially in pretrial hearings, if allowed by the Judicial Conference or Congress.

Conclusion

How the federal courts pivoted to an online format during a global pandemic has remained an unanswered research question within judicial scholarship. Little is known about the judicial processes which allowed the federal district courts to continue criminal cases without meeting in the physical courtroom, until now. Though remote proceedings have demonstrated opportunity for increased efficiency in civil cases, the impact of moving criminal case hearings to a virtual format has been unobserved. The COVID-19 pandemic presented an experiment for the federal district courts—the choice to either embrace technology as a lifeline, or to close the doors to justice. As the original arbiters of criminal justice, the federal district courts adapted quickly to ensure the protection of constitutionally demanded rights in a safe setting: remote hearings.

Given the circumstances surrounding the COVID-19 pandemic, criminal cases held remotely provided opportunities for the federal district courts to remain in operation while prioritizing the health and safety of court officials, attorneys, and criminal defendants. In a series of eleven one-on-one interviews with sitting federal district court judges in Georgia, the procedures which prioritized the constitutional rights of criminal defendants like the right to a speedy trial in scheduling remote hearings become clear. Through postponing jury trials until after greater health protections against COVID-19 allowed juries to safely gather in the physical courtroom and continuing to hold specified criminal hearings via remote technology, the federal district courts never closed their doors. While balancing the costs and benefits of remote hearings, judges embraced such hearings as temporary solutions to the COVID-19 problem.

However, dedication to justice as a goal of criminal hearings remains a significant consideration when judges mitigate the net benefits of remote proceedings. Court legitimacy drives hesitance towards continuation of virtual proceedings in criminal cases, and though entities like the Judicial Conference and Congress relaxed restrictions for a short period during the COVID-19 pandemic, judges generally maintain their position that the physical courtroom is the most appropriate venue to hold criminal hearings. While remote technology offers expediency in scheduling and ease of travel, and can decrease major costs for attorneys and their clients, judges are unwilling to sacrifice the human connection that naturally occurs when congregating together in the courtroom. The bottom line for judges in the Northern District of Georgia is that the seriousness of criminal case outcomes demands formality, which is best delivered in person, in the courtroom.

CHAPTER 5

CONCLUSION

In the digital age, technology proliferates every corner of life, and the federal judiciary is not immune to this revolution. While the use of remote technology in civil cases has demonstrated potential for quicker case cessation and positive resolution, the efficacy of technology in criminal cases has been far less observed. Through consideration of Congress's prolonged attempts to legislate in the arena of judicial procedure via cameras in the courtroom, the impact of remote technology on the adversarial legal system, and the first introduction of remote technology in criminal cases at the federal court level, I find that technology may best be utilized in criminal cases in pretrial hearings, and that high stakes hearings such as sentencings will best be held in person.

Comparison: Civil Cases and Criminal Cases in Remote Settings

A primary motivation for this research is the extensive literature available on the implications of remote hearings in civil cases, as compared to the lack thereof in criminal cases. In an illuminating analysis of civil cases during the COVID-19 pandemic, Alyx Mark provides perspective into the implementation of remote proceedings at the state-level (Mark 2025). Central to understanding administrative decision-making, Mark considers whether states took a centralized or decentralized approach. Decentralized responses in states like Texas and Florida allowed lower courts to decide how and when to hold civil cases remotely, while centralized responses mandated all civil procedures go remote in states like Kentucky and Massachusetts. After declaring that the

pandemic necessitated alternate procedures for the federal district courts, the decision by the Judicial Conference to allow each district court to determine when and how to hold remote proceedings mirrors the decentralized procedures illuminated by Mark's 2025 research.

Comparison: State Trial Courts and Federal District Courts

The state of Michigan provides exemplary evidence of how states pivoted to embrace remote proceedings in criminal hearings as a byproduct of the COVID-19 pandemic. Before the CARES Act was passed by the United States Congress on March 27th of 2020, the Michigan Supreme Court issued an order (AO 2020-1) allowing trial courts to use remote technology for criminal hearings involving in-custody defendants; this applied to arraignments, pleas, bail hearings, and probation-violation proceedings. This administrative order also required that out-of-custody, non-emergent matters be adjourned, and suspended all criminal jury trials. Three days later, the Michigan Supreme Court issued a second order (AO 2020-2) which directed the courts to hold proceedings remotely when possible and prohibited in-court procedures to only those that were essential and limited them to no more than ten people. By April of 2020, more than 100,000 hours of Zoom proceedings had been reported by Michigan courts; by July of 2020, the courts had logged more than 500,000 hours of remote proceedings (Caplan 2020). In tandem, the Michigan Supreme Court also dramatically expanded public access to court proceedings through an enhanced 'Virtual Courtroom Directory', where users can search courts holding remote hearings and watch proceedings virtually (Michigan Supreme Court 2020).

Unlike the federal judiciary, the Michigan Supreme Court formally amended court rules in 2021 to allow for virtual appearances and filing through another administrative order (Burtka 2021). Specifically, the court order mandates that "trial courts are required to use remote participation technology to the greatest extent possible for a wide variety of criminal proceedings,

including arraignments, probable-cause conferences, pleas, and preliminary hearings.” The Virtual Courtroom Directory is still in use five years later, and though the exact number of criminal hearings held remotely today are not readily available, Michigan courts are formally operating under the amendments made in 2021. States like Michigan which are embracing the opportunity for technology and remote hearings to positively impact criminal cases present examples for the federal courts. However, the federal judiciary has ceased the stipulations of the CARES Act which allowed for remote proceedings in criminal cases, and does not hold criminal hearings remotely as of July 2025.

Findings & Implications

Remote technology provides ample improvement upon the expediency of civil cases within the federal court system. However, the efficacy of remote technology in criminal cases has been unexplored. The COVID-19 pandemic presented the perfect opportunity for the federal courts to try out remote technology in criminal cases, merely to keep the courts open amidst an uncertain time. Prior to the onset of the pandemic, the Judicial Conference had prohibited cameras in the courtroom and any type of broadcasting or recording of court proceedings. When the COVID-19 pandemic created both necessity and urgency for the adoption of remote technology simply to keep the courts running and cases progressing, the CARES Act provided opportunity for experimentation within the federal courts regarding the use of remote technology in criminal cases. Through interviews with sitting district court judges, I revealed the procedures followed by the United States District Court for the Northern District of Georgia and demonstrated the myriad ways in which constitutional protections for criminal defendants were upheld in remote proceedings.

When utilized under certain circumstances, technology has potential to advantage all criminal defendants. Despite Congress's numerous attempts at requiring the broadcast of court proceedings via federal legislation, hesitation from the judiciary itself had always kept the cameras outside of the courtroom. While the district court judges expressed gratitude that remote technology provided an outlet for the continuation of criminal cases, they overwhelmingly prefer to hold criminal hearings in person. Through the framework of adversarial legalism, it is simple to equate technology to a legal resource, much like wealth. When utilized in certain circumstances (i.e. pretrial hearings) versus in unideal circumstances (i.e. sentencings), technology has the potential to advantage all defendants.

Limitations

This research fills a gap in judicial literature by exhibiting the criminal procedures followed by the federal district courts throughout the COVID-19 pandemic. To further fill this gap, more qualitative interview data from more than one district court should be collected in tandem with available data on how many criminal case hearings were held remotely and the outcomes of such cases. The subject of this research is a single district court, and more district courts should be observed in order to compare procedural differences. For example, the U.S. District Court for the Northern District of Georgia circulated remote hearing instructions (written internally by one of this court's members) to each judge. Though not required, each judge was encouraged to read these instructions before each remote hearing in criminal cases, to ensure that criminal defendants waived their right to appear in person and knew the procedures for requesting private communication with counsel. Whether each district court read instructions like these prior to each remote hearing is uncertain and is a limitation of this research. Still, insight into the internal

procedures followed by one district court bench benefits our understanding of overall federal judicial procedure.

Future Research

The interviews with sitting district court judges unveiled the changes in judicial procedure at the federal level that occurred as a byproduct of the COVID-19 pandemic. In the future, interviews with magistrate judges and state court judges would be exceptionally illuminating; more than one district judge highlighted this demographic as one that makes critical decisions which impact criminal case outcomes, so the introduction of remote technology into this decision-making space is integral to any analysis. While one career clerk was part of the interview process, more interviews with court personnel would also provide detailed insight to the challenges and benefits associated with scheduling remote hearings and ensuring that they happened without issue.

Conclusion

Change is inevitable. Technology has infiltrated daily life across the world, and the criminal justice system in the United States is not immune to such societal advancements. Many judges mentioned remembering when changes were made to filing procedures at the federal district courts, shifting from being delivered to the courts on paper to being filed online. In speaking of this major change to judicial procedure, judges commented that they were hesitant to embrace this change decades ago. They also compared this procedural shift to the necessary shift from in-person to virtual proceedings due to the pandemic. In opining on the future of technology in criminal cases at the federal district courts, judges were optimistic about the flexibility remote hearings give to the courts and its defendants. If judges could survive and even come to embrace online filings despite ambivalence about changing integral judicial procedure, perhaps there is opportunity for judges to utilize remote proceedings in a beneficial manner.

Judges who worked previously as lawyers during the COVID-19 pandemic may be more willing to adopt virtual hearings as a procedural option in criminal cases. Of the interviews held with federal district court judges, there were few judges who had not been appointed to the bench prior to or during the COVID-19 pandemic. Their interviews focused on the difficulties and benefits of being lawyers and public defenders during the pandemic, and their perspectives led them to be more inclined to use remote hearings while now on the bench. Younger judges also demonstrated a greater desire for remote hearings as an option in certain circumstances, while still maintaining that the physical courtroom is the best place for justice to be administered. Lastly, judges who used technology more often in their personal lives felt more comfortable using it on the bench.

The federal judiciary has survived, and even thrived, on changes to the bench. Most impressive of these has been the immediate pivot to an online format when faced with a global pandemic, while also maintaining personal rights and the legitimacy of the courts. If technology is embraced by the federal judiciary in the future, there will be no doubt be initial hesitation. But, the bench has shown resilience in the face of change before, and will do so again if asked—unless asked by Congress.

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APPENDICES

Appendix A: Remote Hearing Instructions/Script

The following instructions were read before each remote hearing in criminal cases at the United States District Court for the Northern District of Georgia. Written by a judge on the bench and circulated amongst colleagues, the video proceeding instructions reiterate critical criminal rights and ensure that defendants are knowledgeable about their court hearing. The instructions are replicated in full below:

Video Proceeding — with Interpreter

We are here for the (plea, sentencing, revocation) of (Defendant).

Ms. Kemp, you may swear the interpreter.

[If a plea] Ms. Kemp, you may swear the Defendant.

The Defendant is at the (Hall County Detention Center/Robert A. Deyton Detention Facility) and is appearing by video link to the courtroom.

His lawyer, the prosecutor, the interpreter, and other participants are (in the courtroom/appearing by video conference/participating by phone). I am in the courtroom in the U.S. Courthouse in Gainesville, which is open to the public, with certain health-related restrictions. On the screen, you should be able to see all of the participants.

If you have any trouble with the video connection, or you cannot hear or see what is happening, or have difficulty hearing or understanding the interpreter, please let us know by speaking up or waving your hand. We will stop the proceeding and try to take care of it.

If you want something repeated, please let me know.

The court reporter may prepare a transcript of this proceeding, but no recording of the video itself will be preserved.

You have the right to be physically present in open court at your (plea, sentencing, revocation), but you can waive that right. Before I ask whether you intend to waive your right, you should know the following:

Today is (Date) and we are experiencing a worldwide epidemic caused by the coronavirus. Congress has passed an emergency statute, the CARES ACT, that permits defendants in criminal cases to appear in court by video or telephone for certain types of proceedings under certain circumstances.

Our normal procedure, before the emergency caused by the epidemic, was to have all defendants physically present in the courtroom for these proceedings.

But, we are attempting, as best we can, to protect the health and safety of everyone who is involved with these proceedings, while at the same time, having the basic functions of the court to go forward without unnecessary delays.

To try to minimize the health risk, we are giving defendants who prefer to appear in court by video the option to do so. At this point, it is voluntary, you do not have to appear by video. If you choose to appear by video, I will ask you to waive your right to be physically present.

You should know that you have the right to have your (plea, sentencing, revocation) conducted in open court in public view and with access by the public.

Do you understand that you have the right to be physically present in open court for your (plea, sentencing, revocation)?

Do you understand that you have a right to consult with your lawyer during this proceeding?

Do you understand that if you wish to speak with your lawyer during the proceeding, you should let us know, and we will make arrangements for the two of you to have a confidential communication?

Do you understand that you have the right to hear and see everything that happens in court during this proceeding?

Have you consulted with your lawyer concerning waiving your right to appear in person?

Do you agree to waive your right to appear in person for your (plea, sentencing, revocation) and instead appear by video?

Do you agree that to the extent that your right to public access to this proceeding is in any way impaired, you waive that right?

[To the lawyers]: Is there any reason I should not accept the waiver?

I find that the defendant has knowingly and voluntarily waived his right to appear physically and has knowingly and voluntarily agreed to proceed by video conference.

I further find that the measures taken to provide public access to this proceeding are reasonable under the circumstances, and that to the extent that the defendant's right to public access to these proceedings is in any way impaired, defendant has knowingly and voluntarily waived that right.

I further find that the case cannot be further delayed without serious harm to the interests of justice and will accept the waiver and we will proceed.

Appendix B: Interview Procedures

Setting Up Interviews

Emails requesting a thirty-to-sixty minute in-person interview were sent to each judge on the Northern District of Georgia. Follow-up emails were sent to ensure as many interviews as possible. Of the fourteen judges on the Northern District of Georgia, eleven were available for interview, all of which were conducted in-person at the Richard B. Russell Federal Building. Some judges interviewed were not on the bench during COVID-19; their interviews centered primarily around their interactions with remote technology since their start on the bench as well as their experiences as practicing attorneys throughout the pandemic.

Confidentiality

The interviewer guaranteed our participants confidentiality, so we are unable to reveal the names of the judges who participated.

Generalizability

Interviews were conducted only in one federal district court. However, the tenure of each judge varied from Biden appointees to Clinton appointees so a broad range of ideology and partisanship were included.

Interview Questions

All interviews were conducted by the same interviewer. During the interviews, the researcher asked about the types of criminal hearings conducted virtually (including an approximation of the frequency of remote criminal hearings), the type of technology utilized to conduct criminal case hearings remotely, and the challenges and benefits associated with remote criminal hearings. More specifically, a series of questions was asked to discover whether judges liked or disliked holding criminal hearings remotely and whether there were advantages for defendants who chose to have

certain hearings held virtually. The interviewer also asked several questions to determine the comfortability of each judge with technology, including how often judges utilized technology in their personal lives. Questions regarding the overall impression of remote hearings and the potential for remote hearings to impact case backlog and access to justice were also asked.

Appendix C: Institutional Review Board (IRB) Protocols

This research was approved through the IRB at the University of Georgia on September 20th, 2024 and is Project ID 00009749. All interviewees agreed to have their interviews audio recorded, were ensured confidentiality, and signed waivers prior to participation.