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Due Process and Administrative Hearings in the Time of COVID-19: Help, I Need Somebody!

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Due Process and Administrative Hearings in the Time of COVID-19: Help, I Need Somebody!

Leslie Birnbaum¹

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PREFACE

In March 2020, I applied for the National Association of Administrative Law Judiciary (NAALJ) fellowship. I was encouraged by my former supervisor, Laura Bradley, now a Senior Administrative Law Judge with the Washington State Office of Administrative Hearings (OAH), and by my current supervisor, Brian Watkins, Assistant Chief Industrial Appeals Judge with the Washington State Board of Industrial Insurance Appeals (Board). At that time, I was still conducting in-person hearings at the Board; however, a small number of my colleagues were beginning to conduct proceedings remotely.

The fellowship application required an outline and a topic. I chose the “create-your-own- topic” option. In light of the frequent, disturbing COVID-19 headlines, I proposed to write about the virus and its effect on due process and administrative hearings. I was not alone. Many people from a number of different fields were researching and writing about the pandemic. Creativity flourished; there were parodies, songs, stories, memes and more emerging out of these complicated times. COVID-19-related writing has run the gamut of science, health, law, politics and religion.² Artists and writers have discussed conspiracy theories, psychological effects, economic disparity, racial discrimination, and educational impacts, to name a few.³ This article is intended to raise awareness and explore a critical piece of the legal puzzle—procedural due process.

The pandemic is far from over, and although there is a foundation for speculation about what disputes may occur in the future, I would not be surprised to see due process disputes, as well as other constitutional challenges, regarding education, unemployment and workers compensation making their way through the hearing process.⁴

In March 2020, I envisioned that the coronavirus would run its course like a bad flu, over a limited period, not exceeding two or three months. However, one shutdown led to another and another. Courthouses and administrative forums suspended in-person proceedings and virtual hearings became relevant. I wrote and rewrote my outline, with the aid and support of Professor Gregory Ogden, from Pepperdine Caruso School of Law. I never imagined that the pandemic would be ongoing at the time of my October 2020 presentation or this publication. I envisioned traveling to Washington, D.C. to deliver this paper at the annual NAALJ conference, just as fellows had done in healthier times. When the conference changed to an online forum, I re-envisioned my presentation as a shorter, virtual presentation.

I did not foresee the mass building shutdowns by courts and administrative tribunals, the physical distancing and separation from colleagues, friends and

² See, e.g., Mark Fischetti & Britt Glaunsinger, *Inside the Coronavirus: What Scientists Know About the Inner Workings of the Pathogen*, SCI. AM. 323 (July 2020); *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021).

³ Steven Johnson, *The Living Century*, N.Y. TIMES MAGAZINE (May 2, 2021), at 15.

⁴ See Christie Aschwanden, *Five Reasons Why COVID Herd Immunity Is Probably Impossible*, 591 NATURE 520 (Mar. 2021); Siddhartha Mukherjee, *Why Does the Pandemic Seem to Be Hitting Some Countries Harder than Others?*, THE NEW YORKER (Mar. 1, 2021), <https://www.newyorker.com/magazine/2021/03/01/why-does-the-pandemic-seem-to-be-hitting-some-countries-harder-than-others>.

family. I did not anticipate the overwhelming tragedy and the tumultuous social unrest. When a family member said they would not see others until there was a vaccine, I was dismissive. Back then, Operation Warp Speed was simply a *Star Trek* term, not a 2021 vaccination program with a January production goal of 300 million COVID-19 vaccine doses.⁵

The increasing number of remote hearings has changed my perspective. Similar to the administrative process in New Hampshire, Massachusetts, North Carolina, and many other states, administrative law judges throughout the country have worked towards reinventing the hearing process in a virtual or hybrid setting.⁶ The wave of an insidious virus has caused a turbulent wake of continuances, backlogs, and unanswered questions about the new normal. Families, friends and colleagues struggle with the swift changes. "Help! I need somebody!" is a familiar refrain introduced by the Beatles in 1965, but resonates now, as we work our way through the COVID-19 crisis and move forward.

I. PANDEMIC BEGINNINGS

A. Introduction

The persistence of COVID-19 has disrupted the traditional administrative hearing process. A reinvention of the hearing process is ongoing. Many administrative forums are balancing due process considerations of notice and the meaningful opportunity to be heard against a crisis full of restrictions.⁷ The Beatles line, "Help, I need somebody!" represents a call for assistance, as well as a call to action. The chorus has rippled through our communities as the virus has demanded answers to difficult questions from scientific, legal, medical, and educational professionals.

Stress, illness, and death have become common.⁸ Many states have instituted restrictions that make in-person hearings impossible.⁹ The business of administrative hearings cannot continue as usual. As of this writing, a vaccine is

⁵ U.S. DEP'T OF HEALTH AND HUMAN SERVS., TRUMP ADMINISTRATION'S OPERATION WARP SPEED ACCELERATES ASTRAZENECA COVID-19 VACCINE TO BE AVAILABLE BEGINNING IN OCTOBER (May 21, 2020), *available at* <https://www.defense.gov/Newsroom/Releases/Release/Article/2310834/trump-administrations-operation-warp-speed-accelerates-astrazeneca-covid-19-vac/>.

⁶ *See, e.g.*, U.S. D.N.H., Standing Order (20-6), General Order (20-07), and Administrative Order (20-12); U.S. D. Mass., General Order (20-19), General Order (20-32); U.S. M.D.N.C., Amended Standing Order 13; *see also* Jeremy Graboyes, *How Administrative Courts Are Handling Hearings (For Now)*, YALE J. ON REG. (Apr. 1, 2020), <https://www.yalejreg.com/nc/how-administrative-courts-are-handling-hearings-for-now-by-jeremy-graboyes/>.

⁷ *Protecting the Federal Workforce and Requiring Mask Wearing*, Exec. Order No. 13991, 86 Fed. Reg. 7045 (Jan. 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01766/protecting-the-federal-workforce-and-requiring-mask-wearing>.

⁸ *See* Kim Tingley, *Studies Show*, N.Y. TIMES MAGAZINE, <https://www.nytimes.com/column/studies-show>; Karen Brown, *Something Bothering You? Tell it to Woebot*, N.Y. TIMES (June 1, 2021).

⁹ *See supra* text accompanying note 6.

not available to most administrative law judges and litigants.¹⁰ However, at the time of editing, a large number of Americans received the vaccination.¹¹ The Centers for Disease Control reported that providers administered 304,753,476 doses of a COVID vaccine.¹² Like the coronavirus, the hearing process is more susceptible to experimental treatment - trial and error - as we rework notice and the opportunity to be heard in virtual and hybrid settings. The force of the pandemic and its unflinching path has been a surprise, but the reinvention of a hearing process that balances public health and safety concerns is all too familiar.¹³

Familiarity has bred contempt for the coronavirus. The pandemic has caused panic, confusion, and chaos.¹⁴ Collectively, we have had a short-term memory problem about health crises.¹⁵ We have distanced ourselves from the tragedies and lessons of past pandemics.¹⁶ The coronavirus pandemic is different from past pandemics in terms of the number of people who have been ill, the ease and speed of the virus's transmission, and the numerous shelter-in-place orders and shutdowns.¹⁷ Agencies suspended in-person administrative hearings and the virtual world of remote hearings emerged overnight.¹⁸ However, restrictions

¹⁰ As of the editing of this article, COVID vaccinations were available to adults and children ages 12 and older. *COVID-19 Vaccinations in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (last accessed May 15, 2021).

¹¹ Audrey Carlsen, *How Is The COVID-19 Vaccination Campaign Going In Your State?*, NPR, <https://www.npr.org/sections/health-shots/2021/01/28/960901166/how-is-the-covid-19-vaccination-campaign-going-in-your-state> (last accessed June 10, 2021).

¹² *Vaccines for COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/index.html> (last updated June 10, 2021).

¹³ *Jacobson v. Massachusetts*, 197 U.S. 11, 25–28, 39 (1905).

¹⁴ Deborah Serani, *Covid and Pandemic Anxiety*, PSYCHOLOGY TODAY (Mar. 16, 2020), www.psychologytoday.com/us/blog/two-takes-depression/202003/covid-19-and-pandemic-anxiety.

¹⁵ Necia B. Hobbes, *Out of the Frying Pan into the Fire: Heightened Discrimination & Reduced Legal Standards When Pandemic Strikes*, 72 U. PITT. L. REV. 800, 800–02 (2011).

¹⁶ *Id.* at 806–07.

¹⁷ See Tim Newman, *Comparing COVID-19 With Previous Pandemics*, MEDICAL NEWS TODAY (Apr. 19, 2020), <https://www.medicalnewstoday.com/articles/comparing-covid-19-with-previous-pandemics>; Alfred Lubrano, *The World Has Suffered Through Other Deadly Pandemics. But The Response to Coronavirus Is Unprecedented*, THE PHILA. INQUIRER (Mar. 22, 2020), <https://www.inquirer.com/health/coronavirus/coronavirus-philadelphia-spanish-flu-world-war-two-civil-war-pandemic-aids-20200322.html>; see also Jan Brauner, *Inferring the Effectiveness of Government Interventions against COVID-19*, 371 SCIENCE 802 (Feb. 2021); Dan Hurley, *Coronavirus Shutdowns Have Quashed Nearly All Other Common Viruses. But Scientists Say a Rebound Is Coming*, WASH. POST (Jan. 12, 2021); *FDA v. Am. Coll. of Obstetricians and Gynecologists*, 141 S. Ct. 578, 580 (2021).

¹⁸ See *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, U.S. CTS. (March 31, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic>; Alejandra Loaiza-Delgado & Abigail Busse, *Best Practices for Remote Hearings*, AM. BAR ASS'N (June 9, 2020), <https://www.americanbar.org/groups/litigation/committees/trial-evidence/articles/2020/best-practices-remote-hearings/>.

including quarantines, masks and isolation are far from new.¹⁹ During the pandemic, due process concerns have been raised when the emergency restrictions interfere with individual rights.²⁰ There have been disruptions, technical issues, and disparate experiences for minority and disadvantaged groups.²¹ This is the first pandemic where we are able to communicate virtually through technology.²² Despite the digital age, there is a divide. A disproportionate percentage of minorities have limited access to technology, which places them at a significant disadvantage in a digital hearing room, and often questions whether they truly are granted due process.²³ Due process concerns need to be addressed by improving technology and addressing discrimination for all who enter the virtual hearing room during and after the pandemic.²⁴

B. The Pandemic: The Novel Coronavirus

Under an electron microscope, the COVID-19 virus appears as a sphere of proteins.²⁵ Proteins, called “S proteins,” form a spike and grab onto a human cell.²⁶ The virus has the appearance of a crown, or in Latin, *corona*, hence the *coronavirus*.²⁷

In December 2019, the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), COVID-19, appeared in Wuhan, China.²⁸ It was marked by mild to severe symptoms that include fever, cough, shortness of breath, chills, muscle pain, headache, sore throat, loss of taste or smell, congestion, runny nose, nausea,

¹⁹ Allison Bond, M.D., *We Must Learn from Our Past*, UNIV. OF CAL. S.F. MAGAZINE (Summer 2020), <https://www.ucsf.edu/magazine/covid-past-pandemics>.

²⁰ See Jeremy Graboyes, *Legal Considerations for Remote Hearings in Agency Adjudications*, ADMIN. CONF. OF THE U.S. (June 16, 2020), <https://www.acus.gov/report/legal-considerations-remote-hearings-agency-adjudications>; Matthew Richardson & Scott C. Smith, *The Clash Between Emergency Powers and Individual Rights During COVID-19 Pandemic*, JD SUPRA (May 16, 2020), <https://www.jdsupra.com/legalnews/the-clash-between-emergency-powers-and-88205/>; *Human Rights Dimensions of COVID-19 Response*, HUMAN RIGHTS WATCH (March 19, 2020), <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>; see also *Page v. Cuomo*, 2020 WL 4589329, at *7–12 (N.D.N.Y. 2020).

²¹ Betsy Ladyzhets, *The Surge in U.S. Coronavirus Cases Shows a Shift in Who's Getting Sick*, SCIENCE NEWS (May 3, 2021), www.sciencenews.org/article/covid-coronavirus-surge-4th-wave-us-young-cases-vaccination.

²² Francine Uenuma, *Video Chat Is Helping Us Stay Connected in Lockdown. But the Tech Was Once a 'Spectacular Flop*, TIME (May 11, 2020), <https://time.com/5834516/video-chat-zoom-history/>.

²³ Hobbes, *supra* note 15, at 791; see also Elisabeth Beaunoyer, Sophie Dupere, & Matthieu J. Guillon, *COVID-19 and Digital Inequalities: Reciprocal Impacts and Mitigation Strategies*, 111 COMPUTERS IN HUMAN BEHAVIOR (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7213963/>.

²⁴ Graboyes, *supra* note 20, at 12–13, 20–21.

²⁵ Fischetti & Glaunsinger, *supra* note 2.

²⁶ *Id.*

²⁷ Grant C.M. Killoran & Christa D. Wittenberg, *Due Process in the Time of the Coronavirus*, 93 WIS. LAWYER 18, 22 (2020).

²⁸ Denis Chow, *Where Did the Coronavirus Come From? Past Outbreaks Provide Hints*, NBC NEWS (Feb. 28, 2020), <https://www.nbcnews.com/science/science-news/where-did-new-coronavirus-come-past-outbreaks-provide-hints-n1144521>.

vomiting, and diarrhea.²⁹ People also could be asymptomatic yet test positive for the virus.³⁰ As a result of its silent spread, affected individuals may experience the full magnitude of the virus or nothing at all.³¹ This causes the kind of fear that causes people to hoard toilet paper, flour, and hand-sanitizer.³² At its core, the fear stokes panic; the virus has a highly contagious nature and sometimes a deadly outcome.³³

COVID-19 is highly infectious; it spreads from person to person through respiratory droplets, released when people talk, sing, sneeze, cough or simply breathe within the proximity of one another, typically within distances of six feet or less.³⁴ Gathering places, such as grocery stores, airports, places of worship, and courtrooms, present higher transmission risks because people remain indoors for extended periods of time.³⁵

In its fledgling phases, COVID-19 shut down a city, a country and, eventually, the world.³⁶ Empty windows, vacant buildings, and locked doors have become trademarks of its rapid transmission. Schools, courthouses, and businesses closed their doors and several suspended operations entirely. In a recent Supreme Court case, Chief Justice John Roberts described the virus as an illness with no known cure and no effective treatment; infected people may show no symptoms but can unwittingly infect others.³⁷

The elderly, people of color and the poor have been disproportionately affected.³⁸ There has been an over-representation of the Black and Latinx populations in the reported cases compared to their population percentage.³⁹

²⁹ *2019 Novel Coronavirus (COVID-19) Outbreak*, NAT'L FOUND. FOR INFECTIOUS DISEASES, <https://www.nfid.org/infectious-diseases/19036/> (last accessed Jan. 29, 2021).

³⁰ *Clinical Care Guidance*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last updated Feb. 16, 2021).

³¹ *Id.*

³² See Carol Mathews, M.D., *Hoarding and the COVID-19 Pandemic*, PSYCHOLOGY TODAY (Oct. 30, 2020), www.psychologytoday.com/us/blog/overcome-anxiety/202010/hoarding-and-the-covid-19-pandemic; Emma Balter, *From Toilet Paper to Roller Skates, These Were the Great Shortages of 2020*, HOUSTON CHRONICAL (Dec. 30, 2020), <https://www.houstonchronicle.com/life/article/shopping-shortages-2020-covid-pandemic-15836207.php>.

³³ *COVID-19: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last updated May 7, 2021). See also Fischetti & Glaunsinger, *supra* note 2, at 32; Serani, *supra* note 14.

³⁴ *How to Protect Yourself & Others*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last accessed Jan. 27, 2021).

³⁵ *Id.*

³⁶ Mathews, *supra* note 32. See also Mukherjee, *supra* note 4.

³⁷ *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020).

³⁸ Tian Gu & Maxwell Salvatore et al., *Characteristics Associated with Racial/Ethnic Disparities in Covid-19 Outcomes in an Academic Health Care System*, J. OF MED. ASS'N NETWORK OPEN (2020); see also Rachel Nania, *COVID-19 Proves Especially Fatal to Aging African Americans*, AARP (Nov. 9, 2020), <https://www.aarp.org/health/conditions-treatments/info-2020/older-african-americans-coronavirus-risk.html>.

³⁹ Gu & Salvatore et al., *supra* note 39.

American Indian, African American and Hispanic/Latino communities have been impacted to a greater extent and have higher numbers of cases and deaths.⁴⁰

State governments have responded with shutdowns, quarantines and restrictions.⁴¹ Federal, state and local agencies, including administrative tribunals, have responded with closures, limited operations, and telecommuting.⁴² Large, high-density events, such as weddings, political rallies, and receptions (including the Rose Garden indoor reception for the announcement for the new United States Supreme Court Justice) have become known as “super spreaders.”⁴³

The CDC has tracked COVID-19 cases since January 2020.⁴⁴ According to the CDC website,⁴⁵ the first case was detected on January 22, 2020. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.⁴⁶ In the United States, on July 22, 2020, the CDC reported 3,955,664 total cases and 142,755 deaths. By November 22, 2020, there were 12,175,921 reported cases and 255,958 deaths.⁴⁷ And by December 22, 2020, the numbers had soared to 17,790,376 reported cases and 316,844 deaths.⁴⁸ The holiday season presented a threat of yet another increase.⁴⁹ The Centers for Disease Control posted an alert: “COVID-19 cases, hospitalizations, and deaths across the United States are rising. As cold weather moves in, people spend more time indoors, and the holidays approach, take steps to slow the spread of COVID-19.”⁵⁰

⁴⁰ *COVID-19 Hospitalization and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last updated Nov. 30, 2020); *see also* Sangeetha Padalabalanarayanan & Vidya Sagar Hanumanthu et al., *State Stay-at-Home Orders and State-Level African American Population with COVID-19 Case Rates*, J. OF MED. ASS’N NETWORK OPEN (2020).

⁴¹ Jacqueline Orfield et al., *COVID-19: US State Policy Report—December 4, 2020*, NAT’L L. REV. (Dec. 5, 2020), <https://www.natlawreview.com/article/covid-19-us-state-policy-report-december-4-2020>; *see also* Brauner, *supra* note 17.

⁴² *See COVID-19: Teleworking*, NAT’L CONF. OF STATE LEGIS. (Mar. 30, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-teleworking.aspx>; 7 *Federal Agencies Making the Most of Telework Now (and Beyond)*, FEDSCOOP (Mar. 16, 2021), <https://www.fedscoop.com/list/7-federal-agencies-making-telework-now-beyond/>; Graboyes, *supra* note 20, at 18.

⁴³ *See* Natalie Musumec, *What’s a COVID-19 Superspreader Event? Six Glaring Examples*, N.Y. POST (Dec. 2, 2020), <https://nypost.com/article/what-is-a-covid-19-superspreader-event-definition-examples/>.

⁴⁴ *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last visited May 15, 2021).

⁴⁵ *Id.*

⁴⁶ WORLD HEALTH ORG., WHO DIRECTOR-GENERAL’S OPENING REMARKS AT THE MEDIA BRIEFING ON COVID-19—11 MARCH 2020 (Mar. 11, 2020), <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴⁷ COVID DATA TRACKER, *supra* note 45.

⁴⁸ *See id.*

⁴⁹ *COVID-19*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/index.html> (last visited Dec. 22, 2020).

⁵⁰ *Id.*

On June 13, 2021, the Centers for Disease Control reported 33,283,781 reported cases of COVID-597,195 deaths and 143,921,222 fully vaccinated people.⁵¹ The numbers of reported COVID cases have decreased; however, scientists anticipate herd immunity may be difficult to achieve as a result of the number of people who do not get vaccinated and the presence of variants.⁵²

No state has remained immune. In March 2020, Washington State and New York had the highest numbers of cases.⁵³ In October 2020, Texas, California, and Florida reported the highest numbers of cases, while Vermont had the lowest.⁵⁴ In November 2020, North Dakota, South Dakota, and Wyoming had the highest number of cases, while Hawaii had the lowest.⁵⁵ By December 2020, Tennessee, California, and Oklahoma had the highest number, while Hawaii had one of the lowest.⁵⁶ Individual states responded differently. Some instituted regulations or laws that required closures, restricted gatherings, reduced travel, and mandated mask-wearing.⁵⁷ But not all states have taken the same measures; some have lifted restrictions and allowed restaurants and bars to operate before others.⁵⁸ Typically, states that used restrictive and preventative measures that reduce transmissions such as stay-at-home orders, business shutdowns, and online learning, have had more success at slowing the spread of the virus.⁵⁹

C. History of Pandemics

History repeats itself. From the third century BCE to the present day, communities have combated infectious diseases.⁶⁰ Societies have instituted quarantines and restrictions.⁶¹ The centuries have hosted deadly pandemics, such as smallpox, bubonic plague, and polio.⁶² Certain illnesses, such as smallpox, can be prevented, and others, such as polio and the COVID-19 virus can only be

⁵¹ COVID DATA TRACKER, *supra* note 45 (last visited June 13, 2021).

⁵² Aschwanden, *supra* note 4.

⁵³ COVID DATA TRACKER, *supra* note 45 (last accessed May 16, 2021).

⁵⁴ *Id.* (last visited Dec. 22, 2020).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Aschwanden, *supra* note 4, at 11–12; see Rachel Treisman, *How Is Each State Responding To COVID-19?*, NPR (Dec. 4, 2020), <https://www.npr.org/2020/03/12/815200313/what-governors-are-doing-to-tackle-spreading-coronavirus>.

⁵⁸ Aschwanden, *supra* note 4.

⁵⁹ See Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 78 (2020); Padalabalanarayanan, *supra* note 41; see also *Transmission of SARS-CoV-2: Implication for Infection Prevention Precautions (How to Prevent Transmission)*, WORLD HEALTH ORG. (July 9, 2020), <https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions>; *Covid Data Tracker—Social Impact Covid-19 Events in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#social-impact>.

⁶⁰ Eugenia Tognotti, *Lessons from the History of Quarantine, from Plague to Influenza A*, 19 EMERGING INFECTIOUS DISEASES JOURNAL 254 (Feb. 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3559034/pdf/12-0312.pdf>.

⁶¹ *Id.*; Eleanor Klibanoff, *A History of Quarantines from Bubonic Plague to Typhoid Mary*, NPR (Jan. 26, 2020), <https://www.npr.org/sections/goatsandsoda/2020/01/26/799324436/a-history-of-quarantines-from-bubonic-plague-to-typhoid-mary>.

⁶² Tognotti, *supra* note 61; Klibanoff, *supra* note 62.

controlled.⁶³ As the administrative hearing process reinvents itself, history presents a study of past practices.⁶⁴ Laws and regulations that implement safety and control measures are longtime accompaniments to these difficult times.⁶⁵

Smallpox emerged in the 3rd century BCE and was eradicated in the 1980s.⁶⁶ From 1347 through 1353, the bubonic plague, also known as the Black Death, was a deadly pandemic without a cure.⁶⁷ In 1894, polio emerged and saw a resurgence in 1916 and in the 1950's.⁶⁸ In 1918, the Spanish influenza brought tragedy and death.⁶⁹ From 1957 to 1958, there was an outbreak of the Asian flu, known as the H2N2 virus.⁷⁰ In 1968, there was a spread of the H3N2 virus, the avian flu.⁷¹ From 2002 through 2004, the infectious disease known as severe acute respiratory syndrome, or SARS, caused serious upper respiratory symptoms.⁷² From 2009 to 2010, the swine flu, H1N1, infected many.⁷³ And in late 2019, COVID-19, spread lethally from Wuhan, China, and throughout the globe in 2020, where it continues to rage.⁷⁴

In the past, quarantines, border controls, contact tracing, and masking have proven effective as organized responses to slow transmission and control outbreaks. However, over time, restrictions and safety measures have raised procedural due process concerns. These measures are not easily put into action, as they trigger political, legal and socioeconomic issues. A balance between public health interests and individual rights is key.

The more virulent and deadly the pandemic becomes, the more restrictions a community is likely to see.⁷⁵ During the Black Plague quarantine, isolation, and

⁶³ In December 2020, two vaccinations received FDA emergency use authorization. *See The Advisory Committee on Immunization Practices' Interim Recommendation for Allocating Initial Supplies of COVID-19 Vaccine—United States, 2020*, MORBIDITY AND MORTALITY WEEKLY REPORT (Dec. 11, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6949e1.htm>. Healthcare workers have been among the first to receive the first of two doses of the Pfizer BioNTech or Moderna vaccine. *Id.*

⁶⁴ Funmi E. Olorunnipa, *Agency Use of Video Hearings: Best Practice and Possibilities for Expansion*, ADMIN. CONF. OF THE U.S. (Mar. 24, 2011), <https://www.acus.gov/sites/default/files/documents/Draft-Recommendation-Agency-Use-of-Video-Hearings-3-24-11.pdf>.

⁶⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 23–24 (1905).

⁶⁶ *History of Smallpox*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 20, 2021), <https://www.cdc.gov/smallpox/history/history.html>

⁶⁷ Klibanoff, *supra* note 62.

⁶⁸ *See Polio Elimination in the United States*, CTRS. FOR DISEASE CONTROL AND PREVENTION, www.cdc.gov/polio/what-is-polio/polio-us.html (last updated July 23, 2021); Man Mohan Mehndiratta, *Poliomyelitis: Historical Facts, Epidemiology, and Current Challenges in Eradication*, 4 NEUROHOSPITALIST 223, 223–29 (Oct. 2014), <https://pubmed.ncbi.nlm.nih.gov/25360208/>.

⁶⁹ Klibanoff, *supra* note 62.

⁷⁰ Tognotti, *supra* note 61.

⁷¹ Edwin D. Kilbourne, *Influenza Pandemics of the 20th Century*, 12(1) EMERGING INFECTIOUS DISEASES 9 (Jan. 2006), <http://dx.doi.org/10.3201/eid1201.051254>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Outbreak*, *supra* note 29.

⁷⁵ Killoran & Wittenberg, *supra* note 27, at 22.

border and travel restrictions were used to slow the spread of the disease.⁷⁶ Around 1789 in France and England, the implementation of quarantines, isolating people, and a compulsory smallpox vaccination raised significant conflicts with individual rights, as well as personal freedom.⁷⁷ The enforcement of health and sanitary measures saw an increase in police power as well.⁷⁸ The Black Plague was the impetus for the government to exert control through law. The Ordinance of Labourers in 1349 froze workers' wages and prices due to a manpower shortage and a high demand for laborers.⁷⁹ In 1710, the Parliament passed the Quarantine Act in England, instituting quarantines, such as the isolation of ships and crews, to control the disease.⁸⁰

In the United States, the deadly spread of infectious diseases such as smallpox raised similar conflicts between personal freedom and safety and health restrictions. In 1905, the Supreme Court addressed a compulsory vaccination program in Massachusetts.⁸¹ Massachusetts imposed a five dollar fine or imprisonment for neglecting or refusing to submit to vaccination.⁸² The Court stated that the legislature has the right to pass laws to prevent the spread of contagious diseases.⁸³ It also found that the regulation was a reasonable exercise of police power.⁸⁴

In 1918, in response to the outbreak of the Spanish influenza, there were school, church and theater closures, and restrictions on public gatherings.⁸⁵ In 1957, in response to the H2N2 and H3N2 viruses, containment efforts included school and asylum closures, and public gathering bans.⁸⁶ In 2002–2004, during the SARS outbreak, limitations and travel restrictions contributed to discrimination against certain groups and protests against those measures.⁸⁷ As the governments and communities addressed pandemics with increased controls and safety measures, the isolation, separation and quarantine of people more frequently affected liberty interests of minority groups and those of lower socioeconomic class.⁸⁸ Abroad and in the United States, fear has historically risen as illness and death escalate. Laws and ordinances controlling a public

⁷⁶ Tognotti, *supra* note 61. In 1377, Dubrovnik, Croatia instituted a quarantine to combat the plague. Venice, Italy used a plague hospital on the island of San Marco. In 1663, England disinfected and quarantined ships. In the United States, New York (1688) and Boston (1691) used a quarantine to control yellow fever. *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *The Law of Pandemics*, ENGLISH LEGAL HISTORY (Mar. 26, 2020), <https://englishlegalhistory.wordpress.com/2020/03/26/the-law-of-pandemics>; *see also* Michael Bennett, *The Impact of the Black Death on English Legal History*, 11 AUSTL. J.L. & SOC'Y 191, 191–204 (1995)

⁸⁰ *The Law of Pandemics*, *supra* note 81.

⁸¹ *Jacobson v. Massachusetts*, 197 U.S. 11, 12–13. (1905).

⁸² *Id.* at 12–14, 26.

⁸³ *Id.* at 26–28.

⁸⁴ *Id.* at 35.

⁸⁵ Tognotti, *supra* note 61.

⁸⁶ *Id.*

⁸⁷ *Id.* Canada asked people with a possible exposure to SARS to voluntarily quarantine. China limited building access, erected road checkpoints and limited work in affected areas. *Id.*

⁸⁸ *Id.*

health crisis through legal measures are not uncommon. However effective in battling an outbreak, these controls are not always welcome, as they disrupt the balance between personal freedom and restrictive safety measures.

D. Procedural Due Process: Adaptation and Reinvention—A Balancing Act

Due process arises out of the Fifth and Fourteenth Amendments to the United States Constitution.⁸⁹ It encompasses both substantive and procedural due process. Substantive due process addresses individual liberties, while procedural due process addresses what process is due when liberty or property interests are at risk of deprivation.⁹⁰

The flexibility of due process is well known and is part of our history. Supreme Court Justice Thurgood Marshall viewed procedural due process as essential for fairness.⁹¹ He saw the importance of balancing procedural due process with liberty interests.⁹² Justice Marshall acknowledged the adaptation of due process over time, stating:

Courts ... do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a “natural” and “self-evident” ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom.⁹³

The pandemic has been the impetus for reinventing customs associated with equality, consistency and fairness in administrative hearings. However dire the emergency, the Constitution does not change nor does it provide an exception when a pandemic overwhelms the community.⁹⁴ Individual rights and liberty interests ingrained in the Constitution do not vanish during a healthcare emergency.

COVID-19 crossed the globe with the force of a blizzard. Since its first appearance in the United States, a number of states have experienced three surges.⁹⁵ It has left behind confusion, chaos and tragedy. Prevention measures trigger issues of government intrusion and questions about what processes are due for such intervention.⁹⁶ The courts recognize the state police power to enact laws

⁸⁹ See U.S. Const. amend. V, § 4; U.S. Const. amend. XIV, § 1.

⁹⁰ *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974).

⁹¹ Richard H.W. Maloy, *Thurgood Marshall and the Holy Grail—The Due Process Jurisprudence of a Consummate Jurist*, 26 PEPP. L. REV. 289, 291 (1988).

⁹² *Id.*

⁹³ *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985)).

⁹⁴ Jeffrey D. Jackson, *Tiered Scrutiny in a Pandemic*, 12 CONLAWNOW 39, 55 (2020).

⁹⁵ See Betsy Ladyzhets, *The Surge in U.S. Coronavirus cases Shows a Shift in Who's Getting Sick*, SCIENCE NEWS (May 3, 2021), www.sciencenews.org/article/covid-coronavirus-surge-4th-wave-us-young-cases-vaccination; Timothy Smith, *If U.S. is in a Fourth Covid-19 Surge, What Should We Do?*, AM. MED. ASS'N (Apr. 19, 2021), www.ama-assn.org/delivering-care/public-health/if-us-fourth-covid-19-surge-what-should-we-do.

⁹⁶ Killoran & Wittenberg, *supra* note 27, at 20.

controlling the rate of infection by instituting quarantines, isolation, and travel and business restrictions.⁹⁷ Due process raises questions of what process is required when an individual liberty interest has been infringed.⁹⁸

The implementation of remote and hybrid hearings raises legal concerns and due process considerations. What process is due, before, during, and after health and safety restrictions and what new procedures are put into place?⁹⁹ Is there a need for legal counsel, a right to confront witnesses, and a meaningful opportunity to be heard? The public health concerns have invoked police power, in the face of the deprivation or delay of liberty interests. Due process cannot be pushed aside. A balancing act is important to weigh due process protections against public health measures.¹⁰⁰

A call for help has echoed in many states and in their courts and administrative forums.¹⁰¹ Whether it involves technical support, updated cyber-friendly equipment, new terminology or revised notices, due process is a check on the virtual systems taking the place of in-person hearings. Procedural due process, with its history, flexibility and emphasis on balance, offers room to expand remote hearings in light of safety and health mandates prohibiting or transforming in-person hearings.¹⁰²

Over a short period of time, virtual and hybrid hearings have changed the face of administrative hearings as a result of COVID-19. However, there are ramifications of a mass evacuation of staff, changes from paper to electronic files, and safety concerns. Who picks up the pieces as due process reinvents itself? There are increasing impacts of rapid and innovative change. Administrative judges and support staff struggle, regroup and work through the many changes confronting new professional and personal spheres.

II. THE NEXT GENERATION: TO BOLDLY GO WHERE NO ONE HAS GONE BEFORE (BUT WHERE EVERYONE IS HEADED)

Since March 2020, holidays and events have brought higher infection rates leading to overwhelmed hospitals. Healthcare workers suffer from burnout and people experience Zoom-fatigue.¹⁰³ Businesses open and shut with economic uncertainty.¹⁰⁴ From March through December 2020, California, New York, Washington, and many other states increased restrictions in an effort to slow the spread of COVID-19.¹⁰⁵

⁹⁷ Jackson, *supra* note 96, at 44.

⁹⁸ Killoran & Wittenberg, *supra* note 27, at 21.

⁹⁹ *Id.* at 21, 24.

¹⁰⁰ *Id.* at 23.

¹⁰¹ Michael K. Newell, *The Mother of Invention: How the Family Court Pivoted to Keep Serving the Public*, 38 DEL. LAWYER 8, 9–10 (2020); Graboyes, *supra* note 20, at 19–23.

¹⁰² See Jackson, *supra* note 96; Kieffaber v. Ethicon, 2021 WL 423822, at *4 (2021).

¹⁰³ Vignesh Ramachandaran, *Stanford Researchers Identify Four Causes for 'Zoom Fatigue' and Their Simple Fixes*, STANFORD NEWS (Feb. 23, 2021), <https://news.stanford.edu/2021/02/23/four-causes-zoom-fatigue-solutions/>.

¹⁰⁴ Stacy Cowley, *Chaos Grow as Aid Pool for Business Empties Out*, N.Y. TIMES (May 21, 2021).

¹⁰⁵ See *Remarks by President Biden on the Anniversary of the COVID-19 Shutdown* (Mar. 11, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/03/11/remarks-by->

Just as the vaccination program has moved quickly in Operation Warp Speed, the migration to virtual hearings that began in March has thrust administrative proceedings into the Next Generation.¹⁰⁶ As due process navigates through surges and safety measures, familiar themes of constitutional protections established in *Goldberg v. Kelly*¹⁰⁷ and *Mathews v. Eldridge*¹⁰⁸ are resurrected.

A. Due Process and Case Law

1. *Goldberg v. Kelly*¹⁰⁹

In *Goldberg v. Kelly*, Kelly and other New York City residents receiving welfare benefits under the federal program, Aid to Families with Dependent Children, or the state program, Home Relief, challenged the notice and hearing procedures when the state terminated their benefits.¹¹⁰ The state did not provide notice or a hearing before terminating welfare benefits.¹¹¹ The plaintiffs challenged whether the state's procedures for notice and an opportunity for hearing met constitutional standards.¹¹²

The Supreme Court addressed whether and what procedural due process rights were due when a welfare recipient's benefits were about to be terminated without prior notice and without a hearing.¹¹³ The court held that process was due under the Fourteenth Amendment of the Constitution, requiring notice and opportunity to be heard.¹¹⁴ Prior to the termination of public assistance, a welfare recipient needed to have timely and adequate notice as well as an opportunity for a hearing "at a meaningful time and in a meaningful manner."¹¹⁵ The hearing required the opportunity to confront adverse witnesses and to present evidence and arguments.¹¹⁶ The Court also reflected on balancing a welfare recipient's need for assistance, and avoiding an erroneous deprivation of those benefits,

president-biden-on-the-anniversary-of-the-covid-19-shutdown/; John Meyers & Rong-Gong Lin II, *Newsom Orders New Limits on California Businesses and Activities as COVID-19 Soars*, L.A. TIMES (Dec. 3, 2020), <https://www.latimes.com/california/story/2020-12-03/newsom-weighs-shutdown-california-covid-19-cases-soar-december>; Derick Waller, *Coronavirus New York Update: State Tightens Restrictions as Cases Rise Again*, ABC 7 N.Y. (Nov. 14, 2020), <https://abc7ny.com/covid-19-ny-coronavirus-restrictions-new-york-in/7917108/>; Julia Jacobo, *Washington State Gov. Jay Inslee Announces New Restrictions Amid 'Third Wave' of COVID-19 Cases*, ABC NEWS (Nov. 15, 2020), <https://abcnews.go.com/US/washington-state-gov-jay-inslee-announces-restrictions-amid/story?id=74218184>; Chris Brown, *Gov. Jay Inslee Announces Three-Week Extension of COVID-19 Restrictions*, CLARK COUNTY NEWS (Dec. 8, 2020), <https://www.clarkcountytoday.com/news/gov-jay-inslee-announces-three-week-extension-of-covid-19-restrictions/>.

¹⁰⁶ Susskind, Richard, *The Future of Courts*, THE PRACTICE (July/Aug. 2020), <https://thepractice.law.harvard.edu/article/the-future-of-courts/>. The phrase, "Next Generation," is a reference to the future as used in the Star Trek television series and movies. *Id.*

¹⁰⁷ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁰⁸ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹⁰⁹ *Goldberg*, 397 U.S. at 257.

¹¹⁰ *Id.* at 255–57.

¹¹¹ *Id.* at 259–60.

¹¹² *Id.* at 256.

¹¹³ *Id.* at 260.

¹¹⁴ *Id.* at 267–68.

¹¹⁵ *Id.* at 267 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

¹¹⁶ *Id.* at 261.

against fiscal and administrative governmental interests.¹¹⁷ This balancing act is needed to safeguard the interests of the individual who is at risk of being deprived of their assistance benefits.¹¹⁸ In his dissent, Justice Black expressed concern about the survival of an indigent recipient.¹¹⁹ He stated that the requirement of a pretermination hearing would make it more difficult to terminate benefits without full process, but there could be repercussions that would make it more difficult for indigent people to get benefits in the first place.¹²⁰

2. *Mathews v. Eldridge*¹²¹

Six years following *Goldberg*, in *Mathews v. Eldridge*, Eldridge challenged the Social Security Administration's (SSA) denial of his disability benefits.¹²² He had been receiving social security disability benefits and received a notice from SSA.¹²³ The notice stated that he was no longer disabled and that his benefits would be terminated.¹²⁴ SSA informed Eldridge that he could provide additional medical information within a reasonable time, and had the right to request reconsideration of the termination.¹²⁵ Eldridge responded that SSA had sufficient evidence and disputed one of the characterizations of his disability.¹²⁶ SSA made a final determination and denied Eldridge's benefits.¹²⁷ He challenged the termination based on a denial of due process under the Constitution, similar to *Goldberg*.¹²⁸ Eldridge contended that SSA's termination without a pretermination hearing was a denial of due process.¹²⁹

The Supreme Court applied a three-part balancing test that weighed (1) the private interest affected by an official action; (2) the risk of erroneous deprivation of that interest by the procedure utilized, as well as the value of additional procedural safeguards; and (3) the governmental interest, including administrative and fiscal burdens, triggered by additional safeguards.¹³⁰

After applying the three-part test, the Supreme Court held that Eldridge received sufficient process prior to administrative action because he had been provided a right to a hearing and judicial review before the determination became final.¹³¹ As a result, he was not deprived of due process.¹³² The court noted the flexibility of due process and the procedural protections it provides while considering situational demands.¹³³

¹¹⁷ *Id.* at 265–66.

¹¹⁸ *Id.* at 267.

¹¹⁹ *Id.* at 278.

¹²⁰ *Id.* at 279.

¹²¹ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

¹²² *Id.* at 324–25.

¹²³ *Id.* at 323–24.

¹²⁴ *Id.* at 324.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 324–25.

¹²⁹ *Id.* at 325.

¹³⁰ *Id.* at 321.

¹³¹ *Id.* at 349.

¹³² *Id.*

¹³³ *Id.*

In the Court's opinion, Justice Powell wrote about the balancing process involving the "ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants."¹³⁴ He stated that ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness.¹³⁵ The Court distinguished between the welfare benefits in *Goldberg* and the disability benefits of Eldridge and stated that *Goldberg* was not controlling. The same pre-deprivation process that the Court required in *Goldberg* was not required in Eldridge's situation because disability benefits were different than welfare benefits and were not financially based.¹³⁶ Justice Powell also referred to the public interest, which included administrative and financial burdens, as the final factor in the balancing test.¹³⁷

What happens to the meaningful opportunity to be heard during the pandemic, and how does the balancing test apply in the face of a highly contagious virus, frightened litigants, and administrative closures? COVID-19 has spawned new regulations, guidelines, and directives that have had an immediate and profound effect on administrative hearings.

Tribunals should consider utilizing the *Mathews* three-part balancing test in their hearing and decision-making processes. The test provides a consistent, established procedure for balancing restrictions implemented during a pandemic against individual interests. In addition, the third part of the test, examining government interests, is broad and includes the public interest. Consequently, the balancing test has the capacity to weigh the safety and emergency procedures that are put into place during a health crisis as part of the public interest against the individual's rights at risk of deprivation.

3. Virtual Hearings: The Flexibility of Due Process and the Adaptation of Hearings

The wear and tear of procedural due process throughout history does not just reflect its flexibility; rather, it demonstrates a consistent presence over time and familiar principles. In *Marbury v. Madison*, Chief Justice John Marshall stated, "It is a settled and invariable principle, that every right, when withheld, must have a remedy in every injury, its proper redress."¹³⁸

In numerous jurisdictions, in-person hearings came to a halt; however, disputes and controversies continued in administrative forums and beyond. The implementation of remote hearings provided forums for redress. In the early stages of the pandemic, administrative forums quickly utilized telephonic hearings, if they were not already in place. Through Zoom or other virtual modalities, remote hearings presented viable options and technical challenges. Requests for continuances due to the virus, also referred to as *COVID continuances*, could not be granted repeatedly during the pandemic, to which there is no end in sight. Thus, alternatives and the consideration of statutory

¹³⁴ *Id.* at 348.

¹³⁵ *Id.*

¹³⁶ *Id.* at 325.

¹³⁷ *Id.* at 347.

¹³⁸ *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

directives must be considered when balancing due process and remote proceedings.¹³⁹

With the cycle of closures of nonessential businesses and reopenings, some forums have opened their hearing doors in a limited way. On December 2, 2020, the *New York Times* reported that the virus had wreaked havoc on the New York court system.¹⁴⁰ The article mentioned new features, such as Plexiglas boxes, dividers, masks, face shields, and air filters, which are among some of the new measures used to promote safety as criminal proceedings restart.¹⁴¹ Federal courts are suspending trials, including jury trials, through the middle of January 2021, or later, due to the virus. Courts and administrative tribunals have created their own protocols. The *New York Times* article mentions that it has been a challenge to find lawyers willing to participate in these hearings due to the virus.¹⁴² Rescheduling, postponements, and backlogs are among the concerns raised by the closures and delays.

4. Continuances¹⁴³

The delay of justice presents due process concerns regarding the opportunity for a meaningful, timely hearing, and the denial of justice. Requests for continuances or extensions of time are common. Throughout history, adjudicators have allowed delays and granted continuances for a variety of reasons and typically require a good cause.¹⁴⁴ In the face of COVID-19, continuances have become more popular for valid and sometimes tactical reasons. Repeated requests for continuances, solely on the basis of COVID-19 and attempts to delay the administrative process until in-person hearings return, present scheduling and due process concerns. Open-ended delays do not serve individuals who suffer a deprivation or an administrative hearing process dealing with a mounting backlog.

In a 2019 Board of Immigration Appeals removal proceeding, the Third Circuit Court of Appeals ruled that a hearing done by video conference did not deprive an individual of due process rights, absent a showing of a problem that occurred during the proceeding.¹⁴⁵

A review of case law does not capture the frequency and challenges of COVID-19-related delays.¹⁴⁶ Anecdotally, continuances and delays were more frequent at the beginning of the pandemic in the spring of 2020. Requests for in-person hearings occurred for a variety of valid and tactical reasons, including credibility determinations, access issues, technology issues, illness/COVID-19 issues, discovery issues and witness availability. The Administrative Conference of the United States compiled COVID-19-related memos and policies pertaining

¹³⁹ Graboyes, *supra* note 20, at 4.

¹⁴⁰ Nicole Hong & Jan Ransom, *9 Trials in 9 Months: Virus Wreaks Havoc on New York's Courts*, N.Y. TIMES (Dec. 2, 2020).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Although there have been several criminal cases that raise issues concerning the pandemic, these are beyond the scope of this article and are not included.

¹⁴⁴ Graboyes, *supra* note 20, at 4, 8, 17.

¹⁴⁵ *Mendoza Reyes v. United States*, 767 F. App'x 358, 362, (3d Cir. 2019)

¹⁴⁶ Susskind, *supra* note 108.

to federal administrative agencies.¹⁴⁷ In June 2020, the Executive Office for Immigration Review cautioned against granting motions for continuances that had a suggestion of being "used as a cover for purely dilatory tactics."¹⁴⁸

In a parental rights case in New York state, a father objected to a virtual hearing.¹⁴⁹ The Supreme Court of New York did not allow his request for a postponement because they did not know when the court would resume in-person hearings due to an anticipated resurgence of COVID-19. In addition, the court found that a postponement would negatively affect the children. The court cited *Bagot v. McClain*, where the court held that due process was not denied when there was a faulty video conference.¹⁵⁰

Case law research reveals several criminal cases in which defendants and inmates requested early releases, presented grievances, and challenged confinement due to COVID-19. Due to the limited scope of this topic, this article will not address criminal matters but acknowledges the severity and vulnerabilities that the virus poses for inmates in confinement.¹⁵¹

5. Restrictions

In the face of a serious, continuing outbreak, there is a recurring theme of states using quarantines and restrictions to slow the spread of the virus. Some citizens are suing or appealing, litigating challenging emergency orders and safety measures as restrictions are imposed and relaxed by various state and local governments. For example, there is ongoing litigation, significant fines and potential criminal charges for restaurants and bars defying indoor dining restrictions in a number of states, such as Washington, Massachusetts and Maine.¹⁵²

While there is a public health consensus about the measures needed to slow the transmission of the virus, there are varying infection rates and surges from autumn holiday gatherings. The legal challenges contend that governmental control tramples individual rights. Exactly what due process is due before the hearing and during the hearing process, as well as the timing of that process, has been contested. During the pandemic, the courts have generally shown deference

¹⁴⁷ *Coronavirus (COVID-19) and Adjudication*, ADMIN. CONF. OF THE U.S., <https://www.acus.gov/coronavirus-and-adjudication> (last accessed Apr. 22, 2021).

¹⁴⁸ James McHenry III, *EIOR Practices Related to the COVID-19 Outbreak* (June 11, 2020), EXEC. OFFICE FOR IMMIGRATION REVIEW, <https://www.justice.gov/eoir/page/file/1284706/download>.

¹⁴⁹ *A.S. v. N.S.*, 128 N.Y.S. 3d 435 (2020).

¹⁵⁰ *Id.* (citing *Bagot v. McClain*, 148 A.D.3d 882,883 (2017)).

¹⁵¹ *Valentine v. Collier*, 140 S. Ct. 1598, 1600 (2020).

¹⁵² *See, e.g., Drew Mikkelsen, Thurston County Restaurant Owner Faces Judge and More Fines for Violating COVID-19 Restrictions*, KING 5 (Dec. 29, 2020), <https://www.king5.com/article/news/health/coronavirus/farm-boy-spiffys-restaurats-facing-fines-for-violating-covid-restrictions-olympia-lewis-county/281-e30150d4-bef6-4fb9-b73c-969d75fdef45>; Neal McNamara, *Worcester Restaurant Caught Defying Coronavirus Dine-In Ban: PD*, PATCH (Mar. 19, 2020), <https://patch.com/massachusetts/worcester/worcester-restaurant-caught-defying-coronavirus-dine-ban-pd>; Charles Eichacker, *Maine Restaurant Loses Health and Liquor License After Defying State Virus Orders*, BANGOR DAILY NEWS (May 1, 2020), <https://bangordailynews.com/2020/05/01/business/more-than-100-show-up-to-dine-at-oxford-county-restaurant-defying-maine-virus-orders/>.

to state or local governments acting in a public health crisis under *Jacobson v. Commonwealth of Massachusetts*.¹⁵³ For the most part, constitutional challenges have been unsuccessful in changing or eliminating restrictions or providing additional due process.¹⁵⁴ Constitutional considerations are not ignored, nor are they avoided. The deprivation, the interest at stake, as well as the public interest regarding the health crisis, must be balanced. In many instances, the balance appears to weigh in favor of restrictions that slow the spread of COVID-19, just as they did more than 100 years ago in the mandatory smallpox vaccination program in *Jacobson*.¹⁵⁵

As a result of the pandemic, there is a battle being waged between the right to exercise religious freedom under the First Amendment against safety precautions and occupancy restrictions in places of worship.¹⁵⁶ In a Supreme Court worship case, the court upheld an injunction against New York's imposition of occupancy restrictions and disfavored *Jacobson*.¹⁵⁷ The Supreme Court reiterated that there was no constitutional exception for the pandemic. In a concurring opinion, Justice Gorsuch stated, "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical."¹⁵⁸ In Justice Breyer's dissent, he noted that a balancing must occur.¹⁵⁹ Health, safety and administrative needs must be at balanced against constitutional rights and challenges.¹⁶⁰ The exact form of this balancing may not be clear because of the rapidly changing circumstances of an unpredictable pandemic. He acknowledged that the court system does not provide the quickest response to emergency health and safety measures because the officials implementing those measures have the discretion to address the needs of the public in a timelier fashion.¹⁶¹

In the COVID-19 era of due process cases, state courts have often denied challenges to emergency safety measures and restrictions and cited *Jacobson* in support of the state's power to institute these measures without pre-deprivation hearings, and at times, with limited post-deprivation process.¹⁶² In the article, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, Linda Sharp authored an in-depth review that summarized the different circuits addressing due process challenges of restrictions or safety measures authorized through emergency orders.¹⁶³ She considered the constitutionality of the emergency orders implementing quarantines, shelter-in-

¹⁵³ Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 78 (2020).

¹⁵⁴ Linda Sharp, *COVID-19 Related Litigation: Constitutionality of Stay-at-Home, Shelter-in-Place, and Lockdown Orders*, 55 A.L.R. FED. 3D (2020).

¹⁵⁵ *Jacobson v. Massachusetts*, 197 U.S. 11, 25–28 (1905).

¹⁵⁶ David Crary, *More U.S. Churches Sue to Challenge COVID-19 Restrictions*, ASSOCIATED PRESS (Aug. 13, 2020), <https://apnews.com/article/virus-outbreak-mn-state-wire-religion-ca-state-wire-lawsuits-7d2933ca919f33aa8c4c845e1d3febd>.

¹⁵⁷ *Roman Catholic Diocese*, 141 S. Ct. at 68–70.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 78 (Breyer, J., dissenting).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Sharp, *supra* note 156.

¹⁶³ *Id.*

place/stay-at-home directives, travel restrictions, lockdowns, and other measures that have appeared in short order during the pandemic.

The Supreme Court upheld the denial of an injunction in California where restrictions limited attendance at places of worship to twenty-five percent of their capacity or a maximum of 100 worshippers.¹⁶⁴ Although this case addressed liberty interests, it provides insight into the reopening or easing of restrictions during the pandemic. It acknowledges that the circumstances attributed to a pandemic and social activities are dynamic. The court noted that the Constitution protects the health and safety of the people, and it cited to *Jacobson* for its broad latitude to protect those interest in a crisis.¹⁶⁵

The Supreme Court denied a preliminary injunction of a New York executive order requiring a 14-day self-quarantine for those traveling to the state who had tested positive for Covid.¹⁶⁶ The court stated that notice and the opportunity to be heard needed to be appropriate to the nature of the case because of the crisis.¹⁶⁷ The court permitted the state to implement emergency procedures related to the public health crisis.¹⁶⁸ To determine whether the safety measure had a real or substantial relationship to protecting the public health, the court cited *Jacobson*.¹⁶⁹

In a Pennsylvania case, the governor's emergency executive order required suspending the operation of non-life-sustaining businesses.¹⁷⁰ Violations triggered citations, monetary penalties, and license suspensions, but did not provide the opportunity for an administrative review process.¹⁷¹ The circuit court found that the plaintiff real estate agents could request a waiver through an application process, and there was no denial of procedural due process.¹⁷² A pre-deprivation hearing was not required because of the nature of the pandemic and its rapid transmission.¹⁷³ The waiver application process provided sufficient process to satisfy constitutional requirements, and the court denied a temporary restraining order.¹⁷⁴

In *League of Independent Fitness Facilities and Trainers*, the Sixth Circuit stated that *Jacobson* did not provide an unlimited ability to infringe on constitutional rights when considering public safety.¹⁷⁵ The government needed to show that the continued closure of a gym was related to the preservation of public health. Ultimately, the challenge failed, and the court found that the order was sufficient under a rational basis test.¹⁷⁶

¹⁶⁴ *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020).

¹⁶⁵ *Id.*

¹⁶⁶ *Page v. Cuomo*, 2020 WL 4589329, at *2 (N.D.N.Y. 2020).

¹⁶⁷ *Id.* at *12.

¹⁶⁸ *Id.* at *12–13.

¹⁶⁹ *Id.* at *7–8.

¹⁷⁰ *Benner v. Wolf*, 461 F. Supp. 3d 154, 159 (M.D. Pa. 2020).

¹⁷¹ *Id.*

¹⁷² *Id.* at 163–64.

¹⁷³ *Id.* at 162–63.

¹⁷⁴ *Id.* at 158.

¹⁷⁵ *League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125 (6th Cir. 2020); *see also* Sharp, *supra* note 156.

¹⁷⁶ Sharp, *supra* note 156.

In Florida, restrictions were put into place as a result of the governor's emergency orders.¹⁷⁷ The restrictions involved isolation and quarantine under the state's police power. The court would not stay a suspension of an alcoholic beverage license when the license-holder failed to comply with emergency orders.¹⁷⁸ The emergency orders were enacted due to COVID-19: bars were found to be a cause for the spread of the virus in Florida.¹⁷⁹ This is an instance where the balancing of the health and safety interests of the public due to the virus had to be weighed against due process considerations.¹⁸⁰

In an unpublished case, the Texas Court of Appeals addressed mask requirements for in-person depositions.¹⁸¹ The trial court issued a decision allowing one litigant with family health concerns and responsibilities to appear by video conferencing; they also denied the other litigant's request to appear remotely.¹⁸² The appellate court's emergency order allowed the trial court to have discretion to determine whether proceeding would occur remotely by telephone or by video.¹⁸³ However, safety procedures were necessary for an in-person deposition.¹⁸⁴ In this situation, the trial court did not define sufficient safety procedures for the depositions, and the Court of Appeals found that a requirement to wear masks was not sufficient.¹⁸⁵ Other procedures requiring social distancing, limiting maximum size and imposing other precautions were necessary. The proposed safety procedure was too limited to comply adequately with the emergency order.¹⁸⁶ In addition, the Court stated that the lower court needed to take reasonable efforts to hold remote proceedings.¹⁸⁷

In a case out of South Carolina, the judge denied a motion to go forward with written testimony, and ordered a virtual hearing.¹⁸⁸ In an unpublished case, the Massachusetts Superior Court discussed the flexibility of due process in a situation involving traveling to the courtroom during the pandemic.¹⁸⁹ The court discussed the balance between private interests and government interests, including the risk of deprivation when additional safeguards are involved in such a situation.¹⁹⁰ The court also discussed avoiding the risks of COVID-19 by utilizing virtual hearings.¹⁹¹

¹⁷⁷ Henry v. DeSantis, 461 F. Supp. 3d 1244, 1248–51 (2020).

¹⁷⁸ Showntail the Legend LLC v. Fla. Dep't of Bus. and Prof'l Regul., 302 So. 3d 1085, 1086–87 (Fla. Dist. Ct. App. 2020).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1088–89; *see also DeSantis*, 461 F. Supp. 3d at 1256–57.

¹⁸¹ In re Landstar Ranger, 2020 WL 5521136, at *5 (2020).

¹⁸² *Id.*

¹⁸³ *Id.* at *4.

¹⁸⁴ *Id.* at *5–6.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at *5.

¹⁸⁷ *Id.*

¹⁸⁸ In re: Annual Review of Base Rates for Fuel Costs for Dominion Energy South Carolina, Inc., 2020 WL 2125 O29 (S.C.P.S.C. 2020).

¹⁸⁹ Commonwealth v. Masa, 2020 WL 4743019, at *5–6 (2020).

¹⁹⁰ *Id.* at *3.

¹⁹¹ *Id.* at *5–7.

Challenges to government-imposed restrictions show that constitutional protections are needed to meet situational demands.¹⁹² They illustrate that due process can be flexible during a public health crisis and a balancing test may be used to address what health and safety measures are necessary to protect the public.¹⁹³ However, restrictions are not automatic simply because there is a public health crisis. An evaluation of the potential deprivation of the individual rights affected, the proposed state action, what process is due, and the timing of that process, is needed. Balance is important each time situational demands require protections or restrictions.¹⁹⁴ "The constitutional safeguard of due process is not some 'technical conception with a fixed content unrelated to time, place and circumstances.'"¹⁹⁵

6. The Pinnacles and the Pitfalls of the New Normal

Some of the benefits of the pandemic are the reduction in travel, the accessibility of virtual hearings, and the ease of connection.¹⁹⁶ As the workforce migrated away from the office, and staff became physically distant from one another to reduce the spread of the virus, opportunities presented themselves for remote communication.¹⁹⁷ There has been positive reframing of a difficult situation, which has been advantageous to those who have the capability and opportunity to work from home.¹⁹⁸ Telecommuting has been helpful to those who have up-to-date electronic equipment for video conferencing, such as smart phones and computers with cameras.¹⁹⁹

The pandemic has reset the way people communicate.²⁰⁰ Offices that went paperless prior to the pandemic had an easier transition to telecommuting because that transition occurred before the chaos of the mass exodus and shelter-in-place orders in March 2020. Telephonic and video remote proceedings work well for individuals without internet connectivity or broadband issues, and for those with functional equipment.²⁰¹ For those who do not have access - or have limited access—the pandemic has been a greater challenge.²⁰²

¹⁹² *Landstar Ranger*, 2020 WL 5521136, at *5; see also *Jacobson v. Massachusetts*, 197 U.S. 11, 26–28 (1905).

¹⁹³ *Masa*, 2020 WL 4743019, at *3.

¹⁹⁴ *Page v. Cuomo*, 2020 WL 4589329, at *12 (N.D.N.Y. 2020).

¹⁹⁵ *Id.* (quoting *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

¹⁹⁶ *As Courts Restore Operations COVID 19 Creates a New Normal*, U.S. CTS. (Aug. 20, 2020), <https://www.uscourts.gov/news/2020/08/20/courts-restore-operations-covid-19-creates-new-normal>.

¹⁹⁷ Jay Zitter, *COVID-19 Related Litigation: Effect of Pandemic on Deadlines for State Court Filings and Hearings*, 55 A.L.R. 7TH (2020).

¹⁹⁸ Katherine Guyot & Isabel V. Sawhill, *Telecommuting will Likely Continue Long after the Pandemic*, THE BROOKINGS INSTITUTION (Apr. 6, 2020), <https://www.brookings.edu/blog/upfront/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/>.

¹⁹⁹ Josh Grissom, *An Analysis of the Temporary and Lasting Effects of the Covid-19 Pandemic on International Human Rights*, 24 GONZ. J. INT'L L. 178, 191–94 (2021).

²⁰⁰ Takeshi Kasai, *From the "New Normal" to a New Future": A Sustainable Response to COVID-19*, THE LANCET REGIONAL HEALTH—WEST PACIFIC (Oct. 9, 2020), [https://www.thelancet.com/journals/lanwpc/article/PIIS2666-6065\(20\)30043-2/fulltext](https://www.thelancet.com/journals/lanwpc/article/PIIS2666-6065(20)30043-2/fulltext).

²⁰¹ Zitter, *supra* note 199.

²⁰² Guyot & Sawhill, *supra* note 200.

In order to participate in a pre-pandemic, in-person hearing, a self-represented person, or for that matter, any participant, has to make their way into an administrative hearing room.²⁰³ The new normal has brought the hearing room into homes across every state, and there has been an increase in remote courts.²⁰⁴ Distance is not an obstacle. Disabilities that thwart participation in a live hearing are easier to accommodate in one's own environment. If someone is ill, has a mobility issue, or has caretaking responsibilities for children or elderly relatives, they need not worry about the time or expense of traveling to a hearing room.²⁰⁵ A telephonic hearing is just a phone call away. Similarly, a virtual hearing is a mouse click on a cyber link. How easy is that? Postponements due to reasons such as car trouble, lack of funds for transportation, or childcare are less frequent. On the other hand, the pandemic presents significant obstacles for those responsible for elder care, childcare, or on-line learning, and for those who cannot easily work at home.²⁰⁶

7. Inside the Virtual Administrative Hearing Room: Heightened Discrimination and Reduced Legal Standards

So why hasn't the pandemic become a panacea for administrative hearings? The digital divide and technical problems present challenges to administrative law judges as well as litigants.²⁰⁷ For example, appellants who represent themselves, either by choice or due to a lack of funds, and those who speak English as a second language and appear with an interpreter, may not have the same access to virtual hearings and may experience additional frustrations with remote participation.²⁰⁸

Data from the swine flu era showed that safety measures that indirectly restrained discriminatory behavior under normal circumstances would likely be reduced, minimized or removed during an emergency response to a pandemic.²⁰⁹ In *Out of the Frying Pan into the Fire*, an article about heightened discrimination and reduced legal standards during the 2009 H1N1 (swine flu) pandemic in 2009, the author found that the reduction of due process, involving a reduction of procedures during a health crisis, disproportionately affected minority groups. In addition, Black people, Latinos, and Native Americans were more likely to die from H1N1 than European Americans.²¹⁰ A cautionary note from the past provides a warning about discrimination and racism.²¹¹ This foreshadows the

²⁰³ David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISC. 246, 259 (2020).

²⁰⁴ Susskind, *supra* note 108.

²⁰⁵ *Id.*

²⁰⁶ Mukherjee, *supra* note 4; see Graboyes, *supra* note 20, at 16.

²⁰⁷ Emily Vogels et al., *53% of Americans Say the Internet has been Essential during the COVID 19 Outbreak*, PEW RESEARCH CENTER (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>; see Graboyes, *supra* note 20, at 21.

²⁰⁸ Graboyes, *supra* note 20, at 16.

²⁰⁹ Hobbes, *supra* note 15, at 780–84.

²¹⁰ *Id.* at 780, 788.

²¹¹ Sendhil Mullainathan, *Racial Bias, Even When we have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), <https://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html>.

effects a pandemic can have on minority groups, including disparities in available legal processes, medical equipment, treatment as well as politics and education.²¹²

B. State Surveys

1. Massachusetts

As previously mentioned, the original focus of this article included an examination of unemployment benefit hearings in Massachusetts. The Massachusetts Department of Employment Assistance's website informs users that hearings are now held remotely by telephone or video conferences. In some cases, the agency holds in-person hearings when identification verification is an issue.²¹³ Due to the unprecedented number of claims, the director promulgated emergency regulations for the purpose of alleviating hardships caused by the virus. There was no notice and opportunity provided or required for a hearing due to the public interest.²¹⁴

In the early 1900s, Massachusetts was the site for a controversial, compulsory vaccination program to thwart the smallpox epidemic. The *Jacobson* case has once again become important in COVID-19 cases that balance restrictions, such as quarantines and other safety measures, against individual rights.²¹⁵

Over 100 years ago, the Supreme Court addressed a compulsory vaccination program in Cambridge Massachusetts in *Jacobson*.²¹⁶ In this case, there was a five-dollar fine or imprisonment for neglecting or refusing to submit to a smallpox vaccination.²¹⁷ The court stated that the legislature has the right to pass laws which prevent the spread of contagious diseases.²¹⁸ It also found that the regulation was a reasonable exercise of police power.²¹⁹

The Massachusetts Department of Industrial Accidents (DIA) has an active caseload of worker injury appeals. Virtual hearings have not been without issues in Massachusetts. DIA has had technical issues with WebEx virtual hearings that have included delays, audio and video dropping issues, and interpreter difficulties with overlapping talking. As of September 28, 2020, the agency returned to doing limited virtual hearings and has made progress on clearing its backlog.²²⁰

In March 2020, Massachusetts' governor issued emergency orders restricting gatherings, suspending in-person instruction at schools, and on-

²¹² *Id.*; see Hobbes, *supra* note 15, at 781–87.

²¹³ *Changes to Unemployment Services during the COVID-19 Pandemic*, COMMONWEALTH OF MASS., <https://www.mass.gov/info-details/changes-to-unemployment-services-during-the-covid-19-pandemic> (last visited Jan. 27, 2021).

²¹⁴ 430 Code Mass. Regs. 23.00–23.01 (2020).

²¹⁵ See *South Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).; see also *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020).

²¹⁶ *Jacobson v. Massachusetts*, 197 U.S. 11, 12 (1905).

²¹⁷ *Id.* at 14.

²¹⁸ *Id.* at 35.

²¹⁹ *Id.* at 28, 35.

²²⁰ Omar Hernandez, EMERGENCY ADMINISTRATIVE BULLETIN 7: DISPUTE RESOLUTION RE-OPENING PROCEDURES, MASS. EXEC. OFFICE OF LABOR AND WORKFORCE DEVELOPMENTS (Sept. 16, 2020), <https://archives.lib.state.ma.us/bitstream/handle/2452/833022/on1196136602.pdf>.

premises activity in bars and restaurants. The emergency order was challenged, and plaintiffs contended that it violated procedural, substantive and other constitutional rights.²²¹ In December 2020, the Supreme Judicial Court of Massachusetts found that the emergency order did not interfere with legislative functions and did not violate the Constitution pertaining to substantive due process, procedural due process, and the right to free assembly. The court cited both *Jacobson* and *South Bay United Pentecostal Church* in its discussion of the broad latitude that officials have when acting in situations with medical and scientific uncertainty.²²² It also stated that the governor had been informed by public health officials, and the order addressed the state's interest in slowing the speed of the virus. The court held that the emergency orders did not violate procedural due process because the orders were general rules that provided policies about restrictions, and they did not address adjudications that involved specifically identified individuals.²²³ Because the orders constituted generalized rules, the Court stated that the orders did not provide an entitlement to individual hearings.²²⁴

2. Indiana

In Indiana, COVID-related cases addressed a variety of issues including election postponement,²²⁵ early release from prison,²²⁶ delay of the Indiana State Bar examination,²²⁷ and school closings.²²⁸ Since March 2020, Indiana's governor instituted and extended emergency rules that address court proceedings during the pandemic.²²⁹ These court rules address alternatives for in-person appearances in conferences and hearings, and allow the use of telephonic or video technology, unless a party's due process rights are violated.²³⁰ The emergency rules also address good cause related to COVID-19 or illness as a basis to permit a remote appearance or a continuance of a proceeding.²³¹

In July 2020, the Indiana Department of Education released guidance for proceeding with reentry into schools for grades kindergarten through twelve.²³² In August 2020, a school in Palestine, Indiana reported COVID cases affecting students and staff.²³³ A newspaper reported more than one hundred cases in

²²¹ *Desrosiers v. Baker*, 486 Mass. 369, 387 (2020).

²²² *Id.* at 385–86.

²²³ *Id.* at 386–87.

²²⁴ *Id.* at 387.

²²⁵ *DeCola v. Starke Cty. Election Bd.*, 146 N.E.3d 1084 (Ind. Ct. App. 2020).

²²⁶ *Merkel v. Indiana*, 160 N.E.3d 1139 (Ind. Ct. App. 2020).

²²⁷ *In re July 2020 Ind. Bar Examination*, 143 N.E.3d 300 (Ind. 2020).

²²⁸ *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527 (2020).

²²⁹ *In re Admin. Rule 17 Emergency Relief for Ind. Trial Courts Relating to 2019 Novel Coronavirus (COVID-19)*, 147 N.E.3d 1019 (Ind. 2020).

²³⁰ *Id.*

²³¹ *Id.*

²³² Adam Baker, *Indiana Department of Education Announces 2020-2021 School Year COVID-19 Reentry Considerations*, IND. DEP'T OF ED. (June 5, 2020), <https://www.doe.in.gov/news/indiana-department-education-announces-2020-2021-school-year-covid-19-reentry-considerations>

²³³ Julia Deng, *No State-Mandated Reopening Rules for Indiana Schools*, WISH-TV (Aug. 4, 2020), <https://www.wishtv.com/news/no-state-mandated-reopening-rules-for-indiana-schools/>.

Indiana Schools.²³⁴ In September 2020, the governor of Indiana lifted a significant number of restrictions pertaining to business and capacity limits.²³⁵ Since that time, there have been reports of significant increases in COVID-19 patients and death tolls.²³⁶

Regarding education, the CDC recommended mitigation strategies to promote the successful operation of schools during the pandemic.²³⁷ The CDC acknowledged that the resources required to reopen and maintain schools safely will involve increased costs.²³⁸ They estimated to range of \$55 per student to \$442 per student for schools that use the maximum number of custodial staff and additional transportation.²³⁹ In schools that operate virtually or use a hybrid model, costs could be cheaper.²⁴⁰ Mitigation strategies involved wearing masks, social distancing, handwashing, cleaning and disinfecting, contact tracing in conjunction with local health departments, and staggered scheduling.²⁴¹

Currently, more Indiana schools are operating online. The *Indianapolis Star* reported approximately 3,000 additional COVID-19 cases in the Indiana public schools, from November 2020 through approximately December 21, 2020, for a total of almost 27,000 cases.²⁴²

3. Washington

Early in the pandemic, when an appellant in workers' compensation appeals failed to appear before the Board of Industrial Insurance Appeals, an industrial appeals judge would dismiss the appeals.²⁴³ After the pandemic developed more fully, the Board found that one self-represented appellant received inconsistent information in the notice for a hearing.²⁴⁴ The notice stated that he needed to wait for a call from the judge in order to join the hearing.²⁴⁵ He

²³⁴ Arika Herron & MJ Slaby, *Schools Have Reported More Than 100 COVID-19 Cases*, INDIANAPOLIS STAR (Aug. 13, 2020), <https://www.indystar.com/story/news/education/2020/08/13/indiana-education-schools-have-reported-more-than-100-covid-19-cases/3362206001/>.

²³⁵ Brandon Smith, *Gov. Eric Holcomb Lifts Almost All COVID-19 Restrictions*, WYFI (Sept. 23, 2020), <https://www.wfyi.org/news/articles/gov-eric-holcomb-lifts-almost-all-covid-19-restrictions>.

²³⁶ Casey Smith, *More Indiana Schools Move Online as COVID-19 Spread Spikes*, AP NEWS (Nov. 12, 2020), <https://apnews.com/article/indianapolis-coronavirus-pandemic-indiana-b980b7dd7e314cba4b75eb675ba14db6>.

²³⁷ *Strategies for Protection K-12 School Staff from COVID*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-staff.html#guiding-principles> (last accessed Apr. 23, 2021).

²³⁸ *Estimated Resource Costs for Implementation of CDC's Recommended COVID-19 Mitigation Strategies in Prekindergarten through Grade 12 Public Schools—U. S., 2020-21 School Year*, 69 CDC MORBIDITY AND MORTALITY WEEKLY REPORT 1917 (2020).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² Arika Herron & MJ Slaby, *Nearly 3000 Additional COVID-19 Cases Reported in Schools, Total Nears 27,000*, INDIANAPOLIS STAR (Dec. 21, 2020), <https://www.indystar.com/story/news/education/2020/12/21/indiana-schools-covid-19-case-database-total-nears-27-000/3990386001/>.

²⁴³ Wash. Admin. Code § 263-12-115(8) (2020).

²⁴⁴ *In re Kinchen*, BIIA Dec., 1924896 (May 2020).

²⁴⁵ *Id.*

also received notice that he was required to call into the hearing using a particular telephone number and code.²⁴⁶ The appellant demonstrated good cause by showing confusion. The Board remanded the case for a new hearing.

In July 2020, the Washington governor issued emergency proclamations requiring various establishments, including fitness centers, to suspend indoor activities in Washington State.²⁴⁷ As a result of a workplace safety inspection, the Department of Labor and Industries issued penalties to two fitness centers in eastern Washington that kept their doors open to patrons.²⁴⁸ The controlling regulation stated, "Where a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work."²⁴⁹ The industrial appeals judge did not reach a determination of the validity or scope of the emergency proclamation because he found that the evidence did not support the violation.²⁵⁰ The Department of Labor and Industries presented insufficient evidence to show employees were present at the fitness centers.²⁵¹ The Department had the burden to prove that employees were exposed to a hazard, and it failed to do so.²⁵² The state agency was not excused from the responsibility of presenting sufficient evidence, even in the face of the pandemic.²⁵³

The governor recently extended Washington's emergency orders until January 11, 2021.²⁵⁴ In defiance of the governor's ban on indoor dining, at least two restaurants—one in Olympia, Washington, and another in Chehalis, Washington—have remained open. The Department of Labor and Industries imposes steep fines of \$2,000 to more than \$9,000 per day on noncompliant restaurants.²⁵⁵ The owners are at risk for losing their business licenses, as well as contempt and criminal charges.²⁵⁶ One restaurant owner stated that he cannot afford to pay his employees by limiting services to take out.²⁵⁷

²⁴⁶ *Id.*

²⁴⁷ *Inslee Announces Steps to Address COVID-19 Spread*, THE OFFICE OF THE GOVERNOR (July 16, 2020), www.governor.wa.gov/news-media/inslee-announces-steps-address-covid-19-spread.

²⁴⁸ See Jeffrey Cawood, *Gym in Washington State Fined Nearly \$10k Per Day for Defying COVID-19 Orders*, DAILY WIRE (Dec. 13, 2020), <https://www.dailywire.com/news/gym-in-washington-fined-nearly-10k-per-day-for-defying-covid-orders>.

²⁴⁹ Wash. Admin. Code § 296-800-14035 (2020).

²⁵⁰ *In re Bradshaw Dev. dba Anytime Fitness*, BIIA Dec., 20W0126 (Dec. 2020).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Inslee Announces "Healthy Washington—Roadmap to Recovery"*, THE OFFICE OF THE GOVERNOR (Jan. 5, 2021), <https://www.governor.wa.gov/news-media/inslee-announces-healthy-washington>.

²⁵⁵ Essex Porter, *Restaurant That Defied State's Indoor Dining Ban Gets Short Reprieve*, KIRO 7 NEWS (Dec. 29, 2020), <https://www.kiro7.com/news/local/restaurant-that-defied-states-indoor-dining-ban-gets-short-reprieve/>.

²⁵⁶ Mikkelsen, *supra* note 154.

²⁵⁷ *Id.*

4. Local Survey

During August and September of 2020, I conducted an informal survey of industrial appeals judges in Washington State and administrative law judges in Oregon.²⁵⁸ In Washington State, forty-five out of sixty-nine industrial appeals judges responded to a survey about administrative hearings during COVID.²⁵⁹ All of the judges worked remotely with paperless files. From March through August 2020, 70% of parties' requested continuances due to the pandemic.²⁶⁰ During that time, 64% of the judges noted a backlog of cases and 34% of the judges reported that they completed proceedings within the time periods allowed.²⁶¹ 89% of the industrial appeals judges reported that notices were sent out timely; however, scheduling and hearing notices did not necessarily contain accurate information regarding call-in instructions for telephonic hearings, or provide information about video hearings.²⁶² In proceedings where parties were unable to access video or telephonic hearings, the most common problem was proper equipment.²⁶³ After the pandemic, approximately 15% of the judges reported that they would prefer telephone hearings, while about 15% preferred video proceedings instead of in-person hearings.²⁶⁴

In Oregon, all administrative law judges conducted most of their proceedings by telephone prior to the pandemic. In September 2020, twenty-nine out of fifty-one administrative law judges responded to the survey, and all of the judges worked remotely with paperless files.²⁶⁵ From March through mid-September 2020, most of the judges reported that more than 25% of the continuances requested were due to the pandemic. During that time, approximately 63% of the judges noted a backlog of cases and about the same percentage reported that their proceedings were completed within the time periods allowed.²⁶⁶ About 96% of the administrative law judges reported that notices were sent out timely.²⁶⁷ In proceedings where parties could not access video or telephonic hearings, the most common problem was the lack of proper equipment.²⁶⁸ Approximately 75% of the judges reported that they would prefer to conduct telephone hearings after the pandemic, while about 50% preferred video proceedings instead of in-person hearings after the pandemic.²⁶⁹

²⁵⁸ Leslie Birnbaum, *Due Process and Administrative Hearings during the Pandemic COVID-19* [Washington State Board of Industrial Insurance Appeals], Survey Unpublished (Sept. 2020); Leslie Birnbaum, *Due Process and Administrative Hearings during the Pandemic COVID-19* [Oregon State Office of Administrative Hearings], Survey Unpublished (Sept. 2020).

²⁵⁹ Leslie Birnbaum, *Due Process and Administrative Hearings during the Pandemic COVID-19* [Washington State Board of Industrial Insurance Appeals], Survey Unpublished (Sept. 2020).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Leslie Birnbaum, *Due Process and Administrative Hearings during the Pandemic COVID-19* [Oregon State Office of Administrative Hearings], Survey Unpublished (Sept. 2020).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

5. National Survey

The National Conference of Administrative Law Judges (NCAL) and NAALJ conducted a national survey over the course of one week in April 2020, and received responses from eighty-eight administrative law judges from forty-five state, local and federal agencies.²⁷⁰ Among other things, the survey asked about the problems that the judges encountered during the COVID-19 emergency.²⁷¹ Possible responses included adding to the case backlog, difficulty communicating with parties, difficulty communicating with attorneys, difficulties accessing shared office drives/docket, difficulty with home connectivity (Wi-Fi) or VPN, and a lack of technology training.²⁷² The survey found that judges had the most difficulty with the increased case backlog.²⁷³ The respondents expected a 35 percent increase in the backlog when forums upgraded their operations.²⁷⁴

In answer to the question whether the judges were satisfied with the use of telephone or video, the survey reported that 59 percent of those surveyed were very satisfied with the use of telephones and videos for hearings, and 58 percent believed that telephone and video hearings should continue after the emergency.²⁷⁵

Not all the judges surveyed had complete access to electronic files and documents.²⁷⁶ More than 50 percent of the respondents had a high percentage of electronic dockets. In the age of technology and with the increase of telecommuting during the pandemic, the lack of complete access to electronic files presented a significant disadvantage. The authors of the survey commented that the pandemic may have a "silver lining" - the increased efficiency of hearings, the promotion of paperless files and a backlog reduction.²⁷⁷

III. CONCLUSION AND RECOMMENDATIONS

A. Lessons Learned

Generally speaking, hearings begin in a similar fashion: assignment, scheduling, preparation, organization, and presentation of evidence and witnesses. The devil lies in the details. Due process emphasizes notice and a meaningful opportunity to be heard. Parties must be given timely and accurate notice that complies with regulations that delineate when, where, and how the hearing will take place. If the notices do not state when, where and how the hearing will occur (whether by telephone, video or some hybrid), the notices are not accurate and cannot be timely.

²⁷⁰ NCALJ COVID-19 Outreach Committee, *Survey Regarding Impact of COVID-19 on Administrative Courts*, AM. BAR ASS'N (June 5, 2020), https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/2020-ncalj-covid-survey-report.pdf.

²⁷¹ *Id.* at 3, 8–69.

²⁷² *Id.* at 5, 53.

²⁷³ *Id.* at 52.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 38–39.

²⁷⁶ *Id.* at 45.

²⁷⁷ *Id.* at 7.

Whether the hearing is telephonic, virtual, or in-person, the parties must file documents and deliver them to the adjudicator. In the past, litigants could easily deliver documents by messenger. COVID-19 changed the modes of delivery. Because of the exodus from the office, staff could not receive documents in person. Electronic filing provided the only means of providing documents or exhibits. At the best of times, self-represented litigants face a challenging system that is difficult to navigate. As administrative hearings move forward and virtual hearings increase, filing may present an obstacle for those who do not have the knowledge or equipment to file electronically. This presents another access issue for disadvantaged litigants or for those lacking updated technology.

The administrative hearing door has opened to virtual hearings. As the door has widened, technical issues that affect a party's opportunity to be heard may be an obstacle to access and to making a complete record. Technical issues range from a lack of equipment to broadband issues and connectivity problems. Delays, freeze frames, audio issues, cutting in and out, the inability to mute or unmute, and difficulties turning on and off cameras, are some of the problems that people experience in the virtual hearing room. In addition, we cannot minimize the "digital divide," where all participants, litigants, pro se appellants, or individuals who do not speak English as their first language may not have access to updated equipment, computers with cameras, smart phones or other devices needed for remote hearings.

Beyond equipment and technical issues, a virtual or telephonic hearing simply does not provide the same opportunities for visual contact and communication. Are parties denied due process if the parties are required or compelled to participate in a remote hearing? Professor George Berman says that a judge cannot see demeanor and body language in a virtual hearing.²⁷⁸ When an administrative judge cannot see beyond the video frame, or telephone, outside activity and issues of control. Off-screen coaching or unidentified document reviews are some of the potential areas of concern.²⁷⁹

Parties may have to prepare differently for a virtual or telephonic hearing than they do for an in-person hearing. For a remote hearing, judges must provide different instructions for virtual participation, exhibits and testimony. If any of the parties are unfamiliar with the hearing platform, such as Zoom or WebEx, the hearing or mediation judge may consider offering a practice session or written instructions in advance of the hearing. Parties may benefit from additional instructions and translations if they are unrepresented or speak a language other than English.

As mentioned, many judges have complained about technical difficulties and equipment failures.²⁸⁰ Virtual hearings work more effectively with updated

²⁷⁸ KATHARINA PISTOR, *LAW IN THE TIME OF COVID-19* 171–72 (2020).

²⁷⁹ *Edwards v. Evergy Mo. W., Inc.*, No. EC-2020-0252, 2020 WL 5503933, at *1–4 (Mo. P.S.C. 2020); *see also* *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1477 (9th Cir. 1993).

²⁸⁰ *Survey Regarding Impact of COVID-19*, *supra* note 272; *see also* Graboyes, *supra* note 20, at 21.

and reliable technology and litigants who know how to use it.²⁸¹ If there is a freeze frame during a Zoom hearing, there is a fairly simple remedy: to disconnect and reenter the virtual hearing room. Judges and parties would benefit from a backup plan, which would include additional equipment consisting of a computer or cell phone/landline. From another perspective, parties can control the Zoom video screen and present their own documents as exhibits. This was the admitting party has access to the screen and exhibit. They can scroll through the document and control the way they want the participants to view the exhibit and how long to display the exhibit. These features allow the judge to focus on the exhibit, the admission process and the testimony.

Some of the concerns when moving into the digital door of administrative hearings involve the expansion of the hearing room. Providing a meaningful opportunity to be heard is dependent on the ability to be heard clearly. Audio issues may depend on equipment and connectivity. Connectivity may rely on broadband width and Internet capabilities.

Virtual remote hearings open the administrative hearing door in a way that may facilitate participation. Parties do not have to spend as much time and money on travel, and efficiency may be increased.²⁸² However, additional issues connected to virtual hearings need attention, such as the demeanor and credibility of witnesses. Credibility determinations, assessment of demeanor, and general observations of witnesses become more problematic than in an in-person hearing.²⁸³

The limitations of technology raise the question of what is lost in a virtual hearing. Some people are concerned about whether video hearings reveal the entire picture. The judge, attorneys and witnesses cannot see outside activity beyond the viewing range of the camera. A witness may choose to get a glass of water off-screen, attend to their children, read a document, and talk or text another person while testifying.²⁸⁴

Telephonic hearings may be more problematic due to the lack of visual input, especially when there are audio issues. Making credibility judgments and determinations of when and how to interact with the party where the judge suspects that there are additional documents or people present, are topics that can be raised prior to the hearing or during an introduction.²⁸⁵ At the same time, the administrative hearing must balance the right to be heard, a meaningful opportunity for hearing and the limitations of the hearing modality.²⁸⁶

²⁸¹ Engstrom, *supra* note 205, at 248.

²⁸² *Agency Use of Video Hearings Best Practice and Possibilities for Expansion*, ADMIN. CONF. OF U.S. (June 7, 2011), <https://www.acus.gov/recommendation/agency-use-video-hearings-best-practices-and-possibilities-expansion>.

²⁸³ Pistor, *supra* note 280, at 171–72.

²⁸⁴ Local 4 WDIV Detroit, *Prosecutor Catches Accused Abuser in Same Home as Victim During Zoom Court Hearing*, YOUTUBE (Mar. 10, 2021), <https://www.youtube.com/watch?v=xgz3Tx69zXk>.

²⁸⁵ Graboyes, *supra* note 20, at 11.

²⁸⁶ Killoran & Wittenberg, *supra* note 27, at 22.

As mentioned, many forums have granted continuances, delayed proceedings and suspended in-person hearings, during the COVID-19 crisis.²⁸⁷ They contribute to case back logs, which the surveys reported as the most difficult problem encountered during the pandemic. At the beginning of the pandemic, continuances were liberally granted and good cause was redefined. As virtual administrative hearings extend into 2021, postponements no longer serve the same purpose. The administrative hearing process must promote timely and reliable remote hearings on a consistent basis. Judges must evaluate the true nature of a postponement and determine whether the continuance is for good cause, not simply due to the pandemic or as a means of delay.

B. Recommendations for the Future

The pandemic pushed us into a dynamic new normal. People frequently use the word, "unprecedented" when discussing COVID-19.²⁸⁸ We altered traditions, social interactions and developed a new vocabulary. We formed safety pods with our families and protective bubbles for sports teams.²⁸⁹ We sheltered-in-place, drank "quarantinis," made mistakes like covidiot, and held hearings and family gatherings on Zoom.²⁹⁰ If Zoom crashes or an uninvited outsider "bombs," the hearing, we need help.²⁹¹ The navigation of a lethal pandemic, with a possible, new more contagious coronavirus variants rising at the time of this writing, is unpredictable.²⁹² Other unknowns exist; people in high-risk groups, people with compromised immune systems may not return to mainstream activities quickly.²⁹³ In-person hearings may put a segment of the population at a higher risk, and we may see a greater demand for remote hearings.

The ghosts of pandemics past have returned. The past has a lesson to teach; we cannot ignore history.²⁹⁴ We have seen illness, death, quarantines, masks, and emergency restrictions during the smallpox epidemic, the black plague, and SARS. We have seen COVID affect vulnerable populations, such as people with disabilities and racial and ethnic minority groups.²⁹⁵ These groups have been vulnerable in the past, and our communities have done this before, so

²⁸⁷ Graboyes, *supra* note 20, at 6, 18.

²⁸⁸ Killoran & Wittenberg, *supra* note 27, at 19.

²⁸⁹ Maureen A. Weston, *Covid-19's Lasting Impact on the Sports Industry: Financial, Legal, And Innovation*, 61 SANTA CLARA L. REV. 121, 142–43 (2021).

²⁹⁰ *Covidiot? Quarantini? Linguist Explains How COVID-19 Has Infected Our Language*, CANADIAN BROADCAST CORP. (Apr. 22, 2020), <https://www.cbc.ca/radio/thecurrent/the-current-for-april-22-2020-1.5540906/covidiot-quarantini-linguist-explains-how-covid-19-has-infected-our-language-1.5540914>.

²⁹¹ *Id.*

²⁹² *What You Need to Know About Variants*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html> (last updated Aug. 6, 2021).

²⁹³ *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last updated May 13, 2021).

²⁹⁴ Casey. C. DeReus, *Ashes to Ashes—The Coronavirus, Ebola, and the Erosion of Liberty and Property Interests in the Fight Against Communicable Diseases*, 81 LA. REV. 887, 890 (2021).

²⁹⁵ *People with Certain Medical Conditions*, *supra* note 295.

why do we struggle? COVID-19 wreaked havoc for more than a year and caused changes that have not been contemplated in the past.²⁹⁶

In March 2020, in-person hearings came to an abrupt halt. Judges granted continuances and back logs mounted.²⁹⁷ As social distancing and restrictions increased, remote hearings have grown in number as a result of the pandemic. As the nation becomes vaccinated, and reopening phases begin in earnest, in-person hearings will become more viable. When and how that will occur remain questions for the future.

In the aftermath of the pandemic, the surveys indicate that we will likely move away from in-person hearings.²⁹⁸ Virtual and telephonic hearings are here to stay.²⁹⁹ However, they raise due process concerns as well as raise tensions stemming from technical and equipment access issues.³⁰⁰ Many of the judges surveyed indicated a preference to conduct post-pandemic proceedings remotely.³⁰¹ Some did not. Not all litigants can afford to purchase up-to-date equipment or the other resources necessary to present their cases in a virtual proceeding. During the pandemic, attorneys and self-represented parties requested continuances that raised a preference for an in-person setting. The parties typically stated that the judge needed to observe a witness's demeanor to make credibility determinations and the parties needed to see all off-screen activity.³⁰² We must keep such considerations in mind so that parties may be provided with a meaningful opportunity to be heard and an opportunity to make a complete record.

Virtual hearings provide a viable option. Their benefits and disadvantages provide room for growth in the areas of due process. We must consider accessibility and connectivity issues in order to provide a meaningful opportunity to be heard.³⁰³ The concept of notice does not appear to raise problems. We cannot forget to pay attention to detail and cannot omit timely and accurate information for notices of virtual proceedings.

Current case law provides an insight into restrictions, due process and balance. Vaccinations, already in progress, provide good tidings and hope for the end of the pandemic.³⁰⁴ Yet, they may bring challenges, similar to *Jacobson*.³⁰⁵ Since March 2020, the daunting task of improvising a virtual hearing amid

²⁹⁶ Weston, *supra* note 291, at 125.

²⁹⁷ *Survey Regarding Impact of COVID-19*, *supra* note 295, at 42, 52.

²⁹⁸ *Id.* at 63.

²⁹⁹ Engstrom, *supra* note 205, at 257.

³⁰⁰ Graboyes, *supra* note 20, at 21.

³⁰¹ *Survey Regarding Impact of COVID-19*, *supra* note 295, at 63.

³⁰² Graboyes, *supra* note 20, at 11–15.

³⁰³ Graboyes, *supra* note 20, at 21.

³⁰⁴ Alvin Powell, *Vaccines Can Get Us to Herd Immunity Despite the Variants*, THE HARVARD GAZETTE (Feb. 25, 2021), <https://news.harvard.edu/gazette/story/2021/02/vaccines-should-end-the-pandemic-despite-the-variants-say-experts/>.

³⁰⁵ Andres F. Quintana & Mikayla R. Quintana, *Surviving the COVID-19 Pandemic of 2020: A Constitutional and Policy Review of Involuntary Quarantine*, 11 WAKE FOREST J.L. & POL'Y 327, 369–72 (2021).

emergency shut-down orders and quarantines has triggered the deprivation of liberty interests and raised due process issues.³⁰⁶

The appearance of a virtual administrative hearing may be unique and accommodate pandemic restrictions; however, the process presents risks. Constitutional considerations require another look at what process parties require and by when.³⁰⁷ The *Mathews* balancing test may be a helpful tool.³⁰⁸ It is well-established and has proven to be reliable since it was introduced in 1976.³⁰⁹ In addition, the third prong of the test has the ability to balance government interests and the public interest.³¹⁰ In the face of a pandemic, it is more likely than not that restrictions that infringe on an individual's interests will be imposed to slow the spread.³¹¹ During those times, the tribunal will need to weigh the safety and emergency procedures the government put into place during a health crisis as part of the public interest against the individual's rights at risk of deprivation.³¹²

The length of the pandemic and the extent of symptoms and speed of death has required adaptations and flexibility not fully contemplated by outbreaks throughout history.³¹³ The tension between due process and the limitations required to contain the virus and reopen the administrative in-person hearing process requires balancing. We do not know the extent of what balance administrative hearings will need. As more vaccinations are made available to nonessential workers, families and children, we may see challenges, such as those occurred more than 100 years ago in *Jacobson*.³¹⁴ As the population becomes immunized, administrative proceedings may need further adaptations and additional safety measures.³¹⁵

The safeguards of the due process clause are more important than ever in maintaining that balance. Justice Breyer's November 2020 dissent, addressing a tiered occupancy restriction on places of worship, stated that the balance was unclear.³¹⁶ I agree. The cases, as well as the safety measures are not consistent. Perhaps this is not dissimilar from the chaotic trajectory of COVID-19 itself. That trajectory has seen super-spreading events, surges, warp-speed restrictions, and adaptations.³¹⁷ For the most part, due process challenges have not been successful, and courts have found restrictive safety measures to be valid under the police power of the states to control a public health crisis.³¹⁸ But, the pandemic

³⁰⁶ *Id.* at 376–82.

³⁰⁷ *Id.* at 382.

³⁰⁸ *Id.* at 376–77.

³⁰⁹ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

³¹⁰ *Id.* at 348.

³¹¹ Quintana & Quintana, *supra* note 307, at 329.

³¹² *Id.* at 330, 376–77.

³¹³ Quintana & Quintana, *supra* note 307, at 329–30, 336, 392.

³¹⁴ Marguerite Z. Hammes & Grant C. Killoran, *COVID-19 Vaccination: Legal Landscape and Challenges*, 94 WIS. LAWYER 36, 37 (2021).

³¹⁵ Graboyes, *supra* note 20, at 2, 24.

³¹⁶ *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

³¹⁷ Quintana & Quintana, *supra* note 307, at 328, 332–33.

³¹⁸ Sharp, *supra* note 156.

does not provide an exception to, nor the opportunity to minimize, due process requirements.³¹⁹

C. New Statutes to Promote Virtual Hearings

What role does the administrative law judge play, and what is her authority? The administrative law judge should have discretion to decide whether a remote hearing should proceed by video or telephone. However, parties may want an option to stipulate a video hearing in lieu of an in-person proceeding. The technical capabilities and limitations of witnesses, litigants and counsel must be a consideration in the exercise of that discretion. In addition, the need for one or more interpreters, the presence of unrepresented parties, and the availability of proper equipment, also play a significant role in the decision of the hearing format.³²⁰

The unpredictable and unprecedented closures, travel restrictions, and economic and social unrest, coupled with a raging virus, provide challenges on a personal and administrative level. Some may prefer repeating past practices. Judges use different tools that have been successful in in-person hearings for efficiency and to help make a complete record.³²¹ There is no need to abandon past practices that promote accountability and consistency. These are hallmarks of a reliable, effective administrative hearing.

David Freeman Engstrom stated that the legal system has a "declining capacity to provide justice to ordinary Americans."³²² In his article, *Post-COVID Courts*, he discusses a reasonable expectation that a pandemic recovery will include a backlog due to the increasing number of continued and stayed cases.³²³

The revolving door of shutdown, partial reopening and reopening, has widened the window of unpredictability in the administrative process. Remote hearings are likely to become more prevalent.³²⁴ How common will they become? Telephonic hearings are widely used in various states, such as Oregon, Massachusetts, Washington, and North Carolina for unemployment insurance appeals, health-related appeals, workers compensation hearings and other matters.³²⁵

In the aftermath of a pandemic, there is work to be done.³²⁶ The disparate treatment of minority litigants provides new and ongoing challenges for the

³¹⁹ *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021).

³²⁰ Graboyes, *supra* note 20, at 16, 21.

³²¹ *Survey Regarding Impact of COVID-19*, *supra* note 295, at 7.

³²² Engstrom, *supra* note 205, at 248.

³²³ *Id.* at 246–48.

³²⁴ *Survey Regarding Impact of COVID-19*, *supra* note 295, at 6, 63.

³²⁵ *See Changes to Unemployment Services During the COVID-19 Pandemic*, MASS. DEP'T OF UNEMPLOYMENT ASSISTANCE, <https://www.mass.gov/info-details/changes-to-unemployment-services-during-the-covid-19-pandemic> (last accessed Jan. 27, 2021); Leslie Birnbaum, *Due Process and Administrative Hearings during the Pandemic COVID-19 [Oregon State Office of Administrative Hearings]*, Survey Unpublished (Sept. 2020). Leslie Birnbaum, *Due Process and Administrative Hearings during the Pandemic COVID-19 [Washington State Board of Industrial Insurance Appeals]*, Survey Unpublished (Sept. 2020).

³²⁶ Engstrom, *supra* note 205, at 249.

administrative hearing process.³²⁷ Although one of the themes of this paper has been the flexibility of due process; however, flexibility does not provide a complete picture. The balancing test will be the driving force in future litigation, and as Justice Breyer stated, the balance is unclear.³²⁸ A significant number of the cases discussed the flexibility of due process, which has been documented for more than 100 years. Perhaps the unknowns emanate from the pandemic itself. The course of the illness and its spread and fatalities have disrupted the nation as well as the administrative hearing process.³²⁹ Finding our way back is not straightforward. Administrative hearings have changed, and judges need to adapt, pay attention to due process and maintain safeguards.³³⁰ The underlying rights at risk of deprivation still require due process, before or after the deprivation occurs. A virtual hearing must be balanced against health and safety concerns.³³¹ Consistency, developments in notices and a meaningful opportunity to be heard are evolving.³³² Accessibility, transparency, and balance, bellwethers of change, need to be in the forefront as the vaccine becomes more available and in-person hearings resume.³³³

D. Conclusion

Whether or not a vaccine and widespread vaccination program will turn the tables of due process again, is unknown. What began as an overnight change from in-person to virtual hearings will outlast the pandemic. The refrain of "Help, I need somebody," is a reminder that we do not conduct hearings in a vacuum. Virtual hearings are not easy, and they are only as strong as the weakest technological link.

Virtual hearings have emerged as a blessing and a curse. With the Administrative Law Judge as Zoom Master and administrator, involvement in a virtual proceeding can be relatively difficult. When the remote hearing works as planned, there may be technical and logistical issues. In a virtual hearing, additional concerns have materialized regarding the off-screen, out of view activity by witnesses and litigants. In-person hearings are preferred by many because of credibility determinations and demeanor assessments. People rely on the assistance of others to provide transparency and meaningful hearings with complete records. However, hearings are not conducted in isolation, even in a pandemic.

There are appellants and respondents who need assistance. Their voices may have been silenced during COVID. Minorities, appellants without lawyers, and non-English speakers have been lost in the shuffle throughout history. As adjudicators, assistants, and staff, we cannot let that pattern continue.

³²⁷ Hobbes, *supra* note 15; see also Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y L. & ETHICS 122, 170–71 (2020).

³²⁸ Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020).

³²⁹ Quintana & Quintana, *supra* note 307, at 327–28.

³³⁰ Engstrom, *supra* note 205, at 250.

³³¹ *As Courts Restore Operations*, *supra* note 198.

³³² Graboyes, *supra* note 20, at 11, 15–17.

³³³ *Id.* at 22; see *As Courts Restore Operations*, *supra* note 198.

The pandemic has pushed the administrative hearing door open and remote hearings have rushed in. Constitutional considerations require ongoing attention. A virtual platform provides the distancing needed so that a hearing can proceed safely. Due process needs to step in and provide constitutional safeguards, as it has done in the past. Since COVID arrived in 2020, we have suffered from a memory lapse. The trauma of the pandemic has skewed reality and buried deep-seated memories. Past pandemics provide examples of restrictions and adaptations to due process. Lessons from the history can serve as a driving force to develop creative ways to provide a meaningful opportunity for remote hearings. More attention to due process during remote hearings is needed to provide the same access to disadvantaged groups and those who lack the technology. "Help, I need somebody!" is both a call for assistance and a call to action. Updated hearing rooms that address health and safety needs, updated equipment, improved connectivity, and access to a separate, safe area with the technology could provide disadvantaged parties with the tools for full participation in the virtual process.

The flexibility of due process can only go so far. Ultimately, it is the balance that will sustain the hearing process and move it forward into 2021. In that journey, we cannot forget the appellants who walk through those doors, before and after the pandemic, and have lost their way. Help! Our job is not done.

As the late Justice Ruth Bader Ginsburg said, "I am ever hopeful that if the court has a blind spot today, its eyes will be open tomorrow."³³⁴

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³³⁴ Katie Couric, *Exclusive: Ruth Bader Ginsburg on Hobby Lobby Dissent*, YAHOO GLOBAL NEWS INTERVIEW (July 30, 2014), <https://news.yahoo.com/katie-couric-interviews-ruth-bader-ginsburg-185027624.html>.