

Testimony of Melissa Wasser
Policy Analyst, The Reporters Committee for Freedom of the Press

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

“Federal Courts During the COVID-19 Pandemic:
Best Practices, Opportunities for Innovation, and Lessons for the Future”

June 25, 2020

Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee:

I am Melissa Wasser, a policy analyst at the Reporters Committee for Freedom of the Press (the “Reporters Committee”), a nonprofit organization that has been defending the First Amendment rights of journalists since 1970. Thank you for giving me the opportunity to testify. My CV is attached. I have a brief statement for the record, which I can supplement after the hearing if the Committee seeks additional information.

I. Federal courts during the COVID-19 pandemic.

The Reporters Committee has long championed the public’s constitutional and common law rights of access to judicial records and proceedings, and has been monitoring the response of state and federal courts around the country to the current public health crisis.¹ The pandemic has changed the daily operations of federal courts across the country as they strive to protect the health and safety of court employees, litigants, attorneys, members of the judiciary, and the public. Like all public institutions, the federal judiciary took proactive steps to fight the spread of COVID-19, including limiting public access to court proceedings.

In doing so, federal courts also took laudable steps to facilitate remote press and public access to judicial proceedings. Press and public access to judicial proceedings and court records is no less important during times of crisis. Indeed, at such times, visibility into the operations of the government, including the judiciary, is all the more crucial.

The Reporters Committee urges the federal judiciary to continue to ensure that the public’s ability to meaningfully observe judicial proceedings is not curtailed due to restrictions on physical access to courthouses both now and in future times of crisis. The Reporters Committee further urges courts and Congress to preserve these advances toward greater transparency once the current crisis is over.

While our advocacy extends to both civil and criminal proceedings, our comments below focus on civil matters given the subject of this hearing.

By attending judicial proceedings, the press plays a key role in ensuring “an informed and enlightened public opinion.”² The public relies on the press to “observe at first hand the operations of . . . government” and report on them.³ An informed public is an essential component of a healthy democracy.⁴

In response to the ongoing COVID-19 pandemic, many judicial proceedings typically held in open court have been held remotely—either telephonically or by video conference. To

¹ *RCFP State and Federal Court Responses to COVID-19 From the Reporters Committee for Freedom of the Press* (www.rcfp.org/covid19), Reporters Committee for Freedom of the Press, <https://bit.ly/3dNQSJQ> (collecting standing orders from all federal courts) (last visited June 23, 2020).

² *Grosjean v. Am. Press Co.*, 297 U.S. 233, 247 (1936).

³ *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

⁴ *See Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

facilitate public access to such proceedings, the Judicial Conference temporarily approved the use of teleconferencing to provide the press and public audio access to civil proceedings.⁵

Courts and judges across the country relied on the Judicial Conference's guidance to provide remote access for the press and public, but have implemented the policy in different ways. The United States Supreme Court also approved public access, issuing a press release on April 13 stating that it would hear 10 oral arguments by telephone in May 2020, for the first time in the Court's history. It explained that "[t]he Court anticipates providing a live audio feed of these arguments to news media"⁶ and media feeds were made available to the public.

II. Remote access during COVID-19 has demonstrated the intense public interest in the operations of the federal courts generally.

As noted, courts around the country have provided virtual access to proceedings during the COVID-19 pandemic in different ways.

Several judges have affirmatively provided public access to proceedings in which the public interest is strong. For example, Judge Preska of the U.S. District Court for the Southern District of New York directed the parties in a civil matter to file the dial-in information for a telephonic hearing on the public docket.⁷ Similarly, Judge Boasberg of the U.S. District Court for the District of Columbia granted requests by reporters to listen to a telephonic hearing related to a coronavirus lawsuit and provided members of the news media with dial-in access.⁸

A number of courts have taken a universal approach to providing remote access for the news media and public. As Chief Judge Howell of the U.S. District Court for the District of Columbia stated, her court "is committed to providing the public and the media with access to public court proceedings, including those held by video or teleconference."⁹ Many other district courts have made similar commitments, implementing policies requiring that all remote proceedings be made available to the public.¹⁰

⁵ See *Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, United States Courts (Mar. 31, 2020), <https://perma.cc/7HAG-L2FB>; *Judiciary Provides Public, Media Access to Electronic Court Proceedings*, United States Courts (Apr. 3, 2020), <https://perma.cc/VM68-R6N7>.

⁶ See, e.g., Press Release, Supreme Court of the United States, May Teleconference Oral Arguments (Apr. 13, 2020), <https://perma.cc/CB72-ESH9>.

⁷ See *Giuffre v. Maxwell*, 1:15-cv-07433-LAP, ECF No. 1039 (S.D.N.Y. Mar. 30, 2020); ECF No. 1041 (S.D.N.Y. Mar. 30, 2020) (listing dial-in information).

⁸ See Ann E. Marimow, *Federal Courts Shuttered by Coronavirus Can Hold Hearings by Video and Teleconference in Criminal Cases*, Wash. Post (Mar. 31, 2020, 5:59 PM), <https://wapo.st/2X1rg6w>.

⁹ See *id.*

¹⁰ See, e.g., *MGO 20-13 Suspension of Court Proceedings Effective May 1, 2020*, U.S. District Court District of Alaska (Apr. 21, 2020), <https://perma.cc/YM2L-NQ98> (providing that a toll-free conference line will be publicly available for civil and criminal proceedings); *In re: Public and Media Access to Judicial Proceedings During COVID-19 Pandemic*, U.S. District Court District of Columbia (Apr. 8, 2020), <https://perma.cc/F99Q-5RTA> (providing that video and audio access to judicial proceedings will be available for the public); *Notice Regarding Public Access to Telephonic Hearings During COVID-19 Outbreak*, U.S. District Court Eastern District of Wisconsin, <https://perma.cc/98CR-TN7M> (last visited June 23, 2020).

The public has demonstrated an abiding interest in these proceedings. For instance, SCOTUSblog reported that within a few hours of the argument session, approximately 500,000 people tuned into livestreamed oral arguments before the Supreme Court on May 12, 2020, in *Trump v. Mazars USA LLP*, No. 19-715, and *Trump v. Vance*, No. 19-635.¹¹ And, as of June 23, 2020, an estimated 1.9 million people have listened to at least one of the Supreme Court’s recorded oral arguments online, compared to the usual 50 members of the public who are able to physically attend an oral argument in person.¹²

Similarly, many of the videos posted by the U.S. Court of Appeals for the Ninth Circuit, which regularly livestreamed video of its oral arguments even before the pandemic, have hundreds of viewers, enough to fill several courtrooms.¹³ Guidance and support from Congress would help broaden remote access to proceedings at all levels of the federal judiciary, and ensure that these advances in transparency survive both in future crises and become a fixture of public access to judicial proceedings generally.

III. Recommendations and best practices.

A. Provide support and guidance to allow courts at all levels to broadcast or stream live proceedings in future crises and during normal operation.

The Reporters Committee urges Congress to consider legislation that would permit the courts to permanently remove barriers for the broadcast or streaming of proceedings in the federal judiciary. Congress should enact legislation to ensure that all federal trial and appellate courts have sufficient funding to continue providing live audio and video access to all public proceedings and that courts are able to enact revisions to any contrary policy, including the Judicial Conference’s “Cameras in the Courtroom” policy.¹⁴

These policies have served as a barrier to public access in the past. For instance, at least one federal appellate court gave the Judicial Conference’s policy against broadcasting civil proceedings “substantial weight” in holding that local rules did not permit a federal district court judge to allow broadcasting of proceedings in a specific civil case.¹⁵

Congress could provide guidance and support for courts to allow the broadcast or streaming of judicial proceedings. That guidance and support would empower the Judicial

¹¹ Amy Howe, *Courtroom Access: Where Do We Go From Here?*, SCOTUSblog (May 13, 2020, 12:37 PM), <https://perma.cc/THX9-F8XJ>.

¹² *SCOTUS Oral Argument Numbers*, Reporters Committee for Freedom of the Press, <https://bit.ly/2TUql5m> (last visited June 23, 2020).

¹³ *See United States Court of Appeals for the Ninth Circuit*, YouTube, <https://bit.ly/2TgQf2Y> (last visited May 17, 2020).

¹⁴ *See* History of Cameras in Courts, United States Courts, <https://perma.cc/HM4A-35F9> (last visited June 23, 2020). In some cases, district courts incorporate Judicial Conference policies into local rules or general orders. *See* General Order 58, United States District Court Northern District of California (Sept. 15, 2015), <https://perma.cc/ET6L-JWRV>. Even if they are not directly incorporated, the Judicial Conference’s policy conclusions are “at the very least entitled to respectful consideration.” *See Hollingsworth v. Perry*, 558 U.S. 183, 193 (2010) (citation omitted).

¹⁵ *See In re Sony BMG Music Entm’t*, 564 F.3d 1, 6–7 (1st Cir. 2009) (noting that Judicial Conference policies are “not lightly to be discounted, disregarded, or dismissed”).

Conference to remove this hurdle, allowing district courts to quickly adapt to any future emergency necessitating remote proceedings, to experiment with finding the best technological means for broadcasting or streaming proceedings, and to simultaneously realize many of the benefits to public access that have been highlighted by the Judicial Conference’s recent temporary approval in light of COVID-19.

The Judicial Conference implemented the “Cameras in Courtroom” policy in 2016, after the conclusion of a four-year pilot program that introduced cameras into 14 district court courtrooms from 2011–2015.¹⁶ The Federal Judicial Center’s report on that pilot program found that more than 70 percent of participating judges and attorneys favored recording court proceedings.¹⁷ By the end of the pilot program, more judges were in support of cameras in the courtroom than against,¹⁸ and most judges and attorneys said they would be in favor of permitting video recordings of civil proceedings.¹⁹

Further, many judges and attorneys who participated in the pilot program also expressed surprise that the cameras were as unobtrusive as they were.²⁰ Now that many more judges have conducted remote and recorded proceedings as a result of the COVID-19 pandemic, Congress should ensure that additional funding is available for courtroom technology, specifically for live video and audio access of court proceedings at the appellate and trial level.

Moreover, allowing courts to permanently broadcast and stream judicial proceedings will prepare courts to easily transition to operating remotely in future national crises. Before the pandemic, several federal appellate courts regularly provided live audio or video of oral arguments and archived those recordings.²¹ In response to the COVID-19 pandemic, more federal appellate courts, including the Supreme Court, have turned to live audio of oral arguments.²²

For arguments in which counsel for the parties or the court themselves participated remotely during the COVID-19 pandemic, those appellate courts that regularly livestreamed their oral arguments—such as the Ninth and District of Columbia Circuits—were able to quickly adapt to remote, livestreamed proceedings. A permanent policy permitting the broadcast or streaming of proceedings at the district court level would be similarly beneficial.

¹⁶ See History of Cameras in Courts, United States Courts, <https://perma.cc/HM4A-35F9> (last visited June 23, 2020).

¹⁷ See Molly Treadway Johnson et al., Fed. Judicial Ctr., Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project 33–34, 55 (2015).

¹⁸ *Id.* at 33–34.

¹⁹ *Id.* at 36, 44–45.

²⁰ *Id.* at 40–41.

²¹ See News Release, United States Court of Appeals for the District of Columbia Circuit, Court to Provide Live Audio Streaming of All Arguments at Start of 2018-2019 Term (May 23, 2018), <https://perma.cc/Y9W9-G65P>; Audio and Video, United States Court of Appeals for the Ninth Circuit, <https://www.ca9.uscourts.gov/media/> (last visited June 23, 2020).

²² See, e.g., Press Release, Supreme Court of the United States, May Teleconference Oral Arguments (Apr. 13, 2020), <https://perma.cc/CB72-ESH9>; Advisory, United States Court of Appeals for the Federal Circuit, Availability of Live Audio Access to April 2020 Court Session (Apr. 1, 2020), <https://perma.cc/7F8J-N8JG>.

B. Ensure uniform and effective public notice of remote court proceedings during COVID-19 and beyond.

To ensure meaningful public access, public notice of when remote proceedings will take place and how members of the public can observe them is crucial. Courts have been inconsistent in this respect during the COVID-19 pandemic. Many district court policies now make clear that presiding judges should provide a publicly accessible link to remote hearings and other proceedings on the docket for the relevant matter, or upon request. Other courts have posted links to remote proceedings on their websites—an approach that has the advantage of reaching a broader swath of the public, as it does not require a PACER account to access.

Unfortunately, however, during the pandemic, some members of the press have reported difficulty in obtaining information about when certain proceedings were to take place or have been required to request access to proceedings on a case-by-case basis.

This uncertain terrain poses challenges for journalists and other members of the public attempting to observe specific court proceedings that, absent COVID-19 restrictions, they would have been able to attend in person. The Reporters Committee urges Congress to support efforts to ensure that whenever proceedings that would normally be held in open court must instead be held remotely due to a national crisis or otherwise, courts should provide effective public notice of those proceedings, including instructions for how members of the press and public can easily observe them. Uniformity in the manner in which courts provide such notice would remove an obstacle for members of the press and public exercising their rights of access.

C. Pass H.R. 6017, H.R. 5645, and H.R. 6642.

Three pending bills would increase public access to the federal courts.

H.R. 6017, known as the “Twenty-First Century Courts Act,” would require live audio and an online archive of “each oral argument and opinion reading” before the Supreme Court be “made available for public transmission over the internet.”²³ It would also create live audio and archival requirements for all federal appellate proceedings.²⁴

H.R. 5645, known as the “Eyes on the Courts Act of 2020,” would require that cameras be allowed in all Supreme Court and federal appellate court proceedings.²⁵

H.R. 6642, known as the “Court Access Amid the Pandemic Act,” would require any oral arguments in circuit courts and district courts be made public in real time via video teleconferencing and telephone conferencing and be permanently archived on the internet.²⁶

While Supreme Court justices have expressed concern in the past that live audio and video could potentially hurt the sanctity and tradition of the Court, and that the Supreme Court is

²³ H.R. 6017, 116th Cong. § 5 (2019).

²⁴ *Id.*

²⁵ H.R. 5645, 116th Cong. (2020).

²⁶ H.R. 6642, 116th Cong. (2020).

unique and need not follow trends with respect to public access in the lower courts, the recent demand for streaming of the Court’s oral arguments in May 2020 clearly shows the American public wants to know about its tremendously important work.

Further, there is no indication that the livestreaming has had a deleterious effect on the Court’s operations—quite the contrary. If anything, the manifest public interest in the Court’s deliberations has had a beneficial effect on how the public views access to the federal judiciary. According to recently released polls, 83 percent of Americans supported regular live-streamed audio at the Supreme Court, and nearly 70 percent called for all courts to allow cameras in the courtroom.²⁷ Finally, it is worth noting the important role that C-SPAN has played in facilitating audio access for the public to recent Supreme Court arguments. Just as C-SPAN has provided visibility into the operations of Congress, it has now taken up that mantle with respect to the Supreme Court. It should be permitted to continue to do so.

In sum, the Reporters Committee believes that increased public access to the nation’s federal courts, including the Supreme Court, is, on balance, an important step to promote accountability, transparency, and an informed electorate.

I want to thank the Committee for including me in this important conversation surrounding court access and look forward to answering any questions you may have.

²⁷ See Kalvis Golde, *Public Approves of Live Access to Supreme Court Arguments, Polls Show*, SCOTUSblog (May 21, 2020, 3:20 PM), <https://perma.cc/2GDB-P2C7>; see also *Poll: 83% of Americans Support SCOTUS’s Decision to Livestream; 70% Want to Keep Live Audio Post-Pandemic*, Fix the Court (May 20, 2020), <https://perma.cc/9G5R-P673>.