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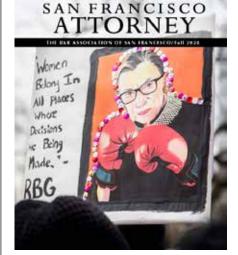
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On Our Cover

In memory of Justice Ruth Bader Ginsburg, who passed away on Friday, September 18, we dedicate our cover to the legal and feminist icon who led the way for gender equality. We honor her life and service by continuing the fight for equality and fairness for all.

Photo credit: Jess Pomponio

About This Issue

We'd like to thank Ben Feuer for coordinating the articles for the theme of this issue, "Constitutional Powers During a Lockdown." Feuer moderated a Bar Association of San Francisco panel on the topic this summer. We are grateful for his assistance reaching out to the authors and working with them on their submissions.



16TH ANNUAL

From engaging experiences featuring drinks, food, and art, to inspiring stories from those impacted by JDC's work, and thought-provoking discussions with others in the community, it was a night to remember.

See highlights from the evening at www.sfbar.org/gala.

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FINDING Opportunity In challenging Times

PRESIDENT'S REPORT

Stuart Plunkett

his has been a year none of us expected. After so many months of doing things differently to minimize the risks of COVID-19, the memories of how things were at the beginning of the year, and last year, and the year before that, are starting to fade. The new normal is starting to seem just, normal. And many of us are much more comfortable on camera than we ever thought we could be, though I confess I long for an oldfashioned conference call where I don't have to maintain eye contact with an image on a screen.

Challenging times provide an opportunity to confront important topics in new ways. This issue of *San Francisco Attorney* includes constitutional law themes with a focus on access to justice issues that are exacerbated in times of crisis. So, I wanted to dedicate this column to the hardworking staff of the Bar Association of San Francisco (BASF) and the Justice & Diversity Center (JDC), and our many volunteers, by highlighting just how much work they have been doing to promote access to justice during COVID-19 and to confront systemic problems. As I have noted before, BASF and JDC quickly pivoted to working remotely in March and began adjusting programming and advocacy to address the urgent problems of our times. Of course, promoting access to justice is part of BASF and JDC's missions—thus, many of our core programs do just that. The San Francisco-Marin Lawyer Referral and Information Service (LRIS) has been up and running even during COVID-19. Since 1946, LRIS has helped educate our community about their legal rights and has provided direct access to affordable, competent legal representation. JDC continues to provide access to justice to more than 9,000 lowincome individuals and families annually, including with staffed self-help centers at the courts, direct representations, and advocacy for immigrant rights. Our Homeless Advocacy Project continues to provide much-needed service to San Francisco's homeless population and to those at risk of becoming homeless.

PRESIDENT'S REPORT

AS WE CONTINUE TO WEATHER THIS STORM AND PROVIDE ESSENTIAL LEGAL SERVICES TO OUR COMMUNITY, I SPEAK FOR EVERYONE AT BASF AND JDC IN THANKING YOU FOR YOUR CONTINUED SUPPORT OF THESE FINE ORGANIZATIONS.

And JDC has continued to give law school scholarships to minority students. This summer, JDC awarded a historically large number of scholarships thanks to the generosity of our donors and supporters.

But BASF and JDC have done even more to promote access to justice since we began sheltering-in-place in March. There are numerous examples. BASF immediately began to provide valuable information on court closures and procedures, updating our website regularly with new information and hosting live programs with court leaders who could answer questions. BASF and JDC also launched programs to promote access to justice and to break down barriers that stand in the way of equal and fair treatment under the law. One of these programs, Essential Planning for Essential Workers, was launched in April to provide free wills and other essential life planning to workers considered essential during the COVID-19 pandemic. We expanded the program in June to include other essential workers, like grocery store employees, delivery drivers, public transit workers, teachers, and others. And in July, BASF hosted a Continuing Legal Education program to discuss COVID-19's impact on the rule of law and access to justice around the world.

JDC's Community Organization Representation Project launched a Racial Equity Partnership, which works together with the East Bay Community Foundation's ASCEND:BLO Initiative and the Greenlining Institute's Economic Equity Project, to provide streamlined access to much-needed pro bono legal support to Black-led organizations in California. The Barristers Club launched a Racial Justice Initiative, designed to help members educate themselves, study issues of inequity, and keep racial justice at the forefront. And to promote awareness of racial inequality following George Floyd's death in May, BASF issued a 21-Day Racial Equity Habit-Building Challenge to its members, following the model established by diversity expert Dr. Eddie Moore Jr. More than 7,500 attorneys visited the challenge page.

BASF's Criminal Justice Task Force has continued to work to break down institutional access barriers. (See article on page 40.) The task force recommended steps for police reform and urged progress on policy implementations stalled by the San Francisco Police Officers Association's lengthy meet-and-confer negotiations. These reforms include improvements to the body-worn camera policy, including a prohibition on officers reviewing body-worn camera footage in

PRESIDENT'S REPORT

certain circumstances, as where there is any use of force by an officer. Executive Director Yolanda Jackson presented nationally to a peer group of bar executives interested in replicating the task force's work in their own communities.

We have also used our collective voice to speak out on numerous issues during COVID-19. In March, BASF and JDC spoke out in support of immigrants and those under threat from the U.S Immigration and Customs Enforcement's practice of making courthouse arrests. We recognized that ICE's practice had a direct impact on access to justice, with the threat of deportation discouraging those most in need of justice from simply going to court. Undocumented immigrants who were victims of crime would be unwilling to take part in criminal proceedings. As California Chief Justice Tani G. Cantil-Sakauye stated in 2017, when fear of arrest

CHALLENGING TIMES PROVIDE AN OPPORTUNITY TO CONFRONT IMPORTANT TOPICS IN NEW WAYS. prevents people from coming to court, it "undermines the judiciary's ability to provide equal access to justice."

Soon after shelter-in-place orders began in San Francisco, BASF and JDC sought urgent action to protect survivors of domestic violence and sexual assault in the face of court closures. We advocated for a moratorium on evictions, and we wrote to Governor Gavin Newsom regarding the release of elderly and medically vulnerable inmates. We have also weighed in on the impact of COVID-19 on the July 2020 Bar Examination and issued a statement on professional conduct in times of crisis.

This is far from an exhaustive list of what BASF and JDC have done to promote access to justice and equality as part of their core missions and in response to the COVID-19 crisis. As we continue to weather this storm and provide essential legal services to our community, I speak for everyone at BASF and JDC in thanking you for your continued support of these fine organizations.

Stuart Plunkett is a partner at Alston & Bird and the 2020 President of the Bar Association of San Francisco and the Justice & Diversity Center.



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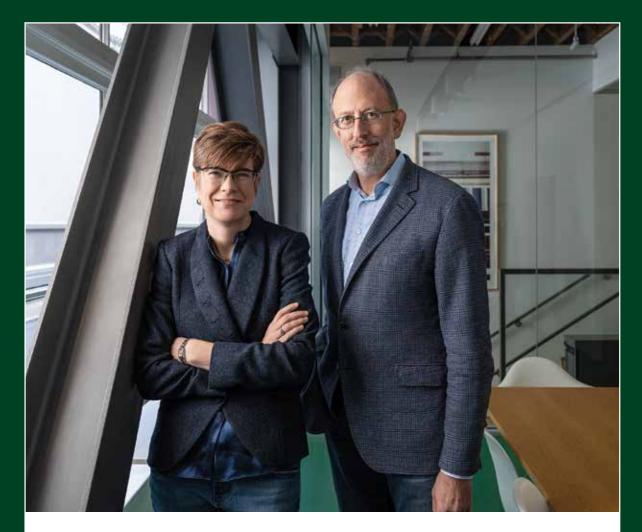
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BARRISTERS REPORT

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BARRISTERS REPORT

2020: A TIME FOR Change and action

Kelly Matayoshi

remember being very excited for 2020. The even numbers. The symmetry. The start of a new decade. I had made New Year's resolutions – basically the same as the ones last year, but this year I promised myself I would do them (I have not). I had a plan for how the Barristers Club's year would go: take last year's events and make them better, and add some new programming.

Then, COVID-19 struck. The world turned upside down and I watched as my carefully laid-out plans for myself and the Barristers went out the window. But we pivoted to remote work, virtual Continuing Legal Education seminars and events, and programming to address these novel legal issues. We learned we could adapt, and survive. However, 2020 was not done with us quite yet. This year has brought us renewed and urgent calls for racial justice and to end police brutality. It has highlighted the dire consequences of global warming in California, through wildfires, red skies, and smoke. It has expanded the already deep divides in economic disparities, political rhetoric, and racial and gender inequality. It has seen us lose icons of the civil rights and women's movement in Representative John Lewis and Justice Ruth Bader Ginsburg. This year is not over either, and with the election fast approaching there is sure to be more to come. YEARS FROM NOW WHEN WE LOOK BACK AT 2020, WE WILL UNDOUBTEDLY RECOUNT THE UNFOLDING OF TRAGEDY AFTER TRAGEDY— BUT WE WILL ALSO FOCUS ON WHAT WE DID IN RESPONSE THAT, EVENTUALLY, CHANGED THE WORLD.

However, the point of this article is not to dwell on all of the tragedies this year has brought, of which you are all well aware. It is instead to ask a simple question: What are you going to do about it? If there is a silver lining to this year, it will be in how we react to the challenges before us. Will we sit back, throw our hands in the air, and fail to react? Or will we use these events to push us forward and enact real, lasting change?

When the Barristers' year started, our plans were ambitious but familiar. We would do what we did last year, just better and more. But in the face of this year's difficulties, we rose to the occasion and created new programming we have never done before. We created the Barristers' Racial Justice Initiative, and have been putting on programming from *How to Be an Ally* to a *Town Hall on Police Accountability, Discipline & Oversight.* These programs have shown us that there is an intense interest and desire for change. With an average attendance of almost fifty people per program, we plan on having put on a dozen programs before the end of the year. The Racial Justice Initiative is not only an initial reaction to the killings of Black men and women, but an initiative that Barristers intend on continuing into next year and beyond. This type of programming was not what we had thought we would do this year, but the year's challenges compelled us to do so—and as a result, we are better for it. So while I would never wish for the challenges 2020 has brought, I am grateful for the changes it has urged us to make.

In a sense, this year has woken us up. We always knew that the status quo was not good enough, that it did not work to the benefit of all. But for many of us, we did not do anything about it. With everything happening now, with the world reeling and the future unknown, this is our moment to act. This is our opportunity to make things better. Years from now when we look back at 2020, we will undoubtedly recount the unfolding of tragedy after tragedy-but we will also focus on what we did in response that, eventually, changed the world. If this all sounds a bit big, ambitious, and cliché, you are not wrong. However, you are wrong if you think this means you should not do anything. You do not need to quit your job, donate all your money, or move to a swing state. The changes that you make can be small but meaningful. Choose something to do that makes sense for you, your time, and your budget. If you are looking for where to start, here are some suggestions:

- VOTE!
- Help to get out the vote: check out the Lawyers' Committee for Civil Rights Election Protection coalition
- Get involved in organizations and causes that you believe in

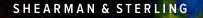
BARRISTERS REPORT

- Volunteer your time: the Justice & Diversity Center has many opportunities
- Donate to causes that matter to you
- Write or call your elected representatives
- Educate yourself on issues—check out the Bar Association of San Francisco's programming or others'
- Speak up when you see inequality or injustice
- Use your position to promote diversity, equality, and inclusion
- Fill out the 2020 Census, and encourage others to as well

No matter what you choose, do something. Take the difficulties that this year has brought and turn them into action, and turn 2020 into a year of change.

As the late Justice Ginsburg said, "So often in life, things that you regard as an impediment turn out to be great, good fortune." I am confident that we can do just that, and emerge from 2020 better and stronger than before.

Kelly Matayoshi is a senior associate at Farella Braun + Martel and the current Barristers Club President. Her practice focuses on business litigation and employment, with a focus on the consumer products industry.



We proudly support the Justice & Diversity Center of the Bar Association of San Francisco

> Diversity-Inclusion

HOW WILL SCOTUS HANDLE FUTURE ISSUES RELATED TO THE COVID-19 CRISIS?

Notes and flowers left at the U.S. Supreme Court in memory of late Justice Ruth Bader Ginsburg



Erwin Chemerinsky

he COVID-19 pandemic, not surprisingly, has led to a great deal of litigation throughout the country, especially as there have been challenges to the shelter-in-place and shutdown orders.

Overwhelmingly, federal and state courts have ruled in favor of the government and its power to take action to stop the spread of a communicable disease. A few of these cases already have reached the U.S. Supreme Court.

Although none of these cases have resulted in decisions after full briefing and oral argument, there have been some Supreme Court actions. What can be learned from them, and what does this tell us about the court's likely handling of future cases arising from the pandemic?

Elections and the Pandemic

In *Republican National Committee v. Democratic National Committee*, the court overturned a federal district court decision to extend the time for absentee ballots to be cast. Wisconsin was holding its presidential primary on Tuesday, April 7.

There was a huge backlog of absentee ballots with many not having been delivered. In order to be counted, Wisconsin law required that they be received by April 7. A federal district court in Wisconsin extended that deadline by six days and said the ballots would be counted so long as they were received by Monday, April 13.

The Supreme Court reversed, and in a per curiam opinion held that the district court abused its discretion in the order. The court said that "extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election."

The court relied on its earlier precedent in *Purcell v. Gonzalez* (2006) and said: "This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."

The late Justice Ruth Bader Ginsburg wrote a vehement dissent, joined by Justices Stephen G. Breyer, Sonia M. Sotomayor and Elena Kagan. She lamented that the court's ruling would result in "massive disenfranchisement." She explained that there had been a huge surge in requests for absentee ballots, and many had not yet been sent or delivered. PROTECTING THE RIGHT TO VOTE WITHOUT ENDANGERING HEALTH IS GOING TO REQUIRE CREATIVITY AND VIGILANCE.

Ginsburg said: "Either they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own. That is a matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the state's election process, and in this most extraordinary time, the health of the Nation."

On July 2, the Supreme Court, again 5-4, stayed a federal district court order which would have made it easier for voters to cast absentee ballots for the July 14 Alabama primary. Although Alabama had expanded absentee balloting, the district court found that several restrictions "pose severe obstacles to voting" in light of the pandemic.

The district court entered an injunction that barred election officials in three counties from requiring high-risk voters to have their absentee ballot envelopes witnessed or notarized and to mail in a copy of their



Election poll workers wear masks during the 2020 primary election day in Nevada.

photo ID. The Supreme Court stayed the district court's order, pending appeal to the 11th Circuit, while Ginsburg, Breyer, Sotomayor, and Kagan indicated that they would have allowed the balloting accommodations to remain in place.

And just a few days earlier, the Supreme Court denied a request from the Texas Democratic Party to allow all voters in the state to vote by mail without an excuse. Texas law permits absentee ballots only if a voter meets specific criteria. A federal district court, in light of the pandemic, expanded this to all voters. The 5th Circuit reversed, and the Supreme Court denied review. The lessons from these cases for the November 2020 election are disturbing. With the pandemic surging, there is little reason to believe that things will be significantly better by November. Protecting the right to vote without endangering health is going to require creativity and vigilance. But so far the conservative majority on the court has shown hostility to allowing district courts to fashion such solutions. The effect of the court's decision in Wisconsin was long lines of people waiting for hours to vote, risking their health in order to cast ballots.

Also troubling is the ideological split of the justices. At this point, nationally, Republicans are trying to limit voter turnout while Democrats are seeking to expand AT THIS POINT, NATIONALLY, REPUBLICANS ARE TRYING TO LIMIT VOTER TURNOUT WHILE DEMOCRATS ARE SEEKING TO EXPAND IT. THE JUSTICES SO FAR ARE LINING UP IN EXACTLY THAT WAY. ONE CANNOT HELP BUT THINK OF *BUSH V. GORE* FROM TWO DECADES AGO.

it. The justices so far are lining up in exactly that way. One cannot help but think of *Bush v. Gore* from two decades ago.

Religion and the Pandemic

There have been two Supreme Court rulings involving churches challenging restrictions on religious gatherings as violating free exercise of religion. In both, the court, 5-4, upheld the COVID-19 restrictions and ruled against the religion claims. In each, Chief Justice John G. Roberts Jr. joined the liberal justices to create the majority.

On May 29, in *South Bay United Pentecostal Church v. Newsom*, the court rejected a challenge by a church to California Governor Gavin Newsom's restrictions on public gatherings, limiting attendance at places of worship to 25% of building capacity or a maximum of 100 attendees. The lower courts had ruled against the church and the Supreme Court declined to intervene. There was no opinion for the court, but Roberts wrote an opinion concurring in the denial of injunctive relief.

Roberts forcefully expressed the need for great deference to government officials in their efforts to combat the pandemic.

He wrote: "The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts 'the safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' When those officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence and expertise to assess public health and is not accountable to the people."

Kavanaugh wrote a dissent arguing that Governor Newsom's order discriminated against religious gatherings and thus violated free exercise of religion.

He wrote: "I would grant the church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment."

On July 24, the court again refused to overturn a governor's restrictions on gatherings that limited assemblies for religious worship. In *Calvary Chapel*

Dayton Valley v. Sisolak, the court without opinion denied the request for injunctive relief.

Justice Samuel A. Alito wrote an angry dissent, joined by Justices Clarence Thomas and Kavanaugh. Like Kavanaugh's dissent in *South Bay United Pentecostal Church*, Alito stressed that the government was discriminating against religious entities.

He wrote: "The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But the governor of Nevada apparently has different priorities. ... That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this court's willingness to allow such discrimination is disappointing."

Justices Kavanaugh and Neil Gorsuch wrote separate dissents echoing the same basic point that the government was impermissibly discriminating against religion.

Two cases resolved without briefing and oral argument provide a slim basis for gleaning how the court is going to deal with restrictions imposed because of COVID-19. But Roberts's emphatic declaration of the need to defer to government officials, and his votes with the liberal justices in both cases, suggests a majority likely to give great latitude when considering restrictions imposed to stop the spread of COVID-19.

In Conclusion

At this time, there are no cases on the court's docket for next term that directly relate to government actions taken to stop the transmission of the novel coronavirus. Certainly *California v. Texas*, which concerns whether the Affordable Care Act is unconstitutional, is important for how health care is provided and will be heard and decided in the midst of the pandemic.

But in light of the large number of challenges to government restrictions that have been filed in the lower courts, it is inevitable that some of these will make their way to the Supreme Court in the months ahead.

Erwin Chemerinsky is dean of the University of California at Berkeley School of Law. He is an expert in constitutional law, federal practice, civil rights and civil liberties, and appellate litigation. He's the author of several books, including The Case Against the Supreme Court (Viking, 2014). His latest book, We the People: A Progressive Reading of the Constitution for the Twenty-First Century, was published in 2018.

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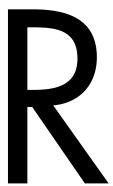
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LIBERTY OF MOVEMENT AND ASSEMBLY

When everyone is potentially lethal to others, without any individual choice on anyone's part



Eugene Volokh



estrictions on freedom of movement and assembly in a time of epidemic are massive restraints on liberty. They would normally be intolerable. But I think that the normal liberty arguments against them don't quite work in times of epidemic. Many facets of liberty rest on certain assumptions, and sometimes can't extend to situations where those assumptions don't apply.



People in front of Los Angeles' City Hall protest the state's COVID-19 stay-at-home orders in May.

Some examples, of course, are familiar. Sexual liberty is very important, for instance (as a matter of libertarian principles, whether or not you think the U.S. Constitution is properly interpreted as protecting it). But it rests on assumptions of individual capacity to make potentially risky decisions that might not apply to, say, young children, or mentally handicapped people. Likewise, the right to procreate is very important. But if we were living on a spaceship that was limited to recycling a sharply constrained amount of air and food, that might call for limits on the number of children one has that wouldn't be justifiable in our current world of plenty. Liberty of movement and of physical association—coming together for political, religious, social, professional, recreational, or other purposes—is likewise tremendously important. "The right of the people peaceably to assemble, and to petition the Government for a redress of grievances" is just one particular express elaboration of this liberty. But the premise behind the liberty is that people assembling together can choose to be "peaceable," and thus physically safe for each other and for bystanders, and we should punish only those who deliberately abuse the right (by acting non-peaceably). CONTAGIOUS DISEASE, UNFORTUNATELY, HAS THE PROPERTY THAT I CAN SICKEN OR EVEN KILL YOU WITH IT ENTIRELY INADVERTENTLY, WITHOUT ANY CHOICE ON MY PART.

Contagious disease, unfortunately, has the property that I can sicken or even kill you with it entirely inadvertently, without any choice on my part. It's not like carrying a gun, which I might misuse but which I can choose to use properly. It's like carrying a gun that every so often (and largely unavoidably) just shoots a bullet in a random direction, without my pulling the trigger.

What's more, not only can I sicken or kill you when you've voluntarily agreed to be around me (e.g., agreed to go to a political rally or a religious service where many potentially infected people gather): I can end up helping cause the sickness or death of other parties with whom you later come into contact, or those even more steps removed.

Libertarians often articulate the basic principle that people cannot initiate the use of force or fraud against others. But I don't think it makes sense to see the "force" prong as limited to deliberate injury; causing sickness or death to others inadvertently may be less morally culpable, but it is just as injurious. Right now, our bodies (at least until the availability of highly reliable tests for not being infected, or, better yet, being immune) are, for most of us, a potential source of infection and thus injury and death to third parties. The normal conditions that have justified liberty of movement and assembly in the U.S. for all my life unfortunately do not apply right now.

Now of course this raises all sorts of complicated questions. Obviously liberty emerged at a time when contagious diseases were both much more common and more deadly than they are today, because of the absence of effective prevention and treatment—consider, for instance, tuberculosis. Some amount of unintended risk created for others was seen as acceptable.

My sense is that our society is now insisting on a much lower threshold of acceptable risk, perhaps because we have gotten so used to a very low death toll from casually communicated illnesses (mostly from the flu and similar diseases). One can certainly debate whether we have adopted too low a threshold: Perhaps massive restraints on travel and assembly might be acceptable for diseases with the lethality of Ebola or some unvaccinatable-against mutation of smallpox, but shouldn't be acceptable for this strain of coronavirus.

And of course this is further complicated by the uncertainty of just how reliable various protective measures might be. For instance, if we were confident that wearing a certain kind of mask would prevent the wearer from infecting others, then there would be



San Francisco protestors preparing for the George Floyd Black Lives Matter protest, in June 2020.

much less justification for banning mask-wearers from traveling and gathering with others. Unfortunately, so much remains unknown about the facts here.

But the broader point is that the normal conditions that justify liberty of movement and travel—that make this liberty consistent with the libertarian judgments that each of us should have the right to do things that don't physically harm others—are regrettably not present when each of us (with no conscious choice on our parts) is potentially highly lethal to people around us. However peaceable we might be in our intentions, our assembling is a physical threat. Our judgments about liberty, I think, need to reflect that.

Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law, where he specializes in First Amendment law and internet law.

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PANDEMIC CONSTITUTIONAL RIGHTS Not an All-or-Nothing Proposition

he death toll associated with the novel coronavirus, otherwise known as COVID-19, has surpassed 200,000 in the United States. To place this suffering in context, more Americans have died due to COVID-19 than all the American deaths suffered during the Vietnam War, the 9/11 terrorist attacks, the wars in Iraq and Afghanistan, and as a result of H1N1, Ebola and the Zika virus—all combined. In six months, COVID-19 killed more Americans than what Americans have witnessed in the past fifty years of war and disease combined.



Michele Goodwin

The chilling number of American deaths that spanned nearly two decades in Vietnam (58,000) pales in comparison to deaths caused by this deadly virus. In essence, COVID-19 took barely two months to surpass deaths suffered by Americans over nineteen years of the Vietnam War. And while the Vietnam War is long over, COVID-19 still rages in the United States.

What this staggering death toll brings to light are two interrelated matters. First, it exposes questions related to capacity, compassion, and competency in American leadership—from the federal government down to local officials. The failure to heed international warnings and develop effective test kits in December and January highlights serious weaknesses in pandemic preparedness and American leadership. Hasty and imprudent political rhetoric in February and March, comparing COVID-19 to the seasonal flu, was not IN SIX MONTHS, COVID-19 KILLED MORE AMERICANS THAN WHAT AMERICANS HAVE WITNESSED IN THE PAST FIFTY YEARS OF WAR AND DISEASE COMBINED.

only inaccurate and misguided; it likely contributed to a sense of false security among Americans, who came to believe the virus was no more infectious and no greater a threat than the seasonal flu. Sadly, this view persists among some Americans, including in government.

Second, fundamental questions of constitutional law have also emerged. The coronavirus crisis has brought to the forefront a national debate related to the interaction between constitutional rights, state police powers, and federalism: What are the limits of government action in the midst of a pandemic?

Certain basic constitutional law questions persist for some Americans: Do governors have the authority to issue executive orders to shelter-in-place or quarantine? Can the legislature prioritize some business activity as "essential" while not granting that status to others? Is it legal to impose shelter-in-place on Sundays—a day when many Americans seek to worship?

The short answer is that, for nearly three centuries, quarantine has been justified and legally upheld—even before the official founding of the United States, dating all the way back to 1738.

In an 1824 case, *Gibbons v. Ogden*, the Supreme Court specifically referenced state authority to regulate health and erect quarantine laws. Eighty years later, in a seminal decision, the Supreme Court spoke directly to state police power to protect public health in its 1905 ruling, *Jacobson v. Massachusetts*. In that case, the court upheld an ordinance requiring compulsory vaccination of all persons fit for inoculation. The court found the statute to be a valid exercise of local police power to protect public health and reduce the spread of smallpox—a deadly disease.

Despite the myriad rallies and protests to "re-open" some filled with vile and violent imagery, including effigies—governmental authority to impose the types of orders modeled in California by Governor Gavin Newsom, in Michigan by Governor Gretchen Whitmer or in New York by Governor Andrew Cuomo is clear, consistent with constitutional law, and legal. In other words, during a pandemic, some constitutional rights may be burdened, but only to protect the public health and promote safety.

Nevertheless, government authority is not absolute and that's important to keep in mind, even in times of pandemic. In fact, during times of national disaster and health crises, the government may attempt to exercise unconstitutional authority or unfairly or excessively infringe on civil rights and civil liberties. Historically, governments, including our own, have deployed protecting the public health as a justification when seeking to harm and undermine the civil liberties of vulnerable groups. From eugenics, involving the forced sterilization of poor girls and women, to racial discrimination involving water fountains, swimming pools, and interracial marriage, politicians have oftentimes claimed to be in the service of public health goals when actually serving no other purpose than the perpetuation of social and racial stereotypes and discrimination.

Nearly a century ago, the commonwealth of Virginia claimed it was in a public health crisis, "swamped" by children, men, and women it considered socially and morally unfit. Its solution was to impose sterilization on Virginians as young as ten in order to rid the state of those who "burdened" society. The sad result included the sterilizations of thousands of people in Virginia alone—a clear violation of civil rights and civil liberties.

GOVERNMENT INFRINGEMENTS ON CIVIL RIGHTS AND CIVIL LIBERTIES SHOULD BE DRIVEN BY SCIENCE, CONFIRMED BY MEDICAL EVIDENCE, AND TAILORED TO ADDRESS THE HEALTH HARMS AND THREATS. During this pandemic, questions related to the limits of governmental authority are all the more pressing and relevant in the wake of legislatures in Alabama, Indiana, Mississippi, Oklahoma, and Texas, among others, that have used the pandemic as a cover for discriminating against women by dismantling abortion access. From a medical perspective, this is all the more senseless and tragic, considering that abortions are as safe as penicillin shots and far safer than child delivery; a woman is fourteen times more likely to die by carrying a pregnancy to term than having an abortion. In these instances, hampering abortion rights had nothing to do with protecting health and safety, but were simply political attempts to undermine abortion rights.

For these reasons, government infringements on civil rights and civil liberties should be driven by science, confirmed by medical evidence, and tailored to address the health harms and threats. It's not all or nothing that's too simplistic a view. Rather, protecting the public's health and safety during COVID-19 requires prioritizing the public's health while safeguarding civil liberties.

Michele Goodwin is a Chancellor's Professor at the University of California, Irvine as well as an Executive Committee member of the American Civil Liberties Union. She writes about civil liberties and civil rights with articles appearing in the Yale Law Journal, Harvard Law Review, Cornell Law Review, and NYU Law Review among others. She is the author of Policing the Womb: Invisible Women and the Criminalization of Motherhood, and is also the host of On the Issues with Michele Goodwin podcast at Ms. magazine.

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WHAT IT'S LIKE TO LITIGATE APPEALS DURING COVID-19



Ben Feuer

'm the chairman of a specialty appellate law firm with offices in San Francisco, Los Angeles, and San Diego, and I'm involved with a number of appellate-related local and federal committees and organizations. COVID-19 disruptions began to appear on my radar relatively early, and we moved quickly to make sure we were fully prepared.

Our firm is fortunate in that it has been built to work remotely from the start. Because appellate practice is primarily a writing and procedural skill set, the only tools you really need are a computer and an internet connection. With that in mind, we set our firm up to be seamlessly accessible on the go, to let our lawyers have more flexibility in their personal lives. The idea was to let folks more easily travel or spend a summer in Europe, but the technologies and procedures we adopted work just as well when you can't even travel outside your home. And for the same reason, we have always minimized our fixed office space, an unwanted liability during the business lockdown.

Appeals themselves are relatively well-suited to the limitations that arise during lockdowns. Because most

trial court filings are now electronic, so too are appellate records, as well as court reporter's transcripts. Briefs are researched and edited online, of course, and can be done from the family couch on a laptop. There's no discovery to conduct, no depositions or hearings that require inperson testimony.

For similar reasons, the business of the appellate courts didn't slow nearly as much as the trial courts beyond deadline extensions:

- In the Ninth Circuit, the court allowed automatic 30-day extensions on demand on the basis of COVID-19 concerns, whatever they may be.
- In the California Court of Appeal and California Supreme Court, with a few exceptions, deadlines were automatically extended between March and May.
- In the U.S. Supreme Court, extensions were granted as a matter of course for COVID-19-related reasons, and the time in which to file certiorari petitions was extended from 90 to 150 days.

APPEALS THEMSELVES ARE RELATIVELY WELL-SUITED TO THE LIMITATIONS THAT ARISE DURING LOCKDOWNS.

The appellate courts have mostly been e-filing courts for some time, making that part of the transition to remote work relatively painless. To the extent the courts still required some paper filings in addition to electronic filings, those rules were either suspended entirely or the required number of copies reduced. Some of these changes may stick as judges and justices become more and more comfortable working with purely electronic versions of documents.

As the pandemic swept across the United States, the appellate courts relatively quickly—and surprisingly smoothly for arms of government not used to cuttingedge technologies—switched to remote arguments. The California appellate courts use BlueJeans or telephone conferences, the Ninth Circuit uses Zoom, and the U.S. Supreme Court is using telephone conferences only. The Ninth Circuit is at a bit of an advantage, because unlike California courts, it has authority to choose whether to hold oral argument in any given case at all. Unsurprisingly, submission without oral argument is up significantly since the pandemic began, as the court reserves oral arguments for cases where the judges genuinely feel conflicted or have questions they want answered.

Reports on remote oral arguments from judges, justices, and litigants have, overall, been relatively positive. You certainly lose something on a video—body language is harder to pick up, and sometimes it's more difficult to tell when a jurist is trying to jump in with a question but 90 percent comes through. Telephone conference is less optimal from the perspective of body language, but it does force everyone to focus closely on the words being said rather than the other distractions that can come with visual stimuli. The most high-profile snafu, a toilet flush caught on a U.S. Supreme Court teleconference earlier this year, was not indicative of broader trends (nor, hopefully, the flushing justice's view of the argument being presented at the time).

For the Ninth Circuit in particular, where nearly fifty Circuit Judges and dozens of visiting judges had to fly each month between the circuit's four main courthouses, the replacement of in-person arguments with virtual arguments is a big change. It's likely saving the judiciary huge travel bucks—especially for visiting judges from around the country as well as litigants and government attorneys from the circuit's remoter corners. It will be interesting to see whether arguments return fully to the usual in-person style after the pandemic ends, given the cost savings for many of the court's constituents. All of these changes led to some early delays in the appellate courts' processing of cases, but they quickly caught up. And, with trial courts much longer delayed, especially with their most complicated cases and jury trials, incoming appeals have dropped off somewhat. That's denting backlogs and allowing older pending cases to finally reach a decision. But, also due in part to slowness in the trial courts, we've seen a marked increase in the need for writs of mandamus.

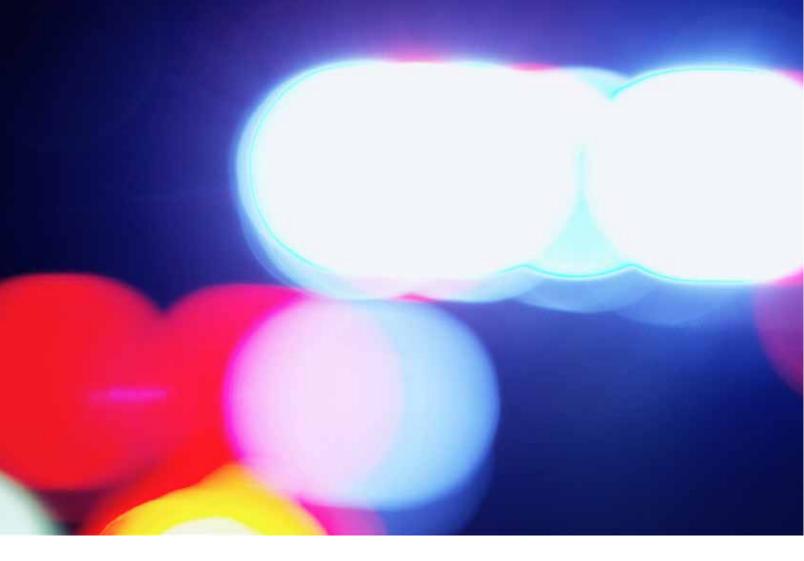
One group I feel especially sympathetic towards is the current group of law clerks, who will miss out on a year working shoulder-to-shoulder and late at night with their judge and co-clerks, winding through the law, analyzing and debating challenging and important cases, and coming to understand how appellate judges think and decide appeals. It is the kind of unique experience that is difficult to imagine offering the same richness remotely.

THE APPELLATE COURTS HAVE MOSTLY BEEN E-FILING COURTS FOR SOME TIME, MAKING THAT PART OF THE TRANSITION TO REMOTE WORK RELATIVELY PAINLESS. But aside from unavoidable trade-offs, overall, the appellate courts are making it through the pandemic with relatively low levels of disruption to their work. Of course, the coronavirus threat isn't over, but society seems to be finding ways to cope, as have the bench and bar. I think it's unlikely that earlier delays and mandatory extensions will reappear even if we see another "wave" of the virus's spread.

Indeed, there is at least one small positive side-effect as well. I am co-chair of the Appellate Section of the Bar Association of San Francisco, and I've been organizing CLE programs on appellate and constitutional law issues for nearly a decade. Because these programs are now all on Zoom, geography has vanished as a barrier for speakers and panelists for the first time. The program I organized on COVID-19 and the Constitution welcomed panelists in Southern California, Chicago, and New York in addition to the Bay Area. That's something we've never been able to offer before.

Ultimately, this pandemic will end, and I suspect things will largely return to pre-pandemic normalcy. But some changes may survive and become part of standard practice. If a few of these do, both bench and bar will benefit.

Ben Feuer is the chairman of the California Appellate Law Group, a seventeen-attorney appellate specialty boutique based in San Francisco. He is also the co-chair of the Appellate Section of the Bar Association of San Francisco. You can learn more about him at www.calapplaw.com/ben or email him at ben.feuer@calapplaw.com.



BASF TASK FORCE FACILITATES Police Reform

Laura Ernde

fter the death of George Floyd reignited national conversations about police violence against Black people, activists across the country raced to learn what was happening in their local cities so they could map out meaningful reforms.

San Francisco was one step ahead, thanks to the Bar Association of San Francisco's (BASF) Criminal Justice Task Force, formed in the wake of Michael Brown's death in Ferguson, Missouri. Since early 2015, the task force has worked collaboratively with the San Francisco Police Department (SFPD) and other law enforcement agencies, diving deep in its research of best practices and pushing for new policies and procedures to protect the legal rights of local citizens.

In the wake of this year's protests, the task force began asking how it could seize the moment and increase the pace of urgently needed reforms, said Yolanda Jackson, BASF executive director.

The task force zeroed in on the meet-and-confer process, which under their observation led to months or years of delay. Even when the police chief and San Francisco Police Commission have agreed on policy changes, implementation often gets bogged down in negotiations between the police union and the human resources department, Jackson said. These closed-door meetings can be dominated by arguments over minutiae. THE TASK FORCE ZEROED IN ON THE MEET-AND-CONFER PROCESS, WHICH UNDER THEIR OBSERVATION LED TO MONTHS OR YEARS OF DELAY.

"It can stay there for years, fighting over commas and semicolons," Jackson said. To tackle the meet-andconfer issue, the task force started by doing what lawyers do best: researching and writing.

Yet the members of the task force—made up of prosecutors, defense attorneys, civil rights attorneys, law professors, the judiciary, members of law enforcement, and police oversight agencies—quickly realized they would need some help. No one on the panel had expertise in labor and employment law. Task force member Kevin M. Benedicto, a litigator in the San Francisco office of Morgan, Lewis & Bockius, brought the idea back to his law firm, which had organized a firmwide *Mobilizing for Equality* racial justice task force. The meet-and-confer issue was a perfect fit for its pro bono efforts.

Within a matter of weeks, Morgan Lewis lawyers based in San Francisco and Los Angeles looked into the public sector bargaining laws and helped draft a series of letters to city officials. Morgan Lewis lawyers explored how the meet-andconfer process came to exist and how the courts have interpreted that language. They discovered that the process, intended to address how policies affect working conditions for officers, was being interpreted very broadly. As a result, almost every policy change under consideration was subject to bargaining.

The lawyers then assisted in drafting a series of letters—which the BASF Board of Directors ultimately approved—urging city officials to bypass the meet-andconfer process in two instances: changes to the body-



San Francisco Mayor London Breed addresses crowd during SF NAACP "Kneel-in" protest, following nationwide unrest in response to police brutality.

worn camera policy and a ballot initiative regarding police staffing levels.

Body-Worn Cameras

The San Francisco Police Department has used bodyworn cameras for transparency and accountability since 2016. But BASF and other community organizations have called for changes in the policy to prohibit officers from reviewing the camera footage before making official reports and statements.

A January 2018 policy change, approved unanimously by The San Francisco Police Commission, has been stalled in meet-and-confer negotiations ever since. It would restrict officers from reviewing footage in cases of officer-involved shootings and in-custody deaths.

"We stand in partnership with the Commission, the SFPD, and the City to achieve our shared goals for a fairer criminal justice system," BASF President Stuart C. Plunkett's letter to the police commission said, citing stakes for San Francisco that "could not be greater."

Police Staffing Levels

A second letter urged the city to move forward with a November ballot measure establishing a new process for setting the size of the city police force.

A 1994 amendment to the City Charter calls for the Police Department to maintain 1,971 full-time officers. Supervisor Norman Yee introduced a charter amendment to eliminate this arbitrary number and require the Police Department to submit a report and recommendation on police staffing levels to the Police Commission every two years. BASF AND OTHER COMMUNITY ORGANIZATIONS HAVE CALLED FOR CHANGES IN THE POLICY TO PROHIBIT OFFICERS FROM REVIEWING THE CAMERA FOOTAGE BEFORE MAKING OFFICIAL REPORTS AND STATEMENTS.

Again, the letter cited the meet-and-confer process, which had threatened to delay the ballot measure until 2022. A few weeks after BASF sent the letter, the San Francisco Board of Supervisors voted to put the measure on the ballot.

BASF's letter urged the city to adopt a new approach to negotiating police department matters with the police union that takes into consideration other factors besides improving labor-management relations.

"The City's approach must also prioritize transparency, timeliness, and the advancement of substantive police reforms," Plunkett's letter said. "The law supports these principles. It recognizes that formulating policies that promote public safety and trust between police agencies and the communities they serve is a fundamental duty of local government that must not be encumbered with undue delays, or worse, bargained away behind closed doors." Benedicto said the letters represented a perfect example of the role lawyers and bar associations can play in advancing changes within the framework of the law.

"Lawyers are good at distilling research, making recommendations, bringing an analytical mindset to issues," he said.

In addition to sending the meet-and-confer letters, BASF and the task force is helping the city government prioritize a long list of potential police reforms, Jackson said.

Based on its years of experience closely tracking the city's progress, the task force recommended the city focus on these five areas:

- Expedite the implementation of the Serious Incident Review Board to review use-of-force investigations and report on them publicly within 30 days.
- Appoint and confirm experienced police reform advocates to two vacant seats on the Police Commission.
- Require the police to provide information to the Department of Police Accountability, which investigates complaints against officers.
- Create greater transparency regarding officer disciplinary hearings and findings.
- Hold the police department and commission accountable to deadlines and increase community participation in the reform process.

Since the task force was formed, task force members have worked to rewrite the police use-of-force policy, researched and advocated against the use of Tasers, weighed in on a statewide effort to reform the bail system, and helped shape anti-bias policing measures. For more detail about this work, read the Fall 2019 issue of *San Francisco Attorney*.

Assisting Other Bar Associations

This year's nationwide reckoning of racial justice issues has prompted bar associations across the country to get involved in state and local efforts for police reform.

In July, Jackson presented a webinar to dozens of bar officials across the country, walking them through the process of forming and staffing a task force and deciding what issues to focus on. She described how the task force was able to pivot as new issues came to the forefront and others waned.

"We'll be the catalyst for inviting people into a room. Give us an issue and we'll start researching it nationally," Jackson said. "We know the city just doesn't have those resources. We're going to do what lawyers do best, which is research, write analyses, and see if that helps."

Laura Ernde is a San Francisco-based writer and communications consultant. She has covered legal affairs for more than a decade, as a journalist and former editor of the California Bar Journal.

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Sixty-sixth Congress of the United States of Imerica;

At the First Session,

Begun and held at the City of Washington on Monday, the nineteenth day of May, one thousand nine hundred and nineteen.

JOINT RESOLUTION

Proposing an amendment to the Constitution extending the right of suffrage to women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States.

"ARTICLE -----

"The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. "Congress shall have power to enforce this article by appropriate

legislation."

dent?

F. H. Lillett.

Speaker of the House of Representatives.

Vice President of the United States and President of the Schale.

Joint Resolution of Congress proposing a constitutional amendment extending the right of suffrage to women, May 19, 1919; Ratified Amendments, 1795-1992; General Records of the United States Government; Record Group 11; National Archives.

PATH TO 19TH AMENDMENT OFFERS LESSONS FOR TODAY

Rebecca Bers

he Nineteenth Amendment federally guaranteed women the right to vote on August 26, 1920: 100 years ago. On this occasion, celebration is warranted; but it is not enough.

The Nineteenth Amendment's adoption followed over seven decades of continuous advocacy. The racial and class divisions that affected the movement seem all too familiar today. Yet, there are many things it did not change. Women of all races did not suddenly gain unimpeded access to the polls. Native American women were excluded from the franchise by the Snyder Act until 1924, Chinese American women were excluded by the Chinese Exclusion Act until 1943, and Black and Latina women were effectively excluded by poll taxes, literacy tests, voter purges, outright violence and intimidation, and other racist voter suppression tactics, some of which persist today. The Nineteenth Amendment also did not swing open the doors to power or eliminate sexism, racism, and classism. Women, and particularly BIPOC¹ women, are still underrepresented in positions of power in government and business. But,

the Nineteenth Amendment is an important milestone on our journey, and we can find inspiration in this history as we continue to seek universal voting rights and a more inclusive society.

Abolitionists Controversially Agree to Advocate for Women's Suffrage

The Seneca Falls Convention in July 1848, often cited as the birth of the United States' suffrage movement, was organized by Lucretia Mott and Elizabeth Cady Stanton, who began their collaboration while attending abolitionist events where women were not permitted to speak. Over a hundred participants, including Frederick Douglass, attended the convention, which resulted in the Declaration of Sentiments. Suffrage was the most controversial resolution at the convention, which also sought reforms in education, employment, church, and property rights. Nevertheless, the Declaration of Sentiments proudly echoed the language of the Declaration of Independence: "We hold these truths to be self-evident: that all men and women are created equal." In 1866, following the end of the Civil War, Susan B. Anthony, Elizabeth Cady Stanton, and Frederick Douglass formed the American Equal Rights Association to achieve this goal. Douglass would remain an advocate for women's suffrage until his death, despite divisions within the movement.

Division Among Suffragists in the 1860s

The 1860s would see division among advocates for universal suffrage. Some women (among them, Anthony, Stanton, and Sojourner Truth) objected to the Fifteenth Amendment omitting women, while others (including Lucy Stone, Henry Blackwell, and Douglass) supported the Fifteenth Amendment, and urged women to be patient. Two rival associations formed: Stanton and Anthony established the National Woman Suffrage Association (NWSA), while Stone and Blackwell established the American Woman Suffrage Association (AWSA). NWSA took a national strategy, and addressed social, economic, and political issues beyond suffrage. NWSA's newsletter exhorted women to "earn their own livelihood," a radical idea at the time. Echoing their opposition to a Fifteenth Amendment that excluded women, NWSA also resorted to racist appeals. AWSA by contrast adopted a state by state strategy and was considered a more moderate organization, focused on DESPITE THE OMISSION OF WOMEN FROM THE FIFTEENTH AMENDMENT, SEVERAL WOMEN TRIED TO VOTE AFTER ITS PASSAGE, FAMOUSLY INCLUDING SUSAN B. ANTHONY, WHO WAS ARRESTED FOR VOTING IN 1872.

achieving suffrage for women without challenging other Victorian norms. The two groups would reconcile in 1890 to form the National American Woman Suffrage Association (NAWSA).

Black, Indigenous, and Women of Color Advocate Amid Racism

Black women created a wide network of suffrage groups across the country. In the 1890s, Frances Ellen Watkins Harper led the American Association of Colored Youth, and, along with Harriet Tubman, Mary Church Terrell, and Ida B. Wells-Barnett, was a founding member of the National Association of Colored Women, whose motto was "lifting as we climb." Terrell was one of the first Black women to earn a college degree, graduating in 1884 from Oberlin College. She advocated for women's suffrage and greater equality for Black women. Wells-Barnett advocated internationally for the rights of Black women, and openly confronted white women who ignored lynching.

Zitkala-Sa, a Yankton Sioux writer and political activist, advocated for women's rights at the same time that she advocated for Native American rights. Mabel Ping-Hua Lee, who immigrated to the United states from China as a young child, became a young leader for Chinese American women in lower Manhattan. She also led a large suffrage march in New York on horseback as a teenager.

Despite white women's racism, prominent Black women's advocates continued to fight alongside them in national organizations. As is still too often the case, these Black women were often the only ones in the room. At the 11th National Women's Rights Convention in 1866, Watkins Harper movingly declared: "We are all bound up in one great bundle of humanity, and society cannot trample on its weakest and feeblest of members without receiving the curse in its own soul."

The Fifteenth Amendment

The Fifteenth Amendment declared: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." Many assume the right to vote referenced in the Amendment lies elsewhere in the Constitution. But the text of the Constitution only mentions voting



MRS. FRANCIS E. W. HARPER. See p. 753.

"We are all bound up in one great bundle of humanity, and society cannot trample on its weakest and feeblest of members without receiving the curse in its own soul."

> -Frances Ellen Watkins Harper National Women's Rights Convention,1866

> > Photo: Library of Congress



Annie Rolph, wife of San Francisco mayor James Rolph, voting in 1911. In California, women's suffrage became legal with the passage of Proposition 4 in 1911 yet not all women were enfranchised.

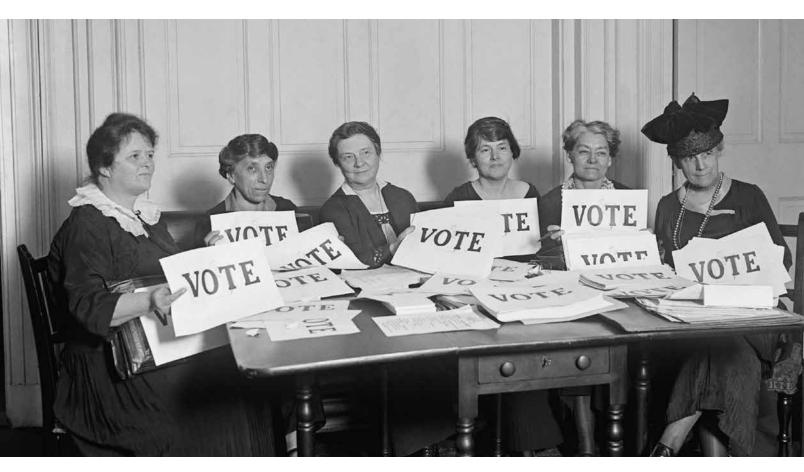
rights to delegate to the states the decision about who qualifies. (Article I, Section 2: "the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.")

Despite the omission of women from the Fifteenth Amendment, several women tried to vote after its passage, famously including Susan B. Anthony, who was arrested for voting in 1872. Another NWSA member, Virginia Minor, took her challenge to the Supreme Court of the United States, arguing that the Fourteenth Amendment gave women the right to vote because it was a "privilege or immunity" guaranteed to all citizens under the Fourteenth Amendment. In the 1874 decision *Minor v. Happersett*, the Supreme Court rejected Minor's argument. Because the Constitution gave states the right to determine eligibility to vote, it was not a "privilege or immunity" of a citizen.

Suffragists Modernized Political Activism

Women's suffrage advocates used and built on the advocacy skills they had learned as abolitionists and prohibitionists. They also borrowed from British suffragists. Their public advocacy efforts, which started with meetings and conventions, came to include marches, parades, rallies, commemorative pins and stamps, fliers, and independent newspapers. In 1913, a group marched from New York to Washington, a journey of over 250 miles. During the 1913 Woman Suffrage Procession, occurring in Washington the day before President Woodrow Wilson's inauguration, white leaders of NAWSA told black suffragists, including Ida B. Wells-Barnett, to walk at the back of the parade. She refused.

In 1917, women led by Alice Paul, who became known for her more radical methods, formed a "silent sentinel" in front of the White House. The sentinels allowed their banners to speak for them. At that time, picketing the White House was unheard of, and the banners were also seen as aggressive, pointing out the hypocrisy of the United States supporting self-determination abroad, when denying women the vote domestically. Some attacked these tactics as unpatriotic once the United States joined World War I, and in June, women began



National League of Women Voters hold up signs reading, 'VOTE', Sept. 17, 1924. Millions of women voted in 1920 and 1924, but in a lower proportion than men.

receiving tickets for "obstructing the sidewalk." Things only escalated from there. Paul went on a hunger strike in the D.C. Jail and was force-fed. On November 14, 1917, thirty-three of the silent sentinels were arrested, beaten, and tortured. The suffragists dubbed this the "Night of Terror," and publicized their treatment, passing out pins with jail bars on them to gain further public support.

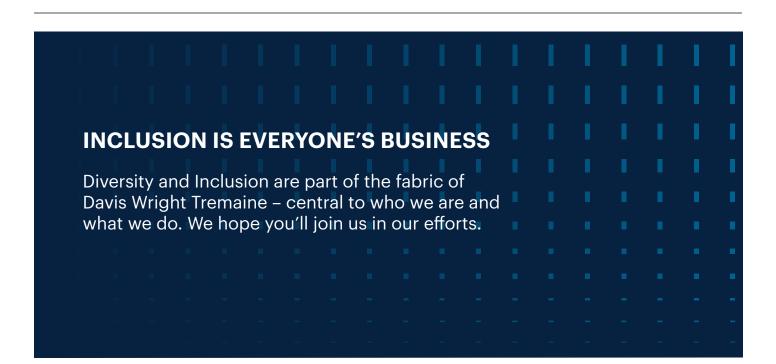
The Amendment

On June 4, 1919, the Senate finally passed the "Anthony Amendment." But it remained to be ratified by threefourths of the states. By that time, all of the Rocky Mountain West, and a few other states had granted women full voting rights. California had adopted women's suffrage in 1911, although the referendum was decided by only 3,587 votes. Women's suffrage had not yet taken hold in the following states: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, and West Virginia. Thus, women had to fight for ratification in states where they could not vote. The Tennessee state legislature would be the 36th and final vote ratifying the Nineteenth Amendment. The legislature was split evenly down the middle, and twenty-four-year-old legislator Harry T. Burn cast the final vote, after famously receiving a letter from his mother that he should "be a good boy" and support the amendment.

Moving Forward

Voting rights were just the beginning for the suffragists of the 1920s. They hoped the Equal Rights Amendment would pass quickly. Although proposed in 1923, it would not pass until 1972, and was not ratified before its constitutional deadline, despite an extension. In January of this year, Virginia became the 38th State to ratify the Amendment. Whether the ratification has the effect of amending the constitution will likely be decided by the Supreme Court. In the meantime, women continue to use the political advocacy tools of our foremothers, and build on them to protect all of our rights. Rebecca A. Bers is a Deputy City Attorney in San Francisco, where she regularly litigates in state and federal court. She serves as Secretary on the Executive Committee of the Bar Association's Litigation Section, and on the Communications and Programs Committee for the Bar Association's Women's Impact Network – No Glass Ceiling 2.0 Committee.

¹ BIPOC is an acronym for "Black, Indigenous, and People of Color" that has gained popularity recently. I use it to be inclusive and avoid the erasure of the different experiences of Black and Indigenous people.



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PRACTICAL TIPS FOR PURSUING A JUDICIAL APPOINTMENT

Courtney Brown

survey by the Bar Association of San Francisco shows a significant number of new attorneys aspire to be judges later in their careers. On June 25, 2020, the Barristers Club was honored to have Governor Gavin Newsom's Judicial Appointments Secretary, Justice Martin Jenkins, take part in a virtual in-depth conversation with Barristers Club President Kelly Matayoshi.

Prior to being appointed in January 2019, Justice Jenkins served as an Associate Justice on the California Court of Appeal since 2008. From 1997 to 2008, he served as a judge for the U.S. District Court for the Northern District of California, and from 1989 to 1997 as a judge on the Alameda Superior Court and Oakland Municipal Court. Prior to his appointment to the bench, Secretary Jenkins worked as a prosecutor for the Alameda County District Attorney's Office, with the U.S. Department of Justice in the Civil Rights Division-Criminal Section, and with the Pacific Bell Legal Department.

Justice Jenkins provided general information about the appointment process, as well as practical tips for pursuing appointment as a judge in California. Here are some of the highlights from the conversation. HIGHLIGHTS FROM A JUNE 25 BARRISTERS CLUB EVENT WITH JUSTICE MARTIN JENKINS, GOVERNOR GAVIN NEWSOM'S JUDICIAL APPOINTMENTS SECRETARY

The Application

The California Judicial Application can be found online at www.gov.ca.gov/instructions-for-completingjudicial-appointment-applications.

The application is currently made up of sixty-seven questions. Justice Jenkins suggested that anyone thinking of applying for appointment should download the application, read the application in its entirety, and then set it aside to allow time for thinking. Ask yourself whether being a judge is what you really want and if you can actually do the job. Not everyone is suited for or would enjoy being on the bench, and applicants should not apply without careful consideration.

The application is the first opportunity for the Judicial Appointments Secretary to learn about you as an

applicant. Therefore, the application needs to be well written without typos or incomplete sentences. Not only should you carefully review your application, but you should also have someone else review it before it is submitted. When completing the section regarding prior violations, you should err on the side of full disclosure. In many instances a violation such as a DUI will not automatically disqualify a candidate from the appointment process, but failure to disclose likely will.

Letters of Recommendation: While there is no magic number, three letters of recommendation are more than enough. Since you are required to list five other references and identify counsel connected to your ten most significant cases, there are many people the Judicial Appointments Secretary will be able to contact during the vetting process.

However, the letters allow you to pick people who really know you substantially and can speak to your character and evaluate your work. If you merely choose someone to write a letter because of their stature or connections to the governor, it will be obvious and will not help you in the application process.

Giovernor Newsom's Process

As the Judicial Appointments Secretary, Justice Jenkins reviews every application submitted. As he reads the application, he makes notes of the applicant's experience and involvement in community activities. Justice Jenkins then decides which applicants are sent to the Judicial Selection Advisory Committees (JSAC).

JSAC assists in the process by looking for bias the applicant may have and determining the applicant's

temperament by interviewing opposing counsel and judges. After the committee has completed its vetting process, JSAC sends a report to Justice Jenkins, who compares his notes regarding the applicant to the JSAC report. Although JSAC may conclude an applicant should not be sent to the Commission on Judicial Nominees Evaluation (JNE), Justice Jenkins does not always agree with this determination and may send an applicant not endorsed by JSAC to the JNE for further vetting. For example, JSAC may find an applicant is not qualified because the applicant lacks significant trial experience, but Justice Jenkins may determine they are qualified because the complexity of their trials makes the applicant as qualified or more qualified than an applicant with less complex and diverse trials.

After Justice Jenkins reviews the JSAC reports and compares them to his notes, he sends about 10 percent of all applications to the JNE for further evaluation. Justice Jenkins also sends the applications to local bar associations, which further help evaluate a candidate.

The entire process can take a year or more to complete. However, Justice Jenkins stated that an application never goes offline and it may take two to three years before you are called about your application. If you submit an application, but do not hear back within a year, you should submit supplemental information to keep your application updated.

Traits and Attributes of Judicial Applicants

There are several legal skills that an applicant must possess. First, it is important to have an above-average

ability to apply the law and write with persuasion. Second, the applicant must also be able to properly deal with conflict and practice law with ethics.

Outside of the necessary legal skill set, applicants must have traits that show they will be able to do the job. Applicants must be smart and their intelligence must be rooted in practicality. Sometimes a judge must make tough calls and be able to do what the law requires even if it is not the popular choice; this requires an applicant to have courage. Being a judge is about public service, so an applicant must be interested in serving their community through their position on the bench.

The most important trait Governor Newsom is looking for in a candidate is humility. Although the other values and traits are important, humility is what anchors all of the other values. It means a person is willing to be educated—so as a judge the applicant will listen to the parties, and litigants will know they were heard and understood. It also means the applicant understands there is a collective process of what the law is about.

Governor Newsom believes that we are better collectively when there is diversity, so it is important to him that there is a diverse bench. Diversity allows us to learn about the law in different ways and how it affects people. Justice Jenkins does not just look for diversity in race and ethnicity, he also believes it is important that judges are diverse in the practice areas they were in before they were appointed to the bench.

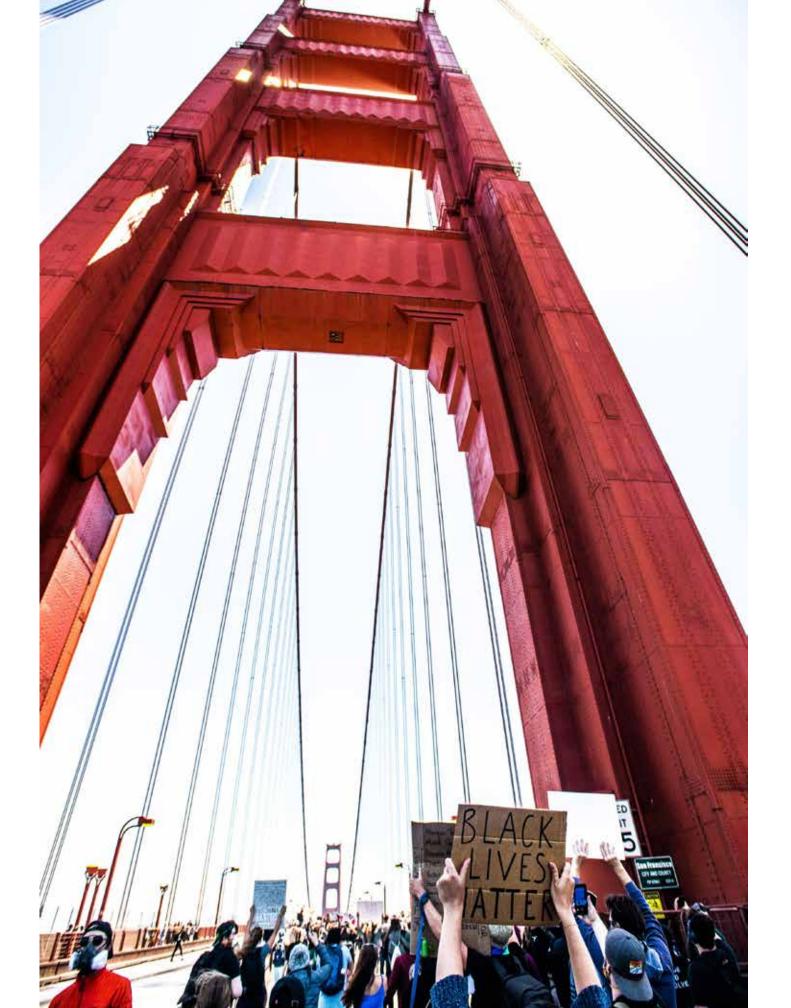
Advice for Newer Attorneys

When asked what advice he had for newer attorneys who aspire to be judges in the future, Justice Jenkins stated it is important that you be the kind of person you want others to be. Go high when other people go low. Be the best lawyer you can be and learn the most you can.

Although trial experience is important, Justice Jenkins noted that attorneys are trying fewer cases across the spectrum. Since newer attorneys may not have the opportunity to try as many cases as attorneys in the past, it is important to find other ways to develop the skill set that would be learned during a trial. For example, working as a judge pro tem or arbitrating cases would be helpful in learning the skill set and exposing the person to rules they may not be exposed to otherwise.

Also know that this process requires deep introspection. You have to determine whether you have the skill set necessary to do this job and want to do this job for the right reasons. So do your due diligence to have a sense of what this job is, and what current judges like and do not like about being on the bench. It is also important to get honest feedback from those around you, including judges, about whether they believe you would be good on the bench. Then reflect on the feedback you receive before deciding if being a judge is the right job for you.

Courtney M. Brown is a litigator at the Law Offices of Mary Catherine Wiederhold and is a board member for the Barristers Club. Her practice focuses on representing tenants facing a variety of issues including wrongful eviction, housing violations, and fire-related losses.



JUDICIAL ETHICS AND INDEPENDENCE MUST GUIDE JUDGES' RESPONSES To racial injustice

Judge Noël Wise, Alameda County Superior Court Judge Monica F. Wiley, San Francisco County Superior Court

> n California, the judge's Oath of Office begins, "I solemnly swear that I will support and defend the Constitution of the United States and the Constitution of the State of California." The first Canon of the California Code of Judicial Ethics states, "A judge shall uphold the integrity and independence of the judiciary." Support. Defend. Uphold. These are words of action, not omission.

On July 20, the California Supreme Court Committee on Judicial Ethics Opinions responded to inquiries by California judges who sought ethical guidance about their moral obligations at this point in history. In response to recent, national events that have brought critical focus to issues of race, social justice, and the First Amendment, some judges want to participate in demonstrations that denounce racism, support equal justice, and reinforce constitutional rights to free speech and peaceable assembly. In an effort to answer these questions and provide guidance, the committee issued CJEO Formal Opinion 2020-14. The opinion does not explicitly forbid California Judges from participating in public demonstrations, but unlike the June 9 California Judges Association Ethics Committee Chair's Guidance on this same topic, the CJEO committee discouraged participation because it concluded it is fraught with ethical risk. We are judges who are committed to our ethical obligations under our Oath of Office and the Code of Judicial Ethics, and we believe that in this instance, the perspective of the CJA guidance provides judges with clearer direction, and more properly defers to each judge to decide how to personally uphold the integrity and independence of the judiciary.

The CJA guidance posed six questions and provided succinct, clear responses. The first question was: "May a judge participate in a peaceful protest during non-court time?" "Yes" was the response. "Yes" was also the answer to the question of whether "During a protest, may a judge 'take a knee' or perform similar actions?" The CJA guidance briefly clarified, stating that because judges are "not required to surrender [our] rights or opinions as citizens" judges "like anyone else" may march in peaceful protests on their own time, provided they do not identify themselves as judges or otherwise "take actions that may appear to compromise the integrity or impartiality of the judge or the judiciary."

Perhaps the CJEO committee provided more restrictive advice because it framed the question differently than the CJA guidance. The committee asked: "May judicial officers ethically participate in public demonstrations and rallies about racial justice and equality, or make public statements about those matters, under the Code of Judicial Ethics?" In response to this question, which presumes that judicial inaction is the ethically preferable baseline, the committee warned: "Judges may not participate in a public demonstration or rally if [the] participation might undermine the public's confidence in the judiciary." Throughout the opinion the committee invoked the text of the Judicial Canons and the related advisory commentary that follow them. Although the committee acknowledged that "Complete separation of a judge from extrajudicial activities is neither possible nor wise" and "a judge should not become isolated from the community in which he or she lives" the committee nevertheless provided a litany of potential ethical perils that may befall a judge who joins a community demonstration. It reminded judges that they are subject to "constant public scrutiny" and that the test for impropriety, "is whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act [in the performance of their judicial duties] with integrity, impartiality, and competence."

It appears that the committee approached this issue no differently than the way it would examine any potential controversial legal issue a judge might encounter on the bench. Outside of writing judicial opinions, a judge should not publicly comment on substantive issues the judge may need to decide in court-this may include existing or proposed legislation in areas as diverse as securities, environmental regulation, and bond measures. But there is a fundamental difference between a judge commenting on an issue that may be the subject of a legal dispute versus a judge publicly supporting the core constitutional principle that all people are equal under the law. The former is improper. The latter is not up for legal debate and no judge should be ethically constrained from speaking or taking action that reinforces that constitutional and moral imperative. Instead, a judge is ethically obligated to affirmatively defend and uphold the Constitution, not complacently remain silent. At New Judge Orientation, judges are taught that even during a small social gathering it is unacceptable for a judge to say nothing in response to a racist remark because others may reasonably interpret our silence as approval. That insidiousness grows exponentially when

judges fail to publicly stand against racial injustice in our communities and our nation.

The CJEO opinion also noted that the canons prohibit a judge from engaging in political activity. It cautioned that, "Although such demonstrations and rallies [about racial justice and equality] are not necessarily partisan, they address matters that are the subject of current debate and litigation and can relate to subjects over which passions run high." It is immaterial whether individuals or elected officials have expressed opinions about racism or equality. No political party is devoid of racism. Racially charged rhetoric, regardless of the speaker, does not make equal protection a political issue and it is troubling that the formal opinion referred to racial justice as a matter that is subject to current debate.

Judges are not members of a legal monastery who should be sequestered from engaging their community on critical issues of law, equity and equality. An outstanding example is our Chief Justice Tani Cantil-Sakauye who is a leader in civics education. Last year she received the Sandra Day O'Connor Award for Advancement in Civics Education in part due to her work inspiring California judges to engage with public school students about democracy, civics, and justice. Judges also teach at colleges and law schools, write academic and newsworthy articles, and testify in legislative proceedings about issues of law, justice, and access to our courts. The Judicial Canons, which seek to protect the reputational integrity, independence, and neutrality of the judiciary, are premised on the view that every judge is a guardian of justice who serves as a role model and leader in the community.

Our branch of government, particularly in California, is proudly diverse (race, gender, religion, age, sexual orientation, etc.), and that diversity symbiotically reinforces that we are not mere observers in the fight for racial justice and equality locally and nationally. Everything judges do in their personal and professional lives must demonstrate the absence of bias or prejudice, promote confidence in the judiciary, and exemplify integrity, which the Canons define as an "uprightness, and soundness of character." It is a fallacy to think our communities will have confidence in a judiciary that lacks the integrity to actively repudiate racism or threats to our constitutional rights. For those of us who have school-aged sons and daughters, it is also fair to assume that our communities will not lose confidence in the uprightness of our character if we elect to hold the hands of our children when they walk in a public demonstration for equality and justice.

The committee's opinion acknowledged that judges may feel a moral obligation to act, and quoted the California Supreme Court's June public Statement on Equality and Inclusion that succinctly and eloquently asserted: "We state clearly and without equivocation that we condemn racism in all its forms: conscious, unconscious, institutional, structural, historic, and continuing. We say this as persons who believe all members of humanity deserve equal respect and dignity; as citizens committed to building a more perfect Union; and as leaders of an institution whose fundamental mission is to ensure equal justice under the law for every single person."

The committee stated that judges are ethically permitted to follow suit, urging that because, "judges can maintain control of the substance and tone of a written statement, a writing that addresses issues of racial justice and equality may present fewer ethical risks than participating in a public demonstration or rally on those same issues." It is true that a measured, written statement can be powerful, and it poses fewer ethical risks than participating in a public demonstration. But the committee's opinion elevates fear of running afoul of ethical rules over the judicial courage to stand for what our oath, the Constitution, and our individual morals may demand of us.

The CJA guidance was correct when it reminded judges that, "there are no special Social Justice Ethics to learn. We simply apply our current Code of Ethics, along with a healthy dollop of common sense." That advice allows for straightforward answers to these ethical questions: May judges publicly speak, write, or act to condemn racism and to uphold the rights guaranteed by the First Amendment? Yes. May judges participate in demonstrations that denounce racism, support equal justice, and reinforce our constitutional rights to free speech and peaceable assembly? Yes. Are there some inherent ethical hazards in that participation? Yes, but as judges we are expected, as we are expected in all situations, to use our independence, integrity, and sound judgment to navigate those risks.

We Concur:

Hon. Michael Isaku Begert Hon. Rupert A. Byrdsong Hon. Jeffrey S. Brand Hon. Linda Colfax Hon. Halim Dhanidina Hon. Daniel Flores Hon. Lupe C. Garcia Hon. Brenda F. Harbin-Forte (Ret.) Hon. Rita F. Lin Hon. Jennifer S. Madden Hon. Michael M. Markman Hon. Victor A. Rodriguez Hon. Christine Van Aken Hon. Rubén A. Villalobos

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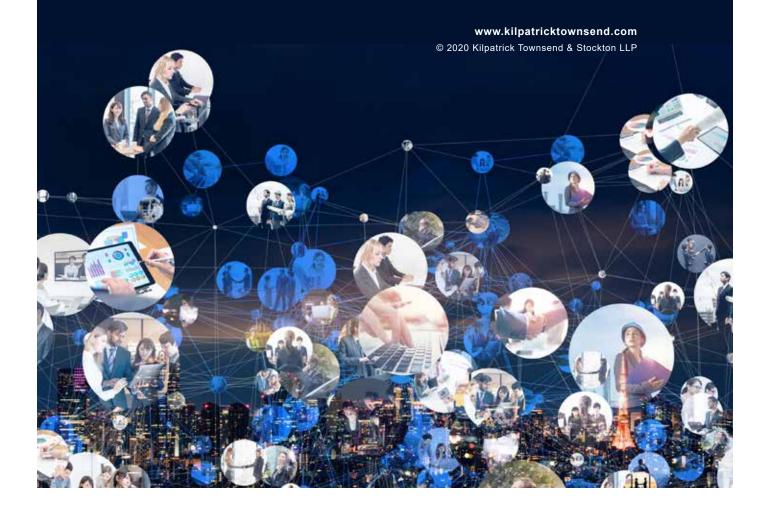
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