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## Federal Courts Prepare for Pandemic Influenza

By George B. Huff Jr.

What is the judiciary's strategy for continuing the business of the courts in the event of human-to-human transmission of H5N1 avian influenza? Due to the unique nature of the threat, judges and court administrators are emphasizing human capital, communications, and teleworking to assure the court's ability to perform essential functions during a pandemic.



## Threat of Pandemic Influenza

Pandemic influenza is a global outbreak that occurs when an influenza virus appears or “emerges” in the human population, causes serious illness, and spreads easily from person to person worldwide. Pandemic flu, which is caused by an influenza virus to which humans have no natural immunity, differs from seasonal flu, for which humans have varying degrees of immunity. In the last century, three influenza pandemics have swept the globe. In 1918, the first pandemic (sometimes referred to as the “Spanish flu”) killed more than 500,000 Americans and more than 20 million people worldwide. One-third of the U.S. population was infected, reducing the average life expectancy by 13 years. Pandemics in 1957 and 1968 killed tens of thousands of Americans and millions of people across the world. Scientists believe that viruses from birds played a role in each of those outbreaks. This article describes the actions that the judiciary has taken to prepare for continuity of operations in the event of the special threats posed by pandemic influenza—such as high levels of employee absenteeism and lengthy disruptions to court processes and proceedings—as compared to other forms of disasters or emergencies.

Today, we face a new pandemic threat. A strain of influenza—Influenza A (H5N1)—is spreading through bird populations across Asia, Africa, and Europe, infecting domesticated birds, including ducks and chickens, and long-range migratory birds. The first recorded appearance of H5N1 in humans occurred in Hong Kong in 1997. Since then, the virus has infected more than 200 people in the Eastern Hemisphere, resulting in a mortality rate of higher than 50 percent. At this time, avian influenza is primarily an animal disease; infections in humans are generally limited to individuals who come into direct contact with infected birds. If the virus develops the capacity for sustained, efficient, human-to-human transmission, however, it could spread quickly around the globe.

Whether the disease is avian flu or a new strain of influenza, experts predict that a pandemic could come in waves, each lasting six to eight weeks, with several months between the waves, with the total duration lasting from one to three years. The clinical disease attack rate among the overall population is expected to be 30 percent, precipitating a rate of 40 percent employee absenteeism at its peak as a result of personal illness, illness among family members, and fear of contagion.

### Strategy for Continuing the Business of the Courts

During the years since Sept. 11, 2001, and the anthrax attacks that followed, the judiciary has energetically established a comprehensive nationwide program to assure continuity of operations plans for all federal courts,<sup>1</sup> which include pandemic influenza annexes for each court type. To coordinate the courts’ planning responsibilities more effectively, the Administrative Office of the U.S. Courts (AOUSC) interacts with the executive branch entities that oversee national continuity planning and is also a member of the Continuity of Operations (COOP) Working Group, an interagency forum that works on contingency planning

for the national capital region under the auspices of the Federal Emergency Management Agency’s (FEMA) Office of National Security Coordination.<sup>2</sup> The individual courts are responsible for their own COOP plans, in accordance with the policy guidance provided by the AOUSC.<sup>3</sup>

In December 2005, based on preliminary guidance from the Homeland Security Council, the AOUSC provided initial information to all courts concerning pandemic influenza and COOP guidance to assist in planning for a pandemic.<sup>4</sup> Courts and court units were advised to review their COOP plans and to incorporate the planning assumptions, considerations, and guidance on preparing for an influenza pandemic. To cover manmade events such as terrorist attacks as well as natural disasters, in March 2006 the Judicial Conference of the United States delegated broader authority to the AOUSC’s director to grant waivers of miscellaneous fees, excluding filing fees, when emergency conditions are present, upon the request of the chief judge of the affected court.<sup>5</sup> In 2006, with the guidance provided by the AOUSC, judges and court unit executives in circuit, district, and bankruptcy courts across the country, with input from several court advisory groups, developed new information and procedures for an influenza pandemic.<sup>6</sup>

Judges and court executives looked at their COOP plans in terms of how judicial chambers, clerks of court, probation and pretrial offices, federal defenders, and court-related organizations would function during a pandemic, and how the impact could be minimized. For the courts’ new pandemic influenza template, a number of practical issues were identified, including establishing a chain of command, developing a capacity for working from remote sites, operating with reduced staffs, and reacting to decisions by public health officials. In fall 2006, the U.S. District Court for the Southern District of New York assumed the leadership role in New York City’s pandemic preparedness exercise; the court’s effort was sponsored by a Federal Executive Board that included federal, state, and local participants as well as people from the private sector.<sup>7</sup> Lessons learned from that pandemic exercise and others undertaken in 2006 helped the courts to define emergency techniques for telework and remote communications.

In November 2006, the AOUSC distributed templates for creating pandemic influenza annexes to the courts’ COOP plans that were already in place in most courts and court units. To create pandemic plan templates, the AOUSC’s Judiciary Emergency Preparedness Office worked in coordination with staff from the Department of Homeland Security, worked with consultants, and sought input from selected courts. Conventional COOP planning guidance is designed to help organizations withstand an all-hazards event and to ensure continuity of operation of essential functions for up to 30 days by relocating select staff to an alternative facility.<sup>8</sup> Because a pandemic will not be geographically or temporally bound and will not directly affect the physical infrastructure of an organization but will cause a high rate of employee absenteeism, the traditional COOP planning model does not adequately prepare for a pandemic scenario.

## The Homeland Security Council's Planning Assumptions

The Homeland Security Council's National Strategy for Pandemic Influenza Implementation Plan acknowledges that preparedness for a pandemic requires specialized planning.<sup>9</sup> However the council believes the COOP planning elements described in FEMA's Federal Preparedness Circular (FPC) 65, *Federal Executive Branch Continuity of Operations (COOP)*, remain applicable across all levels of government and can be used to develop pandemic-specific planning resources.

The council's implementation plan recommends that federal planning efforts should take into account the following assumptions:

- Susceptibility to the pandemic influenza virus will be universal.
- Efficient and sustained person-to-person transmission signals an imminent pandemic.
- The clinical disease attack rate will be 30 percent in the overall population during the pandemic. Illness rates will be highest among school-aged children (about 40 percent) and will decline with age. Among working adults, an average of 20 percent will become ill during a community outbreak.
- Some persons will become infected but not develop clinically significant symptoms. However, asymptomatic or minimally symptomatic individuals can still transmit the infection and can develop immunity to subsequent infection.
- The number of patients seeking medical care cannot be predicted with certainty; however, in previous pandemics about half of those who became ill sought care. With the availability of effective antiviral medications for treatment, this proportion may be higher during the next pandemic.
- Rates of serious illness, hospitalization, and death will depend on the virulence of the pandemic virus and will differ by an order of magnitude between more and less severe scenarios. Risk groups for severe and fatal infection cannot be predicted with certainty but are likely to include infants, the elderly, pregnant women, and persons with chronic or immuno-suppressive medical conditions.
- Rates of employee absenteeism will depend on the severity of the pandemic. In a severe pandemic, absenteeism attributable to illness, the need to care for family members who are ill, and fear of infection may reach 40 percent during the peak weeks of a community outbreak, with lower rates of absenteeism during the weeks before and after the peak. Certain public health measures (closing schools, quarantining household contacts of infected individuals, shutting down the operations of federal government agencies) are likely to increase rates of absenteeism.
- The typical incubation period (the interval between infection and onset of symptoms) for influenza is approximately two to five days.
- Individuals who become ill may shed the virus and transmit the infection for one-half to one day before

the onset of illness. Viral shedding and the risk of transmission will be greatest during the first two days of illness. Children will play a major role in transmitting the infection, because their illness rates are likely to be higher, they shed more of the virus over a longer period of time, and they control their secretions less well.

- On average, infected persons will transmit the infection to approximately two other people.
- Epidemics will last from six to eight weeks in affected communities.
- Multiple waves (periods during which community outbreaks occur across the country) of illness are likely to occur, with each wave lasting two to three months. Historically, the largest waves have occurred during the fall and winter, but the seasonality of a pandemic cannot be predicted with certainty.<sup>11</sup>

## Court-Specific Planning Assumptions

It is impossible to predict the evolution or impact of an influenza pandemic. For planning purposes, however, the pandemic influenza template assumes a worst-case scenario, in which the economic and societal disruption caused by an influenza pandemic is significant. The rate of employee absenteeism across multiple sectors is anticipated to be higher than 40 percent.

### All Courts

In a worst-case scenario, the judicial planners make the following assumptions:

- Emergency response actions taken by federal, state, and municipal agencies may impact all COOP plans.
- Social distancing and infection control measures, as well as fear of contagion, will affect the ability to hold court in public areas and to conduct court proceedings.
- Federal courthouses and buildings controlled by the General Services Administration (GSA) will be accessible, but right of entry may be limited.
- Access to the Internet by court employees, parties in a proceeding, and attorneys (including the ability to read notices and announcements on the courts' Web sites) will continue and will not be impaired.
- Congress will favorably consider legislation that would empower a chief district court judge to toll all civil statutes of limitation, including those in bankruptcy cases, during times of crisis.

### District Courts

In addition to these worst-case assumptions, if the rate of employee absenteeism reaches 40 percent or higher, district courts should assume the following:

- The court will focus on meeting statutory deadlines and will conduct emergency hearings as necessary; it will temporarily suspend other proceedings.
- The court may consider temporarily suspending most civil proceedings.
- U.S. attorneys will continue to file cases, and federal

public defenders and panel attorneys will continue to represent criminal defendants.

- The court will focus on criminal proceedings and develop procedures by which the most serious of significant criminal matters can be brought to court.
- If the rate of employee absenteeism reaches 40 percent or higher, or if the rate rises to a level at which the court is unable to function, the circuit can authorize judges in other districts to assist the court (that is, temporarily permit the intracircuit and intercircuit assignment of cases).
- Attorneys will continue using PACER and Case Management/Electronic Case Files (CM/ECF) unimpaired.
- CM/ECF could facilitate teleworking by some court personnel.

### **Bankruptcy Courts**

In addition to the worst-case assumptions listed above, if the rate of employee absenteeism reaches 40 percent or higher, bankruptcy courts should assume the following:

- Debtors will continue to file petitions for relief; creditors and debtors will continue to file pleadings and claims with the court, depending on the extent of the social disruption.
- U.S. trustees and case trustees will continue to oversee cases.
- Pro se debtors and most pro se creditors will not use CM/ECF; these groups do not use CM/ECF in normal circumstances.
- CM/ECF could facilitate teleworking by some court personnel.
- The 15 single-judge districts in the country will have a prearranged plan for pandemic assistance from other multiple-judge district(s) (referred to as the district's "sister court"). If the sole judge in a district is unavailable or the court in that district ceases to function, the circuit can assign judges from the sister court to preside over the proceeding. The availability of "distance participation technologies" will enable the parties in the case to conduct proceedings remotely with the judge from the sister court.
- Judicial districts with only two bankruptcy judges that consider it necessary to have a backup have identified this need and have made arrangements with a sister court.

### **Courts of Appeals**

In addition to considering the worst-case assumptions for all courts, courts of appeals will focus only on emergency matters, which involve immediate issues of life, liberty, and irreparable harm.

### **Template for a Pandemic Influenza Annex**

The template for each pandemic influenza annex is designed to achieve the following objectives:

- Protect the health and safety of judges, attorneys, parties, clerks and deputy clerks, marshals and deputy

marshals, court administrators and staff, as well as the general public.

- Ensure that the court's essential functions and services can be maintained in the event of significant and sustained employee absenteeism or attrition.
- Provide clear direction on the manner in which the court will support federal, state, and local responses to the pandemic and will help maintain the rule of law during the outbreak.
- Communicate pandemic preparedness, implementation, and response guidance, and messages to court-related organizations and to people who have an interest in the court's operation.

Typically, a court's COOP plan covers issues that deal with facilities and infrastructure; however, in order to achieve the objectives, the template for an influenza pandemic annex deals with issues relating to people and communications.<sup>12</sup> The template sets forth a strategy for continuing the court's business during a pandemic while minimizing the risks to court employees and others by using telecommunications, emergency teleworking, social distancing, and other procedures that provide for the continuity of operations. The template is designed to assist people in thinking through critical issues related to an influenza pandemic and to help them create comprehensive plans that will address these needs.

The content within the template is the basis for the annex to a court's COOP plan. Court emergency organizations may find that their planning requirements exceed the judiciary's current resources, but this situation does not preclude a court from planning its response to the best of its ability and identifying the resource shortfalls.

Pandemic planning efforts build upon existing COOP planning by the court and court-related organizations and expand to address particular issues. The resulting pandemic COOP annex is part of emergency preparedness and emergency operations plans and is used in concert with the COOP plans of other courts, court-related organizations, and people with interests in the court. The plans are located together and are available for reference during emergencies in order to ensure efficient and effective implementation.

Because implementing new procedures during an emergency will prove to be challenging during a pandemic, each court is encouraged to use its existing procedures for conducting conferences and hearings remotely. Expanded use of installed audio- and videoconferencing capabilities will assist in completing actions related to cases. These capabilities can also be used to support public access by attorneys and others participating in the case. Public access via the Internet will enable conferees to communicate by using a variety of devices, such as personal digital assistants, cellular devices, and telephones. Teleconferencing and videoconferencing aids make it possible for judicial officers to conduct sidebars, enable the electronic sound recording of the proceedings in order to create an official transcript, and provide for an ongoing accounting that all participants are connected and

have not dropped off. Where or when the court's tele- or videoconferencing capabilities are unavailable or not deemed to be essential, the court may conduct Web-based, Internet videoconferences.<sup>13</sup> To prepare for teleworking by court employees during an emergency, each court must conduct a needs assessment to determine that all the tools needed to sustain working from remote sites are in place; these tools include equipment, support, telecommunications, network capacity, Web-enabled applications and other Web capabilities and readiness, videoconferencing, software, training, and other tools.

To achieve the objectives of the plan and to implement this strategy, each court develops its own annex to ensure continuity of operations during a pandemic. This annex is developed by identifying and enumerating the court's essential functions (that is, those functions that enable the court to exercise its statutory authorities during an emergency) in advance, developing a clear understanding of the internal and external forces that are expected to complicate the execution of essential functions, and by describing how the court will perform essential functions and deliver essential services. It is important to emphasize that—in the area of communications—testing, training, and exercising the strategy is the way to make sure that everyone participating in the communications linkups has a common level of technology that interoperates with that of others. Failure to consider this in advance and to test it will lead to problems under actual pandemic conditions or in other emergencies. If one party cannot join a conference, it may prevent the proceedings from continuing, or result in uneven or unfair practices.

### **Emphasis on Human Capital, Communications, and Teleworking**

As with conventional COOP planning, continuity planning for a pandemic is built on the 11 program elements identified by FEMA's Office of National Security Coordination and published in FPC-65.<sup>14</sup> To the extent that the court's overarching COOP plan provides sufficient guidance in the program elements for pandemic planning, the court's emergency organization may refer to the overarching COOP plan. However, because of the unique nature of a pandemic influenza threat, human capital, communications, and teleworking will need to be emphasized in order to ensure the court's ability to perform essential functions during a pandemic.<sup>15</sup>

#### ***Human Capital***

A fundamental concept underlying continuity of operations is an organization's ability to develop, update, exercise, and implement comprehensive plans to protect its workforce. The threat to the health of office personnel and their families—and the subsequent impact on the availability of employees—is the primary threat to the court's continuity of operations during a pandemic. Planners will implement policies to help protect their personnel and to ensure that staff members can carry on the work of the courts wherever possible and through whatever means are available.<sup>16</sup> Examples of human capital

considerations developed in 2006 by the Office of Personnel Management to support federal employees in the event of an influenza pandemic are locality-based comparability and evacuation payments during a pandemic,<sup>17</sup> including emergency worksite determinations and relaxed sick leave rules to assist employees who may be required to care for family members.<sup>18</sup>

The court's emergency organization listed in the COOP plan identifies both the personnel who are responsible for continuing the essential functions of each office and court unit and the personnel who provide planning, logistics, and administrative support for the emergency operations. The emergency organization roster supports a rate of employee absenteeism of 40 percent or higher and sufficiently ensures training and cross-training of backup personnel.

The court carefully assesses its essential functions, both internally and externally, to determine which staff, materials, and equipment are absolutely necessary to ensure that the functions can be performed during a pandemic. The contractors, suppliers, shippers, resources, and other businesses with which the court interacts to perform these essential functions are identified in the plan, along with contingency plans for delivering the services and supplies.

The following list provides examples of essential functions performed by judges and court employees during a pandemic:

- Holding of critical hearings, such as criminal presentments, temporary restraining orders, time sensitive contested matters or adversary proceedings, will be accomplished by video or teleconferencing, or by a sister court within the same district or an adjacent one.
- Jury trials will need to be suspended, and courts will have to coordinate with appropriate persons to determine suitable procedures for processing and detaining offenders and defendants.
- Teleworking by judges and court employees will be used to sign and issue court orders, such as orders excluding time under the Speedy Trial Act.
- If the pandemic severely affects travel in an area for more than 30 days, criminal presentments and Section 341 meetings will be held by telephone or videoconference, through the use of interrogatories, or through a combination of these methods. Local program offices of U.S. trustees will coordinate with the clerk of the district court regarding the provision of notices of meetings. During a pandemic, the Executive Office of U.S. Trustees will coordinate with each U.S. trustee regarding waivers of credit counseling and debtor education requirements.
- Court employees will use teleworking to disseminate information about emergency procedures and deadlines by posting and updating the suspension of civil proceedings and will process information about new filings, hearings, and Section 341 meetings on the court's Web site; notices by publication will continue to be made by newspapers and legal journals, if possible.

- Accepting documents for filing via Electronic Case Files (ECF) will be accomplished by employees teleworking and by paper/diskette filings via a drop box outside the court facility using a disease-resistant drop box, if one is available.
- After receiving paper filings, court employees will scan them into ECF and prepare docket entries.
- For electronic filings, employees will use teleworking to perform quality control and related tasks (issuing notices of deficiencies, for example) and assign filings to judges and trustees.
- For issuing notices, court employees who are teleworking will prepare notices for e-mailing and surface mailing by the bankruptcy noticing center's contractor.
- Collecting and receiving fees will be accomplished by teleworking by accepting credit card payments via ECF; for paper filings, employees at the court facility will continue to accept checks and deposit funds.
- If possible, teleworking will be used to docket filings; court employees will perform quality control and make docket entries for electronic filings, and for paper filings, employees will perform quality control after scanning into ECF.
- For pro se filers, court employees will continue to offer personal assistance using social distancing and audio assistance communication techniques, if possible. Employees will assist pro se filers at the court facility with requests for in forma pauperis status; via teleworking they will scan and docket paper filings into ECF.
- Court employees will issue discharges and check for pre-discharge requirements by teleworking and then send the applicable notices to the bankruptcy noticing center.

A pandemic may involve a situation requiring devolution—the transfer of the responsibility to conduct the court's essential functions to the personnel of another court. This situation assumes that a court's emergency organization and backup personnel are incapacitated. During a pandemic, devolution may be the only viable way to continue the court's essential functions; therefore, devolution plans must be developed, coordinated, and tested. The following list provides examples of issues involving devolution that should be considered:

- Within districts, courts should take into account the ability of the circuit chief judge or judicial council to authorize the cross-designation of district and bankruptcy judges from other districts within the circuit.
- Within circuits, plans should be developed for courts to assume another court's workload.
- Within circuits, plans should address the fact that the circuit chief judge may designate district or circuit judges to serve as district judges in any district within the "home" circuit.
- Within districts, such devolutions may invoke the provisions of the Federal Judiciary Emergency Special Sessions Act of 2005.<sup>19</sup>

A pandemic may also require reconstitution—the ability of an organization to recover from a catastrophic event and consolidate the necessary resources that allow it to return to a fully functional capacity. Pandemic COOP is unlike traditional COOP because repeated activation of a plan may be required as successive pandemic waves affect the court's operations.

Courts may consider several measures to accomplish reconstitution, recovery, and preparation for subsequent waves of influenza:

- Courts should establish processes for assessing sufficiency of resources and the funding capabilities needed to commence reconstitution efforts.
- "Hot-wash" sessions should be held to share and capture lessons learned and best practices and plans for integrating them into future pandemic COOP activation.
- Plans should be made for replacing employees who are unable to return to work and for prioritizing hiring efforts, including recalling retired employees and using contractors' services in an emergency.
- Courts should develop processes and procedures for ensuring that courthouses and court facilities are safe for employees to return to normal operations and for observing the appropriate social distancing measures and infection control measures.

### ***Communications and Teleworking***

The success of a viable COOP capability to respond to a pandemic will depend on the ability of the court's emergency organization to communicate remotely and to telework from an alternative facility or from employees' homes. Public health measures such as strict social distancing measures and quarantines may force courthouses and court-related facilities to shut down. Judicial planners are considering the implications for courts of the executive branch's new information technology and telecommunications guidelines affecting teleworkers and arrangements for alternative workplaces.<sup>20</sup>

Based on the severity of an infectious or viral pandemic outbreak, the court will determine the extent to which hearings and proceedings will be held in the normal course of operations at the courthouse or will be conducted remotely. Any order of the court deferring hearings and proceedings until a future date (for example, a "pandemic hearing order"), with appropriate accompanying orders tolling statutes of limitations and extending deadlines, will be posted on the court's public Web page and also outside of the clerk's office. In the most severe situations, the court can determine that it is in the best interest of the community to stay all matters for a designated period of time. The court can also make provisions to hear emergency matters only and may require counsel to certify the emergency nature of the matter to be heard. Emergency matters can include, but are not limited to, initial appearances in criminal cases, temporary restraining orders, first-day orders in Chapter 11 cases, motions for relief from stay or turnover of property to protect the property from loss or destruction, motions for relief from stay

to pursue matters in other courts (such as those in domestic courts), and other types of emergency matters as determined by the court. All matters that are not deferred or stayed by the pandemic hearing order will be scheduled for hearings in a courtroom or at a remote site.

It is important to keep in mind advanced teleconferencing or videoconferencing systems will work effectively only if the same capabilities—and often the same vendor products—and support for the same standards are available on all ends of the connections. If the participating attorneys or clients do not have the same system, the advanced capabilities may not work and all systems may have to default to minimum capabilities. Courts should contact their local bar association to try to develop acceptable changes in court business necessitated by a pandemic. Courts should also start examining local rules that would need to be changed. In addition, courts should consider asking their local bar association to help develop a list of equipment standards that would be supported by the court when it has to conduct business from nontraditional locations. The courts should encourage opposing counsel to cooperate with each other and with pro se parties in scheduling proceedings at a remote site during an emergency; cooperation is especially important for scheduling, establishing access to telephone lines, ensuring capabilities for conference calls, recording proceedings, and sharing other information pertinent to participation in the hearings or proceedings.

As the severity of the pandemic outbreak subsides, the court can add nonemergency proceedings to its calendar at a pace determined by the community's social and health circumstances. It is advisable for the court to determine an orderly way to schedule matters that have been stayed (such as, matters that have been stayed for the longest period of time and categories of proceedings that require the court's attention as soon as possible after the pandemic outbreak subsides). If a pandemic outbreak recurs in waves, the court can extend or reinstate its pandemic hearing order.

Once the court has determined that it is prudent to allow people to assemble in the courtroom, the court will post a notice on its Internet Web page and outside the clerk's office. The notice will serve to inform the public that court will commence live sessions on a particular date and that all stayed matters will be scheduled in due course with notice given to the parties involved in each matter.

Teleworking will be integrated into COOP planning, including plans for a pandemic health crisis. Court employees will engage in teleworking to the extent possible during a pandemic to enable that staff members and court units to provide electronic support to the judicial officers who will be working at remote sites. The following list provides examples of issues that should be considered when developing policies for teleworking during emergencies:

- The court's management will determine which essential functions and services can be accomplished via teleworking and establish the procedures that will be followed to accomplish those functions.
- The court's management will complete a teleworking needs assessment to determine all equipment, support, telecommunications, network capacity, Web-enabled applications and other Web capabilities and readiness, videoconferencing, software, training, and other tools needed for effective teleworking for several months. The assessment should be reviewed and updated as applicable to provide maximum flexibility of teleworking options.
- Managers will ensure that emergency organization personnel and senior staff who are required to telework have been issued the proper equipment to perform necessary functions; this equipment includes cellular telephones, laptop computers, and remote access to the court's computer network.
- Employees designated to work from home during an emergency should telework frequently enough to ensure that all systems function smoothly. Employees using computers and other information technology tools while teleworking will need effective support during working hours; this should be taken into account when planning for a distributed workforce.
- Following the circuit's policy dealing with information technology, as applicable, the court's team responsible for information technology needs to introduce system priorities so that the network can identify and allocate bandwidth resources based on mission needs (for example, virtual private network prioritization for judges, senior staff, clerks, and other users).
- The court should conduct regularly scheduled testing and training exercises of teleworking procedures.
- Members of the information technology teams for circuit and bankruptcy courts may want to pool their resources and combine efforts. The court's team should limit the number of staff members working onsite in an effort to reduce the risk of exposure to the virus.

## Conclusion

The federal judiciary has taken the appropriate first steps to prepare for continuity of operations in the event of the special threats posed by a pandemic influenza. These steps are consistent with the executive branch's guidance issued by the Homeland Security Council, the Centers for Disease Control and Prevention, and other authorities. Leaders at all levels are preparing for the worst case and hoping for the best results. The Administrative Office of the U.S. Courts, judges, law professionals, and court employees recognize the vital importance of protecting the health and safety of judges, attorneys, parties to cases, clerks and deputy clerks, marshals and deputy marshals, court administrators and staff, and the general public. To continue the business of the courts, the judiciary recognizes the need to coordinate efforts with various levels of government and to communicate with the nation's legal communities during a catastrophic public health emergency. In 2007 and beyond, federal courts will continue testing, training, and exercising their COOP plans as a part of the nation's resolve to meet the threat of pandemic influenza. How the courts and legal commu-

nities respond to the challenge of a pandemic is as much a part of preparedness as what is done before or after the emergency passes. **TFL**

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## Endnotes

<sup>1</sup>See George B. Huff Jr., *Planning for Disasters Emergency Preparedness, Continuity Planning, and the Federal Judiciary*, 45 JUDGES' J. 1 (Winter 2006).

<sup>2</sup>The Judicial Conference's Executive Committee created the Committee on Judicial Security, effective October 1, 2005, "to devote its efforts entirely to security matters." Admin. Office of U.S. Courts, *Report of Proceedings of the Judicial Conference of the United States* 5–6 (Sept. 20, 2005). The Committee has overall responsibility for courts' contingency guidelines, but program implementation is the work of the AOUSC's Judiciary Emergency Preparedness Office and the individual courts.

<sup>3</sup>To assist court administrators with continuity planning, in December 2002, the AOUSC distributed three model templates for COOP plans, covering circuit, district and bankruptcy courts. See Huff, *supra* note 1, at 9.

<sup>4</sup>Leonidas Ralph Mecham, director, Administrative Office of the U.S. Courts, Memorandum to all chief judges, U.S. courts (Dec. 22, 2005).

<sup>5</sup>The Judicial Conference noted that this broader authority would be consistent with recent legislation that permits courts to hold proceedings outside their geographic boundaries in time of emergencies and applies to all emergency conditions. Administrative Office of the U.S. Courts, *Report of Proceedings of the Judicial Conference of the United States* (March 14, 2006), available at [www.uscourts.gov/06MarProceedings.pdf](http://www.uscourts.gov/06MarProceedings.pdf).

<sup>6</sup>The statutory authority for the judiciary's policy for continuity activities is based on the inherent administrative duties of the AOUSC's director, as supervised and directed by the Judicial Conference, and also on the inherent directive responsibilities of each circuit judicial council to exercise administrative control of the nonjudicial activities in its jurisdiction. See 28 U.S.C. §§ 604, 332 (2007).

<sup>7</sup>District Court Executive Clifford Kirsch of the Southern District of New York chairs the Federal Executive Board in New York City. Communities across the nation are planning for a potential pandemic; community policies will impact the operations of government entities in their jurisdiction. There are 28 Federal Executive Boards in major centers of federal activity (Albuquerque–Santa Fe, Atlanta, Baltimore, Boston, Buffalo, Chicago, Cincinnati, Cleveland, Dallas–Fort Worth, Detroit, Honolulu, Houston, Kansas City, Los Angeles, Miami, Minneapolis–St. Paul, Newark, New Orleans, New York, Oklahoma City, Philadelphia, Pittsburgh, Portland, St. Louis, San Antonio, San Francisco, and Seattle) that provide a useful mechanism for coordinating federal activities

with those of the community. More information is available at [www.feb.gov](http://www.feb.gov).

<sup>8</sup>See Department of Homeland Security, Federal Emergency Management Agency, Office of National Security Coordination, *Federal Preparedness Circular 65, Federal Executive Branch Continuity of Operations (COOP)* (June 15, 2004), available at [www.fema.gov/government/coop/index.shtml](http://www.fema.gov/government/coop/index.shtml) (last visited Feb. 20, 2007).

<sup>9</sup>Homeland Security Council, *National Strategy for Pandemic Influenza Implementation Plan* (May 2006), available at [www.pandemicflu.gov](http://www.pandemicflu.gov) (last visited Feb. 20, 2007).

<sup>10</sup>*Id.* at 171, 188.

<sup>11</sup>Homeland Security Council, *supra*, note 9, at 25.

<sup>12</sup>*Planning for a Pandemic*, 38/12 THE THIRD BRANCH (Dec. 2006), [www.uscourts.gov/ttb/12-06/planning/index.html](http://www.uscourts.gov/ttb/12-06/planning/index.html) (last visited Feb. 20, 2007).

<sup>13</sup>At this time, the AOUSC cannot endorse any specific commercial products providing these capabilities. In addition, the current Data Communications Network (DCN) infrastructure is not optimized to provide support for advanced teleconferencing and videoconferencing systems. A combination of more capacity (bandwidth) and network class of service/quality of service capabilities along with the necessary network management tools are needed to ensure consistent audio and video fidelity. These advances are being planned for the DCN in the future.

<sup>14</sup>Department of Homeland Security, Federal Emergency Management Agency, Office of National Security Coordination, *supra*, note 8.

<sup>15</sup>See also U.S. Department of Justice, Bureau of Justice Assistance, *Guidelines for Pandemic Emergency Preparedness Planning: A Road Map for Courts* (March 2007), available at [www.ojp.usdoj.gov/BJA/pandemic/Pandemic\\_Road\\_Map.pdf](http://www.ojp.usdoj.gov/BJA/pandemic/Pandemic_Road_Map.pdf) (last visited Mar. 12, 2007).

<sup>16</sup>See generally Centers for Disease Control and Prevention, *Interim Pre-Pandemic Planning Guidance: Community Strategy for Pandemic Influenza Mitigation in the United States* (February 2007), available at [www.pandemicflu.gov/plan/community/commitigation.html](http://www.pandemicflu.gov/plan/community/commitigation.html) (last visited Feb. 20, 2007) (explaining nonpharmaceutical measures to help delay or mitigate the spread of influenza and introducing the Pandemic Severity Index, a five-category predictive tool based on the case fatality ratio (the proportion of deaths among clinically ill persons)).

<sup>17</sup>*Interim Regulations: Locality-Based Comparability Payments and Evacuation Payments*, 71 FED. REG. 47,692 (Aug. 17, 2006) (codified as Evacuation Payments During a Pandemic Health Crisis at 5 C.F.R. § 550.409 (2007)).

<sup>18</sup>*Absence and Leave*, 71 FED. REG. 47,693 (Aug. 17, 2006) (codified at 5 C.F.R. § 630.401 (2007)).

<sup>19</sup>See 28 U.S.C. §§ 141(b), 152(c)(2), 636(a)(2007).

<sup>20</sup>*Information Technology and Telecommunications Guidelines for Federal Telework and Other Alternative Workplace Arrangement Programs*, 72 FED. REG. 9,532-01 (Mar. 2, 2007), 2007 WL 618797. (Among other provisions, the General Services Administration's guidance permits executive agencies to install and pay for lines in employees' residences and links teleworking and the need to be prepared for COOP and disaster response situations.)