ADVISORY COMMITTEE
ON
APPELLATE RULES

April 7, 2021

ADVISORY COMMITTEE ON APPELLATE RULES
Meeting of April 7, 2021
Via Teams

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TAB 1A

ADVISORY COMMITTEE ON APPELLATE RULES

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Lloyd D. George U.S. Courthouse 333 Las Vegas Boulevard South Las Vegas, NV 89101-7065	Professor Edward Hartnett Richard J. Hughes Professor of Law Seton Hall University School of Law One Newark Center Newark, NJ 07102

Members

Honorable Stephen J. Murphy III United States District Court Theodore Levin U.S. Courthouse 231 West Lafayette Boulevard Detroit, MI 48226	Honorable Elizabeth Prelogar Acting Solicitor General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530
Professor Stephen E. Sachs Duke Law School 210 Science Drive Box 90360 Durham, NC 27708-0360	Danielle Spinelli, Esq. Wilmer Cutler Pickering Hale and Dorr LLP 1875 Pennsylvania Avenue, NW Washington, DC 20006
Honorable Paul J. Watford United States Court of Appeals Richard H. Chambers Building 125 South Grand Avenue Pasadena, CA 91105-1621	Honorable Richard C. Wesley United States Court of Appeals Livingston County Government Center Six Court Street Geneseo, NY 14454-1043
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Liaisons

Honorable Bernice B. Donald (*Bankruptcy*) United States Court of Appeals Clifford Davis and Odell Horton Federal Building 167 North Main Street Memphis, TN 38103	Honorable Frank M. Hull (*Standing*) United States Court of Appeals Elbert P. Tuttle Court of Appeals Building 56 Forsyth Street, NW Atlanta, GA 30303

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Advisory Committee on Appellate Rules

Members	Position	District/Circuit	Start Date	End Date
Jay S. Bybee Chair	C	Ninth Circuit	Member: 2017 Chair: 2020	---- 2023
Stephen J. Murphy III	D	Michigan (Eastern)	2015	2021
Elizabeth Prelogar*	DOJ	Washington, DC	----	Open
Stephen E. Sachs	ACAD	North Carolina	2016	2022
Danielle Spinelli	ESQ	Washington, DC	2017	2023
Paul J. Watford	C	Ninth Circuit	2018	2021
Richard C. Wesley	C	Second Circuit	2020	2023
Lisa B. Wright	ESQ	Assistant Federal Public Defender (Appellate) (DC)	2019	2022
Edward Hartnett Reporter	ACAD	New Jersey	2018	2023

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* Ex-officio - Acting Solicitor General

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. James C. Dever III *(Criminal)* Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1B

	FRAP Item	Proposal	Source	Current Status
7	18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting Draft approved for submission to Standing Committee 4/18 Draft approved for publication by Standing Committee 6/18 Discussed at 10/18 meeting Final approval for submission to Standing Committee 4/19 Approved by Standing Committee 6/19 Approved by Judicial Conference 9/19 Submitted to Supreme Court 10/19 Approved by Supreme Court 4/20 Effective 12/20
6	16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Approved by Standing Committee 6/20 Submitted to Supreme Court 10/20
4	17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee formed Discussed at 4/18 meeting and continued review Discussed at 10/18 meeting and continued review Draft approved for submission to Standing Committee 4/19 Draft approved for publication by Standing Committee 6/19 Discussed at 10/19 meeting Final approval for submission to Standing Committee 4/20 Remanded by Standing Committee 6/20 Discussed at 10/20 meeting
4	18-AP-E	Provide privacy in Railroad Retirement Act cases as in Social Security cases	Railroad Retirement Board	Discussed at 4/19 meeting and subcommittee formed Discussed at 10/19 meeting and continued review Draft approved for submission to Standing Committee 4/20 Draft approved for publication by Standing Committee 6/20 Discussed at 10/20 meeting

	FRAP Item	Proposal	Source	Current Status
1	18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting and subcommittee formed Discussed at 10/18 meeting Discussed at 4/19 meeting Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting
1	19-AP-E	Electronic Filing Deadlines	Hon. Michael Chagares	Discussed at 6/19 meeting of Standing Committee and joint committee formed Discussed at 10/19 meeting Discussed at 4/20 meeting Discussed at 10/20 meeting
1	19-AP-C	IFP Standards	Sai	Initial consideration 10/19 Discussed at 4/20 meeting and subcommittee formed Discussed at 10/20 meeting
1	20-AP-A	Relation Forward of Notices of Appeal	Bryan Lammon	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting
1	None assigned	Rules for Future Emergencies	Congress (CARES Act)	Initial consideration and subcommittee formed 4/20 Discussed at 10/20 meeting
1	20-AP-D	IFP Forms	Sai	Initial consideration 10/20 and referred to IFP subcommittee
1	20-AP-E	Rule 3	Sai	Initial consideration 10/20 and referred to Relation Forward subcommittee
1	20-AP-G	Amicus Briefs and Recusal	Alan Morrison	Initial consideration 4/21
1	21-AP-A	Adding Time After Service of Judgment	Greg Patmythes	Initial consideration 4/21
1	21-AP-B	IFP Forms	Sai	Initial consideration 4/21
1	21-AP-C	Amicus Disclosures	Senator Whitehouse & Representative Johnson	Issue noted and subcommittee formed 10/19 Initial consideration of suggestion 4/21
0	None assigned	Review of rules regarding appendices	Committee	Discussed at 11/17 meeting and a subcommittee formed to review Discussed at 4/18 meeting and removed from agenda Will reconsider in 4/21
0	19-AP-B	Decisions on Unbriefed Grounds	AAAL	Initial consideration 10/19 and subcommittee formed Discussed at 4/20 meeting and to be considered in 4/23

	FRAP Item	Proposal	Source	Current Status
0	19-AP-G	Titles in Official Capacity Actions	Sai	Initial consideration 4/20 Discussed at 4/20 meeting and tabled pending Clerks' information Discussed at 10/20 meeting and removed from agenda
0	20-AP-B	Incorporate Civil Rule 11	Sai	Initial consideration 10/20 and removed from agenda
0	20-AP-C	Pro Se Electronic Filing	Usha Jain	Initial consideration 10/20 and tabled pending consideration by Civil Rules Committee

0 removed from agenda or deferred to future meeting
1 pending before AC prior to public comment
2 approved by AC and submitted to SC for publication
3 out for public comment
4 pending before AC after public comment
5 final approval by AC and submitted to SC
6 approved by SC
7 approved by SCOTUS

TAB 1C

Effective December 1, 2020

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2020)
- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Amendment (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Subdivision (c) amended to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms rule to proposed amendment to Appellate Rule 26.1.	AP 26.1
BK 8013, 8015, and 8021	Eliminated or qualified the term "proof of service" when documents are served through the court's electronic-filing system, conforming the rule to the 2019 amendments to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, amended to require that the parties confer about the matters for examination before or promptly after the notice or subpoena is served. The subpoena must notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Subdivision (b) amended to expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The phrase "crimes, wrongs, or other acts" replaced with the original "other crimes, wrongs, or acts."	

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2020)

REA History:

- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	The proposed amendment to Rule 3 addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendment changes the structure of the rule and provides greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendment to the proposed amendment to Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Conforming amendments to the proposed amendment to Rule 3, creating Form 1A and Form 1B to provide separate forms for appeals from final judgments and appeals from other orders.	AP 3, 6
BK 2005	The proposed amendment to subsection (c) of the replaces the reference to 18 U.S.C. § 3146(a) and (b) (which was repealed in 1984) with a reference to 18 U.S.C. § 3142.	
BK 3007	The proposed amendment clarifies that credit unions may be served with an objection claim under the general process set forth in Rule 3007(a)(2)(A) - by first-class mail sent to the person designated on the proof of claim.	
BK 7007.1	The proposed amendment would conform the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	
BK 9036	The proposed amendment would require high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. (These proposed amendments were published Aug 2019 – Feb 2020).	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

TAB 1D

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; Referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	• 1/4/21: Introduced in House; Referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
COVID-19 Bankruptcy Relief Extension Act of 2021	**S.473** *Sponsor:* Durbin (D-IL) *Co-sponsor:* Grassley (R-IA) **H.R.1651** *Sponsor:* Nadler (D-NY) *Co-sponsor:* Cline (R-VA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/senate-bill/473/text **Summary** The bill would amend the CARES Act and the CAA of 2021 to extend certain temporary provisions of those acts (notably, an expanded definition of debtors who can take advantage of Chapter 11, Subchapter V of the Bankruptcy Code) until March 27, 2022.	• 2/25/21: S.473 Introduced to Senate and referred to Judiciary Committee • 3/8/21: HR.1651 introduced to the House and referred to Judiciary Committee • 3/18/21: H.R. 1651 passed the house.

TAB 2

TAB 2A

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on January 5, 2021. The following members participated in the meeting:

Judge John D. Bates, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia A. Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); Dr. Emery G. Lee and Dr. Tim Reagan, Senior Research Associates at the FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue. Andrew Goldsmith and Jonathan Wroblewski were also present on behalf of the DOJ.

OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He began by reviewing the technical procedures by which this virtual meeting would operate. He next acknowledged recent changes in the leadership of the Rules Committees. Judge Bates introduced himself, acknowledging that this was his first Standing Committee meeting as Chair, and thanked Judge David Campbell for his wonderful leadership and insight. Judge Bates next recognized new Advisory Committee Chairs: Judge Robert Dow is the new Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee is the new Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz is the new Chair of the Advisory Committee on Evidence Rules. Judge Bates noted next that Rebecca Womeldorf, Secretary to the Standing Committee, would be leaving the Rules Committee Staff to work as the Reporter of Decisions to the Supreme Court. Judge Bates thanked Ms. Womeldorf for her friendship and years of work with the Rules Committees.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the June 23, 2020 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2020. Also included are the rules approved by the Judicial Conference in September 2020 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2021, provided the Supreme Court approves them and Congress takes no action to the contrary. Other rules included in the chart are currently out for public comment. Julie Wilson of the Rules Committee Staff explained that a hearing on the proposed Supplemental Rules for Social Security Review Actions currently out for comment is scheduled for January 22, 2021.

JOINT COMMITTEE BUSINESS

Emergency Rules Project Pursuant to the CARES Act

Judge Bates introduced this agenda item, included in the agenda book beginning at page 91, which has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He began by highlighting the fact that Chief Justice Roberts had recognized the role of the Rules Committees in his end of the year address on the state of the federal courts. The Chief Justice complimented their efforts thus far, particularly those members who had worked on the videoconferencing provisions included in the CARES Act. Judge Bates also thanked everyone who has worked on this project for their superb efforts. He noted the particular efforts of Professor Capra in coordinating the project across committees and of both him and Professor Struve in preparing the presentation of the advisory committees' suggestions for today's meeting.

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the

Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In the intervening months, each advisory committee – except for the Evidence Rules Committee – developed draft rules for discussion at this Standing Committee meeting. The goal at this meeting was to present the draft rules and to seek initial feedback from the Standing Committee. Comments on details are welcomed, but the focus would primarily be on broader issues. Overarching questions for the members to keep in mind included what degree of uniformity across rules would be desirable and who should have authority to declare an emergency or enact emergency rules. At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

Professor Struve began the presentation of the emergency rules proposals. She echoed Judge Bates's thanks to all those who have brought the project to this stage, especially the advisory committee chairs, reporters, relevant subcommittee members, and Professor Capra. She explained the structure by which the day's discussion would proceed. The discussion would be segmented by topic. Professors Struve and Capra would introduce each topic and then advisory committees' reporters would be invited to summarize their committees' views on that topic. The topic would then be opened for general discussion among the Standing Committee members.

Professor Capra thanked the advisory committee members and reporters and described the history of the project. He explained that the Evidence Rules Committee would not be presenting a proposal. Its members determined early in the process that there was no need for an emergency rule because the Evidence Rules are already sufficiently flexible to accommodate emergencies.

"Who Decides" Issue. This first topic concerns what actor or actors decide whether an emergency is declared. The advisory committees' subcommittees decided early in the process that a rules emergency should not be tied to a declaration of a presidential emergency. Although the CARES Act relies on a presidential declaration of emergency, and instructed the Rules Committees to consider emergency rules in that context, the advisory committees all agreed that the judiciary would benefit from being able to respond to a broader set of emergencies, and that limiting the emergency rules to only a presidentially declared emergency would not make sense. The advisory committees agreed that the Judicial Conference should have the authority to declare a rules emergency, but they were not in agreement on whether other actors should share this authority. The draft amendment to Appellate Rule 2 grants such authority to "the court" as well, and provides that the chief circuit judge can exercise the same authority unless the court orders otherwise. Draft Bankruptcy Rule 9038 grants the authority first to the Judicial Conference either for all federal courts or for one or more courts, second to the chief circuit judge for one or more courts within the circuit, and third to the chief bankruptcy judge for one or more locations in the district.

Professor Gibson and Judge Dennis Dow summarized the position of the Bankruptcy Rules Committee. Professor Gibson explained that the Advisory Committee thought there could be emergencies of different scope – some might be on a national scale like the COVID-19 pandemic, others might be confined to a circuit, a state, or to one district or part of a district within a state. The Advisory Committee thought it was more efficient for local actors to be able to declare an emergency and to act more quickly to respond to a localized emergency. She noted that the Advisory Committee was not concerned that overeager judges would be too quick to declare an emergency, and pointed out that paragraph (b)(4) of draft Bankruptcy Rule 9038 would allow the Judicial Conference to review and revise any declaration. A majority of the Advisory Committee favored giving actors at all three levels the authority to declare an emergency. Judge Dow explained that his committee thought that in the case of a localized emergency, decisionmaking should be at the local level, where the effects of the situation would be felt. He thought this was similar to the proposal put forward by the Appellate Rules Committee. He emphasized the stakes of the issue – draft Rule 9038 only deals with procedural issues, not substantive rights. Finally, he noted that the bankruptcy draft rule balances the need for rapid response with the opportunity for modification after the fact by the Judicial Conference. Professor Capra added that because the draft rule allows a number of actors to declare an emergency, it had to be drafted differently from the other advisory committees' proposals, which introduced some additional lack of conformity.

Judge Bybee and Professor Hartnett explained the Appellate Rules Committee's proposal. Judge Bybee began by noting that Appellate Rule 2 already allows a court of appeals to "suspend any provision of" the appellate rules "in a particular case." The proposed appellate emergency rule would amend Appellate Rule 2 to allow the courts of appeals to make these kinds of changes across all cases. The Appellate Rules Committee thought it was important to allow the chief judge of a circuit or a court to make these changes. Most of the appellate rules, like the bankruptcy rules, are procedural, limiting any impact on substantive rights when the rules are suspended. Jurisdiction, for example, would never be affected. Further, Judge Bybee explained the Advisory Committee's view that courts of appeals are accustomed to having to deal collegially. This would provide a check on the judgment of a chief judge. He added that the Advisory Committee preserved the backup option of allowing the Judicial Conference authority to exercise the same rule-suspending powers. Professor Hartnett noted the long history of flexibility in the appellate rules. Rule 2 has existed since the Appellate Rules were first promulgated and the circuit courts' authority to suspend their rules predates the Appellate Rules. The nature of a court of appeals is that it speaks with one voice and its procedures are designed to that end. Finally, Professor Hartnett addressed the dignity of the courts of appeals, explaining that there is no right of appeal from these courts. They are courts of last resort and courts with that authority ought to be able to suspend the rules.

Judge Kethledge and Professors Beale and King spoke on behalf of the Criminal Rules Committee. That committee determined that the Judicial Conference was the ideal body to make emergency declarations because it has input from around the country and authority to act. The Criminal Rules Committee has long been the recipient of suggestions that the Criminal Rules be amended to allow for greater use of remote proceedings. The Criminal Rules Committee has historically resisted allowing virtual proceedings. Professor Beale noted the critical differences between the kinds of emergency rules being considered by each advisory committee. The need for gatekeeping is much greater when it comes to criminal proceedings because constitutional issues are implicated most directly by changes to the Criminal Rules. This makes it more important to

exercise restraint when suspending any rules. The Judicial Conference is better positioned to act in this manner. The Criminal Rules Committee believed there was no reason to think the Judicial Conference would suffer from a lack of information or that the Judicial Conference and its Executive Committee could not act with appropriate speed. Given the nature of the emergency rules and the values they protect, the Advisory Committee believed it was preferable to have a single gatekeeper deciding when to declare an emergency. Professor King added that the Advisory Committee had considered the concerns – expressed by other committees – that an emergency might be localized, but that their proposal accounted for this possibility. It requires the Judicial Conference to consider moving proceedings to another district or another courthouse before emergency rules can be enacted. Because there is always an obligation to move proceedings and to remain under the normal rules, there is less reason to think that a local decisionmaker is needed or that the Judicial Conference is not well situated to make the necessary decisions.

Judge Robert Dow and Professors Cooper and Marcus spoke on behalf of the Civil Rules Committee. Professor Cooper explained that their committee arrived at the same conclusion as the Criminal Rules Committee. The Civil Rules already allow broad discretion to the trial courts and they seem to be functioning well during the pandemic. Professor Marcus added that confusion could result if two courts or districts located near one another were both affected by the same emergency but chose to respond in different ways. The Judicial Conference would be able to coordinate efforts across districts and could better achieve consistency.

The discussion was then opened to the members of the Standing Committee. Judge Bates spoke first. Moving away from the particular proposals, he reminded the members of the overall goal of uniformity. To the extent that decisionmaking is dispersed, there would be a potential for undermining this uniformity in a way that is undesirable even in an emergency context. The CARES Act had envisioned emergency rules relating to a presidential emergency and some committees were now looking at very localized actors like a small district. The scale of the departure from what Congress originally suggested was worth keeping in mind. Judge Bates's understanding was that the Judicial Conference, and particularly its Executive Committee, was able to act quickly when necessary. He also suggested that he saw little reason to think that the speed of the emergency declaration would matter more for any one set of rules than for another. Speed is equally important for each type of rules and court proceedings. In response to the Appellate Rules Committee's suggestion that the courts of appeals can and should "speak with one voice," Judge Bates thought this could be an argument for keeping the authority at that level rather than at the district level, but did not think it was an argument against giving the authority to the Judicial Conference.

An attorney member spoke in favor of uniformity with respect to 'who decides.' This member thought that in creating emergency rules for the first time, it was preferable to be cautious and incremental and to create a single gatekeeper rather than a complex multitiered system. This member also thought that the challenges created during the current emergency were greatest in the criminal context and thought that there was something to be said for choosing the gatekeeper that makes the most sense for that set of rules.

Another attorney member agreed that uniformity in 'who decides' makes sense. If the reasons for decentralization are increased nimbleness and ability to accommodate geographical

differences, and the reasons for centralization are the substantive issues raised by the Criminal Rules Committee, then substantive issues should win out. This is particularly so if the Judicial Conference can act with sufficient nimbleness and precision.

One judge member noted that, by definition, an emergency creates an atmosphere of unease. Having the authority to declare an emergency reside in one place – with the Judicial Conference – suggests authority and promotes trust. It makes sense to focus on a single identifiable body that is designed to be sensitive to lots of issues. A member agreed that substantive protections are most important. This member thought that the authority to declare an emergency should be tailored to the kind of nationwide issue – like the pandemic – that Congress had in mind when it suggested emergency rules. Local issues, like floods, hurricanes, or power outages, have been dealt with in the past without an emergency rule and have not prompted Congressional action.

Another judge member also spoke in favor of uniformity and argued that the benefits of uniformity outweigh those of localization.

Another judge member noted that the consideration of emergency rules happens infrequently and that we should consider the types of emergencies that are possible. This member suggested that a situation where the country's communications infrastructure is damaged might make it infeasible to communicate nationally and might make local control desirable.

One judge member expressed that she was impressed with the drafts and had originally been comfortable with different decisionmakers for different sets of rules, but was now thinking that uniformity was more desirable in light of the scope of the proposed changes. As an alternative means of balancing the values at stake, this member suggested that perhaps the Judicial Conference could be the default decisionmaker but that others could be permitted to determine that the Judicial Conference is unreachable and – in those situations – to act on their own.

Professor Coquillette echoed Judge Bates's view that the Executive Committee of the Judicial Conference can act very quickly and has done so in the past.

A judge member asked about the extent to which the bankruptcy rules are already sufficiently flexible to allow judges to toll and extend deadlines in particular cases. Professor Gibson responded that there is already a rule that allows flexibility with regard to some deadlines (Bankruptcy Rule 9006(b)), but that, because there are limits on the authority granted and some deadlines are exempt, the subcommittee thought an emergency rule would be helpful. This same committee member then explained his view that although the Bankruptcy Rules Committee's reasons for allowing emergency declarations at the bankruptcy court level made sense, the other committees' arguments to the contrary were also compelling. This member also suggested that there was an appearance benefit favoring an Article III over an Article I decisionmaker that might tilt the balance in favor of giving the Judicial Conference sole authority.

Another judge member supported having a different decisionmaker for the appellate rules, but found today's arguments in favor of uniformity compelling. This member thought that the courts of appeals were very different from trial courts – there are fewer substantive rights at stake and they are sufficiently nimble. Circuit-wide orders have been used in the past in order to

immediately protect rights when, for example, major weather events necessitate the extension of filing deadlines.

An attorney member thought that perceptions of what constitutes an emergency may vary throughout the country and was initially inclined to favor some devolution of power to regional courts. However, he was persuaded by the flexibility of the existing rules and the need for uniformity and now favored keeping the decisionmaking power in the Judicial Conference, and thought it was important that a uniform federal authority be identifiable in emergencies.

Definition of a Rules Emergency. Professor Capra introduced questions concerning what ought to qualify as a "rules emergency." There was at least some uniformity across advisory committees on this issue. The advisory committees agreed there must be "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court" which "substantially impair[s] the court's ability to perform its functions in compliance with the[] rules." One early issue was whether there should be a requirement that the parties, as well as the courts, are unable to operate under the normal rules. This possibility was rejected because the courts, and particularly the Judicial Conference, would be unlikely to have information about the parties' access. Further, a problem for the parties is necessarily a problem for the courts so – to the extent the information is available – it makes no difference. The remaining point of inconsistency across committees is that the Criminal Rules Committee, and no other committee, included a requirement (in draft Criminal Rule 62(a)(2)) that before the Judicial Conference declares a Criminal Rules emergency it must determine that "no feasible alternative measures would eliminate the impairment within a reasonable time."

Judge Kethledge explained this additional requirement. First, he explained that the "extraordinary circumstances" finding under paragraph (a)(1) of the proposed criminal rule – the finding the other committees also require – is a substantive impairment requirement. The additional requirement in paragraph (a)(2) is an exhaustion requirement. These are not redundant. Judge Kethledge emphasized that the committees have thought about different kinds of proceedings and have focused on different things. Procedurally, the Criminal Rules are the only rules the CARES Act directly amended. The Criminal Rules Committee gave intensive consideration to how the rules ought to be abrogated in light of this kind of emergency. They thought it was important that the rules not be abrogated unless doing so proves absolutely necessary. The Criminal Rules protect core substantive interests with a long history in the law. Given how carefully these rules have been crafted in the first place, all feasible alternatives should be explored before any rules are suspended. There might be ways of adapting that cannot be foreseen right now but which the Judicial Conference might be able to learn about in the moment from local actors on the ground. Judge Kethledge thought any remaining disuniformity was worth allowing. Professor Beale added that uniformity on this point was not essential – the Criminal Rules Committee was not asking the other advisory committees to adopt the additional exhaustion requirement. She suggested that it might be fine for a Bankruptcy Rules emergency to be declared at the local level while extra protections are afforded the substantive rights at issue in the criminal context. Professor King agreed that the Criminal Rules Committee feels very strongly about including the exhaustion requirement.

Professor Cooper spoke on behalf of the Civil Rules Committee. That committee was comfortable with the "no feasible alternative" requirement being included in a criminal emergency rule but not in the civil rule. It did not think it was necessary for the Civil Rules and, in light of the different rights being protected in the criminal context, was not concerned with the disuniformity. Professor Marcus agreed that Civil and Criminal Rules are very different so having a difference on this point made sense.

Professor Gibson said the Bankruptcy Rules Committee felt similarly to the Civil Rules Committee and had decided against including the "no feasible alternative" language. They were not concerned with the disuniformity.

Judge Bybee observed that the only "friction points" for the courts of appeals in an emergency were the filing of briefs and the holding of oral arguments. Neither of these implicated the kinds of values at stake in the Criminal Rules, and the Appellate Rules Committee was therefore also not concerned by the possibility of allowing the additional requirement in the proposed criminal rule to remain in place.

Judge Bates thought the Criminal Rules Committee made a strong argument but he had two points to add. First, he wanted to be sure that the exhaustion requirement was not redundant. He asked whether it might be said that before it could find a "substantial impairment" the Judicial Conference would necessarily have to have considered alternatives? Second, if the Judicial Conference were put in the position of declaring a rules emergency across all the rules sets, was there anything to be said for having the same standard for all the rules? If the rule were to state that declaring a Criminal Rules emergency required consideration of feasible alternatives, might this imply that there was no obligation to consider alternatives outside of the criminal context? What would be the implications of leaving the requirement out for the other sets of rules?

A judge member reminded the Committee of the existing authority of the courts of appeal under Appellate Rule 2 to suspend the Appellate Rules in particular cases and asked whether the proposed amendment to Appellate Rule 2 could be seen as constraining this existing authority to a narrower set of circumstances. This member noted that courts of appeal have been able to respond to emergencies in the past and would not want to see their existing power limited.

An attorney member suggested adding "or set of cases" to Appellate Rule 2(a) in order to avoid constraining the current authority of the courts of appeals. This would make it clear that the courts of appeal could issue suspensions of rules across cases without declaring an emergency. Professor Hartnett thought the Appellate Rules Committee would be receptive to such a change because they did not want the existing authority of the courts of appeals to be constrained. Professor Capra asked whether the issuance of orders under such an authority might start to look like local rulemaking. Professor Hartnett responded that the language "a set of cases" would imply that orders suspending rules cannot be applied to all cases. Professor Struve asked for clarification on the suggestion that subdivision (a) be modified in a way that would apply even outside of emergency situations.

A judge member thought the higher standard for declaring a Criminal Rules emergency was appropriate. Although the inclusion of the higher standard in only one of four emergency rules

would imply that alternatives did not need to be considered in other contexts, this member did not think the drawbacks of this implication outweighed the benefits of the heightened standard for a Criminal Rules emergency.

Another judge member asked whether this language was added in response to any particular situation that had come to the Criminal Rules Committee's attention. Professor King explained that the Criminal Rules' Emergency Rules Subcommittee had held a miniconference and consulted with a broad group of actors. The input received through these avenues influenced the Criminal Rules Committee's thinking. One circumstance that distinguished its approach was the possibility of a hurricane or other major catastrophe rendering all the courthouses in a district not useable. Other advisory committees would consider this a substantial impairment but history had shown – in Puerto Rico and Louisiana – that criminal proceedings could be moved to a different courthouse in another area. Judge Kethledge added that the Emergency Rules Subcommittee had canvassed chief judges around the country. In response to Judge Bates's questions, Judge Kethledge thought that the required determinations were not redundant because paragraph (a)(1) of draft Criminal Rule 62 only looked for an impairment and did not imply any evaluation of alternatives. In a situation like the aftermath of Hurricane Katrina, court proceedings were moved pursuant to 28 U.S.C. § 141. If an option like this is available, courts would be obligated to use it to hold criminal proceedings under the existing rules while an emergency might be declared under the Appellate, Bankruptcy, and Civil rules.

An attorney member said that he had been somewhat confused by the language because it seemed that the "substantial impairment" finding would take into account the possibility of moving court functions. However, this member now thought that a court moving its functions would be "substantially impaired" because relocated proceedings do not constitute normal court operations. The member suggested that it might be worth adding an adverb to modify "eliminate" in paragraph (a)(2) – possibly "sufficiently." This would indicate that the alternative must be sufficiently effective to mitigate the disruption of court operations.

Ms. Shapiro expressed the DOJ's support for Judge Kethledge's reasoning and for including the additional requirement for the Criminal Rules.

Judge Bates suggested that while the Criminal Rules Committee's reasoning was compelling, it might be worth reevaluating the value of uniformity. He also wanted to be sure that, just as the Criminal Rules Committee had considered dropping the requirement, the other advisory committees had considered adopting it.

Open-ended Appellate Rule Structure. Professor Capra explained that the proposed appellate emergency rule sets almost no limit on the range of Appellate Rules that are subject to suspension in a rules emergency. Nor does it state what the substitute rule (if any) must be when a rule is suspended. The appellate emergency rule proposal does not specify what provisions need to be included in an emergency rules declaration. It imposes no particular time limits on a rules emergency declaration. These and other limitations are found in the other three emergency rules.

Judge Bybee reiterated that the two "friction points" for the courts of appeal operating under emergency situations are filing deadlines and oral argument scheduling. Given the flexibility

already available under the current Appellate Rules, the Appellate Rules Committee did not think it made sense to have a more detailed rule for adjusting the timing of these events during emergencies. The Advisory Committee would prefer having no emergency rule to adding more constraints to their proposal because without an emergency rule the courts of appeal can just rely on the flexibility they already have.

Professor Hartnett added that the current Appellate Rule 2 can be thought of as the Appellate Rules' equivalent to Civil Rule 1, which states that the Civil Rules should be interpreted to preserve justice and efficiency. Professor Hartnett understood that the proposed amendment to Appellate Rule 2 was particularly open-ended and did not identify alternative rules but noted that rule-suspension provisions during the pandemic have often not provided alternatives. For example, an order waiving a paper-filing requirement does not have to include all the details of online filing. Professor Hartnett also suggested that subdivision (a) – the current Appellate Rule 2 – would carry over into an appellate rules emergency and would then authorize courts to create whatever alternatives they might need to operate. In addition, the Appellate Rules Committee did not set timing deadlines for emergency declarations, opting instead for the open-ended instruction that the emergency-declarer "must end the suspension" of rules "when the rules emergency no longer exists." Finally, he noted that he was not aware of anyone having suggested that Rule 2 had been abused historically.

Judge Bates suggested that the courts of appeals' normal modification of deadlines and oral argument timing was not quite comparable to the suspension of rules during an emergency. The ability to alter deadlines and scheduling is not unique to the courts of appeal. The distinguishing feature of the courts of appeals might be that there is not much at stake when deadlines and schedules are changed. He said it did not seem to him that this was what the committees were concerned with here. Judge Bates also asked whether there is a downside to not setting out replacement rules. If nothing is set out, it will be left to someone – the chief circuit judge, a panel, the circuit as a whole – to describe specifics.

Judge Bates then pointed out that subdivision (a) says the court "may suspend and order proceedings as it directs" while subdivision (b), the emergency rule, only says the court "may suspend" and does not mention ordering proceedings. He asked whether paragraph (b) needs something about the authority to order proceedings, or whether the omission was intentional. Professor Hartnett explained that the Appellate Rules Committee had assumed that the authority in paragraph (a) was implicit in (b), but he agreed that it should probably be made explicit.

A judge member made a similar drafting note. In paragraph (b)(2) the suspension of rules within a circuit is allowed, but sometimes the rule only needs to be suspended in part of a circuit. The member suggested that perhaps the rule should refer to "all or part of that circuit."

Another judge member did not think it was a problem for the courts of appeals to have a different structure to their emergency rules, but this member thought that a sunset provision – maybe ninety days – would be an appropriate and important safeguard. Professor Capra added that if the Judicial Conference was, ultimately, the only authority declaring emergencies across all the rule sets, it would be particularly odd for there to be a time limit on the other three types of rules emergencies but not on an appellate rules emergency.

An attorney member had a question about language in paragraph (b)(2) that identifies "time limits imposed by statute and described in Rule 26(b)(1)-(2)" as those that cannot be set aside in an emergency and whether this referred to time limits both "imposed by statute" *and* "described in Rule 26" and about the extent to which these categories overlapped. Professors Hartnett and Struve indicated that they were not aware of any time limits in the Appellate Rules imposed by statute but not covered in Rule 26(b), but recommended keeping the references to both because some requirements covered in Rule 26(b) are not set by statute.

Judge Bybee thought it made sense to add "and order proceedings" to subdivision (b) for consistency with subdivision (a), and he did not have any objection to a ninety-day time limit for an emergency declaration. He agreed with Professor Capra's point that this would be a particularly good idea if the Judicial Conference were in the position of declaring rules emergencies across rules sets. He also agreed with the proposal to add "or set of cases" and expressed his view that the Appellate Rules Committee would likely be amenable to these suggestions.

Some relatively brief comments rounded out this discussion. One judge member noted that if a ninety-day sunset provision is introduced there should be an option to extend the emergency past the ninety days. Another judge member thought it would be helpful for paragraph (b)(2) to reference both deadlines imposed by statute and Rule 26(b) because it was helpful to the reader to include both, noting that, in this judge's court, there exists a practice of including sunset provisions when issuing emergency-type orders. Another judge member suggested that paragraph (b)(3) be amended to limit the Judicial Conference's review authority to review of decisions under subdivision (b) as opposed to all of Rule 2, which would include subdivision (a). Judge Bybee pointed out that the draft committee note addressed some issues that had been raised and that he expected the Advisory Committee would be open to including additional clarifications.

Authority. Professor Struve introduced an issue raised in the Appellate Rules Committee meeting, regarding whether rules allowing the Judicial Conference or other actors to declare an emergency might run afoul of the Rules Enabling Act. She framed the issue in this way: a judge presiding over individual cases is generally understood to have authority over her own docket. In the draft emergency rules, the advisory committees give authority to the Judicial Conference. That authority would not be limited to cases on its members' own dockets. Nor does 28 U.S.C. § 331 – which establishes and lays out the powers of the Judicial Conference – give the Judicial Conference the authority to declare emergencies or suspend rules of procedure. Would there be a problem if rules of procedure enacted through the Rules Enabling Act process gave the Judicial Conference such authority?

Professor Struve reported that the general consensus after discussion among the reporters was that there was not an issue under the Rules Enabling Act. One way of thinking about it was that there are a variety of decisionmakers that exist outside of the courts that make determinations that are incorporated by reference to the ways the courts function. For example, a state can declare a legal holiday and have that decision incorporated into a time-counting provision, giving that holiday declaration a legal effect in the rules. In the draft criminal, civil, and bankruptcy rules, the Judicial Conference would choose from a menu of options and could choose to implement some or all of them. There is less structure to the proposed appellate emergency provisions but as

discussed, they already have more flexibility to suspend their rules, and the stakes are somewhat lower.

Professor Capra thought the issue was simple. He pointed out that making a declaration that an existing rule comes into effect is different from making a rule. The rule is preexisting, and triggering it is not rulemaking. Professor Hartnett looked at the question differently. He thought the concern was not that the federal rules cannot incorporate other law by reference, but rather the source of the authority for another body to act in the first place: Where does the Judicial Conference get the authority to declare the emergency? The other way to think about it is that perhaps the rule promulgated under the Rules Enabling Act can itself be the source of the Judicial Conference's authority, but this requires thinking through the implications. Can a rule promulgated under the Rules Enabling Act create authority for a body that did not have such authority already?

Professor Coquillette did not think this presented a practical problem. He added that Congress instructed the Rules Committees to make rules that solve this problem, and he did not think it was likely that anyone would challenge it.

A judge member asked whether paragraph (b)(3) of the draft amendment should refer to a "declaration" under paragraph (b)(1) rather than a "determination," because the word "determination" would seem to suggest that the Judicial Conference can review and revise the rules modifications put in place as well as the emergency declaration. It did not seem to this member that the Judicial Conference should necessarily be reviewing the modifications.

Professor Marcus thought it was very peculiar to suggest that there was an authority problem when Congress had instructed the Rules Committees to do something like this and when Congress would be reviewing the rule before it went into effect.

Professor Cooper thought that it was a very good idea for the Judicial Conference to be the actor empowered to act and that there was therefore likely a way to find authority under either the Rules Enabling Act or 28 U.S.C. § 331.

Professor Beale thought that the Rules Enabling Act provides the necessary authority if such authority did not exist otherwise. If there is a statutory gap – and, in her opinion, one does not appear to exist – she thought that the Rules Enabling Act's supersession could bridge that gap. If the Judicial Conference is the logical place to lodge the power to declare an emergency and if the Rules Committees, the Judicial Conference, the Supreme Court, and Congress affirm that by approving the emergency rules – that ought to be enough to alleviate any lingering concerns.

Professor Gibson noted that although the section of the Rules Enabling Act that applies specifically to Bankruptcy Rules, 28 U.S.C. § 2075, does not include a supersession clause, she nevertheless agreed that it provided sufficient authority.

Professor Cooper said that the Civil Rules had embraced things prescribed by the Judicial Conference in the past. For example, electronic filing was originally permitted according to standards developed by the Judicial Conference. Local rules numbering and the maintenance of district court records were similar examples.

An attorney member asked if there was a gap between the current rule proposals and the CARES Act's focus on presidentially declared emergencies. Is there anything to be pointed to other than the later ratification process? Professor Capra thought that this was only a problem if the CARES Act were relied on for authority to promulgate the emergency rules. Instead the Rules Enabling Act could be relied on as the statutory authority. Judge Bates clarified that the authority question here is different from the statutory authorization.

Criminal Rules Provisions. The next topic for discussion was some of the substantive provisions of draft Criminal Rule 62, particularly subdivisions (c) and (d). Subdivision (c) lays out specific substantive changes for emergency circumstances that were developed based on feedback the committee received from participants in the miniconference. Judge Kethledge and Professors Beale and King invited any thoughts from the Standing Committee on these proposals.

Judge Bates had a question concerning paragraph (c)(3), which would allow the court to conduct a bench trial without the government's consent when it finds that doing so "is necessary to avoid violating the defendant's constitutional rights." He asked why the Criminal Rules Committee had limited this to constitutional rights instead of allowing the same procedure when a statutory right was at stake. Judge Kethledge thought the main reason was to avoid any questions under *Singer v. United States*, 380 U.S. 24 (1965), in which the Supreme Court held that a defendant has no constitutional right to waive trial by jury. Professor Beale noted also that the DOJ was opposed to too much of a deviation from the norm and that the subcommittee had taken these views into account. Originally, the rule would have allowed a bench trial without the government's consent whenever doing so would be "in the interest of justice." The Advisory Committee ultimately determined that this provision should be a narrow one. Judge Kethledge noted that there was division over this provision among advisory committee members and that it had not been put forward with unanimous support.

A judge member questioned the extent to which the situation envisioned by paragraph (c)(3) could ever actually arise. Presumably the constitutional right at issue would be a speedy trial right, and evaluating whether an additional delay would violate that right requires a fairly complicated multi-factor decision. If, under the rule as drafted, a judge has to go through all of that analysis and get it right, subject to an interlocutory appeal by the government, in practice it could be very difficult to ever actually order a bench trial over a government objection. The member was not opposed to the provision though because criminal defendants sitting in jail while proceedings are delayed has been a major problem during the current pandemic. Professor Beale thought that as a practical matter the provision could be used. The member asked whether looking at the statutory speedy trial test rather than the constitutional one might make the provision more likely to actually come into play. Professor King noted that *Singer* concerned the method of trial; it did not involve speedy trial rights. The consensus of the Advisory Committee was to not limit the provision to speedy trial rights because we cannot predict all future emergency circumstances and what constitutional rights they might somehow implicate.

Another judge member expressed the view that this would likely be a null set provision if the government's veto can only be overridden based on constitutional concerns, and that it was not worth writing a rule for a circumstance that would not happen.

A member asked for clarification on whether the rules and statutes normally allow a bench trial without the government's consent. Professor Capra and others confirmed that they do not. This member then asked whether this was a substantive change. Judge Kethledge thought there might be a question there.

An attorney member thought the emergency setting could pit the defendant and government against one another in a new way. In an emergency, the choice between a jury and a bench trial also might implicate a very long incarceration. Judge Kethledge agreed these are serious concerns. Professor King said there had been mixed reports regarding whether the government had been withholding consent to bench trials in situations like these.

Professor Coquillette noted that the Supreme Court routinely approves the Standing Committee's recommendations but that the bench trial provision was the kind of thing that had historically attracted more attention from the Court. Judge Bates agreed. On the other hand, Judge Bates thought members of Congress might want statutory speedy trial rights protected as well as constitutional rights. Accordingly, he thought it important to be very careful.

A judge member appreciated that the proposed rule addressed the issue of extended detention while trials are delayed. This member was not aware of this issue arising but thought there might be a need to think about defendants who want to have a jury trial but are not able to get one for an extended period of time.

Mr. Wroblewski said that the DOJ shared the concerns with delayed trials, especially for detained defendants. It had urged U.S. Attorneys to offer bench trials, and some offices had made blanket offers. Many defendants have not taken this offer. There have been some situations where the government has not consented to a bench trial, but those have been few. While the DOJ does not anticipate that paragraph (c)(3) will have much impact in the end, it is sensitive to concerns about what the Supreme Court will think. It supports the current proposal as a compromise rule.

As a final point on the bench trial issue, a member wondered why this rule was necessary. If constitutional rights are at stake, this member asked, isn't the government always obligated to agree or to drop the case? Frequently the government must choose to prosecute a case in a manner it would not prefer in order to avoid violating a defendant's constitutional rights.

A judge member offered a view on paragraph (c)(1) which, as currently drafted, would establish that "[i]f emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding." This member felt that the word "preclude" was too strong. At times in the past year, public attendance was severely limited but not totally unavailable. It would be better to encourage or require allowing alternative public access when in-person access is seriously limited but not precluded.

Discussion then proceeded to subdivision (d), which addresses remote proceedings. In general, subdivision (d) is more restrictive than the CARES Act's remote proceedings provisions. It carries over some aspects but has additional prerequisites that must be met before proceedings may be held remotely.

Judge Bates asked whether subparagraph (d)(2)(A) should refer to "in-person proceedings" rather than "*an* in-person proceeding." The latter formulation, which is in the current draft, would seem to suggest a case-specific finding, which Judge Bates did not think was the Criminal Rules Committee's intent.

A judge member asked about subparagraph (d)(3)(B), which requires that – in conjunction with other things – a defendant make a written request that proceedings be conducted by videoconference. The member wanted to know what the Criminal Rules Committee had in mind here. Professor King explained that there are two goals behind this requirement. First, it helps guarantee that the gravity of the waiver is well-understood by both the defendant and counsel. Second, it helps to create a record. The Advisory Committee did envision that the required writing would be filed with the court. An additional provision in paragraph (c)(2) provides for obtaining the defendant's signature, written consent, or written waiver under emergency circumstances.

A judge member agreed with Judge Bates about subparagraph (d)(2)(A). This member said that there had been concerns among judges regarding whether one judge in a district holding in-person proceedings undermined findings by other judges that in-person proceedings could not be held. This member also asked about the timing requirement in subparagraph (d)(2)(A) and suggested it be mirrored in subparagraph (d)(3)(A).

Professor Capra asked whether there was inconsistency regarding the use of the word "court," in draft Criminal Rule 62, but he thought it was clear enough in each provision whether the word referred to a single judge or to a court in the sense of a district or courthouse. He observed that the Criminal Rules already use the word "court" in both senses. Professor Beale said this was something each advisory committee should review for consistency and clarity. Professor Garner added that "court" is used to refer to an individual judge throughout the rules and that this was generally not a problem.

Miscellaneous Emergency Rules Issues. Professors Cooper and Marcus briefly explained how the Civil Rules Committee's CARES Act Subcommittee had identified the Civil Rules that might warrant emergency changes. It conducted a thorough review of all the rules and identified only a few that were not sufficiently flexible. These were the rules that are in subdivision (c) of draft Civil Rule 87.

A judge member suggested that if the Judicial Conference is going to be the decisionmaker in all instances, it would be more uniform to rephrase Rule 87 in the same way as the others. Currently draft Bankruptcy Rule 9038 and Criminal Rule 62 default to enacting all the emergency provisions unless the emergency-declarer says otherwise, while draft Civil Rule 87 requires that the emergency-declarer affirmatively identify which emergency rules will go into effect. Professor Capra agreed that consistency would be good here.

Professor Capra next raised the issue of what happens if the Judicial Conference is unable to meet and declare an emergency? Should the rules account for such a situation? He said he didn't think such a provision was needed because if events were so dire that the Judicial Conference or its Executive Committee couldn't communicate for a significant amount of time that the Federal

Rules of Practice and Procedure would not be a particularly high priority. There would be bigger problems to deal with. Further, the Executive Committee of the Judicial Conference is a smaller body and that smaller group is the one that would be deciding. The judge member who had raised this issue in the first place found Professor Capra's reasoning was persuasive.

Another judge member thought it was worth considering an emergency in which communications are seriously disrupted. This member suggested that a judge or chief judge who cannot communicate with the Judicial Conference should be able to act. This member thought the fact that the situation was extreme did not mean it was not worth considering.

Finally, Professor Capra raised the issue of the termination of a declared rules emergency. Draft Bankruptcy Rule 9038, Civil Rule 87, and Criminal Rule 62 say that if the emergency situation on the ground ends before the declared rules emergency ends, there is a provision by which the rules emergency may be terminated. The Bankruptcy and Civil Rules Committees' draft rules provide that the rules emergency "may" be terminated; the Criminal Rules Committee's proposal said that it "must" be terminated. Professor Capra suggested that the termination should be permissive, not mandatory because imposing a mandate on the Judicial Conference seems extreme.

One judge member disagreed and thought that the mandatory language was preferable. These emergency rules should be preserved for extreme situations where there are no alternatives. The sunset provisions limit the damage somewhat but still if the emergency is resolved it is important to return to normal court operations. This member was not concerned about the possibility that someone would have a cause of action if the Judicial Conference was required to terminate the emergency but failed to do so. Professor Capra asked whether this would mean the initial emergency-declaring authority should also say "must" instead of "may." This member did not think so, and Professor Capra agreed.

An attorney member agreed that any rules emergency should not last any longer than the actual emergency, but this member thought that it was necessary to allow discretion. The relevant question at the end of an emergency would be how to terminate, not whether to terminate. Suggesting a mandatory obligation at the instant the emergency ends could distort the discussion because, at the end of the day, the Judicial Conference would have to determine the reasonable means of winding down the emergency operations.

A member expressed concern about writing a rule that forces the Judicial Conference to do anything. If – as it seemed – any mandatory language would not be enforceable, then maybe precatory language of some kind would be sufficient.

Judge Bates had one final question concerning proposed draft Bankruptcy Rule 9038. As currently drafted, paragraph (c)(1) provides that certain actions could be taken district-wide "[w]hen an emergency is declared" but paragraph (c)(2) which addresses actions that could be taken in a specific case or proceeding did not include that same phrase. Judge Bates asked whether paragraph (c)(2) should also say "when an emergency is declared." Professor Gibson explained that the style consultants had thought the current phrasing was clear – that yes, paragraph (c)(2)

also requires that an emergency must have been declared, but she and Judge Bates agreed that perhaps it did need to be clarified.

Other Matters Involving Joint Subcommittees

Judge Bates briefly addressed two ongoing joint subcommittee projects: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on October 20, 2020. The Advisory Committee presented four information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 195.

Information Items

Proposed Amendments Published for Public Comment. Judge Bybee explained that at the June 2020 Standing Committee meeting the Appellate Rules Committee had received some feedback concerning proposed Rule 42, which would address voluntary dismissals. The committee addressed the concern and would be seeking final approval of this proposed rule change in the spring of 2021. There was no present action to be taken. Professor Hartnett noted that the concerns raised at the Standing Committee related to how the requirement that parties agree to dismissal of an appeal might interact with local rules requiring the defendant's consent before dismissal. Judge Bates, who had raised this concern, stated that he was happy with the adjustments that the Appellate Rules Committee had made to proposed Rule 42.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing). The Appellate Rules Committee is still considering combining Rules 35 and 40. It was thought that consolidating these rules might eliminate some confusion in the Appellate Rules. This issue remains under careful study.

Suggestions Related to In Forma Pauperis *Relief.* Various suggestions relating to *in forma pauperis* relief had been submitted to the Appellate Rules Committee. Judge Bybee explained that it was not clear that the problems identified were problems with the Appellate Rules. The issues are under consideration, but may be put off.

Relation Forward of Notices of Appeal. The relation forward of notices of appeal was still under discussion by the committee.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Bankruptcy Rules Advisory Committee, which last met via videoconference on September 22, 2020. The Advisory Committee presented four action items and two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 241.

Action Items

Retroactive Approval of Official Form 309A–I (Notice of Bankruptcy Case). Judge Dow explained this action item concerning a series of forms that are used to notify recipients of the time and place of the first meeting of creditors and certain other deadlines. The information on these forms includes the web address of the PACER system. This web address had been changed, so the forms needed to be updated to reflect the new address. The change has already been made pursuant to the Bankruptcy Rules Advisory Committee's authority to make technical changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, and the Advisory Committee now sought that retroactive approval. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the changes to the Official Form 309A–309I.**

Proposed Amendments for Publication. An amendment to Rule 3011(Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases), was brought up in connection with a project on unclaimed funds and is intended to reduce the amount of such funds and clerks' offices' liabilities with regard to them. The Bankruptcy Rules Advisory Committee asked for a modification of Rule 3011 in order to achieve a wider circulation of information about unclaimed funds. The modification proposed by the Bankruptcy Rules Committee would add a new subdivision (b) that would require court clerks to provide searchable access on court websites to data about unclaimed funds on deposit with the clerk. The Bankruptcy Rules Committee added a proviso that would allow the clerk to limit access to this information in specific cases for cause shown (e.g., to protect sealed information). The Advisory Committee sought publication of this proposed amendment.

Related Amendments to Bankruptcy Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Form 417A (Notice of Appeal and Statement of Election) were proposed in order to maintain uniformity with recent amendments to the Federal Rules of Appellate Procedure. Rule 8003 would be amended to conform to pending amendments to Appellate Rule 3. The amendments would clarify that the designation in a notice of appeal of a particular interlocutory order does not preclude appellate review of all other orders that merge into that judgment or order. Form 417A, the Bankruptcy Notice of Appeal Form, would be amended to conform to the wording changes in Rule 8003. Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendments to Rule 3011, Rule 8003, and Form 417A.**

Information Items

Changes to Instructions for Official Form 410A (Proof of Claim, Attachment A). Judge Dow explained that a bankruptcy judge had pointed out a problem with Form 410A to the Bankruptcy Rules Committee. The Form is an attachment to a Proof of Claim Form that is filed in bankruptcy cases for mortgage-related claims. The problem related to how total debt is calculated when the underlying mortgage claim has been reduced to judgment and has merged into that judgment. A question can arise as to what governs the claim at that point in jurisdictions that have judicial foreclosure. Judge Dow said that the Advisory Committee added a paragraph to the instructions to Form 410A clarifying that the "principal balance" in this situation is the amount due on the judgment along with any other charges that may have been added to the claim by applicable law. Judge Dow explained that because only the instructions were changed, and not the form itself, that no Standing Committee action was required.

Bankruptcy Rules Restyling. Professor Bartell explained that the style consultants have been doing great work making the rules more comprehensible. Parts one and two of the restyled rules had been published, consideration of parts three and four were proceeding on schedule, and the style consultants had just given the committee a draft of part five. An official draft of part six was scheduled to be ready in February. Professors Garner and Kimble expressed their appreciation to the Bankruptcy Rules Committee.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Civil Rules Committee, which last met via videoconference on October 16, 2020. The Advisory Committee presented three action items and four information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

Action Items

Proposed Amendment to Rule 7.1 (Disclosure Statement). The Civil Rules Committee first sought final approval of a proposed amendment to Rule 7.1 which was presented at the Standing Committee's June 2020 meeting and remanded to the Civil Rules Committee for further consideration in light of the feedback provided by the Standing Committee. Proposed paragraph (a)(1) and subdivision (b) have not changed since the June 2020 meeting. These provisions deal with adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. Proposed paragraph (a)(2) has been revised since the June 2020 meeting.

Proposed Rule 7.1(a)(2) seeks to require timely disclosure of information necessary to determine diversity of citizenship for jurisdictional purposes. Often this is not complicated, and citizenship is settled when the case is initially filed in federal court or removed from state court. However, determining citizenship is complicated in a number of cases, especially considering the proliferation of LLCs. The Civil Rules Committee thought it was worth amending Rule 7.1 because the consequences of failing to spot a jurisdictional problem early can be severe. As the committee's report explains, the committee came up with two ways to address the issues raised by

the Standing Committee at the June meeting – one more detailed than the other. The Advisory Committee prefers the more detailed version but presented an alternative version for the Standing Committee's consideration.

Professor Cooper described the alternatives. As published, the rule would have required disclosure of citizenship at the time the action was filed in federal court, with the idea that this would apply equally to cases removed from state court because the time at which the case is removed is the time at which it is first filed in federal court. Public comments suggested that the rule would be clearer if it referred to the time at which an action is "filed in or removed." Proposed subparagraph (a)(2)(A) was revised and now reflects these suggestions. In committee discussion, it was noted that diversity may need to be evaluated at other times as well. Subparagraph (a)(2)(B) was added to account for this and required filing "at another time that may be relevant to determining the court's jurisdiction." Last June, some Standing Committee members were concerned that the language of this subparagraph was too open-ended. The proposal was remanded to the Advisory Committee for further consideration.

After extensive discussion, the Advisory Committee concluded again that it would be worthwhile to draw judges' and practitioners' attention to the complexity of the diversity rules and to the fact that diversity jurisdiction is not permanently fixed at the moment when the case first arrives in federal court. This led to the proposed revision of subparagraph (a)(2)(B)'s language presented at this meeting. The proposal would now require the filing of disclosures when "any subsequent event occurs that could affect the court's jurisdiction." The Advisory Committee recognized that this was still somewhat nonspecific, but felt that the alternative of trying to spell out all the events that could affect diversity jurisdiction as an action progresses was simply not feasible. The Advisory Committee also suggested that the Standing Committee could approve a version that simply omits subparagraphs (a)(2)(A) and (B) (and dropping the word "when" from the end of paragraph (a)(2)), but Professor Cooper explained that the Advisory Committee did not recommend this course of action.

Judge Bates wondered whether there was still ambiguity in the word "when" in paragraph (a)(2). He was concerned that someone could be confused as to whether this refers to the time for filing or the time the citizenship is attributed. Professor Cooper said that, in the Civil Rules, the word "when" is often used to mean "at the time." He said that it was possible to add a few more words if it would help to clarify, but the Advisory Committee believed it was not necessary and was better to avoid unnecessary verbiage. Judge Bates noted that the second alternative proposed would avoid the problem by dropping subparagraphs (A) and (B).

A judge member offered a number of suggested alterations to the text of the proposed amendment. First, this member noted that no matter whether "when" or "at the time" was used, it was unlikely that practitioners would assume that the filing had to be made immediately. It might be helpful to provide a time limit to ensure prompt filing. This particular suggestion was later withdrawn. The member also asked whether the word "or" might be preferable to "and" at the end of subparagraph (A). Professor Cooper explained that "and" was used because the filing under subparagraph (A) would have to be made in every case and would often be sufficient to resolve questions. If something happens after that, having fulfilled the subparagraph (A) requirement in the past does not make the subparagraph (B) filing unnecessary. The member then suggested

moving the word "when" from before the colon to, instead, the start of both of subparagraphs (A) and (B). This same member suggested that the reference to a party that "seeks to intervene" in paragraph (a)(1) ought to be reflected in paragraph (a)(2) which currently refers only to an "intervenor." Professor Cooper did not recall this issue having been raised before the Advisory Committee. For paragraph (2), though, Professor Cooper thought it might make sense to wait for intervention to be granted under some circumstances. Judge Bates noted that, if implemented in paragraph (a)(2), this change should also be made in subdivision (b). The committee member also suggested subparagraph (2)(B)'s reference to "any subsequent event . . . that could affect the court's jurisdiction," might be too broad. If, for example, a case arguably became moot, this would be an event that could affect the court's jurisdiction. But this is not a circumstance where the re-filing of disclosures would be necessary or desirable. Professor Cooper agreed that an amendment to narrow the filing requirement could be added.

Professor Kimble said that although moving the word "when" to both (A) and (B) would not change the meaning, the current draft was consistent with what the style consultants would typically recommend. He said that the style consultants would typically change "at that time" to "when."

Professor Hartnett asked if it would be helpful to break paragraph (a)(2) into two sentences. (". . . a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must . . . .") Professor Cooper thought this was a good idea. Judge Dow wondered whether "intervenor or proposed intervenor" would be an appropriate way to refer to the party seeking to intervene, and he endorsed the suggestion that (a)(2) be split into two sentences.

Another attorney member asked why paragraph (a)(1) referred to "*A* nongovernmental corporate party" but to "*any* nongovernmental corporation that seeks to intervene," rather than using "any" in both places. Professor Cooper thought it should be changed to whichever conforms to the Appellate and Bankruptcy Rules, and Judge Bates agreed. Professor Garner suggested that the style consultants would normally change "any" to "a" and that if other rules were phrased differently, those rules were inconsistent with the style guidelines.

Judge Bates reviewed and summarized the changes under consideration. A judge member pointed out that revisions to the committee note might also be necessary. Judge Bates determined that it was better to circulate the proposed amendment incorporating the changes made during the meeting via email, with an opportunity for discussion, followed by a vote by email. This was done later in the week. There was no call for discussion and, upon a motion that was seconded, the Standing Committee voted unanimously to **recommend for approval the proposed amendment to Rule 7.1.** The agenda book has been updated to reflect the final version of the proposed amendment that the committee approved.

Proposed Amendment to Rule 15(a)(1). Judge Dow presented a proposed amendment to Rule 15(a)(1), with a request that it be approved for publication for public comment. The proposed amendment is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21

days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." A literal reading of "within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than." **The Committee approved for publication the proposed amendment to Rule 15(a)(1).**

Proposed Amendment to Rule 72(b)(1). Judge Dow next presented a proposed amendment to Rule 72(b)(1), with a request that it be published for public comment. The rule currently directs that the clerk "must promptly mail a copy" of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means.

The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be "immediately served" on the parties as provided in Rule 5(b). In determining how to amend the rule to bring it in line with current practice, the Advisory Committee referred to Rule 77(d)(1) which was amended in 2001 to direct that the clerk serve notice of entry of an order or judgment "as provided in Rule 5(b)." In addition, Criminal Rule 59(b)(1) includes a provision analogous to Civil Rule 72(b)(1), directing the magistrate judge to enter a recommendation for disposition of described motions or matters, and concluding: "The clerk must immediately serve copies on all parties." Criminal Rule 49, like Civil Rule 5, contemplates service by electronic means. Professor Kimble asked why the word "promptly" had been changed to "immediately." Professor Cooper said this change was made for conformity with Criminal Rule 59(b)(1). Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 72(b)(1).**

Information Items

Subcommittee on Multidistrict Litigation. Judge Dow provided the report of the Multidistrict Litigation (MDL) Subcommittee. The first topic, formerly called "early vetting" is now called "initial census." In three of the largest MDLs going on right now, a form of initial census has occurred over the past year. Judge Dow had spoken with the judges overseeing two of these three cases. Rather than have lengthy fact sheets, the judges in these cases have relied on the basic information on the first few pages of the fact sheets. The judges in these cases have used this basic information to organize the plaintiffs' steering committee, to organize discovery, and to dismiss certain plaintiffs. The subcommittee has been very happy with how this has been developing in the big MDLs. It remains on the study agenda because a rule may be helpful, but it is also possible that these practices may just be circulated as best practices and could belong in the *Manual on Complex Litigation* or spread as a model by discussion at conferences. A rule may not be necessary.

An attorney member wanted to share their view. In this member's experience, courts and the plaintiffs' bar think there is little need for change and the defense bar does think there is a need

for change. This makes rulemaking difficult. On paper, the rules seem to suggest that defendants could have a number of cases that they might want to join together into an MDL. In practice, though, the existence of an MDL can lead to more cases against a defendant because there is less of a hurdle to additional plaintiffs joining – and in fact the plaintiffs' bar wants more plaintiffs. Additionally, MDLs are perceived on both sides as settlement vehicles. A lot of work goes into them, but they nearly always settle. This member understood that the Advisory Committee was not inclined toward allowing interlocutory appeals, but thought that it was worth looking at the initial census option as a way of avoiding the multiplicity problem.

Another attorney member thought there might be an opportunity to craft a flexible rule that would allow the courts to craft an initial census tailored to the particular case. Judge Dow agreed that this was what the Advisory Committee had in mind – something prompting the lawyers and the judge to consider an initial census in every case.

Judge Dow next explained that the subcommittee had also been very focused on interlocutory appeals. The subcommittee had held a conference of judges and lawyers working on MDLs, including a particularly good representation of non–mass tort MDLs. The conference had had a large influence on the subcommittee's thinking and in the recommendation that an interlocutory appeal rule should not be pursued at this time. Some feel that the current interlocutory appeal options (and mandamus) are sufficient. Other interested persons think that even if there are some gaps, there is no need for new rules or rules amendments because the current rules are good enough and any delays caused by interlocutory appeals would not be worth it. As an example of one problem that could arise if interlocutory appeals were permitted, Judge Dow explained that state courts might not be willing to wait around while a federal Court of Appeals takes up a case. At the end of the day, the members of the subcommittee all thought that an interlocutory appeal rule was not worth pursuing at this time. Professor Marcus added that there had also been definitional issues concerning what kinds of cases to which such a rule would apply.

Finally, Judge Dow explained that equity and fairness and the role of the court in the endgame of settlements of large MDLs was the area that the subcommittee would likely be focused on in the near term. There are obvious similarities between MDLs and class actions, and for class actions the rules require that courts approve settlements. This is not the case for MDLs unless they are resolved through a class action mechanism. Questions can arise about whether all parties are treated the same and about what the court's role should be. Professor Cooper drafted a memo on these issues. At the last subcommittee meeting it was resolved that a conference convening stakeholders would be useful to help determine whether action should be taken on this issue.

An attorney member thought that it might be worth considering whether the attorneys with the most clients or client with the largest interest ought to be lead counsel, or at least whether this ought to be a factor in determining lead counsel. One criticism of MDLs is that they are lawyer-driven litigation and hinging lead counsel assignments on characteristics of the clients might ameliorate this somewhat (as opposed to giving prominence to the lawyer who files first or who is best-known in the district).

Another judge member suggested that in preparation for the conference, it might be worth asking the Federal Judicial Center to survey clients who received settlements in MDLs. An

attorney member said he feared the proposal of rewarding the lawyers who aggregated the most clients. This would incentivize lawyers to form coalitions and would undermine the courts' control overall. In securities litigation, there are policy reasons to put institutional shareholders in the lead, but those reasons don't necessarily carry over to MDLs across all kinds of subject areas. This member agreed it was worth investigating what happens with money that ends up in common benefit funds. Lawyers applying to be lead counsel could be questioned regarding what has happened to funds they have won or overseen in the past. The member cautioned these issues might not be appropriately resolved through a civil rule.

Items Carried Forward or Removed from the Advisory Committee's Agenda. Judge Dow briefly summarized items on the Advisory Committee's agenda. He explained that the Civil Rules Committee is continuing to consider an amendment to Rule 12(a) that would clarify the time to file where a statute sets time to serve responsive pleadings but that the Advisory Committee had not yet come to an agreement on that issue. The Advisory Committee was also interested in investigating a potential ambiguity lurking in Rule 4(c)(3)'s provision for service by a U.S. Marshal in *in forma pauperis* cases. This investigation had not proceeded recently because the Marshals Service had been preoccupied with pandemic-related security concerns and the committee did not want to bother them at this time. There had been suggestions that the Advisory Committee look into amending Rules 26(b)(5)(A) and 45(e)(2) to revise how parties provide information about materials withheld from discovery due to claims of privilege. The Civil Rules Committee plans to create a new Discovery Subcommittee to look into these issues. An Advisory Committee member submitted a suggestion to amend Rule 9(b), on pleading special matters – this would be discussed at the Advisory Committee's next meeting. Finally, Judge Dow explained that the Advisory Committee had removed from its agenda suggestions to amend Rule 17(d) (regarding the naming of defendants in suits against officers in their official capacity) and Rule 45 (concerning nationwide subpoena service).

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge presented the report of the Criminal Rules Committee, which met via videoconference on November 2, 2020. The Advisory Committee presented two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 395.

Information Items

Rule 6 Subcommittee. Judge Kethledge reported that the Advisory Committee was continuing to consider suggestions to amend the grand jury secrecy provisions in Rule 6. Since the last meeting, the Advisory Committee has received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances. The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the

authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers). The Advisory Committee anticipates having more to report at the June 2021 meeting.

Items Removed from the Advisory Committee's Agenda. A number of items had been removed from the Advisory Committee's agenda. Discussion of these items is in the committee's report.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on November 13, 2020. The Advisory Committee presented three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 441.

Information Items

Amendment to Rule 702 (Testimony by Expert Witnesses). Judge Schiltz explained that the committee was looking at two issues relating to testimony by expert witnesses. The first was what standard a judge should apply when considering whether to allow expert testimony. It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. The requirements are that the testimony will assist the trier of fact, that it is based on sufficient facts or data, that it is the product of reliable principles and methods, and that the expert reasonably applied those principles and methods to the facts at hand. It is not appropriate for these determinations to be punted to the jury, but judges often do so. For example, in many cases expert testimony is permitted because the judge thinks that a reasonable jury *could* find the methods are reliable. There is unanimous support in the Evidence Rules Committee for moving forward with an amendment to Rule 702 that would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met. This would not be a change in the law, but rather would consolidate information available in two different rules and two Supreme Court opinions.

The second expert testimony issue being considered by the Evidence Rules Committee is the problem of overstatement. Judge Schiltz explained that this refers to the problem of experts overstating the strength of the conclusions that can reasonably be drawn by the application of their methods to the facts. For example, an expert will testify that a fingerprint "was the defendant's" or that a bullet did come from a gun, with no qualification or equivocation. Experts will make these claims with certainty when the science does not support such strong conclusions. The defense bar has been asking for an amendment that would not permit such overstatements. The Evidence Rules Committee was divided on this suggestion from the defense bar. Only the DOJ, however, was opposed to a more modest proposed amendment that would draw attention to the need for every expert conclusion to meet the standard set under Rule 702. Judge Schiltz anticipates that the Advisory Committee will present something related to Rule 702 at the Standing Committee's June 2021 meeting, once he has received input from new members who recently joined the Advisory Committee.

Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements). The "rule of completeness" requires that if at trial one party introduces part of a writing or recorded statement, the opposing party can introduce other parts of that statement if in fairness those other parts should also be considered. Judge Schiltz explained that there are a couple of problems with this rule in practice. One is that the circuits are split on whether the "completing portion" can be excluded as hearsay. This can arise, for example, when a prosecutor misleadingly introduces only part of a statement and the defendant wants the jury to hear the completing portion. Some courts will exclude the completing portion under the hearsay rule out of a concern that the jury will overweight it. Other courts will allow the completing portion in but will instruct the jury not to consider it for the truth of the matter but only as providing context. Other courts just let it all in with no limit. The Evidence Rules Committee plans to draft an amendment to Rule 106 that would say that a judge cannot exclude the completing portion for hearsay, but that a judge may issue a limiting instruction.

Another problem with Rule 106 is that it only applies to written or recorded statements. If the statement was made orally, the common law governs and there is a lot of inconsistency in how it is applied. This is one of few areas of evidence law where the Evidence Rules are not considered to preempt the field. It is an odd area for that to be the case because generally this issue arises at trial and must be addressed on the fly, with minimal time for a judge to research the common law. The Evidence Rules Committee plans to draft an amendment rule that would apply to oral statements and supersede the common law.

The Evidence Rules Committee agreed to proceed with both changes to Rule 106. The Department of Justice opposed both changes.

Proposed Amendment to Rule 615 (Excluding Witnesses). Judge Schiltz explained that Rule 615 is, on its face, quite simple. It says that a judge must exclude witnesses from the courtroom during trial if the opposing side asks the judge to do so. These requests are common. There is confusion, though, over whether the ruling granting such a request only keeps the witness out of the courtroom or whether it also implies that the witness may not learn about what has been said in court – through conversations, reading a transcript, reading a newspaper, etc. Some circuits have said that the order automatically prevents the excluded witness from learning through these other avenues, while other circuits view the order as only effecting the physical exclusion. Because of this confusion, it can be very easy for witnesses to accidentally violate the order and find themselves in contempt of court. The Evidence Rules Committee unanimously agreed to draft an amendment retaining the part of Rule 615 that requires the court to exclude witnesses if any party asks but making clear that courts can also go further to prevent witnesses from learning about in court testimony. This should clarify that any additional restrictions must be made explicit.

A judge member noted that it was worth thinking about the implications of Rule 615 during trials held over videoconference or otherwise remotely. Additionally, this member noted that in bench trials direct testimony can be taken by affidavit and that it might be worth referring to that sort of testimony in the rule as well. Professor Capra thought the rule would help with these situations because it draws attention to methods of hearing about other witnesses' testimony beyond simply sitting in the courtroom while the witness testifies.

OTHER COMMITTEE BUSINESS

The meeting concluded with a series of reports on other committee business. First Judge Bates addressed the 2020 *Strategic Plan for the Federal Judiciary*. The agenda book contains material concerning the strategic plan, beginning at page 471. Judge Bates explained that the Judicial Conference committees – including this one – were asked to provide input on what strategies and goals reflected in the *Plan* should receive priority in the next two years. Those recommendations would be reviewed at the upcoming meeting of the Executive Committee of the Judicial Conference. Committee members were instructed to send any suggestions to Judge Bates and to Shelly Cox of the Rules Committee Staff.

Julie Wilson delivered a report on the Judiciary's Response to the COVID-19 pandemic. Judge Campbell had discussed this at the Standing Committee's June meeting. The Administrative Office's COVID-19 Task Force was established early last year and continues to meet bi-weekly. The Task Force remains focused on safely expanding face-to-face operations at the AO and in the courts. Notably, the Task Force has formed a Virtual Judiciary Operations Subgroup, which will recommend technical standards along with policies and procedures regarding the operation of remote communications, including with defendants in detention. Another big part of their work will be to standardize virtual operations throughout the judiciary. In the Administrative Office, guidelines, data, and information are being posted regularly on the JNet website, including information about the resumption of jury proceedings. These materials are available to judges and their staff. The only Judicial Conference activity relating to COVID-19 that has occurred since the last meeting was the extension of the CJRA reporting period from September 30 to November 30.

Ms. Wilson also delivered a legislative report. She explained that the Administrative Office had requested supplemental appropriations from Congress to address various needs within the judiciary due to the pandemic. These appropriations were not made. The Administrative Office also submitted 17 legislative proposals. These were not taken up by the recently concluded 116th Congress. One notable law enacted last year was the Due Process Protections Act. This was introduced in the Senate in May 2019 and had been tracked by the Rules Committee Staff. It was passed quickly and unanimously in 2020. The Act statutorily amended Criminal Rule 5 (Initial Appearance) to require that judges issue an oral and written order confirming prosecutors' disclosure obligations under *Brady* and its progeny. The Act required the creation of model orders for each district. Judge Campbell and Judge Kethledge had sent a letter to the leadership of the House Judiciary Committee expressing the Rules Committees' preference for amending the rules through the Rules Enabling Act process, but the Act passed regardless. The 117th Congress was sworn in on January 3, 2021, just a few days before the Committee met. Some legislation that has been of interest to the Rules Committees in the past had already been reintroduced. Representative Andy Biggs reintroduced the Protect the Gig Economy Act. It would expand Civil Rule 23 to require that the prerequisites for a class action be amended to include a requirement that the claim does not concern misclassification of workers as independent contractors as opposed to employees. Representative Biggs also introduced the Injunctive Authority Clarification Act. This would prohibit the issuance of nationwide injunctions. Other familiar pieces of legislation will likely also be introduced in the coming weeks. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 22, 2021. The hope is that the meeting will be in person in Washington, D.C. if doing so is safe and feasible at that time.

TAB 2B

Agenda E-19 (Summary)
Rules
March 2021

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve the proposed amendment to Civil Rule 7.1 and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 9-10

The remainder of the report is submitted for the record and includes the following for the information of the Judicial Conference:

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 5, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S.

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, and Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Committee received and responded to reports from the five advisory committees and two joint subcommittees. The Committee also discussed the Rules Committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281. Additionally, the Committee discussed an action item regarding judiciary strategic planning and was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

IMPACT OF THE COVID-19 PANDEMIC ON JURY OPERATIONS

The Committee considered a proposal from the jury subgroup of the judiciary's COVID-19 Task Force addressing the impact of COVID-19 on jury operations in criminal proceedings. In August 2020, the Executive Committee referred the proposal to this Committee, the Committee on Court Administration and Case Management, the Committee on Criminal Law, and the Committee on Defender Services, to consider whether rules amendments or legislation should be pursued that would allow grand juries to meet remotely during the pandemic. The chairs of the four committees discussed the proposal after consulting with their respective committees and, in a letter dated August 28, 2020, advised the Executive Committee that they did not recommend pursuing efforts to authorize remote grand juries. The letter

explained that although the pandemic has impacted the ability of courts around the country to assemble grand juries, courts have found solutions to the problem including using large spaces in courthouses, masks, social distancing, and other protective measures. Such measures protect public health to the greatest extent possible without compromising the secrecy and integrity of grand jury proceedings, and they have allowed investigations and indictments to proceed where needed.

EMERGENCY RULES

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. A significant portion of the Committee's meeting was dedicated to reviewing the draft rules developed by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules in response to that directive. The advisory committees began their work by soliciting public comments on challenges encountered during the COVID-19 pandemic in state and federal courts by lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. The advisory committees also formed subcommittees to begin work on the issue. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with:
(1) identifying rules that might need to be amended to account for emergency situations; and
(2) developing drafts of proposed rules for discussion at each advisory committee's fall 2020 meeting.

In the intervening months, the subcommittees collectively invested hundreds of hours to develop draft emergency rules for consideration at the fall 2020 advisory committee meetings.

At its January 2021 meeting, the Committee was presented with a report describing this process and was asked to provide initial feedback on the draft rules. The report reached several preliminary conclusions; among the most important was that an emergency rule was not needed for all rule sets. Early on, the Evidence Rules Committee concluded that its rules are already flexible enough to accommodate an emergency. And, although both the Appellate and Civil Rules Committees drafted emergency rules for consideration, they have left open the possibility that no emergency rule is needed in their rule sets.

The advisory committees also concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended. Their initial consensus was that the Judicial Conference in particular (or the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference) is the most appropriate judicial branch entity to make such determinations, in order to promote consistency and uniformity in declaring rules emergencies. In addition, the advisory committees concluded that any emergency rules should only be invoked for emergencies that are likely to be lengthy and serious enough to substantially impair the courts' ability to function under the existing rules.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to drafting emergency rules that are uniform to the extent reasonably

practicable, given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. Notably, in the following respects, the proposed draft rules are uniform. First, the term "rules emergency" is used in each rule set to highlight the fact that not every emergency will trigger the emergency rule. Second, the basic definition of a rules emergency is largely uniform among the four rule sets. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." (Draft Criminal Rule 62 contains an additional element discussed below). Third, the draft rules were reviewed in a side-by-side analysis by the Standing Committee's style consultants with a view toward implementing style guidelines and eliminating differences that are purely stylistic.

Much of the Standing Committee's discussion addressed the advisory committees' request for input on substantive differences among the draft rules and whether those differences were justified. For example, in addition to the basic definition of a rules emergency, draft new Criminal Rule 62 (Criminal Rules Emergency) includes the requirement that "no feasible alternative measures would eliminate the impairment within a reasonable time." As another example, all of the draft rules provide that the Judicial Conference can declare a rules emergency and subsequently terminate that declaration; however, the draft amendment to Appellate Rule 2 (Suspension of Rules) also gives that authority to the court of appeals (acting directly or through its chief judge), and draft Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) includes emergency-declaring authority for both the chief bankruptcy judge in a district where an emergency occurs and the chief judge of a court of appeals.

At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the

Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action). At this time, it remains to be seen which, if any, of the advisory committees will recommend publication of draft rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Information Items

The Advisory Committee on Appellate Rules met by videoconference on October 20, 2020. In addition to discussion of the emergency rules project and possible related amendments to existing rules, agenda items included a review of previously-published proposed amendments. In addition, the Advisory Committee reviewed the criteria for granting in forma pauperis status, including potential revisions to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In response to a recent suggestion, the Advisory Committee also discussed a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to deal with premature notices of appeal. The issue was considered by the Advisory Committee ten years ago, but it is reviewing the issue again to determine if conditions have changed to justify an amendment. Finally, the Advisory Committee continued its comprehensive review of Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) regarding hearings and rehearings en banc and panel rehearings. Several options for amendment are under consideration in an attempt to align the two rules more closely.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Rules and Form Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3011 and 8003, and Official Form 417A, with a request that they be published for public

comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The rule change would mirror a pending amendment to the *Guide to Judiciary Policy*, Vol. 13, Ch. 10, § 1050.10(c), which would require courts to provide notice of unclaimed funds on their websites (pursuant to that Committee's efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds). The Bankruptcy Committee suggested an accompanying rules amendment because the *Guide* is not publicly available and Bankruptcy Rules are often the first place an attorney or pro se claimant looks to determine how to locate and request disbursement of unclaimed funds; a rule change would therefore inform the public where to access unclaimed funds data.

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal)

The proposed amendment revises Rule 8003(a) to conform to the pending amendment to Appellate Rule 3. The Appellate Rules amendment (which is on track to take effect on December 1, 2021 if adopted by the Supreme Court and Congress takes no contrary action) revises requirements for the notice of appeal in order to reduce the inadvertent loss of appellate rights. The proposed amendment to Bankruptcy Rule 8003(a) takes a similar approach and will help to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules.

Official Form 417A (Notice of Appeal and Statement of Election)

Parts 2 and 3 of Official Form 417A would be amended to conform to the wording of the proposed amendment to Rule 8003.

Retroactive Approval of Technical Conforming Amendments to Official Form 309A - I

The Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) was changed from pacer.gov to pacer.uscourts.gov. Because the PACER address is incorporated in several places on the eleven versions of the "Meeting of Creditors" forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the Rules Committee Staff's concern that users will experience broken links in the year or so it would take to update the forms via the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses on the forms using the delegated authority given to it by the Judicial Conference to make non-substantive, technical, or conforming changes to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. The Standing Committee unanimously approved the form changes.

Information Item

The Advisory Committee met by videoconference on September 22, 2020. In addition to its recommendations discussed above, discussion items included an update on the restyling of the Bankruptcy Rules. Notably, the 1000 and 2000 series of the restyled Bankruptcy Rules were published for comment in August 2020, and the Advisory Committee will be reviewing the comments on those rules at its spring 2021 meeting.

The Restyling Subcommittee has completed its initial review of restyled versions of the 3000 and 4000 series of rules, and received feedback from the Standing Committee's style consultants on the subcommittee's proposed changes. The subcommittee received an initial draft of the 5000 series of restyled rules from the style consultants at the end of December 2020, and it expects to receive the initial draft of the 6000 series of restyled rules from the consultants by February 2021.

At its upcoming spring 2021 meeting, the Advisory Committee will consider recommending for publication in August 2021 the 3000 and 4000 series of restyled rules, along with the 5000 and 6000 series of restyled rules if those rules are ready. The Advisory Committee plans to continue work on the remaining rules (the 7000, 8000, and 9000 series) with the intent of recommending them for publication in August 2022, so that final approval of all the Restyled Bankruptcy Rules can be considered by the Standing Committee at its summer 2023 meeting, and by the Judicial Conference at its fall 2023 session.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment.

The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020).

The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposal published for public comment identified the time that controls whether complete diversity exists as "the time the action was filed." In light of public comments received, as well as discussion at the Committee's June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule's reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed "when the action is filed in or removed to federal court" and "when any later event occurs that could affect the court's jurisdiction under § 1332(a)."

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 as set forth in the Appendix, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 15 and Rule 72, with a request that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 15(a)(1) (Amendments Before Trial – Amending as a Matter of Course)

The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently

provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

The difficulty lies in the use of the word "within." A literal reading of "within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period *does not commence until* the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment seeks to preclude this interpretation by replacing the word "within" with "no later than."

Rule 72(b)(1) (Dispositive Motions and Prisoner Petitions – Findings and Recommendations)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

Information Item

The Advisory Committee met by videoconference on October 16, 2020. In addition to the action items discussed above, the Advisory Committee spent a majority of the meeting hearing the report of its CARES Act Subcommittee and discussing its draft Rule 87 (Procedure in Emergency). Other agenda items included an update on the Multidistrict Litigation (MDL) Subcommittee's ongoing consideration of suggestions that rules be developed for MDL proceedings.

The MDL Subcommittee reported on the status of its three remaining areas of study:

1. Screening claims in mass tort MDLs – whether by using plaintiff fact sheets and defendant fact sheets or by using a "census" approach that employs a simplified version of a plaintiff fact sheet;

2. Interlocutory appellate review of district court orders in MDL proceedings; and

3. Settlement review, attorney's fees, and common benefit funds.

At the Advisory Committee's meeting, the MDL Subcommittee reported its conclusion that the second area of study – interlocutory appellate review – should be removed from the study agenda. The original suggestion was for a rule that would create a right to immediate review. Such a route would bypass the discretion that 28 U.S.C. § 1292(b) currently provides to the district court (whether to certify that § 1292(b)'s criteria are met) and to the court of appeals (whether to accept the appeal). The idea of creating a right to immediate review was quickly disfavored, with the subcommittee focusing instead on whether some other type of expanded interlocutory review might be worth pursuing. The subcommittee reviewed submissions from proponents and opponents of expanding appellate review. Subcommittee representatives attended multiple conferences addressing the topic, including a June 2020 meeting that included lawyers and judges with extensive experience in MDL proceedings beyond the mass tort context. The subcommittee found insufficient evidence to justify proposing an expansion of appellate review, especially in light of the many difficulties that would be involved in crafting such a proposal.

The Advisory Committee agreed with the subcommittee's recommendation that expanded interlocutory review be removed from the list of topics under consideration; the remaining two topics continue to be studied by the subcommittee. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Item

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The meeting focused on the emergency rules project and the Advisory Committee's draft Rule 62 (Criminal Rules Emergency). The agenda also included a report from the Rule 6 Subcommittee.

At its May 2020 meeting, the Advisory Committee formed a subcommittee to consider two suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012. As previously reported to the Conference in September 2020, the suggestions seek to add additional exceptions to the secrecy provisions in Rule 6(e). A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." The question of inherent authority has also been raised in recent Supreme Court cases. First, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.* Second, the respondent in *Department of Justice v. House Committee on the*

Judiciary, No. 19-1328 (cert. granted July 2, 2020), has relied on the courts' inherent authority as an alternative ground for upholding the lower court's decision.

The Advisory Committee has now received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers).

FEDERAL RULES OF EVIDENCE

Information Items

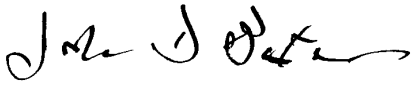
The Advisory Committee on Evidence Rules met by videoconference on November 13, 2020. Discussion items included possible amendments to Rule 106 (Remainder of or Related Writings or Recorded Statements) to exempt the "completing" portion of a statement from the hearsay rule and to extend the rule of completeness to oral as well as written statements; possible amendments to Rule 615 (Excluding Witnesses) to clarify the application of sequestration orders to out-of-court communications to sequestered witnesses; and possible amendments to Rule 702 (Testimony by Expert Witnesses) to clarify that the admissibility requirements must be found by a preponderance of the evidence, and to prohibit "overstatement" by forensic experts.

OTHER ITEMS

An additional action item before the Standing Committee was a request by Chief Judge Jeffrey R. Howard, Judiciary Planning Coordinator, that the Committee review the 2020 *Strategic Plan for the Federal Judiciary* and submit suggestions regarding prioritization of strategies and goals. The agenda materials included a copy of the *Plan* for Committee members to review prior to the meeting. After opportunity for discussion, the Standing Committee did not identify any particular strategies or goals to recommend for priority treatment over the next two years. This was communicated to Chief Judge Howard by letter dated January 11, 2021.

The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Respectfully submitted,



John D. Bates, Chair

Richard P. Donoghue	William K. Kelley
Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Kosta Stojilkovic
William J. Kayatta Jr.	Jennifer G. Zipps
Peter D. Keisler	

Appendix – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

TAB 3

Minutes of the Fall 2020 Meeting of the

Advisory Committee on the Appellate Rules

October 20, 2020

Via Teams

Judge Jay Bybee, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, October 20, 2020, at 10:00 a.m. EDT. The meeting was conducted remotely, using Microsoft Teams.

In addition to Judge Bybee, the following members of the Advisory Committee on the Appellate Rules were present: Justice Judith L. French, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, Judge Paul J. Watford, and Lisa Wright. Acting Solicitor General Jeffrey B. Wall was represented by H. Thomas Byron III, Senior Appellate Counsel, Department of Justice.

Also present were: Judge John D. Bates, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison Member, Advisory Committee on the Appellate Rules; Molly Dwyer, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Administrative Analyst, RCS; Kevin Crenny, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; Brittany Bunting, Administrative Analyst, RCS; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Professor Daniel J. Capra, Reporter, Advisory Committee on the Rules of Evidence and Liaison to the CARES Act Subcommittees; Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure; and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure.

I. Introduction

Judge Bybee opened the meeting and greeted everyone, particularly Molly Dwyer, the new Clerk Representative. He offered his heartfelt appreciation to Judge Michael Chagares, the immediate past chair of the Committee.

II. Report on Meeting of the Standing Committee

The draft minutes of the June Standing Committee meeting are in the agenda book, along with the report of the Standing Committee to the Judicial Conference.

III. Approval of the Minutes

The draft minutes of the April 3, 2020, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

A. Proposed Amendment to Rule 42—Stipulated Dismissal of Appeal (17-AP-G)

The Reporter stated that the Advisory Committee had submitted for final approval a proposed amendment to Rule 42 that would make it mandatory for a Clerk to dismiss an appeal when the parties so stipulate. The Standing Committee, however, was concerned how this proposed amendment could interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. As reflected in the agenda book (page 107), he suggested the addition of a provision to deal with this concern:

> **(d) Criminal Cases.** A court may, by local rule, impose requirements to ensure that a defendant consents to the dismissal of an appeal in a criminal case.

He added that Professor Struve was concerned that this phrasing might be read by naïve readers (particularly defendants themselves) as suggesting that the court of appeals should pressure a defendant to withdraw an appeal. Professor Struve added that no lawyer would read it this way but was concerned about paranoid readings by inmates. She suggested rewriting the provision.

Judge Bybee noted that the proposed addition sends readers to the local rules. Professor Struve responded that her concern was not that any court of appeals would think that it should pressure defendants, but that she is always looking out for ways that members of the public might misread rules.

An academic member suggested using the phrase "confirm whether" instead of "ensure that" and asked whether the addition should be limited to criminal appeals or extend to habeas cases or civil cases generally. Judge Bates suggested that perhaps the addition be broadened to require compliance with all relevant local rules, but also stated that he was not aware of any such local rules other than those dealing with criminal appeals.

Mr. Byron responded that if the Appellate Rules are to encourage or permit local rules, they should do so in a focused way. To date, the relevant local rules are limited; we should not encourage more local rule making, particularly since the point

of the amendment is to require that courts dismiss when the parties stipulate. He said that the addition should not extend to civil cases, including habeas, and noted that securing the parties' consent would be complicated in cases with corporate parties.

The Reporter asked whether the change to "confirm whether" met Professor Struve's concern. She agreed it did.

An attorney member noted that she was not familiar with stipulated dismissals in criminal cases, and that in her experience, such a dismissal was done by motion. The Reporter responded that the concern raised by the Standing Committee was about stipulated dismissals, but that the proposed amendment would reach both.

Judge Bybee moved that the phrase "ensure that" be replaced by the phrase "confirm whether." Mr. Byron found that phrasing awkward: if one imposes a requirement it is usually to do something. Perhaps "confirm that" would be better. Professor Struve suggested "confirm that the defendant is consenting." An attorney member suggested "confirm that the defendant has consented." This last suggestion was met with unanimous approval.

The Committee approved the following addition:

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

B. Proposed Amendment to Rule 25—Railroad Retirement Act (18-AP-E)

The Reporter explained that the proposed amendment to Rule 25 would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases. But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

The proposal has been published for public comment. Only one comment has been received; that comment (reproduced on page 109 of the agenda book) is not specifically directed to the proposed amendment. The Standing Committee, however, expressed some concern about whether other kinds of cases—such as ERISA cases and Hague Convention cases—might warrant similar treatment and asked that outreach be done to relevant stakeholders. The Reporter noted that he had reached out to the ABA Joint Committee on Employee Benefits but had not yet heard back. He invited members of the Committee to suggest any additional outreach, particularly regarding Hague Convention cases.

He added that it was somewhat awkward because any amendment to deal with such cases would have to be to the Civil Rules rather than the Appellate Rules. In most instances, the Appellate Rules can simply piggyback on the privacy protections in the Civil Rules. The only reason this Committee got involved with this proposed amendment is that Railroad Retirement Act cases come directly to the courts of appeals.

Judge Bybee stated that this should be worked out with the Civil Rules Committee; our work is done here. Both Judge Bates and Professor Coquillette stated that the Reporter should talk to the reporters for the Civil Rules Committee.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendment to Rule 2—CARES Act

The Reporter presented the subcommittee's report regarding the CARES Act (Agenda Book page 115). He stated that Congress had directed the Judicial Conference to consider amendments under the Rules Enabling Act to address future emergencies. Each of the Advisory Committees has undertaken this task. The Evidence Committee decided that no changes were needed, thereby freeing its reporter, Professor Daniel Capra, to coordinate the efforts of the other Committees.

Thus far, the various subcommittees have taken a range of approaches, with Criminal being the most restrictive, Appellate the least restrictive, and Civil and Bankruptcy in between. There are three major issues: what triggers the emergency provisions, who decides whether to invoke those provisions, and what can be changed in an emergency.

All four subcommittees are using the same basic triggering language—"If extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a [court of appeals], substantially impair the ability of a [court of appeals] to perform its functions in compliance with these Rules." Criminal, however, adds a requirement that there be no feasible alternative.

The four subcommittees differ regarding who is empowered to invoke the emergency provisions. Criminal and Civil restrict the power to the Judicial Conference, with Criminal adding the requirement of particular findings. Bankruptcy adds both the Chief Circuit Judge and the Chief Judge of the Bankruptcy Court. The Appellate subcommittee proposal empowers the Chief Judge of the Circuit and the Judicial Conference, with power in the latter to review and revise any determination of the former.

Other Committees list particular rules that can be changed. The Appellate subcommittee proposal does not, reflecting that existing Rule 2 permits virtually any rule to be suspended in a particular case.

Professor Capra elaborated on some of the differences between the various subcommittees, noting that many are stylistic, but that Appellate is the outlier in being so open-ended.

Mr. Byron stated that it is appropriate for Appellate to be more open-ended and that we should advocate for that approach. Professor Capra stated that there is much to be said for uniformity, and that the various subcommittees are using the same basic definition of an emergency but have considerable disuniformity.

An academic member raised a question of statutory authority. 28 U.S.C. § 2071 gives each court rule making authority, and 28 U.S.C. § 2072 gives the Supreme Court general rule making authority. 28 U.S.C. § 331 gives the Judicial Conference the authority to modify or abrogate local rules that are inconsistent with federal law. But where does the Judicial Conference or the Chief Judge get the authority to promulgate a rule? In response to a question from Judge Bybee about whether a similar problem affects the existing Rule 2, an academic member stated that a panel hearing a case has authority to act, and existing Rule 2 provides that it is not hemmed in by other existing rules. He suggested that the authority should be channeled through local rules, which in turn could authorize the Chief Judge to act, and the Judicial Conference be empowered to make recommendations.

Judge Bates observed that other committees are proposing language that would substitute for the existing rules that are suspended. The proposed amendment to Rule 2 gives leeway to suspend, but it doesn't say what replaces the suspended rule. This may be a concern when the proposed rules go to the Judicial Conference, the Supreme Court, and Congress.

The Reporter suggested that the CARES Act itself might provide the necessary statutory authorization. A judge member agreed with Judge Bates; there is a difference between suspending the rules and issuing rules. The court should have power, not the chief judge.

Professor Coquillette drew on his institutional memory to recall that when Congress wants the rules committees to do something, it is willing to clarify their authority. It's not a practical problem; Congress wants the committees to act. On the other hand, using local rules is much more problematic. It is far easier for Congress to oversee the Rules Enabling Act rulemaking process than to oversee local rules.

Professor Capra added that the authority issue is not a problem if the Judicial Conference is simply making findings that trigger alternatives that are built into the rules.

An academic member noted that the CARES Act refers only to presidential declarations of national emergencies. He is particularly concerned about the Judicial

Conference, which does not seem to have any rule making authority on its own. A local rule, however, can preauthorize the chief judge to act.

Professor Capra stated that each of the various subcommittees reached beyond presidential declarations of national emergencies, concluding that the proposed amendments need not be tied to such an emergency.

In response to a question, Judge Bates clarified that while nothing has lessened the urgency of moving forward, no action was expected at the January meeting of the Standing Committee. Instead, the expectation is that there will be some disuniformity among the proposals from the various committees. This Committee should send forward for discussion what it thinks best.

The Reporter stated that the standard for an emergency was close to uniform, but that there is a significant difference as to who could invoke the emergency provisions. Judge Bates emphasized that the issue of the authority of the Judicial Conference is more of an issue for the proposal before this committee than for the proposals before other committees. He added that it is problematic to throw the problem to local rulemaking, because that process is not a quick one. Some wonder whether the Judicial Conference can act quickly enough, but local rules are slow. An academic member responded that the local rules could preauthorize the chief judge to act.

Professor Capra stated that local rules would be fighting words for the Criminal Committee. He added that, under the approach taken by other committees, the Judicial Conference would not be engaged in rulemaking, but only declaring that an emergency exists, triggering the replacement rules that then take effect.

Professor Struve urged the Committee to focus on what it thought the best approach would be rather than the question of authorization, noting that Congress might bless the results with legislation if needed.

A judge member expressed concerns about someone acting unilaterally. Judge Bybee stated that he was comfortable with giving authority to the Chief Judge, noting that in the Ninth Circuit, there is an active executive committee. Mr. Byron agreed that he is not concerned about a rogue chief judge, and that a majority of the court could overrule. A different judge member stated that her court also has an executive committee, that any chief judge seeks consensus, and that a majority could override. She added that her court suspended the requirement of paper submissions, and the chief consulted with everyone. Ms. Dwyer agreed that the chief judge is appropriate as an initial decisionmaker, based on working for 32 years under 8 different chief judges.

An academic member suggested empowering the court to act, providing that unless the court orders otherwise, the Chief Circuit Judge may act on a court's behalf,

and empowering the Judicial Conference to recommend suspensions to one or more circuits, as well as reviewing and revising determinations by the court.

Professor Capra observed that this suggestion is even more at odds with other committee because it means that the Judicial Conference would not itself be taking action.

Mr. Byron stated he is happy with giving the power to the chief judge but did not oppose the alternative of empowering the court. He added that uniformity is appropriate; if the Judicial Conference has statutory authority, it should be empowered to make the decision. An academic member clarified that his only objection to the role of the Judicial Conference concerned its statutory authority.

A judge member expressed concern with giving the power to the chief judge, preferring that it be vested in the court. Professor Coquillette stated that the executive committee of the Judicial Conference moves fast when it has to and is under the control of the Chief Justice.

The Reporter suggested addressing separately (1) the power of the chief judge and (2) the power of the Judicial Conference. The Committee reached a tentative consensus to empower the court and the Judicial Conference, while permitting the chief judge to act on the court's behalf unless the court orders otherwise.

An academic member raised two additional issues: Should there be a 90-day sunset provision? Should the proposed amendment be limited, as existing Rule 2 is, by Rule 26(b)?

As to the first issue, the Reporter responded that the proposal required that the suspension be ended when the substantial impairment no longer exists, and Professor Capra stated that other committees are proposing 90-day renewable periods. Mr. Byron observed that our current situation has lasted well more than 90 days.

As to the second issue, the Reporter stated the proposal would allow the suspension of rule-based time limits, but not statutory time limits. Professor Struve suggested that this distinction be written into the text of the rule. Mr. Byron appreciated the value of being clear in the text of the rule but was concerned about trying to identify the limits of what could be suspended. An academic member suggested adding "other than times limits imposed by statute"; the Reporter suggested "other than jurisdictional times limits imposed by statute." Professor Struve suggested that precision is appropriate, and suggested "other than times limits imposed by statute and described in Rule 26(b)(1)–(2)." Mr. Byron was persuaded.

The Committee produced the following working draft:

Rule 2. Suspension of Rules

(a) **Particular Cases.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these Rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) Rule Emergencies. If extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court of appeals, substantially impair the ability of a court of appeals to perform its functions in compliance with these Rules, the court may suspend any provision of these Rules in that circuit, other than time limits imposed by statute and described in Rule 26(b)(1)–(2). The court must end the suspension when the substantial impairment no longer exists. The Judicial Conference of the United States may exercise this same power to suspend in one or more circuits, and may review and revise any determination by a court under this rule. Unless the court orders otherwise, the Chief Circuit Judge may act on a court's behalf under this Rule.

Judges Bates urged the Committee to be prepared to defend the decision to empower the chief judge, as opposed to leaving the decision to the Judicial Conference, as Civil and Criminal propose.

Mr. Byron stated that appellate judges act collegially on behalf of the whole court in ordinary appeals. Unlike district judges, they do not act independently. The Reporter added that the issues addressed by district judges include trials, with juries and witnesses, while appellate judges at most hear oral argument, so that greater flexibility in suspending the rules is appropriate—as existing Rule 2 reflects. A judge member added that individual circuit judges exercise little authority, but individual district judges exercise considerable authority. A circuit judge's colleagues can overrule that judge's decision; a district judge's colleagues can't. The public is much more affected in the district court, considering all the ways in which the public comes to proceedings in a district court. The public has little role in the courts of appeals; in her court, only 15% of the appeals are orally argued.

Judge Bates responded that this is all basically accurate and distinguishes the chief judge of a circuit from the chief judge of a district. But the question isn't chief judge of a circuit vs. the chief judge of a district; it is chief judge of a circuit vs. the Judicial Conference.

Professor Coquillette added that this could be a real concern when the proposal is before the Standing Committee. The Judicial Conference is very collegial; the chief judges of each circuit will be involved.

A judge member supported keeping the authority in the chief judge, mainly for efficiency reasons. But if that's going to cause problems with the Standing Committee, it may be better to simply put the authority in the Judicial Conference. The chief judge will deal with the executive committee of the Judicial Conference.

Judge Bybee noted that we already have Rule 2; the proposal we are considering looks an awful lot like just using Rule 2 in every case.

Mr. Byron stated that he preferred staying with what we have, but that if the Standing Committee opposes giving this authority to anyone but the Judicial Conference, he can live with it.

An academic member suggested giving the Judicial Conference the authority to declare an emergency. That declaration, in turn, would trigger the power of the court (or the chief judge, unless the court orders otherwise) to suspend. Judge Bates stated that there might be pushback in the Supreme Court or Congress about different solutions in different parts of the country to a national emergency. He emphasized a particular concern if the emergency rule did not identify the substitute rule that would govern if the ordinary rule were suspended. He is concerned about Congress getting into the act. Professor Coquillette agreed. Professor Capra stated that the latest suggestion (giving the Judicial Conference authority to declare an emergency) would move the Appellate proposal closer to that of other committees. There would still be the need to identify which rules were suspended.

The Reporter cautioned that an emergency rule that specified which rules could be suspended ran the risk of losing the flexibility provided by existing Rule 2, which seems to have been sufficient for this pandemic.

Judge Bates observed that the Advisory Committee on Civil Rules had a similar concern and came close to not recommending an emergency rule. Criminal is in a different situation.

A judge member like the idea of doing nothing. There's no issue of statutory authority. Rule 2 has already been adopted.

Mr. Byron suggested that we propose the broad version of Rule 2 that we have been working with and pull it if we meet with significant push back. A judge member stated that he would be willing to give up on the authority of the chief judge, leaving it in the hands of the Judicial Conference, but that if we had to specify which rules could be suspended, he would withdraw the proposal.

Mr. Byron stated that there are relative risks to consider. If it is necessary to leave the authority in the Judicial Conference alone, that's probably okay. But the biggest risk would be if others insist on identifying particular rules that can be suspended and specifying their replacements. That would limit existing authority.

The Committee agreed without dissent to forward the working draft above to the Standing Committee for discussion.

The Reporter noted that the Civil Rules Committee currently lists Civil Rule 6 as one that could be suspended in an emergency. If that goes forward, it will be necessary to coordinate with this Committee.

The Committee recessed for lunch at approximately 12:45 p.m. and reconvened at approximately 1:15 p.m.

The Reporter presented the rest of the recommendations by the CARES Act subcommittee. Reviewing the Federal Rules of Appellate Procedure in light of the experience of the pandemic led the subcommittee to suggest some changes without regard to a rules emergency (agenda book page 118).

FRAP 4(c). The subcommittee recommended providing for situations where a prison mail system is unavailable by adding a new provision to the prisoner mail box rule: "If an institution's internal mail system is not available on the last day for filing, an inmate who files a notice of appeal on the first day that it becomes available receives the benefit of this rule."

FRAP 26(a)(3). The subcommittee considered defining "inaccessibility" of the clerk's office in a way that takes account of the possibility that electronic filing might be unavailable. But further research led the subcommittee to recommend not making any revision to FRAP 26(a)(3). That's because the 2009 amendment removed the reference to "weather or other conditions" precisely to account for the possibility of inaccessibility of electronic filing.

FRAP 33. The subcommittee recommended permitting an appeal conference to be conducted "remotely" rather than "by telephone."

FRAP 34(b). The subcommittee recommended providing that argument may be held in a courtroom as usual, but with some participants joining in remotely and, more broadly, permitting the court to set the "manner" of oral argument. To do this, the requirement that the clerk advise all parties of the "place" for oral argument would be deleted, and the following provision would be added: "If oral argument will be heard in person, the clerk must advise all parties of the place for it. If oral argument will be heard remotely, in whole or in part, the clerk must advise all parties of the manner in which it will be heard."

FRAP 34(g). The subcommittee recommended that the rules governing use of physical exhibits apply only if argument is held in person, by adding the phrase "an in-person" before the word argument. Judge Bybee noted that physical exhibits might be used in a remote argument. The Reporter responded that Rule 34 requires that

arrangements be made for placing physical exhibits in the courtroom and removing them, requirements that would not apply to a remote argument.

FRAP 45(a). The subcommittee looked into clarifying the interplay between a court being "always open" under Rule 45 and the clerk's office being "inaccessible" under Rule 26. Given the history and apparent purpose of the "court always open" provision, and its connection to longstanding statutory provisions, the subcommittee suggested leaving the "court always open" provision in place rather than making any change to it. On the other hand, it is difficult to see how the requirement that the clerk or a deputy must be in attendance during business hours can be reconciled with the possibility envisioned by Rule 26 that the clerk's office might be inaccessible. Prior to restyling, the word used was "shall," rather than "must," and "shall" often carries some element of discretion. But the stylists banned the word "shall," so the "shall" became a "must." Rather than trying to restore "shall"—as was done for Civil Rule 56 in 2010—the subcommittee recommended leaving the word "must," but imposing the duty only whenever reasonably possible.

Judge Bates stated that the phrase "reasonably possible" was not a common one. He suggested a possible cross-reference to Rule 26. Judge Bybee noted that there is always a force majeure exception. Mr. Byron suggested instead that the word "must" be replaced by the word "will," so that the rule would provide. "The clerk's office with the clerk or a deputy in attendance will be open during business hours on all days except Saturdays, Sundays, and legal holidays."

With this change, the Committee agreed unanimously to forward these proposed amendments to the Standing Committee for discussion.

B. Proposed Amendment to Rules 35 and 40—Rehearing

Professor Sachs presented the subcommittee's report regarding Rule 35 and 40 (agenda book page 125). He explained that this project has been kicking around for some time. There is considerable duplication that results from having two rules that address rehearing. The Committee previously focused on spelling out what happens when a petition for rehearing en banc is filed and the panel believes that it can fix the problem. How do we make clear that this can happen while still preserving a party's right to access the full court? Working on the specifics revealed a spaghetti string of cross-references.

As a result, the Committee asked the subcommittee to attempt to integrate the two rules. The main arguments against doing so is that the changes are mostly stylistic, that renumbering rules can produce some difficulties in legal research, and that local rules will themselves have to be renumbered. On the other hand, having a single rule governing rehearing is much less confusing for those not already familiar with appellate practice.

The subcommittee proposes that Rule 35 be abrogated and that a single rule—Rule 40—govern all petitions for rehearing. Proposed Rule 40(a) provides that a party may petition for panel rehearing, for rehearing en banc, or for either. Proposed Rule 40(b) sets forth the criteria for each kind of rehearing. Proposed Rule 40(c) brings together in one place uniform provisions governing matters such as the time to file, form, and length.

The key moves to deal with the problem that prompted this project are contained in proposed (c)(1) and (c)(5). Proposed (c)(1) provides that any amendment to a decision restarts the clock for seeking rehearing, thereby not blocking access to the full court. Proposed (c)(5) provides that a petition for rehearing en banc does not limit a panel's authority to grant relief.

Before turning to the details of the proposal, the Committee first discussed the big question: whether or not to engage in the comprehensive revision. Mr. Byron thanked Professor Sachs for the huge amount of work and reflection he put into this project. Mr. Byron stated that for the last several years he has been advocating a comprehensive revision. It provides a real benefit of clarifying the interaction of panel rehearing and rehearing en banc, and of creating a single resource rather than leaving readers flipping back and forth between two rules. This is a huge improvement.

A lawyer member stated that overall this is great, but had one concern about the statement that panel rehearing is the "ordinary" means of reconsidering a panel decision. She found that phrasing too encouraging; panel rehearing is not ordinarily done. Judge Bybee added that none of this is favored.

A judge member stated that she has never been in favor of the comprehensive revision, seeing no problem that needs fixing. The substantive standards for each kinds of rehearing are totally different. The proposed additions contained in (c)(1) and (c)(5) to deal with the identified problem can be put in one of the rules; there is no need to redo the whole thing. The comprehensive revision will create tremendous work for the courts and will make people file combined petitions for panel rehearing and rehearing en banc. Now, forty percent seek only panel rehearing; with this amendment, everyone will file for both. The ship has sailed on a comprehensive revision, but it is important to keep people from filing for both all the time. The prohibition on oral argument should be placed in (b)(1) dealing with panel rehearing.

Professor Sachs responded that it is a good idea to extend the existing prohibition on oral argument to en banc petitions. A lawyer member stated that she was not aware that the Committee had yet made a decision to consolidate Rules 35 and 40, and that she had never heard of a court hearing argument on a petition for rehearing. She suggested adding "unless the court orders otherwise." No member of the Committee could identify a situation in which a court would hold oral argument

on the question whether to grant rehearing—as opposed to hearing oral argument on the merits after deciding to grant rehearing. Mr. Byron and Judge Bybee suggested moving the prohibition on oral argument to subsection (a). Professor Sachs voiced support for making clear that the prohibition on oral argument applies to the petition for rehearing itself and feared that adding "unless the court orders otherwise" would invite motions for oral argument on the petition. The Committee agreed to move the provision regarding oral argument to subsection (a) and revise it to read, "Oral argument on whether to grant the petition is not permitted."

Discussion then turned to the first bracketed language in the subcommittee's draft (agenda book page 127). That language in (b)(2) would require that a petition for rehearing en banc also meet the standard in (b)(1) for a petition for panel rehearing.

A lawyer member stated that this bracketed language doesn't make sense. A petition for rehearing en banc might not involve a claim that the panel misapprehended any law or fact; it might simply argue that the prior precedent should be revisited. She urged deleting the bracketed language. Judge Bybee agreed, and no one urged keeping it.

Professor Sachs then explained the reasons for retaining the second bracketed language in the subcommittee's draft. That language in (b)(3) establishes the criteria for rehearing en banc that applies even when the court acts sua sponte. He also worried about the negative inference that some could draw if the provision, which is in current Rule 35, were delated.

A lawyer member stated that the language is certainly duplicative, and that she is not worried about sua sponte rehearing. A judge member urged changing as little as possible in the existing rule. This accentuates the point. The proposed rule is so much shorter than the existing rules. Judge Bybee added that any redundancy is in the existing Rule 35. A lawyer member noted that the proposed rule now says that rehearing en banc "is not favored" twice; maybe it's worth making that point twice. A judge member noted that 50% of appeals involve pro se litigants.

No member of the Committee objected to retaining this language.

A judge member suggested that proposed (c)(1), which restarts the time to file a petition for rehearing after a decision is amended, should refer to when the "panel" amends its decision, not when the "court" amends its decision. Professor Sachs responded that use of the word "court" was deliberate, to take account of the possibility of seeking rehearing of an en banc court's decision. While rare, an en banc court could make a mistake; even the Supreme Court allows petitions for rehearing of its decisions. A judge member stated that this project started because of an identified problem dealing with panel decisions; we shouldn't make this change.

Judge Bybee pointed out that using the word "panel" would include the en banc panels used in the Ninth Circuit, where it is possible to have a super en banc.

The Committee decided to use the word "panel" rather than "court."

A judge member stated that Professor Sachs had produced a phenomenal draft, and asked what happens if a party files a petition for rehearing en banc and, while it is pending, the panel changes its decision? She urged that a party should be able to stand on the already-filed petition for rehearing en banc, amend it, or file a new one.

Professor Sachs responded that, under the current draft, the earlier petition is wiped out and treated as moot. The clock starts for a new one. The party may have a very different point.

A judge member stated that the change might be minor, so a party might want to simply stand on the existing petition or amend it.

A lawyer member stated that she would file a new petition, alerting the court that she still wanted the rehearing en banc. She suggested that it might be worth clarifying this in (c)(5).

Mr. Byron agreed that a litigant's response should be clear. A new petition makes the litigant's response clear, including to the clerk. A judge member expressed concern that this will lead to pro se litigants having to file new sets of papers, even where the change was minor. Mr. Byron stated that requiring a new filing is the clearest way to know the litigant's position. Judge Bybee stated that this could be very difficult for little folks; Mr. Byron responded that a pro se letter could be treated as a petition.

The Reporter noted that we are not trying to submit a draft for the Standing Committee to approve for publication at its January meeting. The Committee decided to leave this issue to be considered further by the subcommittee.

A lawyer member raised an issue that had not been considered by the subcommittee. Subsection (c)(3) of the subcommittee's draft provides that "ordinarily" a petition will not be granted in the absence of a request for a response. She was recently involved in a case where a panel amended an opinion in response to a petition for rehearing without calling for a response. Perhaps the panel figured that since the same party prevailed, it didn't matter. But if a response had been sought, the prevailing party could have pointed out that the issue had been expressly waived. She is still dealing with the fallout. Perhaps stronger language could be used.

Judge Bybee noted that sometimes scrivener's errors are fixed without calling for a response. Sometimes parties simply want their ages stated correctly, or their names spelled correctly. A judge member suggested maybe something that required that a decision not be "substantively amended" without calling for a response. A

lawyer member stated that in another context, the subcommittee struggled with a similar question, and ultimately decided against using the modifier "substantive."

Professor Sachs then turned to the final bracketed language from the subcommittee draft, subsection (c)(4)(C) (agenda book page 128). The question is whether to include language that would add new language, not in the current rules, empowering a panel to prevent second or successive rehearing petitions; a concern is not preventing access to the full court. In response to a question from a judge member, he explained that rest of proposed section (c)(4) currently applies to panel rehearing, but that it makes sense for it to apply to both a panel and the full court. It doesn't impose a restriction on the full court.

A judge member stated that we should not add the new bracketed language, especially if we require a new petition in response to changes made by a panel. Judge Bybee noted that his court issues these orders, but he now questions whether it should.

A lawyer member stated that even if a panel is empowered to block further petitions for panel rehearing, it should not be empowered to block petitions for rehearing en banc.

A judge member urged keeping out the new language and suggested, more broadly, that subsection (c)(4) doesn't really fit the en banc court, urging that it remain limited to panel rehearing.

A lawyer member responded that no substantive change is intended, that applying subsection (c)(4) to the en banc court is the consequence of combing the two rules, and that it does fit the en banc court. Professor Sachs agreed that while it is a change, it is not a substantive change, and worries about negative inferences if the subsection is limited to panels. A judge member responded that the en banc court has inherent power to do whatever it wants. A lawyer member noted that the rule can make clear to litigants what a court may do.

A judge member drew attention to current Rule 35 (b)(3), which provides that length limitations apply to separately filed petitions for panel rehearing and rehearing en banc as if they were a single document, unless a local rule requires separate petitions. Does the subcommittee proposal change that?

Professor Sachs responded that it was intentional to require a single document subject to the word limits. In response to a question about what would happen if a party filed separate documents, Professor Sachs stated that the subcommittee did not envision that the use of the word "either" in subsection (a) would lead parties to file two separate documents. A lawyer member suggested using the word "both" rather than "either."

The concern remains whether to remove the ability of local rules to require separate documents. The Committee's recollection is that at this point only the Court of Appeals for the Fifth Circuit has such a local rule. We will check with the Fifth Circuit.

The subcommittee will continue its work in light of this discussion. A judge member stated that it was a great improvement.

C. IFP Standards—(19-AP-C)

The Reporter reported on the work of the IFP subcommittee (agenda book page 144). The subcommittee is considering a suggestion by Sai to regularize the criteria for granting IFP status and to revise the IFP form. The Civil Rules Committee has removed the item from its agenda. The forms used in the district courts are Administrative Office forms that can be revised by the Administrative Office. The form used in courts of appeals, however, is Form 4 of the Federal Rules of Appellate Procedure and adopted pursuant to the Rules Enabling Act.

There is reason to think that the there is considerable variation in the way the IFP statute is implemented across the district courts. In addition, the IFP statute, as amended by the Prison Litigation Reform Act, is a mess.

The subcommittee is looking at other forms. It also hopes to learn how the courts of appeals handle IFP applications, including what standards are used and what information from Form 4 is actually useful.

Ms. Dwyer will look into this.

D. Relation Forward of Notices of Appeal—(20-AP-A)

Mr. Byron presented the report of the subcommittee (agenda book page 155). The subcommittee is considering a suggestion to deal with premature notices of appeal. While the existing Rule 4(a)(2) usually works, there are situations in which there is a discernible problem, even if that problem is not large.

The solution offered by Professor Bryan Lammon, who submitted the suggestion, would allow any premature notice of appeal to become effective once a judgment or appealable order is filed. The subcommittee thinks that this proposed solution would cause more problems than it solves.

One category of cases is the most sympathetic one. These cases involve appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. A belated certification works, but what if the

case reaches final judgment without a Rule 54(b) certification? Sometimes, but not always, this results in a loss of appellate rights.

Another category of cases involves appeals from decisions regarding liability without a determination of the remedy. A third category involves appeals from reports and recommendation by magistrate judges prior to their adoption by a district judge. This final category often involves pro se litigants.

All the solutions that the subcommittee has considered so far are unsatisfactory. We do not want to create incentives for premature notices of appeal. Perhaps there is a way to increase awareness of the effect of a notice of appeal and whether it divests the district court of jurisdiction. The subcommittee will continue to look.

VI. Discussion of Matters Before Joint Subcommittees

A. Electronic Filing Deadlines (19-AP-E)

Judge Bybee reported that the joint subcommittee considering whether the deadline for electronic filing should be moved to some time prior to midnight continues to gather information, but that data gathering has been delayed due to COVID-19 (agenda book page 168). He added that the Court of Appeals for the Ninth Circuit has had some discussion about whether the existing rule is unfair to young associates.

The Reporter noted that Judge Chagares continues to be involved in this project. Ms. Dwyer stated that lawyers in immigration matters want to keep the midnight deadline. It can be especially important when seeking a stay of removal.

B. Finality in Consolidated Cases after *Hall*

The Reporter reported on the work of the joint subcommittee dealing with finality in consolidated cases. The Supreme Court in *Hall v. Hall* decided that consolidated actions retain their separate identify for purposes of appeal so that if one such action reaches final judgment it is appealable, even though other consolidated cases remain pending. This decision creates the risk that some will lose their appellate rights because they did not realize that their time to appeal had begun to run, and creates the risk of inefficiency in the courts of appeals because multiple appeals are taken at different times from a proceeding that a district judge thought similar enough to warrant consolidation. Because any fix would likely be made to the Civil Rules, particularly Rule 42 and Rule 54(b), enabling district judges to release for appeal individual actions that were consolidated, the Reporter for the Civil Rules Committee is taking the lead. His report is in the agenda book (page 170).

A docket study by Emery Lee has identified thousands of consolidated cases, not including MDL cases. A sample of 400 of these consolidated cases revealed nine that produced a final judgment in one originally separate action while the rest of the consolidated proceeding remained pending. He projected that there may be hundreds of such instances every year.

No particular problem was found in the cases from this sample. Problems may exist but be hidden. Lawyers may miss the issue, and only discover it when it is too late. Lawyers spend time having to figure out whether a decision in consolidated proceedings finally resolves one of the originally separate actions. Courts may overlook the problem. The joint subcommittee intends to learn what, if anything, courts of appeals are doing to screen appeals for *Hall* problems. Perhaps Ms. Dwyer can help with that. The joint subcommittee may also reach out to the bar. For now, the joint subcommittee continues its evaluation.

The one thing that is said in favor of the rule in *Hall* is that it is clear. But while it is clear in simple cases, it is not so clear in cases where there has been a consolidated amended complaint or where additional parties have been added after consolidation. The Reporter asked members of the Committee to keep an eye out for problems.

VII. Discussion of Recent Suggestions

A. Titles in Official Capacity Actions (19-AP-G)

The Reporter stated that Sai has suggested that Civil Rule 17 be amended to require, rather than merely permit, the use of an official title in official capacity actions, and that Appellate Rule 43 be amended accordingly. At the last meeting, this matter was tabled pending the gathering of information about how Circuit Clerks currently handle the naming of official capacity actions. Perhaps all or most courts do what the Court of Appeals for the Third Circuit does—replace an official's name with his title.

The information gathered, however, reveals that most litigants and courts use an individual's name (agenda book page 176). The Reporter noted that if parties are choosing to use individual names, despite the longstanding Rules permitting the use of official titles, maybe they have some reason to do so. Do the advantages of using official titles justify overriding the considered choice of litigants?

He added that the Civil Rules Committee removed the item from its agenda. The Department of Justice opposed the suggestion, not only because there was no problem needing fixing, but because the use of titles can be complicated. Some federal officers are appointed by the President with the advice and consent of the Senate, others are acting officers, still others perform the duty of an office as a matter of

delegation. Judge Dow was concerned that the proposed amendment could mislead litigants, particularly in the *Ex parte Young* context where a name is required.

Mr. Byron suggested removing the item from the agenda, and the Committee agreed.

B. Incorporate Civil Rule 11 (20-AP-B)

The Reporter stated that Sai has submitted a suggestion that Civil Rule 11 be amended to require prefiling review of all complaints, matching the prefiling review of IFP cases under 28 U.S.C. § 1915(e), and that a new Rule 25.1 be added to the Appellate Rules to incorporate Civil Rule 11. The Reporter noted that there was consideration of this idea back in the 1980s, at a time when Civil Rule 11 had mandatory sanctions. He suggested removing this item from the Committee's agenda—unless the members of the Committee believe that Rule 38 sanctions are not being imposed frequently enough, or that Rule 38 is inadequate to serve its purposes.

Mr. Byron recalled that the idea of explicitly adopting the Rule 11 standard in the Appellate Rules was considered in the 90s and the 00s. Rule 38 seems adequate to him, and he suggested removing the item from the agenda. There doesn't seem to be a problem.

The Committee agreed to remove this item from its agenda.

C. Pro Se Electronic Filing (20-AP-C)

The Reporter described a suggestion that electronic filing be made more widely available to pro se litigants, especially because of the pandemic (Agenda Book page 186). There have been a number of similar suggestions made to the Civil Rules Committee. Current Appellate Rule 25(a)(2)(B) establishes a presumption against electronic filing by pro se litigants, but a court order or local rule may permit it.

An academic member thought that it might become appropriate to flip the presumption and suggested revisiting the issue at the next meeting. Mr. Byron stated that this issue has come up several times. In the past, clerks—especially district court clerks—have voiced strong opposition, but maybe that has changed. Ms. Dwyer stated that Mr. Byron is correct, but that the Court of Appeals for the Ninth Circuit has allowed it. The big staffing issue in the pandemic has been sending people into the office to deal with the paper filings. There is a huge problem with incarcerated litigants. Arizona has set up kiosks in prisons; they are working well. The pushback has been from district clerks rather than circuit clerks. In the court of appeals, if someone abuses the system, we just bar them.

Judge Bates added that PDF filings sent by email are being made in the D.C. Circuit and that he is not aware of any problems. A judge member expressed concerns about repeat filers. A different judge member said that her court used to block such filings but now allows them and it hasn't been a problem. The item should not be removed from the agenda; the current presumption increases costs for pro se litigants. Perhaps we can wait to see what Civil does.

The Committee agreed to table the matter, revisiting it once we see what the Civil Rules Committee does.

D. IFP Forms (20-AP-D)

The Reporter stated that Sai has submitted a suggestion calling for quick revision to Form 4, focusing on the Form's demand for financial information about a spouse (Agenda Book page 193). This suggestion is directly related to Sai's broader suggestion regarding IFP standards (19-AP-C).

The Committee agreed to refer this suggestion to the IFP subcommittee.

E. Rule 3 (20-AP-E)

The Reporter stated that Sai has submitted a suggestion calling for a simplification of Rule 3 (Agenda Book page 205). The suggestion is really a comment on the proposed amendment to Rule 3 that has already been approved by the Standing Committee.

For that reason, it could be removed from the agenda and, if the pending amendment to Rule 3 proves problematic, a new suggestion could be entertained at that time. Alternatively, the suggestion could be referred to the Relation Forward subcommittee.

The Committee decided to refer the suggestion to the Relation Forward subcommittee.

VIII. Review of Impact and Effectiveness of Recent Rule Changes

The Reporter stated that Rule 25(d) was amended in 2019 to no longer require proof of service for documents served via the court's electronic docketing system. At the last meeting, it was reported that some courts of appeals were still requiring proof of service despite this rule change.

The Reporter added that research indicates that some courts of appeals continue to have local rules that require proof of service, but that at least one of these courts does not in practice require such proof of service, and is working on revisions to its local rules.

Mr. Byron stated that DOJ continues to have problems and urged that we reach out again. He added that the Fifth Circuit seems to be the prime offender.

IX. New Business

No member of the Committee presented any new business.

X. Adjournment

Judge Bybee thanked the participants, stating that it is wonderful to be part of this group that speaks up frankly and civilly to have an impact on important issues. He knows that it takes a lot of time out of the day, and that it can make for a very expensive day.

He announced that the next meeting would be held on April 7, 2020, in San Diego. That's optimistic, but the situation is fluid.

The Committee adjourned at approximately 4:00 p.m.

TAB 4

TAB 4A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Proposed amendments previously published for public comment

Date: March 7, 2021

There are two proposed amendments previously published for public comment. Based on the prior action of the Advisory Committee, both appear to be ready for the Advisory Committee to approve and forward to the Standing Committee for final approval.

A. Rule 42—Voluntary Dismissal

This proposed amendment to Rule 42 was published for public comment in August of 2019. At the June 2020 meeting of the Standing Committee, the Advisory Committee presented it for final approval. The Standing Committee, however, was concerned about how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal. It decided to withhold approval until local rules were examined.

At its October 2020 meeting, the Advisory Committee examined several local rules that are designed to be sure that a defendant has consented to dismissal. These local rules take a variety of approaches, such as requiring a signed statement from the defendant personally or requiring a statement from counsel about the defendant's knowledge and consent. To guard against the risk that these local rules might be superseded by the proposed amendment, the Advisory Committee approved the addition of paragraph (d), shown below. This addition met the Standing Committee's concern.

Accordingly, the following is ready for the Advisory Committee's final approval.

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief under Rule 42(b)(1) or (2) beyond the dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

(d) Criminal Cases. A court may, by local rule, impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond dismissal of an appeal—including approving a settlement, vacating, or remanding—requires a court order. Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

The amendment permits local rules that impose requirements to confirm that a defendant has consented to the dismissal of an appeal in a criminal case.

B. Rule 25—Railroad Retirement Act

This proposed amendment to Rule 25 was published for public comment in August of 2020. It would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. The reason for the amendment is that Railroad Retirement Act benefit cases are very similar to Social Security Act cases.[1] But unlike Social Security Act cases, Railroad Retirement Act cases are brought directly to the courts of appeals.

At its October 2020 meeting, the Advisory Committee decided that if any amendments to extend privacy protections to other kinds of cases are warranted, such amendments would have to be made to the Civil Rules rather than the Appellate Rules.

Prior to its October 2020 meeting, the Advisory Committee had received only one comment, a comment not specifically addressed to the proposed amendment, but generally calling for simplicity in the language used in rules. Since then, the Federal Courts Committee of the New York City Bar commented that "this limited change is both sensible and narrow, and we therefore support it."

Accordingly, the following is ready for the Advisory Committee's final approval.

Rule 25. Filing and Service

(a) Filing

* * ** *

(5) Privacy Protection. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote access in Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

[1] This is not to say that they are identical in every respect. *See Salinas v. United States R.R. Ret. Bd.*, 141 S. Ct. 691, 699 (2021) (noting that "section 405(g) of the Social Security Act provides that reviewable decisions must be 'made after a hearing,' whereas § 355(f) of the RRA contains no such limitation.").

* * * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

The text of the proposed amendments and the proposed Committee Notes to Rules 42 and 25 as published for public comment follow this report.

TAB 4B

Rule 42. Voluntary Dismissal

* * * * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ must dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant's Motion to Dismiss. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. A court order is required for any relief beyond the mere dismissal of an appeal—including approving a settlement, vacating an action of the district court or an administrative agency, or remanding the case to either of them.

(c) Court Approval. This Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.

* * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. See, e.g., F.R.Civ.P. 23(e) (requiring district court approval).

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including approving a settlement, vacating, or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, "appeal" should be understood to include a petition for review or application to enforce an agency order.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 25. Filing and Service

(a) Filing

* * * * *

(5) **Privacy Protection**. An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case. The provisions on remote access in

[1] New material is underlined in red; matter to be omitted is lined through.

Federal Rule of Civil Procedure 5.2(c)(1) and (2) apply in a petition for review of a benefits decision of the Railroad Retirement Board under the Railroad Retirement Act.

* * * * *

Committee Note

There are close parallels between the Social Security Act and the Railroad Retirement Act. One difference, however, is that judicial review in Social Security cases is initiated in the district courts, while judicial review in Railroad Retirement cases is initiated directly in the courts of appeals. Federal Rule of Civil Procedure 5.2 protects privacy in Social Security cases by limiting electronic access. The amendment extends those protections to Railroad Retirement cases.

TAB 5

TAB 5A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Subcommittee on CARES Act

Re: Emergency Appellate Rule 2

Date: March 11, 2021

The subcommittee met and considered the reaction of the Standing Committee to the discussion draft of an Emergency Appellate Rule 2 that was previously submitted by the Advisory Committee. It also considered the proposals by other Advisory Committees in an effort at harmonizing the various emergency rules.

Here is the discussion draft that went to the Standing Committee after some revisions by the style consultants:

Rule 2. Suspension of Rules

(a) **In a Particular Case.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) In an Appellate Rules Emergency.

(1). *Conditions for an Emergency.* The court may declare an Appellate Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these Rules. Unless the court orders otherwise, the chief circuit Judge may act on its behalf under this Rule.

(2) *Content of a Declaration; Early Termination.* When a Rules emergency is declared, the court may suspend in that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). The court must end the suspension when the rules emergency no longer exists.

(3) *Action by the Judicial Conference.* The Judicial Conference of the United States may exercise these same powers in

one or more circuits, and may review and revise any determination by a court under this rule.

For the most part, the members of the Standing Committee did not like the idea of vesting authority to declare an emergency in the courts of appeals. Concerns for uniformity across the various sets of Federal Rules carried the day, leading to the conclusion that the exclusive authority to issue such a declaration should be in the Judicial Conference.

The concern raised in the last meeting of the Appellate Advisory Committee about the authority of the Judicial Conference was discussed at the Standing Committee meeting. Several theories were considered, including:

- that the Federal Rules frequently incorporate by reference actions taken by others (such as state holidays or state service rules),
- that a Federal Rule adopted under the Rules Enabling Act (REA) can itself confer authority (at least on judicial actors),
- that Congress clearly wants us to act, that the supersession power of the REA permits a rule to expand the statutory authority of the Judicial Conference,
- that existing Federal Rules refer to actions by the Judicial Conference or the Administrative Office,
- that a proposed rule that made it through the entire REA process would be blessed by that process, and
- that a simple declaration of a rules emergency (as opposed to the prescription of a rule) does not present an authority question.

While no single rationale was formally adopted, there does not appear to be a real concern on the Standing Committee with leaving the power to declare a rules emergency with the Judicial Conference alone. Taking the apparent view of the Standing Committee into account, the subcommittee revised the draft of Rule 2 accordingly, giving the Judicial Conference alone the power to declare a rules emergency, while not giving it any power to prescribe a rule.

On the other hand, the Standing Committee seemed comfortable with the open-ended approach for the Appellate Rules. It did seem to think that sunset provisions—as contained in other advisory committee drafts—would be appropriate. The subcommittee agreed.

The Standing Committee seemed largely comfortable with the definition of a rules emergency: where there are "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, [that] substantially impair the court's ability to perform its functions in compliance with these rules."

The subcommittee considered the additional language the Advisory Committee on the Criminal Rules had proposed—that there also be "no feasible alternative measures [that] would eliminate the impairment within a reasonable time." However warranted such a heightened standard might be in the criminal context, the subcommittee saw no need for it in the appellate context.

A significant concern with our discussion draft was that it did not say what replaces a rule that is suspended in an emergency. Sometimes no substitute is required. But to the extent one is, the subcommittee added the language empowering the court to "order proceedings as it directs"—language that already exists in Rule 2.

Here is the subcommittee's revision after considering the comments by the Standing Committee:

Rule 2. Suspension of Rules

(a) **In a Particular Case.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) In an Appellate Rules Emergency.

(1). *Conditions for an Emergency.* The Judicial Conference of the United States may declare an Appellate Rules emergency when it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these Rules.

(2) *Content of a Declaration.* Each declaration of an emergency:

(A) must designate the circuit or circuits affected; and

(B) must be limited to a stated period of no more than 90 days.

(3) *Modification; Early Termination.* The Judicial Conference may modify or terminate a declaration before the end of the stated period.

(4) Additional Declarations. Additional declarations may be made under Rule 2(b).

(5) Proceedings in a Rules Emergency. When a Rules emergency is declared, the court may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2), and order proceedings as it directs.

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules Emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, that substantially impair the court's ability to perform its functions in compliance with these Rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. It can be modified or terminated before its expiration.

When a Rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a Rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statue. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to "order proceedings as it directs," the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

* * *

The reporters for the Advisory Committee on the Federal Rules of Civil Procedure participated in the subcommittee meeting. That Committee is considering a Civil Emergency Rule that would empower a district court to extend the time to file certain post-judgment motions. Under existing Federal Rule of Appellate Procedure 4, the filing of the relevant motion triggers the resetting of the appeals clock.

The subcommittee worked with the reporters to coordinate the operation of the proposed emergency civil rule with Appellate Rule 4. The subcommittee considered the possibility that nothing need be said about Appellate Rule 4 in the emergency civil rule. The existing provision of Appellate Rule 4(a)(4)(A) refers to "the time allowed by" the Federal Rules of Civil Procedure. A motion filed within the time set by an extension granted under the Emergency Civil Rule would be filed within "the time allowed by" the Federal Rules of Civil Procedure. But the subcommittee was persuaded that an explicit reference to Appellate Rule 4 was appropriate to head off a narrow interpretation that could defeat appellate rights.

Another concern was how to protect appellate rights if a party obtains an extension to file a motion but then decides that such a motion would not be justified or wise. After considering various ways to deal with this situation that avoided having a Federal Rule of Civil Procedure (rather than a Federal Rule of Appellate Procedure) state when the time to appeal begins to run, the subcommittee decided that the most straightforward way was best.

The subcommittee was comfortable with the following:

Emergency Civil Rule 6(b)(2):

A court may apply Rule 6(b)(1) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). A motion filed within the time as extended has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under Rule 50(b), 52(b), 59, and 60; if no authorized motion is made within the time as extended, the time to file an appeal runs for all parties from the expiration of the extended period.

The latest version from the Civil CARES Act subcommittee makes modest changes:

Emergency Civil Rule 6(b)(2):

A court may apply Rule 6(b)(1)(A) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). A motion authorized by the court and filed within the extended period ~~time as extended~~ has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under Rule 50(b), 52(b), 59, and 60.~~; if~~ If no ~~authorized~~ motion authorized by the court is made within the extended period ~~time as extended~~, the time to file an appeal runs for all parties from the expiration of the extended period.

TAB 5B

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: CARES Act Subcommittee

Re: Various Amendments Occasioned by the CARES Act Review

Date: March 11, 2021

Early in the process called for by the CARES Act, the subcommittee reviewed every Federal Rule of Appellate Procedure to determine whether any amendments were appropriate to deal with future emergencies. That review led the subcommittee at the last meeting to present to the full Committee some minor amendments that may be appropriate in light of the experience of the pandemic without regard to a rules emergency.

The subcommittee met again to review these possible minor amendments. Upon further review, the subcommittee has decided to not recommend the amendment to the prisoner mailbox rule that has been under consideration.

1. Rule 4(c)—Prisoner Mailbox Rule

Rule 4

* * *

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an institution's internal mail system is not available on the last day for filing, an inmate who files a notice of appeal on the first day that it becomes available receives the benefit of this rule.

~~(2)~~ (3) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

~~(3)~~ (4) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

* * *

The subcommittee does not recommend this amendment. There is concern about what "not available" means and how it would be determined. There is also concern that such an amendment would be an invitation to inmates to contend that the mail system was not available to them because of their own individual circumstances. The idea for this amendment did not arise from any sense that there is a problem, but rather from a CARES Act review of every Appellate Rule. This appears to be a solution in search of a problem—and one that might well cause problems.

If the full Advisory Committee disagrees, a parallel change to Rule 25(a) might also be appropriate.

2. Rule 33—Appeal Conferences

Rule 33. Appeal Conferences

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or remotely ~~by telephone~~. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority

as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

Committee Note

The amendment recognizes that conferences can be conducted by a variety of remote technologies, not just telephones.

3. Rule 34—Oral Argument

Rule 34

* * *

(b) Notice of Argument; Postponement. The clerk must advise all parties whether oral argument will be scheduled, and, if so, the date~~,~~ and time~~, and place~~ for it, and the time allowed for each side. If oral argument will be heard in person, the clerk must advise all parties of the place for it. If oral argument will be heard remotely, in whole or in part, the clerk must advise all parties of the manner in which it will be heard. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date.

* * *

(g) Use of Physical Exhibits at Argument; Removal. Counsel intending to use physical exhibits other than documents at ~~the~~ an in-person argument must arrange to place them in the courtroom on the day of the argument before the court convenes. After the argument, counsel must remove the exhibits from the courtroom, unless the court directs otherwise. The clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them.

Committee Note

The amendment recognizes that oral argument can be conducted in a variety of formats, including the traditional format in which all judges and counsel are in a courtroom together, the fully remote format used widely during the coronavirus pandemic in which no one is in a courtroom and all participants are connected electronically, and various

intermediate formats in which some participants are in a courtroom and others are remote. To enable counsel to be prepared for the format to be used, the amendment also requires the Clerk to advise parties of the way any argument will be heard. In addition, because the provisions governing use of exhibits in a courtroom are unnecessary for remote arguments, the amendment limits them to in-person arguments.

The subcommittee is concerned that this amendment might burden the Clerk's office in situations where argument will be conducted in a courtroom, but for some reason a lawyer or a member of the panel will be participating remotely. There is also the risk that disclosure of the remote participation of a judge might reveal the identity of that judge prior to the time when a court of appeals would otherwise reveal the members of the panel. If these burdens and risks are not substantial or can be managed, the amendment is valuable so that counsel can be properly prepared.

4. **Rule 45—Clerk's Duties**

Rule 45

* * *

(2) When Court Is Open. The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance ~~must~~ will be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Note

A variety of circumstances may make it impossible or infeasible for the clerk's office to be open with the clerk or a deputy in attendance. Recognizing this reality, the amendment replaces the word "must" with the word "will" to avoid imposing a mandatory burden that cannot always be met.

Civil Rule 77(c) is quite similar to this rule. So, too, is Criminal Rule 56(b). If this amendment goes forward, the issue of consistency across sets of rules will arise.

TAB 5C

Appellate	Bankruptcy	Civil	Criminal
Rule 2. Suspension of Rules **(b) In an Appellate Rules Emergency.** **(1) *Conditions for an Emergency.*** The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these rules.	**Rule 9038. Bankruptcy Rules Emergency** (a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Bankruptcy Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a bankruptcy court, substantially impair the court's ability to perform its functions in compliance with these rules.	**Rule 87. Civil Rules Emergency.** (a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.	**Rule 62. Criminal Rules Emergency** **(a) Conditions for an Emergency.** The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that: (1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and (2) no feasible alternative measures would sufficiently address the impairment within a reasonable time.

Appellate	Bankruptcy	Civil	Criminal
(2) *Content.* The declaration must: (A) designate the circuit or circuits affected; and (B) be limited to a stated period of no more than 90 days. **(3) *Early Termination.*** The Judicial Conference may terminate a declaration for one or more circuits before the termination date.	(b) DECLARING AN EMERGENCY. (1) *Content*. The declaration must: (A) designate the bankruptcy court or courts affected; (B) state any restrictions on the authority granted in (c) to modify the rules; and (C) be limited to a stated period of no more than 90 days. (2) *Early Termination.* The Judicial Conference may terminate a declaration for one or more bankruptcy courts before the termination date.	(b) DECLARING AN EMERGENCY. (1) *Content*. The declaration must : (A) designate the court or courts affected; (B) adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them; and (C) be limited to a stated period of no more than 90 days. (2) *Early Termination.* The Judicial Conference may terminate a declaration for one or more courts before the termination date.	**(b) Declaring an Emergency.** (1) Content. The declaration must: (A) designate the court or courts affected; (B) state any restrictions on the authority granted in (c) and (d) to modify the rules; and (C) be limited to a stated period of no more than 90 days. **(2) Early Termination**. The Judicial Conference may terminate a declaration for one or more courts before the termination date.

Appellate	Bankruptcy	Civil	Criminal
(4) *Additional Declarations*. The Judicial Conference may issue additional declarations under Rule 2(b). **(5) *Proceedings in a Rules Emergency*.** When a rules emergency is declared, the court may: (A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and (B) order proceedings as it directs.	(3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule.	(3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule.	**(3) Additional Declarations.** The Judicial Conference may issue additional declarations under this rule.

Here is the draft after review by the style consultants and coordination with reporters for other advisory committees to achieve as much uniformity as possible.

Rule 2. Suspension of Rules

(a) **In a Particular Case.** On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(b) In an Appellate Rules Emergency.

(1). *Conditions for an Emergency.* The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these rules.

(2) *Contents.* The declaration must:

(A) designate the circuit or circuits affected; and

(B) be limited to a stated period of no more than 90 days.

(3) *Early Termination.* The Judicial Conference may terminate a declaration for one or more circuits before the termination date.

(4) Additional Declarations. Additional declarations may be made under Rule 2(b).

(5) Proceedings in a Rules Emergency. When a rules emergency is declared, the court may:

(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and

(B) order proceedings as it directs.

Committee Note

Flexible application of the Federal Rules of Appellate Procedure, including Rule 2, has enabled the courts of appeals to continue their operations despite the coronavirus pandemic. Future emergencies, however, may pose problems that call for broader authority to suspend provisions of the Federal Rules of Appellate Procedure. For that reason, the amendment adds a new subdivision authorizing broader suspension authority when the Judicial Conference of the United States declares an Appellate Rules emergency. The amendment is designed to add to the authority of courts of appeals; it should not be interpreted to restrict the authority previously exercised by the courts of appeals.

The circumstances warranting the declaration of an Appellate Rules emergency mirror those warranting a declaration of a Civil Rules Emergency and a Bankruptcy Rules emergency: extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, that substantially impair the court's ability to perform its functions in compliance with these rules. A declaration must designate the circuit or circuits affected. It must also have a sunset provision so that the declaration is in effect for no more than 90 days unless the Judicial Conference makes an additional declaration. The Judicial Conference may also terminate the declaration for one or more circuits before the termination date.

When a rules emergency is declared, the court of appeals may suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2). This enables the court of appeals to suspend the time to appeal or seek review set only by a rule, but it does not authorize the court of appeals to suspend jurisdictional time limits imposed by statue. Sometimes when a rule is suspended, there is no need to provide any alternative to the suspended rule. For example, if the requirement of submitting paper copies of briefs is suspended, it may be enough to rely on electronic submissions. However, to deal with situations in which an alternative is required, the amendment empowers the court to "order proceedings as it directs," the same language that existed in Rule 2—now Rule 2(a)—before this amendment.

TAB 5D

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Rule 35/40 Subcommittee

Re: Amended Rules 35 and 40

Date: March 11, 2021

For several years, the Advisory Committee has been considering a comprehensive revision of Rules 35 and 40. Rule 35 addresses hearing and rehearing en banc, and Rule 40 addresses panel rehearing. The project began with an attempt to address smaller-scale issues, such as the rules governing panel action while a petition for rehearing en banc is pending. However, after encountering difficulties in crafting clear provisions split across two different rules, the subcommittee again considered a broader effort at clarification. The full Advisory Committee has not yet decided to recommend a comprehensive revision. But by the October 2020 meeting it had made substantial progress toward creating an integrated draft that will enable the Advisory Committee to decide whether the benefits of such a revision are worth the costs.

Three major issues were left for the subcommittee.

First, current Rule 35(b)(3) allows circuits, by local rule, to require separate petitions for panel rehearing and rehearing en banc. Should this local option continue or should the Rule call for a single petition covering both requests? The subcommittee draft requires a single petition unless a local rule provides otherwise. It appears that the Court of Appeals for the Fifth Circuit is the only court that requires separate petitions. The subcommittee is attempting to learn whether that court remains committed to its preference for separate petitions.

Second, when a panel changes its decision in response to a petition for rehearing, should a party be able to stand on its previously filed petition for rehearing en banc rather than file a new petition for rehearing? The subcommittee did not make specific provision regarding a previously filed petition, believing that a court of appeals will take some action on the previously filed petition and inform the parties of that action.

Third, should the rule state that a panel that changes its decision in response to a petition for rehearing may order that no further petitions for panel rehearing will be entertained? The subcommittee does not recommend that the Rule specifically authorize such an order. Instead, the draft Committee Note calls attention to the court's power to set a shorter time to file a new petition, to set a shorter time to issue the mandate, to order the immediate issuance of the mandate, or to use Rule 2 to suspend the ability to file a new petition for panel rehearing.

The subcommittee also made numerous other changes from the working draft that was before the Advisory Committee in October 2020, designed to clarify the operation of the Rule. The text of the proposal Rule with a Committee Note follows, plus conforming amendments to the Appendix listing length limits.

Rule 35. En Banc Determination (Abrogated.)

Rule 40. Petition for Panel Rehearing; En Banc Determination.

(a) In General. A party may seek rehearing of a decision through a petition for panel rehearing, a petition for rehearing en banc, or a petition for both forms of rehearing. Panel rehearing is the ordinary means of reconsidering a panel decision, and rehearing en banc is not favored.

(b) Criteria; Content of Petition.

(1) Petition for Panel Rehearing. A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.

(2) Petition for Rehearing En Banc. A petition for rehearing en banc must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(c) When Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be reheard by the court of appeals en banc. A vote need not be taken to determine whether the case will be reheard en banc unless a judge calls for a vote. Rehearing en banc is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(d) Time to File; Form; Length; Response; Action by the Court if Granted; Panel's Authority.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for rehearing may be filed within 14 days after entry of judgment, or, if the panel subsequently amends its decision (on rehearing or otherwise), within 14 days after the entry of the amended decision. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after such entry if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) Form of Petition. The petition must comply in form with Rule 32. Copies of the petition must be served and filed as Rule 31 prescribes, except that the number of filed copies may be prescribed by local rule or altered by order in a particular

case. If a party seeks both panel rehearing and rehearing en banc, the party must file a single petition subject to the limits in Rule 40(d)(3), unless a local rule provides otherwise.

(3) Length. Except by the court's permission:

(A) a petition produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition must not exceed 15 pages.

(4) Response. Unless the court requests, no response to the petition is permitted. Ordinarily the petition will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(d)(2)–(3) apply to the response. Oral argument on whether to grant the petition is not permitted.

(5) Action by the Court. If a petition is granted, the court may do any of the following:

(A) make a final disposition of the case without further briefing or argument;

(B) order additional briefing or argument; or

(C) issue any other appropriate order.

(6) Panel's Authority. A petition for rehearing en banc of a panel decision does not limit the panel's authority to grant relief under Rule 40(d)(5).

(e) Initial Hearing En Banc. An appeal or other proceeding may be heard initially en banc, and a party may petition for such a hearing. The petition must be filed by the date when the appellee's brief is due. The provisions of Rule 40(c) apply to an initial hearing en banc, and those of Rule 40(b)(2) and (d)(2)–(4) apply to a petition therefor. Initial hearing en banc is not favored and ordinarily will not be ordered.

Committee Note

For the convenience of parties and counsel, the amendment addresses panel rehearing and rehearing en banc together in a single rule, consolidating what had been separate, overlapping, and duplicative provisions of Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). Rule 35 is abrogated, and Rule 40 is expanded to address both panel rehearing and en banc determination.

Subdivision (a). The amendment makes clear that parties may seek panel rehearing, rehearing en banc, or both. It emphasizes that rehearing en banc is not favored and that rehearing by the panel is the ordinary means of reconsidering a panel decision. This description of panel rehearing is by no means designed to encourage petitions for panel rehearing or to suggest that they should in any way be routine. The ordinariness of panel rehearing is only by way of contrast to the extraordinary nature of rehearing en banc. Furthermore, the amendment's discussion of rehearing petitions is not intended to diminish the court's existing power to order rehearing sua sponte, without any petition having been filed.

Subdivision (b). Panel rehearing and rehearing en banc are designed to deal with different circumstances. The amendment clarifies the distinction by contrasting the criteria for and required content of a petition for panel rehearing (preserved from Rule 40(a)(2)) with those relating to a petition for rehearing en banc (preserved from Rule 35(b)(1)).

Subdivision (c). The amendment preserves the existing criteria and voting protocols for ordering rehearing en banc, including that no vote need be taken unless a judge calls for a vote (previously found in Rule 35(a) and (f)).

Subdivision (d). The amendment establishes uniform time, form, and length requirements for petitions for panel rehearing and rehearing en banc, as well as uniform provisions on responses to the petition and on subsequent action by the court. It also adds a new provision concerning the authority of a panel to act while a petition for rehearing en banc is pending.

Time. The amended Rule 40(d)(1) preserves the existing time limit, after the initial entry of judgment by a panel, on filing a petition for panel rehearing (previously found in Rule 40(a)(1)) or a petition for rehearing en banc (previously found in Rule 35(c)). It adds new language extending the same time limit to a petition filed after a panel amends its decision, on rehearing or otherwise.

Form. The amended Rule 40(d)(2) preserves the existing form, service, and filing requirements for a petition for panel rehearing (previously found in Rule 40(b)), and it extends these same requirements to a petition for rehearing en banc. The amended Rule also preserves the court's existing power (previously found in Rule

35(d)) to determine the required number of copies of a petition for rehearing en banc by local rule or by order in a particular case, and it extends this power to petitions for panel rehearing. Finally, the amended Rule requires a party seeking both panel rehearing and rehearing en banc to file a single petition subject to the same length limitations as any other petition, preserving the court's power (previously found in Rule 35(b)(3)) to provide otherwise by local rule.

Length. The amended Rule 40(d)(3) preserves the existing length requirements for a petition for panel rehearing (previously found in Rule 40(b)) and for a petition for rehearing en banc (previously found in Rule 35(b)(2)).

Response. The amended Rule 40(d)(4) preserves the existing requirements for a response to a petition for panel rehearing (previously found in Rule 40(a)(3)) or to a petition for rehearing en banc (previously found in Rule 35(e)). Unsolicited responses to rehearing petitions remain prohibited, and the length and form requirements for petitions and responses remain identical. The amended Rule extends to rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing, as opposed to oral argument on the reheard case. It also extends to rehearing en banc the existing suggestion (previously found in Rule 40(a)(3)) that a petition for panel rehearing will ordinarily not be granted without a request for a response. The use of the word "ordinarily" recognizes that there may be circumstances where the need for rehearing is sufficiently clear to the court that no response is needed. But before granting rehearing without requesting a response, the court should consider that a response might raise points relevant to whether rehearing is warranted or appropriate that could otherwise be overlooked. For example, a responding party may point out that an argument raised in a rehearing petition had been waived or forfeited, or it might point to other relevant aspects of the record that had not previously been brought specifically to the court's attention.

Action by the Court. The amended Rule 40(d)(5) clarifies the existing provisions empowering a court to act after granting a petition for panel rehearing (previously found in Rule 40(a)(4)), extending these provisions to rehearing en banc as well. The amended language alerts counsel that, if a petition is granted, the court might call for additional briefing or argument, or it might decide the case without additional briefing or argument. *Cf*. Supreme Court Rule 16.1 (advising counsel that an order disposing of a petition for certiorari "may be a summary disposition on the merits").

Panel's authority. Sometimes, a panel may conclude that it can fix the problem identified in a petition for rehearing en banc. The amendment makes clear that the panel is free to do so, and that the filing of a petition for rehearing en banc does not limit the panel's authority. A party, however, may not agree that the panel's action has fixed the problem, or a party may think that the panel has created a new problem. If the panel amends its decision while a petition for rehearing en banc is pending, the en banc petition remains pending until its disposition by the court, and the amended

Rule 40(d)(1) specifies the time during which a new rehearing petition may be filed from the amended decision. In some cases, however, there may be reasons not to allow further delay. In such cases, the court might shorten the time for filing a new petition under the amended Rule 40(d)(1), or it might shorten the time for issuance of the mandate or might order the immediate issuance of the mandate under Rule 41. In addition, in some cases, it may be clear that any additional petition for panel rehearing would be futile and would serve only to delay. In such cases, the court might use Rule 2 to suspend the ability to file a new petition for panel rehearing. Before doing so, however, the court ought to consider the difficulty of predicting what a party filing a new petition might say.

Subdivision (e). The amended Rule 40 preserves the existing requirements concerning the rarely invoked initial hearing en banc (previously found in Rule 35). The time for filing a petition for initial hearing en banc (previously found in Rule 35(c)) is retained; the other requirements and voting protocols, which were identical as to hearing and rehearing en banc, are incorporated by reference. The amendment adds new language to remind parties that initial hearing en banc is not favored and ordinarily will not be ordered. As above, the amendment's discussion of petitions for initial hearing en banc is not intended to diminish the court's existing power to order such hearing sua sponte, without any petition having been filed.

Conforming changes would also be required in the last line of the chart of length limits in the Appendix to the rules. (Even if this proposal does not go forward, the last line of the Appendix should be updated to include responses to petitions. When explicit length limits for responses to petitions for rehearing were added to the text of the rules, the chart was not updated.)

		* * *			
Rehearing and en banc filings	~~35(b)(2) & 40(b)~~ 40(d)(3)	• Petition for hearing en banc • Petition for panel rehearing; petition for rehearing en banc • Response if requested	3,900	15	Not applicable

TAB 5E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: AMICUS Act Subcommittee

Re: AMICUS Act and Potential Amendments to Rule 29

Date: March 12, 2021

This memorandum reports on the work of the AMICUS Act Subcommittee and offers some thoughts and recommendations regarding potential amendments to the amicus disclosure requirements of Rule 29.

By way of background, in May 2019, Sen. Sheldon Whitehouse introduced S. 1411, the Assessing Monetary Influence in the Courts of the United States Act, or the AMICUS Act (attached as Exhibit A). An identical bill, H.R. 3993 (sponsored by Rep. Henry Johnson), was introduced in the House. As discussed in more detail below, the AMICUS Act was prompted by concerns that the funding of amicus briefs and of the organizations that file them was not being disclosed adequately to the courts or the public. The Act would have required organizations that file three or more amicus briefs per year in the courts of appeals or the Supreme Court to register publicly and to disclose the sources of significant monetary contributions they received. Sen. Whitehouse and Rep. Johnson also exchanged correspondence with Scott Harris, the Clerk of the Supreme Court, inquiring about the Court's enforcement of Supreme Court Rule 37.6, which requires amici to disclose certain monetary contributions made in connection with the preparation and submission of amicus briefs, and requesting comment on the AMICUS Act.

During our October 2019 meeting, a subcommittee was appointed to monitor the AMICUS Act and, in the event it appeared to be moving forward, to examine the issues it raised more closely, and to make a recommendation to the full Committee regarding any further action that might be appropriate. In September 2020, Mr. Harris wrote to the Committee on Rules of Practice and Procedure, attaching his correspondence with Sen. Whitehouse and Rep. Johnson. He noted that Rule 29 included disclosure requirements similar to those of Supreme Court Rule 37.6, and that the Committee might wish to consider whether to amend Rule 29, which would in turn "provide helpful guidance" on whether Supreme Court Rule 37.6 should be amended. Letter from Scott S. Harris to Hon. David G. Campbell and Hon. John D. Bates (Sept. 18, 2020) (attached as Exhibit B).

The AMICUS Act as introduced in 2019 ultimately died in committee and did not receive a vote during the last session of Congress. On February 23, 2021, however, Sen. Whitehouse and Rep. Johnson wrote to Judge Bates to request that the Committee on Rules of Practice and Procedure establish a working group "to address the problem of inadequate funding disclosure requirements for organizations

that file *amicus curiae* briefs in the federal courts" and amending Rule 29. Letter from Sen. Sheldon Whitehouse and Rep. Henry C. Johnson, Jr. to Hon. John D. Bates (Feb. 23, 2021) (the "2021 Whitehouse Letter") (attached as Exhibit C). On March 1, 2021, Judge Bates responded that the issue had been referred to the Advisory Committee on Appellate Rules, which had already established a subcommittee to consider it.

The Subcommittee met to discuss the 2021 Whitehouse Letter, the AMICUS Act, and the issues they raise. As discussed in more detail below, the Subcommittee believes these issues are important and deserve further study. Some of the solutions proposed by the AMICUS Act may fall outside this Committee's remit. The Subcommittee does, however, believe that the Committee should consider certain amendments to Rule 29's disclosure requirements. While we are not yet making any specific recommendations, we offer some potential language for the Committee's consideration. We also think it would be helpful for the full Committee to discuss whether more extensive amendments should be considered and for the Subcommittee to conduct additional research and analysis on that question, informed by the Committee's initial views, before the Committee's October 2021 meeting.

Rule 29's Current Disclosure Requirements

Rule 29(a)(4)(E) currently provides that an amicus curiae other than the United States, a federal officer or agency, or a State must include in its brief "a statement that indicates whether":

> (i) a party's counsel authored the brief in whole or in part;
>
> (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and
>
> (iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person.

This provision was adopted in 2010 and was modeled on Supreme Court Rule 37.6.[1] The Committee Note explains its purpose as follows:

> The disclosure requirement . . . serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs . . . . It also

[1] That rule provides in relevant part: "[A] brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution."

may help judges to assess whether the amicus itself considers the issue important enough to sustain the cost and effort of filing an amicus brief.

Concerns Regarding The Current Disclosure Regime

The 2021 Whitehouse Letter describes several concerns regarding disclosure of funding of amicus briefs and related issues that drove the introduction of the AMICUS Act and the current request that the Committee revisit the disclosure requirements of Rule 29. We offer a summary below, but the full letter (again, attached as Exhibit C) describes the issues in much more detail, as does an article by Sen. Whitehouse, *Dark Money and U.S. Courts: The Problem and Solutions*, 57 Harv. J. Leg. 273, 293 (2020) (attached as Exhibit D).[2] These concerns largely fall into three categories.

1. *Parties can still fund amicus briefs.* The letter argues that the disclosure requirements of Rule 29 and its Supreme Court analogue are too narrowly drawn to achieve their intended goal of preventing parties to a case from circumventing the length restrictions on party briefs by funding amicus briefs instead. As written, the letter argues, the rule still allows parties to fund amicus briefs through undisclosed monetary contributions to the amicus organization. 2021 Whitehouse Letter at 1–2. For example, the letter argues that because Rule 29 requires disclosure only of monetary contributions "intended to fund preparing or submitting" an amicus brief, parties can still effectively fund amicus briefs by making contributions to the amicus organization that are not specifically earmarked for a particular amicus brief. *Id.* at 3–4. The letter even suggests that the rules could be construed "so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief." *Id.* at 3. Because money is fungible, the letter contends, these disclosure requirements are easily evaded. *Id.*

The letter offers as an example *Google LLC v. Oracle America Inc.* (No. 18-956), a pending Supreme Court copyright case, citing reports by Bloomberg that both Oracle and Google had made undisclosed contributions to organizations that filed amicus briefs on their respective sides of the case. According to Sen. Whitehouse and Rep. Johnson, the Internet Accountability Project had received between $25,000 and $99,999 from Oracle in 2019, without disclosing that in its brief in support of Oracle—presumably because the funds were not specifically earmarked for the brief. *Id.* at 3.

2. *Donors may anonymously fund a party and/or multiple amici.* The letter also notes that "many high-profile, politically charged cases are financed directly by ideological foundations," which "also exploit the courts' lenient *amicus*

[2] Notably, the letter discusses Supreme Court practice almost exclusively, although it presumes that the same concerns can arise in the courts of appeals because of the similarity of the Appellate Rules' amicus disclosure provisions.

funding disclosure rules to anonymously fund armadas of *amicus* briefs." *Id.* at 4. The letter asserts, for example, that in *Friedrich v. California Teachers Ass'n*, 136 S. Ct. 1083 (2016) (mem.) and *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), which challenged mandatory union agency shop fees as unconstitutional, a private foundation provided funds both to the plaintiffs and to several different organizations that filed amicus briefs supporting the plaintiffs, without any disclosure to the Court. 2021 Whitehouse Letter at 4.

Relatedly, the letter notes that Rule 29 expressly exempts amici from disclosing funding by their members, creating "the possibility that parties to litigation can secretly fund *amicus* briefs in support of their position by funneling money to organizations of which they are members." *Id.* at 6. The letter offers the example of the U.S. Chamber of Commerce, which is funded by its members and which files amicus briefs without disclosing the members' identities or participation in funding a brief. *Id.*

3. *Inequitable enforcement of disclosure requirements*. In one recent case in the Supreme Court, an amicus brief was "crowdfunded" through small donations from a large number of donors. Because some of the donors chose anonymity via the GoFundMe service, the brief was unable to comply with the Court's rules for disclosing contributors, and the brief's authors were obliged to return the anonymous donations. *Id.* at 7. Sen. Whitehouse and Rep. Johnson cite this example to suggest that the existing disclosure rules disadvantage ordinary citizens as compared to "the large and anonymous corporate funders of sophisticated repeat-players." *Id.*

In general, the letter argues that the current disclosure regime has thus enabled "a massive, anonymous judicial lobbying program" that "systematically favors well-heeled insiders over the average citizen." *Id.* at 6. The letter concludes by noting that while "it would be salutary for the judicial branch to address these issues on its own," "a legislative solution" like the AMICUS Act "may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field." *Id.* at 8.

The AMICUS Act

The AMICUS Act, as introduced in 2019, has several components worth noting.

Covered Amici. The Act does not apply to all amici, but only to any "covered amicus," defined to mean "any person . . . that files not fewer than 3 total amicus briefs in any calendar year in the Supreme Court of the United States and the courts of appeals of the United States." S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(a)).

Disclosure. The Act would require any covered amicus who files an amicus brief in the Supreme Court or courts of appeals to "list in the amicus brief the name

of any person who—(A) contributed to the preparation or submission of the amicus brief; (B) contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or (C) contributed more than $100,000 to the covered amicus in the previous year." S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(b)(1)). It makes an exception for "amounts received by a covered amicus … in commercial transactions in the ordinary course of any trade or business conducted by the covered amicus or in the form of investments (other than investments by the principal shareholder in a limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the covered amicus." *Id.* (proposing new 28 U.S.C. § 1660(b)(2)).

Registration. The Act would require each covered amicus to register yearly with the Administrative Office of the U.S. Courts. S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(c)). The registration would include the name of the covered amicus; "a general description of [its] business or activities"; the name of any person who made a contribution subject to disclosure; "a statement of the general issue areas in which the [amicus] expects to engage in amicus activities"; and "to the extent practicable, specific issues that have, as of the date of the registration, already been addressed or are likely to be addressed in [those] amicus activities." *Id.* (proposing new 28 U.S.C. § 1660(c)(2)). The Comptroller General is to conduct an annual audit to ensure compliance with the registration requirements, and the registrations are to be maintained indefinitely and made available to the public on the Administrative Office's website. *Id.* (proposing new 28 U.S.C. § 1660(d)-(e)).

Prohibition on Gifts. The Act would prohibit covered amici from making any gift or providing any travel, other than reimbursement for travel for an appearance at an accredited law school, to any court of appeals judge or Supreme Court Justice. S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(f)).

Civil Fines. Covered amici who "knowingly fail[] to comply with any provision" of the Act "shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $200,000." S. 1411, § 2(a) (proposing new 28 U.S.C. § 1660(g)(1)).

Analysis and Recommendations

As noted above, Sen. Whitehouse's letter addresses several potential concerns. First, parties may enjoy more influence over amicus briefs than the current disclosure regime reveals. One of the major goals of the existing disclosure provisions in Rule 29 is to prevent parties from evading the length requirements imposed on their briefs. If those provisions are not accomplishing their ends, they may need to be revised.

Another concern raised in the letter is the difficulty faced by anonymous small-dollar donors under a "crowdfunding" regime. Here there are important interests on each side. While small anonymous donations may pose little danger to the integrity of the court system, permitting them may also undermine efforts to regulate the involvement of parties.

Finally, the most fundamental concern expressed in the letter and underlying the AMICUS Act is that the current disclosure rules allow deep-pocketed persons or organizations to wield outsize influence anonymously through amicus briefs. Under the current regime, the letter suggests, neither the courts nor the public may know who is supporting the position a particular amicus brief urges a court to adopt. As discussed above, a single individual or foundation could potentially fund multiple amicus briefs nominally submitted on behalf of different organizations. This could create the impression that the position endorsed by the amicus briefs enjoys wider support than it actually does.

The AMICUS Act essentially treats the filing of amicus briefs as akin to lobbying, and its registration and disclosure regime appears to be inspired by the regime that covers lobbyists. Indeed, Sen. Whitehouse and Rep. Johnson's letter refers to repeat-player amicus organizations as engaged in "judicial lobbying." 2021 Whitehouse Letter at 6; *see also* Whitehouse, *Dark Money and U.S. Courts*, 57 Harv. J. Leg. 273, 293 (2020) (comparing "dark money" funded amicus briefs to lobbying and urging transparency).

There are obvious differences between lobbying activity subject to registration requirements under current law and amicus briefs. In particular, amicus briefs are filed publicly; lobbying activity, by definition, consists of non-public attempts to influence the legislative or executive branch. *See* 2 U.S.C. § 1602(8)(B) (excluding communications "distributed and made available to the public" or "submitted for inclusion in the public record of a hearing" from the definition of "lobbying contact"). The arguments made by amici can be rebutted by the parties.

More generally, the right to participate anonymously in the public square is one recognized as protected by the Constitution. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). When a vaguely named organization publishes a leaflet or newspaper advertisement, the public usually does not know who is behind it, and under First Amendment doctrine it has no right to know. Of course, an amicus brief is neither a leaflet nor a newspaper advertisement, and courts may restrict amicus briefs in ways that the government may not regulate ordinary expression. Yet similar First Amendment concerns may be implicated by the forced disclosure of an organization's members or supporters as a condition for the organization's ability to petition the government for a redress of grievances. *See NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958).

Nonetheless, the current rules do require disclosure of some funding of amicus briefs by non-parties, and it is worth considering what purpose those disclosure requirements are intended to serve, whether they in fact do so, and whether more expansive disclosure requirements could benefit the courts and the public without infringing on constitutional rights. The extent to which amicus briefs are controlled by, or represent the views of, undisclosed persons or entities, and the steps that might be appropriate to further greater transparency, are important and complex issues that deserve further investigation and consideration by the Subcommittee and the full Committee. Because much of the concern around this issue appears to be driven by practice in the Supreme Court, it may also be appropriate for the Subcommittee or Committee to consult with the Clerk of the Supreme Court regarding this issue before making any final recommendation.

That said, in order to move forward, the Subcommittee has begun to consider potential amendments to the Rules, and offers some initial thoughts on potential amendments below. In considering such amendments, the Subcommittee's current view is that the Committee should focus in the first instance on disclosure requirements for parties who file amicus briefs. The other steps proposed in the AMICUS Act, such as the establishment of a registration scheme for repeat-party amicus filers, prohibitions on gifts, and fines for non-compliance, are either not within the Committee's purview or less obviously so than disclosure requirements for briefs. *See* 28 U.S.C. § 2072(b) (rules of procedure may not abridge, enlarge, or modify any substantive right).

Below we identify certain amendments to existing Rule 29(a)(4)(E) that the Committee may want to consider. We do not yet recommend any specific language, but offer these thoughts as a starting point for discussion.

1. *Who must make disclosures.* The AMICUS Act applies only to repeat filers—persons or organizations that file three or more amicus briefs in the Supreme Court and/or courts of appeals in a calendar year. That is consistent with the Act's focus on deep-pocketed special-interest groups and its implicit analogy to lobbying. Because rules of procedure typically apply evenhandedly to all participants in litigation, however, the Subcommittee's initial view—subject to further discussion—is that amendments to Rule 29's disclosure regime should apply to all amici, not just to repeat filers.

2. *The meaning of "preparing or submitting."* The 2021 Whitehouse Letter suggests that Rule 29(a)(4)(E)'s requirement that amici disclose persons who "contributed money that was intended to fund preparing or submitting the brief" could be read narrowly to encompass only money used for printing and filing the brief. We do not believe that the Rule was ever intended to be so narrow, or that amici typically interpret it so narrowly. Nonetheless, the point could potentially be clarified

by changing the rule to cover contributions of "money that was intended to fund *drafting*, preparing, or submitting the brief," or similar language.

3. *Parties' ability to evade the rule by making non-earmarked contributions.* The letter contends that parties can easily evade Rule 29(a)(4)(E) via contributions to amicus organizations not specifically earmarked for a particular amicus brief, given the fungibility of money. Since the consideration that originally motivated the adoption of Rule 29(a)(4)(E) was preventing parties from circumventing the limitations on the length of party briefs, a party's funding or control of an amicus seems particularly relevant. One possibility would be to adopt a disclosure rule specific to parties, requiring the amicus to indicate whether a party or a party's counsel has an ownership interest in the amicus curiae above a certain threshold (say, the 10% threshold used for Rule 26.1(a) disclosure statements), or whether it contributed some amount of the amicus curiae's gross annual revenue above a certain threshold during the twelve-month period preceding the filing of the amicus brief.

4. *Parties' ability to evade the rule by contributing to amici of which they are members.* The letter also suggests that parties can evade disclosure by contributing to organizations of which they are members. We believe that a specific requirement of disclosure of funding by parties should trump a general rule allowing amici not to disclose contributions by members. If clarification is needed, however, the rule could be amended to provide for a statement whether any "person—other than the amicus curiae, its counsel, or its members *who are not parties or counsel to parties to the case*—contributed money that was intended to fund preparing or submitting the brief" and identifying each such person.

5. *Small donations by non-members of an amicus.* We are not currently suggesting any changes to address the situation of the "GoFundMe" brief discussed in Sen. Whitehouse and Rep. Johnson's letter—that is, a brief funded by many small donations from people who are not members of the amicus. The current rule requires disclosure of the identity of such donors, and it is not obvious that the requirement imposes an undue burden on the amici in question.

With the amendments suggested above, the Rule might require, for example, that an amicus curiae other than the United States, a federal officer or agency, or a State must include in its brief "a statement that indicates whether":

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund drafting, preparing, or submitting the brief; ~~and~~

(iii) a party or a party's counsel has a [10%] or greater ownership interest in the amicus curiae or the amicus curiae's direct or

indirect parent, or contributed [10%] or more of the gross annual revenue of the amicus curiae or the amicus curiae's direct or indirect parent during the twelve-month period preceding the filing of the amicus brief, not including amounts received in commercial transactions in the ordinary course of the business of the amicus curiae or its direct or indirect parent or in the form of investments (other than investments by the principal shareholder in a limited liability corporation), if such amounts are unrelated to the amicus curiae's amicus activities; and

(~~iii~~iv) a person—other than the amicus curiae, its counsel, or its members who are not parties or counsel to parties to the case~~, or its counsel~~—contributed money that was intended to fund drafting, preparing, or submitting the brief and, if so, identifies each such person.

6. *Other entities' ability to evade the rule.* Just as parties can potentially evade the rule by making contributions not specifically earmarked for a particular brief or by becoming a member of an amicus organization, so can influential nonparties, as amici are only required to identify persons other than their members or counsel who "contributed money intended to fund preparing or submitting" the specific brief at issue. This issue raises more complex questions, however, and we have not proposed any language to address it, although we believe it deserves further consideration.

It would be possible to adopt a rule, similar to the proposed Rule 29(a)(4)(E)(iii) above, requiring an amicus to disclose any person or entity that holds a 10% or greater ownership interest in the amicus or that contributed more than 10% of the amicus's gross annual revenue for the previous year. Such a rule might well have salutary effects, in that it could reveal the existence of orchestrated amicus campaigns funded by a single person or entity (who might be funding a party to the litigation as well). It would thus, at least to some extent, make the courts and the public aware of who is speaking through the amicus briefs filed in a case, and would lessen the likelihood of mistaking an organized campaign funded by one or a few donors for widespread agreement.

On the other hand, as discussed above, such a rule—especially to the extent it would require disclosure of an organization's membership—could potentially raise concerns regarding freedom of association. *Cf. Patterson*, 357 U.S. 449. Sen. Whitehouse and Rep. Johnson's letter seeks to distinguish *Patterson*, which struck down an Alabama law that would have compelled disclosure of the identity of the NAACP's members, on the ground that the corporate members of an organization like the Chamber of Commerce "face no serious threat of reprisal for the public expression

of their views." 2021 Whitehouse Letter at 6. Nonetheless, the Subcommittee believes that this issue and its implications should be given further consideration.

We look forward to discussing this set of issues with the full Committee.

TAB 5F (Ex. A)

116TH CONGRESS
1ST SESSION

S. 1411

To amend title 28, United States Code, to require certain disclosures related to amicus activities.

IN THE SENATE OF THE UNITED STATES

MAY 9, 2019

Mr. WHITEHOUSE (for himself, Ms. HIRONO, and Mr. BLUMENTHAL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to require certain disclosures related to amicus activities.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Assessing Monetary Influence in the Courts of the United States Act'' or the ''AMICUS Act''.

SEC. 2. DISCLOSURES RELATED TO AMICUS ACTIVITIES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Disclosures related to amicus activities

''(a) DEFINITION.—In this section, the term 'covered amicus' means any person, including any affiliate of the person, that files not fewer than 3 total amicus briefs in any calendar year in the Supreme Court of the United States and the courts of appeals of the United States.

''(b) DISCLOSURE.—

''(1) IN GENERAL.—Any covered amicus that files an amicus brief in the Supreme Court of the United States or a court of appeals of the United States shall list in the amicus brief the name of any person who—

''(A) contributed to the preparation or submission of the amicus brief;

''(B) contributed not less than 3 percent of the gross annual revenue of the covered amicus for the previous calendar year if the covered amicus is not an individual; or

''(C) contributed more than $100,000 to the covered amicus in the previous year.

''(2) EXCEPTIONS.—The requirements of this subsection shall not apply to amounts received by a covered amicus described in paragraph (1) in commercial transactions in the ordinary course of any trade or business conducted by the covered amicus or in the form of investments (other than invest-

ments by the principal shareholder in a limited liability corporation) in an organization if the amounts are unrelated to the amicus filing activities of the covered amicus.

"(c) REGISTRATION.—

"(1) IN GENERAL.—Each covered amicus shall register as a covered amicus with the Administrative Office of the United States Courts.

"(2) CONTENTS.—The registration described in paragraph (1) shall include—

"(A) the name of the registrant;

"(B) a general description of the business or activities of the registrant;

"(C) the name of any person described in subsection (b)(1);

"(D) a statement of the general issue areas in which the registrant expects to engage in amicus activities; and

"(E) to the extent practicable, specific issues that have, as of the date of the registration, already been addressed or are likely to be addressed in the amicus activities of the registrant.

"(3) DEADLINE.—Each amicus shall submit to the Administrative Office of the United States

Courts the registration required under this subsection not later than—

"(A) 45 days after the date on which the amicus becomes a covered amicus; and

"(B) January 1 of the calendar year after the calendar year in which the amicus was a covered amicus.

"(d) AUDIT.—The Comptroller General of the United States shall conduct an annual audit to ensure compliance with this section.

"(e) PUBLICLY AVAILABLE LISTS.—The Administrative Office of the United States Courts shall periodically update the website of the Administrative Office of the United States Courts with the information described in subsection (c)(2), which shall be made publicly available indefinitely.

"(f) PROHIBITION ON PROVISION OF GIFTS OR TRAVEL BY COVERED AMICI TO JUDGES AND JUSTICES.—

"(1) IN GENERAL.—Except as provided in paragraph (2), no covered amicus may make a gift or provide travel to a judge of a court of appeals of the United States, the Chief Justice of the United States, or an associate justice of the Supreme Court of the United States.

"(2) REIMBURSEMENT FOR TRAVEL FOR APPEARANCES AT ACCREDITED LAW SCHOOLS.—Paragraph (1) shall not apply to reimbursement for travel for an appearance at an accredited law school.

"(g) CIVIL FINES.—

"(1) IN GENERAL.—Whoever knowingly fails to comply with any provision of this section shall, upon proof of such knowing violation by a preponderance of the evidence, be subject to a civil fine of not more than $200,000, depending on the extent and gravity of the violation.

"(2) USE OF FINES.—Amounts collected from fines issued under paragraph (1) may be used to maintain the website described in subsection (e)(2).

"(h) RULES OF CONSTRUCTION.—

"(1) CONSTITUTIONAL RIGHTS.—Nothing in this section shall be construed to prohibit or interfere with—

"(A) the right to petition the Government for the redress of grievances;

"(B) the right to express a personal opinion; or

"(C) the right of association, protected by the First Amendment to the Constitution of the United States.

"(2) PROHIBITION OF ACTIVITIES.—Nothing in this section shall be construed to prohibit, or to authorize any court to prohibit, amicus activities by any person or entity, regardless of whether such person or entity is in compliance with the requirements of this section.

"(i) SEVERABILITY.—If any provision of this section, or the application thereof, is held invalid, the validity of the remainder of this section and the application of such provision to other persons and circumstances shall not be affected thereby.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"1660. Disclosures related to amicus activities.".

○

TAB 5G (Ex. B)

Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

Scott S. Harris
Clerk of the Court

202-479-3014
Fax 202-479-3033

September 18, 2020

The Honorable David G. Campbell
Chair, Judicial Conference Committee on
Rules of Practice and Procedure
401 West Washington Street, Suite 623
Phoenix, Arizona 85003

The Honorable John D. Bates
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Campbell and Judge Bates:

The Supreme Court has received correspondence from Senator Sheldon Whitehouse and Representative Hank Johnson concerning disclosure requirements for those filing *amicus curiae* briefs in the Supreme Court and in the federal courts of appeals. The correspondence focuses upon Supreme Court Rule 37.6, which includes a requirement that an *amicus* disclose the identity of any person who made a contribution to fund the submission of the brief.

Federal Rule of Appellate Procedure 29(a)(4)(e) includes a similar requirement for *amicus* briefs in the courts of appeals. In light of the similarity of the two rules, the Committee on Rules of Practice and Procedure may wish to consider whether an amendment to Rule 29 is in order. The Committee's consideration would provide helpful guidance on whether an amendment to Supreme Court Rule 37.6 would be appropriate.

For your information, I am enclosing the correspondence with Senator Whitehouse and Representative Johnson. Please do not hesitate to contact me with any questions or if you need any additional information.

Very truly yours,

Scott S. Harris

TAB 5H (Ex. C)

Congress of the United States
Washington, DC 20510

February 23, 2021

Honorable John D. Bates
Chair, Judicial Conference Committee on Rules of Practice and Procedure
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: Funding Disclosure Requirements for *Amicus Curiae* Briefs

Dear Judge Bates,

We write you to request that the Committee on Rules of Practice and Procedure consider the establishment of a working group to address the problem of inadequate funding disclosure requirements for organizations that file *amicus curiae* briefs in the federal courts, which implicates Federal Rule of Appellate Procedure (FRAP) 29(a)(4)(e). This letter follows previous correspondence with Hon. Scott Harris, Clerk of the Supreme Court, regarding the Supreme Court's parallel Rule 37.6. We understand that Mr. Harris recently brought this correspondence to your attention, suggesting that the Committee on Rules of Practice and Procedure may wish to consider whether an amendment to Rule 29 is in order in light of our concerns.

I. Overview

FRAP 29—modeled after the Supreme Court Rule 37.6—provides that an *amicus* filer must include a statement in their brief whether "a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief," and whether "a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person" (emphasis added).[1] Mr. Harris explained in our correspondence that this rule "strikes a balance." "By requiring the disclosure of those who make a monetary contribution specifically intended for a particular *amicus* brief," Mr. Harris explained, "the rule provides information about funding directly aimed at advocating specific positions" in court. "At the same time," he continued, "it recognizes that requiring broader disclosure of an organization's membership information or general donor lists could well infringe upon the associational rights of the organization . . . ."

[1] Similarly, Supreme Court Rule 37.6 provides that "a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person or entity, other than the amicus curiae, its members, or its counsel, who made such a monetary contribution to the preparation or submission of the brief."

In practice, however, this "balance"—between the public's interest in transparency and organizations' associational rights—is badly off-kilter. Thanks to these rules' narrow requirements that *amici* disclose only such funding "that was intended to fund preparing or submitting the brief," *amici* rarely if ever disclose the sources of their funding. This is apparently permissible under the rules so long as the funding was not specifically earmarked to fund "preparing or submitting the brief." In other words, the rules permit an *amicus* group not to disclose even large donations earmarked generally to fund its *amicus* practice; in fact, the rules could plausibly be construed so narrowly as to only encompass the costs of formatting, printing, and delivering the specific brief in the specific case at issue. The rules thus fail to account for the reality that "money is fungible," *Holder v. Humanitarian Law Project*, 561 U.S. 1, 32 (2010), creating a loophole that allows an *amicus* filer, in practice, to never disclose its funders, even if those funders include a party-in-interest to the case. As we detail here, sophisticated parties, *amicus* groups, and their wealthy funders have successfully exploited this loophole to exert anonymous influence on our courts. As a result, opposing parties, the public, and courts themselves are left in the dark about who is seeking to influence judicial decision-making, compromising judicial independence and the public perception thereof.

II. The Current *Amicus* Disclosure Rules Do Not Achieve Their Intended Goals.

Amicus briefs—written by non-parties to a case for the purpose of providing information, expertise, insight, or advocacy—have increased in both volume and influence in the past decade. During the Supreme Court's 2014 term, *amici* submitted 781 amicus briefs,[2] an increase of over 800% from the 1950s and a 95% increase from 1995. From 2008 to 2013, the Supreme Court cited *amicus* briefs 606 times in 417 opinions. Supreme Court opinions also often adopt language and arguments from *amicus* briefs.[3] That increase in the volume of *amicus* filings—and the concomitant rise in high-dollar investment in *amicus* participation—reflect a growing recognition among those who seek to shape the law through the courts that the federal courts are susceptible to their influence.

The Supreme Court adopted its *amicus* funding disclosure rule in 1997 "in an effort to stop parties in a case from surreptitiously 'buying' what amounts to a second or supplemental merits brief, disguised as an amicus brief, to get around word limits."[4] Likewise, the parallel rule of federal appellate procedure—expressly modeled after the Supreme Court Rule—"serves to deter counsel from using an amicus brief to circumvent page limits on the parties' briefs."[5] In 2018, the Supreme Court's public information office explained that "the Clerk's Office interprets [the Rule] to preclude an amicus from filing a brief if contributors are anonymous."[6]

It is difficult to reconcile the Court's interpretation of these rules as precluding an *amicus* from filing a brief if contributors are anonymous with the Court's practice of routinely accepting

[2] Anthony J. Franze & R. Reeves Anderson, *Record Breaking Term for Amicus Curiae in Supreme Court Reflects New Norm*, NAT'L L.J. (Aug. 19, 2015).
[3] Paul M. Collins, Jr. & Lisa A. Solowiej, *Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court*, 32 LAW & SOC. INQUIRY 955, 961 (2007).
[4] *Supreme Court Rule Puts a Crimp in Crowd-Funded Amicus Briefs*, LAW.COM (Dec. 10, 2018), https://www.yahoo.com/now/supreme-court-rule-puts-crimp-075351473.html?guccounter=1.
[5] Committee notes on the 2010 Amendment to the Federal Rules of Appellate Procedure.
[6] *Id*.

amicus curiae briefs from special-interest groups that fail to disclose their donors. To the extent the rules were devised to preclude *amici* from filing "supplemental merits briefs" on behalf of parties, or if their financial backers are anonymous, they are not achieving those goals. A review of *amicus* practice before the Supreme Court illustrates how parties to litigation—as well as large donors who fund and develop "impact litigation" with the goal of shaping law and public policy through the courts—use *amicus* briefs to get around page limits on the parties' briefs, advance boundary-pushing arguments on behalf of the donors' long-term interests, and do so under a cloak of anonymity. This can take any of several forms.

a. Parties Directly Funding *Amici*

The narrow demands of Rule 37.6 and FRAP 29—requiring disclosure of only those donations that were given "to fund preparing or submitting the brief"—allow parties to litigation to do precisely what the rules were intended to prevent, i.e., surreptitiously buy what amounts to a supplemental merits brief, disguised as an *amicus* brief. One recent high-profile Supreme Court case illustrates this problem. In *Google LLC. v. Oracle America Inc.* (No. 18-956), the Internet Accountability Project (IAP)—a 501(c)(4) "social welfare" organization that does not disclose its funders—filed an *amicus* brief supporting Oracle's position, telling the Court that it wanted to "ensure that Google respects the copyrights of Oracle and other innovators." *Bloomberg* subsequently reported that Oracle had itself donated between $25,000 and $99,999 to IAP in 2019 as "just one part of an aggressive, and sometimes secretive, battle Oracle has been waging against its biggest rivals," including Google.[7] The report further documented donations from Google to at least ten groups that filed briefs in support of its position.

The Court's *amicus* funding disclosure rule did not require that any of these donations—assuming they were not specifically earmarked for the "preparation or submission of the brief"—be disclosed to the Court. And indeed, the majority of these party-funded *amici* did not disclose that they had been funded by a party to the case.[8] IAP, for example, misleadingly (yet compliantly) attested that "none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief." Nevertheless, at least four of these *amicus* filers—but not IAP—voluntarily reported the financial support they had received from one of the parties in the case, in the words of one *amicus*, "[i]n an abundance of caution and for the sake of transparency."[9] These voluntary disclosures suggest that some attorneys believe their ethical obligations required

[7] Naomi Nix and Joe Light, *Oracle Reveals Funding of Dark Money Group Fighting Big Tech,* BLOOMBERG (Feb. 25, 2020), https://www.bloomberg.com/news/articles/2020-02-25/oracle-reveals-it-s-funding-dark-money-group-fighting-big-tech.

[8] *See*, e.g., *Google LLC. v. Oracle America Inc.* (No. 18-956), Brief of Internet Accountability Project, at n.1

[9] *See* Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Petitioner; *see also* Brief of *Amici Curiae* Python Software Foundation et al. fn. 1 ("Counsel for amici curiae was previously engaged to advise Google in connection with this matter earlier in its history, and represents Google in other matters[.]"); Brief of *Amici Curiae* Center for Democracy and Technology et al. fn. I ("Counsel for amici curiae was previously engaged to advise Google in connection with this matter earlier in its history, and represents Google in other matters, but Google has had no involvement with the preparation of this brief."); Brief of *Amici Curiae* Computer and Communication Industry Association and Internet Association et al. fn. 2 ("Google is a CCIA member, and Oracle and Sun Microsystems were formerly members of CCIA, but none of these parties took any part in the preparation of this brief . . . Google is a member of IA. As noted above, Google took no part in the preparation of this brief.").

a greater degree of disclosure than the Supreme Court requires. Plenty of others, however, have been content to conceal these suspicious financial arrangements, which the Court's Rule permits.

b. Donors Funding *Amici* and Litigants in the Same Case, and Donors Anonymously Orchestrating *Amicus* "Projects"

In recent years, thanks to the work of investigative reporters, we have seen how many high-profile, politically charged cases are financed directly by ideological foundations. Often, the same foundations that fund the litigation also exploit the courts' lenient *amicus* funding disclosure rules to anonymously fund armadas of *amicus* briefs that support their preferred outcomes. For example, in the orchestrated challenge to union agency shop fees first initiated in *Friedrichs v. California Teachers Association*, 136 S. Ct. 1083 (2016), one organization, the Lynde and Harry Bradley Foundation—a conservative foundation that has long sought to weaken labor rights, including by financing impact litigation—bankrolled not only the nonprofit law firm bringing the case, but also eleven different organizations that filed *amicus curiae* briefs supporting the plaintiffs.[10] Surely if the disclosure Rule were operating to its intended effect, the Court would have required disclosure of that funding. Yet none of those *amicus* filers disclosed the Bradley Foundation (or any other source) as a source of its funding for the brief under Rule 37.6, and none of those briefs was rejected by the Court for lack of such disclosure.

The Bradley Foundation's coordinated, undisclosed funding of the litigants and *amici* in *Friedrichs* was not a one-off. In *Janus v. AFSCME*, the follow-up to *Friedrichs*, investigative reporters found that the Bradley Foundation again funded both groups representing the plaintiffs, as well as 12 groups that filed *amicus* briefs.[11] Similarly, the two groups representing the *Janus* plaintiffs, plus 13 *amicus* filers, all received funding from an organization named Donors Trust (or its sister organization Donors Capital Fund), a so-called "donor advised fund" that has been described as "the dark-money ATM of the right."[12] None of this common funding was disclosed to the Court. Thus, the current disclosure rules permit wealthy donors like the Bradley Foundation to finance litigants and law firms to bring ideologically motivated cases while simultaneously funding upwards of a dozen *amicus* briefs supporting those cases, circumventing Court limits on the parties' briefs and creating the false impression of broad popular support for the donors' preferred position.

In an *amicus* brief in *Seila Law LLC v. Consumer Financial Protection Bureau* (No. 19-7), Senators documented how thirteen *amici* aligned with Petitioner received financial support from the same entities that fund the Federalist Society.[13] That brief also detailed how the Federalist Society had long promoted the "unitary executive" legal theory advanced by Petitioner and ultimately adopted by the Court—a theory that redounds to the financial benefit of Federalist Society funders. The Center for Media and Democracy subsequently found that "16 right-wing foundations," including the Bradley Foundation and Donors Trust, "have donated a total of

[10] *See* Brief for Senators Sheldon Whitehouse and Richard Blumenthal as Amici Curiae in Support of Respondents, *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018), at 16-17.
[11] Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html.
[12] *Id*.
[13] Brief of *Amici Curiae* U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono, Appendix A.

nearly $69 million to 11 groups that filed amicus briefs in favor of scrapping the CFPB."[14] None of this information was required to be disclosed to the Court under its current Rule.

Recently published documents reveal how influential donors like the Bradley Foundation use tax-exempt money to coordinate *amicus* "projects" to influence court results through legal networks such as the Federalist Society, as presumably occurred in *Seila Law*. In 2015, a representative of the Bradley Foundation emailed Leonard Leo, then Executive Vice President of the Federalist Society, to ask if there was "a 501(c)(3) nonprofit to which Bradley could direct any support of the two Supreme Court *amicus* projects other than Donors Trust," the identity-laundering "donor-advised fund" described above.[15] Leo replied: "Yes, Judicial Education Project could take and allocate." In turn, Judicial Education Project—a 501(c)(3) tax-exempt organization that does not disclose its donors—submitted a grant proposal to Bradley seeking $200,000 to coordinate and develop *amicus* briefs in two politically charged (yet completely unrelated) cases: the aforementioned *Friedrichs*, and *King v. Burwell*, 576 U.S. 988 (2015), a challenge to the Affordable Care Act. The Bradley Foundation estimated that "each of the two *amicus*-brief efforts costs approximately $250,000, for a total of $500,000," and the Bradley staff recommended a $150,000 grant to JEP to support this work. The Bradley staffer explained the strategy behind this investment as follows:

> At this highest of legal levels, it is often very important to orchestrate high-caliber amicus efforts that showcase respected high-profile parties who are represented by the very best lawyers with strong ties to the Court. Such is the case here, with *King* and *Friedrichs*, even given Bradley's previous philanthropic investments in the actual, underlying legal actions.[16]

In the *King* and *Friedrichs* cases, none of the *amici* supporting the Bradley-funded litigants' positions disclosed their Bradley Foundation funding, or any of their funding sources for that matter, pursuant to Rule 37.6. While this nondisclosure arguably violated the Rule, it also arguably did not, if one interprets the Rule narrowly to require disclosure of only such funds intended to cover the costs of formatting, printing, and delivering the briefs. In any event, this example illustrates why a broader and more demanding disclosure rule is necessary.

c. Member-funded *Amici* Who Do Not Disclose Their Members

The *amicus* funding disclosure regime's transparency aims are also undercut by its own terms, which specifically exempt from disclosure any contributions by an *amicus*-filer's members. See FRAP 29(a)(4)(E)(iii) ("An amicus brief . . . must include . . . a statement that indicates whether a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief."). This again

[14] Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB,* THE CENTER FOR MEDIA AND DEMOCRACY (Feb. 13, 2020).
[15] Lisa Graves, *Snapshot of Secret Funding of Amicus Briefs Tied to Leonard Leo–Federalist Society Leader, Promoter of Amy Barrett*, TRUE NORTH RESEARCH (Oct. 9, 2020), https://truenorthresearch.org/2020/10/snapshot-of-secret-funding-of-amicus-briefs-tied-to-leonard-leo-federalist-society-leader-promoter-amy-coney-barrett/.
[16] *Id*. (emphasis added).

leaves open the possibility that parties to litigation can secretly fund *amicus* briefs in support of their position by funneling money to organizations of which they are members.

For example, the U.S. Chamber of Commerce—by far the Court's most prolific *amicus* filer[17]—routinely submits influential *amicus* briefs in Supreme Court litigation. The Chamber has complied with Supreme Court Rule 37.6 by affirming that "no person other than *amicus,* its members, or its counsel made a monetary contribution to its preparation or submission."[18] However, the Chamber does not disclose its members to the public,[19] so there is no way to know who is influencing the positions the Chamber takes in litigation. As a result, its disclosure is effectively meaningless, and the deep-pocketed corporate contributors to the Chamber's *amicus* activity can enjoy, in complete anonymity, the fruits of its unparalleled Supreme Court win rate—9-1 in cases in which it participated last term. The Chamber makes similar disclosures in briefs it files in the circuit courts.[20]

We are sensitive to claims that required disclosure of membership lists may implicate associational and/or speech rights, such as those at issue in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in which the Supreme Court refused to allow compelled disclosure of the identities of NAACP members who faced significant threats to their physical safety during the civil rights era. But granting sweeping anonymity protections to *all* member organizations, including business networks like the U.S. Chamber of Commerce whose corporate members face no serious threat of reprisal for the public expression of their views, simply does not follow. Indeed, "applying *NAACP v. Alabama*'s holding in a formally symmetrical manner to the relatively powerful . . . without regard to context may undermine rather than affirm the values underlying that decision."[21]

d. The *Amicus* Funding Disclosure Regime Creates Absurd Results, Unfairly Favoring Sophisticated Repeat-Players.

As we have documented here, wealthy and sophisticated repeat players have exploited the Supreme Court's ineffective *amicus* funding disclosure regime to develop what amounts to a massive, anonymous judicial lobbying program. They similarly exploit the lower appellate courts' Rule, where orchestrated *amicus* projects are arguably even more influential.

One rare example of the Supreme Court actually *enforcing* its Rule 37.6 illustrates the absurd results created by this regime, demonstrating how it systematically favors well-heeled insiders over the average citizen who wishes to make his or her voice heard. In 2018, the

[17] Adam Feldman, *The Most Effective Friends of the Court*, EMPIRICAL SCOTUS (May 11, 2016), https://empiricalscotus.com/2016/05/11/the-most-effective-friends-of-the-court/.
[18] *See, e.g.*, Brief for the Chamber of Commerce of the United States as Amicus Curiae, *Epic Systems v. Lewis,* 138 S.Ct. 1612 (2018), at n.1 (emphasis added).
[19] Dan Dudis, *Why the US Chamber of Commerce is fighting transparency*, THE HILL (April 6. 2016), https://thehill.com/blogs/pundits-blog/finance/275301-why-the-us-chamber-of-commerce-is-fighting-transparency.
[20] *See*, *e.g.*, Brief Amicus Curiae of the Chamber of Commerce of the United States of America, *Crossroads Grassroots Policy Strategies v. Federal Elections Commission*, Case No. 18-5261, D.C. Circuit (filed on Mar. 18, 2019) at n.1, https://www.fec.gov/resources/cms-content/documents/cgps_185261_uscc_amicus.pdf.
[21] Dale E. Ho, NAACP v. Alabama and False Symmetry in the Disclosure Debate, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405 (2012).

Supreme Court rejected an *amicus* submission made by the U.S. Alcohol Policy Alliance for its failure to comply with Rule 37.6, because its brief failed to disclose the names of each of the group's donors, many of whom had contributed to the brief through the small-dollar "crowdfunding" website GoFundMe.[22] As a result, *amicus* was forced to return donations from individuals who wished to remain anonymous, and re-file its brief, disclosing the names of individuals who had supported the GoFundMe campaign. Donations to the brief ranged from $25-$500.

The Court's disparate treatment of the crowdfunded, small-dollar-backed brief filed by the U.S. Alcohol Policy Alliance and the wealthy, repeat-player *amici* who routinely file anonymously funded briefs is troubling, and telling. It reflects an elemental tension in a democracy between two classes of citizens. One is an influencer class that occupies itself with favor-seeking from government, and therefore desires rules of engagement that make government more and more amenable to its influence. The second class is the general population, which has an abiding institutional interest in a government with the capacity to resist that special-interest influence. This is a centuries-old tension.[23] When courts establish and apply rules designed to promote transparency and integrity, they should not overlook this latter abiding interest.

Ironically, the Court's application of its own Rule is what has posed the most significant threat to associational and speech interests. By applying Rule 37.6 to require small donor disclosure for an *amicus* brief funded through GoFundMe, the Court directly chilled the ability of individuals to band together on an *ad hoc* basis to support a legal position of importance to them.[24] A rule that forces disclosure of these donors, but not the large and anonymous corporate funders of sophisticated repeat-players like the United States Chamber of Commerce, does not "strike[] a balance" at all.[25]

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[22] Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs,* THE NATIONAL LAW JOURNAL (Dec. 10, 2018).

[23] *See* Theodore Roosevelt, *New Nationalism Speech* (1910) ("[T]he United States must effectively control the mighty commercial forces [.] . . . The absence of an effective state, and especially, national, restraint upon unfair money-getting has tended to create a small class of enormously wealthy and economically powerful men, whose chief object is to hold and increase their power."); DAVID HUME, PHILOSOPHICAL WORKS OF DAVID HUME 290 (1854) ("Where the riches are in a few hands, these must enjoy all the power and will readily conspire to lay the whole burden on the poor, and oppress them still farther, to the discouragement of all industry."); Andrew Jackson, 1832 Veto Message Regarding the Bank of the United States (July 10, 1832) (transcript available in the Yale Law School library) ("It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purpose ... to make the richer and the potent more powerful, the humble members of society ... have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of the Government."); NICCOLO MACHIAVELLI, THE PRINCE IX (1532) ("[O]ne cannot by fair dealing, and without injury to others, satisfy the nobles, but you can satisfy the people, for their object is more righteous than that of the nobles, the latter wishing to oppress, whilst the former only desire not to be oppressed.").

[24] *See* Letter from Sen. Sheldon Whitehouse to C.J. John Roberts and Scott S. Harris, Clerk, U.S. Supreme Court (Jan. 4, 2019); *see also* Tony Mauro, *Supreme Court Rule Crimps Crowd-Funded Amicus Briefs,* THE NATIONAL LAW JOURNAL (Dec. 10, 2018).

[25] Letter from Scott S. Harris, Clerk, U.S. Supreme Court, to Sen. Sheldon Whitehouse (Feb. 27, 2019).

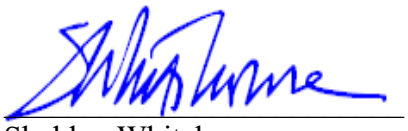
III. Recommendations

As noted in our correspondence with Mr. Harris, we believe a legislative solution may be in order to ensure much-needed transparency around judicial lobbying, and to put all *amicus* funders on an equal playing field. While we disagree with Mr. Harris's suggestion that legislation along these lines would improperly "intrude into areas historically left to the Court" or implicate separation-of-powers concerns, we agree it would be salutary for the judicial branch to address these issues on its own.

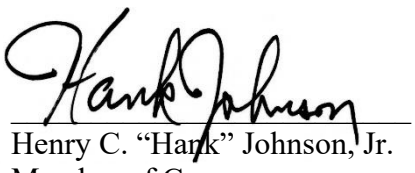
There are better ways to structure a disclosure rule to achieve the public interest in transparency while protecting the associational interests of those who risk real danger of physical harm or other demonstrable injury as a result of funding organizations that file *amicus* briefs. Our AMICUS (Assessing Monetary Influence in the Courts of the United States) Act, for example, would require funding disclosure by only repeat *amicus* filers—defined as those who file three or more *amicus* briefs in the Supreme Court or the federal courts of appeals during a calendar year. The bill also narrowly targets only high-dollar funders of *amicus* filers, requiring disclosure of only those who contributed three percent or more of the *amicus* group's gross annual revenue, or over $100,000. We have attached a copy of the bill text and offer it merely as one possible approach the judiciary might take to adopting a rule that strikes a better balance between these competing interests.

We appreciate the Committee's attention to this issue and hope it will take these concerns seriously. It should not fall to members of Congress and investigative journalists to scrutinize court dockets and IRS forms to expose conflicts of interest that, left hidden, could undermine the legitimacy of the judiciary's work. More than ever before, the judiciary should be vigilant about this threat, as political actors seeking to shape American law and public policy increasingly turn to the courts to achieve those goals, through multi-million dollar judicial confirmation campaigns, sophisticated *amicus* "projects," and the like. As Justice Scalia wrote: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."[26] We fully agree.

Sincerely,



Sheldon Whitehouse
United States Senator



Henry C. "Hank" Johnson, Jr.
Member of Congress

[26] *Doe v. Reed*, 561 U.S. 186 (2010) (Scalia, J., concurring).

I. Appendix

a. AMICUS Act

TAB 5I (Ex. D)

POLICY ESSAY

DARK MONEY AND U.S. COURTS: THE PROBLEM AND SOLUTIONS

SENATOR SHELDON WHITEHOUSE*

"There are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

– James Madison

I. INTRODUCTION

The Founding Fathers had many threats in mind when they crafted a constitution for our young and fragile nation. Locke, Montesquieu, and other Enlightenment thinkers offered helpful political theory, but theory went only so far. Our Founders knew that patriotism could be overborne by selfish impulses and personal passions; that foreign governments and rapacious elites could exploit weak institutions; and that sharp differences divided the thirteen colonies. They planned for a lot of threats and dangers—but they did not plan for the corrupting power of corporations.

Today, corporations wield commanding power in our democracy. They do so directly, and through a network of trade associations, think tanks, front groups, and political organizations. That power too often is directed by corporate forces to dodge accountability for harms to the public; to subvert the free market to their advantage; and to protect their own political power by undermining democratic institutions.

This Article explores the expansion of that corporate power in our government, and its extension into a branch of government customarily viewed as insulated from special interest influence: the federal judiciary. I begin

* Sheldon Whitehouse served as Rhode Island's United States Attorney and Attorney General before being elected to the United States Senate in 2006. He is a member of the Judiciary Committee and the ranking Democrat on the Judiciary Subcommittee on Crime and Terrorism.

Senator Whitehouse has worked to strengthen American cybersecurity capabilities, improve resources to fight drug abuse and treat addiction in Rhode Island, and reverse the rise in prison populations and costs. He is a leading advocate for protecting access to justice, including the Seventh Amendment right to a civil jury.

In response to a series of judgments favoring powerful corporate interests, Senator Whitehouse has warned of the dangers of judicial activism and dark money influence over the judicial selection process. A strong supporter of greater transparency in the judicial system, Senator Whitehouse has introduced legislation to the require Supreme Court justices and federal judges to disclose travel and hospitality perks they receive as prominent public figures, and to require the meaningful disclosure of funders of amicus curiae briefs.

In addition to Judiciary, he is a member of the Budget, the Environment and Public Works, and the Finance Committees.

with a brief historical overview of corporate influence in America and a discussion of how that influence grew after the Supreme Court's decision in *Citizens United v. FEC*.[1] I then turn to the fifty-year-long project of the corporate right to reshape both federal law and the federal bench; to the scheme's tools, particularly anonymous "dark money" and the network of front groups behind which these interests hide; and to the long-fought scheme's ultimate successes, culminating in the massive power grabs achieved in the Trump administration. The Article concludes with recommendations for legislation that would increase transparency at the Court. We must address the crisis of legitimacy the courts now face before captured courts become a national scandal.

II. Corporations, Then and Now

The Federalist Papers provide an important window into the concerns that animated the Founding Era as citizens considered a new Constitution for their colonies. The concerns that Alexander Hamilton, James Madison, and John Jay addressed were the prominent ones around which debate centered and on which the public needed reassurance. The main concerns were protecting individuals against the power of government (e.g., *The Federalist* No. 51);[2] protecting democracy against the emergence of a new aristocracy or royalty (e.g., *The Federalist* No. 38);[3] and protecting society from the power of faction—what we today call partisanship and special interest (e.g., *The Federalist* No. 10).[4]

We honor our Constitution, but it alone did not satisfy the colonial public. The Framers had to draft our Bill of Rights to protect explicitly an array of individual rights and fortify those rights with powerful defenses. Thence came freedom of speech, access to the jury, clearly delineated criminal process rights, and other protections.[5] Together, the Constitution and Bill of Rights won the confidence of the American people and unified our country behind a single vision of federal government.

All of these efforts and robust debates reveal by omission that the Founders had a blind spot: they did not anticipate any threat to individuals from the power of corporations. It is easy to understand why not. For the Founders, corporations were not front of mind. The word "corporation" only appears in the eighty-five Federalist Papers three times, with one of those a

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[1] 558 U.S. 310 (2010).

[2] The Federalist No. 51 (James Madison).

[3] The Federalist No. 38 (James Madison).

[4] The Federalist No. 10 (James Madison).

[5] The Declaration of Independence (U.S. 1776); *see also* Gerard N. Magliocca, *The Bill of Rights as a Term of Art*, 92 Notre Dame L. Rev. 231, 236 (2016) (noting that "Jefferson did write one letter in 1792 that stated: '[M]y objection to the Constitution was, that it wanted a bill of rights securing freedom of religion, freedom of the press, freedom from standing armies, [and] trial by jury . . . . The sense of America has approved my objection and added the bill of rights.' ").

reference to municipal corporations.[6] The word barely registers in Madison's notes of the Federal Convention.[7] On our American continent, the big British corporations threatened no harm: The British Hudson Bay Company operated in remote areas of Canada; the Massachusetts Bay Company had become a colony;[8] the British East India Company had been humbled.[9] Such smaller corporations as existed in the colonies were creations of state legislatures, and operated under the watchful eye of local political forces, usually to provide roads, canals, and other welcome infrastructure. If a corporation overstepped its bounds or harmed its local community, political authorities could revoke its charter.[10] At the Founding, corporate entities were no threat to the fledgling democracy, and the idea of such non-human entities achieving a dominant role in a republic of "We the People" would have seemed fanciful.

Fast forward to the modern era where corporations are now ubiquitous and hold massive political power throughout government. Let's consider how.

One obvious exercise of that power is through corporate lobbying. Congress swarms with corporate lobbyists. In 2018 alone, corporations spent $3.4 billion on direct lobbying.[11] One trade organization, the U.S. Chamber of Commerce, has spent over $1.5 billion lobbying over the past two decades.[12] Much of its effort has been on political mischief like climate denial.[13] Mick Mulvaney, after leaving Congress to serve as the Director of the Office of Management and Budget, said something that illustrated one aspect of the problem: he told an American Bankers Association conference that "[w]e had a hierarchy in my office in Congress, [i]f you're a lobbyist

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[6] *See* THE FEDERALIST NOS. 37, 45 (James Madison), NO. 69 (Alexander Hamilton).

[7] *See* James Madison, *Notes on the Debates in the Federal Convention*, THE AVALON PROJECT (1787), https://avalon.law.yale.edu/subject_menus/debcont.asp [https://perma.cc/8JWU-AV3C].

[8] *See* Massachusetts Bay Colony, FLETCHER CYC. CORP, ENCYC. BRITANNICA ONLINE, s.v.

[9] *See* William Dalrymple, *The East Indian Company: The Original Corporate Raiders*, GUARDIAN (Mar. 4, 2015), https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders?CMP=share_btn_tw [https://perma.cc/T837-FPJD].

[10] *See, e.g.*, Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 135 (2012) (describing how Connecticut "reserved to the legislature a power to revoke or amend" the Connecticut Medical Society's charter and how "[t]he Pennsylvania General Assembly revoked [the Bank of North America's] corporate charter" by "rel[ying] on a committee report citing the bank's inordinate power").

[11] Karl Evers-Hillstrom, *Lobbying Spending Reaches $3.4 Billion in 2018, Highest in 8 Years*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Jan. 25, 2019), https://www.opensecrets.org/news/2019/01/lobbying-spending-reaches-3-4-billion-in-18/ [https://perma.cc/RKE9-WZ5K].

[12] *See Top Spenders*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2019 [https://perma.cc/J7VK-YKZH].

[13] *See, e.g.*, Corynne Cirilli, *The US Chamber of Commerce Might Not Be What You Think*, VOX MEDIA: RACKED (Oct. 2, 2017), https://www.racked.com/2017/10/2/16370014/us-chamber-commerce-explainer [https://perma.cc/7UVQ-GE7F] ("Deferring to the goals of its large corporate backers, [CEO and then-president Tom] Donohue vowed to get the Chamber involved in 'many important political battles' in Washington. And climate was one of the first things on his list.").

who never gave us money, I didn't talk to you. If you're a lobbyist who gave us money, I might talk to you."[14]

Which takes us to the next problem: corporate spending in elections. Gone are the days when the problem was trickles of corporate money flowing from corporate political action committees ("PACs") and lobbyists' checkbooks into candidates' campaign war chests. In the wake of the Supreme Court's infamous *Citizens United* decision,[15] corporate interests have flooded huge sums of money into electioneering and advocacy groups, often anonymizing themselves in the process, and used this flotilla of front groups to sway election results. In the 2012 federal election cycle immediately following *Citizens United*, spending by these so-called "outside" groups surged to more than triple their political spending from the cycle before.[16] By 2016, outside groups would spend over $1.4 billion in American elections.[17] Today, in major elections around the country, outside groups often outspend the actual candidates: in 2018, outside groups spent more than the candidates' campaigns in twenty-eight different federal races,[18] and in Indiana during the last election cycle, dark-money and outside groups outspent the U.S. Senate candidates by nearly $35 million.[19] You don't spend this kind of money for long if you are not getting results.

Much of this spending is "dark money"—funding that cannot be traced to actual donors. In the decade since *Citizens United*, groups that don't disclose their donors have spent nearly $1 billion in elections, compared to only $129 million over the previous decade.[20] This staggering figure does not even include money spent on "issue ads," which are often just thinly veiled political attack ads, but are not reported to the Federal Election Commission.

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[14] Aaron Blake, *Trump's Rumored Next Chief of Staff Mick Mulvaney Admits to Selling Access a Congressman*, WASH. POST (Apr. 25, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/04/25/trumps-rumored-next-chief-of-staff-mick-mulvaney-admits-to-selling-access-a-congressman/ [https://perma.cc/9R74-WATW].

[15] Citizens United v. FEC, 558 U.S. 310 (2010).

[16] *See Outside Spending by Cycle, Excluding Party Committees*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, https://www.opensecrets.org/outsidespending/index.php?filtertype=A [https://perma.cc/957L-NK2L].

[17] Robert Maguire, *$1.4 Billion and Counting in Spending by Super PACs, Dark Money Groups*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Nov. 9, 2016), https://www.opensecrets.org/news/2016/11/1-4-billion-and-counting-in-spending-by-super-pacs-dark-money-groups/ [https://perma.cc/T266-5PJD].

[18] *Races in Which Outside Spending Exceeds Candidate Spending, 2018 Election Cycle*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, https://www.opensecrets.org/outsidespending/outvscand.php?cycle=2018 [https://perma.cc/GW3U-XQD4].

[19] *Compare Summary Spending,* CTR. FOR RESPONSIVE POL.: OPENSECRETS, https://www.opensecrets.org/races/summary?cycle=2018&id=INS1[https://perma.cc/3LQR-DHRG], *with Outside Spending*, CTR. FOR RESPONSIVE POL.: OPENSECRETS, https://www.opensecrets.org/races/outside-spending?cycle=2018&id=INS1&spec=N [https://perma.cc/4T4U-JPSP].

[20] Karl Ever-Hillstrom et al., *More Money, Less Transparency: A Decade Under Citizens United*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Jan. 14, 2020), https://www.opensecrets.org/news/reports/a-decade-under-citizens-united [https://perma.cc/9CF8-E5VA].

Although the *Citizens United* decision imaginatively presumed a campaign finance system with "effective disclosure,"[21] corporate interests quickly exploited loopholes to keep their spending anonymous, and the Court has conspicuously failed to police its supposed "effective disclosure." Three loopholes have been particular favorites. Internal Revenue Code 501(c)(4) "social welfare" organizations have been allowed to spend on political activities, but need not disclose their donors to the public.[22] Shell corporations (e.g., limited liability corporations that obscure their true beneficial owners[23]) are a simple tool to hide donor identities. And donor-directed trusts have been subverted into massive laundering shops that strip donor identities away from contributions to politically active non-profits.[24] Because corporate brands and reputations are precious commodities, a broad array of trade associations, think tanks, and advocacy groups insulates corporations from the dirty practices and unpopular purposes of this vast new enterprise.

At the heart of this is money, but money alone is not the entire danger. As any politician can tell you, with the ability to spend millions of dollars in elections comes the ability to threaten or promise such expenditures. With the ability to spend millions of dollars *anonymously,* the menace of such threats darkens. Sometimes the threats or promises might be general and public;[25] but the greatest danger of corruption comes from threats or promises made covertly. The threat is real—a massive barrage of anony-

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[21] Citizens United v. FEC, 558 U.S. 310, 370 (2010).

[22] *See* 26 U.S.C. § 6033(a)(1) (2018); 26 C.F.R. § 1.501(c)(4)–1(a)(2)(i) (2019); *see also* Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 60 (2011) ("One way that for-profit corporations can throw their support behind, or undermine, a particular candidate after *Citizens United* is by donating money to a non-profit, which then, in turn, purchases a political ad. Under current tax law, for-profit political spending through non-profits such as social welfare organizations organized under Internal Revenue Code (IRC) Section 501(c)(4) . . . is undetectable by the public.").

[23] Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 708 (2012) (arguing that "[t]he real disclosure issue arises when a 501(c)(4) social welfare organization, 501(c)(6) trade association, or Super PAC reports donations from a dummy or shell corporation or LLC which gets its funds from one or a small number of shareholders, or from a nonprofit that does not have a mass membership base but serves primarily as a vehicle for pooling funds from a small number of large donors and channeling them to independent spending committees").

[24] Donors Trust is one of these groups, for example. *See* Andy Kroll, *Exposed: The Dark Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013), https://www.motherjones.com/politics/2013/02/donors-trust-donor-capital-fund-dark-money-koch-bradley-devos/ [https://perma.cc/S9M3-N7YC] ("Donors Trust is a so-called 'donor-advised fund,' a breed apart from a family foundation like, say, the Lynde and Harry Bradley Foundation, which helped build the conservative movement over decades with donations totaling tens of millions of dollars. The people who donate to Donors Trust don't get final say over how their money is spent. But they get to recommend where their cash goes, and in exchange for giving up some control, they get a bigger tax write-off than they would with a family foundation. (And those who wish it get anonymity.)").

[25] *See* Nicholas Confessore, *Koch Brothers' Budget of $889 Million for 2016 Is on Par with Both Parties' Spending*, N.Y. TIMES (Jan. 26, 2015), https://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html [https://perma.cc/YD6E-8AJ5].

mous campaign spending in the waning days of a campaign can leave voters with no information about who is making the attack and the target with no time to respond. An early barrage can "define" (read, mercilessly smear) a candidate before his or her campaign even gets up and running. So threats are credible, and covert threats and acquiescence is the very definition of corruption.

Dark money fouls political debate, as well. From the shelter of anonymity, corporate interests can without accountability propagate a "tsunami of slime"[26]—the manufactured front group bears the onus for the smears and attacks, and can be disposed of like Kleenex.[27] And of course if just the threat of a slimy political attack is successful, it saves the special interest from actually having to spend the money. Worse, it leaves the public unaware that anything went on behind the scenes.

The policy result of unlimited special-interest spending power is unsurprising: a powerful political current bends elected officials toward the will of the special interests, even against the will of their constituents.[28] This weakens the political system's response to the general population, and skews political response toward wealthy interests. Empirically, one study found:

> [T]he views of constituents in the upper third of the income distribution received about 50% more weight than those in the middle third, with even larger disparities on specific salient roll call votes. Meanwhile, the views of constituents in the bottom third of the income distribution received no weight at all in the voting decisions of their senators.[29]

The problem is not just in Congress. The ability of big interests to deploy unlimited money from behind dark-money front groups into presidential races has similar effects.[30] But much of the corporate political effort is down at the executive agency level. Corporations have grown adept at cap-

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[26] Joe Hagan, *The Coming Tsunami of Slime*, N.Y. MAG. (Jan. 20, 2012), https://nymag.com/news/features/negative-campaigning-2012-1/ [https://perma.cc/U2HR-HN8C].

[27] *See id.*; *see also* Sheldon Whitehouse, *The Many Sins of 'Citizens United'*, NATION (Sept. 24, 2015), https://www.thenation.com/article/archive/the-many-sins-of-citizens-united/ [https://perma.cc/W3WU-CH8V].

[28] *See, e.g.*, MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 70–123 (2012) (explaining that the country's policymakers respond almost exclusively to the preferences of the economically advantaged); *see also* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 143–47 (2011) (noting that dependency donors cause Congress to spend more time on issues that matter to their funders than to the general public).

[29] LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 253–54 (2008).

[30] *See, e.g.*, Robert Maguire, *GOP Donors Too 'Embarrassed' to Publicly Support Trump Gave Millions to Dark Money Group*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (Mar. 6, 2018), https://www.opensecrets.org/news/2018/03/big-revenues-for-group-providing-cover-for-gop-donors-too-embarrassed-to-publicly-support-trump-in-2016/ [https://perma.cc/RV7L-5Z2A] (reporting that a dark money group "spent $45 million from the run-up to the 2016 presidential election into the early days of President Trump's administration").

turing regulatory agencies.[31] This involves some amount of high-powered agency lobbying, and some amount of simply outgunning ill-funded public interest advocates in administrative procedures; but more often than not it involves sending industry personnel to embed with regulators—the "revolving door." According to an analysis by ProPublica and Columbia Journalism Investigations, the Trump administration has brought in to official positions at least 281 former corporate lobbyists, just through October 2019.[32] That number increases when one includes the corporate executives embedded in the Trump administration, who may not have technically lobbied for their company but nonetheless are motivated to influence outcomes for their industry.

The result has been an unprecedented capture of regulatory agencies by the interests they should be regulating.[33] The Environmental Protection Agency ("EPA") under the Trump administration, for example, has been overrun with officials tied closely to polluting industries. Former EPA Administrator Scott Pruitt rose to political power by raising funds for oil and gas industry groups.[34] Pruitt had demonstrated an unusual willingness to do the industry's bidding; in one instance, he put fossil fuel industry text verbatim onto his official Oklahoma Attorney General letterhead and submitted it to the EPA.[35] Later, as EPA Administrator, Pruitt could do the industry's

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[31] *See* J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1555 (2018) (arguing that "[w]hile capture can occur through corruption, it can also happen in less obvious ways, such as when a regulator receives a job offer from a company which he or she regulates, or through a 'revolving door' between the agency and the regulated industry").

[32] David Mora, *We Found a Staggering 281 Lobbyists Who've Worked in the Trump Administration*, PROPUBLICA (Oct. 15, 2019), https://www.propublica.org/article/we-found-a-staggering-281-lobbyists-whove-worked-in-the-trump-administration [https://perma.cc/SCE8-NVSV].

[33] *See* Lindsey Dillon et al., *The Environmental Protection Agency in the Early Trump Administration: Prelude to Regulatory Capture*, 108 AM. J. PUB. HEALTH 589, 589 (2018), https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304360 [https://perma.cc/GQX6-DXRV] (explaining that an agency is effectively captured by the private interests it regulates when its "'regulation is . . . directed away from the public interest and toward the interest of the regulated industry' by 'intent and action' of industries and their allies") (quoting DANIEL CARPENTER, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 73 (2014)).

[34] *See* Andrew Perez & Margaret Sessa-Sawkins, *Conservative Group Led by EPA Chief Pruitt Received Dark Money to Battle Environmental Regulations*, FAST CO. (June 7, 2017), https://www.fastcompany.com/40428688/conservative-group-led-by-epa-chief-pruitt-received-dark-money-to-battle-environmental-regulations [https://perma.cc/8G8Z-7UEW] (reporting that "[a]n organization once led by [Scott Pruitt] raised more than $750,000 from conservative dark money groups to battle federal regulators, including officials at the agency he now leads").

[35] *See* Letter from E. Scott Pruitt, Attorney General, Oklahoma, to Lisa Jackson, Administrator, U.S. Environmental Protection Agency (Oct. 12, 2011), https://www.documentcloud.org/documents/3301387-Draft-and-Final-Letters-to-EPA-From-Devon-Energy.html [https://perma.cc/9JSM-PL9J]; E-mail from William F. Whitsitt, Executive Vice President of Public Affairs, Devon Energy Corp., to Patrick Wyrick, Office of the Attorney General, Oklahoma (Sept. 2, 2011, 2:55 PM), https://www.documentcloud.org/documents/3301387-Draft-and-Final-Letters-to-EPA-From-Devon-Energy.html [https://perma.cc/9JSM-PL9J] (attaching draft version of letter to EPA).

bidding directly, without need for such subterfuge. Andrew Wheeler, Pruitt's successor as Administrator, had been a leading lobbyist for the coal industry.[36] Trump's first head of the EPA Office of Air and Radiation, Bill Wehrum, gained prominence by helping build and run an array of fossil fuel industry trade associations and front groups.[37]

Former oil lobbyist David Bernhardt serves as Secretary of the Department of the Interior, an agency charged with administering the bulk of federal lands.[38] In that position, Bernhardt has a central role administering oil and gas leasing, offshore drilling, and areas of policy of interest to the oil and gas industry. Bernhardt and his predecessor, Ryan Zinke, have helped to open massive tracts of federal land to oil and gas development during their tenures.[39] They have also overseen suspicious delays in siting New England

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[36] *See* Nihal Krishan, *Andrew Wheeler's Long History with the Energy Sector*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (July 10, 2018), https://www.opensecrets.org/news/2018/07/andrew-wheeler-longtime-coal-lobbyist/ [https://perma.cc/NTR8-KECF] (discussing how Wheeler became "a lobbyist for the law firm Faegre Baker Daniels, where he represented energy companies such as coal producer Murray Energy, which was his best-paying client. The coal-mining company paid his firm between $160,000–$559,000 annually from 2009 through 2017, according to CRP's records. Murray Energy is privately owned by Robert Murray, whose company donated $300,000 to President Trump's inauguration.").

[37] *See* Letter from Senator Sheldon Whitehouse, Senator Thomas R. Carper, Ranking Member, U.S. Senate Committee on Environment and Public Works, and Rep. Frank Pallone, Jr., Chairman, U.S. House Committee on Energy and Commerce, to Charles Sheehan, Acting Inspector General, U.S. Environmental Protection Agency, at 2 n.6 (Feb. 21, 2019), https://www.whitehouse.senate.gov/imo/media/doc/2019-02-21%20Wehrum%20Letter%20to%20EPA%20IG%20final.pdf [https://perma.cc/9SA7-GNP7] (explaining that one of Wehrum's former clients, the Utility Air Regulatory Group, "is not an incorporated entity and does not appear to have a staff, physical location, or presence of any sort outside of Hunton & Williams. Its membership and decision-making processes appear opaque, and it has been described as 'a front group of convenience [that] allows individual electric utility companies to shield their names and anti-public health crusades from public awareness.'" (quoting John Walke, *Is Your Power Company Fighting in Court Against Safeguards From Mercury and Toxic Air Pollution?* NAT. RES. DEF. COUNCIL (May 25, 2012), https://www.nrdc.org/experts/john-walke/your-power-company-fighting-court-against-safeguards-mercury-and-toxic-air [https://perma.cc/W7YW-K35K])).

[38] *See* Anthony Andragna, *Senate Confirms Bernhardt to Head Interior*, POLITICO (Apr. 11, 2019), https://www.politico.com/story/2019/04/11/david-bernhardt-secretary-interior-department-1345662 [https://perma.cc/66HE-L2KN] ("Bernhardt, currently acting secretary, will replace Ryan Zinke, who left Interior in January in the midst of several ongoing ethical investigations. Bernhardt won bipartisan backing from the chamber despite concerns that he has conflicts of interests related to past lobbying clients, criticism that he failed to keep adequate records, and worries about the department's plans to expand offshore drilling along the Atlantic and Pacific coasts.").

[39] *See, e.g.*, Coral Davenport, *Top Leader at Interior Dept. Pushes a Policy Favoring His Former Client*, N.Y. TIMES (Feb. 12, 2019), https://www.nytimes.com/2019/02/12/climate/david-bernhardt-endangered-species.html [https://perma.cc/3D4C-KNSN] ("As a lobbyist and lawyer, David Bernhardt fought for years on behalf of a group of California farmers to weaken Endangered Species Act protections for a finger-size fish, the delta smelt, to gain access to irrigation water. As a top official since 2017 at the Interior Department, Mr. Bernhardt has been finishing the job: He is working to strip away the rules the farmers had hired him to oppose.").

offshore wind energy projects—projects that would displace gas-fired electric generation in the region.[40]

The Founders would likely have been astounded that such a commanding political force arose in our Republic, exerting such control over our executive and legislative branches. Industry lobbying distorts legislative outcomes. Post-*Citizens United* dark-money election spending constricts America's political aperture. Regulatory capture in the Trump administration has spread corruption widely through government agencies. But the most coveted prize, the pearl beyond price of influence-seeking, lies in the courts.

III. The Corporate Influence Machine Targets Article III Courts

Courts set rules. Federal courts decide what the Constitution means. Federal courts decide how laws are applied. Federal courts set the ground rules for challenges to legislation; they set rules for executive agency process and review; and they set rules that govern commercial and political activity.

The prospect of resetting all those rules to advance systematically one's own power and position makes courts an alluring target for the influence machine. At the same time, because so many judicial practices and principles are designed to keep courts honest and independent, they are a difficult target. The stalking and capture of the courts had to be measured and slow.

In 1971, prominent corporate lawyer and future Supreme Court Justice Lewis Powell wrote a secret memo to an official at the U.S. Chamber of Commerce. Powell warned that "the American economic system"—by which he seemed to mean corporate America—"is under broad attack" from academics, the media, leftist politicians, and other progressives.[41] To counter the progressive spirit that had delivered the New Deal and Great Society, Powell wrote, it was time for an unprecedented influence campaign on the part of corporate America. He advised:

> [I]ndependent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the

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[40] *See* Chris Martin & Jennifer A. Dlouhy, *Trump Delay Casts Doubt on First Major U.S. Offshore Wind Farm*, Bloomberg News (Aug. 10, 2019), https://www.bloomberg.com/news/articles/2019-08-09/u-s-is-said-to-extend-review-of-first-major-offshore-wind-farm [https://perma.cc/39VR-QM7R] (reporting that "[t]he Trump administration cast the fate of the nation's first major offshore wind farm into doubt by extending an environmental review for the $2.8 billion Vineyard Wind project off Massachusetts").

[41] Confidential Memorandum from Lewis F. Powell, Jr., to Eugene B. Snydor, Jr., Chairman, Education Committee, U.S. Chamber of Commerce 1 (Aug. 23, 1971), https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo [https://perma.cc/5Q9B-RFTX].

> political power available only through united action and national organizations.[42]

Corporate forces followed this advice, and today we see how much the "political power" made available through "united action" has delivered in the executive and legislative branches. Powell also flagged the value of pro-corporate "activist" judges to shape the courts and the law, and slowly but surely corporate forces began to reshape our judiciary. Over many patient years, they produced not only pro-corporate, anti-regulatory judges and doctrines, but a coordinated array of front groups set up to effect this infiltration. Behind this network of front groups lurks a network of corporate, right-wing donors who secretly fund this "united action" in the judiciary.[43]

There have long been competing philosophies of adjudication and legal analysis, a debate reflected over decades in different judicial philosophies from Republican and Democratic presidents' court nominees. This exercise was different. This was about winning, not about theories. Tellingly, the record of the many "conservative" wins under Chief Justice Roberts in the Supreme Court shows more often that conservative entities are the victors than that conservative judicial principles are followed.[44] The donors behind the scheme want victories and are not fussy about philosophy.

It is slowly becoming clear how the so-called conservative legal movement has been secretly bankrolled by corporate interests which benefit from that legal movement. It is even sometimes frankly admitted. Describing his efforts to stock the federal judiciary, Donald McGahn, the former White House Counsel and early architect of the Trump administration's judicial selection efforts, did not even try to hide the connection: "There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin."[45] In other words, the "plan" is to groom and select judges who will then support the Republican political effort to roll back unwelcome laws passed by Congress and unwelcome regulations developed by independent agencies.

The influence machine's efforts in the federal judiciary are particularly pernicious for government. First, unlike legislators and political appointees,

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[42] *Id.* at 11.

[43] *See* Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html [https://perma.cc/W598-ZS9B] (arguing that "[e]ven circuits that are decidedly liberal are undergoing significant changes" and that "a radically new federal judiciary could be with us long after Trump is gone").

[44] *See* Sheldon Whitehouse, *A Right Wing Rout: What the "Roberts Five" Decisions Tell Us About the Integrity of Today's Supreme Court*, AM. CONST. SOC'Y: ISSUE BRIEF (Apr. 2019), https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf [https://perma.cc/H5UC-NQF9].

[45] Robert Barnes & Steven Mufson, *White House Counts on Kavanaugh in Battle Against "Administrative State"*, WASH. POST (Aug. 12, 2018), https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-and-the-end-of-the-regulatory-state-as-we-know-it/2018/08/12/22649a04-9bdc-11e8-8d5e-c6c594024954_story.html [https://perma.cc/6SM7-QXNX].

federal judges receive lifetime appointments. Successfully capturing a judicial seat can reward the capturer for decades,[46] and popular umbrage cannot "throw the bum out" in the next election.

Second, in a captured court, strategic advances can be won deep in the weeds of jargon and theory, where the public is less likely to appreciate the ultimate impact; judicial decisions expanding the "unitary executive" theory[47] or limiting *Auer*[48] and *Chevron*[49] deference to administrative agency expertise are not obvious blows to the environment or public health. Mischief can be done outside the spotlight of popular attention.

Third, special interests can ask captured courts to do things Republican legislators wouldn't dare vote for—like allowing unlimited and ultimately anonymous money into politics.[50] Courts are designed to make unpopular decisions in the service of justice; a captured court can deliver unpopular decisions in the service of politics.

Finally, courts have traditionally been viewed as mostly apolitical—neutral arbiters of law and fact.[51] Accordingly, the political branches have treated them with deference, largely leaving it to the judiciary to set its own ground rules. As a result, the courts, and most notably the Supreme Court, operate in unusual secrecy, protected by a veneer of neutrality.

IV. The Apparatus of Capture

To accomplish the capture effort, special interests and their sophisticated teams of lawyers and political operatives have systematically developed an apparatus whose purpose is first to influence the selection and confirmation of judges, and then to influence the judges' decisions in the courts.[52] This apparatus is most visible at the Supreme Court, but it operates in lower courts, too. Here is its battle plan:

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[46] *See* U.S. Const. art. III, § 1 (providing for lifetime tenure of federal judges).

[47] *See* Ian Millhiser, *The Supreme Court Will Decide if Trump Can Fire the CFPB Director. The Implications Are Enormous.*, Vox (Oct. 18, 2019), https://www.vox.com/policy-and-politics/2019/9/18/20872236/trump-justice-department-supreme-court-cfpb-unitary-executive [https://perma.cc/2SAG-6GDV].

[48] Auer v. Robbins, 519 U.S. 452, 461 (1997).

[49] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[50] *See, e.g.*, Brief for U.S. Chamber of Commerce as Amicus Curiae Supporting Appellant, Citizens United v. FEC, 558 U.S. 310 (2010) (acknowledging that "immensely wealthy individuals play a significant role in our political process" and asking the Court to allow "corporations to spend freely on independent candidate advocacy").

[51] *See, e.g.*, The Federalist No. 78 (Alexander Hamilton) ("The judiciary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment.").

[52] Press Release, Brennan Center, Three Nominations Reveal Contrasting Influence of Interest Groups in High Court Nomination Process (Jan. 26, 2006), https://www.brennancenter.org/our-work/analysis-opinion/three-nominations-reveal-contrasting-influence-interest-groups-high-court [https://perma.cc/564L-WQQE] (finding that "interest group spending on television ads and other lobbying tools can have a potent effect on who becomes a judge in America").

- Select carefully vetted judges who embrace the desired pro-corporate world view.[53] This is done by giving a controlling role in judicial selection to an organization to which the interests give millions of dollars (the Federalist Society);
- Unleash millions in dark money supporting the nominee (or opposing him in Judge Merrick Garland's case).[54] This is done through an organization (the Judicial Crisis Network ("JCN")) that uses anonymous donations to fund political advertising campaigns for (or against) nominees;
- With their judges in place, tee up strategic cases and inundate courts with amicus briefs—best understood as lobbying documents. This is done through a flotilla of closely related front groups. These front groups sometimes appear as the litigant, behind a plaintiff of convenience; and sometimes among a flotilla of "amici curiae" signaling in harmony how the influence machine wants the court to decide.[55]

It's quite an investment, but it has paid stunning dividends.

The funding that fuels the judicial influence machine is difficult to expose because of its secrecy, but the coordination, tactics, and strategy of the influence machine are becoming less obscure. One case study is the outside spending group, JCN. According to tax filings, an unnamed donor gave $17 million to JCN to help block President Obama's nomination of Merrick Garland to the Supreme Court and support President Trump's nomination of Neil Gorsuch to that same vacancy.[56] Then, in 2018, a donor—perhaps the same one—gave another $17 million to JCN to support the troubled nomination of

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[53] *See, e.g.*, Colby Itkowitz, *1 in Every 4 Circuit Court Judges Is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html [https://perma.cc/3TJ6-WQK7] ("The three circuit courts that have flipped to Republican majorities this year have the potential to not only change policy but also benefit Trump professionally and politically. The 2nd Circuit, with its new right-leaning majority, will decide whether to rehear a case challenging Trump's ability to block critics on Twitter, as well as one regarding Trump's businesses profiting while he's in office. The 11th Circuit, which handles appeals from Georgia, Florida and Alabama, is set to take up several voting rights cases."); Robert O'Harrow, Jr. & Shawn Boburg, *A Conservative Activist's Behind-the-Scenes Campaign to Remake the Nation's Courts*, WASH. POST (May 21, 2019), https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts/ [https://perma.cc/GS2H-ZLMU] (describing Federalist Society president Leonard Leo's role in selecting Neil Gorsuch and Brett Kavanaugh).

[54] *See* O'Harrow & Boburg, *supra* note 53 (noting the Judicial Crisis Network spent $10 million to support Supreme Court Justice Neil Gorsuch's confirmation after spending $7 million to block President Barack Obama's Supreme Court pick, Merrick Garland).

[55] *See, e.g.*, Brian R. Frazelle, *Corporate Clout: As the Roberts Court Transforms, the Chamber Has Another Big Term,* CONST. ACCOUNTABILITY CTR. (July 26, 2017), https://www.theusconstitution.org/think_tank/corporate-clout/ [https://perma.cc/VKM9-TUYE] (noting that in the 2016–17 term, the U.S. Chamber of Commerce "submitted friend-of-the-court briefs in 15 cases . . . [a]nd in 12 of those cases, or 80%, the position advocated by the Chamber prevailed").

[56] *See* Robert Maguire, *Group that Spent Millions to Boost Gorsuch Also Paid Mysterious Inaugural Donor*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (May 16, 2018), https://

Brett Kavanaugh.[57] JCN received many more anonymous multi-million-dollar donations along the way. A sophisticated media relations campaign, orchestrated by a firm CRC Public Relations interconnected in this web of dark money groups, put those millions to work on political-campaign-style advertising.[58]

JCN is one of many groups working in close coordination. To understand that coordination, let's visit one prominent individual: Federalist Society Co-Chairman Leonard Leo.[59] From his perch at the Federalist Society, Leo has been the lynchpin and chief strategist of the conservative legal movement's court-packing plan for the better part of two decades.

The Federalist Society claims it is merely a not-for-profit group for like-minded aspiring lawyers seeking to discuss conservative ideas and judicial doctrine. The truth, however, is more complicated. In effect, there are three incarnations of the Federalist Society. The first is perfectly appropriate: a debating society for conservatives at law schools and in legal communities across the country to discuss traditionally conservative judicial values, like originalism and the merits of limited government. The second is familiar in Washington, D.C.: a think tank that attracts big-name conservative lawyers, scholars, politicians, and even Supreme Court Justices to events; that publishes and podcasts; and that holds galas.[60] The third role of the Federalist Society is the dangerous one: it is the vehicle for powerful interests seeking to reorder the judiciary by grooming, vetting and selecting amenable judges.[61]

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www.opensecrets.org/news/2018/05/group-that-spent-millions-to-boost-gorsuch-also-paid-mysterious-inaugural-donor/ [https://perma.cc/M33S-9899].

[57] *See* Anna Massoglia & Andrew Perez, *Secretive Conservative Legal Group Funded by $17 Million Mystery Donor Before Kavanaugh Fight*, CTR. FOR RESPONSIVE POL.: OPENSECRETS NEWS (May 17, 2018), https://www.opensecrets.org/news/2019/05/dark-money-group-funded-by-17million-mystery-donor-before-kavanaugh/ [https://perma.cc/E9AS-S763].

[58] *See* Press Release, Judicial Crisis Network, Judicial Crisis Network Launches $10 Million Campaign to Preserve Justice Scalia's Legacy, Support President-Elect Trump Nominee (Jan. 9, 2017), https://judicialnetwork.com/jcn-press-release/judicial-crisis-network-launches-10-million-campaign-preserve-justice-scalias-legacy-support-president-elect-trump-nominee/ [https://perma.cc/DN23-MXWT] (noting that JCN "expects to spend at least $10 million to confirm the next justice . . . [and] CRC Public Relations — President Greg Mueller will spearhead communications and media strategy").

[59] *See* Jonathan Swan & Alayna Treene, *Leonard Leo to Shape New Conservative Network*, AXIOS (Jan. 7, 2020), https://www.axios.com/leonard-leo-crc-advisors-federalist-society-50d4d844-19a3-4eab-af2b-7b74f1617d1c.html [https://perma.cc/8RBG-CMVT] (noting that until recently, and for the period relevant to this Article, Leo served as the Federalist Society's Executive Vice President and that it has been reported that he has limited his role in the Federalist Society in order to establish a new dark money operation focusing on the judiciary).

[60] *See 2019 National Lawyers Convention*, FED. SOC'Y (Nov. 2019), https://fedsoc.org/conferences/2019national-lawyers-convention [https://perma.cc/5J45-8HPE] (featuring Justices Gorsuch and Kavanaugh).

[61] *See* Jason Zengerle, *How the Trump Administration Is Remaking the Courts*, N.Y. TIMES MAG. (Aug. 22, 2018), https://www.nytimes.com/2018/08/22/magazine/trump-remaking-courts-judiciary.html [https://perma.cc/W598-ZS9B] ("Trump might not have known much about the law, but he needed . . . to create the impression that he 'would be reliable in terms of conservative judges, because that would calm down and consolidate a very large bloc of his coalition.' That is, what mattered to the Federalist Society—and the Heritage Foundation—was

This Federalist Society role is the result of many years of work by Leo and his network of donors. As early as 2003, Leo was known in the Bush White House as the coordinator of "all outside coalition activity regarding judicial nominations."[62] In October 2006, Leo presented to students at the University of Virginia ("UVA") School of Law an overview of the measures used to help confirm George W. Bush nominees John Roberts and Samuel Alito. According to an article about the UVA event, Leo's strategies included the following:

- "Aggressive fundraising to hire a top media firm. About $15 million was spent for both confirmations on earned and paid media, telemarketing, and other grassroots mobilization
- "Advance work recruiting more than 60 organizations to support the nomination and confirmation of a person committed to conservative priorities
- "Polling to figure out what the American people thought the role of the court should be so that the message could be framed in a way that resonated with the public
- "Preparation of background memos and briefing materials on every conceivable nominee
- "Research into how Justices William Rehnquist and Sandra Day O'Connor affected the vote count in controversial areas of law
- "A search of history to learn how controversial issue areas had been handled in earlier confirmations
- "Publishing white papers to paint the ground favorably when it comes to the questions that are appropriate for a nominee to answer
- "Training expert lawyers in how to talk to the media
- "Holding dozens of background, off-the-record meetings with reporters to give them information about the nomination and confirmation process"[63]

This playbook is still in use today. In the spring of 2019, *The Washington Post* published an in-depth investigation of Leo and his present network of organizations.[64] It is massive, secretive, and lavishly funded, and its purpose is to pack and influence the courts.[65] As the *Post* found through public records and interviews, the groups in Leo's orbit work in close coordination

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that Trump take their advice on judicial nominees. In an interview with Breitbart in June 2016, Trump pledged, 'We're going to have great judges, conservative, all picked by Federalist Society.'").

[62] O'Harrow & Boburg, *supra* note 53.

[63] *See* Robin Cook, *Confirmation of High Court Justices Akin to Political Campaign, Leo Says*, UNIV. OF VA. SCH. OF L. (Oct. 2, 2006), https://www.law.virginia.edu/news/2006_fall/leo.htm [https://perma.cc/T35W-3AJV].

[64] *See* O'Harrow & Boburg, *supra* note 53.

[65] *See id.*

and are linked through multiple vectors: finances, board members, phone numbers, addresses, office support staff, and operational details.[66]

Anonymous funding is the lifeblood of this network and its judicial influence campaign. Between 2014 and 2017, Leo's nonprofits collected more than $250 million in dark-money donations.[67] Secret donors providing money at that quarter-billion-dollar scale obviously expect a robust return on their investment, and this money was used to carry out all manner of activities to achieve that return. The *Post* unearthed a list of clients of a conservative media relations firm outlining the network's role in the Garland and Gorsuch nomination battles:

> Nine of the [Leo-affiliated] groups hired the same conservative media relations firm, Creative Response Concepts, collectively paying it more than $10 million in contracting fees in 2016 and 2017. During that time, the firm coordinated a months-long media campaign in support of Trump's Supreme Court nominee, Neil M. Gorsuch, including publishing opinion essays, contributing 5,000 quotes to news stories, scheduling pundit appearances on television and posting online videos that were viewed 50 million times, according to a report on the firm's website.[68]

This description tracks closely the methods outlined by Leo years before at UVA.

While the plan has been long in the making, in the Trump administration it has become open and obvious. As a member of the Senate Judiciary Committee, I have seen the dark-money-funded politicization of the judicial nomination and confirmation process emerge, climb to top political priority (it now dwarfs any legislative activity in the Senate), and pay remarkable dividends. According to an October 2019 analysis by the Senate Democratic Policy and Communications Committee, the Republican-controlled Senate had allowed less than one-sixth the number of votes on legislation and amendments compared to the Democratic-controlled House.[69] Meanwhile, as of February 2020, the Senate has confirmed 193 Article III judges during the Trump administration, including fifty-one influential appellate judges—nearly as many as President Obama appointed in his eight-year presidency (fifty-five).

The Federalist Society now counts eighty-five percent of the Trump administration's Supreme Court and circuit court nominees as members.[70] In November 2019, at his first major public event since taking his seat on the Supreme Court bench, Justice Kavanaugh spoke to a high-priced Federalist

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[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] Analysis on file with Democratic Policy and Communications Committee.
[70] Statistic on file with Office of Senator Whitehouse.

Society gala fundraiser.[71] Justice Kavanaugh thanked Federalist Society member and Trump White House Counsel Donald McGahn for his help during the confirmation process;[72] McGahn once quipped that he had been "insourced" to the White House to deliver on the Federalist Society's priorities.[73] Justice Kavanaugh appreciatively called McGahn his "coach."[74]

With vetted and selected judges in place comes the next step: strategically guiding the Court to desired outcomes. Again, dark money plays a role: over years, anonymously funded groups have sprung up to serve this effort. One task is to seek out cases with fact patterns that support arguments for changes in law the big interests desire, and then bring those cases before the Court. To get there, these legal organizations recruit plaintiffs, usually with the offer of free services. (Ordinarily, in real litigation, the plaintiff selects the lawyer, not vice versa.)

I saw this happen in a case I argued before the Supreme Court. The dark-money-funded Pacific Legal Foundation swept in from across the country and recruited a Rhode Island plaintiff, who agreed to let them bring his case before the Supreme Court.[75] When the Court's decision ultimately did not get them the result they wished to achieve, they dropped him, and went on to other cases. Pacific Legal Foundation is still at it before the Court.[76]

Once one of these groups gets the case up before the Court, an armada of related amici curiae ("friends of the court") sails in to echo and amplify the corporate message. Many of these amici are funded by the same donors. In a recent amicus brief I wrote, I pointed out the common funding of many of the other amici in that very case, and how at least thirteen of those amici were funded by entities that also have funded the Federalist Society.[77] The

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[71] Adam Liptak, *Kavanaugh Recalls His Confirmation at Conservative Legal Group's Annual Gala*, N.Y. TIMES (Nov. 14, 2019), https://www.nytimes.com/2019/11/14/us/kavanaugh-federalist-society.html [https://perma.cc/Q5FD-6H97].

[72] Nina Totenberg, *Kavanaugh Hailed at Federalist Society as Protesters Attempt Disruption*, NAT'L PUB. RADIO (Nov. 15, 2019), https://www.npr.org/2019/11/15/779438921/kavanaugh-hailed-at-federalist-society-as-protesters-attempt-disruption [https://perma.cc/BS9Q-ABEC].

[73] Lydia Wheeler, *White House Lawyer: 'Completely False' that Trump Outsources Judicial Selections*, HILL, (Nov. 17, 2017), https://thehill.com/regulation/360981-white-house-lawyer-completely-false-that-trump-outsources-judicial-selections [https://perma.cc/TH6X-PAG9].

[74] Robert Barnes & Ann E. Marimow, *As Trump Cases Arrive, Supreme Court's Desire to Be Seen as Neutral Arbiter Will Be Tested*, WASH. POST (Nov. 26, 2019), https://www.washingtonpost.com/politics/courts_law/as-trump-cases-arrive-supreme-courts-desire-to-be-seen-as-neutral-arbiter-will-be-tested/2019/11/26/1d186f92-106d-11ea-b0fc-62cc38411ebb_story.html [https://perma.cc/3EZ7-8JLD].

[75] *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[76] In 2019, Pacific Legal Foundation represented the petitioner in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), where the Supreme Court overruled precedent that required property owners to seek compensation for state and local property takings in state courts before seeking compensation in federal courts, *id.* at 2179.

[77] Brief for U.S. Senators Sheldon Whitehouse, Richard Blumenthal, and Mazie Hirono as Amicus Curiae Supporting Respondents, Seila Law LLC v. Consumer Fin. Prot. Bureau, No. 19-7 (U.S. Jan. 22, 2020) https://www.supremecourt.gov/DocketPDF/19/19-7/129418/20200122115258928_19-7%20Amici%20Brief.pdf [https://perma.cc/3DHS-GF6Q].

Center for Media and Democracy noted the brief and followed up with a more robust analysis—indeed a stunning analysis—finding that "sixteen right-wing foundations gave nearly $69 million to groups urging the Supreme Court to abolish the Consumer Financial Protection Bureau since 2014" and that the same sixteen foundations had given over $33 million to the Federalist Society over the same period.[78]

Applying the "united action" campaign to the courts required a long and patient effort, but the end result of all this investment is profound. A small group of large donors is funding the vetting and selection of judges, and funding the campaigns for their confirmation, and funding the litigants who present cases to them, and funding a swarm of front-group amici who provide amplification of the donors' message and an illusion of broad support.

V. Results at the Court

Mired in dark-money influence, the Supreme Court has become a reliable ally for corporate and Republican partisan interests. Professional observers know it. As renowned *New York Times* columnist Linda Greenhouse reluctantly concluded, it is "impossible to avoid the conclusion that the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda."[79] Her sentiment is not unique. Veteran court watcher Norm Ornstein has written that the Supreme Court "is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen."[80] *The New Yorker*'s Jeffrey Toobin was blunt in an assessment of Chief Justice Roberts, comparing Justice Scalia, "who has embodied judicial conservatism during a generation of service on the Supreme Court," with Chief Justice Roberts, who "has served the interests, and reflected the values, of the contemporary Republican Party."[81]

The hard proof is in the numbers. As I have documented, from the 2004 through 2017 Terms, the Roberts Court issued seventy-three five-to-four partisan decisions benefiting big corporate and Republican donor interests. By partisan, I mean that it was all Republican appointees making up the five. The benefits to Republican donor groups are not hard to discern. They in-

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[78] Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB*, Ctr. for Media & Democracy: PR Watch (Feb. 13, 2020), https://www.prwatch.org/news/2020/02/13540/conservative-foundations-finance-push-kill-cfpb [https://perma.cc/P39U-P8FG].

[79] Linda Greenhouse, *Polar Vision*, N.Y. Times (May 28, 2014), https://www.nytimes.com/2014/05/29/opinion/greenhouse-polar-vision.html [https://perma.cc/E8VY-XR65].

[80] Norm Ornstein, *Why the Supreme Court Needs Term Limits*, Atlantic (May 22, 2014), https://www.theatlantic.com/politics/archive/2014/05/its-time-for-term-limits-for-the-supreme-court/371415/ [https://perma.cc/6U9E-6J4V].

[81] Jeffrey Toobin, *No More Mr. Nice Guy*, New Yorker (May 25, 2009), https://www.newyorker.com/magazine/2009/05/25/no-more-mr-nice-guy [https://perma.cc/6NLN-TXCV].

clude allowing corporate interests to spend unlimited money in elections, hobbling pollution regulations, enabling attacks on minority voting rights, curtailing labor's right to organize, and restricting workers' ability to challenge employers in court.[82] In its 2018 Term, the Court added seven more of these five-to-four partisan decisions to this tally.[83]

In this run of now eighty partisan five-to-four cases (and counting), something else quite telling took place. The Republican majority routinely broke traditionally conservative legal principles, such as respect for precedent, "minimalism" in the scope of their decision, or "originalist" reading of the Constitution. The Justices in these bare partisan majorities even went on remarkable fact-finding expeditions, violating core traditions of appellate adjudication that leave fact-finding to lower courts.[84] (It added no luster to this effort that the facts they found were false.[85]) The consistent measure across these decisions is not traditional doctrines of conservative jurisprudence; it is the interests that win.

A results-oriented judiciary is anathema to our Founders' vision. A judiciary independent of the political branches, and with justice as its end rather than political gains for factions, is fundamental to our constitutional democracy. As Montesquieu put it, "There is no liberty, if the power of judging be not separated from the legislative and executive powers."[86] But corporate and partisan special interests are purposefully eroding that fundamental ideal to win this array of victories, and the Court seems content to be shepherded down that path. Some of these victories go beyond donor interests just pocketing a win in a particular case; the most dangerous victories actually tilt the political or legal or regulatory playing fields in favor of the donor interests in ways that will enable streams of future victories.

It is perhaps not a coincidence that polls show the public's faith in the courts receding. In one poll, only thirty-seven percent responded that they have "a great deal" or "quite a lot" of confidence in the Supreme Court.[87]

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[82] Whitehouse, *supra* note 44.

[83] *See* Nielsen v. Preap, 139 S. Ct. 954 (2019); Bucklew v. Precythe, 139 S. Ct. 1112 (2019); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019); Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019); Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019); Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019); Rucho v. Common Cause, 139 S. Ct. 2484 (2019).

[84] Brief for Sen. Whitehouse et al., *supra* note 77.

[85] *See, e.g.*, *The Effects of* Shelby County v. Holder, Brennan Ctr. for Justice (Aug. 6, 2018), https://www.brennancenter.org/our-work/policy-solutions/effects-shelby-county-v-holder [https://perma.cc/27MK-DMMB] (documenting new state laws restricting voting rights after *Shelby County*); Richard L. Hasen, *The Decade of* Citizens United, Slate (Dec. 19, 2019), https://slate.com/news-and-politics/2019/12/citizens-united-devastating-impact-american-politics.html [https://perma.cc/4DE8-VYXT] (documenting the effects of *Citizens United* on anonymous campaign spending despite the decision's endorsement of the value of disclosure requirements).

[86] Charles de Montesquieu, The Spirit of the Laws (1748); *accord* The Federalist No. 78 (Alexander Hamilton).

[87] *Confidence in Institutions*, Gallup (Feb. 29, 2020, 10:11 AM), https://news.gallup.com/poll/1597/confidence-institutions.aspx [https://perma.cc/CYM6-WN49].

By seven to one, Americans have reported in polling the belief that they are less likely before the Justices of this Court to get a fair shot against a corporation, compared to vice versa.[88] That ought to be a hazard light flashing for the Court.

VI. Proposed Solutions: Bringing Transparency to the Judiciary

Millions of dollars in dark money have no business coursing through the judicial nomination and selection process, or funding litigants and so-called "friends of the Court." All this coordinated, anonymous funding creates an odor of rot, and it risks lasting damage to the institution of the Court. Congress can take steps to stop the erosion of confidence and restore the Court to its proper, constitutionally prescribed lane. While some have called for dramatic and sweeping structural change—like imposing term limits, or adding seats to the Court—a logical first step is to shine the light of greater transparency and accountability into the Court.[89]

In the political branches, we require transparency as a safeguard. Congress and the Executive Branch have extensive reporting requirements: the Lobbying Disclosure Act provides insight into who is influencing the legislative and rulemaking processes;[90] the Federal Election Campaign Act mandates public disclosures about political campaigns;[91] and the Ethics in Government Act requires financial disclosures from officials.[92]

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[88] Mark Mellman, *Winning Messages: On Judges, Guns and Owning the Constitution's Text, History & Values*, Constitutional Accountability Ctr. 9 (Feb. 29, 2020, 10:24 AM), https://www.theusconstitution.org/wp-content/uploads/2018/03/PUBLIC-Mellman-CAC-Poll-Presentation.pdf [https://perma.cc/BA53-DNAE].

[89] *See Supreme Court Justice Term Limits: Where 2020 Democrats Stand*, Wash. Post, https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/supreme-court-term-limits/ [https://perma.cc/X7AU-WX95] (last visited Feb. 29, 2020) (showing that several 2020 Presidential candidates support or are open to term limits for Supreme Court Justices); Burgess Everett & Marianne Levine, *2020 Dems Warm to Expanding Supreme Court*, Politico (Mar. 18, 2019), https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625 [https://perma.cc/6T65-B7JV] (stating that "[t]he surprising openness from White House hopefuls along with other prominent Senate Democrats to making sweeping changes—from adding seats to the high court to imposing term limits on judges and more—comes as the party is eager to chip away at the GOP's growing advantage in the courts").

[90] Lobbying Disclosure Act of 1995, 2 U.S.C. § 1603(a)(1) (2018) ("No later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, or on the first business day after such 45th day if the 45th day is not a business day, such lobbyist (or, as provided under paragraph (2), the organization employing such lobbyist), shall register with the Secretary of the Senate and the Clerk of the House of Representatives."); Lobbying Disclosure Act of 1995, 2 U.S.C. § 1602(10) (2018) ("The term 'lobbyist' means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period.").

[91] Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. §§ 30104(b)(1)–(8) (2018).

[92] Ethics in Government Act of 1978, 5 U.S.C. App. § 101(f) (2018).

By comparison to the other branches, the judiciary is largely a black box. It's not just that hidden donors lurk behind amici seeking to influence courts, or that groups like JCN need not disclose the donors behind political campaigns for judges; loopholes also allow Supreme Court justices and federal judges to avoid disclosing travel and hospitality perks. Judges are nominally covered by the Ethics in Government Act, but judicial disclosures, as implemented by the regulations of the Judicial Conference, are the least comprehensive and effective.[93] We would never have known of Justice Scalia's all-expenses-paid hunting vacation, except that he died on that vacation so it made the news.[94]

For a branch of government without either force or purse, for one that bases its authority on its legitimacy, it's a mess. If conflicts of interest lurk behind the millions of dollars in anonymous money, it could produce a reputational crisis for the Court. Legislation that I propose would go a long way to protect against those potential conflicts through the sunlight of public disclosure. Not for nothing did Supreme Court Justice Louis Brandeis say that "sunlight is the best disinfectant."[95]

It is hard to predict what true transparency would disclose, but the worst scenario is that a small cabal of special interest funders anonymously pays to (a) select the Justices, (b) campaign for their confirmation, (c) have cases strategically brought before the Court, (d) flood the Court with an echo chamber of scripted amici, and (e) fund elaborate travel and hospitality for the agreeable Justices. Ample evidence suggests the worst-case scenario may not be far from reality. So here are some proposed repairs for various danger areas.

A. Anonymous Amici Curiae

Amicus curiae briefs, written by non-parties for the purpose of providing information, expertise, insight or advocacy, have surged in both volume and influence in the past decade. Supreme Court and circuit court opinions often adopt language and arguments from amicus briefs.[96] During the Supreme Court's 2014 term, it received 781 amicus briefs, an increase of over

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[93] *See generally* CODE OF JUDICIAL CONDUCT FOR U.S. JUDGES, Canon 4 (JUDICIAL CONFERENCE OF THE U.S. 2019).

[94] *See* Eric Lipton, *Scalia Took Dozens of Trips Funded by Private Sponsors*, N.Y. TIMES (Feb. 26, 2016), https://www.nytimes.com/2016/02/27/us/politics/scalia-led-court-in-taking-trips-funded-by-private-sponsors.html [https://perma.cc/J495-7X94].

[95] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY (Dec. 20, 1913), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-chapter-v [https://perma.cc/2HYS-V8WE].

[96] *See* Paul M. Collins Jr., Pamela C. Corley, & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 L. & SOC'Y REV. 917, 917 (2015) (finding "the justices adopt language from amicus briefs based primarily on the quality of the brief's argument, the level of repetition in the brief, the ideological position advocated in the brief, and the identity of the amicus").

800% from the 1950s and a 95% increase from 1995.[97] From 2008 to 2013, the Supreme Court cited amicus briefs 606 times in 417 opinions.[98]

Amicus briefs are an increasingly powerful advocacy tool for special interest groups. When those interest groups lobby Congress, they face stringent financial disclosure requirements;[99] no similar requirements exist for this form of judicial lobbying.

Janus v. AFSCME[100] (and its precursor, *Friedrichs v. California Teachers Association*)[101] presents a textbook example of coordinated, dark-money judicial lobbying in a case with massive political implications.[102] The case garnered over seventy-five amicus briefs, including many opposing the right of public-sector labor unions to collect fees from non-union members. Many of these briefs were by amicus groups with funding from the same source: the conservative Lynde and Harry Bradley Foundation, which has a stated goal of "reduc[ing] the size and power of public sector unions."[103] None of this information was disclosed in either case to the Court or the parties. Instead, it fell to the diligent later research of transparency groups, using what public data is available, to document this web of influence with the Bradley Foundation at its heart.[104] While the Court in *Friedrichs* deadlocked at four-to-four because of the death of Justice Scalia, the radical right was right away ready with a new case in *Janus*. With Justice Gorsuch confirmed, the Court by a vote of five-to-four overturned forty years of settled law and undermined public sector unions' ability to engage in political advocacy.[105]

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[97] Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1902 n.3 (2016).

[98] *Id.* at 1941.

[99] Lobbying Disclosure Act of 1995, 2 U.S.C. § 1603(b)(4) (2018) ("Each registration under this section shall contain . . . the name, address, principal place of business, amount of any contribution of more than $5,000 to the lobbying activities of the registrant, and approximate percentage of equitable ownership in the client (if any) of any foreign entity . . . .").

[100] 138 S. Ct. 2448 (2018).

[101] 136 S. Ct 1083 (2016).

[102] *See* Mary Bottari, *Behind* Janus*: Documents Reveal Decade-Long Plot to Kill Public-Sector Unions*, IN THESE TIMES (Feb. 22, 2018), https://inthesetimes.com/features/janus_supreme_court_unions_investigation.html [https://perma.cc/K3KN-S5XS] (noting "[i]n the past decade, a small group of people working for deep-pocketed corporate interests, conservative think tanks and right-wing foundations have bankrolled a series of lawsuits to end what they call 'forced unionization' . . . . Most of the groups pursuing this agenda, including Bradley and SPN, are tax-exempt charitable groups").

[103] *Free Markets: Improving Opportunity for All Citizens by Promoting Economic Growth*, BRADLEY FOUND. (Feb. 29, 2020, 10:20 AM), https://www.bradleyfdn.org/impact/free-markets [https://perma.cc/8TDY-L54C].

[104] Brian Mahoney, *Conservative Group Nears Big Payoff in Supreme Court Case*, POLITICO (Jan. 11, 2016), https://www.politico.com/story/2016/01/friedrichs-california-teachers-union-supreme-court-217525 [https://perma.cc/93MA-RWW7] (discussing that in *Friedrichs*, "The Bradley Foundation funds the Center for Individual Rights, the conservative D.C. nonprofit law firm that brought the case; it funds (or has funded) at least 11 organizations that submitted amicus briefs for the plaintiffs; and it's funded a score of conservative organizations that support the lawsuit's claim that the 'fair-share fees' nonmembers must pay are unconstitutional").

[105] As Justice Kagan noted in her dissent, "The majority has overruled *Abood* [*v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)] for no exceptional or special reason, but because it never

In *Seila Law v. CFPB*,[106] the case in which I filed my brief disclosing the common funding of other amici, a group of common funders had (a) supported at least thirteen amici attacking the constitutionality of the Consumer Financial Protection Bureau, (b) developed and propagated the so-called "unitary executive" theory of executive power their amici supported, and (c) funded the Federalist Society's efforts to bring on to the Court Justices who would be agreeable to this theory.[107]

Many of the amici in both *Janus* and *Seila Law* claim status as "social welfare" organizations, and thereby keep their donor lists private.[108] Without knowledge of the common funding, one might consider thirteen amicus briefs to present a broad outpouring of support; once the common funding becomes apparent, it suggests an artificial echo chamber manufactured by a small cabal of self-interested entities.

Judges and parties should know who is trying to influence the outcome in their case, but disclosure rules are woefully inadequate for today's dark-money fueled legal advocacy. Supreme Court Rule 37(6) requires only that amicus briefs:

> [I]ndicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution.[109]

The Federal Rules of Appellate Procedure have a similar disclosure requirement,[110] but these rules allow for easy evasion. A group like the Bradley Foundation can fund dozens of organizations to participate as amici in a case. As long as the money is not directed to the "preparation or submission" of a particular brief (which may be taken to mean merely printing and mailing costs), the amicus need not tell the Court where it gets its money. The real interests lie back in the shadows, while their front groups—often groups with anodyne names that belie their true purposes—create an illusory chorus of support.

Worse, the rule is inconsistently applied. In 2018, the Court rejected an amicus brief funded through a GoFundMe campaign, with most donors giv-

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liked the decision . . . . Because, that is, it wanted to pick the winning side in what should be—and until now, has been—an energetic policy debate." *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting).

[106] No. 19-7, 140 S. Ct. 427 (2019) (granting certiorari).

[107] *See* Brief for Sen. Whitehouse et al., *supra* note 77, at Appendix A.

[108] *See* Bullock v. Internal Revenue Serv., 401 F. Supp. 3d 1144, 1159 (D. Mont. 2019) (invalidating a 2018 Internal Revenue Service rule that permitted 501(c)(4) "social-welfare" organizations to keep their donor lists private).

[109] SUP. CT. R. 37(6).

[110] FED. R. APP. P. 29(a)(4)(E).

ing tens or hundreds of dollars.[111] At the same time, the Supreme Court routinely accepts amicus briefs from the United States Chamber of Commerce. The Chamber refuses to disclose its funding; indeed, the anonymity of Chamber membership is a selling point for corporations seeking to influence policy and the courts without associating their names with the often-toxic positions of the Chamber.[112] It is difficult to conjure any valid reason to reject one brief because an individual who donated $50 to the effort did not disclose her identity, while accepting another whose corporate donors in the millions of dollars remain anonymous.

This discrepancy seemed so obvious that I wrote to the Supreme Court to suggest that its disclosure rule should be changed.[113] Responding for the Court, Clerk of the Court Scott Harris wrote, "The language of Rule 37.6 strikes a balance . . . . While your letter suggests that non-disclosure of donor or member lists favors 'well-heeled' amici, it is just as likely to protect organizations that advocate for the disadvantaged or unpopular causes. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (recognizing right of NAACP not to provide membership lists where disclosure might lead to retribution and could chill group activity)."[114]

The Court's response was troubling in two ways. First, it draws a false, if not outright offensive, equivalence between Alabama NAACP members at risk of physical violence during the Civil Rights era and large corporate interests seeking to bend the law anonymously to their advantage.[115] Second, the Court *did require* the disclosure of the small donors, who were the ones much more comparable to the ordinary NAACP members protected in the Alabama case. The Court's unwillingness to look behind these hidden big-money influence campaigns runs contrary to longstanding precedent that disfavors anonymity in judicial proceedings.[116] It would not be difficult to

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[111] *U.S. Supreme Court Rule Crimps GoFundMe Backed Amicus Brief*, YAHOO FIN. (Dec. 10, 2018), https://finance.yahoo.com/news/u-supreme-court-rule-crimps-075351237.html [https://perma.cc/889T-RV5U].

[112] Dan Dudis, *Chamber of Commerce Wages War Against Political Transparency*, THE HILL (Oct. 20, 2016), https://thehill.com/blogs/pundits-blog/finance/302067-chamber-of-commerce-wages-war-against-political-transparency [https://perma.cc/T9CG-9AR2] (stating that "Chamber President Tom Donohue has said that the Chamber is in the business of providing 'reinsurance' to companies that need help lobbying for positions that aren't publicly or politically palatable. And key to the Chamber's ability to provide this 'reinsurance' is the fact that it can do the dirty work for its members without them leaving their fingerprints behind").

[113] Letter on file with author.

[114] Letter on file with author.

[115] *See* Dale E. Ho, NAACP v. Alabama *and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 433 (2012) ("[A]pplying *NAACP v. Alabama*'s holding in a formally symmetrical manner to the relatively powerful . . . without regard to context may undermine rather than affirm the values underlying that decision.").

[116] *See, e.g.*, United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995) (finding that a lower court erred when granting the "'rare dispensation' of anonymity against the world" when it allowed an amicus to file a brief anonymously, and that "the court has 'a judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation is warranted'"); Doe v. Frank, 951 F.2d 320, 324 (11th Cir. 1992) ("A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters

honor that precedent and fashion a rule of disclosure that allows an exception for true associational threats of violence, had the Court wished.

A legislative solution to this problem is the AMICUS (Assessing Monetary Influence in the Courts of the United States) Act. This very limited legislation would require disclosure by repeat players in the influence game—those who file three or more amicus briefs in the United States Supreme Court or the federal courts of appeals during a calendar year. Disclosure would be required only of these groups' big-dollar funders, those who contributed three percent or more of the entity's gross annual revenue or over $100,000. In addition, the bill would prohibit covered amicus brief filers from making gifts or providing travel or hospitality to judges, akin to current restrictions on legislative lobbying.[117]

B. Judicial Travel and Hospitality

Another means of influence is the "soft" lobbying of gifts and travel. Supreme Court travel paid for by others is not infrequent. Reporting by the nonpartisan Center for Public Integrity and by the *Washington Post* revealed that the nine Supreme Court Justices received over 365 trips paid for by outside groups from 2011 to 2014.[118] Unlike the vulgar and immediate quid pro quo exchange of a thing of value for a specific judicial outcome in a particular case, soft lobbying plays the long game of mutual habituation and good will through more decorous activities, like travel, which happen to avail access to the donors and their intermediaries. The long game is well known to Leonard Leo, his corporate cabal, and the savvy repeat players who represent them.

There are myriad unreported ways interests can cultivate the good will of the Court. Linda Greenhouse described a recent Federalist Society gala as sending a message from the corporate donor community to the Justices: "We've been here for you, and we expect you to be here for us. If you want to come back, don't disappoint us."[119] Current judicial travel and gift disclosure requirements do not provide enough sunlight into these relationships.

While the Ethics in Government Act requires judges to provide some financial disclosure, judges and Justices are not required to identify the exact

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of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough."); Babak A. Rastgoufard, Note, *Pay Attention to That Green Curtain: Anonymity and the Courts*, 53 CASE W. RES. L. REV. 1009 (2003).

[117] *See* 2 U.S.C. § 1613 (2018).

[118] Mark Berman & Christopher Ingraham, *'Supreme Court Justices Are Rock Stars.' Who Pays When the Justices Travel Around the World?*, WASH. POST. (Feb. 19, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/19/what-supreme-court-justices-do-and-dont-disclose/ [https://perma.cc/5QAU-KHPJ].

[119] Linda Greenhouse, *Supreme Court Party Time*, N.Y. TIMES (Nov. 22, 2018), https://www.nytimes.com/2018/11/22/opinion/supreme-court-federalist-society.html [https://perma.cc/38CM-CBCN].

dollar value of the reimbursement, and they are exempted entirely from reporting any gifts in the form of "food, lodging, or entertainment received as personal hospitality."[120] The Executive Branch personal hospitality exemption is limited to "hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or the individual's family";[121] the Senate's is virtually identical, and is commonly understood to be an exception for old friends and family.[122]

The death of Antonin Scalia demonstrated the difference for Justices. Justice Scalia was a well-known traveler, reporting 258 trips paid for by private sponsors over eleven years.[123] The $700-per-night accommodations at the West Texas hunting lodge where Justice Scalia died were paid by John Poindexter, owner of a corporate defendant in an age discrimination lawsuit, *Hinga v. MIC Group*,[124] that the Supreme Court the year before refused to hear,[125] to the company's advantage.[126] This all-expenses-paid hunting trip with a litigant was treated as personal hospitality.

It seems fair to require that judges and Justices make the same disclosures that elected officials do. The Judicial Travel Accountability Act would require judicial officers' financial disclosure statements to include the dollar amount of transportation, lodging, and meal expense reimbursements and gifts, as well as a detailed description of any meetings and events attended. It would align judicial disclosures with disclosures required in the other branches. This legislation has bipartisan support and has been introduced in both houses of Congress.[127]

C. Supreme Court Transparency

The Supreme Court is such an opaque institution that the public has no idea whom the Justices meet with in their chambers. Recent reports show why that information matters.

In October 2019, Justices Alito and Kavanaugh met with representatives of the National Organization for Marriage (NOM).[128] NOM is a political advocacy group with both 501(c)(3) and 501(c)(4) not-for-profit corporate status.[129] It uses that dual status to oppose same-sex marriage ini-

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[120] Ethics in Government Act of 1978, 5 U.S.C. § 102 (a)(2)(A) (2018).
[121] 5 C.F.R. § 2634.105(k) (2018).
[122] 5 U.S.C. App. § 109(14) (2018).
[123] Lipton, *supra* note 94.
[124] 136 S. Ct. 246 (2015).
[125] *Id.*
[126] *See* Lipton, *supra* note 94.
[127] Judicial Travel Accountability Act, S. 2632, 116th Cong. (2019).
[128] *See* Ephrat Livni, *An Unseemly Meeting at the US Supreme Court Raises Ethics Questions*, QUARTZ (Nov. 2, 2019), https://qz.com/1740845/scotus-justices-impartiality-questioned-after-unseemly-meeting/ [https://perma.cc/92ZQ-XQZ5].
[129] *About Us*, NAT'L ORG. FOR MARRIAGE, https://nationformarriage.org/about [https://perma.cc/MW5Y-MKNX] (last visited Mar. 4 2020).

tiatives in federal and state legislatures and in the courts,[130] promoting "an understanding of marriage as the union of one man and one woman."[131] In this instance, NOM was an amicus curiae in three consolidated cases then pending, which presented the issue whether the Civil Rights Act protected against discrimination based on sexual orientation.[132]

It is a fair question whether Justices should even take such meetings with amici.[133] At a minimum, those meetings should be disclosed. If the disclosures show patterns suggesting bias, or might influence a recusal motion, or appear to tread close to ex parte meetings, further action may be appropriate. But no disclosure is required. We know the Justices met with these advocates only because of a social media post from NOM President Brian C. Brown.[134]

Most judges take great care to avoid even the appearance of an ex parte contact during pending litigation. To be sure, NOM was a friend of the court, not a party to the litigation. But it would seem fair for parties litigating an issue to know if their opponents among the amici are getting a special audience with two of the Justices deciding their case.

Similarly, the Associated Press recently reported that the Supreme Court can be rented for private events.[135] The Supreme Court's website says nothing about such a service, but again thanks to social media we know that for a fee, and with the sponsorship of a Justice, the Court's premises are available for hire. No surprise, the Federalist Society, sponsored by Justice Alito, held an event at the Court in July 2018.[136] The Court refuses to disclose either the groups that rent the Court or the sponsoring Justices. Ac-

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[130] *Id.* (explaining that NOM "organiz[es] as a 501(c)(4) nonprofit organization, giving it the flexibility to lobby and support marriage initiatives across the nation" and that "[c]onsistent with its 501(c)(4) nonprofit status, NOM works to develop political messaging, build its national grassroots email database of voters, and provide political intelligence and donor infrastructure on the state level").

[131] *Our Work*, NAT'L ORG. FOR MARRIAGE, https://nationformarriage.org/main/ourwork#navigation-bar (last visited Mar. 4, 2020) [https://perma.cc/DJX4-Z8A6].

[132] Brief for National Organization for Marriage and Center for Constitutional Jurisprudence, as Amici Curiae Supporting Respondents, Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019) (No. 17-1617).

[133] *See, e.g.*, Elie Mystal, *Conservative Supreme Court Justices Are Showing Their Biases on Twitter Now*, ABOVE THE LAW (Oct. 31, 2019), https://abovethelaw.com/2019/10/conservative-supreme-court-justices-are-showing-their-biases-on-twitter-now/ [https://perma.cc/M5GW-63BA] ("It's really bad enough that conservative justices are so willing to give public aid and comfort to right-wing groups like the Federalist Society. Brett Kavanaugh, who has been credibly accused of attempted rape, has promised to take revenge on his enemies, so you can't really claim the justice's partisan hackery is surprising. But this meeting with the NOM is outrageous.").

[134] Brian S. Brown (@briansbrown), TWITTER (Oct. 29, 2019, 12:12 PM), https://twitter.com/briansbrown/status/1189213352167428096 [https://perma.cc/6CGS-U5LY].

[135] Mark Sherman, *Who Made the New Drapes? It's Among High Court's Mysteries*, AP NEWS (Nov. 29, 2019), https://apnews.com/a1781172562243a8acd91804a5c8ad10 [https://perma.cc/BPA7-8SG7].

[136] The Federalist Society, FACEBOOK (2018), https://www.facebook.com/pg/Federalist.Society/photos/?tab=album&album_id=10155760987728481 [https://perma.cc/GU8A-JE3J].

cording to court spokeswoman Kathy Arberg, "The court does not maintain public records of organizations holding events."[137] If a Justice were sponsoring an event for a litigant, or regularly sponsored events for particular amici curiae, it would seem that other litigants and the public ought to know.

Simple legislation would make all this information public. The official calendars of the Justices and a list of private events with sponsoring Justices could be made public by the Court after an appropriate interval. The Justices could still meet with whomever they choose, and sponsor groups for events they support, but they would do so knowing their choices will become public. For an institution whose authority is grounded in its public legitimacy, it is far better to be open with the public than not.

D. Supreme Court Records

Currently, no law provides for the preservation of Supreme Court Justices' papers. The Federal Records Act specifically excludes the Supreme Court, and the Justices' papers are considered private property rather than public records.[138] As *The New Yorker*'s Jill Lepore wrote in 2014:

> The decision whether to make these documents available is entirely at the discretion of the Justices and their heirs and executors. They can shred them; they can burn them; they can use them as placemats. Texts vanish; e-mails are deleted. The Court has no policies or guidelines for secretaries and clerks about what to keep and what to throw away. Some Justices have destroyed virtually their entire documentary trail; others have made a point of tossing their conference notes. "Operation Frustrate the Historians," Hugo Black's children called it, as the sky filled with ashes the day they made their bonfire.[139]

Given the life tenure and extraordinary power to shape American law that comes with a seat on the Supreme Court of the United States, there is a public interest in public access to Supreme Court records.

Following the model provided by the Presidential Records Act, which ensures public access to presidential records,[140] my Supreme Court Records Act would make Supreme Court records the public property of the United States; place the responsibility for the custody and management of records with the incumbent Justice and, upon the Justice's retirement, the Archivist of the United States; allow an incumbent Justice to dispose of records that no longer have administrative, historical, informational, or evidentiary value,

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[137] Sherman, *supra* note 135.

[138] Federal Records Act of 1950 (FRA), 44 U.S.C. § 3101 (2018).

[139] Jill Lepore, *The Great Paper Caper*, New Yorker (Dec. 1, 2014), https://www.newyorker.com/magazine/2014/12/01/great-paper-caper [https://perma.cc/A83Z-2QLV].

[140] The Presidential Records Act (PRA) of 1978, 44 U.S.C. §§ 2201–07 (2018).

subject to the approval of the Archivist; and establish a process for restriction of public access to these records.

E. DISCLOSE Act for Judicial Nominations

Judicial nominations and confirmations look more and more like political campaigns. Millions of dollars of dark money flow into social media, television, and radio advertising supporting and opposing nominees. The ads target states whose senators could be swayed on the nomination. It is political tradecraft, deployed for political purpose, and all of it ought to be regulated like the political campaign spending that it is.

Two things need to happen for effective regulation of political spending on judicial nominations. First, the Federal Election Campaign Act (FECA) needs to cover these judicial nominations campaigns so the spending is reported to the Federal Election Commission.[141]

Second, the law must deal with the post-*Citizens United* identity-laundering devices available to secretive donors. Existing FECA disclosures do not reach behind the nominal donor to give a true picture of who's behind political spending.[142] So we need a remedy like the DISCLOSE (Democracy Is Strengthened by Casting Light On Spending in Elections) Act[143] to unveil the real parties behind political advertising, who are now hiding behind shell corporations, donor trusts, and 501(c)(4) organizations.

A Judicial DISCLOSE Act, which I plan to introduce, would require groups that run political advertisements supporting or opposing federal judicial nominations to disclose their biggest donors. The bill is modeled after the DISCLOSE Act, which would end the plague of dark money in our campaign finance system by requiring outside groups to disclose their donors to the FEC.

VII. Conclusion

We must be clear-eyed about the hurdles these reforms face. Enormous effort has been put by large and powerful interests into a fifty-year project to capture the courts. These interests seek to maintain, and indeed further entrench, the corporate-friendly outcomes into which they have invested hun-

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[141] Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. § 30101 (2018) (currently defining the term "candidate" as "an individual who seeks nomination for election, or election, to Federal office," but not including judicial nominees).

[142] Anna Massoglia, *'Dark Money' in Politics Skyrocketed in the Wake of Citizens United*, Ctr. for Responsive Pol.: OpenSecrets News (Jan. 27, 2020), https://www.opensecrets.org/news/2020/01/dark-money-10years-citizens-united/ [https://perma.cc/CJK8-3TQ8] ("Dark money groups have reported nearly $1 billion in direct spending on U.S. elections to the FEC since *Citizens United* with just 10 groups bankrolled by secret donors spending more than $610 million of that.").

[143] S. 1147, 116th Cong. (1st Sess. 2019).

dreds of millions of dollars. Transparency is inconsistent with their scheme. They will fight.

This is a fight worth having. Dark money is a plague anywhere in our political system. Citizens deprived of knowing the identities of political forces are deprived of power, treated as pawns to be pushed around by anonymous money and message. Dark money encourages bad behavior, creating the "tsunami of slime" that has washed into our political discourse. Dark money corrupts and distorts politics. Bad as all that is, dark money around courts is even worse. The chances of corruption and scandal explode. The very notion that courts can be captured undercuts the credibility upon which courts depend. It is surprising that the Judiciary has not come to its own defense in these matters, but that makes it our job.

As Justice Brandeis also said, "If we desire respect for the law we must first make the law respectable."[144] The legislation I have proposed here would be an important—indeed necessary—first step to bringing a respectable transparency to our judiciary.

[144] Louis D. Brandeis, The Brandeis Guide to the Modern World 166 (Alfred Lief ed., 1941).

TAB 5J

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: IFP Subcommittee

Re: Status Report (19-AP-C; 20-AP-D)

Date: March 11, 2021

The subcommittee met on March 5, 2021, to further discuss and consider suggestions to establish more consistent criteria for granting IFP status and to revise the Appellate Form 4 to be less intrusive.

At this point, the subcommittee is focusing its attention on the one aspect of the issue that is clearly within the purview of the Advisory Committee, Appellate Form 4. Form 4 is a form adopted through the Rules Enabling Act, not a form created by the Administrative Office.

It is not, at this point, proposing any changes to Rule 4. (Nor did it do so earlier; an earlier report included other forms as potential points of comparison, not as proposals.)

Instead, the subcommittee is continuing to gather further information about IFP practice in the courts of appeals, including what standard or standards are used and what information from Form 4 is useful and what information is not. The subcommittee will continue to report its progress.

TAB 5K

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Relation Forward Subcommittee

Re: Status Report (20-AP-A)

Date: March 11, 2021

The subcommittee met and continued its consideration of a suggestion submitted by Professor Bryan Lammon to broadly permit the relation forward of notices of appeal. In his suggestion to the Advisory Committee and in his law review article, *Cumulative Finality*, 52 Ga. L. Rev. 767 (2018), he argues that there are splits between and within circuits regarding the circumstances in which subsequent events save a premature notice of appeal. He reports that the courts of appeals have not only "created three different approaches," but that they have "also issued inconsistent, irreconcilable opinions within several of the circuits themselves." *Id*. at 802–03.

In its earlier consideration of this suggestion, the subcommittee noted that the cases largely fall into three broad categories. The first category consists of appeals from district court decisions that could have been certified for immediate appeal under Civil Rule 54(b) but were not. The second category consists of cases where the district court has decided liability (on the merits, for attorney's fees, or for some kind of sanction) but had not yet determined the precise remedy (damages, amount of attorneys' fee, terms of the sanction). The final category consists of cases where a magistrate judge issued a report and recommendation, a party filed a premature notice of appeal to the court of appeals, and the district court later adopted the report and recommendation. The subcommittee previously concluded that the most compelling category is the first one.

In focusing on this category, the subcommittee considered ways to save notices of appeal that were filed after a district court decision that could have been (but was not) certified under Rule 54(b), such as by providing that such a notice is treated as filed after subsequent resolution of the rest of the case. (That subsequent resolution might be adjudication by the district court of the remaining claims, or it might be voluntary dismissal of the remaining claims.) But the subcommittee feared that doing so would encourage premature notices of appeal and undermine the process established by Rule 54(b).

The subcommittee also considered formalizing in the Rules the practice recognized in *Behrens v. Pelletier*, 516 U.S. 299, 310–11 (1996), that "enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings," by certifying an appeal as frivolous. But it also recognized that the district court and the parties should already realize that the district court should not proceed, once a notice of appeal is filed, without determining that it is proper to do so. It is not clear that codifying the *Behrens*

practice would help those who miss the notice of appeal or its significance. And it risks imposing additional burdens on district courts. Crafting a rule that applied to both ordinary civil cases and bankruptcy cases would be challenging, while having different rules for ordinary civil cases and bankruptcy cases runs the risk of parties relying on the wrong practice.

For these reasons, the subcommittee is inclined to take no action—just as the Advisory Committee decided last time it considered this question. But before reaching this conclusion, it will examine more closely the nature of the circuit split.[1]

The subcommittee also began its consideration of Professor Lammon's much narrower suggestion—submitted not as a separate suggestion but as a comment to the proposed amendment to Rule 3—to amend Rule 4(a)(4)(b) to no longer require a new or amended notice of appeal to challenge the disposition of a Rule 4(a)(4) motion. The first issue that the subcommittee will focus on regarding this issue is the different treatment of civil and criminal cases. *Cf.* Rule 4(b)(3)(C) ("A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).")

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[1] The subcommittee's last report cited *Donahue v. Federal National Mortgage Ass'n*, 971 F.3d 1 (1st Cir. 2020), which had refused to save the premature notice of appeal, while acknowledging the circuit split. *Id.* at 5. (citing *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1055 & n.5 (2d Cir. 1993). On rehearing, the court of appeals avoided the question, explaining:

> We begin by addressing whether we have appellate jurisdiction to hear this case. The parties initially were in agreement that there was jurisdiction under 28 U.S.C. § 1291 based on a ripening of the premature notice of appeal that took effect when the plaintiff voluntarily dismissed her claims pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). Following our issuance of an opinion rejecting that position, Donahue filed a petition for rehearing, and we requested supplemental briefing. The parties now diverge as to whether we have appellate jurisdiction, in part based on the significance of the fact that Donahue had previously voluntarily dismissed what she asserts was the same claim against GNMA, which she contends affects the finality of the events following her notice of appeal.
>
> Having now considered these arguments, including those not raised before, we conclude that the prudent course here is, as we sometimes do, to assume appellate jurisdiction and proceed to the merits, given how clear they are.

Donahue v. Fed. Nat'l Mortg. Ass'n, 980 F.3d 204, 206–08 (1st Cir. 2020).

TAB 5L

TOLEDO LAW
THE UNIVERSITY OF TOLEDO

Bryan Lammon
Professor of Law
University of Toledo College of Law

February 9, 2020

The Honorable Michael A. Chagares
United States Court of Appeals
U.S. Post Office and Courthouse
Two Federal Square, Room 357
Newark, NJ 07102-3513

Professor Edward Hartnett
Richard J. Hughes Professor of Law
Seton Hall University School of Law
One Newark Center
Newark, NJ 07102

Subject: Proposed amendment to Federal Rule of Appellate Procedure 4(a)(2).

Dear Judge Chagares & Professor Hartnett:

I write to ask that the Advisory Committee on Appellate Rules consider amending Federal Rule of Appellate Procedure 4(a)(2).

Rule 4(a)(2) is supposed to give effect to notices of appeal filed before the district court enters a judgment or otherwise appealable order. But the courts of appeals are divided over when exactly Rule 4(a)(2) does so. They have also split on whether Rule 4(a)(2) supersedes the common law cumulative-finality doctrine that the rule (at least partially) codified. And courts do not just disagree with each other; several circuits have issued conflicting decisions on these matters. The Committee looked into these issues in 2010 and 2011 but ultimately decided to take no action. The intervening years have not made things any better.

I accordingly ask the Committee to look into this issue again. I recently published an article addressing these issues in depth: *Cumulative Finality*, 52 Ga. L. Rev. 767 (2018), a copy of which is attached. I use this letter to summarize my analysis in that article and propose a possible rule change. I first briefly discuss the history of cumulative finality up through the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). Second, I describe the split among and within the circuits on the meaning of Rule 4(a)(2). Finally, I offer potential language for a rule amendment that would

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resolve the current cumulative-finality mess.

1. How We Got Here

Litigants normally must wait until the end of district court proceedings before filing a notice of appeal. But sometimes they file too early, before the district court has entered a judgment or other appealable decision. Problems can then arise if these litigants do not then file a second notice (or amend their first). No proper notice has been filed. And litigants that do not file a proper notice forfeit their right to appellate review.

To address this problem, courts and rulemakers developed the cumulative-finality doctrine, which allows subsequent events to save a premature notice of appeal.

Cumulative finality first emerged as a coherent doctrine in the 1960s and 70s. The courts of appeals developed the doctrine to save a variety of prematurely filed notices of appeal. *See* Lammon, *Cumulative Finality*, *supra*, at 781–87. Courts held, for example, that notices filed after a district court announced its decision were saved by the district court's subsequent entry of a judgment. *See, e.g.*, *Hodge v. Hodge*, 507 F.2d 87 (3d Cir. 1975). They held that notices filed after dismissal of a complaint (but not dismissal of the entire action) were saved by the later dismissal of the action. *See, e.g.*, *Firchau v. Diamond National Corp.*, 345 F.2d 269 (9th Cir. 1965). Courts also held that notices filed after the district court resolved some (but not all) of the claims in a multi-claim action were saved by a subsequent judgment that resolved the remaining claims. *See, e.g.*, *Richerson v. Jones*, 551 F.2d 918 (3d Cir. 1977); *Jetco Electronics Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). And a few decisions from this time allowed subsequent events to save a notice of appeal filed after an order that did not even resolve a claim. *See, e.g.*, *Curtis Gallery & Library, Inc. v. United States*, 388 F.2d 358 (9th Cir. 1967) (holding that a notice of appeal filed after summary judgment on only liability was saved by a subsequent judgment that determined the amount of damages).

Rule 4(a)(2) was added to the Federal Rules of Appellate Procedure in 1979. As amended, the rule now provides that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." The Notes state that the rule was meant "to avoid the loss of the right to appeal by filing the notice of appeal prematurely." The Notes also indicate that the Committee intended to codify an existing practice in the courts of appeals and cited to some the caselaw in this area.

But neither the Notes nor the rule itself specified what precisely was being codified or how the rule affected the then-existing common law cumulative-finality doctrine. And the post-Rule 4(a)(2) caselaw does not offer many hints. Despite the new rule, the courts of appeals continued to develop cumulative finality as a largely judge-made doctrine. *See* Lammon, *Cumulative Finality*, *supra*,

at 788–93.

Then came the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). *FirsTier* held that Rule 4(a)(2) saved a notice of appeal filed after a district court had announced from the bench its decision to dismiss the case but before it formally entered the final judgment of dismissal on the docket. The Court echoed the Committee Notes on the rule's purpose and origins: Rule 4(a)(2) exists to prevent the loss of appellate rights when a late notice does not prejudice the appellee, and the rule codified an existing practice in the courts of appeals. But the Court added that Rule 4(a)(2) would not save every premature notice of appeal. The rule instead "permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would* be appealable if immediately followed by the entry of judgment."

2. The Current Split

FirsTier sowed the seeds for confusion in the courts of appeals; writing for the Tenth Circuit in *In re Woolsey*, 696 F.3d 1266, 1271 (10th Cir. 2012), then-Judge Gorsuch characterized *FirsTier*'s discussion of Rule 4(a)(2)'s limits as "cryptic and arguably tangential," and he noted that the opinion is "open to many different understandings." After *FirsTier*, the courts of appeals developed three approaches to cumulative finality. *See* Lammon, *Cumulative Finality*, *supra*, at 795–802. Some cases held that appeals only from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. *See, e.g.*, *Miller v. Special Weapons, L.L.C.*, 369 F.3d 1033, 1035 (8th Cir. 2004). Other cases held that Rule 4(a)(2) will also save notices filed after decisions that could have been certified for an intermediate appeal under Rule 54(b). *See, e.g.*, *Outlaw v. Airtech Air Conditioning & Heating, Inc.*, 412 F.3d 156, 161–62 (D.C. Cir. 2005) (Roberts, J.). Still other cases held that nearly any district court decision, no matter how interlocutory, can be saved by a subsequent judgment. *See, e.g.*, *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 587 (3d Cir. 1999).

The courts have also disagreed about the interaction between Rule 4(a)(2) and the common law doctrine that preceded it. Some courts hold that Rule 4(a)(2) is now the only source of law on cumulative finality. *See, e.g.*, *Outlaw*, 412 F.3d at 160. Others have concluded that the common law doctrine survived Rule 4(a)(2) and continues to exist alongside it. *See, e.g.*, *Lazy Oil*, 166 F.3d at 587.

The split is not just between the circuits; several circuits have issued internally inconsistent decisions on these matters. *See* Lammon, *Cumulative Finality*, *supra*, at 802–14. The Eighth Circuit, for example, has one decision holding that Rule 4(a)(2) saved a notice of appeal filed after the district court had ordered sanctions but before it determined the amount of those sanctions. *Hill v. St. Louis Uniersity*, 123 F.3d 1114, 1120–21 (8th Cir. 1997). But seven years later, the Eighth Circuit claimed to be unaware of any Eighth Circuit decision adopting the cumulative finality doctrine and held that neither the common law

cumulative finality doctrine nor Rule 4(a)(2) saved a notice of appeal filed when a counterclaim remained outstanding. *Miller*, 369 F.3d at 1035.

Until recently, the Federal Circuit has generally taken the narrowest approach to cumulative finality, holding in two unpublished cases that notices filed only after decisions resolving all outstanding issues can be saved by the entry of a final judgment. *See Stoney Point Prods., Inc. v. Underwood*, 15 F. App'x 828, 830–31 (Fed. Cir. 2001) (holding that an appeal from "a judgment disposing of only some asserted claims" was not saved by a subsequent final judgment); Meade Instruments Corp. v. Reddwarf Starware, LLC, No. 99-1517, 2000 WL 987268, at *3 (Fed. Cir. June 23, 2000) (same). That court has, however, taken a broader approach in an appeal from the Board of Contract Appeals. *See Fireman's Fund Ins. Co. v. England*, 313 F.3d 1344, 1348–49 (Fed. Cir. 2002). And just recently, the Federal Circuit allowed counsel to cure a premature notice by abandoning an unresolved counterclaim during oral argument. *See Amgen Inc. v. Amneal Pharmaceuticals LLC*, 945 F.3d 1368 (Fed. Cir. 2020). But the recent decision did not reference any of the Federal Circuit's decisions in this context (or any other court's decisions), nor did it mention Rule 4(a)(2). *See* Bryan Lammon, "The Federal Circuit & Cumulative Finality," Final Decisions (Jan. 31, 2020), https://finaldecisions.org/the-federal-circuit-cumulative-finality.

The Fifth Circuit's caselaw is in what's probably the worst state. Even before *FirsTier*, the Fifth Circuit had issued a series of inconsistent decisions on how cumulative finality operates. *Compare Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1165–66 (5th Cir. 1984) (holding that a subsequent decision on the amount of attorneys' fees saved a notice of appeal filed after the district court had determined liability, damages, and entitlement to attorney's fees), *and Tower v. Moss*, 625 F.2d 1161, 1164–65 (5th Cir. 1980) (holding that the subsequent dismissal of the sole outstanding claim saved a notice of appeal filed from an earlier order dismissing only some of the claims), *with United States v. Taylor*, 632 F.2d 530, 531 (5th Cir. 1980) (holding that the subsequent dismissal of a plaintiff's claims did not save the defendant's notice of appeal filed after the dismissal of its counterclaims). The Fifth Circuit's post-*FirsTier* decisions are a mess. That court first appeared to hold that Rule 4(a)(2) would save notices filed after decisions that could be certified for an intermediate appeal under Rule 54(b). *See Barrett v. Atl. Richfield Co.*, 95 F.3d 375, 378–79 (5th Cir. 1996); *Riley v. Wooten*, 999 F.2d 802, 804–05 (5th Cir. 1993). But in *United States v. Cooper*, 135 F.3d 960, 963 (5th Cir. 1998), the Fifth Circuit held that *FirsTier* required the narrowest interpretation of Rule 4(a)(2)—only notices filed from decisions that resolve all outstanding issues in the district court can be saved by the entry of a final judgment. (*Cooper* addressed the scope of then-Rule 4(b), now Rule 4(b)(2), which is the criminal analogue of Rule 4(a)(2). *Id.* at 962. The *Cooper* court noted, however, that Rule 4(b) should be interpreted like the nearly identical Rule 4(a)(2). *Id.* at 962 n.1.) But *Cooper*'s limiting of Rule 4(a)(2) has not stuck, as some subsequent Fifth Circuit decisions reject it. *See Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 277 n.1 (5th Cir. 2008) (holding that a premature notice of appeal filed after a partial

grant of summary judgment was saved by the later disposition of all outstanding issues); *Boudreaux v. Swift Transportation Co.*, 402 F.3d 536, 539 n.1 (5th Cir. 2005) (holding that a premature notice of appeal filed after the district court had granted summary judgment in favor of one defendant but before dismissing the claims against a second defendant was saved by the subsequent final judgment). *See also Swope v. Columbian Chemicals Co.*, 281 F.3d 185, 191–92 (5th Cir. 2002).

The Fifth, Eighth, and Federal Circuits are not alone. The First, Third, Ninth, and Tenth Circuits all have issued cumulative-finality decisions that are at least in tension (if not direct conflict) with prior panel decisions. *See* Lammon *Cumulative Finality*, *supra*, notes 226–231 & 239–51 and accompanying text.

3. A Better Cumulative-Finality Rule

Given the various approaches to cumulative finality, some litigants are losing their opportunities for appellate review by filing a notice of appeal too early. I find that troubling. The error here is a technical one. It is not as though a notice of appeal was not filed; it was just filed too early. And the proper time for filing a notice of appeal is not always clear, particularly to those who are not well versed in the intricacies of federal appellate procedure. Parties accordingly sometimes file too early.

Technicalities can be important, especially when dealing with procedure. But the punishment for a procedural misstep should fit the crime. The misstep here—filing a premature notice of appeal—generally does little (if any) harm. Similarly harmless is allowing subsequent events to save these notices. Early notices—unlike late ones—do not implicate any reasonable reliance interests on the finality of a judgment. Early notices create no risk of piecemeal appeals, as the district court must enter a judgment or appealable order before anyone can perfect the appeal. And no one should be surprised when a litigant who filed a premature notice of appeal wants to later obtain appellate review of the district court's decisions.

Granted, a more generous approach to saving premature notices of appeal could encourage litigants to file more premature notices. And when parties file a premature notice of appeal, there is some risk of bogging down litigation while the courts and parties determine the effect of the notice.

But a clearer rule could mitigate these problems. Premature notices that disrupt litigation already occur, due largely to uncertainty about what to do with them. A clearer cumulative finality rule—no matter its content—might largely solve this problem. And of the possible rules, the broadest approach is the most pragmatic. Indeed, courts rarely (if ever) conclude that giving effect to a premature notice causes any prejudice. What little harm a broader approach to cumulative finality might cause can be mitigated through a clear rule. And courts could develop internal procedures for handling the premature notices—placing the appellate docket in suspension, for example, and allowing the parties to reopen it once the district court has entered a judgment or appealable order.

As for language, I have a proposed starting point.. (The language I propose here is different from that proposed in the article, which is due to the proposed amendments to Rule 3(c).) Again, Rule 4(a)(2) currently reads:

> *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

One possible change would be the following:

> *Filing Before Entry of Judgment.* A notice of appeal filed before the court enters a judgment or appealable order is treated as filed on the date of and after the entry of that judgment or order.

The proposed language treats all premature notices the same; it no longer asks what kind of decision or order a notice was filed after. The language makes that notice effective at the entry of the judgment or order that would normally have been appealable. And given that notices of appeal are not supposed to define the scope of appellate review (as the proposed amendments to Rule 3(c) make clear), there is no need to address which judgment or order is entered. Upon the entry of a judgment or appealable order, a prior notice of appeal would spring into effect and allow the party to appeal any matters that would be within the scope of appellate review in an appeal from that judgment or order.

This is not the only way in which to amend Rule 4(a)(2) to cure its ills. But I hope it will provide a helpful jumping-off point for the Committee's work.

I appreciate your time and consideration of this issue. Please let me know if there is anything I can do to assist the Committee in its work.

Sincerely,

Bryan Lammon

TAB 5M

From: Sai
To: RulesCommittee Secretary
Subject: Comment re proposed FRAP Rule 3 amendments, and suggestion for new rule re statements on possible appeals
Date: Monday, August 24, 2020 12:51:36 PM

Dear FRAP and FRCP Committees —

The proposed amendment to Rule 3 seeks to cure a needlessly complicated rule by still more complication.

The current proposed language in proposed (c)(4) / (c)(5) is excessively legalistic and technical. It does not really solve the problem of making notices of appeal simpler and more robust; rather, it's a new source of confusion and a potential trap for those who rely upon it.

Consider, for instance:

1. What, exactly, counts as "merged"?

This isn't a naïve question; I do know the doctrine, roughly speaking. The problem is that this is hardly a straightforward issue — nor one that the average trial litigator will be expert in. It's an appellate technicality that a procedurally aggressive appellee's appellate-specialist counsel will be sure to challenge.

A litigant who wants to ensure that their notice of appeal is bulletproof can take no solace in the proposed (c)(4). Until the court of appeals makes its ruling, there is no truly *reliable* way to know whether an issue is merged or not — and therefore the proposed (c)(4) also cannot be relied on.

A cautious litigant will simply ignore this clause and opt to be verbose, to protect against having to later argue a possible technical defect — the exact opposite of the Committee's stated intent.

Perhaps the Committees will remember their response to my modest proposal that clerks state what's appealable when, including what counts as a "judgment": a great deal of hand-wringing that the *court itself* might make an error. Surely it's harder to determine what's "merged" into a judgment than the bare question of whether an order is one or not. This proposed rule provides no guidance or determination to make that any better.

If you don't even trust the court itself to decide this correctly — as you said in response to my prior proposal — you really should not be making it implicit in a rule that tells litigants "don't worry about this". They will inevitably commit the error of doing so — only to learn that it's an error after it's far too late to correct, and worse yet, that the erstwhile assurance of your new rule is illusory, with no protective power behind it.

If you are to give such an assurance ethically, you must make it both unmistakable in coverage and binding on the courts of appeals. The proposed rule does neither.

2. What does it even mean for a rule to say something is "not necessary", considering that the essential nature of rules is to only make statements of what is either required or permitted?

This necessarily implies an override of some other rule that says or implies it *is* necessary. So, a cautious (or textualist) reader will ask: where is that other rule, and what else does it require? The answer is, again, not at all obvious, and fodder for hyper-technical circuit splits.

The fix is not to add yet another layer of caveats, exceptions to exceptions, or summary restatements of doctrine.

Rather, it's to change the basic rule to be simpler & more permissive in the first place.

I suggest a radical simplification:

Change the rule so that the appellant just has to say "[I/We] appeal" — and the rule's defaults ensure that they are completely covered.

Any indication of appeal should be taken to encompass everything appealable at that time, unless the notice of appeal explicitly *excludes* some appealable matter from the scope. Rather than having to state what's included (and thereby risk a technical failure), one only has to say something extra if one wants to *waive* an issue. Exempting things *not* appealed, or represented parties not joining the appeal, should be the exception.

If filed before final judgment, then it should encompasses everything subject to interlocutory appeal. If filed afterwards (or contemporaneously), then it's everything except matters that can *only* be interlocutorily appealed.

If filed by CM/ECF, it should be a non-document entry. CM/ECF will note the filer and parties represented as always; it should present a list of everything appealable at the time of entry, with all of them selected by default. Click 'submit' and it files a text-only docket entry that says "X appeals everything appealable except Y — which, for convenience, CM/ECF thinks is the following ECF #s: [list]". If filed by paper, it's an ordinary filing whose entire content is literally "[I/We] appeal." and the usual signature block.

To be more specific, I propose the following replacement language (with proposed committee footnotes inlined):

Rule 3. Appeal as of Right—How Taken

…

(c) Filing the Notice of Appeal.

[delete all of (c)(1), replace with following]

(1) (A, B, & C) Abrogated.

(D) The notice of appeal must indicate that the filer is appealing.

[Note: "[I/We] appeal." is sufficient, and should ordinarily be the entire content of the notice of appeal. CM/ECF should offer a non-document entry for this purpose. By default, everything appealable is appealed, by all parties represented by the filer, to the court of appeals with jurisdiction over the court appealed from.]

(E) The notice of appeal may, but ordinarily will not, designate express exceptions.

(i) The notice may designate parties in the case who are represented by the filer, but are not joining the appeal. In the absence of such an exclusion, all such parties are deemed to be taking the appeal.

[Note: A pro se filer represents whomever of themselves, their spouse, and their minor children are parties.
In a class action, whether or not the class has been certified, the class is included if any appealing party is qualified to be a class representative.
If a represented party is joining the appeal in personal but not official capacity, or vice versa, this must be explicitly stated.]

(ii) The notice may designate judgment(s), appealable order(s), or parts thereof which the appealing parties are not appealing. In the absence of such an exclusion, all appealable matters, including all orders that merge for

purposes of appeal, are deemed to be appealed;

[Note: Unless explicitly excluded, a notice of appeal in civil cases includes the final judgment, regardless of the existence of a separate FRCP 58 document, if it is filed after:
(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
(B) an order described in Rule 4(a)(4)(A).]

(iii) The notice may designate court(s) to which the appeal is taken. In the absence of such a statement, the usual appellate court is the court to which the appeal is taken.

[Note: A court should only be designated in exceptional circumstances, e.g. for direct appeals to the Supreme Court that skip the usual court of appeals; MDLs; or situations where the appeal is to be transferred to a different jurisdiction.]

(F) The clerk, or CM/ECF if all parties receive electronic service, should immediately thereafter make an advisory filing, informing the parties of the defaults under subparagraph (B), i.e.:

[Note: This notice is purely advisory, and has no substantive or procedural effect. The notice should, if possible, be entirely automated by CM/ECF. If any exclusions were designated, this notice should state that the exclusions take precedence over these defaults.]

(i) the parties represented by the person filing the appeal;
(ii) the full list of appealable orders and judgments at the time of the appeal; and
(iii) the usual court of appeal.

(G) If the notice of appeal is filed directly in the court of appeals, it shall be considered as having been properly filed in the originating court, and the clerk shall send a copy to the originating court.

[Note: 28 U.S. Code § 1631 (cure for mistaken filing in court of appeals).]

[delete (c)(2 & 3), and mark them as abrogated (rather than renumbering following paragraphs), so as to not harm the comprehensibility of other sources' references by number. See e.g. abrogated FRAP 11(d).]

[discard proposed (c)(4-6)]

[delete FRAP 12(b) as redundant]

Furthermore, I suggest the following addition, in order to preempt (or at least lessen) a routine source of confusion, paucity of record for review, technicalities, and avoidable litigation:

FRAP 3(c)(1)

(H) Statements on possible appeals.

See FRCP 60.1, which is triggered by the filing of a notice of appeal.

FRCP 60.1 Statements on possible appeals.

The court must:

(a) within 3 days of
(1) a party's request,
(2) the filing of a notice of appeal, or
(3) the filing of any "judgment" under Rule 54;

(b) file a statement addressing, for each prior order not addressed in a prior statement under this rule:
(1) regardless of whether final judgment has issued:
(i) whether it is a "judgment" under Rule 54;
(ii) whether an appeal from it is, or would be, taken in good faith; and

[Note: Element (ii) is based on FRAP 24(a)(3)(A) and (a)(4)(B); see 28 U.S.C. § 1915(a). Nevertheless, it is required under this rule regardless of the IFP status of the parties.]

(iii) whether it is, or will be, merged into the final judgment; and

(2) if final judgment has not yet issued:
(i) whether and when it is appealable, addressing 28 USC §§ 1291 & 1292 at minimum;
(ii) whether it involves
(I) a controlling question of law
(II) as to which there is substantial ground for difference of opinion;
(iii) whether an immediate appeal would materially advance the ultimate termination of the litigation;
(iv) whether it is separable from, and collateral to, rights asserted in the action;
(v) whether it is too important to be denied interlocutory review;
(vi) whether it is final, and if not, what would convince the court to change its decision; and
(vii) whether it is effectively reviewable or curable on appeal from final judgment.

[Note: Elements (ii—vii) are based on 28 U.S. Code § 1292(b) and Cohen v. Beneficial Industrial Loan Corp. In circuits whose precedent sets forth further elements for determining interlocutory appealability, the statement must address those elements as well.

The statement is not binding on the court of appeals, and does not affect the standard of review.]

(c) The court may make a statement under this rule sua sponte, e.g. at the same time as it issues an order.

[Note: This is encouraged. Addressing appealability issues contemporaneously would reduce the number of orders in the scope of ¶ (b); give parties immediate notice of whether an order is appealable without the risk of irritating a judge by making an explicit request; ensure that the record reflects the judge's views at the time the order was issued; and remind judges of the need to make a record sufficient for review.]

I suggest that the Committees read about whitelist vs blacklist based defense in computer security, e.g. as used to prevent SQL injections or determine what programs are safe to run. This is fundamentally the same concept, and the proposed rule commits the usual fundamental error: it picks the wrong default, and then tries to fix it by adding more and more caveats.

If you want to make a simple rule that definitively prevents the risk of underinclusion, the answer is simple: make everything included by default, so that action only needs to be taken to *exclude* something from the default scope.

Sincerely,
Sai

TAB 6

TAB 6A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Midnight filing deadline (19-AP-E)

Date: March 9, 2021

Information continues to be gathered to help inform whether to propose any change to the midnight deadline for electronic filing.

In particular, the Federal Judicial Center (FJC) is continuing to analyze data regarding what time of day filings are made in federal courts. This process is now more than half complete. In addition, the FJC is looking at both local rules of federal courts and state courts' rules for topics such as filing times and whether pro se litigants can use electronic filing.

A survey of attorneys, clerks, and judges is on hold for now due to the pandemic.

Later the FJC may undertake a comparison of filing patterns for a few courts pre- and post-pandemic to get a sense of whether the pandemic changed time-of-day patterns.

TAB 6B

10. Appeal Finality After Consolidation
Joint Civil-Appellate Subcommittee Report

The Joint Civil-Appellate Subcommittee was appointed to study the effects of the final judgment rule for consolidated actions announced in *Hall v. Hall*, 138 S.Ct. 1118 (2018). Implicitly choosing among the four approaches that had been taken by the courts of appeals, the Court ruled that complete disposition of all claims among all parties to what began as a separate action is a final judgment no matter that other parties and claims asserted in originally independent actions remain undecided. The Court also suggested that if this rule creates problems, solutions may be found in the Rules Enabling Act process.

Subcommittee work began with an extensive and elaborate Federal Judicial Center study of appeals in consolidated actions filed in 2015, 2016, and 2017 that was described in the report to the October 2020 meeting. Further work by the FJC does not seem warranted now. The Subcommittee's next efforts will be informal while it continues to debate whether the abstract reasons to question the *Hall v. Hall* rule may justify rule amendments even without clear lessons from practice.

The Subcommittee has begun its informal efforts by asking judges in the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals about experience with *Hall v. Hall*. Each circuit routinely screens incoming appeals for timeliness. No occasion to dismiss appeals as untimely under the *Hall v. Hall* rule was recalled in the Third, Seventh, Ninth, or Eleventh Circuits, either on staff screening or on motion to dismiss.

The Second Circuit did find occasion to dismiss appeals in *McCullough v. World Wrestling Ent., Inc.*, 827 F.Appx. 3 (2d Cir. 2020). The setting was complicated. Seven actions were originally filed in several districts. All were consolidated for all purposes in the District of Connecticut under a forum selection clause in the underlying contracts. After all claims in two of the actions were dismissed, the Second Circuit dismissed appeals for want of a final judgment, employing its pre-*Hall* rule that there is a strong presumption against appealability when a judgment in a consolidated action does not dispose of all parts of all consolidated actions. *McCullough v. World Wrestling Ent. Inc.*, 838 F.3d 210 (2d Cir. 2016). Two other of the seven actions were completely resolved after that, one before the decision in *Hall v. Hall* and the other one day after the decision. Eventually four appeals were taken, two by the two plaintiffs whose first appeals had been dismissed, and two by the later two plaintiffs. The circumstances with respect to the other three actions in the consolidation are not clearly described. The result, however, is clear. All four appeals were dismissed as untimely, with an explanation that any arguments as to the applicability of the new rule or "work-arounds" had been waived. The appeal problems in this case may not provide much ground for predicting like

contretemps in other cases.

The informal survey also revealed that the Seventh and Ninth Circuit appeals handbooks include advice about appealability in light of *Hall v. Hall*.

The Subcommittee will meet again to weigh the competing values of extending its informal surveys, waiting developments in practice for awhile, or considering the arguments sketched in the October 2020 report that the parties, trial courts, and appellate courts might be better served by restoring one of the alternative approaches previously taken in the courts of appeals as a clear and uniform but different rule of finality.

TAB 7

TAB 7A

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Standards for Judicial Disqualification Based on Amicus (20-AP-G)

Date: March 9, 2021

As amended in 2018, Federal Rule of Appellate Procedure 29(a)(2) provides:

> **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

Alan Morrison notes that that there are no guidelines for what triggers disqualification based on an amicus brief and therefore on what causes a brief to be struck. Indeed, the Committee Note to the 2018 amendment explicitly states, "The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification." He contends that this poses a problem not only for judges but also for potential amici (and counsel to potential amici) who wish to do what they can to avoid creating the kind of conflict that leads to a brief being struck. He points to recent cases where briefs were struck, observing that it is unclear why the briefs were struck, or even which judge's connection triggered the rule.

He suggests that this Advisory Committee, "or perhaps the AO or the FJC, undertake a study with the view toward recommending guidelines that the judicial conference could adopt, after allowing for public comment as is done for the rules process generally."

It is not clear whether this is a matter properly within the bailiwick of this Advisory Committee. But rather than answer that question prematurely, the Advisory Committee may wish to refer the suggestion to the AMICUS subcommittee, which is already examining issues related to amicus briefs.

TAB 7B

From: Alan Morrison
Date: Thu, Dec 10, 2020 at 9:19 AM
Subject: Proposal for Appellate Rules Committee
To: Rebecca Womeldorf

Attention Judge Jay Bybee, Chair.

Federal Rule of Appellate Procedure 29(a)(2) provides for the filing of amicus briefs on appeal as follows: **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, *but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.*

Before the italicized portion was added in 2018, I submitted comments and addressed the Appellate Rules Committee orally, to explain my concerns about the proposal. My objections were not followed, and I am not moving for rehearing. However, the attached article from the National Law Journal, discussing two recent cases in which the Rule was invoked to strike previously filed amicus briefs prompted me to write to the committee to make a suggestion.

The rules on judicial disqualification in 28 USC 455 are reasonably clear when there is a potential for a conflict of interest or the appearance of one because of a relationship of some kind to a party (and in some circumstances to a party's counsel). But there is nothing in that statute that speaks to a similar problem when the relationship is to an amicus, or perhaps to a member of an amicus when the amicus is a trade association or some other entity. I am also unaware of any other rules or even guidelines to assist judges and also counsel for a potential amicus who wishes to avoid coming close to the line in Rule 29(a)(2). Indeed, it is unclear from the published article or any court order in those cases which appellate judge's connection caused the briefs to be stricken or on what basis.

To my thinking, the root of the problem is that there are no guidelines for what a judge should do when the potential basis for recusal in a case is an amicus or its counsel. My suggestion is that your committee or perhaps the AO or the FJC undertake a study with the view toward recommending guidelines that the judicial conference could adopt, after allowing for public comment as is done for the rules process generally. I am sure that all federal judges want to do "the right thing" when faced with issues of recusal, but they need guidance when the potential source of a recusal is not a party, but an amicus.

I am happy to assist the committee or others on the project if that would be helpful.

Respectfully, Alan B. Morrison

4th Circuit Scraps McDermott Amicus Brief in Rare Nod to Recusal Rule

A panel of Fourth Circuit judges in August ruled for the Trump administration—reversing a district judge's nationwide injunction—but the court on Thursday night said it would rehear the dispute. Minutes before the court announced its plans, an order striking the McDermott amicus brief was issued.

By **Marcia Coyle** | December 04, 2020 at 02:23 PM

The U.S. Court of Appeals for the Fourth Circuit on Wednesday **barred** an amicus brief on behalf of more than 100 companies in a closely watched Trump administration immigration case, after concluding the filing would have caused one of the court's 15 judges to sit on the sidelines for an upcoming hearing.

The law firm McDermott Will & Emery had **filed the brief** earlier this year on behalf of 104 businesses and organizations that were backing a challenge to the Trump administration's "public charge" rule. The administration's new definition of a "public charge"—a person who receives 12 months of benefits in a three-year window—would hinder admissibility of certain immigrants, critics assert.

A panel of Fourth Circuit judges in August **ruled** for the Trump administration—reversing a district judge's nationwide injunction—but the full court on Thursday night said it would rehear the dispute. Minutes before the court announced its plans, an order striking the McDermott amicus brief was issued. The brief immediately was removed from the court docket.

Scrapping the McDermott brief, the appeals court acted under **local appellate procedure rule 29(a).** The rule states that the court will strike an amicus brief if it would result in the recusal "of a member of the en banc court from a vote on whether to hear or rehear a case en banc." It also applies to potential recusal of panel members.

"We were surprised when the court struck the brief, but we understand the basis for the policy," said McDermott partner Paul Hughes, who was on the brief with partner Michael Kimberly and counsel Matthew Waring. Hughes and Kimberly are the co-leaders of the firm's Supreme Court and appellate group.

Many courts have similar local rules; the federal judiciary at large adopted a similar rule just a couple of years ago. There was some pushback over the rule, whose application appears to occur infrequently.

Gibson, Dunn & Crutcher also felt the sting of a similar local rule and the new federal rule—29(a)(2)—last year when its amicus brief in a challenge involving the Affordable Care Act was **struck** at the panel stage in the Fifth Circuit.

The Fifth Circuit, like the Fourth Circuit, did not give any reason about which judge would have had to recuse. A judge's connection to a law firm, or tie to a group or company that is participating as an amicus, might give rise to a recusal. At least one new member on the Fifth Circuit had earlier worked at Gibson Dunn, but it was not clear that the law firm connection drove the court's order.

Two of Trump's three appointees to the Fourth Circuit arrived from law firms, but not from McDermott. Allison Rushing Jones **arrived** from Williams & Connolly, and A. Marvin Quattlebaum from Nelson Mullins Riley & Scarborough. Julius Richardson was an assistant U.S. attorney prior to his arrival to the bench.

McDermott's Hughes said he did not know which Fourth Circuit judge would have faced recusal because of the firm's amicus brief. The brief was on behalf of 104 businesses and organizations, including Levi Strauss & Co., Microsoft Corp., Twitter and LinkedIn Corp.

It's possible a financial conflict arose, where a judge had a personal stake in the business of one of the amicus companies. "Many of the companies were not publicly traded but others were. Or, there may be an equity interest in one of the non-public companies," Hughes said.

Their amicus brief, which supported the district court's injunction, also was filed in at least three other circuit courts reviewing the legality of the rule, according to Hughes. It argued that the rule will impede hiring by American employers and impose onerous compliance burdens of workers and employers.

The local and federal rules allowing the strike of amicus briefs that could result in recusals were enacted mainly to prevent strategic filing of briefs. The federal rule drew some opposition at the proposal stage.

In a **2017 letter** to the Judicial Conference's Committee on Rules of Practice and Procedure, Alan Morrison of George Washington University law school expressed some of those objections.

At the panel stage, Morrison wrote, there was no evidence of any significant number of cases in which recusal had been required, or an amicus brief was filed for the strategic reason of recusing a particular judge. Those courts could almost always find a replacement for a recused judge at that stage, he added. Barring the brief denied amici an opportunity to be heard and denied judges information that could be useful.

The en banc stage was somewhat different, according to Morrison. But he thought the rule should be limited to new filings at the en banc consideration stage because there was some possibility of filing a brief in order to obtain recusal of a specific judge.

Hughes said his personal view was for a broad standard for federal judges that would require them to place their assets in a blind trust or index mutual funds. “All things being equal, avoiding recusal on the basis of financial holdings would be optimal, but we appreciate that’s not the current ethics or recusal rule,” he said

TAB 7C

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Adding time after service of a judgment (21-AP-A; 21-CV-B)

Date: March 9, 2021

Greg Patmythes has submitted a suggestion to both the Civil and Appellate Advisory Committees.

He finds Civil Rule 6 and its interplay with Appellate Rule 4 to be confusing. As he reads Civil Rule 6(d), he should have three extra days after service of a judgment to file a motion that tolls the time to appeal under FRAP 4(a)(4). He suggests an amendment that would make that explicit.

He also sees a trap in the relationship between Civil Rule 60 and Appellate Rule 4(a)(4). Civil Rule 60 does not have a 28-day time limit, while Appellate Rule 4(a)(4) treats Rule 60 motions filed with 28 days after judgment as tolling the time to appeal. He suggests adding a provision to Civil Rule 60 that would require Rule 60 motions to be made within 28 days to toll the time to appeal and deleting the 28-day provision from Appellate Rule 4(a)(4).

I recommend that this suggestion be removed from the agenda.

Civil Rule 6(d) provides:

> When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

By its terms, this rule applies when time is measured "after being served." It has no application when time is measured from some other event. And the time to file various tolling motions runs from the entry of judgment, not service. *See* Civil Rules 50(b) and (d), 52(b), 59(b) and (e). So, too, does the time to file a notice of appeal. Appellate Rule 4(a).

Changing any of the deadlines that run from entry of judgment to deadlines that run from service would be a major shift and require considerable reworking of various rules. Changing them without a strong reason to do so would seem to invite trouble, especially by upsetting that which is settled and understood. And I don't see much reason at all.

I understand the predicament of someone who does not learn of the entry of judgment in time to act. The problem is acute for pro se litigants who are not permitted to use electronic filing. That may be a reason to flip the presumption regarding pro se use of electronic filing. *See* e.g, Suggestion 20-AP-C.

Appellate Rule 4(a)(6) is designed to deal with this problem in the context of notices of appeal:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> > (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
> >
> > (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and
> >
> > (C) the court finds that no party would be prejudiced.

Perhaps there might be some value in creating a parallel provision to help a litigant who lacks notice of the entry of judgment and wants to bring a Rule 50(b) motion or a Rule 59 motion rather than immediately appeal. Failing to file such motions can preclude certain arguments on appeal. But the problem would seem to arise rarely. A party whose case was tried is less likely to miss the entry of judgment than someone whose case was decided on motion. Plus, with electronic filing, it is much easier to avoid missing entry of judgment. It seems unlikely many trials involve pro se litigants not using electronic filing. Whatever the merits, the question appears to be one for the Civil Rules Committee.

As for the relationship between Civil Rule 60 and Appellate Rule 4(a)(4): Appellate Rule 4 treats motions made under Civil Rule 60 within 28 days of the judgment the same way it treats timely motions under Civil Rules 50(b), 52(b), and 59. The reason for this treatment is not to encourage Civil Rule 60 motions to be made within 28 days, but to protect someone who could have filed a motion under 50, 52, or 59 yet styled the motion as a Rule 60 motion—and to protect the court from having to parse a Civil Rule 60 motion filed within 28 days of the judgment to determine what parts of it could have been brought under those other rules. Keeping the provision that treats Rule 60 motions filed within 28 days of the judgment in the Appellate Rules serves these functions.

TAB 7D

Good morning Rules Committee Secretary,

Whether FRCP 6(d) requires clarification as to its application in calculating the 28 period for filing posttrial motions.

Whether FRCP 60 should be amended to remove the 'trap' currently set in FRAP 4(a)(4)(A)(vi).

Because of the constraints on the judiciary the improvements suggested will:

- Increase judicial efficiencies
- Reduce the number of resources devoted to certain 'jurisdictional' issues
- Create additional amity and comity
- Improve consistency and clarity
- Preserve the style and integrity of the rules

I. FRCP 6(d) and entry of judgment

In keeping with the Guidelines for Drafting and Editing Court Rules and honoring the command of FRCP 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding", I respectfully submit a simplification of FRCP 6(d) by adding a phrase already contained elsewhere in the FRCP. By adding the phrase "or after entry of judgment" will simplify the rule, comports with the style of the rules, and removing any remaining doubt that FRCP 6(d) applies to entry of judgment mentioned elsewhere in these rules.

To me, as a disabled layperson, FRCP 6 is ambiguous, cumbersome, and confusing. Specifically, the interplay between FRCP 6(d) and FRCP 6(a) when involving the required service of the notice of entry of judgment under FRCP 77. "That should have been clear to any federal litigator, and to read it the way McCarty's attorney has constitutes inexcusable neglect." *McCarty v. Astrue*, 528 F.3d 541, 545 (7th Cir. 2008).

Currently FRCP 59(e) and FRCP 60 (via FRAP 4(a)(4)(A)(vi) require a motion be filed within 28 days of the entry of judgment (FRCP 58) in order to "toll the time" for filing a notice of appeal.

Here is how the mental model I built looks:

The court enters judgment (58), which is a 'paper' (5). The Clerk then makes service (77) to the parties according to the method the parties consented to (5) and records service on the docket (79).

Because time, 28 days, starts the day after the event (6(a)(1)(A) the period is then calculated. (Day of event + 1 day) + 28 days

Because local rules (83) allow a pro se to be served by mail (5(b)(2)(c) and 6(d) requires additional time after certain kinds of service be added after the expiration of the time calculated in 6(a). That would give us:

Calculation of period in FRCP 6(a):

(Day of event + 1) + 28 days + 3 days.

From the 2018 calendar:

Day of entry: Wednesday, June 13, 2018
Day to start counting: Thursday, June 14, 2018
Days to count: 28 days

June 14 + 28 = July 11, 2018 (Wednesday) = 28 days as calculated in FRCP 6(a). Because notice of entry was served by mail, 3 days are added per 6(d). July 11 + 3 days = Saturday, July 14, 2018. Because July 14, 2018 is a Saturday, the filing day becomes the non-Saturday, non-Sunday, non-Holiday, which is Monday, July 16, 2018.

Because 6(d) is an 'automatic' calculation and requires neither action nor discretion by the court, rule 6(b) is inapplicable.

In 2005 the rules committee wrote "Rule 6(e) is amended to remove any doubt as to the method for extending the time…" When viewed together with Fed. R. Civ. P. 5(d)(4) "Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice" that means the service by mail of the notification of entry of judgment adds 3 days to the 28-day period one must file a posttrial motion for the tolling of time. Compare with " Fed.R.Civ.P. 6(e) applies only to documents `served' on opposing counsel, not to documents such as complaints or notices of appeal that must be filed in court."" *McCarty v. Astrue*, 528 F.3d 541, 545 (7th Cir. 2008).

I propose adding "or after entry of judgment" to FRCP 6(d):

> (d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served or <u>after entry of judgment</u>

and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

The application of Rule 6(d) to the calculation of time for the filing of posttrial motion(s) and a notice of appeal has no effect on the finality of the judgment/order and opinion nor does the additional 3 days cause a disadvantage to the appellee.

II. FRCP 60 and the FRAP trap.

FRAP 1(a) limits the scope of the rules to the United States courts of appeals. FRAP 1(b) goes on discuss the filing of motions or other document in the district court, the procedure must comply with the practice of the district court. The FRCP refers to 'paper(s)' and FRAP diverges by use of 'document.' Perhaps, that difference between the two sets of rules should be reconciled as well.

To toll the time for filing a Notice of Appeal, the FRCP requires posttrial motions to be filed within 28 days, except FRCP 60. The 28-day limitation for FRCP 60 appears in FRAP 4(a)(4)(A)(vi).

This minor language tweak will result in greater amity and comity amongst the districts and their circuits. For purposes of continuous improvement and consistency between the sets of rules FRCP Rule 60 should be amended to include the 28-day limitation and the reference to 28-days should be simultaneously removed from FRAP 4(a)(4)(A)(vi).

I propose amending FRCP Rule 60(c):

(c) TIMING AND EFFECT OF THE MOTION.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—

(A) no more than a year after the entry of the judgment or order or the date of the proceeding for reasons (b)(1), (b)(2), and (b)(3)

(B) within 28 days to toll the time for filing an appeal.

I propose the following amendment to FRAP Rule 4(a)(4)(A)(vi):

(vi) for relief under Rule 60 ~~if the motion is filed no later than 28 days after the judgment is entered.~~

Thank you for your time, attention, and consideration of the analysis, and proposed amendments to the FRCP and FRAP. Because a litigant can lose important appeal rights, I beg you to fast-track these items. Alternatively, if my analysis is erroneous, I ask that you point out any errors in a compassionate manner.

Sincerely,

Greg Patmythes

Totally and permanently disabled

TAB 7E

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: IFP Forms (21-AP-B)

Date: March 9, 2021

Sai has submitted a "response to the IFP subcommittee's Sept. 24, 2020 report regarding my proposal on IFP forms and rules, 19-AP-C." The response has been docketed as a separate suggestion.

I suggest that the Advisory Committee may wish to formally refer this suggestion to the IFP subcommittee.

TAB 7F

From: Sai
To: RulesCommittee Secretary
Subject: Comment re 19-AP-C report dated Sept. 24, 2020
Date: Tuesday, February 09, 2021 5:23:50 PM

Dear FRAP and Standing Committees —

I write in response to the IFP subcommittee's Sept. 24, 2020 report regarding my proposal on IFP forms and rules, 19-AP-C.

1. Qualification standard

First, because the Committee has repeatedly misconstrued this, I must reiterate: the qualification standard must be sufficient, not necessary. If someone meets this standard, then they qualify.

If they don't meet the standard, then nevertheless they may qualify, depending on the circumstances. The standard should try to cover the majority of cases, but obviously it cannot account for everything. This should be emphasized, lest judges fail to take special circumstances into account in a situation the standard failed to foresee.

I broadly agree with Prof. Hammond's proposal that anyone at ≤150% FPL should qualify. I also agree that someone currently receiving means-tested government benefits should be excluded on that basis alone, without requiring any further test.

I disagree with Prof. Hammond's asset test, however, for two reasons:
a. It's almost never a good idea to put a specific dollar amount in a policy — and certainly not here. Any asset test should be tied to FPL, just like income. I suggest that it be set at one year's worth of the qualifying income, both for simplicity of administration, and because this is a reasonable amount of savings for people to have (especially when they are inherently at risk of financial instability).
b. It fails to exclude other property that should be excluded. See the LSC's standards at 45 CFR Part 1611.

My own proposal, below, applies the dual 125% / 200% test used by the LSC. I am of course not opposed to a more generous standard for what FPL percentage should be pegged.

The LSC's rulemaking received far more input and scrutiny than Prof. Hammond's paper. Its dual standard incorporates multiple considerations for other circumstances that I believe are important and should be followed, regardless of whether the lower threshold is set at 125% or 150% FPL.

I don't believe the LSC's standards are perfect — if you compare closely, you will see that my proposal makes a few tweaks and additions — but they are a solid basis to work from.

2. The proposed forms are improvements, but still violate 28 USC 1915(a)(1) or have other problems.

a. Hammond form

For a non-prisoner, the *only* lawful part of this form's content is the first paragraph.

Literally none of the suggested questions are in any way authorized by the IFP statute. The law is extremely clear that it requires only an affidavit, not any detail.

Even for prisoners, nothing in 28 USC 1915(a) authorizes any question at all about income, expenses, or dependents. Those simply are not "assets", by any definition.

If a court wants more information, it can issue an order to show cause why the affiant should not be held in contempt for perjury. Such an order may require, under 18 USC 6002(1), whatever further details are appropriate to the situation.

A sworn affidavit is either sufficient evidence in itself, or a crime. If the court has no reason to accuse the affiant of perjury, it has absolutely no business demanding further proof of what was sworn to. Such inquiry cannot be justified as merely a routine response to applying for IFP status.

It is irrelevant whether an applicant is represented by a legal aid organization per se. If that legal aid is a means-tested program whose qualification standards are equivalent, like LSC-funded legal aid programs, then *that* is the relevant fact. Any such program should be permitted as an automatic IFP qualification.

On the plus side, the Hammond form is at least *less* illegal than the current AO forms, because it does not ask questions about the affiant's spouse, creditors, debtors, etc. (as I've detailed previously), and the amount of detail it asks is far less intrusive.

In short, it's illegal and inapt — but nevertheless substantially better than AOUSC's current forms.

b. Ohio form

Nothing in the IFP statute, or indeed any federal rule of procedure I'm aware of other than bankruptcy, authorizes a court to routinely ask an applicant their date of birth or any part of their SSN. In fact, the AOUSC adopted, and the Supreme Court promulgated, my proposal 15-AP-E that the former SSN question be removed from FRAP Form 4.

The number the applicant's *dependents* is relevant to automatic qualification under the Federal Poverty Guidelines (which are based on the family size of a head of household).

However:
i. non-dependent cohabitants are not relevant to the FPGs
ii. the residence and identity of third parties is private information and may not be disclosed like this
iii. a dependent's age is irrelevant
iv. a dependent can be someone other than a spouse or child
v. again, 28 USC 1915(a)(1) simply does not authorize a court to ask for this kind of information.

The appropriate solution is to simply set forth a table of qualifying amounts, explaining that the affiant should refer to the line corresponding to the number of their defendants, and let the affiant swear that they meet the relevant criterion.

Again, if a court has reason to believe that the affiant made a false statement, it can inquire pursuant to an OSC. But it cannot simply ignore the plain text of the statute and impose utterly atextual disclosure requirements.

As I've stated before, a spouse's resources are completely irrelevant. Cohabitation neither implies nor denies access to joint financial resources. The court should state simply that if the affiant has actual access to joint resources, the affiant must include such resources when comparing themselves to the FPG-based income/asset standard.

Even if they were authorized by law — which they are not — many of the questions are far too invasive for a document that is not sealed. Veteran status, alimony, expense profile, debts, taxes, etc. are all private information.

Most (or indeed all) of this information is potentially a 5th Amendment violation as well. If there's a discrepancy, even an innocent one, with the affiant's IRS, SSI, alimony, etc. filings, that can potentially be used as evidence against them.

Courts have extremely clear authority to make the 5th Amendment issue moot: the grant of use immunity pursuant to 18 USC 6002(1). All IFP affidavits are, in essence, submitted as a condition of the constitutional right to access the courts, i.e. under a kind of duress. IFP litigants can hardly be expected to recognize what might be used as evidence against them, know what use immunity is, and push back against a court's demand for information.

See Simmons v. United States, 390 US 377, 394 (1968) and United States v. Kahan, 415 US 239, 243 (1974). (These are as to CJA affidavits, not IFP, but there is no relevant difference here.) As far as I know, the Court has never decided the issue of privilege to IFP/CJA affidavit content, but the lacuna carved out could not be clearer, since it matches the exact distinction that is made in 6002(1): perjury on an affidavit can be used, but the content is likely privileged.

There's a very simple and clearly established way to cure this: all IFP forms should be *automatically* considered as orders issued pursuant to

6002(1), and all responses to them given use immunity.

3. Features of my proposal, and of your review

I suggest that the AOUSC adopt the definitions, exclusions, qualification standards, and related rules that I've set forth below.

They address all issues that have been raised by myself, Prof. Hammond, and all Committee members' comments on the record to date.

They provide judges and applicants with clear, objective standards that will cover the supermajority of situations — as well as flexible rules for situations that those will inevitably fail to foresee. These standards are consistent with, and quote from, the Supreme Court's ruling in Adkins.

They're consistent with the LSC standards — as well as those of every state whose rules I've seen. (E.g. Arizona C.J.A. 5-206 & A.R.S. 12-302, 22-281, 25-355.) Please note that Ariz. S.B. 1111, Ch. 358, 2148-54 (41st) was explicitly the basis for the PLRA, which was introduced by Arizona's Sen. Kyl. The PLRA is what introduced the obvious drafting error in 28 USC 1915(a)(1) that is the sole statutory basis for courts' demand of IFP affiants' information.

They exclude income and assets that are legally protected; necessary for a person's livelihood or living; controlled by third parties or adversaries; or not actually available to the applicant to pay court costs.

They provide for notification to the court on substantive changes, consistent with the LSC standards, litigants' duty of candor to the tribunal, and the threat of dismissal "at any time" under 28 USC 1915(e)(2)(A).

They provide for *partial* waiver, consistent with 28 USC 1915(e)(2)(A), 1915(b)'s scheme for prisoners' payment installment plans, similar provisions under state law (such as Arizona's), and the general principles of proportionate, equitable relief.

They provide clear definitions of the terms to which an affiant is expected to swear.

They provide for courts to determine what government programs qualify prima facie, without reference to an individual's circumstances. This means that the list of qualifying and non-qualifying programs will stay up to date without having to change the Rules, and without making every applicant re-litigate pure questions of law of this sort. The Federal Poverty Guidelines are uniform across all states except Alaska and Hawaii, so only 3 variations will be required to track the FPG for all 50 states. The Judiciary should not attempt to reinvent what HHS has done for decades.

They provide for courts to make *categorical* decisions where possible when the basic standards fail and discretion is required. This will prevent the extremely wide variation documented by Prof. Hammond and

attested to by Committee members. By making the issue a question of law that can apply to *anyone* in similar circumstances, rather than every single case having one-off determination, there will emerge case law that can both address unusual situations and be consistent for everyone. This is necessary for the reliance interests of affiants, clear notice to prospective litigants of what will or won't qualify in all situations other than ones that are truly novel, and the fundamental due process right to equal treatment.

They proactively cure the 5th Amendment issues signaled by the Supreme Court in Simmons and Kahan, to ensure that applicants are not put in an unconstitutional dilemma of choosing between one right and another.

They are not, however, perfect.

I am quite certain that the Committee will find things to nitpick. I am not an expert, let alone on the law of martial community property, bankruptcy, attachment, taxation, or the like. I will surely have made errors; there will be phrasing that can be made more clear; etc.

Don't hold my proposal to an impossible standard. It's better than what you've set forth so far; it addresses all the issues I enumerate above, which your proposals do not. It's clearer than what *any* Federal court has set forth to date on IFP standards.

You cannot reasonably ask for more.

Please try to work with it as a draft. Ask yourselves whether a different proposal — including the proposal of rejection — would better solve the issues I've enumerated. Let the proposal that best solves them prevail.

And, again, please bear in mind that, right now, courts are routinely violating 1915(a)(1).

The plain text, and the entire legislative history of the PLRA — whether you're a textualist or otherwise — gives no basis to demand non-prisoners to provide anything more than a two-sentence affidavit that quotes the text in the statute, and explains the nature of the case. Nothing else is allowed.

Even for prisoners, the only addition is a statement of the "assets such prisoner possesses" — not non-assets, nor the property of others. There is simply no textual defense for the current forms.

Try to imagine that this were a regulation by the Executive.

The current forms could not survive Chevron review. Current practice by judges would be enjoined as arbitrary and capricious, and thoroughly lacking notice, consistency, reliance, transparency, or basis in statutory authority. They've survived this long only because they target an extremely vulnerable group of litigants.

I know that's a bitter fact to swallow, but it's the truth, and it's

long past time for the AOUSC to admit — and correct — its error in promulgating rules and forms that have no basis in law.

The Judiciary must hold its own regulatory rulemaking to a higher standard.

4. Text of my proposal

A. Definitions

1. Assets
  a. “Assets” means cash or other resources that are readily convertible to cash.
  b. “Assets” excludes
   i. assets which are not currently and actually available to the applicant to pay for the fees or security for which waiver is sought,
   ii. assets which the court determines should be exempt in the interests of justice,
   iii. the applicant's principal residence,
   iv. a vehicle used by the applicant for transportation,
   v. assets used by the applicant in producing income,
   vi. assets received by the applicant under any Governmental poverty assistance program,
   vii. assets exempt from bankruptcy under 11 U.S. Code § 522, and
   viii. assets exempt from attachment under State or Federal law.

2. Income
  a. “Income” means gross income, as defined in 26 U.S. Code § 61 and Internal Revenue Service regulations.
  b. “Income” excludes
   i. income which is not currently and actually available to the applicant to pay for the fees or security for which waiver is sought,
   ii. income which the court determines should be exempt in the interests of justice,
   iii. income that is committed to medical or nursing home expenses,
   iv. income that is not taxable, as defined in 26 U.S. Code § 63 and Internal Revenue Service regulations, and
   v. assistance under any Governmental poverty assistance program.

3. Assets and income that are not “currently and actually available to the applicant” include those that are
  a. owned, whether or not jointly with the applicant,
   i. by an opposing party,
   ii. by a person accused by the applicant of domestic violence towards the applicant, or
   iii. by a person against whom the applicant has a relevant, adverse legal interest; or
  b. owned non-jointly by another person, such as applicable local law of martial property.

B. Qualification standard

1. In general

An applicant is “unable to pay” if:

a. the applicant’s assets total no more than one year of 125% of the Federal Poverty Guidelines, and the applicant’s income is no more than 125% of the Federal Poverty Guidelines;

b. the applicant’s income is no more than 200% of the Federal Poverty Guidelines, and
i. the effect of the case, if won by the applicant, is to maintain or obtain benefits under a governmental poverty assistance program;
ii. the effect of the case, if won by the applicant, is to maintain or obtain governmental benefits for persons with disabilities; or
iii. the court determines that significant factors — such as the applicant’s legal claims, or the applicant’s current or prospective assets, expenses, debts or obligations, costs of living, unreimbursed medical expenses, age or disability related expenses, or taxes — indicate that the person is unable to pay; or

c. the court determines that, under the circumstances,
i. the applicant is not able to pay all expected costs and sureties, or
ii. paying all expected costs and sureties would cause the applicant to be unable to provide themselves and their dependents with the necessities of life, or cause the applicant to become a public charge, such as by being so poor as to qualify for government assistance.

NOTE: See Adkins v. DuPont, 335 US 331, 339 (1948)

2. Automatic qualification

If the applicant currently receives benefits from a means-tested State or Federal poverty assistance program, such status constitutes automatic satisfaction of the income and/or asset thresholds of paragraph (1) corresponding to the test required by that program.

3. Partial waiver

If an applicant does not qualify for full waiver, the court may grant a partial waiver proportional to the applicant’s ability to pay.

Partial waivers may include periodic payments, deferred payments, payment from money awarded to the recipient in judgment, or similar arrangements.

C. Change in qualification status

If a person receiving a waiver no longer qualifies under the standard pursuant to which the waiver was granted, the recipient shall promptly notify the court, and may file a renewed motion for waiver.

If the court thereafter, or acting sua sponte, determines that the recipient no longer qualifies — or if the notification states that the recipient no longer qualifies — the recipient must pay such proportion

of waived fees or security as the court determines, or the court shall dismiss the case pursuant to 28 USC 1915(e)(2)(A).

If a person who paid fees or surety is subsequently granted fee waiver, the court shall refund all payments that would be waived.

D. Information required to be disclosed to the court in fee waiver applications

In general, the court shall only require an applicant to disclose the information enumerated in paragraph (E)(1), and to identify which qualification standard in this rule is relied upon by the applicant.

If the applicant is a prisoner, the court shall also require the applicant to disclose all assets the applicant possesses, as defined in paragraph (A).

If the applicant claims qualification under paragraph (B)(2), the court may require the applicant to identify the program relied upon.

If a court has previously determined, pursuant to 28 USC 1915(e)(2)(A), that the applicant made a false statement of poverty — or if the court issues an order to show cause why the applicant should not be sanctioned for perjury — the court may require such additional information as is proper under the circumstances.

If the applicant claims qualification under paragraph (B)(1)(b)(iii), (B)(1)(c), or (B)(3), the court may require disclosure of information that is necessary for its determination, and may request (but not require) such additional information as may reasonably affect the determination.

E. Separation, privacy, and use immunity of financial affidavits

a. Public affidavit

All applicants shall publicly file a sworn affidavit stating:
i. "I am unable to pay the fees or security ordinarily required by this court."
ii. "I believe that I am entitled to redress."
iii. "The nature of my action, defense, or appeal is that _____."
iv. (optional) "I am able to pay a part of the costs, or on an installment plan, as set forth in my sealed affidavit."

b. Sealed affidavit

Affidavits of any other information under this rule shall be filed separately, ex parte and under seal.

c. Use immunity

All affidavits required by this rule, or by any court rule or order requiring information under 28 USC 1915, are automatically granted use immunity pursuant to 18 USC 6002(1).

NOTE: See Simmons v. United States, 390 US 377, 394 (1968) and United States v. Kahan, 415 US 239, 243 (1974).

d. Access to sealed affidavits

i. The affiant may move to unseal their own sealed affidavit under this rule as of right, unless it discloses another person's private information.

ii. Anyone may move to unseal a sealed affidavit under this rule by a public motion, opposable by the affiant and anyone whose information is disclosed in the affidavit, demonstrating compelling reasons why the affidavit should be unsealed.

iii. The Government may additionally access a sealed affidavit under this rule, under seal and appropriate protective order, by a public motion, opposable by the affiant, demonstrating that

I. there is good reason to believe that the affidavit is perjured or contains a false statement, and

II. the Government intends to use that fact as evidence in a criminal case against the affiant pursuant to 18 U.S. Code § 6002.

F. Required court determinations and orders

1. Courts shall issue a rule or standing order determining what assistance programs do or do not qualify under paragraph (B)(2).

2. If an applicant claims qualification under a program not clearly addressed by the current rule or standing order, or challenges the program's qualification status, the court shall determine whether that program qualifies as a question of law, and update the rule or standing order accordingly.

3. At the time of granting any discretionary qualification under this rule, the court shall issue an order stating a clear, objective standard for when the recipient must notify the court of a change pursuant to paragraph (C). To the extent reasonably feasible, such orders shall state a categorical standard, without reference to the applicant’s particular details.

3. On a yearly basis, immediately after the publication of updated Federal Poverty Guidelines, the AOUSC shall revise all IFP forms to conform with the updated guidelines to state the current qualifying standards. Such FPG-tracking revisions are ministerial, and exempt from the procedural requirements of the Rules Enabling Act for substantive rules.

Sincerely,
Sai

TAB 8

To: Advisory Committee on the Federal Rules of Appellate Procedure

From: Edward Hartnett, Reporter

Re: Improving Appendices

Date: March 9, 2021

The minutes of the April 2018 meeting of the Advisory Committee reflect that a subcommittee had been formed to investigate the problem of appendices being too long and including much irrelevant information. At that meeting, the Advisory Committee decided that, with changing technology, the problem might be solved by electronic appendices and briefs that cite to the electronic record of the district court.

Accordingly, the Advisory Committee decided to remove this matter from the agenda but revisit the matter in three years.

Three years have now elapsed. The question for the Advisory Committee is whether to:

1) Re-form a subcommittee to address the issue;

2) Wait longer to return to the issue, perhaps on the theory that it is better addressed once a new post-pandemic normal is reached; or

3) Remove the issue from the agenda.