Dear Committees on Federal Rules of Civil and Appellate Procedure, and of the Supreme Court[1] —

Currently, most cases with an official capacity party — notably, virtually all civil rights litigation — are named using the name of the current holder of that office.[2] This results in multiple clear harms:

1. The case name, usually including the short form (first named patties) version, changes every time the office holder changes, as long as the case is ongoing. This has corollary harms:
    a. Notice to the court needs to be filed, causing unnecessary extra work.[3]
    b. Case cites become needlessly confusing, requiring footnotes, *sub nom* tags, etc., especially if a case name keeps shifting because it involves a high-turnover position.[4]
2. Searches of cases involving people who hold office are unable to distinguish between cases:
    a. unrelated to the office, i.e. actually about that individual *personally*;
    b. arising from the office, but in individual capacity (eg § 1983 / *Bivens*); and
    c. related only to the office, not the individual.
3. Using official capacity parties' personal names confuses tracking service of process[5], which capacity has been dismissed, etc, Multiple capacities should be separately listed parties.
4. There is the possibility of entirely collateral dispute of who actually holds the title, as with "acting" officers of uncertain authority.[6] Using an official capacity party's title sidesteps a trap that could drag the court by technicality into an otherwise irrelevant dispute.

---

[1] CC to Committee on Federal Rules of Bankruptcy Procedure re FRBP 7017 & 2010, *see* footnote on page 3.
[2] All current rules *allow* designation by title. FRCP 17(d), FRBP 7025, FRAP 43(c)(1), Sup. Ct. R. 35(4). However, this is almost never actually used.
[3] Substitution is automatic. FRCP 25(d), FRBP 7025 (general) & 2012 (trustees), FRAP 43(c)(2), Sup. Ct. R. 35(3).
[4] E.g., there have been at least *five* (arguably six) DHS Secretaries just since Jan. 1, 2017: Jeh Johnson, John F. Kelly, Elaine Duke, Kirstjen Nielsen, Claire M. Grady (disputed), and Kevin McAleenan. Of those, three were Senate-confirmed.
[5] *See* FRCP 4(i)(2) vs 4(i)(3)
[6] *See e.g.* *Centro Presente v. McAleenan*, No. 1:19-cv-2840 (D. D.C. filed Sept. 20, 2019), 8th claim for relief (disputing DHS Secretary), *La Clínica de la Raza v. Trump*, No. 4:19-cv-4980, ECF No. 85-1 (N.D. Cal. filed Sept. 11, 2019) (*amicus* disputing USCIS director), Politico, *Legality of Trump move to replace Nielsen questioned* (April 9, 2019). *See also Lucia v. SEC*, 138 S. Ct. 2044 (2018) (vacating and remanding because ALJ not properly appointed).

On the other side, there is simply no clear benefit to the current norm.[7] There's no issue of reliance, *stare decisis*, or the like. There's no reasonable likelihood of confusion when a party is named by title. No law (that I know of) requires an official capacity party to be designated by their personal name; using an unambiguous job title is sufficient to "name" them. The current rules explicitly allow it.

I propose a simple fix, with provisions for the transition to the updated naming scheme. If:

- a party is named in official capacity; and
- the relevant[8] title for that capacity is unique and capable of succession[9];

then

- such parties *shall* (not *may*) be referenced by title ("title form"), rather than by name ("name form"), in the docket and case name;
- the clerk shall automatically update the docket and case name for official capacity parties[10], to designate by title rather than name, in all ongoing and future cases;
- in citations to cases preceding this change, reference by title, with a parallel reference to the name(s) used to date, is preferred; and
- official case reporters and PACER shall add a title-form alias, and a searchable flag distinguishing personal, individual capacity, & official capacity, to all cases and to any index of case or party names, including all prior cases.

---

[7] *See e.g. Flores v. [...]*, No. 2:85-cv-4544 (C.D. Cal.) (re detention of immigrant children), which has over the years been titled as *v. Meese*, *Thornburgh*, *Barr*, *Gerson*, *Reno*, *Holder*, *Ashcroft*, *Gonzales*, *Clement*, *Keisler*, *Mukasey*, *Filip*, *Holder* (same person, 2nd term), *Lynch*, *Yates*, *Boente*, *Sessions*, *Whitaker*, and now again *Barr* (also same person, 2nd term). Filed in 1985, and settled in 1997, it is still active, with a Ninth Circuit decision and subsequent motions filed within the last few months. Any case name other than *Flores v. Attorney General* is nigh useless, yet that is the one name it has *not* had.

[8] E.g. David Pekoske is currently both acting DHS Deputy Secretary and acting TSA Administrator. The two are distinct. Either or both might be relevant to a given case. All, and only, *relevant* title(s) should be named.

[9] E.g. ordinary police officers have no title distinguishing them from other officers, unlike the chief of police, which is unique. If they are fired, there is no "successor" to whom their party status could transfer, also unlike the chief. This rule would only apply to parties with a unique title that can have a successor.

[10] In case of uncertainty as to the applicable title(s), the clerk shall request parties to identify the correct title(s).

I therefore petition for rulemaking to amend FRCP 17, FRAP 43, and Sup. Ct. R. 35, as follows:[11]

FRCP 17: Plaintiff and Defendant; Capacity; Public Officers

(d) *Public Officer's Title and Name.*[12]

A public officer who sues or is sued in an official capacity ~~may~~ **shall** be designated by **relevant** official title**(s)** rather than by name **if the title is unique and capable of succession.**~~, but t~~ **A party in multiple capacities shall be designated by title for official capacity, and by name for individual capacity, listed as separate parties. The clerk or court may *sua sponte* substitute party designations, and correct the docket, to conform with this rule.**[13] **T**he court may order that the officer's name be added.

In citations to proceedings where an official capacity party was designated by name, it is preferred to cite as if designated by title under this rule, with a reference to the actual designation(s) used in the proceeding.[14]

FRAP 43: Substitution of Parties

(c) *Public Officer: Identification; Substitution.*

(1) *Identification of Party.* ~~A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.~~ **F. R. Civ. P. 17(d) applies to any proceeding involving a public officer in their official capacity.**[15]

---

[11] Strikethrough = deletion, bold = addition, plain = original. Italics are headings in original.

[12] **[Add line break after paragraph title.]**

[13] **Rules note: Official case reporters and PACER shall add a title-format alias, and a searchable flag distinguishing personal, individual capacity, & official capacity, to all cases involving an official capacity defendant, and to any index of case or party names. Online editions shall be updated as soon as feasible, and print editions updated on the next printing. Updates shall not alter any page numbering.**

[14] **Rules note: As an example, the preferred citation form is:**

> ***See Flores v. [Attorney General]*, No. 2:85-cv-4544 (Settlement agreement) (C.D. Cal. Jan. 28, 1997); order (C.D. Cal. Jan. 20, 2017) (ECF No. 318), *aff'd*, 862 F.3d 863 (9th Cir. 2017); and order (C.D. Cal. Nov. 5, 2018) (ECF No. 518), *app. dismissed for lack of juris.*, No. 17-56297, __ F.3d __ (9th Cir. Aug. 15, 2019).[1]**

with footnote:

> [1] **Titled as *Flores v. Meese* at initiation; *v. Reno* in 1997 settlement agreement, *v. Lynch* in 2017 district court order; *v. Sessions* in 2017 appeal and 2018 district court order; and *v. Barr* in 2019 appeal and currently. Settlement agreement predates CM/ECF.**

As opposed to:

> ***See Flores v. Reno*, No. 2:85-cv-4544 (Settlement agreement) (C.D. Cal. Jan. 28, 1997); *Flores v. Lynch*, No. 2:85-cv-4544 (Order) (C.D. Cal. Jan. 20, 2017) (ECF No. 318), *aff'd sub nom. Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017); and *Flores v. Sessions*, No. 2:85-cv-4544 (Order) (C.D. Cal. Nov. 5, 2018) (ECF No. 518), *app. dismissed for lack of juris. sub nom. Flores v. Barr*, No. 17-56297 (9th Cir. Aug. 15, 2019).**

[15] This is copied substantively from FRBP 7017: *Parties Plaintiff and Defendant; Capacity*, which says simply "Rule 17 F.R.Civ.P. applies in adversary proceedings, except as provided in Rule 2010(b)." Due to this cross-reference, FRBP needs no separate amendment. Rather than having parallel rules, I believe that all Federal rules should act by reference to a

Sup. Ct. R. 35: Death, Substitution, and Revivor; Public Officers

(4) ~~A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.~~ **F. R. Civ. P. 17(d) applies to any proceeding involving a public officer in their official capacity.**

common set except where there is reason to deviate (and then only to state the minimal difference), as FRBP 7017 does.

The change in practice this proposal seeks was specifically encouraged by the Advisory Committee in its *1961* rules amendments. *See id.* notes on FRCP[16] 25(d)(2) (moved to 17(d) in 2007):

> *Subdivision (d)(2).* This provision, applicable in "official capacity" cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems necessary or desirable to add the individual's name, this may be done upon motion or on the court's initiative without dismissal of the action; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.
>
> For examples of naming the office or title rather than the officeholder, see Annot., 102 A.L.R. 943, 948–52; Comment, 50 Mich.L.Rev. 443, 450 (1952)[17]; cf. 26 U.S.C. §7484[18]. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 [Moore's Federal Practice (2d ed. 1950)], 25.09, p. 536[19]. The practice encouraged by amended Rule 25(d)(2) is similar.

Substitution is now automatic under 25(d)(1) (now 25(d)), and thus the pre-1961 concerns about abatement and the personal vs office-holder character of *mandamus* no longer apply.

However, 25(d)(2) (now 17(d)) had a distinct purpose: to name officers by title, so that there would be *no* need to name the individual, and *no* substitution at all (not even an automatic one). These purposes are still useful. Failing to heed them causes other harms, as I explained on the first page.

---

[16] This change was incorporated into FRAP 43(c) in 1967 without further elaboration.

[17] "In view of the fact that the suit against the governmental representative is so much a part of our system of jurisprudence, probably the most practical solution is a compromise under which suit could be brought against the office instead of the official.[40] If, therefore, the official leaves office while the action is pending, the suit merely continues against the successor. No substitution of names would be necessary if the original official was not sued by name. The courts have long held that an action brought against a board or agency with continuity of existence does not abate upon a change in personnel, and no substitution is needed.[41] There is no reason why this practice can not be extended to allow suit against an office with continuity of existence, though held by successive individuals. Many state courts very early recognized this general approach in holding that a mandamus proceeding goes to the office, not to the official, so that a mandamus action against an official will not abate upon his leaving office.[42]
[40] 4 Moore, Federal Practice 536 (1950)
[41] 102 A.L.R. 943 at 956 (1936); *Murphy v. Utter*, 186 U.S. 95, 22 S.Ct. 776 (1902); *Leavenworth County v. Sellew*, 9 Otto (99 U.S.) 624 (1878); *Marshall v. Dye*, 231 U.S. 250, 34 S.Ct. 92 (1913); *Irwin v. Wright*, 258 U.S. 219, 42 S.Ct. 293 (1922).
[42] 102 A.L.R. 943 at 948-952 (1936)."

[18] 26 U.S. Code § 7484: Change of incumbent in office: "When the incumbent of the office of Secretary changes, no substitution of the name of his successor shall be required in proceedings pending before any appellate court reviewing the action of the Tax Court."

[19] This corresponds to § 25.41–45 in Moore's 3d. ed. (2016).

It is the exception, not the rule, that officers are sued in *both* their individual and official capacities, or that the individual who happens to hold the office is even materially relevant to the case.

When they are, the individual and the office litigate as distinct persons. The individual brings separate motions to dismiss, under different legal standards (e.g. qualified immunity). The official capacity, i.e. the office as opposed to the person holding it at the moment, is really a distinct party. It should be named accordingly, i.e. by the title of the office, and listed as a separate party.

Sometimes an office exists but is unfilled.[20] It of course can be sued anyway — and how, but by title?

Unfortunately, in more than half a century of practice since the Committee endorsed use of titles rather than names by default, the current rule has proven insufficient to make it happen. Almost no litigation actually uses title-based designation; we are still mired in pointless naming of individuals when the suit is against the office. It is well past time to change this rule from "may" to "shall".[21]

I have attached as exhibits relevant portions of the 1961 record on FRCP 25(d)(2), including the law review cited in the Notes and the sections of *Moore's* (3d) corresponding to those cited.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[22]
legal@s.ai / +1 510 394 4724

[20] Such gaps will inevitably happen during the period just after events triggering FRCP 25(d) substitution, and before the successor is clear. E.g. right now, there is no DHS Secretary: Sec. McAleenan resigned, the succession rule doesn't permit "acting" officials such as Dep. Sec. Pekoske to become Secretary, and the President has not yet appointed a successor.

[21] If the Committee does not pass "shall", then I ask it to indicate a very strong preference—e.g. "should, by default", "are encouraged to", *vel sim.*—that using titles should be the default (and keep the proposed clerk's designation authority).

[22] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS

TO CERTAIN

Rules of Civil Procedure for the United States District Courts

---

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

JANUARY 1961

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1961

PROPOSED AMENDMENTS TO CERTAIN RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS*

Rule 25. Substitution of Parties

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. ~~When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.~~

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to

*New matter is shown in italics; matter to be omitted is lined through.

hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

ADVISORY COMMITTEE'S NOTE

Subdivision (d) (1). Present Rule 25(d) is generally considered to be unsatisfactory. 4 *Moore's Federal Practice* ¶ 25.01[7] (2d ed. 1950); Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 Vand. L. Rev. 521, 529 (1954); *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 931–34 (1957). To require, as a condition of substituting a successor public officer as a party to a pending action, that an application be made with a showing that there is substantial need for continuing the litigation, can rarely serve any useful purpose and fosters a burdensome formality. And to prescribe a short, fixed time period for substitution which cannot be extended even by agreement, see *Snyder* v. *Buck*, 340 U.S. 15, 19 (1950), with the penalty of dismissal of the action, "makes a trap for unsuspecting litigants which seems unworthy of a great government." *Vibra Brush Corp.* v. *Schaffer*, 256 F. 2d 681, 684 (2d Cir. 1958). Although courts have on occasion found means of undercutting the rule, *e.g. Acheson* v. *Furusho*, 212 F. 2d 284 (9th Cir. 1954) (substitution of defendant officer unnecessary on theory that only a declaration of status was sought), it has

operated harshly in many instances, *e.g. Snyder* v. *Buck, supra; Poindexter* v. *Folsom*, 242 F. 2d 516 (3d Cir. 1957).

Under the amendment, the successor is automatically substituted as a party without an application or showing of need to continue the action. An order of substitution is not required, but may be entered at any time if a party desires or the court thinks fit.

The general term "public officer" is used in preference to the enumeration which appears in the present rule. It comprises Federal, State, and local officers.

The expression "in his official capacity" is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly conferred, *cf. Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, *cf. Ex parte Young*, 209 U.S. 123 (1908); *Ex parte La Prade*, 289 U.S. 444 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office. *Cf. Land* v. *Dollar*, 330 U.S. 731 (1947); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforce-

able against their personal assets; in these cases Rule 25(a)(1), not Rule 25(d), applies to the question of substitution. Examples are actions against officers seeking to make them pay damages out of their own pockets for defamatory utterances or other misconduct in some way related to the office, see *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Howard* v. *Lyons*, 360 U.S. 593 (1959); *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). Another example is the anomalous action for a tax refund against a collector of internal revenue, see *Ignelzi* v. *Granger*, 16 F.R.D. 517 (W.D. Pa. 1955), 28 U.S.C. §2006, 4 Moore, *supra*, ¶ 25.05, p. 531; but see 28 U.S.C. §1346(a)(1), making it likely that such suits will usually be brought against the United States rather than the officer.

Automatic substitution under the amended rule, being merely a procedural device for substituting a successor for a past officeholder as a party, is distinct from and does not affect any substantive issues which may be involved in the action. Thus a defense of immunity from suit may remain in the case despite a substitution.

Where the successor does not intend to pursue the policy of his predecessor which gave rise to the lawsuit, it will be open to him, after substitution, as plaintiff to seek voluntary dismissal of the action, or as defendant to seek to have the action dismissed as moot or to take other appropriate steps to avert a judgment or decree. Contrast *Ex parte La Prade*, *supra*; *Allen* v. *Regents of the University System*, 304 U.S. 439 (1938); *McGrath* v. *National Assn. of Mfgrs.*, 344 U.S. 804 (1952); *Danenberg* v. *Cohen*, 213 F. 2d 944 (7th Cir. 1954).

As the present amendment of Rule 25(d)(1) eliminates a specified time period to secure substitution of public officers, the reference in Rule 6(b) (regarding enlargement of time) to Rule 25 will no longer apply to these public-officer substitutions.

As to substitution on appeal, the rules of the appellate courts should be consulted.

Subdivision (d)(2). This provision, applicable in "official capacity" cases as described above, will

encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems desirable to add the individual's name, this may be done upon motion or on the court's initiative; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.

For examples of naming the office or title rather than the officeholder, see Annot., 102 A.L.R. 943, 948–52; Comment, 50 Mich. L. Rev. 443, 450 (1952); *cf.* 26 U.S.C. § 7484. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 Moore, *supra*, ¶ 25.09, p. 536. The practice encouraged by amended Rule 25(d)(2) is similar.

Rule 54. Judgments; Costs

(b) JUDGMENT UPON MULTIPLE CLAIMS *OR INVOLVING MULTIPLE PARTIES.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, *or when multiple parties are involved,* the court may direct the entry of a final judgment ~~upon~~ *as to* one or more but ~~less~~ *fewer* than all of the claims *or parties* only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims *or the rights and liabilities of less than all the parties* shall not terminate the action as to any of the

confer federal subject matter jurisdiction over cases by and against them.[1] These grants of subject matter jurisdiction provide federal officers with requisite capacity.[2]

§ 17.28 Loss of Capacity During Pendency of Action Results in Dismissal

A party may acquire or lose capacity while litigation is pending. An obvious example is when an infant reaches the age of majority while the case proceeds. When a party loses capacity during pending litigation, the suit is dismissed. Capacity is "not only the power to bring an action, but it is also the power to maintain it."[1] For example, a representative's appointment automatically terminates when the person represented sheds the disability that led to its need for a representative.[2] Assuming that the claim survives the disability as a matter of substantive law, however, the action readily can be revived.

§ 17.29 Public Officer Sued in Official Capacity May Be Designated by Title Rather Than by Name

A public officer who sues or who is sued in an official capacity may be described in a pleading by the officer's title rather than by his or her name.[1] In cases in which

---

[1] **Jurisdiction over cases involving United States.** *See* 28 U.S.C. § 1345; 28 U.S.C. § 1346 ("Except as otherwise provided by Act of Congress, the district courts shall have original jurisdictional of all actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."); *see also* U.S. v. American Druggists' Ins. Co., 627 F. Supp. 315, 319 (D. Md. 1985) (28 U.S.C. § 1345 is "a safety net" that gives district courts general subject matter jurisdiction over actions brought by United States; other special jurisdictional provisions of other federal statutes may also give district courts jurisdiction over some cases brought by United States).

[2] **Federal officers.**

2d Circuit	*See* Beeler v. U.S., 894 F. Supp. 761, 771–772 (S.D.N.Y. 1995) (court had subject matter jurisdiction over action pursuant to 28 U.S.C. § 1345 and 28 U.S.C. § 1346 in action involving claim against government and counterclaim by government).
4th Circuit	*See* U.S. v. American Druggists' Ins. Co., 627 F. Supp. 315, 319 (D. Md. 1985) (court had subject matter jurisdiction over action under 28 U.S.C. § 1345, which confers on district courts general subject matter jurisdiction over suits commenced by United States or by federal agencies or officers authorized to sue by federal statute).

[1] **Capacity at time of award controls.** CBF Indústria de Gusa S/A v. AMCI Holdings, Inc., 846 F.3d 35, 46 (2d Cir. 2017) (holder entitled to enforcement against alter egos although Swiss entity was deleted from Swiss Commercial Register after arbitration award, which had become final under Federal Arbitration Act); Mather Constr. Co. v. United States, 475 F.2d 1152, 1155 (Ct. Cl. 1973) (corporation declared incompetent and case dismissed when corporation was suspended under state law for failure to pay taxes).

[2] **Representative appointment terminated.** JuShu Cheung v. Dulles, 16 F.R.D. 550, 553 (D. Mass. 1954) (when child reached age of majority, child no longer incapacitated individual and motion should be brought requesting court to remove representative).

[1] **Officer described by title rather than name.** Fed. R. Civ. P. 17(d); *see also* Fed. R. Civ. P. 17, advisory committee note of 2007 (reproduced verbatim at § 17.06[2]) (before December 2007, this provision was found in Fed. R. Civ. P. 25(d), and was redesignated as part of Fed. R. Civ. P. 17 as part of the overall 2007 restyling of the Civil Rules).

an officer is described by title rather than name, the court, on motion or on its own initiative, may require the officer's name to be added should that be appropriate for some reason.[2]

Permitting pleadings to describe the party by title, rather than by name, was intended by the drafters of the Rules to "encourage the use of the official title without any mention of the officer individually, thus recognizing the intrinsic character of the action" as an action against the government entity rather than the individual, "and helping to eliminate concern with the problem of substitution."[3] Keeping the rule's purpose in mind, the courts have interpreted it broadly. In one case, for example, the plaintiff served the current officer, but the complaint incorrectly named the prior officer by name and title. The present officer argued that service was insufficient; but the court rejected that argument. The court noted that the suit would have been proper if it had been brought against the officer by title alone and, therefore, the result should not be different when the plaintiff had mistakenly included the name of the former officer.[4]

Despite the rule permitting suit by or against public officers by title rather than by name, the practice continues, in most cases, of describing public officers by name. When an officer has been described by name in the pleadings and substitution becomes necessary, the court may either state the name of the new officer or describe the officer by title as allowed by Rule 17(d).[5]

5th Circuit	*See* Ramirez v. Burr, 607 F. Supp. 170, 173 (S.D. Tex. 1984) (original complaint against "unnamed board members" could be amended to include them by name, because plaintiff was entitled to sue them in their official capacities by title rather than name).
8th Circuit	Lathan v. Block, 627 F. Supp. 397, 405 (D.N.D. 1986) (caption of complaint that named defendants as "All State Directors," "All District Directors," and "All County Supervisors" was sufficient to identify defendants in official capacity action).
D.C. Circuit	Rochon v. FBI, 691 F. Supp. 1548, 1553 n.6 (D.D.C. 1988) (Attorney General was sued under title rather than name).

[2] Fed. R. Civ. P. 17(d).

[3] *See* Fed. R. Civ. P. 25, advisory committee note of 1961 (reproduced verbatim at § 25.06[2]); *see also* Fed. R. Civ. P. 17, advisory committee note of 2007 (reproduced verbatim at § 17.06[2]) (prior to December 2007 restyling of the Civil Rules, the provisions of Fed. R. Civ. P. 17(d) were set out as a part of Fed. R. Civ. P. 25(d)).

[4] **Mistake in including wrong name of officer did not invalidate service of summons and complaint.** Echevarria-Gonzalez v. Gonzalez-Chapel, 849 F.2d 24, 31 (1st Cir. 1988) ("The insignificance of Echevarria's omission in not specifically naming Bauza Salas in the caption of the complaint is underscored by the fact that this action could have been brought directly against the Secretary of Agriculture, without the need of including his name. . . . Service here would have been proper if plaintiff had sued the Secretary by title, without naming anybody in particular. . . . The result should not be different where plaintiff mistakenly has included the name of the former officer." [citations omitted]).

[5] **Court may use title rather than name after substitution.**

2d Circuit	Ammcon, Inc. v. Kemp, 826 F. Supp. 639, 640 n.1 (E.D.N.Y. 1993) (court approved substitution of " 'Secretary of HUD" in place of name of former secretary).

Using the title rather than the name of the officer may be particularly appropriate when the successor has not been named.[6] In fact, in an action dealing with the official solely in his or her capacity, the court's actions regarding substitution are somewhat irrelevant. According to Rule 25, when a public officer who is a party dies, resigns, or otherwise ceases to hold office, the officer's successor is substituted as a party "automatically." Any misnomer that does not affect the parties' substantial rights must be disregarded (*see* Ch. 25, *Substitution of Parties*).[7]

§ 17.30 Honest and Understandable Mistakes

The commentary to Rule 17 refers to "honest" and "understandable" mistakes in naming the appropriate party.[1]

7th Circuit	Payne v. County of Cook, 2016 U.S. Dist. LEXIS 35865, at *21–*22 (N.D. Ill. Mar. 21, 2016) (not possible to sue former public official in official capacity; official capacity claims dismissed).
D.C. Circuit	York Assocs., Inc. v. Secretary of Housing & Urban Dev., 815 F. Supp. 16, 18 n.1 (D.D.C. 1993) (court substituted "Secretary of Housing and Urban Development" in place of name of former Secretary).

[6] **Court may use title when successor has not been named.** *See* Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric., 847 F.2d 1038, 1041–1042 n.3 (2d Cir. 1988) (when successor to state commissioner had not yet been named, successor was automatically substituted, and "[a]ny relief awarded by the Court against the Commissioner in his official capacity shall be enforceable against the individual chosen to take on the Commissioner's responsibilities, either on an acting or permanent basis").

[7] Fed. R. Civ. P. 25(d).

[1] **Application of honest and understandable mistake doctrine.**

1st Circuit	Micro Focus (U.S.), Inc. v. Express Scripts, Inc., 2019 U.S. Dist. LEXIS 22345, at *22 (D.C. Md. Feb. 12, 2019) (summary judgment granted when failure to name real party in interest was not understandable mistake; plaintiff never responded to discovery requests that were timely and plain and never sought to join real party in interest).
2d Circuit	Klein v. Qlik Techs., Inc., 906 F.3d 215, 226 (2d Cir. 2018) (honest mistake not required; substitution of plaintiffs liberally allowed when change is merely formal and does not alter factual allegations as to events or participants, is not proposed in bad faith or effort to deceive or prejudice defendants, and would otherwise result in unfairness); Davison v. First Pennco Co., 1996 U.S. Dist. LEXIS 22030, at *19–*20 (S.D.N.Y. March 22, 1996) (citing **Moore's**, plaintiffs should have reasonable time after objection for joinder or substitution).
9th Circuit	Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 1128 (9th Cir. 2017) (district court should have given plaintiffs reasonable opportunity to substitute right party when counsel made understandable mistake in interpreting district court's approval of stipulation).
10th Circuit	Esposito v. United States, 368 F.3d 1271, 1277 (10th Cir. 2004) (district court abused discretion in denying substitution based on party's failure to demonstrate both that mistake was honest and understandable); CPI Card Grp., Inc. v. Multi Packaging Sols., Inc., 2018 U.S. Dist. LEXIS 117993, at *20–*29 (D.C. Colo. Jul. 16, 2018) (applying *Esposito* and finding that

§ 17.31 Appellate Review

Circuits that have addressed the standard of review on appeal have held that a district court's decision whether to join or substitute a party as a "real party in interest" under Fed. R. Civ. P. 17(a) is reviewed for an abuse of discretion.[1]

---

failure to commence litigation was honest mistake and defendant would suffer no prejudice).

Fed. Circuit — Textainer Equip. Mgmt. v. United States, 2013 U.S. Claims LEXIS 436, at *16 (citing **Moore's**, primary purpose of Rule 17 is to protect defendants from multiple liability and to ensure that judgment will have res judicata effect).

[1] **Review of decision whether to join or substitute party as real party in interest under Fed. R. Civ. P. 17(a) is for abuse of discretion.**

2d Circuit — Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 43–44 (2d Cir. 2005) (dismissal under Rule 17(a) is reviewed for abuse of discretion).

3d Circuit — ICON Group, Inc. v. Mahogany Run Development Corp., 829 F.2d 473, 476, n.3 (3d Cir. 1987) (adopting Rule 19 standard for Rule 17 issues as primary purposes are identical).

5th Circuit — Wieburg v. GTE Southwest Inc., 272 F.3d 302, 308–309 (5th Cir. 2001) (refusal to order ratification, joinder, or substitution of trustee reviewed for abuse of discretion).

9th Circuit — Clift v. BNSF Ry. Co., 726 Fed. Appx. 643, 643 (9th Cir. 2018) (unpublished) (Rule 17 determinations are reviewed for abuse of discretion); Jones v. Las Vegas Metro. Police Dep't, 873 F.3d 1123, 1129 (9th Cir. 2017) (district court abused its discretion by failing to give plaintiffs reasonable opportunity to substitute proper party and thus cure defective complaint).

10th Circuit — Esposito v. United States, 368 F.3d 1271, 1277 (10th Cir. 2004) (district court abused discretion in denying substitution based on party's failure to demonstrate understandable mistake).

[4] If Officer Is Party in Both Capacities, Substitution Under Rule 25(d) Applies Only to Official Capacity Claims

If an official is sued in both an individual and official capacity and leaves office, the successor is automatically substituted with respect to the official capacity claims, but the predecessor remains in the suit with respect to the individual capacity claims.[8] If the official dies while in office, automatic substitution takes place with respect to the

---

the decedent's estate."); *see* Young v. Patrice, 832 F. Supp. 721, 723 (S.D.N.Y. 1993) (court determined that claims were against officer in personal capacity and, therefore, Fed. R. Civ. P. 25(a) applied).

[8] **Official sued in both capacities.**

1st Circuit	Saldana-Sanchez v. Lopez-Gerena, 256 F.3d 1, 10 (1st Cir. 2001) (when mayor was succeeded by new mayor, new mayor became titular defendant in official capacity claims, but former mayor remained in case in personal capacity); Batistini v. Aquino, 890 F.2d 535, 536 n.1 (1st Cir. 1989) (after official resigned, successor was substituted with respect to official capacity claim, but action continued in individual capacity against officer who resigned); Brown v. Town of Allenstown, 648 F. Supp. 831, 841 n.15 (D.N.H. 1986) (officer ceased to be party in official capacity but remained liable for claims against him in personal capacity).
2d Circuit	Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric., 847 F.2d 1038, 1041–1042 n.3 (2d Cir. 1988) (court continued action against Commissioner of Agriculture in his individual capacity, but substituted his yet unnamed successor with respect to official capacity claims).
4th Circuit	Levinson-Roth v. Parries, 872 F. Supp. 1439, 1444 n.3 (D. Md. 1995) (official capacity liability passed to successor, but official remained liable in personal capacity).
5th Circuit	American Civ. Liberties Union, Inc. v. Finch, 638 F.2d 1336, 1340 (5th Cir. Unit A Mar. 1981) (new governor and other state officials succeeded to office and were automatically substituted for former officials with respect to official capacity claims, and injunctive and declaratory relief ran against them, while former officials remained as defendants with respect to individual capacity claims).
6th Circuit	Kaminski v. Coulter, 865 F.3d 339, 343 (6th Cir. 2017) ("After the complaint was filed, [Michigan] Treasurer Clinton was succeeded in office by Treasurer Nick Khouri. Pursuant to the Federal Rules of Civil Procedure, Khouri was automatically substituted in Clinton's place insofar as the complaint named Treasurer Clinton in his official capacity. . . . Although this extinguished the claims against Clinton in his official capacity, he still remained a party to the suit in his individual capacity.").
7th Circuit	Roe v. Elyea, 631 F.3d 843, 847 n.1 (7th Cir. 2011) (successor to medical director of Illinois Department of Corrections was substituted for purposes of official capacity claims but not for those in individual capacity).
8th Circuit	Association of Residential Resources v. Gomez, 843 F. Supp. 1314, 1316 n.5 (D. Minn. 1994), *aff'd*, 51 F.3d 137 (8th Cir. 1995) (officer named in both individual and official capacities remained defendant in individual capacity, but was succeeded in official capacity).
10th Circuit	Valanzuela v. Snider, 889 F. Supp. 1409, 1412 n.1 (D. Colo. 1995) (successor was added as party with respect to official capacity claims, but predecessor remained in suit with respect to individual capacity claims).

official capacity claims, but any substitution with respect to the individual capacity claims is governed by Rule 25(a) (*see* § 25.10).[9]

§ 25.42 Substitution Is Automatic

[1] Substitution Takes Place Without Need for Motion or Order

When a public officer leaves office, the officer's successor is "automatically substituted as a party."[1] The rule does not require a motion or application or any

---

11th Circuit — Ellison v. Chilton Cty. Bd. of Educ., 894 F. Supp. 415, 417 n.3 (M.D. Ala. 1995) (court noted substitution of new school board members for former members with respect to official capacity claims, but former board members remained in their individual capacities).

[9] **Death of official.** *See* Fed. R. Civ. P. 25(a); *see, e.g.*, Felton v. Board of Comm'rs, 796 F. Supp. 371, 380 (S.D. Ind. 1991), *aff'd*, 5 F.3d 198 (7th Cir. 1993) (court dismissed individual capacity claim because plaintiff failed to substitute within 90 days of suggestion of death).

[1] **Substitution is automatic.** Fed. R. Civ. P. 25(d).

1st Circuit — *See, e.g.*, Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464, 468 n.2 (1st Cir. 2009) (when officials sued in official capacity die or leave office, their successors automatically assume their roles in litigation).

2d Circuit — *See, e.g.*, McBurney v. Cuccinelli, 616 F.3d 393, 397 n.1 (4th Cir. 2010) (successor to attorney general was automatically substituted); Kalkouli v. Ashcroft, 282 F.3d 202, 202 n.1 (2d Cir. 2002) (Attorney General was automatically substituted as defendant in place of former Attorney General).

3d Circuit — *See, e.g.*, Coppolino v. Comm'r Pa. State Police, 693 Fed. Appx. 128, 130 (3d Cir. 2017) (unpublished) ("It is the office that is being sued, not the individual officer, and such substitutions are pro forma under our federal rules.").

4th Circuit — *See, e.g.*, Humphries v. Ozmint, 397 F.3d 206, 209 n.1 (4th Cir. 2005) (court of appeals noted that substitution had occurred).

5th Circuit — *See, e.g.*, Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 480 n.1 (5th Cir. 2008) (successor to Commissioner of Arizona Department of Real Estate was automatically substituted for predecessor).

6th Circuit — *See, e.g.*, Top Flight Entm't, Ltd. v. Schuette, 729 F.3d 623, 630 n.1 (6th Cir. 2013) (action did not abate when Governor of Michigan transferred relevant duties from Michigan Lottery Commissioner to Executive Director of Michigan Gaming Board; instead, Executive Director was automatically substituted for Commissioner).

7th Circuit — *See, e.g.*, Shakman v. Democratic Org., 919 F.2d 455, 456–457 (7th Cir. 1990) (sheriff who succeeded former sheriff automatically became party and was bound by consent decree); Suess v. Colvin, 2103 U.S. Dist. LEXIS 133987, at *1 n.1 (N.D. Ill. Sept. 18, 2013) ("On February 14, 2013, Carolyn W. Colvin became Acting Commissioner of Social Security and is substituted for her predecessor, Michael J. Astrue, as the proper defendant in this action. Fed. R. Civ. P. 25(d)(1) [sic].").

8th Circuit — *See, e.g.*, Wishnatsky v. Rovner, 433 F.3d 608, 610 n.1 (8th Cir. 2006) (action that sought relief against clinic director at University of North Dakota School of Law in her official capacity continued automatically against her successor).

showing of a need to continue the action.[2] A motion may be desirable in some circumstances to clarify the situation or to request permission of the court to amend the caption, but is not necessary to effect the substitution.

An order of substitution may be rendered by the court at any time, but this is not necessary, and omitting an order does not affect the substitution or the conduct of the litigation.[3]

9th Circuit — *See, e.g.*, McCormack v. Herzog, 788 F.3d 1017, 1022 (9th Cir. 2015) (successor to county prosecuting attorney was automatically substituted as defendant); Developmental Servs. Network v. Douglas, 666 F.3d 540, 540 (9th Cir. 2011) ("Toby Douglas is the current Director of the California Department of Health Care Services and has, therefore, been automatically substituted for his predecessor, David Maxwell-Jolly." See Fed. R. Civ. P. 25(d).").

10th Circuit — *See, e.g.*, Society of Separationists v. Pleasant Grove City, 416 F.3d 1239, 1242 n.2 (10th Cir. 2005) (city counsel members elected after case was filed were substituted for original defendants).

11th Circuit — *See, e.g.*, Scott v. Taylor, 405 F.3d 1251, 1253 n.1 (11th Cir. 2005) (Fed. R. Civ. P. 25(d) provides for automatic substitution when public officer who is party in official capacity is succeeded in office during pendency of action).

D.C. Circuit — *See, e.g.*, Griffith v. Lanier, 521 F.3d 398, 399 (D.C. Cir. 2008) (when complaint named chief of police in his official capacity as defendant, his successor's taking office triggered application of Fed. R. Civ. P. 25(d), which automatically substitutes successor of public officer named in official capacity).

[2] **Motion not required.** Fed. R. Civ. P. 25, advisory committee note of 1961.

6th Circuit — *See, e.g.*, Top Flight Entm't, Ltd. v. Schuette, 729 F.3d 623, 630 n.1 (6th Cir. 2013) ("the Executive Director is substituted automatically for the Lottery Commissioner by operation of Federal Rule of Civil Procedure 25(d)").

8th Circuit — *See, e.g.*, Kuelbs v. Hill, 615 F.3d 1037, 1042 (8th Cir. 2010) ("a substitution motion is not required for the action to continue.").

9th Circuit — *See, e.g.*, Developmental Servs. Network v. Douglas, 666 F.3d 540, 540 (9th Cir. 2011) ("Toby Douglas is the current Director of the California Department of Health Care Services and has, therefore, been automatically substituted for his predecessor, David Maxwell-Jolly." See Fed. R. Civ. P. 25(d).").

[3] **Order of substitution is not necessary.** Fed. R. Civ. P. 25(d) ("The court may order substitution at any time, but the absence of such an order does not affect the substitution."); *see also* Fed. R. Civ. P. 25, advisory committee note of 1961 (order of substitution is not required, but may be entered at any time if party desires or court thinks fit).

3d Circuit — *See, e.g.*, Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1457 n.1 (3d Cir. 1994) (no formal order was rendered when new governor was elected to office, but this failure did not affect appeal and was noted by court of appeals for purposes of clarification only).

6th Circuit — *See, e.g.*, Brotherton v. Cleveland, 173 F.3d 552, 558 (6th Cir. 1999) (although court had never altered caption to reflect new official's name, court of appeals disregarded misnomer).

7th Circuit — *See, e.g.*, Baugh v. City of Milwaukee, 829 F. Supp. 274, 276 (E.D. Wis.

In some cases a change of officers may take place more than once during the suit. If so, each new officeholder is automatically substituted for the previous one.[4]

The automatic substitution procedure contrasts with the procedure under the rule before the 1961 amendment. The former rule required that an application be made showing there was a substantial need for continuing the litigation. Moreover, the application was required to be made within six months after the official assumed office or the action would be dismissed. This harsh rule was seen as unduly burdensome and a trap for the unwary.[5]

[2] Showing of Need to Continue Litigation Is Not Required for Substitution, Although Action May Be Dismissed if Moot

Because the substitution is automatic, the plaintiff in an action against a public official is not required to show a need to continue the litigation. Thus, the substitution takes place without any showing that the new administration plans to continue the predecessor's policies. Instead, if the successor does not intend to pursue the policies that gave rise to the suit, the successor may seek voluntary dismissal of the action, or seek to have the action dismissed as moot, or may take other appropriate steps to avert

---

1993) (official was automatically substituted at time he left office, regardless of lack of order of substitution).

8th Circuit — *See, e.g.*, Kuelbs v. Hill, 615 F.3d 1037, 1042 (8th Cir. 2010) ("the absence of [a substitution order] does not affect the substitution.").

D.C. Circuit — Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (when successor officials were not yet designated, plaintiff could move for an order of substitution when they were known, but substitution would take place automatically, irrespective of any formal order).

[4] **Series of substitutions may take place.**

1st Circuit — Keyes v. Secretary of the Navy, 853 F.2d 1016, 1018 (1st Cir. 1988) (Navy was sued in person of its secretary, and his successors became parties, seriatim, through operation of law under Fed. R. Civ. P. 25).

2d Circuit — Conyers v. Rossides, 558 F.3d 137, 142 (2d Cir. 2009) ("Conyers's complaint initially named David M. Stone, the then-Acting Administrator of the TSA. In the proceedings below, Kip Hawley was substituted as defendant under Fed. R. Civ. P. 25(d). Current Acting Administrator Gale D. Rossides has now been automatically substituted as defendant pursuant to Federal Rule of Appellate Procedure 43(c)(2)."); Women in City Gov't United v. City of New York, 112 F.R.D. 29, 31 (S.D.N.Y. 1986) (officer became party when she replaced former officeholder and ceased to be party when she left office).

4th Circuit — McBurney v. Cuccinelli, 616 F.3d 393, 397 (4th Cir. 2010) ("The complaint named Robert Francis McDonnell, Attorney General [of Virginia] at the time of filing. Pursuant to Federal Rule of Civil Procedure 25(d), McDonnell's successor William Cleveland Mims was automatically substituted before the district court. After oral arguments in this case, the Appellees substituted the present named Appellee. For clarity, this opinion will refer to individual Appellees by their office titles.")

[5] **Former rule.** *See* Fed. R. Civ. P. 25, advisory committee note of 1961; *see generally* § 25App.103.

a judgment or decree.[6] Substitution is merely a procedural device that does not govern mootness.[7]

After substitution, the claims against the official may be dismissed as moot if there is no longer a live controversy.[8] If a plaintiff claims prior patterns of discrimination by a government official, but there has been a change in the occupant of that office, the plaintiff must establish some basis to believe that the successor will continue the practices of the predecessor before injunctive relief against the successor is warranted. Thus, a motion to dismiss may be granted if the plaintiff fails to allege that the misconduct was the policy of the office or that the successor intended to continue the unlawful practices.[9]

[3] Automatic Substitution May Be Difficult If Successor Is Undetermined

Although substitution of the successor is automatic, in a few situations it may be difficult to determine who the appropriate successor is. For example, when an official leaves office because the position has been eliminated, there may be no obvious successor. In one case, the Civil Aeronautics Board ceased to exist and its authority was transferred to the Department of Transportation. The District of Columbia Circuit ruled that the designated officials at the Department of Transportation, although they

---

[6] **No showing required to continue litigation against substituted official.** Fed. R. Civ. P. 25, advisory committee note of 1961; *see, e.g.*, Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (because rule makes substitution automatic, it does away with former requirement of showing of substantial need for continuing and maintaining action).

[7] **Substitution does not govern mootness.**

7th Circuit	Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982) ("substitution is merely a procedural device that does not govern the question of mootness").
D.C. Circuit	Network Project v. Corporation for Pub. Broadcasting, 561 F.2d 963, 966 (D.C. Cir. 1977) (substitution will not keep alive otherwise moot controversy).

[8] **Action may be dismissed as moot.** *See* Spomer v. Littleton, 414 U.S. 514, 520–523, 94 S. Ct. 685, 38 L. Ed. 2d 694 (1974) (Court remanded for determination whether any live controversy existed in civil rights case after original defendant left office as state attorney); *see also* Hagan v. Quinn, 867 F.3d 816, 819 n.2 (7th Cir. 2017) ("Because plaintiffs' claim for injunctive relief is moot, they have no claim against defendants in their official capacities, and we need not substitute the current office holders for the named defendants under Federal Rule of Civil Procedure 25(d). This action is now only against the defendants in their individual capacities for damages.").

[9] **To obtain relief against successor, basis of claim must continue.**

5th Circuit	Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comm'rs, 622 F.2d 807, 822 (5th Cir. 1980) (plaintiffs met burden of showing that controversy continued to exist).
D.C. Circuit	Network Project v. Corporation for Pub. Broad., 561 F.2d 963, 968 (D.C. Cir. 1977) (district court properly dismissed when complaint did not show that live controversy existed between plaintiffs and successor official); *see also* National Treasury Employees' Union v. Campbell, 654 F.2d 784, 788 (D.C. Cir. 1981) ("where the conduct challenged is personal to the original named defendant, even though he was sued in his official capacity, a request for prospective injunctive relief is mooted when the defendant resigns").

had not yet been named, would be automatically substituted.[10] In a similar case, the court noted that the Secretary of Transportation was substituted for the Secretary of Commerce after the relevant agency was transferred from the Department of Commerce to the Department of Transportation.[11] In some cases the automatic substitution may be defeated because an office or agency is terminated and there is no successor. In this situation the case is moot because there is no person or agency against which relief may be ordered.[12]

If a permanent successor has not been appointed, then an acting officer is substituted. The significant factor is whether the person has the official power to carry out the corrective acts that may be required by the relief ordered.[13]

§ 25.43 After Substitution, Action Continues Without Substantive Effect

[1] Substitution Does Not Affect Suit Substantively

Automatic substitution under Rule 25(d) does not affect any substantive issues in the action. The automatic substitution is merely a procedural device that substitutes a successor for a past official.[1] The sole purpose of the substitution is to allow the suit

---

[10] **Transfer of authority to new entity.** *See* Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (although successor officials were not yet designated, substitution would take place automatically, by force of law, at time of designation with no lapse in jurisdiction).

1st Circuit	*See also* Cornelius v. Hogan, 663 F.2d 330, 334 (1st Cir. 1981) (court noted without deciding that when entity took over functions of previous entity it might be bound by decree in suit).
6th Circuit	Top Flight Entm't, Ltd. v. Schuette, 729 F.3d 623, 630 n.1 (6th Cir. 2013) ("Defendants' argument that the Lottery Commissioner is not a proper party to this lawsuit because he no longer has authority over millionaire-party licensing and regulation is without merit. Although the Michigan Governor transferred these responsibilities to the Executive Director of the Michigan Gaming Control Board, *see* Mich. Comp. Laws § 432.91, the Executive Director is substituted automatically for the Lottery Commissioner by operation of Federal Rule of Civil Procedure 25(d).").
D.C. Circuit	Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) (although successor officials were not yet designated, substitution would take place automatically, by force of law, at time of designation with no lapse in jurisdiction).

[11] **Transfer of duties to new agency.** *See* Independent U.S. Tanker Owners Comm. v. Lewis, 690 F.2d 908, 910–911 (D.C. Cir. 1982).

[12] **No successor.** *See* Skolnick v. Parsons, 397 F.2d 523, 525 (7th Cir. 1968) (no substitution was possible in suit against federal commission and its commissioner when commission was terminated and no successor to commissioner was appointed).

[13] **Acting officer may be substituted.** *See* Fed. R. Civ. P. 25, advisory committee note of 1963 (substitution applies "whenever effective relief would call for corrective behavior by the one then having official status and power"); *see, e.g.*, Dole v. Compton, 753 F. Supp. 563, 564 n.1 (E.D. Pa. 1990) (because Secretary of Labor announced her resignation but no successor had been announced, Acting Secretary was automatically substituted).

[1] **Substitution does not affect substantive issues.** Fed. R. Civ. P. 25, advisory committee note of 1961; *see* Saldana-Sanchez v. Lopez-Gerena, 256 F.3d 1, 10 (1st Cir. 2001) ("As Fed. R. Civ. P. 25(d)

to continue without abatement.[2] A defense of sovereign immunity or Eleventh Amendment immunity is not affected by the substitution.[3] However, if a state official has waived the state's sovereign immunity from suit in federal court by removing an action from state court, that immunity cannot be asserted by officials who are substituted or joined as defendants after removal.[3.1]

[2] Successor Steps Into Place of Predecessor

When the change in officers takes place, the successor is automatically substituted (*see* § 25.42[1]), and becomes a party for all purposes. The successor stands in the same position as the predecessor with respect to the suit and has the same procedural position in the suit as did the predecessor.[4] Any order or judgment binds the successor official.[5]

. . . makes clear, the substitution of a public official by his or her successor in an official capacity suit does not affect the underlying action.").

[2] **Suit continues without abatement.** Fed. R. Civ. P. 25(d).

[3] **Substitution does not affect sovereign immunity or Eleventh Amendment immunity.** *See* Fed. R. Civ. P. 25, advisory committee note of 1961; *see also* American Civil Liberties Union, Inc. v. Finch, 638 F.2d 1336, 1342 n.10 (5th Cir. Unit A. Mar. 1981) (citing advisory committee note of 1961 re Eleventh Amendment).

[3.1] **Removal waives sovereign immunity from suit for officials substituted after removal.** Green v. Graham, 906 F.3d 955, 961–962 (11th Cir. 2018) (sovereign immunity belongs to state, and only derivatively to state officials and entities, so removal of suit by original defendants waives immunity not only for them but for officials substituted or joined after removal).

[4] **Successor stands in place of predecessor.**

1st Circuit	Gaztambide v. Torres, 145 F.3d 410, 415 (1st Cir. 1998) (successor officers had standing to challenge settlement agreement; "As the current officeholders, their lack of participation in events prior to their ascendency to office does not alter their substantive rights.").
11th Circuit	Newman v. Graddick, 740 F.2d 1513, 1517–1518 (11th Cir. 1984) (governor and commissioner who were current officials when consent decree was signed had authority to bind successors, who become parties through automatic substitution and stand in the shoes of their predecessors).

[5] **Orders binding on successor.**

1st Circuit	Rosario-Torres v. Hernandez-Colon, 889 F.2d 314, 316 n.2 (1st Cir. 1989) (orders in case would be binding on successor in official capacity).
5th Circuit	Alberti v. Klevenhagen, 610 F. Supp. 138, 142 n.6 (S.D. Tex. 1985) (court held successor officer in contempt for failing to comply with court-ordered staffing plan at jail, noting that "the inevitable succession of officials in public office does not excuse noncompliance").
7th Circuit	Shakman v. Democratic Org., 919 F.2d 455, 456–457 (7th Cir. 1990) (sheriff who succeeded former sheriff was bound by consent decree that had been reached).
11th Circuit	Newman v. Graddick, 740 F.2d 1513, 1517–1518 (11th Cir. 1984) (successor state officials, on taking office, were bound by consent decree).
D.C. Circuit	Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd., 750 F.2d 81, 88 (D.C. Cir. 1984) ("The Department of Transportation will receive these cases

The substitution applies only with respect to official capacity claims and does not subject the successor officer to individual liability with respect to the predecessor's acts. Persons may be individually liable only if they are named and properly served.[6]

[3] Former Official Ceases to Be Party in Official Capacity

Once substitution is automatically effected under Rule 25(d), the predecessor public officer ceases to be a party.[7] The predecessor lacks standing to challenge any decisions in the action (unless the officer is also a party in an individual capacity). In one case, legislative officers intervened in an action to defend a statute providing for a minute of silence in schools. They lost in the district court and the court of appeals. After an election, they were replaced as legislative officers, although they remained as members of the legislature. When they sought review in the Supreme Court, the Court ruled that they lacked standing to prosecute the appeal. The authority to do so belonged exclusively to the new legislative officers.[8]

[4] Caption May Be Amended to Reflect Change

After the automatic substitution, or when the substitution is called to the court's attention, the court should amend the caption to reflect the name of the substituted party, and further proceedings should be in that name.[9] Failure to do so does not affect

---

under a holding that CAB, the predecessor-defendant, has unreasonably delayed agency action").

[6] **Successor not personally liable.**

1st Circuit	Cabrera v. Municipality of Bayamon, 622 F.2d 4, 6 (1st Cir. 1980) (when mayor replaced predecessor, mayor was not personally liable, because neither original nor amended complaint contained allegations of wrongdoing against mayor in individual capacity).
2d Circuit	Women in City Gov't United v. City of New York, 112 F.R.D. 29, 31 (S.D.N.Y. 1986) (officer became party in official capacity but could not be party in individual capacity because person may not become personally liable without service).
7th Circuit	Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982) (sheriff was properly substituted as defendant in official-capacity suit, although he could incur no personal liability).

[7] **Predecessor ceases to be party.** *See, e.g.*, Baugh v. City of Milwaukee, 829 F. Supp. 274, 276 (E.D. Wis. 1993) (official was automatically substituted in his official capacity at time he left office, regardless of lack of order of substitution).

[8] **Predecessor has no standing to appeal after substitution.** Karcher v. May, 484 U.S. 72, 78, 83, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987) (legislative officers who intervened in suit in their official capacities were not entitled to appeal after they were succeeded in office).

[9] **Case should proceed in name of substituted party.** Fed. R. Civ. P. 25(d).

3d Circuit	*See* Williams v. Red Bank Bd. of Educ., 662 F.2d 1008, 1024 n.18 (3d Cir. 1981) (court of appeals noted that automatic substitution had taken place and that on remand "some restructuring of the complaint may be desired," although this was a matter for the district court to deal with in first instance).
11th Circuit	*See, e.g.*, Klassy v. Weaver, 575 F. Supp. 801, 804–805 (N.D. Ga. 1982)

the progress of the suit, and any misnomer not affecting substantive rights is disregarded.[10]

§ 25.44 Title of Officer May Be Used Rather Than Name

A public officer suing or being sued in an official capacity may be designated by official title rather than by name, although the court may order that the officer's name be added.[1] For a complete discussion of suits by or against public officers designated only by their official titles, *see* Ch. 17, *Plaintiff and Defendant; Capacity; Public Officers.*

§ 25.45 Substitution on Appeal

Rule 25(d) applies when a public officer is separated from office during the pendency of trial court proceedings.[1] If the separation happens on appeal, substitution is governed by Appellate Rule 43(c) or Supreme Court Rule 35.[2] Those rules are

---

(court directed clerk of court to change caption to reflect automatic change in public officers).

[10] **Failure to amend caption does not affect case.** *See* Fed. R. Civ. P. 25(d)(1).

3d Circuit — Presbytery of the Orthodox Presbyterian Church v. Florio, 40 F.3d 1454, 1457 n.1 (3d Cir. 1994) (caption in suit against governor was not changed when new governor was elected to office, but this failure did not affect appeal and was noted by court for purposes of clarification only); Finberg v. Sullivan, 634 F.2d 50, 53 n.2 (3d Cir. 1980) (former officer continued to be named in caption after automatic substitution, but court disregarded misnomer because it did not affect substantive rights and noted this only to avoid possible confusion).

5th Circuit — Arizpe v. Peters, 260 Fed. Appx. 663, 663 (5th Cir. 2007) (unpublished) ("We also conclude that Arizpe's argument that the district court's ruling is legally invalid because it listed Maria Cino as Acting Secretary of Transportation, rather than Mary Peters as Secretary of Transportation, is frivolous. See Fed. R. Civ. P. 25(d) ("[A]ny misnomer not affecting the parties' substantial rights must be disregarded.").

6th Circuit — Brotherton v. Cleveland, 173 F.3d 552, 558 (6th Cir. 1999) (although case retained former official's name, "we disregard the misnomer, and we look to the merits").

9th Circuit — Thomas v. County of Los Angeles, 703 Fed. Appx. 508, 512 (9th Cir. 2017) (unpublished) ("[A]lthough the district court erred by substituting the County as the defendant when Sheriff Baca left office—it should have substituted Sheriff Baca's successor, Sheriff John Scott—this error did not 'affect[] the parties' substantial rights' and hence 'must be disregarded.' ").

[1] Fed. R. Civ. P. 17(d); *see* Fed. R. Civ. P. 25, advisory committee note of 2007 (provision dealing with suits by or against public officers brought by or against parties designated only by their official title was formerly contained in Fed. R. Civ. P. 25(d); but as part of the 2007 restyling of the Federal Rules of Civil Procedure, this provision was moved and became Fed. R. Civ. P. 17(d) because "it deals with designation of a public officer, not substitution.").

[1] Fed. R. Civ. P. 25(d).

[2] *See* Fed. R. App. P. 43; Sup. Ct. R. 35.3; *see generally* Ch. 343, *Substitution of Parties*; Ch. 535, *Death, Substitution, and Revivor: Public Officers.*

essentially the same as Rule 25(d), however, and as a practical matter it is unnecessary to be concerned about when the change in officers occurred. The courts of appeals typically cite to both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure when noting that an automatic substitution has taken place at some time before the appellate opinion is issued.[3]

---

[3] **Substitution on appeal.**

1st Circuit — Diffenderfer v. Gomez-Colon, 587 F.3d 445, 456 (1st Cir. 2009) ("Substitution is automatic where, as here, the district court imposed fees against Gomez-Colon only in his official capacity. *See* Fed. R. App. P. 43(c)(2); Fed. R. Civ. P. 25(d)."); Kaweesa v. Gonzales, 450 F.3d 62, 62 (1st Cir. 2006) (U.S. Attorney General Alberto R. Gonzales substituted for John Ashcroft as respondent, citing Fed. R. Civ. P. 25(d)(1) and Fed. R. App. P. 43(c)(2).

2d Circuit — Conyers v. Rossides, 558 F.3d 137, 142 (2d Cir. 2009) ("Conyers's complaint initially named David M. Stone, the then-Acting Administrator of the TSA. In the proceedings below, Kip Hawley was substituted as defendant under Fed. R. Civ. P. 25(d). Current Acting Administrator Gale D. Rossides has now been automatically substituted as defendant pursuant to Federal Rule of Appellate Procedure 43(c)(2)."); Henry v. Scully, 78 F.3d 51, 52 (2d Cir. 1996) (court noted that superintendent of correctional facility had been automatically substituted as party under Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(c).

4th Circuit — City of Virginia Beach v. Roanoke River Basin, 776 F.2d 484, 486 n.1 (4th Cir. 1985) (court noted that governor had been substituted).

5th Circuit — American Civil Liberties Union, Inc. v. Finch, 638 F.2d 1336, 1340 (5th Cir. Unit A. Mar. 1981) (new governor and other state officials succeeded to office and were automatically substituted by operation of former Fed. R. Civ. P. 25(d)(1) (*now see* Fed. R. Civ. P. 25(d)) and Fed. R. App. P. 43(c)(1)).

6th Circuit — Jones v. Johanns, 264 Fed. Appx. 463, 464 (6th Cir. 2007) (unpublished) ("The district court automatically substituted Mike Johanns for Ann Veneman as the properly named officeholder [i.e., Secretary of the Department of Agriculture] pursuant to Fed. R. Civ. P. 25(d). To the extent that the parties erroneously named Veneman as a party to this appeal, we also recognize the automatic substitution of a successor officeholder pursuant to Fed. R. App. P. 43(c)(2).").

7th Circuit — Kincaid v. Rusk, 670 F.2d 737, 741 (7th Cir. 1982) (noting that Fed. R. App. P. 43(c) was derived from Fed. R. Civ. P. 25(d)).

8th Circuit — McIntyre v. Caspari, 35 F.3d 338, 338 (8th Cir. 1994) (superintendent of correctional facility left office during pendency of appeal, and court substituted new superintendent).

9th Circuit — Dawson v. Myers, 622 F.2d 1304, 1304 (9th Cir. 1980) (state official was substituted for prior official under former Fed. R. Civ. P. 25(d)(1) (now see Fed. R. Civ. P. 25(d)) rather than Fed. R. Civ. P. 43(c)(1) because change took place before appeal was taken).

MICHIGAN LAW REVIEW

Vol. 50 JANUARY, 1952 No. 3

PUBLISHED MONTHLY, NOVEMBER-JUNE, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN
SUBSCRIPTION PRICE $5.50 PER YEAR $1.00 PER NUMBER

COMMENTS

ADMIRALTY—MAINTENANCE AND CURE—The recent decision of *Warren v. United States*[1] marks another instance of the growing inter-

[1] 340 U.S. 523, 71 S.Ct. 432 (1951), discussed infra.

maximum cure was achieved. The minority, consisting of Justices Douglas, Black, Murphy, and Rutledge, dissented on the ground that cure should also include expenses for maintaining a condition of maximum cure if that was necessary.[38]

The duration of the duty of maintenance and cure has been definitively settled by the Supreme Court and today the only question remaining is as to when the maximum cure has been achieved in the particular case.

IV. *Summary*

The shape of the remedy of maintenance and cure has been clearly defined. There are, of course, a number of peripheral questions remaining but the broad outline is clear.

The seaman is entitled to his wages until the end of the voyage or for the period for which he signed on, if longer. He is entitled to maintenance and cure for injuries or illnesses which occur while he is in the service of the ship, but the right may be defeated if the injury or illness arose out of the seaman's gross negligence or willful misconduct. The seaman on shore leave or off duty is considered to be in the service of the ship. The fault of the vessel or its owners is not a requirement of liability. The measure of the maintenance and cure to which the seaman is entitled is the ordinary maintenance and cure given seamen generally. The duty of the vessel and its owners continues only until such time as the maximum cure has been effected.

In line with present day philosophies the trend has been to expand the remedy in favor of the seamen. Justice Douglas is an able spokesman for the majority with its liberalizing tendencies. However, Justices Jackson and Clark appear to have some doubts as to the desirability of further expansion of the remedy.

Donald S. Leeper, S.Ed.

CIVIL PROCEDURE—ABATEMENT—STATUS OF SUIT NOMINALLY AGAINST GOVERNMENT OFFICIAL WHEN OFFICIAL LEAVES OFFICE—Often an action brought against an official of the sovereign is actually against the sovereign itself, nominally represented by the official. The status of such a suit when the official leaves office is even today not

[38] Also denied in Muruaga v. United States, (2d Cir. 1949) 172 F. (2d) 318.

satisfactorily settled. The so-called representative suit,[1] while at one time serving a purpose, has always been somewhat anomalous and today is antiquated and useless.

I. *Common Law Background*

Every civilized political state has, as a part of its judicial system, a principle that the sovereign cannot be sued without its consent.[2] Whether or not this stemmed from the divine right of kings, it is based, at least in part, upon the theory that the ability of governmental authority to operate efficiently depends upon there being no recourse against it. Consequently, both federal and state courts uniformly have held that the United States cannot be sued without its consent.[3] The representative suit was developed as a fiction to circumvent the operation of the principle of sovereign immunity.[4] Instead of making the sovereign a party defendant, suit is brought against an official of the sovereign, not with the intent of making him personally liable,[5] but to force him to perform an official duty, which anyone holding the office could perform, to satisfy a claim in substance against the sovereign.

The representative suit was further identified with the official, the nominal defendant, by the form of action in which the suit was usually brought, namely, a mandamus proceeding.[6] The federal courts have held that mandamus goes to the official, not to the office,[7] so that if the official leaves office while the suit is pending, the action abates[8] as completely as did a tort claim at common law when either party died.[9] The suit could not continue against the official because he could no longer perform the duty requested by the claimant. The official's suc-

[1] In this context, a representative suit, as defined by Justice Frankfurter, is an action against a governmental officer, but in effect against the United States—not a class action in the usual sense of that term. See Snyder v. Buck, 340 U.S. 15 at 28, 71 S.Ct. 93 (1950).

[2] 54 AM. JUR., United States §127 (1945).

[3] The same is true as to the several states. See 49 AM. JUR., States, Territories, and Dependencies §91 (1943).

[4] Snyder v. Buck, 340 U.S. 15 at 28 and 29, 71 S.Ct. 93 (1950).

[5] An exception is the so-called Collector-suit, in which the Collector of Internal Revenue is held to have committed a personal wrong in collecting the tax. For the additional problems raised see 4 MOORE, FEDERAL PRACTICE 531 to 534 (1950).

[6] 102 A.L.R. 943 (1936).

[7] 102 A.L.R. 943 at 945 (1936); 43 AM. JUR., Public Officers §508 (1942); 1 AM. JUR., Abatement and Revival §48 (1936); Secretary of Interior v. McGarrahan, 9 Wall. (76 U.S.) 298 (1869); United States v. Boutwell, 17 Wall. (84 U.S.) 604 (1873).

[8] When an action abated at common law, it was utterly dead and could not be revived except by commencing a new action. First Nat. Bank of Woodbine v. Board of Supervisors of Harrison County, 221 Iowa 348, 264 N.W. 281 (1935). See also 1 WORDS AND PHRASES 65 (1940).

[9] PROSSER, TORTS 950 (1941).

cessor could not be substituted as defendant, because mandamus went to the official, not to the office. If this result was once thought indispensable in order to avoid identification of the official with the sovereign, it became totally unnecessary in many instances after 1855, when the federal government came to realize that it could allow recourse for claims against it and still function as a government, and so created the Court of Claims.[10]

II. *Statutory Development*

The United States Supreme Court became aware of the gross inconvenience caused by the abatement of a representative suit when the official left office. Not only was abatement wasteful both of time and expense, but there was also a likelihood that the plaintiff would be barred forever by the running of a statute of limitations. In an 1895 decision, the Court appealed to Congress to take action.[11] The result was the Act of February 8, 1899,[12] which provided, seemingly unqualifiedly, that an action against a federal government officer should not abate if he left office while the suit was pending. Upon a showing that survival of the action was necessary, the successor could be substituted within twelve months after the original defendant left office. The act, however, was ambiguous as to the result if substitution was not made within the time provided. The Supreme Court in the case of *LeCrone v. McAdoo*[13] held that the action did not abate at all; but, if seasonal substitution was not made, it came to an end. Prior to a judgment the result in the two instances would surely be the same. If, however, the official left office after a judgment in the district court had been obtained, that judgment stood. Actually only the appellate part of the action abated. The effect of a judgment *against* the official after he has

[10] In 1855 the Court of Claims was established with jurisdiction over "All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. . . ." 10 Stat. L. 612 (1855). 24 Stat. 505 (1887) increased the jurisdiction of the Court of Claims to include claims founded upon the Constitution of the United States and gave the district courts concurrent jurisdiction.

[11] Bernardin v. Butterworth, 169 U.S. 600 at 605, 18 S.Ct. 441 (1898).

[12] 30 Stat. L. 822 (1899). ". . . no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term or office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs."

[13] LeCrone v. McAdoo, 253 U.S. 217, 40 S.Ct. 510 (1920).

left office was not made clear. At least one later United States Supreme Court decision[14] and several court of appeals decisions have misinterpreted the *LeCrone* case to mean that the action would abate completely if after twelve months no substitution had been made.[15] The Supreme Court, however, recently has reaffirmed by dictum the statutory interpretation in the *LeCrone* case.[16]

In a 1922 decision, the United States Supreme Court suggested that the Act of 1899 be amended to include substitution of successors to state officers who leave office while suits to which they are parties are pending.[17] The resulting 1925 amendment embodied this proposal, and also shortened the period of substitution to six months after the officer's tenure terminates.[18]

In 1938, the 1925 amendment was incorporated by reference into Federal Rule 25(d), the only difference being in the prescribed period of substitution: six months after the successor takes office rather than six months after the original official leaves office. In 1948, Rule 25(d) was amended to embody completely the 1925 provision, but without reference to it.[19]

While the statutory development has somewhat eased the harshness of the common law rule of abatement, it has not been completely

[14] Fix v. Philadelphia Barge Co., 290 U.S. 530 at 533, 54 S.Ct. 270 (1934).

[15] Black Clawson Co. v. Robertson, (D.C. Cir. 1934) 71 F. (2d) 536; Oklahoma ex rel. McVey v. Magnolia Petroleum Co., (10th Cir. 1940) 114 F. (2d) 111 at 114; Becker Steel Co. of America v. Hicks, (2d Cir. 1933) 66 F. (2d) 497 at 499.

[16] Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631 at 637 to 638, 69 S.Ct. 762 (1949).

[17] Irwin v. Wright, 258 U.S. 219 at 223 to 224, 42 S.Ct. 293 (1922).

[18] 43 Stat. L. 936 at 941, §11(a) (1925). ". . . where, during the pendency of an action . . . brought by or against an officer of the United States . . . and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

[19] Rule 25(d), Rules of Civil Procedure, 28 U.S.C. (1948) §2072. "When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object."

sound in its approach to the problem, as it has not recognized that in many suits against federal officers the United States is the real party in interest, and that, therefore, substitution of one nominal party to replace another is at best a mere formality.[20]

III. *Snyder v. Buck*

The United States Supreme Court in a five to four decision[21] recently affirmed the dictum of the *Defense Supplies Corporation Case*,[22] namely, that the effect of section 11 of the Act of 1925, which governed,[23] was to abate a suit brought against a government official who leaves office while the action is pending, if substitution is not made within the statutory period.

The plaintiff, a naval officer's widow, sued the Paymaster General of the Navy to recover a statutory death gratuity allowance. The suit could have been brought directly in the district court or the Court of Claims. The original action was for mandamus; but, since the duty the performance of which the plaintiff sought to compel was not strictly ministerial,[24] the district court granted a mandatory injunction instead. The Government appealed in the name of the original Paymaster, Buck, who, before appeal but after the judgment of the district court, had been retired. After the statutory substitution period had elapsed, the Government called to the attention of the court of appeals the fact of Buck's retirement. The court of appeals vacated the judgment of the district court and remanded with directions to dismiss the action as abated.

The plaintiff then appealed to the Supreme Court, which affirmed the action of the court of appeals. Justice Douglas, the author of the majority opinion, tracing the history of the problem of abatement in the representative suit, interpreted the Act of 1899 to mean that the action did not abate, but was at an end, if substitution was not made during the twelve-month period, thus reaffirming *LeCrone v. McAdoo*. According to Justice Douglas, section 11 of the Act of 1925, by leaving out the phrase, "no . . . action . . . shall abate,"[25] changed the effect

[20] 4 MOORE, FEDERAL PRACTICE 511 (1950).

[21] Snyder v. Buck, 340 U.S. 15, 71 S.Ct. 93 (1950).

[22] Defense Supplies Corp. v. Lawrence Warehouse Co., 336 U.S. 631 at 637 to 638, 69 S.Ct. 762 (1949).

[23] "For the Court of Appeals during the period material to our problem had in force its Rule 28(b) which provided that abatement and substitution were governed by §11 of the 1925 Act." Snyder v. Buck, 340 U.S. 15 at 17, note 2, 71 S.Ct. 93 (1950).

[24] 34 AM. JUR., Mandamus §66 (1941); Secretary of Interior v. McGarrahan, 9 Wall. (76 U.S.) 298 (1869).

[25] Act of February 8, 1899, 30 Stat. L. 822. See note 12 supra.

of the earlier statute, so that under the new statute the action abated if seasonal substitution was not made. Plaintiff argued that section 11 was intended to apply only to "actions brought against officials for remedies which could not be got in a direct suit against the United States."[26] Justice Douglas held, however, that the act, by its very wording, covered any action brought by or against any officer of the United States relating to present or future discharge of his official duties, and that this necessarily covers many actions which are in substance suits against the United States. The suit, therefore, abated, and the plaintiff had to start anew. If a statute of limitations had run in the meantime, the remedy would have been lost completely.

The fact that there are two dissenting opinions[27] in the *Snyder* case illustrates how unsettled the problem is. Justice Frankfurter, joined by Justice Jackson, made a thorough analysis of the question and presented a common sense solution, though one probably unwarranted by the language of section 11.[28] He reasoned that since this was in substance a suit against the United States and could have been brought directly against it, the appeal should be allowed, and the court should merely "note as a matter of record that the name of the Paymaster General of the Navy is now Fox [Buck's successor]. . . ."[29] If it could be said that the statute does not apply to such a suit, the United States should be substituted rather than the official's successor. It must be admitted, however, that this would present difficulties where the action is mandamus. Surely it would be desirable if Justice Frankfurter's suggestion could be effectuated. The statute, however, purports to cover any suit to which a government officer in his official capacity is a party, though only nominally, and sets a definite time in which substitution must be made in the event the official leaves office. In the face of these express provisions, it is difficult to find that the suit merely continues as though proper substitution under the statute was made.

Justice Frankfurter believed that the Act of 1899 and section 11 (the 1925 amendment) were intended by Congress to have the same effect, and that the purpose of the later statute was merely to enlarge the scope of the earlier one so as to include state, local, and territorial officers. Under his interpretation, an action under either statute would

[26] Snyder v. Buck, 340 U.S. 15 at 20, 71 S.Ct. 93 (1950).
[27] Id. at 22 and 32.
[28] See note 18 supra.
[29] Snyder v. Buck, 340 U.S. 15 at 31, 71 S.Ct. 93 (1950).

abate unless proper substitution is made. This seems to controvert the holding of *LeCrone v. McAdoo*.[30]

Justice Clark dissented[31] on the ground that the court of appeals should have dismissed the appeal, since Buck, the party appealing, no longer had standing before the court. This probably meant that the judgment of the district court would be left standing. Query as to the effect of a judgment against an official having left office. Although Justice Clark reached this result apparently without relying upon section 11, that statute surely applies. His conclusion logically would necessitate a finding that section 11 had the same effect which Justice Douglas attributed to the Act of 1899, namely, that according to the statute the action was at an end. Under present legislation, this may well be the best result of the three opinions, since it is likely that the two statutes were meant to have the same effect, as Justice Frankfurter claimed,[32] but at the same time the wording of the Act of 1899 seems to indicate categorically that the action would not abate.

IV. *Possible Solutions*

Seeking a solution to the question, one discovers four possibilities.[33] The two which will be considered first could be accomplished under Federal Rule 25(d) as it now stands. The remaining two go more to the philosophy of the representative suit and would require legislative changes.

One possible way to resolve the problem under present legislation would be to by-pass Federal Rule 25(d) by saying, as Justice Frankfurter said of section 11 in the *Snyder* case, that it does not pertain to actions in substance against the United States. A number of O.P.A. cases have so held,[34] on the ground that to hold otherwise "would, in our opinion, be to glorify form over substance and reality."[35] Justice Douglas' broad language in the majority opinion of the *Snyder* case seems, correctly, to foreclose this as a possibility without legislative changes. Surely section 11 and Federal Rule 25(d) were intended to cover any action to which an official is either an actual or a nominal

[30] LeCrone v. McAdoo, 253 U.S. 217, 40 S.Ct. 510 (1920).

[31] Justice Black concurred.

[32] Snyder v. Buck, 340 U.S. 15 at 23, 71 S.Ct. 93 (1950).

[33] 4 MOORE, FEDERAL PRACTICE 534 to 538 (1950).

[34] Northwestern Lumber & Shingle Co. v. United States, (10th Cir. 1948) 170 F. (2d) 692; Ralph D'Oench Co. v. Woods, (8th Cir. 1948) 171 F. (2d) 112; Fleming v. Goodwin, (8th Cir. 1948) 165 F. (2d) 334.

[35] Fleming v. Goodwin, (8th Cir. 1948) 165 F. (2d) 334 at 338.

party. It is unlikely that the majority of the Supreme Court will change its position as to the meaning of the present legislation.

A second suggested solution would be to satisfy the technical requirements of the present legislative scheme by allowing an ex parte blanket substitution of the successor in office. Some of the district courts have done so in O.P.A. cases.[36] The workability of this solution to the problem depends, however, upon the voluntary cooperation of the successor and is, therefore, not likely to prove effective where the official is generally defending actions rather than bringing suit.

Third, Congress could recognize, as it has with respect to suits before the Tax Court,[37] that the United States is the actual party in interest and dispense altogether with the necessity of substitution, which is in truth but a formality in "a suit to secure a money claim due from the United States, enforced against the officer who was the effective conduit for its payment."[38] This could easily be accomplished by means of a proviso limiting Federal Rule 25(d) to actions on claims which cannot be brought directly by or against the United States. To paraphrase Justice Frankfurter, since the representative suit arose as a subterfuge to circumvent sovereign immunity, there is no merit in continuing the fiction in cases as to which the sovereign has consented to direct suit.[39]

In view of the fact that the suit against the governmental representative is so much a part of our system of jurisprudence, probably the most practical solution is a compromise under which suit could be brought against the office instead of the official.[40] If, therefore, the official leaves office while the action is pending, the suit merely continues against the successor. No substitution of names would be necessary if the original official was not sued by name. The courts have long held that an action brought against a board or agency with continuity of existence does not abate upon a change in personnel, and no substitution is needed.[41] There is no reason why this practice can not be extended to allow suit against an office with continuity of existence, though held by successive individuals. Many state courts very early recognized this general approach in holding that a mandamus proceeding goes to the office, not to

[36] 4 MOORE, FEDERAL PRACTICE 536 (1950); Bowles v. Goldman, (D.C. Pa. 1947) 7 F.R.D. 12; Bowles v. Weiner, (D.C. Mich. 1947) 6 F.R.D. 540.

[37] 53 Stat. L. 165 (1939), 26 U.S.C. (1946) §1143; 4 MOORE, FEDERAL PRACTICE 534 and 536 (1950).

[38] Snyder v. Buck, 340 U.S. 15 at 28, 71 S.Ct. 93 (1950).

[39] Id. at 28 and 29.

[40] 4 MOORE, FEDERAL PRACTICE 536 (1950).

[41] 102 A.L.R. 943 at 956 (1936); Murphy v. Utter, 186 U.S. 95, 22 S.Ct. 776 (1902); Leavenworth County v. Sellew, 9 Otto (99 U.S.) 624 (1878); Marshall v. Dye, 231 U.S. 250, 34 S.Ct. 92 (1913); Irwin v. Wright, 258 U.S. 219, 42 S.Ct. 293 (1922).

the official, so that a mandamus action against an official will not abate upon his leaving office.[42]

That the problem of the representative suit should today be so unsettled an issue seems strange, especially in view of the fact that adequate legislation has succeeded in laying to rest many another common law ghost. The representative suit is so solidly implanted in our judicial system, however, that it may be with us indefinitely. One can hope, nevertheless, that eventually our legislators will adopt a more realistic philosophy. Perhaps the Supreme Court through the decision of the *Snyder* case will, as it has done in the past,[43] provide the needed impetus.

Alan C. Boyd, S. Ed.

CONSTITUTIONAL LAW — CIVIL RIGHTS — FIRST AMENDMENT FREEDOMS—REFORMULATION OF THE CLEAR AND PRESENT DANGER DOCTRINE—In July 1948 the apostles[1] of Communism in America were indicted under the conspiracy provisions of the Smith Act of 1940. The tension marking both the trial and the present era has obscured the constitutional problems and policy considerations involved. It is the purpose of this comment to trace the history of this cause celebre, *Dennis et al. v. United States*,[2] and to examine its effect upon our constitutional notions of the permissible bounds of utterance, primarily by an analysis of the appellate opinions.

I. *The Nature of the Indictment and the Trial*

The Smith Act of 1940 contained "the most drastic restriction on freedom of speech ever enacted in the United States during peace,"[3] but the far-reaching sections had been little used.[4] The defendants were

[42] 102 A.L.R. 943 at 948-952 (1936).

[43] The case of Bernardin v. Butterworth, 169 U.S. 600, 18 S.Ct. 441 (1898) was largely responsible for the Act of 1899, and the Supreme Court in the case of Irwin v. Wright, 258 U.S. 219, 42 S.Ct. 293 (1922) urged such changes as were later adopted in §11 of the 1925 Judicial Code.

[1] Originally defendants were twelve leaders of the Communist Party of the United States. Eugene Dennis, general secretary, headed the list after the case of William Foster, chairman, was severed because of his illness. See NEW YORK TIMES, Jan. 19, 1949, p. 1:1.

[2] 341 U.S. 494, 71 S.Ct. 857 (1951), Petition for rehearing denied, 72 S.Ct. 20 (1951).

[3] CHAFEE, FREE SPEECH IN THE UNITED STATES 441 (1941). Chafee indicates that the formal title, the Alien Registration Act of 1940, 54 Stat. L. 670 (1940), was misleading.

[4] Title 1 of the original act. The solitary use of the prohibition against conspiracy to advocate overthrow, section 3, was in Dunne et al. v. United States, (8th Cir. 1943) 138 F. (2d) 137, cert. den. 320 U.S. 790, 64 S.Ct. 205 (1943), where leaders of the Socialist

Admiralty and Shipping Section
Washington 25, D.C.

ws

January 30, 1961

Committee on Rules of Practice
and Procedure
Supreme Court Building
Washington 25, D. C.

Dear Sirs:

Consideration of the proposed January 1961 amendments to the Civil Rules with their notes is convincing that they are sound and desirable in principle. Examination of their proposed language further shows that it is well chosen with a view to their probable future incorporation into the Federal Admiralty Rules.

Proposed Civil Rule 25(d)(2) in particular represents a notable advance of substance over form and is a long overdue adoption of the more convenient English practice. However, the application of the same provision of (d)(2) to lines 31-32 of Civil Rule 25(d)(1) appears equally desirable.

I should like personally to suggest that in lines 31-32 the presently proposed words--

> but any misnomer not affecting the substantial rights of the parties shall be disregarded.

Should be replaced by the words--

> described as a party by his official title rather than by name, but the court may require his name to be added.

At this time, such a provision might well bring about a large practical advance in the style and form of much pending litigation.

Sincerely,

Leavenworth Colby
Chief, Admiralty & Shipping Section

cc: All members of Advisory Committees
on Admiralty and Civil Rules

Exhibit "A"

February 13, 1961

MEMORANDUM ON LETTERS RECEIVED
FROM THE BENCH AND BAR IN RESPONSE
TO JANUARY 1961 DRAFT AMENDMENTS

Rule 25(d) (substitution)

1. Of the total of ten letters received from the Bench and Bar on our draft amendments, seven refer either generally or specifically to the Rule 25(d) amendment, all approvingly.

2. One comment (Mr. Colby) would extend the principle of 25(d)(2) (suit by official title) and bring it into play in 25(d)(1) as well. Thus where a suit was started against an official by name, and the official left office, the "automatic" substitution would bring in the successor by official title rather than by name (unless the court required his name to be added).

As to cases instituted after the amended Rule takes effect, the party will have available to him under 25(d)(2) the option to use the official title to begin with, and it can be hoped that this will become the prevailing practice. If, instead, he chooses to designate the official by name, then it seems right that the automatic substitution under 25(d)(1) should be in the same style. The proposal is perhaps more attractive as applied to cases now pending (more particularly those pending cases in which there is a prospect of the officeholder changing two or more times during the litigation), but we should hesitate to introduce language specially covering those cases. In all events a litigant who wanted to change the style of referring to an official from name to title could apply to do so at any time.

3. Another letter (Mr. Dreifus) would like to see us take care expressly of transfers of function from one government agency to another, but concedes that the problem of suits pending against the predecessor agencies is customarily dealt with in the statutes effecting the transfers. Our amendment may help in any cases where the statutes are silent; I doubt that we can safely embark on an amendment to deal with such cases in general terms.

4. A third, very interesting letter (Professor Foster) calls attention to the difficulties that can arise where, in order to avoid a desegregation decree, a School Board may resign en masse, taking care that no successor members of the Board are appointed. This is essentially a problem of enforcement. It should be possible, in some cases at least, to find an official somewhere up or down the line of local or State government who can exercise the power, abdicated by the Board, which is needed to enforce the decree. Beyond this point, the problem of meeting

such evasive tactics must be left to the ingenuity of the court and counsel. The letter does not propose any solution by rule. In the great bulk of cases in less delicate areas, some "acting" successor official can be readily found where the defendant official leaves office and a successor to the particular position is not promptly appointed.

Rule 54(b) (appeals in multiple-parties cases)

1. Seven of the letters refer either generally or specifically to this amendment. Six are approving; one disapproves.

2. One approving letter (Judge Brown) raises a question on the application of the amended rule to a case where the court dismisses the main claim and main defendant, but does not dismiss a related third-party claim and third-party defendant: is the dismissal a final decision for purposes of appeal where the District Court does not make a determination under the amended Rule? My own answer is no. The amended Rule, retaining the words "claim" and "cross-claim" (line 4) and adding the references to "parties," seems to require this conclusion. The letter refers critically to a recent Fifth Circuit case going the other way under the present Rule. Howze v. Arrow Transp. Co., 280 F. 2d 403 (5th Cir. 1960); contra: Tomlinson v. Trustees of the University of Pennsylvania, 226 F.2d 569 (3d Cir. 1959); cf. Capital Transit Co. v. District of Columbia, 225 F.2d 38 (D.C. Cir. 1955). The Howze decision seems hard to support; and would be harder still to defend under the amended Rule. In any event I would not recommend an attempt to deal with this problem by more specific language in the Rule. Of course in most imaginable cases the District Court should dismiss the third-party claim when he dismisses the main claim to which it is related.

3. Another approving comment (Judge Burdick) refers to the North Dakota version of the Rule as being a possible improvement from the standpoint of "grammar." The material difference is that the North Dakota text (corresponding to the 1955 proposal) uses the omnibus expression "multiple claims for relief" in substitution for the present wording "more than one claim for relief . . . whether as a claim, counterclaim, cross-claim, or third-party claim." There is some advantage in retaining the more detailed present phrasing because of the reliance of the courts on the exact language, as in Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445 (1956).

4. The forceful disapproving letter from Judge Friendly (copy attached) deserves careful reading. For the present, Judge Friendly would apparently let the Rule stand in its present text, covering multiple-claims cases. He would not extend

March 4, 1961

MEMORANDUM ON FURTHER COMMENTS RECEIVED
IN RESPONSE TO JANUARY 1961 DRAFT AMENDMENTS

Rule 25(d)(substitution)

1. Of the total of nine additional comments received on our draft amendments, seven refer to Rule 25(d), five approving this amendment as proposed. Among the approving comments is one from Mr. Walter J. Cummings, Jr. on behalf of the Federal Rules Committee of the American Bar Association.

2. Mr. James R. Browning, Clerk of the Supreme Court, questions why our amendment should not go further and cover the now rare actions against collectors for refunds of taxes (our Note indicates that these are excluded from Rule 25(d)). This point was the subject of correspondence between Mr. Browning and Mr. Cummings. I fear that we cannot go further under existing law. These actions against collectors have been traditionally regarded as running against them individually and not in their official capacity; judgments are enforceable out of their personal assets (the Treasury, however, will pay such a judgment if the court makes a certificate under 28 U.S.C. §2006).

Mr. Browning also points to an apparent discrepancy between this reading of Rule 25(d) in respect to collectors and the text of Rule 81(f). This matter is explained in 4 Moore ¶25.05, p. 531, cited in our Note. When we propose amendments of Rule 81 -- as we shall probably have to do in our next batch -- it may be found advisable to deal explicitly with this point.

3. The executive committee of the Federal Bar Association is opposed to and would eliminate new Rule 25(d)(2) regarding use of the official title rather than the name in suits by or against a public officer in his official capacity. (The Association opposed the similar 1955 proposal; see our memorandum book, p. VI-19.) The objection made is that there may be cases where, despite the amendment, suit will, as a matter of law, be maintainable against the officer only by name. Compare Blackmar v. Guerre, 342 U.S. 512 (1952). But our provision is optional, not mandatory; it will still be possible to use the name, if the party wants to do so. Moreover, our amendment states expressly that where the official title is used initially, "the court may require his [officer's] name to be added." So if it appears at any time that there is any reason to use the name, this can be done.

Despite its optional character, the Rule 25(d)(2) amendment is not "superfluous," as the executive committee thinks, but highly beneficial; it can be hoped that under the amendment it will become the general practice to use the official title rather

than the name in "official capacity" cases. Concern with substitution will thereby be eliminated. Thus amended Rule 25(d)(1), providing for automatic substitution, would operate largely for transitional purposes. The executive committee objects to the latter amendment also, and offers a redraft. (The Association opposed the 1955 proposal to extend the time for substitution to a "reasonable" time; although it was sympathetic to the idea, it felt that further study was needed; see p. VI-19.)

While agreeing that Rule 25(d) needs revision, and also apparently favoring a device of automatic substitution, the executive committee is worried that our draft is designed "to simplify the problems of consent to sue and sovereign immunity" in a way that can only be done legislatively. This is fully dealt with in our Note.

The executive committee also points out that actions against officers are now commonly styled against them both individually and officially. The committee seems to feel that in these cases automatic substitution under the wording of our amendment may be awkward, presumably because the possible claim against the predecessor as an individual may disappear from view when the substitution takes effect. This picture is largely unreal.

With "official capacity" broadly construed (see our Note), it will be clear at the time of substitution in the large majority of the cases that relief will be needed and appropriate only against the successor officer, and the Rule 25(d)(1) substitution will do the whole job. In a small fraction of the cases it will be clear that only damages against the officer originally made a party defendant, to be paid out of his own pocket, are sought; here Rule 25(d)(1) will be altogether inapplicable and only Rule 25(a)(1) will apply (substitution on death). If a case arises where it is genuinely doubtful whether the ultimate relief should take one form or the other (or where relief conceivably could be allowed in both forms), the automatic substitution can well apply to bring in the successor, while still leaving the predecessor in the case an an individual. (The executive committee seems to acknowledge this solution.) When a case with such possible complexities is well advanced at the time of the change of officeholder, the doubts will probably have resolved themselves; in any event, clarification, if needed, can be obtained by making a motion. We are dealing at most with fringe situations where the officer is a defendant; the problem does not appear to arise at all where the officer is a plaintiff.

To consider the attempted redraft: Words are added to our draft of Rule 25(d)(1) after "in his official capacity" which attempt both to spell out and limit this concept in terms of relief sought. But the words "derives from" are ambiguously

expansive. I consider the effort at thumbnail definition damaging; compare the explanation in our Note. Automatic substitution in these official capacity cases is retained in the redraft. The possibility of entering an order of substitution is also retained, but the words "on notice" are added. This looks to a motion where questions can be ironed out; but that is available under our draft, which also would allow an order on the court's own initiative. The redraft retains, but seems to put in an inappropriate place, the statements that proceedings following the substitution shall be in the name of the substituted party and that misnomers not affecting substantial rights shall be disregarded.

I do not think we should follow the Federal Bar Association redraft.

Rule 54(b) (appeals in multiple-parties cases)

The six comments on Rule 54(b) are all approving. One of them (Referee Friebolin) raises the linguistic point about "fewer than" in lieu of "less than" mentioned in my covering letter. Another (District of Maryland Committee) inquires whether entry of judgment against one of several defendants may not sometimes prejudice the other defendants. Under the Rule the District Court exercises discretion; see also Rule 62(h) as amended.

Forms 2 and 19

Of the seven comments on the Forms, six are approving. One comment (Mr. Baker) questions why the style of alleging the defendant's principal place of business in Form 2 differs from the style of alleging the plaintiff's. The difference of course reflects the fact that plaintiff will know the facts as to himself but may not be as well informed about his opponent. The same comment cites Cameron v. Hodges, 127 U.S. 322 (1888), as "seriously question[ing] the effectiveness of any non-affirmative allegation in a statement of jurisdictional facts," but the case is distinguishable, and promulgation of the Form as part of the Rules should eliminate any doubt as a practical matter. See Rule 84.