ADVISORY COMMITTEE
ON
APPELLATE RULES

Monterey, CA
April 10-11, 2008
Volume II

Agenda for Spring 2008 Meeting of
Advisory Committee on Appellate Rules
April 10-11, 2008
Monterey, CA

I. Introductions

II. Approval of Minutes of November 2007 Meeting

III. Report on January 2008 Meeting of Standing Committee

IV. Report on Responses to Letter to Chief Judges Regarding Circuit Briefing Requirements

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2. Item No. 01-03 (FRAP 26 – clarify operation of three-day rule)

3. Item No. 07-AP-B (Proposed new FRAP 12.1 concerning indicative rulings)

4. Item No. 05-06 (FRAP 4(a)(4)(B)(ii) — amended NOA after favorable or insignificant change to judgment)

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* N.B.: The public comments are summarized in the relevant memos; the full text of the comments can be found behind the tab at the back of this volume.

B. Item No. 07-AP-E (issues relating to *Bowles v. Russell* (2007))

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D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

E. Item No. 07-AP-F (amend FRAP 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by FRAP 40(a)(3) with respect to responses to requests for panel rehearing)

F. Item No. 07-AP-G (amend FRAP Form 4 to conform to privacy requirements)**

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B. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

C. 08-AP-B (FRAP 28.1 – word limits in connection with cross-appeals)

VIII. Schedule Date and Location of Fall 2008 Meeting

IX. Adjournment

** N.B.: As explained in the enclosed materials, Committee action may be requested on Item No. 07-AP-G.

MEMORANDUM

DATE: March 27, 2007

TO: Advisory Committee on Appellate Rules

CC: Reporters and Advisory Committee Chairs

FROM: Catherine T. Struve

RE: Item No. 07-AP-B: Proposed Appellate Rule on indicative rulings

This memo considers possible options for a proposed Appellate Rule 12.1 that would reflect the procedure to be followed when a district court is asked for relief that it lacks authority to grant due to a pending appeal. If the Appellate Rules Committee approves the proposed Rule, the goal would be to seek permission to publish the proposed Rule for comment this summer, along with proposed Civil Rule 62.1.

I. History of the proposal

In March 2000, the Solicitor General proposed that the Appellate Rules Committee consider adopting a new Appellate Rule 4.1 to address the practice of indicative rulings.[1] The Department of Justice argued that a FRAP rule on this topic would promote awareness of the possibility of indicative rulings; would ensure that the possibility was available in all circuits; and would render the relevant procedures uniform throughout the circuits.[2] The Appellate Rules Committee discussed the proposal at its April 2000 meeting and retained the matter on its study agenda. At the April 2001 meeting, the Committee concluded that the DOJ's proposal should be referred to the Civil Rules Committee, on the ground that any such rule would more appropriately be placed in the Civil Rules.[3]

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[1] *See* Minutes of the Advisory Committee on Appellate Rules, April 13, 2000.

[2] *See id.*

[3] *See* Minutes of the Advisory Committee on Appellate Rules, April 11, 2001.

At its May 2006 meeting, the Civil Rules Committee approved a recommendation to publish for comment a new Civil Rule 62.1 concerning indicative rulings. Though the Committee decided not to request publication in summer 2006, it reported on the proposal at the Standing Committee's June 2006 meeting; at that meeting, there was some discussion of the placement and caption of the proposed Civil Rule. Further discussion of the proposed Civil Rule took place at the Standing Committee's January 2007 meeting, and the Standing Committee has asked the Appellate Rules Committee to consider adopting an Appellate Rules provision that recognizes the Civil Rule 62.1 procedure. The Standing Committee has asked the Civil and Appellate Rules Committees to coordinate so that the provisions concerning indicative rulings will dovetail and will be published for comment simultaneously. A copy of the current draft of proposed Civil Rule 62.1 is enclosed.

In February 2007, we asked Fritz Fulbruge for his input (and that of his fellow circuit clerks) on the indicative-ruling proposal. His memo – which reports his thoughts and those of the D.C. Circuit and Third Circuit clerks – is attached. Fritz reports that overall the clerks do not seem enthusiastic about the proposed rule, in part because "the appellate courts are satisfied with leaving the issue at rest because of locally developed procedures." Mark Langer, the D.C. Circuit clerk, states: "I prefer not to have any rule. We handle things pretty well here without a rule." Despite their doubts about the necessity of a national rule, however, Fritz and the two other clerks who commented on the proposal have provided very helpful insights, which I have attempted to incorporate into this memo and the proposed Rule and Note.

II. Current circuit practices concerning indicative rulings

Ordinarily, "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).[4] Thus, in civil cases the pendency of an appeal limits the district court's possible dispositions of a motion for relief from the judgment under

[4] *See also In re Jones*, 768 F.2d 923, 931 (7th Cir. 1985) (Posner, J., concurring) ("The purpose of the rule is to keep the district court and the court of appeals out of each other's hair....").

Rule 60(b).[5] The court has three options: (1) deny the motion,[6] (2) defer consideration of the

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[5] By pendency of an appeal, I mean to refer to instances when the notice of appeal has become effective. A Civil Rule 60(b) motion that is filed no later than 10 days after entry of judgment tolls the time for taking an appeal, and a notice of appeal filed before the disposition of such a motion does not "become[] effective" until the entry of the order disposing of the motion. Appellate Rule 4(a)(4)(B)(i).

[6] *See Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit...."); *Hyle v. Doctor's Assocs., Inc.*, 198 F.3d 368, 372 n.2 (**2d Cir.** 1999) ("Like most circuits ... , we have recently recognized the power of a district court to *deny* a Rule 60(b) motion after the filing of a notice of appeal from the judgment sought to be modified, *see, e.g., Selletti v. Carey*, 173 F.3d 104, 109 (2d Cir. 1999); *Toliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992), notwithstanding an earlier contrary authority, *see Weiss v. Hunna*, 312 F.2d 711, 713 (2d Cir. 1963), which had previously been cited with apparent approval, *see New York State National Organization for Women*, 886 F.2d 1339, 1349-50 (2d Cir. 1989); *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 107 (2d Cir. 1981)."); *United States v. Contents of Accounts Numbers 3034504504 and 144-07143 at Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 988 (**3d Cir.** 1992); *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("[W]hen a Rule 60(b) motion is filed while a judgment is on appeal, the district court has jurisdiction to entertain the motion, and should do so promptly. If the district court determines that the motion is meritless, as experience demonstrates is often the case, the court should deny the motion forthwith; any appeal from the denial can be consolidated with the appeal from the underlying order."); *Karaha Bodas Co. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order."); *Kusay v. United States*, 62 F.3d 192, 195 (**7th Cir.** 1995) ("Many cases, including *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984), say that a district court may deny, but not grant, a post-judgment motion while an appeal is pending. *Cronic* involved a motion for a new trial under Fed.R.Crim.P. 33, but the principle is general."); *Hunter v. Underwood*, 362 F.3d 468, 475 (**8th Cir.** 2004) ("Our case law ... permits the district court to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending in this court ...."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[D]istrict courts retain jurisdiction after the filing of a notice of appeal to entertain and deny a Rule 60(b) motion.").

The Supreme Court has stated in passing that "the pendency of an appeal does not affect the district court's power to grant Rule 60 relief." *Stone v. I.N.S.*, 514 U.S. 386, 401 (1995). But

motion,[7] or (3) indicate its inclination to grant the motion and await a remand from the Court of Appeals for that purpose.[8] The district court's options are further limited within the Ninth

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a number of courts "have explicitly recognized that the statement in *Stone* is dicta and thus have not modified their similar Rule 60(b) approach." *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 331 (5th Cir. 2004) (adopting this view).

[7] *Cf. LSJ Inv. Co. v. O.L.D., Inc.*, 167 F.3d 320, 324 (6th Cir. 1999) (holding that although Sixth Circuit "cases allow the court to entertain a motion for relief even while an appeal is pending, they do not require the court to do so. Once the defendants appealed, it was not erroneous for the district court to let the appeal take its course.").

Some circuits, however, have suggested that deferral is generally inappropriate. *See, e.g.*, *Puerto Rico v. SS Zoe Colocotroni*, 601 F.2d 39, 42 (**1st Cir.** 1979) ("[W]hen an appeal is pending from a final judgment, parties may file Rule 60(b) motions directly in the district court without seeking prior leave from us. The district court is directed to review any such motions expeditiously, within a few days of their filing, and quickly deny those which appear to be without merit....").

[8] *See Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891 (**4th Cir.** 1999) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. The movant can then request a limited remand from this court for that purpose."); *Karaha Bodas Co., L.L.C. v. Perusahaan Perambangan Minyak Dan Gas Bumi Negara*, No. 02-20042, 2003 WL 21027134, at *4 (**5th Cir.** 2003) (unpublished per curiam opinion) ("If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order."); *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 364 (**6th Cir.** 2001) ("Where a party seeks to make a motion under Fed.R.Civ.P. 60(b) to vacate the judgment of a district court, after notice of appeal has been filed, the proper procedure is for that party to file the motion in the district court. . . . If the district judge was inclined to grant the motion, he or she could enter an order so indicating; and, the party could then file a motion in the Court of Appeals to remand."); *Kusay v. United States* , 62 F.3d 192, 195 (**7th Cir.** 1995) ("A district judge disposed to alter the judgment from which an appeal has been taken must alert the court of appeals, which may elect to remand the case for that purpose."); *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303, 1312 (**8th Cir.** 1977) ("If, on the other hand, the district court decides that the motion should be granted, counsel for the movant should request the court of appeals to remand the case so that a proper order can be entered."); *Mahone v. Ray*, 326 F.3d 1176, 1180 (**11th Cir.** 2003) ("[A] district court presented with a Rule 60(b) motion after a notice of appeal has been filed should consider the motion and assess its merits. It may then deny the motion or indicate its belief that the arguments raised are meritorious. If the district court selects the latter course, the movant may then petition the court of appeals to remand the matter so as to confer jurisdiction on the district court to grant the motion."); *Hoai v. Vo*, 935 F.2d 308, 312 (**D.C. Cir.** 1991)

Circuit, because that circuit takes the view that the district court lacks power to deny a Rule 60(b) motion while an appeal is pending.[9] Though the Ninth Circuit thus diverges from other circuits on the question of whether a district court can deny such a motion without a remand, its indicative-ruling procedure seems fairly similar, in other respects, to that in other circuits.[10]

Local rules or practices addressing the practice of indicative rulings currently exist in the Sixth,[11] Seventh[12] and D.C.[13] Circuits. I was unable to find local rules or handbook provisions

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("[W]hen both a Rule 60(b) motion and an appeal are pending simultaneously . . . . the District Court may consider the 60(b) motion and, if the District Court indicates that it will grant relief, the appellant may move the appellate court for a remand in order that relief may be granted.").

[9] *See Smith v. Lujan*, 588 F.2d 1304, 1307 (**9th Cir.** 1979).

That the Sixth Circuit might take this view is suggested by its statement that the pendency of an appeal deprived the district court of jurisdiction to decide a Rule 60(b) motion. *See S.E.C. v. Johnston*, 143 F.3d 260, 263 (6th Cir. 1998), *abrogated on other grounds by Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 16 (2004).

[10] *See, e.g., Williams v. Woodford*, 384 F.3d 567, 586 (9th Cir. 2004).

[11] Sixth Circuit Rule 45 provides in relevant part:

> Duties of Clerks--Procedural Orders
> (a) Orders That May be Entered by Clerk. The clerk may prepare, sign and enter orders or otherwise dispose of the following matters without submission to this Court or a judge, unless otherwise directed:
> ...
> (7) Orders granting remands and limited remands for the purpose of allowing the district court to grant a particular relief requested by a party and to which no other party has objected, or where the parties have moved jointly, where such motion is accompanied by the certification of the district court pursuant to *First National Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

The procedure set by *First National Bank* is as follows: "[T]he party seeking to file a Rule 60(b) motion ... should ... file[] that motion in the district court. If the district judge is disposed to grant the motion, he may enter an order so indicating and the party may then file a motion to remand in this court." *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976).

[12] Seventh Circuit Rule 57 provides:

> Circuit Rule 57. Remands for Revision of Judgment
> A party who during the pendency of an appeal has filed a motion under

concerning indicative rulings in the other Circuits. The reason may be that, as Fritz reports, the indicative-ruling procedure is not often used; Fritz estimates that in the Fifth Circuit such requests surface only about 30 times per year.

III. Questions to be addressed

It is fairly straightforward to draft a rule that parallels the proposed Civil Rule 62.1. However, a number of questions suggest themselves. This section considers those questions.

Parts III.A. and III.B. observe that the indicative-ruling procedure is also employed in the criminal context and (at least occasionally) in the bankruptcy context. Accordingly, I have

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Fed. R. Civ. P. 60(a) or 60(b), Fed. R. Crim. P. 35(b), or any other rule that permits the modification of a final judgment, should request the district court to indicate whether it is inclined to grant the motion. If the district court so indicates, this court will remand the case for the purpose of modifying the judgment. Any party dissatisfied with the judgment as modified must file a fresh notice of appeal.

[13] D.C. Circuit Handbook of Practice and Internal Procedures VIII.E. provides:

E. Motions for Remand
(*See* D.C. Cir. Rule 41(b).)

Parties may file a motion to remand either the case or the record for a number of reasons, including to have the district court or agency reconsider a matter, to adduce additional evidence, to clarify a ruling, or to obtain a statement of reasons. The Court also may remand a case or the record on its own motion.

If the *case* is remanded, this Court does not retain jurisdiction, and a new notice of appeal or petition for review will be necessary if a party seeks review of the proceedings conducted upon remand. *See* D.C. Cir. Rule 41(b). In general, a remand of the case occurs where district court or agency reconsideration is necessary. *See, e.g., Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988); *Siegel v. Mazda Motor Co.*, 835 F.2d 1475 (D.C. Cir. 1987). By contrast, if only the record is remanded, such as where additional fact-finding is necessary, this Court retains jurisdiction over the case. *See* D.C. Cir. Rule 41(b).

It is important to note that where an appellant, either in a criminal or a civil case, seeks a new trial on the ground of newly discovered evidence while his or her appeal is pending, or where other relief is sought in the district court, the appellant must file the motion seeking the requested relief in the district court. *See Smith v. Pollin*, 194 F.2d 349, 350 (D.C. Cir. 1952); Fed. R. Crim. P. 33; Fed. R. Civ. P. 60. If that court indicates that it will grant the motion, the appellant should move this Court to remand the case to enable the district court to act. *See Smith v. Pollin*, 194 F.2d at 350.

drafted the proposed Rule to encompass contexts other than those implicated by proposed Civil Rule 62.1.

Part III.C. discusses the dangers that would arise from an unconditional remand; in particular, such a remand creates the risk that the district court will deny the motion for postjudgment relief and the movant will have lost the opportunity to challenge the underlying judgment. For this reason, I have added language to the Note urging that a limited remand will often be the preferable course. Part III.C. also considers the choice between requiring an indication that the district court "might" grant the motion and requiring a statement that it "would" grant the motion in the event of a remand.

Part III.D. notes that it may be useful to alert practitioners to the need for a new notice of appeal to challenge any denial of a motion for postjudgment relief; this observation is included in the draft Note. Part III.E. considers the Rule's reference to an appeal that "has been docketed and is pending," and discusses whether docketing is the appropriate point of demarcation in this context. Part III.F. discusses which events should trigger a duty to notify the court of appeals, and also considers whether the Rule or Note should address the logistics of communications by the parties and the district court to the court of appeals. Part III.G. lists alternative numbering possibilities for the draft Rule.

A. Should the Appellate Rule encompass remands in criminal cases?

The indicative-ruling process on the criminal side appears to be roughly similar to that envisioned in proposed Civil Rule 62.1. When a new trial motion under Criminal Rule 33[14] is made during the pendency of an appeal, "[t]he District Court ha[s] jurisdiction to entertain the motion and either deny the motion on its merits, or certify its intention to grant the motion to the Court of Appeals, which [can] then entertain a motion to remand the case." *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).[15]

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[14] Criminal Rule 33(b)(1) explicitly notes the need for a remand before the district court can grant a motion for a new trial: "If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."

[15] *See U.S. v. Graciani*, 61 F.3d 70, 77 (**1st Cir.** 1995) (adopting this procedure); *U.S. v. Camacho*, 302 F.3d 35, 36-37 (**2d Cir.** 2002) (citing *Cronic* and stating that "the district court retains jurisdiction to deny a Rule 33 motion during the pendency of an appeal, even though it may not grant such motion unless the Court of Appeals first remands the case to the district court"); *U.S. v. Fuentes-Lozano*, 580 F.2d 724, 726 (**5th Cir.** 1978) (per curiam) ("A motion for a new trial may be presented directly to the district court while the appeal is pending; that court may not grant the motion but may deny it, or it may advise us that it would be disposed to grant the motion if the case were remanded. Alternatively, as here, to avoid delay, the appellant may seek a remand for the purpose of permitting the district court fully to entertain the motion."); *U.S.*

Under the current rules,[16] a pending appeal affects motions under Criminal Rule 35(a) differently than motions under Rule 35(b). It appears that the district court lacks jurisdiction to

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v. Phillips, 558 F.2d 363, 363-64 (**6th Cir.** 1977) (per curiam) ("[T]he proper procedure for a party wishing to make a motion for a new trial while appeal is pending is to first file the motion in the district court. If that court is inclined to grant the motion, it may then so certify, and the appellant should then make a motion in the court of appeals for a remand of the case to allow the district court to so act."); *U.S. v. Frame*, 454 F.2d 1136, 1138 (**9th Cir.** 1972) (per curiam) ("By necessary implication, Rule 33 permits a district court to entertain and deny a motion for a new trial based upon newly discovered evidence without the necessity of a remand. Only after the district court has heard the motion and decided to grant it is it necessary to request a remand from the appellate court."); *Garcia v. Regents of Univ. of Ca.*, 737 F.2d 889, 890 (**10th Cir.** 1984) (per curiam) ("It is settled that under Rule 33 of the Federal Rules of Criminal Procedure a district court may entertain a motion for new trial during the pendency of an appeal, although the motion may not be granted until a remand request has been granted by the appellate court.").

[16] The caselaw concerning motions under Criminal Rule 35 is complicated because of courts' readings of a previous version of the Rule. Prior to the enactment of the Sentencing Reform Act of 1984, Rule 35(a) stated that "[t]he court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence." Applying that Rule, the Ninth Circuit held that "the trial court retains jurisdiction to correct [a] sentence under Rule 35(a) while [an] appeal is pending." *Doyle v. U.S.*, 721 F.2d 1195, 1198 (9th Cir. 1983). Congress's amendment to Rule 35(a), however, led the Ninth Circuit to change its approach and hold that the district court lacked jurisdiction to grant Rule 35(a) relief during an appeal, because the amended Rule 35 provided "that district courts are to 'correct a sentence that is determined on appeal ... to have been imposed in violation of law, ... upon remand of the case to the court.'" *U.S. v. Ortega-Lopez*, 988 F.2d 70, 72 (9th Cir. 1993).

modify a final judgment under Rule 35(b)[17] while an appeal from that judgment is pending.[18] Appellate Rule 4(b), however, explicitly provides that the district court may correct a sentence under Rule 35(a) despite the pendency of an appeal.[19]

Two of the three circuits that have provisions addressing indicative rulings address them in the criminal as well as civil context: The Seventh Circuit's rule addresses motions to reduce a sentence under Criminal Rule 35(b), while the D.C. Circuit's Handbook addresses motions for a new trial based on newly discovered evidence under Criminal Rule 33. As noted above, the current draft Rule is drafted so as to encompass the criminal context; and the Note refers to the procedure described in *Cronic*.

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[17] *See, e.g., U.S. v. Campbell*, 40 Fed.Appx. 663, 664 (**3d Cir.** 2002) (nonprecedential opinion) ("After the filing of the original notice of appeal, this Court assumed exclusive jurisdiction over the subject matter of the appeal . . . , and the District Court lost jurisdiction to consider a Rule 35 motion. . . . It was for that reason that the parties . . . sought a summary remand to the District Court to permit disposition of the government's motion."); *U.S. v. Bingham*, 10 F.3d 404, 405 (**7th Cir.** 1993) (per curiam) ("Where a party moves for sentence reduction under Rule 35(b) during the pendency of an appeal, it must request that the district court certify its inclination to grant the motion. If the district court is inclined to resentence the defendant, it shall certify its intention to do so in writing. The government (or the parties jointly) may then request that we remand by way of a motion that includes a copy of the district court's certification order.").

[18] This approach accords with the view expressed by the Supreme Court prior to the adoption of the Criminal Rules. *See Berman v. U.S.*, 302 U.S. 211, 214 (1937) ("As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner.").

[19] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." The brevity of Rule 35(a)'s 7-day deadline helps to avoid scenarios in which the district court and court of appeals are both acting with respect to the same judgment. *Cf.* 1991 Advisory Committee Note to Rule 35 ("The Committee believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal and to provide the parties with an opportunity to address the court's correction of the sentence, or lack thereof, in any appeal of the sentence.").

B. Should the Appellate Rule encompass remands in bankruptcy cases?

Ordinarily, appeals from bankruptcy court decisions are taken to the district court,[20] or to a bankruptcy appellate panel where such a panel exists.[21] Such appeals are governed by Part VIII of the Bankruptcy Rules.[22] Final decisions on such appeals are appealable, in turn, to the Court of Appeals,[23] and the Appellate Rules apply to the proceedings in the Court of Appeals.[24] The intermediate step may be bypassed – and an appeal taken directly the Court of Appeals from a bankruptcy court decision – if the requirements of 28 U.S.C. § 158(d)(2) are met.[25] Under the temporary procedures that currently govern such direct appeals, the Appellate Rules would

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[20] See 28 U.S.C. § 158(a).

[21] *See* 28 U.S.C. § 158(b).

[22] *See* Bankruptcy Rule 8001 et seq.; *see also* Bankruptcy Rule 8018(a)(1) ("Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may, acting by a majority of the judges of the council or district court, make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court consistent with--but not duplicative of--Acts of Congress and the rules of this Part VIII.").

[23] *See* 28 U.S.C. § 158(d)(1).

[24] *See* 1983 Advisory Committee Note to Bankruptcy Rule 8001.

[25] Section 158(d)(2) provides in part:

> (2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that--
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> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
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> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
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> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
>
> and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

generally apply.[26]

At least one Bankruptcy Appellate Panel has indicated that the indicative-ruling process followed in the Civil Rule 60(b) context applies equally when Rule 60(b) relief is sought from a bankruptcy court after an appeal has been taken to the district court from the bankruptcy court's decision. *In re Lafata*, 344 B.R. 715, 722 (B.A.P. 1st Cir. 2006) ("Clearly, under the law of *Zoe Colocotroni*, the bankruptcy court had jurisdiction to consider a Rule 60(b) motion filed during the pendency of an appeal of the December 8th orders."). But in *Lafata*, because the district court had decided the appeal, a request for Rule 60(b) relief in the bankruptcy court was improper. *See id.* at 723 ("Eastern cannot attempt to avoid the decision of the District Court through the use of a Rule 60(b) motion in the bankruptcy court, and a subsequent appeal to the Panel.").

From skimming through the cases on the indicative-ruling procedure, I get the impression that it may not be quite as widely used in the bankruptcy context. None of the three extant circuit provisions addresses its use in bankruptcy litigation. Accordingly, though the draft Rule should be broad enough to encompass such uses, the Note does not specifically refer to them.

C. "Might" versus "would" and the nature of the remand

As demonstrated by the recent discussions concerning proposed Civil Rule 62.1, arguments can be made for both the position that an indicative ruling must indicate that the district court "would" grant the relevant motion, and the position that the ruling can indicate either that the court "would" grant it or that the court "might" grant it. District courts may prefer the option of saying "might," since it means the district court need not fully analyze the motion unless and until the court of appeals remands; courts of appeals, by contrast, may prefer not to be asked to remand unless the district court has taken the trouble to determine whether it actually would grant the motion.[27] The Civil Rules Committee has discussed the choice between "might"

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[26] *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, Title XII, § 1233(b), Apr. 20, 2005, 119 Stat. 203 (2005).

[27] One case from the Second Circuit suggests that the court is unwilling to remand unless the district court states its *intent to grant* the motion. Thus, writing of Criminal Rule 33 motions, the court explained: "If the district court decides to grant the Rule 33 motion, the district court may then signal its intention to this Court. . . . Only when presented with evidence of the district court's willingness to grant a Rule 33 motion will we remand the case." *U.S. v. Camacho*, 302 F.3d 35, 36-37 (2d Cir. 2002).

Sixth Circuit Rule 45 refers to the *First National Bank* case, which provides for remands after the district judge enters an order indicating that he or she "is disposed to grant the motion." *First National Bank*, 535 F.2d at 346. The D.C. Circuit Handbook refers to remands after the

and "would" at length, and is considering the possibility of using "might or would" in the version of proposed Rule 62.1 that is published for comment, in order to solicit comment on the choice.

The three circuit clerks who reviewed the proposed rule varied in their responses on this question. Marcie Waldron, the Third Circuit clerk, initially suggested: "[I]t is better to say 'might' than 'would.' Sometimes it's just that the 60(b) motion is substantial enough that the judge wants to have briefing." Her later email also seems to come out in favor of "might"; she points out that when a case has been calendared or argued, the appellate judges would rather get earlier notice "that there was a possibility of a change in the district court's decision."[28]

By contrast, Mark Langer, the D.C. Circuit clerk, objects to the choice of "might" because it "would really change the way we do business here. Our district judges, or the parties, only ask for this kind of remand when the district judge 'would' grant the post-judgment relief." Fritz agrees that "would" is preferable to "might," since the latter would increase the burden on the appellate clerks.

Even if one is agnostic on this question, it underscores the need for care in dealing with a related issue: the scope of the remand. In a system where a remand can occur after the district court indicates merely that it "might" grant the requested postjudgment relief, an unconditional remand can be dangerous for the appellant.[29] Since the time to file a notice of appeal from the

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district court "indicates that it will grant the motion." Seventh Circuit Rule 57 concerns remands after the district court indicates that it is "inclined to grant the motion." The Seventh Circuit in *Boyko* suggested that a limited remand (for the purpose of further consideration of the motion) may be appropriate if the district judge thinks there is "some chance that he would grant the Rule 60(b) motion ...." *Boyko*, 185 F.3d at 675.

[28] The latter point might also be a reason for requiring the movant to notify the circuit clerk when the motion is made in the district court, but, as noted in Part III.F. below, Ms. Waldron does not support such a requirement.

[29] *Cf. U.S. v. Siviglia*, 686 F.2d 832, 837-38 (10th Cir. 1982) (en banc) (per curiam) ("We find nothing in Siviglia's motion to remand to indicate that he sought only a partial or limited remand in order to preserve the direct appeal of his conviction should the district court deny his motion for dismissal or new trial. On the contrary, Siviglia advised the Court in his motion to remand that should the district court deny his motion for dismissal or new trial, he intended to appeal "such denial," which he did. Accordingly, the motion for remand, in practical effect, constituted an abandonment of any appeal going to the merits of his conviction. In this connection, our examination of Siviglia's brief addressing the merits of his second conviction indicate quite clearly that his grounds for reversal are unsubstantial. So, the motion for remand indicates, to us, that Siviglia was staking all on his ability to convince the district court that the charges against him should either be dismissed, or that he should be granted a new trial thereon, or, absent that, a reversal on appeal of any such denial order.").

initial judgment will certainly have run by the time the district court (on remand) rules on the motion for postjudgment relief, the movant will have no opportunity to revive the appeal (by filing a new notice of appeal from the underlying judgment) in the event that the district court denies the postjudgment motion. Though the movant can appeal the denial of postjudgment relief, "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Browder v. Dir., Dep't of Corr. of Ill.*, 434 U.S. 257, 263 n.7 (1978).[30]

Such considerations may well explain why some circuits provide for a "limited remand" to enable the district court to rule on the motion in question. *See, e.g., Fobian*, 164 F.3d at 892 (discussing Fourth Circuit approach); *Karaha Bodas*, 2003 WL 21027134, at *4 (discussing Fifth Circuit approach); *U.S. v. Work Wear Corp.*, 602 F.2d 110, 114 (6th Cir. 1979) ("This Court granted a limited remand to the district court to allow presentation of the Rule 60(b)(6) motion."); *Chisholm v. Daniel*, No. 89-16430, 1992 WL 102562, at **2 n.1 (9th Cir. 1992) (unpublished opinion) ("This court granted Hwang a limited remand for the district court to decide the Rule 60(b) motion."); *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1113 n.21 (9th Cir. 1989) ("The proper procedure in such a situation is to ask the district court for an indication that it is willing to entertain a Rule 60(b) motion. If the district court gives such an indication, then the party should make a motion in the Court of Appeals for a limited remand to allow the district court to rule on the motion."); *Rogers v. Fed. Bureau of Prisons*, 105 Fed.Appx. 980, *982 (10th Cir. 2004) (unpublished opinion) ("[W]e issued a limited remand so the District Court could consider the Rule 60(b) motion. We further noted our intention to remand the entire matter if the District Court decided to grant the Rule 60(b) motion ....").

Seventh Circuit Rule 57 purports to require that the court of appeals must remand all proceedings, rather than remanding for a limited purpose. Writing in the context of request for

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[30] Thus, the Seventh Circuit has observed that an "unlimited remand may not be a completely satisfactory solution" for litigants:

> Suppose that the district court, on remand, thinks better of it's inclination to grant the Rule 60(b) motion, and denies it; is the plaintiff remitted to the limited appellate review conventionally accorded rulings on such motions? And what about the defendant in a case in which the Rule 60(b) motion is granted before he has had a chance to argue to the appellate court that the original judgment was correct-- is he, too, remitted to the limited appellate review of such grants? Probably the answer to both questions is "no," the scope of review of Rule 60(b) orders is flexible and can be expanded where necessary to give each party a full review of the district court's original judgment.

Boyko v. Anderson, 185 F.3d 672, 674 (7th Cir. 1999). The *Boyko* court's suggestion that the scope of appellate review of the Rule 60(b) order can "probably" be extended to encompass a full review of the original judgment hardly seems like an unequivocal assurance that unconditional remands are safe for the would-be appellant.

relief under Civil Rule 60(b), the court explained that partial remands were inappropriate "because the grant of the Rule 60(b) motion operates to vacate the original judgment, leaving nothing for the appellate court to do with it – in fact mooting the appeal." *Boyko v. Anderson*, 185 F.3d 672, 673-74 (7th Cir. 1999). However, the Seventh Circuit does not actually bar the use of limited remands; in that circuit, a limited remand would be the appropriate device when the district court has indicated that it might (rather than would) grant the relevant motion:

> [I]f the judge thought there was some chance that he would grant the Rule 60(b) motion, but he needed to conduct an evidentiary hearing in order to be able to make a definitive ruling on the question, he should have indicated that this was how he wanted to proceed. Boyko would then have asked us to order a limited remand to enable the judge to conduct the hearing. If after the hearing the judge decided (as we know he would have, since he did) that he did want to grant the Rule 60(b) motion, he should have so indicated on the record and Boyko would then have asked us to remand the case to enable the judge to act on the motion and we would have done so.

Boyko, 185 F.3d at 675.

In a similar vein, the Tenth Circuit has observed that the court of appeals has three options when faced with a request to remand so that the district court can consider a request for Rule 60(b) relief:

> [T]his court, confronted with the motion to remand before the trial court has heard the motion for a new trial pursuant to Rule 60(b), has three alternatives: (1) it can remand unconditionally as was done in *Siviglia* but at great risk to the appellant; (2) it can partially remand for consideration of the motion for new trial, retaining jurisdiction over the original appeal and consolidating any subsequent appeal from action on the motion for new trial after the trial court has acted; or (3) it can deny the motion to remand without prejudice, permitting the parties to proceed before the trial court on the motion, and grant a renewed motion to remand after the trial court has indicated its intent to grant the motion for a new trial. If the trial court denies the motion for new trial, it can do so without a remand from this court and appeal may be taken therefrom and consolidated with the original appeal if still pending.

Garcia v. Regents of Univ. of Ca., 737 F.2d 889, 890 (10th Cir. 1984) (per curiam). The court of appeals held that the last of the three options was the appropriate choice "unless the appellant indicates a clear intent to abandon the original appeal." *Id.*

These considerations indicate that the better practice is to exercise caution in setting the terms of the remand. If the district court has stated merely that it "might" grant the relevant motion, then an unconditional remand would be perilous for the appellant; in such cases, the

court of appeals should not grant an unconditional remand unless the appellant has clearly stated its intent to abandon the appeal. By contrast, if the rule requires that the district court state that it "would" grant the motion, one could perhaps, in some cases, follow a simpler procedure: The court of appeals could then remand for the purpose of allowing the district court to grant the motion. Arguably – because the motion is to be granted – the remand could be a full rather than a limited remand. But it still seems prudent for the unlimited nature of the remand to be conditional upon the grant of the motion; otherwise, if the district court were to change its mind and deny the motion, the appellant might be left without an opportunity to revive her appeal from the original judgment. Moreover, in some instances the court of appeals might wish to limit the remand so that it can proceed with the initial appeal even after the district court has granted relief on remand; the Note acknowledges this possibility.

D. Should the rule address whether a dissatisfied party must file a fresh notice of appeal with respect to action taken by the district court?

It may be worthwhile to include in the Committee Note some observations concerning notices of appeal.[31] In a circuit that shares the majority view that a pending appeal does not prevent a district court from *denying* a Civil Rule 60(b) motion,[32] the movant must make sure to take an appeal from such a denial in order to preserve the right to challenge the denial on appeal.[33] Likewise, "where a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals." *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990).

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[31] Both the Seventh Circuit rule and the D.C. Circuit handbook provision address this issue.

[32] *See, e.g., Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890 (4th Cir. 1999) ("If a Rule 60(b) motion is frivolous, a district court can promptly deny it without disturbing appellate jurisdiction over the underlying judgment. Swift denial of a Rule 60(b) motion permits an appeal from that denial to be consolidated with the underlying appeal.").

[33] *See Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial).

E. Is docketing the right demarcation with respect to the transfer of jurisdiction from the district court to the court of appeals?

The draft Rule refers to motions the district court lacks authority to grant "because of an appeal that has been docketed and is pending." One question this suggests is how courts handle requests for postjudgment relief during the period between the filing of the notice of appeal and the docketing of the appeal.

Appeals as of right from the district court[34] are taken by filing a notice of appeal in the district court.[35] The district clerk "must promptly send a copy of the notice of appeal and of the docket entries ... to the clerk of the court of appeals."[36] Upon receiving these items, "the circuit clerk must docket the appeal."[37] Appeals by permission entail a petition for permission to appeal.[38] If permission is granted, no notice of appeal is necessary.[39] Once the district clerk notifies the circuit clerk that the petitioner has paid the required fees, "the circuit clerk must enter the appeal on the docket."[40]

The Fourth Circuit has held that in at least some circumstances the district court can grant relief from the judgment after the filing of the notice of appeal but prior to the docketing of the appeal.[41] Dictum in some other opinions suggests that docketing is the time when jurisdiction

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[34] The procedure appears generally similar, in pertinent respects, for appeals from district courts or bankruptcy appellate panels exercising appellate jurisdiction in bankruptcy cases. *See* Appellate Rule 6(b)(1).

[35] *See* Appellate Rule 3(a).

[36] *See* Appellate Rule 3(d)(1).

[37] *See* Appellate Rule 12(a).

[38] *See* Appellate Rule 5(a).

[39] *See* Appellate Rule 5(d)(2).

[40] *See* Appellate Rule 5(d)(3).

[41] *See Williams v. McKenzie*, 576 F.2d 566, 570 (4th Cir. 1978) ("We hold that on the facts of this particular case, and especially since the appeal was not docketed in this court at the time the district judge reopened the habeas hearing for the taking of additional testimony, that the entertainment of the F.R.C.P. 60(b)(2) motion was appropriate."); *see also Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 891-92 (4th Cir. 1999) (citing *Williams* with approval).

passes to the court of appeals.[42] Additional support for this view might, arguably, be gleaned from the role that docketing of the appeal plays with respect to motions under Rule 60(a). The docketing of the appeal demarcates the time after which the court of appeals' permission is necessary in order for the district court to correct clerical errors under Rule 60(a). To the extent that the choice of docketing as the demarcation point reflects the view that a court of appeals is unlikely to expend effort on an appeal before it is docketed,[43] similar reasoning would support the use of docketing to demarcate the time after which a remand is necessary in order for the district court to grant relief under Rule 60(b).[44] However, a possible counter-argument is that 60(b) relief can have a more significantly disruptive effect on the appeal than 60(a) relief, and therefore that more caution is called for – perhaps weighing in favor of using the filing of the notice of appeal as the cutoff time. Marcie Waldron points out that Appellate Rule 42(a) – which permits the district court to dismiss an appeal before the appeal "has been docketed by the circuit clerk" – provides additional support for the notion that docketing is the relevant demarcation for the shift from district court to appellate court authority.

In contrast to the Fourth Circuit's approach, some other circuits have indicated that it is the filing of the notice of appeal (and thus presumably not the later docketing of the appeal) that demarcates when jurisdiction passes from the trial to the appellate court.[45] Some of these courts echo the *Griggs* Court's statement that "[t]he filing of a notice of appeal is an event of jurisdictional significance--it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs*, 459 U.S. at

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[42] *See Azzeem v. Scott*, No. 98-40347, 1999 WL 301363, at *1 (5th Cir. 1999) (unpublished opinion) ("A district court is divested of jurisdiction upon the docketing in this court of a timely filed notice of appeal.").

[43] *Cf., e.g., In re Modern Textile, Inc.*, 900 F.2d 1184, 1193 (8th Cir. 1990) ("The underlying purpose of this rule, we believe, is to protect the administrative integrity of the appeal, i.e., to ensure that the issues on appeal are not undermined or altered as a result of changes in the district court's judgment, unless such changes are made with the appellate court's knowledge and authorization.").

[44] Some courts have reasoned from this aspect of Rule 60(a) to conclude that the docketing of the appeal marks the passing of jurisdiction from the lower to the appellate court. *See, e.g., Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 932 (9th Cir. 1999) ("When Television Espanola's appeal of the district court's decision was docketed with the Ninth Circuit on October 22, 1997, the district court lost jurisdiction to review its October 6 entry of judgment.").

[45] *See, e.g., Kusay v. U.S.*, 62 F.3d 192, 194 (7th Cir. 1995) ("Just as the notice of appeal transfers jurisdiction to the court of appeals, so the mandate returns it to the district court.").

58.[46] The view that filing the notice of appeal is the relevant time might also be supported by the fact that an appeal as of right is "taken" by filing the notice of appeal in the district court. Appellate Rule 3(a)(1).

Thus, my quick survey of the caselaw suggests that questions exist regarding the district court's power to grant relief from a judgment after the filing of the notice of appeal but before the docketing of the appeal in the court of appeals. One argument for using docketing as the point when jurisdiction passes from one court to another would presumably be that – at least in the case of appeals as of right – the court of appeals is unlikely to expend any time on an appeal before it is docketed. That may not be the case when it comes to appeals by permission, but there, too, the likelihood that the court of appeals would expend effort on the appeal between the grant of permission and the docketing of the appeal may be low.

The three circuit clerks who have commented on the proposed rule favor the use of docketing as the point of demarcation. Fritz has summarized their reasoning thus:

> Even after all the appellate courts convert to the appellate Case Management/Electronic Case Filing system, incarcerated pro se cases likely still will be processed with a lot of paper, so some of the benefits of electronic filing are lost. Even with electronic notice of the filing of an appeal at the district court there are issues. At present, some district courts require that notices be filed in paper; others merely "lodge" an electronic notice until a review is made and approval given by a district court clerk. When the notice of appeal is filed at the district court in electronic form there will still be delays before the appellate court actually enters the case on the appellate docket.

F. Issues regarding notification to the Court of Appeals

Proposed Civil Rule 62.1 requires the movant to notify the appellate clerk when the motion is filed and when the district court acts on the motion. The appellate clerks who reviewed the proposal, however, vigorously oppose the notion of requiring notification when requests are made or when the district court denies a request. As Marcie Waldron, the Third Circuit clerk, points out, "I don't want to be notified every time a 60(b) is filed. We only need to know if the district court wants to grant the motion." Fritz points out, moreover, that most indicative-ruling issues in the Fifth Circuit arise in cases involving pro se litigants, who "are not a dependable source of information." Accordingly, draft Rule 12.1(a) includes two bracketed options – one that requires notification when the motion is filed and when it is resolved, and another that

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[46] *See, e.g., Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985) ("As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal.").

requires notification only when the district court responds favorably to the motion. A parallel provision appears in proposed Civil Rule 62.1, and thus it will be important to coordinate with the Civil Rules Committee on this point.

Marcie Waldron does suggest, however, that notification would be useful, after a remand, when the district court has decided the motion:

> I think the proposed rule should state that the parties must notify the circuit clerk when the district court has decided the motion. Sometimes the district court resolution satisfies everyone and the appeal can go away, but no one bothers to let us know. (Some of our district courts are bad about sending supplemental records.) Or since we retain jurisdiction, if the 60b is denied, they don't always file a new Notice of Appeal and we never know to start the appeal up again.

(She notes, however, that "[t]his problem may evaporate with CM/ECF notifications.") Draft Rule 12.1(b) includes bracketed language that would implement this suggestion.

Another question concerns the mechanics of the procedure by which litigants and the district court communicate the required information to the court of appeals. The current draft Rule 12.1 does not specify the mechanics of those communications. Fritz notes that the circuit practices vary on this point, and suggests that it would be difficult to attain national uniformity with respect to these logistical details. Accordingly, the draft Rule does not specify the procedure for communicating the required information to the court of appeals, but the Note states that "[i]n accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b)."

G. Placement and title of the proposed rule

The DOJ's original proposal was that the rule be numbered 4.1; a Rule 4.1 would, of course, fall between the rules governing appeals as of right and appeals by permission. I have tentatively numbered the draft Rule "12.1" because that would place it at the end of the FRAP title concerning appeals from district court judgments or orders. Another possibility in the same title would be 8.1 (following Rule 8, which concerns stays or injunctions pending appeal). Other options would be in Title VII, concerning general provisions: 33.1 (following Rule 33 on appeal conferences); 42.1 (following Rule 42 on voluntary dismissal); or 49 (at the end of the title).

Rule 12.1 [Remand After an] Indicative Ruling by the District Court [on a Motion for Relief That Is Barred by a Pending Appeal]

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because an appeal has been docketed and is pending, the movant must notify the circuit clerk [when the motion is filed and when the district court acts on it] [if the district court states that it [might or] would grant the motion].

(b) Remand After an Indicative Ruling. If the district court states that it [might or] would grant the motion, the court of appeals may remand for further proceedings [and, if it remands, may retain jurisdiction of the appeal] [but retains jurisdiction [of the appeal] unless it expressly dismisses the appeal]. [If the court of appeals remands but retains jurisdiction, the parties must notify the circuit clerk when the district court has decided the motion on remand.]

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts and generalizes the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot on its own reclaim the case to grant relief under a rule such as Civil Rule 60(b). But it can entertain the motion and deny it, defer consideration, or indicate that it might or would grant the motion if the action is remanded. Experienced appeal lawyers often refer to the suggestion for remand as an "indicative ruling."

Appellate Rule 12.1 is not limited to the Civil Rule 62.1 context; Rule 12.1 may also be used, for example, in connection with motions under Criminal Rule 33. *See United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984). The procedure formalized by Rule 12.1 is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal.

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in face of a pending appeal. The rules that govern the

relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules, as they are or as they develop, deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit clerk [when the motion is filed in the district court and again when the district court rules on the motion] [if the district court states that it [might or] would grant the motion]. If the district court states that it [might or] would grant the motion, the movant may ask the court of appeals to remand the action so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the notification[s] under subdivision[s] (a) [and (b)] and the district court's statement under subdivision (b).

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g.*, *Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned – despite the absence of any clear statement of intent to abandon the appeal – merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

[If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.]

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a separate notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g.*, *Jordan v. Bowen*, 808 F.2d 733,

736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

MEMORANDUM

DATE: October 2, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

As you know, the Court's decision this spring in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines.

Mark Levy has suggested that the Committee review the *Bowles* decision and consider what, if any, changes to the Appellate Rules might be warranted to respond to the decision. This memo summarizes some relevant issues.[1] Parts I and II review and critique the *Bowles* decision. Part III analyzes the decision's implications, focusing particularly on whether all Rule 4 deadlines are now to be considered jurisdictional. Even if some of the Rule 4 deadlines need not be viewed as jurisdictional, many must be so viewed. Part III closes by noting the implications of the "jurisdictional" categorization; among other things, if a deadline is jurisdictional then courts can no longer apply the "unique circumstances" doctrine, under which a party's reasonable reliance on a court's erroneous representation (relating to timing) could operate to salvage an untimely appeal. Part IV examines whether it would be possible and desirable to reinstate the unique circumstances doctrine as to Rule 4 deadlines that, under *Bowles*, are deemed jurisdictional.

I. The *Bowles* decision

The facts of *Bowles* are straightforward. After the district court denied Bowles' habeas petition, Bowles failed to file a notice of appeal within the 30 days prescribed by Rule 4(a)(1)(A) and 28 U.S.C. § 2107(a). Bowles' counsel subsequently moved for an order reopening the time to file an appeal under Rule 4(a)(6), and the district court granted the motion. Both Rule 4(a)(6) and 28 U.S.C. § 2107(c) limited the allowable extension to 14 days after the date of entry of the order reopening the time, but the district court erroneously set a date (February 27, 2004) which extended the time by 17 days after the entry date. Bowles' counsel filed the notice of appeal on

[1] Portions of this memo are adapted from the discussion of *Bowles* in the draft of the forthcoming new edition of Federal Practice & Procedure, Vol. 16A.

February 26 – within the time set by the order but outside the limits set by rule and statute. *See Bowles*, 127 S. Ct. at 2362.

The Sixth Circuit dismissed the appeal for lack of jurisdiction, and a closely divided Supreme Court affirmed. The majority, per Justice Thomas, focused on the fact that the 14-day time limit is set not only in Rule 4(a)(6) but also in Section 2107(c). The Court cited a string of cases stating that appeal time limits are "mandatory and jurisdictional,"[2] as well as a couple of 19th-century cases viewing statutory appeal time limits as jurisdictional.[3] The majority acknowledged that a number of the cases that characterized appeal time limits as "mandatory and jurisdictional" had relied on *United States v. Robinson*, and that it had in recent decisions "questioned *Robinson*'s use of the term 'jurisdictional'"; but the majority maintained that even those recent cases "noted the jurisdictional significance of the fact that a time limit is set forth in a statute," and it stated that "[r]egardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[4] The majority thus concluded that "[j]urisdictional treatment of statutory time limits makes good sense.... Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[5]

The majority also rejected Bowles' argument that he should be forgiven for relying on the district court's assurance that a notice filed by February 27 would be timely. This argument rested on the "unique circumstances" doctrine set forth in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*,[6] and *Thompson v. INS*.[7] The majority characterized this doctrine as moribund, and it "overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to

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[2] *Bowles*, 127 S. Ct. at 2363-64 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam); *Hohn v. United States*, 524 U.S. 236, 247 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); and *Browder v. Director, Dep't of Corrs.*, 434 U.S. 257, 264 (1978)).

[3] *Bowles*, 127 S. Ct. at 2364 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883), and *United States v. Curry*, 6 How. 106, 113 (1848)).

[4] See *Bowles*, 127 S. Ct. at 2364 & n.2 (discussing *United States v. Robinson*, 361 U.S. 220, 229 (1960); *Kontrick v. Ryan*, 540 U.S. 443 (2004); and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

[5] *Bowles*, 127 S. Ct. at 2365.

[6] 371 U.S. 215 (1962) (per curiam).

[7] 375 U.S. 384 (1964) (per curiam).

authorize an exception to a jurisdictional rule."[8] In the light of the majority's view of the 14-day limit as jurisdictional, this meant that Bowles' reliance on the district court's assurance provided no basis to excuse the untimely filing. The majority closed by noting that "[i]f rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits."[9]

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, filed a vigorous dissent. They noted the draconian consequences of characterizing appeal time limits as jurisdictional: Jurisdictional limits cannot be waived, cannot be excused (except as explicitly authorized), and must be raised sua sponte by the court.[10] The dissenting Justices questioned the majority's view that all statutory time limits must be jurisdictional, and highlighted the Court's recent decisions in *Kontrick v. Ryan* and *Eberhart v. United States*, which had criticized *Robinson* and its progeny for "the basic error of confusing mandatory time limits with jurisdictional limitations."[11] The dissenters would have applied the unique circumstances doctrine to forgive Bowles' late filing based on his counsel's reliance on the district court's order setting the February 27 date.

II. A critique of *Bowles*

The Bowles decision's reliance on the statutory nature of the 14-day time limit leaves the strength of its reasoning open to question.[12] Section 2107 has long been entwined with the

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[8] *Bowles*, 127 S.Ct. at 2366.

[9] *Id.* at 2367.

[10] *Id.* at 2368 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting).

[11] *Id.* at 2368 n.3 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) (citing *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

[12] As the *Bowles* majority noted, though, the Court's treatment of the deadlines for seeking Supreme Court review provides support for the distinction drawn in *Bowles* between statutory and rule-based deadlines.

The Supreme Court in 1970 made it clear that a filing-time requirement established by court rule, as distinguished from a requirement promulgated by statute, is not necessarily jurisdictional. In *Schacht v. United States*, the Supreme Court held that its own rule (which has since been changed) establishing a 30-day time limitation for filing a petition for writ of certiorari in a federal criminal case is not jurisdictional and "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." 398 U.S. 58, 64 (1970). In holding that compliance with this time requirement was not inherently jurisdictional, the Court

relevant rule, and the history gives little reason to think that Congress acted independently to limit the appeal times when enacting or amending Section 2107. Section 2107 was first enacted in 1948, some three months after the effective date of the 1946 amendment to Civil Rule 73, and the statutory provision reflected the 30-day and 60-day appeal time limits that had already been inserted into Rule 73 by the 1946 amendments. When, in 1966, the rulemakers amended Civil Rule 73 to broaden its excusable-neglect provision and to set a 14-day period for appeals by other parties, no similar change was made to Section 2107. Likewise, in 1979 the rulemakers amended Appellate Rule 4(a) to permit extensions of appeal time based on good cause (as an alternative to excusable neglect), and they also capped the extension at the later of 30 days after the original appeal time or 10 days from the entry of the order granting the extension. As with the 1966 amendment to Civil Rule 73, the 1979 change to Rule 4(a)'s excusable-neglect provision took effect without any corresponding change in Section 2107.

In 1991, the rulemakers added Rule 4(a)(6), which authorizes the district court to reopen the time for appeal in civil cases if a party failed to receive notice of the entry of judgment. The rulemakers' transmittal note recommended "that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule."[13] Days after new Rule 4(a)(6) took effect, Congress amended Section 2107.[14] As a result of that amendment, the first sentence of Section 2107(c) mirrors Rule 4(a)'s excusable-neglect and good-cause provision as it stood in 1991, and the remainder of Section 2107(c) mirrors Rule 4(a)(6)'s provision for reopening the time to take an appeal.

In the light of this sequence of events, the *Bowles* majority was perhaps imprecise in stating (with respect to the provision for reopening the time period) that "Rule 4 of the Federal

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emphasized that the requirement "was not enacted by Congress but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases." *Id.* Prior to the *Schacht* decision, the Supreme Court on several occasions had entertained petitions for certiorari filed out of time in federal criminal cases, noting that "no jurisdictional statute is involved" in such cases. *Heflin v. U.S.*, 358 U.S. 415, 418 n.7 (1959); *Taglianetti v. U.S.*, 394 U.S. 316, 316 n.1 (1969) (per curiam). On the other hand, in civil cases where the time limitations for taking appeals and applying for certiorari are enunciated by Congress rather than by judicial rule, *see* 28 U.S.C. § 2101(c), the Supreme Court has consistently viewed compliance with the limitations as jurisdictional; a waiver is not permitted however excusable the default may be. *See* Department of Banking v. Pink, 317 U.S. 264, 268 (1942); Teague v. Commissioner of Customs, 394 U.S. 977 (1969).

[13] See 1991 Committee Note to Rule 4.

[14] Act of Dec. 9, 1991, Pub. L. No. 102-198, § 12, 105 Stat. 1627.

Rules of Appellate Procedure carries § 2107 into practice."[15] To the contrary, the history shows that the rulemakers have taken the lead in developing Rule 4(a)'s time limits, with Congress acting afterwards to conform the statute to the rule. This trend has continued in the 1998 and 2005 amendments, which altered Rule 4(a)(6) without any conforming change by Congress. It is notable, as well, that from the adoption of the Appellate Rules until the 2002 amendments, Rule 1 provided – in the words of the restyled version – that the Appellate Rules "do not extend or limit the jurisdiction of the courts of appeals" – a principle that casts some doubt on the notion that time limits first adopted through Appellate Rules amendments should be seen as jurisdictional.[16]

It is true that, as the *Bowles* majority noted, there are cases of long standing which indicate that an appeal time set by statute is jurisdictional. But the case law on this question does not speak with one voice. For example, in *Reconstruction Finance Corp. v. Prudence Securities Advisory Group* the Court interpreted the relevant statutory scheme to require a would-be appellant to file an application for leave to appeal in the circuit court of appeals, rather than filing a notice of appeal in the district court as the Reconstruction Finance Corporation had done. But the Court held that the court of appeals should have exercised its discretion to forgive the RFC's failure to file in the proper court, noting that "[t]he failure to comply with statutory requirements ... is not necessarily a jurisdictional defect."[17]

In any event, *Bowles* leaves uncertain the status of a number of Rule 4 deadlines. The next section examines *Bowles*' likely impact on the classification of those deadlines.

III. After *Bowles*, are all Rule 4 deadlines jurisdictional?

Bowles, of course, concerned Rule 4(a)(6)'s 14-day time limit on reopening the time to

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[15] *See Bowles*, 127 S. Ct. at 2363.

[16] Criminal Rule 37(a)(2) (the precursor of some parts of current Appellate Rule 4(b)), was promulgated under the authority of 18 U.S.C. § 3772, which expressly authorized the promulgation of rules "prescrib[ing] the times for and manner of taking appeals" in criminal cases. *See* Act of June 25, 1948, ch. 645, 62 Stat. 846, 846-47. Section 3772 likewise provided the authority for the promulgation of the original Appellate Rules relating to criminal appeals.

Writing when Appellate Rule 1(b) still existed, Professor Hall observed: "No one has offered an explanation of how a jurisdictional limitation can emanate from the court's rulemaking power in light of this proviso." Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 Ga. L. Rev. 399, 413 (1986).

[17] Reconstruction Fin. Corp. v. Prudence Sec. Advisory Group, 311 U.S. 579, 583 (1941).

take a civil appeal. The *Bowles* Court's reasoning leaves uncertain the status of other appeal time limits set by Rule 4. Rule 4(a)(1)(A)'s 30-day time limit, Rule 4(a)(1)(B)'s 60-day time limit, Rule 4(a)(5)(A)'s 30-day limit, and Rule 4(a)(6)'s 7-day, 14-day, 21-day and 180-day limits are reflected in Section 2107, and thus it seems likely that under Bowles' reasoning these limits are to be regarded as jurisdictional.[18] Rule 4(b)(1)(B)'s 30-day time limit for government appeals mirrors a statutory limit that is now codified at 18 U.S.C. § 3731, and thus the same 'jurisdictional' label may apply to that limit as well. But Rule 4(a)(3)'s 14-day time limit,[19] Rule 4(a)(5)(C)'s 30-day and 10-day limits, Rule 4(b)(1)(A)'s 10-day time limit,[20] Rule 4(b)(3)(A)'s 10-day limits, and Rule 4(b)(4)'s 30-day limit have no corresponding statutory provision. Moreover, though the time limits in Rules 4(a)(1), 4(a)(3), 4(a)(5) and 4(a)(6) apply to appeals to the court of appeals in bankruptcy proceedings, Section 2107 does not "apply to bankruptcy matters or other proceedings under Title 11,"[21] which presumably means that the analysis, under *Bowles*, of the Rule 4(a)(1), 4(a)(5)(A), and 4(a)(6) time limits could differ in the context of an appeal in a bankruptcy proceeding.[22]

The *Bowles* Court's emphasis on the statutorily-prescribed nature of the Rule 4(a)(6) time limits suggests that *Bowles*' holding should be limited to those time limits reflected not only in a rule but also in a statute. Admittedly, *Bowles* does contain a few instances of broader language. The Court opened its analysis by stating that it "has long held that the taking of an appeal within

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[18] A number of court of appeals decisions prior to *Kontrick*, *Eberhart* and *Bowles* held such deadlines to be jurisdictional, as did a number of cases decided after *Kontrick*.

[19] In lines of case law developed prior to *Kontrick* and *Eberhart*, the courts of appeals have split on the question of whether Rule 4(a)(3)'s 14-day deadline is jurisdictional.

[20] A number of cases decided prior to *Kontrick* and *Eberhart* have indicated that Rule 4(b)'s ten-day deadline for a criminal defendant's notice of appeal is jurisdictional. So have some cases decided post-*Kontrick*.

[21] 28 U.S.C. § 2107(d).

[22] However, some courts – prior to *Kontrick*, *Eberhart* and *Bowles* – held that Rule 4(a)'s time limits are jurisdictional in bankruptcy appeals. *See In re* Perry Hollow Mgmt. Co., 297 F.3d 34, 38 (1st Cir. 2002) (where appellant sought review of district court's judgment affirming bankruptcy court decision, court of appeals held that Rule 4(a)(1)'s time limits were mandatory and jurisdictional); Matter of Eichelberger, 943 F.2d 536, 540 (5th Cir. 1991) (court dismissed appeal from judgment of district court exercising bankruptcy appellate jurisdiction, holding that "[r]ule 4(a)'s provisions are mandatory and jurisdictional"); *In re* Loretto Winery Ltd., 898 F.2d 715, 717 (9th Cir. 1990) ("Saslow filed his notice of appeal 31 days after the bankruptcy appellate panel entered judgment. A prospective appellant must file notice of appeal within 30 days of the entry of judgment. 28 U.S.C. § 2107; Fed.R.App.P. 4(a).... We therefore do not have jurisdiction to hear Saslow's appeal.").

the prescribed time is 'mandatory and jurisdictional,'" and it found it "indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[23] But it acknowledged its recent cases – such as *Eberhart* and *Kontrick* – criticizing *Robinson*, and distinguished those recent cases by stating that "none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional."[24] Likewise, the Court cited with apparent approval a case stating that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute."[25]

Where does this leave the Rule 4 time limits that are not reflected in statutory provisions? The answer to this question requires a review of the prior authorities to which the *Bowles* Court adverted. The original Committee Note to Rule 3 characterized the combined requirements of Rules 3 and 4 as jurisdictional, but also stressed that rigid formalism should be avoided in applying those rules:

> Rule 3 and Rule 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is "mandatory and jurisdictional," United States v. Robinson, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance. But the proposed rules merely restate, in modified form, provisions now found in the civil and criminal rules ... , and decisions under the present rules which dispense with literal compliance in cases in which it cannot fairly be exacted should control interpretation of these rules.[26]

The Supreme Court, in the *Robinson* decision, traced the history and interpretation of Criminal Rule 37(a)(2). Stressing Criminal Rule 45(b)'s admonition that "the court may not enlarge ... the period for taking an appeal," the Court concluded that Rule 37(a)(2)'s requirement that the notice of appeal in a criminal case be filed within 10 days after entry of judgment was

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[23] *Bowles*, 127 S. Ct. at 2363 & n.2.

[24] *Id.* at 2364.

[25] *Id.* at 2365 n.3 (quoting U.S. v. Sadler, 480 F.3d 932, 936 (9th Cir. 2007)).

[26] See also Coppedge v. U.S., 369 U.S. 438, 442 n.5 (1962) ("Although the timely filing of a notice of appeal is a jurisdictional prerequisite for perfecting an appeal, United States v. Robinson, 361 U.S. 220 ... , a liberal view of papers filed by indigent and incarcerated defendants, as equivalents of notices of appeal, has been used to preserve the jurisdiction of the Courts of Appeals.").

"mandatory and jurisdictional" and could not be waived on a finding of excusable neglect.[27] The rulemakers in 1966 addressed the particular problem raised by *Robinson* when they amended Criminal Rule 37 to permit extension of the appeal time based on excusable neglect,[28] but the general principle that the rules' appeal time limits were not only mandatory but jurisdictional lived on.

Thus, almost two decades later, the Court quoted *Robinson* when it held in *Browder v. Director, Department of Corrections of Illinois* that "[u]nder Fed.Rule App.Proc. 4(a) and 28 U.S.C. § 2107, a notice of appeal in a civil case must be filed within 30 days of entry of the judgment or order from which the appeal is taken. This 30-day time limit is 'mandatory and jurisdictional.'"[29] In its early-1980s decision in *Griggs v. Provident Consumer Discount Co.*, the Court addressed the plight of litigants trapped by the then-extant provision in Rule 4 that nullified a notice of appeal filed during the pendency of certain timely post-judgment motions: "Under the plain language of the current rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'"[30]

In *Budinich v. Becton Dickinson & Co.*, the Court resolved a circuit split by ruling "that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final."[31] The petitioner argued for a prospective application of this rule, contending that it was a significant change. The Court rejected this request, ruling that even if true, the petitioner's contention could not save the appeal, because "the taking of an appeal within the prescribed time is mandatory and jurisdictional, see Fed. Rules App.Proc. 2, 3(a), 4(a)(1), 26(b)."[32] In another severe decision, the Court held in *Torres v. Oakland Scavenger Company* that a lawyer representing multiple parties who filed a notice of appeal naming only some of those parties, followed by the term "et al.," had failed to effect an appeal on behalf of his

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[27] *Robinson*, 361 U.S. at 224.

[28] See Fed. R. Crim. P. 37 advisory committee note (1966), *reprinted in* 39 F.R.D. 69, 197-200 (1966) ("The final sentence effects a major change in the rule, under which courts have been held powerless to extend the time fixed by rule for taking an appeal. United States v. Robinson, 361 U.S. 220 (1960).").

[29] Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 264 (1978).

[30] Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61 (1982).

[31] Budinich v. Becton Dickinson and Co., 486 U.S. 196, 202 (1988).

[32] Id. at 203.

unnamed client.[33] The *Torres* Court reasoned that Rule 4's time limits were mandatory, Rule 26(b) forbade any extensions of those limits except as provided in Rule 4, and "[p]ermitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal." The Court relied on the 1967 Committee Note to Rule 3 to support its view that the Rule 3 and Rule 4 requirements should be treated "as a single jurisdictional threshold."[34]

Even the more forgiving decisions continued to repeat the "mandatory and jurisdictional" language. Thus, when the Court held in *Smith v. Barry* that an informal brief could serve as the functional equivalent of a notice of appeal, it opened its discussion by stating that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review.... Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal."[35] Likewise, when the Court held in *Becker v. Montgomery* that the failure to sign the notice of appeal does not require dismissal of the appeal so long as the omission is remedied once it is called to the appellant's attention, the Court asserted that "Appellate Rules 3 and 4 ... are indeed linked jurisdictional provisions."[36]

Within the past few years, however, the Court questioned its prior use of the term "jurisdictional." In *Kontrick v. Ryan*, "a creditor, in an untimely pleading, objected to the debtor's discharge. The debtor, however, did not promptly move to dismiss the creditor's plea as impermissibly late."[37] The Court held that Bankruptcy Rule 4004's time limit for filing such objections "is not 'jurisdictional,'" and thus that "a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge."[38] In explaining this holding, the unanimous Court observed:

> Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court.... For example, we have described Federal Rule of Civil Procedure 6(b), on time enlargement, and correspondingly, Federal Rule of Criminal Procedure 45(b), on extending time, as "mandatory and

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[33] Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988).

[34] *Id.* at 315.

[35] 502 U.S. 244, 248 (1992).

[36] 532 U.S. 757, 765 (2001).

[37] 540 U.S. 443, 446 (2004).

[38] Id. at 447.

> jurisdictional." *United States v. Robinson*, 361 U.S. 220, 228-229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960).... Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.[39]

The following year, a unanimous Court in *Eberhart v. United States* held that Criminal Rule 33's 7-day time limit for filing most new trial motions was a non-jurisdictional claim-processing rule, and thus that an objection based upon failure to comply with the time limit could not be raised for the first time on appeal.[40] This was so, the Court held, despite the fact that the then-applicable version of Criminal Rule 45(b) barred a court from extending Rule 33's time limits except as stated in that Rule 33 itself. The *Eberhart* Court stated that it was reinterpreting, rather than overruling, *Robinson*:

> *Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked. This does not mean that limits like those in Rule 33 are not forfeitable when they are *not* properly invoked.... *Robinson* has created some confusion because of its observation that "courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional*."... As we recognized in *Kontrick*, courts "have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." .... The resulting imprecision has obscured the central point of the *Robinson* case-that when the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory. The net effect of *Robinson*, viewed through the clarifying lens of *Kontrick*, is to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often.[41]

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[39] *Id.* at 454-55. The *Kontrick* Court noted that some statutory provisions "contain built-in time constraints," and it observed that one such provision was 28 U.S.C. § 2107(a). Id. at 453 & n.8.

Justice Ginsburg, who authored the Court's unanimous opinion in *Kontrick*, had made similar points in prior opinions. *See* Center for Nuclear Responsibility, Inc. v. U.S. Nuclear Regulatory Comm'n, 781 F.2d 935, 945 n.4 (D.C. Cir. 1986) (Ginsburg, J., dissenting); *see also* Carlisle v. U.S., 517 U.S. 416, 434–35 (1996) (Ginsburg, J., joined by Souter & Breyer, JJ., concurring).

[40] 546 U.S. 12, 19 (2005) (per curiam).

[41] *Id.* at 17-18.

In the view of the unanimous *Eberhart* Court, then, the 10-day appeal deadline for criminal defendants formerly set in Criminal Rule 37(a)(2) – and now contained in Appellate Rule 4(b)(1)(A) – is an emphatic but nonjurisdictional deadline. Because it is emphatic, defendants must be sure to comply with it. But because it is nonjurisdictional, if the failure to comply is not timely raised then noncompliance should not affect the validity of the appeal. Moreover, if this period is nonjurisdictional then it should be subject in appropriate cases to the "unique circumstances" doctrine. *Bowles* need not be read to change any of these observations.[42] *Bowles* rested centrally on the fact that the relevant 14-day limit is imposed by statute as well as by rule; and no statute sets the criminal defendant's 10-day time limit for taking the appeal.[43] Likewise, though *Bowles* overruled the unique circumstances doctrine "to the extent [it] purport[s] to authorize an exception to a jurisdictional rule," under *Eberhart*'s view the 10-day time limit for criminal defendants would not be such a rule.

Similar arguments could be made, post-*Bowles*, for other Rule 4 deadlines that are not mirrored in statutory provisions. But even though such arguments can be made, the prudent appellant will act as though all the Rule 4 time limits are jurisdictional. First, as the *Eberhart* Court observed, it will be rare for one's opponent to fail to raise a valid timeliness objection. Second, even if some Rule 4 time limits are not jurisdictional, they are all mandatory: Rule 26(b)(1) provides that "the court may not extend the time to file ... a notice of appeal (except as authorized in Rule 4)." Thus, once raised, a non-jurisdictional time limit will be strictly enforced unless the appellant successfully invokes the unique circumstances doctrine – a doctrine that has always been narrow and that survives *Bowles*, if at all, only with respect to non-jurisdictional time limits. Third, the *Bowles* Court simply did not address explicitly the question of non-statutory appeal time limits, and the Court could in a later case depart from *Kontrick* and *Eberhart* and hold such limits jurisdictional as well. Indeed, prior to *Kontrick* and *Eberhart*

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[42] The *Bowles* majority cited U.S. v. Sadler, 480 F.3d 932 (9th Cir. 2007), as support for its view that the key question (for purposes of distinguishing jurisdictional from non-jurisdictional deadlines) is whether the time limit is set by statute. *See Bowles*, 127 S. Ct. at 2365 n.3. The court in *Sadler* held that "FRAP 4(b), unlike FRAP 4(a), is a nonjurisdictional claim-processing rule subject to forfeiture." *Sadler*, 480 F.3d at 942. (The *Sadler* case involved Rule 4(b)'s 10-day time limit for defendants' appeals; the court did not discuss the 30-day time limit for the government's appeals, which is set by statute as well as by rule.)

[43] Indeed, at least one court has concluded that *Bowles* supports the conclusion reached in the text. See U.S. v. Martinez, 2007 WL 2285324, at *1 (5th Cir. Aug. 9, 2007) (per curiam) ("[T]he analysis in *Bowles* establishes that the time limit specified in Rule 4(b)(1)(A) is mandatory, but not jurisdictional, because it does not derive from a statute."). *But see* U.S. v. Smith, 2007 WL 1810095, at *2 (10th Cir. June 25, 2007) (citing *Bowles* for the proposition that Rule 4(b)(1)(A)'s 10-day limit is mandatory and jurisdictional).

many courts of appeals had held non-statutory appeal times to be jurisdictional.[44]

What, then, are the implications of the conclusion that a particular Rule 4 time limit is jurisdictional? As the *Bowles* opinions make clear, violations of such a limit are non-waivable, must be raised by the court sua sponte, and require the dismissal of the appeal.[45] Such a limit cannot be nuanced by the "unique circumstances" doctrine. The appellant will bear the burden of demonstrating compliance with the limit.

As illustrated by *Bowles* itself, the unavailability of the unique circumstances doctrine is one of the more troubling results of the determination that a Rule 4 deadline is jurisdictional. The next section explores that issue in detail.

IV. Possible rulemaking responses to *Bowles*

The *Bowles* majority closed its opinion by noting the possibility that the rules might be amended in response to its holding:

> If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization.[46]

This quotation highlights three relevant questions: What responses are possible through the rulemaking process? Do the rulemakers currently have power to undertake those responses? And are those responses desirable as a policy matter?

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[44] *See also, e.g.*, Sueiro Vazquez v. Torregrosa de la Rosa, 2007 WL 2068331, at *4 (1st Cir. July 19, 2007) (with respect to a cross-appeal, citing *Bowles* for the proposition that "[t]he filing of a notice of appeal is a jurisdictional requirement").

[45] Though an occasional case can be found in which the court of appeals addresses the merits despite finding a lack of jurisdiction, they are instances where the court does so only to state why the appeal lacks merit.

[46] *Bowles*, 127 S. Ct. at 2367.

A. Possible responses

Though a range of possible responses to *Bowles* can be imagined,[47] perhaps the most obvious way to respond to the decision would be to attempt to reinstate the "unique circumstances" doctrine with respect to all Rule 4 deadlines. This subsection first discusses the doctrine and then considers how the doctrine might be expressed in a rule.

The unique circumstances doctrine derives its name from *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, in which trial counsel for the losing side sought an extension of Civil Rule 73(a)'s 30-day appeal deadline based on the fact that the client's general counsel was out of the country. The district court granted an extension and counsel relied on it, filing the notice of appeal on the last day of the extended period. The court of appeals dismissed the appeal for lack of jurisdiction, holding that the litigant had failed to make the showing – then required under Civil Rule 73(a) for an extension – of "excusable neglect based on a failure of a party to learn of the entry of the judgment." The Supreme Court vacated and remanded for determination of the case on the merits:

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[47] In addition to the response highlighted in the text, another possibility might be to attempt to alter the Court's classification of statutorily-backed Rule 4 deadlines as jurisdictional.

One can envision policy arguments on both sides of such a question. On the one hand, there are advantages to considering appeal deadlines to be mandatory but not jurisdictional. Writing two decades prior to *Bowles*, Professor Hall presaged the *Bowles* dissenters' concerns, arguing that "[p]roperly conceived, appeal periods are like original jurisdiction limitation periods: they involve primarily the interests of the immediate parties, not fundamental societal interests. They should therefore be subject to waiver by the parties." Mark A. Hall, *The Jurisdictional Nature of the Time to Appeal*, 21 Ga. L. Rev. 399, 399-400 (1986). Professor Hall asserts that "the filing and service requirements for notices of appeal are more analogous to the notice concerns implicated by personal jurisdiction" than to the concerns traditionally thought to underpin subject matter limits. *Id.* at 408. "Because the primary interests at stake are those of the immediate parties, it causes more harm than good and produces a less efficient and less fair judicial system to allow delayed consideration of timing defects on appeal." *Id.* at 427. *Compare* E. King Poor, *Jurisdictional Deadlines in the Wake of Kontrick and Eberhart: Harmonizing 160 Years of Precedent*, 40 Creighton L. Rev. 181, 185 (2007) (arguing that if courts cannot raise sua sponte objections to the timeliness of an appeal, they will lose control of their dockets).

In addition to these policy questions, there is the obvious question of power. For reasons similar to those stated in Part IV.B. of this memo, it seems unclear under the Supreme Court's approach that the rulemakers – without further authorization from Congress – could act to alter the *Bowles* opinion's view concerning the jurisdictional nature of statutorily-backed Rule 4 deadlines.

> In view of the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.[48]

The Court applied this doctrine in *Thompson v. INS*, where a litigant made an untimely new trial motion to which the government did not raise a timeliness objection and which the district court stated "was made 'in ample time.'"[49] The new trial motion – being in reality untimely – did not extend the time to file a notice of appeal, but the litigant – thinking the new trial motion was timely – filed the notice of appeal within 60 days[50] after the posttrial motions' denial but long after the actual appeal deadline had run. Citing *Harris*, the Court ruled that the appeal should be heard on the merits:

> The instant cause fits squarely within the letter and spirit of *Harris*. Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline.[51]

More recently, however, the Court in *Osterneck v. Ernst & Whinney* refused to apply the unique circumstances doctrine, and, in so doing, arguably narrowed its application. In *Osterneck*, a motion for prejudgment interest was filed within ten days[52] after the entry of judgment. While that motion was still pending, the Osternecks filed a notice of appeal from the judgment in favor of, inter alia, Ernst & Whinney. The problem for the Osternecks was that – as the Supreme Court held – the prejudgment interest motion counted as a Rule 59(e) motion that terminated the running of the time to take an appeal. And, under the then-applicable version of Rule 4, that rendered the Osternecks' notice of appeal ineffective.[53] The Osternecks sought to invoke the

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[48] Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 217 (1962).

[49] Thompson v. Immigration and Naturalization Service, 375 U.S. 384, 385 (1964).

[50] The appeal deadline under Civil Rule 73(a) was 60 days because the U.S. was a party.

[51] *Thompson*, 375 U.S. at 387.

[52] Calculated by skipping intermediate weekends. *See* Civil Rule 6(a).

[53] The Osternecks had filed a later notice of cross-appeal, but it was held not to encompass their challenge to the judgment in favor of Ernst & Whinney.

unique circumstances doctrine, arguing that "certain statements made by the District Court, as well as certain actions taken by the District Court, the District Court Clerk, and the Court of Appeals, led them to believe that their notice of appeal was timely."[54] The Court rejected this argument, stating tersely: "[b]y its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done. That is not the case here."[55]

The *Osterneck* Court's formulation of the unique circumstances doctrine has been subject to criticism. For example, Professor Pucillo has argued that *Osterneck* led the courts of appeals to take an unduly stingy approach to the doctrine's application, and he has suggested that a better formulation would be the following: "[I]n determining whether an appeal is timely, a court of appeals is bound to accept as true any representation of a district court upon which a litigant reasonably relies in forgoing an opportunity to initiate an indisputably timely appeal."[56]

This memo will adapt Professor Pucillo's formulation slightly and use it as an example of a provision that might be considered as a means of reinstating the unique circumstances doctrine. The provision could read: "In determining whether an appeal is timely, a court shall accept as true any representation (a) made by a federal judge, (b) relevant to the timing of an appeal deadline under Rule 4, and (c) upon which a litigant reasonably relied in forgoing an opportunity to initiate an indisputably timely appeal."

B. Power to reinstate the unique circumstances doctrine

Part IV.C. of this memo examines the policy arguments for and against reinstating the unique circumstances doctrine. First, however, it is useful to examine whether the rulemakers currently posses the authority to do so. By stating that "Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits," the *Bowles* Court suggested that such authority does not currently exist. One can argue that this conclusion flows logically from *Bowles*' premise that statutorily-backed Rule 4 deadlines are jurisdictional.

The rulemakers are not ordinarily in the business of directly altering the subject matter jurisdiction of the federal courts.[57] Appellate Rule 1(b) used to state that the Appellate Rules did

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[54] Osterneck v. Ernst & Whinney, 489 U.S. 169, 178 (1989).

[55] *Id.* at 179.

[56] See Philip Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the 'Unique Circumstances' Doctrine*, 82 Tul. L. Rev. (forthcoming 2007).

[57] The Rules can and do affect matters of personal jurisdiction. *See* Civil Rule 4.

not "extend or limit the jurisdiction of the courts of appeals." That provision was abrogated in 2002 out of a recognition that Congress had authorized the rulemakers to affect subject matter jurisdiction by adopting provisions that define the finality of a ruling for purposes of 28 U.S.C. § 1291[58] and that provide for interlocutory appeals not otherwise mentioned in 28 U.S.C. § 1292.[59] But neither of those provisions authorizes the adoption of a rule reinstating the unique circumstances doctrine as a means of excusing noncompliance with a statutorily-backed jurisdictional deadline. So it might be concluded that an additional statutory grant of rulemaking authority would be necessary before the rulemakers could adopt a rule excusing compliance with such a deadline.

That conclusion might come as a surprise to those involved in the rulemaking processes that produced the 1966, 1979 and 1991 amendments to Rule 4: Each of those amendments forgave untimeliness that would otherwise (under the then-extant version of 28 U.S.C. § 2107) have proven fatal to an affected appeal – yet all of those amendments were adopted under the then-existing rulemaking authority, which said nothing about whether the rulemaking authority extended to matters of subject matter jurisdiction.[60] (The *Bowles* decision cannot prompt a belated argument that the aspects of Rule 4 introduced by the 1966, 1979 and 1991 amendments are invalid: Congress – acting at the rulemakers' suggestion – in 1991 incorporated the relevant aspects of Rule 4's provisions into Section 2107.)

But despite the incongruity of the *Bowles* approach, and its departure from decades of rulemaking practice, it remains the case that *Bowles* – by holding the statutorily-backed Rule 4 deadlines to be jurisdictional – casts significant doubt on the rulemakers' ability to reinstate the unique circumstances doctrine. If the Committee were to propose such a reinstatement, it would presumably wish to consider either requesting an additional delegation of rulemaking authority or asking Congress to adopt a unique-circumstances provision directly by statute.

C. Advisability of reinstating the unique circumstances doctrine

The *Bowles* majority warned against adopting a rule excusing compliance with statutory time limits: "Even narrow rules to this effect would give rise to litigation testing their reach and

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[58] *See* 28 U.S.C. § 2072(c).

[59] *See* 28 U.S.C. § 1292(e).

[60] The Supreme Court had periodically noted its understanding that court rules could not alter the lower courts' statutorily-conferred jurisdiction. *See, e.g.*, U.S. v. Sherwood, 312 U.S. 584, 589-90 (1941). Presumably reflecting that understanding, Civil Rule 82 has always provided that the Civil Rules do not "extend or limit" district court jurisdiction.

would no doubt detract from the clarity of the rule."[61] This argument, of course, invokes the perennial debate over rules versus standards. Particularly in the context of appeal time limits, the rules must be clear. And if the unique-circumstances doctrine were reinstated, clarity would suffer to a degree because, in those cases to which the doctrine arguably applied, the would-be appellant would seek its application.

But where so much rides on the timeliness determination, there is a strong argument for introducing a degree of flexibility to deal with the most compelling instances where, through judicial error, a litigant forgoes a chance to take a timely appeal. It is true that by introducing flexibility one introduces uncertainty and – to an extent – multiplies the opportunity for litigation. But it is worth noting that the same objection could have been levied against the 1966, 1979, and 1991 amendments to Rule 4, all of which similarly introduced the possibility of litigation over the circumstances justifying relief from Rule 4 deadlines that would otherwise apply.

It seems unlikely that many cases would present a colorable basis for the application of the unique circumstances doctrine. Indeed, a search in Westlaw's "CTA" database for the phrase "unique circumstances doctrine" pulls up only 149 hits – a small number considering that the *Harris Truck Lines* decision was handed down some 45 years prior to *Bowles*. Keyciting *Harris* pulls up 163 cases, while keyciting *Thompson* pulls up 278 cases.[62] Thus, one might conclude that reinstating the unique circumstances doctrine would affect only a relatively small subset of the cases in which the timeliness of an appeal is contested. And that small subset would include cases in which one might argue that the equities weigh particularly heavily in favor of introducing a degree of flexibility: It could be argued that litigants should not be penalized for reasonably relying on a timing-related representation by a federal judge.

V. Conclusion

The *Bowles* Court's view – that statutorily-backed Rule 4 appeal deadlines are jurisdictional – will cause hardship in cases where a litigant loses the chance to take a timely appeal through reliance on a judge's erroneous statement. Reinstating the unique circumstances doctrine could thus be desirable. But under *Bowles*' reasoning it is unclear that the rulemakers currently possess the authority to reinstate the doctrine with regard to jurisdictional deadlines. Thus, if the Committee wishes to act, it should consider the possibility of seeking additional rulemaking authority or of recommending adoption of a statutory fix.

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[61] *Bowles*, 127 S. Ct. at 2367.

[62] I performed these searches in early September 2007. I limited the keycite display to cases (and excluded secondary sources and briefs).

127 S.Ct. 2360, 168 L.Ed.2d 96, 75 USLW 4428, 07 Cal. Daily Op. Serv. 6807, 2007 Daily Journal D.A.R. 8736, 20 Fla. L. Weekly Fed. S 352
(Cite as: 127 S.Ct. 2360)

Bowles v. Russell
U.S.,2007.

Supreme Court of the United States
Keith BOWLES, Petitioner,
v.
Harry RUSSELL, Warden.
No. 06-5306.

Argued March 26, 2007.
Decided June 14, 2007.

Background: State prisoner whose petition for habeas corpus, and subsequent motion for new trial or to amend judgment, had been denied moved to reopen appeal period. The United States District Court for the Northern District of Ohio, Donald C. Nugent, J., granted motion, and prisoner appealed. After initially issuing show-cause order questioning timeliness of appeal, the Court of Appeals granted in part and denied in part a certificate of appealability (COA). The United States Court of Appeals for the Sixth Circuit, 432 F.3d 668, dismissed. Petition for certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

(1) Court of Appeals lacked jurisdiction over appeal, and

(2) Court would no longer recognize the unique circumstances exception to excuse an untimely filing of a notice of appeal, overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

Affirmed.

Justice Souter, filed dissenting opinion, with which Justices Stevens, Ginsburg, and Breyer joined.

West Headnotes

[1] Habeas Corpus 197 ⚿819

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)1 In General
197k817 Requisites and Proceedings for Transfer of Cause
197k819 k. Time for Proceeding. Most Cited Cases

Court of Appeals lacked jurisdiction over state prisoner's appeal from order denying his motion for new trial or to amend judgment denying his habeas corpus petition, which was filed outside of 14-day extension period for filing appeal authorized by federal rule of appellate procedure after period for appeal has been reopened, but within 17-day period granted by District Court for filing notice of appeal; the 14-day rule was authorized by statute, so it was mandatory and jurisdictional, and District Court could not authorize a longer time period. 28 U.S.C.A. § 2107(c); F.R.A.P.Rule 4(a)(6), 28 U.S.C.A.

[2] Federal Courts 170B ⚿5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk3 Jurisdiction in General; Nature and Source
170Bk5 k. Limited Jurisdiction; Dependent on Constitution or Statutes. Most Cited Cases

Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.

[3] Federal Courts 170B ⚿652.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk652 Time of Taking Proceeding
170Bk652.1 k. In General. Most Cited

Cases
When an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.

[4] Limitation of Actions 241 ⚿175

241 Limitation of Actions
241IV Operation and Effect of Bar by Limitation
241k175 k. Waiver of Bar. Most Cited Cases
A litigant may not rely on forfeiture or waiver to excuse his lack of compliance with a statute's jurisdictional time limitations.

[5] Habeas Corpus 197 ⚿819

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)1 In General
197k817 Requisites and Proceedings for Transfer of Cause
197k819 k. Time for Proceeding. Most Cited Cases
Habeas petitioner could not rely on the unique circumstances exception to excuse an untimely filing of a notice of appeal, outside a statutory time limit, as such time limits were jurisdictional; overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261, and *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404.

[6] Federal Courts 170B ⚿7

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk7 k. Equity Jurisdiction. Most Cited Cases
A federal court has no authority to create equitable exceptions to jurisdictional requirements.

[7] Federal Courts 170B ⚿670

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk670 k. Effect of Delay. Most Cited Cases
The timely filing of a notice of appeal in a civil case is a jurisdictional requirement.

***2361** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Having failed to file a timely notice of appeal from the Federal District Court's denial of habeas relief, petitioner Bowles moved to reopen the filing period pursuant to Federal Rule of Appellate Procedure 4(a)(6), which allows a district court to grant a 14-day extension under certain conditions, see 28 U.S.C. § 2107(c). The District Court granted Bowles' motion but inexplicably gave him 17 days to file his notice of appeal. He filed within the 17 days allowed by the District Court, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c). The Sixth Circuit held that the notice was untimely and that it therefore lacked jurisdiction to hear the case under this Court's precedent.

Held: Bowles' untimely notice of appeal-though filed in reliance upon the District Court's order-deprived the Sixth Circuit of jurisdiction. Pp. 2362 - 2367.

(a) The taking of an appeal in a civil case within the time prescribed by statute is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225*(per curiam)*. There is a significant distinction between time limitations set forth in a statute such as § 2107, which limit a court's jurisdiction, see, *e.g.,Kontrick v. Ryan*, 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867, and those based on court

rules, which do not, see, *e.g.,id.,* at 454, 124 S.Ct. 906. *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 505, 126 S.Ct. 1235, 163 L.Ed.2d 1097, and *Scarborough v. Principi,* 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674, distinguished. Because Congress decides, within constitutional bounds, whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *United States v. Curry,* 6 How. 106, 113, 12 L.Ed. 363. And when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Id.*, at 113. The resolution of this case follows naturally from this reasoning. Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), Bowles' failure to file in accordance with the statute deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance. Pp. 2363 - 2366.

(b) Bowles' reliance on the "unique circumstances" doctrine, rooted in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261*(per curiam)* and applied in *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404*(per curiam),* is rejected. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the doctrine is illegitimate. *Harris Truck Lines* and *Thompson* are overruled to the extent they purport to authorize an exception to a jurisdictional rule. Pp. 2366 - 2367.

432 F.3d 668, affirmed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SOUTER, J., filed a dissenting ***2362** opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined.

Paul Mancino, Jr., Cleveland, Ohio, for Petitioner.
William P. Marshall, Chapel Hill, NC, for Respondent.
Malcolm L. Stewart, for United States as amicus curiae, by special leave of the Court, supporting the Respondent.
William P. Marshall, Chapel Hill, NC, Marc Dann, Attorney General of Ohio, Elise W. Porter, Acting Solicitor General, Stephen P. Carney, Robert J. Krummen, Elizabeth T. Scavo, Columbus, OH, for Respondent Harry Russell, Warden.
Paul Mancino, Jr., Paul Mancino, III, Brett Mancino, Cleveland, Ohio, for Petitioner.For U.S. Supreme Court briefs, see:2007 WL 215255 (Pet.Brief)2007 WL 626901 (Resp.Brief)
Justice THOMAS delivered the opinion of the Court.
In this case, a District Court purported to extend a party's time for filing an appeal beyond the period allowed by statute. We must decide whether the Court of Appeals had jurisdiction to entertain an appeal filed after the statutory period but within the period allowed by the District Court's order. We have long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature. Accordingly, we hold that petitioner's untimely notice-even though filed in reliance upon a District Court's order-deprived the Court of Appeals of jurisdiction.

I

In 1999, an Ohio jury convicted petitioner Keith Bowles of murder for his involvement in the beating death of Ollie Gipson. The jury sentenced Bowles to 15 years to life imprisonment. Bowles unsuccessfully challenged his conviction and sentence on direct appeal.

Bowles then filed a federal habeas corpus application on September 5, 2002. On September 9, 2003, the District Court denied Bowles habeas relief. After the entry of final judgment, Bowles had 30 days to file a notice of appeal. Fed. Rule App. Proc. 4(a)(1)(A); 28 U.S.C. § 2107(a). He failed to do so. On December 12, 2003, Bowles moved to reopen the period during which he could file his notice of appeal pursuant to Rule 4(a)(6), which allows district courts to extend the filing period for 14 days

from the day the district court grants the order to reopen, provided certain conditions are met. See § 2107(c).

On February 10, 2004, the District Court granted Bowles' motion. But rather than extending the time period by 14 days, as Rule 4(a)(6) and § 2107(c) allow, the District Court inexplicably gave Bowles 17 days-until February 27-to file his notice of appeal. Bowles filed his notice on February 26-within the 17 days allowed by the District Court's order, but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c).

On appeal, respondent Russell argued that Bowles' notice was untimely and that the Court of Appeals therefore lacked jurisdiction to hear the case. The Court of Appeals agreed. It first recognized that this Court has consistently held the requirement of filing a timely notice of appeal is "mandatory and jurisdictional." 432 F.3d 668, 673 (C.A.6 2005) (citing *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)). The court also noted that courts of appeals have uniformly held that Rule 4(a)(6)'s 180-day period for filing ***2363** a motion to reopen is also mandatory and not susceptible to equitable modification. 432 F.3d, at 673 (collecting cases). Concluding that "the fourteen-day period in Rule 4(a)(6) should be treated as strictly as the 180-day period in that same Rule,"*id.*, at 676, the Court of Appeals held that it was without jurisdiction. We granted certiorari, 549 U.S. ----, 127 S.Ct. 763, 166 L.Ed.2d 590 (2006), and now affirm.

II

[1] According to 28 U.S.C. § 2107(a), parties must file notices of appeal within 30 days of the entry of the judgment being appealed. District courts have limited authority to grant an extension of the 30-day time period. Relevant to this case, if certain conditions are met, district courts have the statutory authority to grant motions to reopen the time for filing an appeal for 14 additional days. § 2107(c). Rule 4 of the Federal Rules of Appellate Procedure carries § 2107 into practice. In accord with § 2107(c), Rule 4(a)(6) describes the district court's authority to reopen and extend the time for filing a notice of appeal after the lapse of the usual 30 days:
"(6) **Reopening the Time to File an Appeal.**
"The district court may reopen the time to file an appeal *for a period of 14 days after the date when its order to reopen is entered,* but only if all the following conditions are satisfied:
"(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
"(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
"(C) the court finds that no party would be prejudiced." (Emphasis added.) FN1

FN1. The Rule was amended, effective December 1, 2005, to require that notice be pursuant to Fed. Rule Civ. Proc. 77(d). The substance is otherwise unchanged.

It is undisputed that the District Court's order in this case purported to reopen the filing period for more than 14 days. Thus, the question before us is whether the Court of Appeals lacked jurisdiction to entertain an appeal filed outside the 14-day window allowed by § 2107(c) but within the longer period granted by the District Court.

A

This Court has long held that the taking of an appeal within the prescribed time is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)*(per curiam)* (internal quotation marks omitted); FN2 accord, ***2364***Hohn v. United States*, 524 U.S. 236, 247, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988); *Browder,supra,* at 264, 98 S.Ct. 556. Indeed, even prior to the creation of the circuit courts of appeals, this Court regarded stat-

utory limitations on the timing of appeals as limitations on its own jurisdiction. See *Scarborough v. Pargoud,* 108 U.S. 567, 568, 2 S.Ct. 877, 27 L.Ed. 824 (1883) ("[T]he writ of error in this case was not brought within the time limited by law, and we have consequently no jurisdiction"); *United States v. Curry,* 6 How. 106, 113, 12 L.Ed. 363 (1848) ("[A]s this appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction"). Reflecting the consistency of this Court's holdings, the courts of appeals routinely and uniformly dismiss untimely appeals for lack of jurisdiction. See, *e.g.,Atkins v. Medical Dept. of Augusta Cty. Jail,* No. 06-7792, 2007 WL 1048810 (C.A.4, Apr.4, 2007)*(per curiam)* (unpublished); see also 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3901, p. 6 (2d ed. 1992) ("The rule is well settled that failure to file a timely notice of appeal defeats the jurisdiction of a court of appeals"). In fact, the author of today's dissent recently reiterated that "[t]he accepted fact is that some time limits are jurisdictional even though expressed in a separate statutory section from jurisdictional grants, see, *e.g.,*...§ 2107 (providing that notice of appeal in civil cases must be filed 'within thirty days after the entry of such judgment')." *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (majority opinion of SOUTER, J., joined by STEVENS, GINSBURG, and BREYER, JJ., *inter alios*) (citation omitted).

> FN2. *Griggs* and several other of this Court's decisions ultimately rely on *United States v. Robinson,* 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), for the proposition that the timely filing of a notice of appeal is jurisdictional. As the dissent notes, we have recently questioned *Robinson's* use of the term "jurisdictional." *Post,* at 2367 (opinion of SOUTER, J.) Even in our cases criticizing *Robinson,* however, we have noted the jurisdictional significance of the fact that a time limit is set forth in a statute, see *infra,* at 2364 - 2365, and have even pointed to § 2107 as a statute deserving of jurisdictional treatment. *Infra,* at 2364 - 2365.Additionally, because we rely on those cases in reaching today's holding, the dissent's rhetoric claiming that we are ignoring their reasoning is unfounded.
>
> Regardless of this Court's past careless use of terminology, it is indisputable that time limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century. Consequently, the dissent's approach would require the repudiation of a century's worth of precedent and practice in American courts. Given the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course.

Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional. Indeed, those decisions have also recognized the jurisdictional significance of the fact that a time limitation is set forth in a statute. In *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), we held that failure to comply with the time requirement in Federal Rule of Bankruptcy Procedure 4004 did not affect a court's subject-matter jurisdiction. Critical to our analysis was the fact that "[n]o statute ... specifies a time limit for filing a complaint objecting to the debtor's discharge." 540 U.S., at 448, 124 S.Ct. 906. Rather, the filing deadlines in the Bankruptcy Rules are " 'procedural rules adopted by the Court for the orderly transaction of its business' " that are " 'not jurisdictional.' " *Id.,* at 454, 124 S.Ct. 906 (quoting *Schacht v. United States,* 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970)). Because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction,"540 U.S., at 452, 124 S.Ct. 906 (citing U.S. Const., Art. III, § 1), it was improper for courts to use "the term 'jurisdictional' to describe emphatic time prescriptions in rules of court,"540

U.S., at 454, 124 S.Ct. 906. See also *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)*(per curiam)*. As a point of contrast, we noted that § 2107***2365** contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906.[FN3] Nor do *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), or *Scarborough v. Principi,* 541 U.S. 401, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004), aid petitioner. In *Arbaugh,* the statutory limitation was an employee-numerosity requirement, not a time limit. 546 U.S., at 505, 126 S.Ct. 1235. *Scarborough,* which addressed the availability of attorney's fees under the Equal Access to Justice Act, concerned "a mode of relief ... ancillary to the judgment of a court" that already had plenary jurisdiction. 541 U.S., at 413, 124 S.Ct. 1856.

> FN3. At least one federal court of appeals has noted that *Kontrick* and *Eberhart* "called ... into question" the "longstanding assumption" that the timely filing of a notice of appeal is a jurisdictional requirement. *United States v. Sadler,* 480 F.3d 932, 935 (C.A.9 2007). That court nonetheless found that "[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules drawn by *Eberhart* and *Kontrick* turns largely on whether the timeliness requirement is or is not grounded in a statute." *Id.,* at 936.

This Court's treatment of its certiorari jurisdiction also demonstrates the jurisdictional distinction between court-promulgated rules and limits enacted by Congress. According to our Rules, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment sought to be reviewed. See this Court's Rule 13.1. That 90-day period applies to both civil and criminal cases. But the 90-day period for civil cases derives from both this Court's Rule 13.1 and 28 U.S.C. § 2101(c). We have repeatedly held that this statute-based filing period for civil cases is jurisdictional. See, *e.g., Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994). Indeed, this Court's Rule 13.2 cites § 2101(c) in directing the Clerk not to file any petition "that is *jurisdictionally* out of time." (Emphasis added.) On the other hand, we have treated the rule-based time limit for criminal cases differently, stating that it may be waived because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion ... ."*Schacht,supra,* at 64, 90 S.Ct. 1555.[FN4]

> FN4. The dissent minimizes this argument, stating that the Court understood § 2101(c) as jurisdictional "in the days when we used the term imprecisely." *Post,* at 2369, n. 4. The dissent's apathy is surprising because if our treatment of our own jurisdiction is simply a relic of the old days, it is a relic with severe consequences. Just a few months ago, the Clerk, pursuant to this Court's Rule 13.2, refused to accept a petition for certiorari submitted by Ryan Heath Dickson because it had been filed one day late. In the letter sent to Dickson's counsel, the Clerk explained that "[w]hen the time to file a petition for a writ of certiorari in a civil case ... has expired, the Court no longer has the power to review the petition." Letter from William K. Suter, Clerk of Court, to Ronald T. Spriggs (Dec. 28, 2006). Dickson was executed on April 26, 2007, without any Member of this Court having even seen his petition for certiorari. The rejected certiorari petition was Dickson's first in this Court, and one can only speculate as to whether denial of that petition would have been a foregone conclusion.

[2] Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them. See *Curry,* 6 How., at

113, 12 L.Ed. 363. Put another way, the notion of " 'subject-matter' " jurisdiction obviously extends to " 'classes of cases ... falling within a court's adjudicatory authority,' "***2366** *Eberhart,supra,* at 16, 126 S.Ct. 403 (quoting *Kontrick,supra,* at 455, 124 S.Ct. 906), but it is no less "jurisdictional" when Congress forbids federal courts from adjudicating an otherwise legitimate "class of cases" after a certain period has elapsed from final judgment.

[3][4] The resolution of this case follows naturally from this reasoning. Like the initial 30-day period for filing a notice of appeal, the limit on how long a district court may reopen that period is set forth in a statute, 28 U.S.C. § 2107(c). Because Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period in § 2107(c), that limitation is more than a simple "claim-processing rule." As we have long held, when an "appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction." *Curry,supra,* at 113. Bowles' failure to file his notice of appeal in accordance with the statute therefore deprived the Court of Appeals of jurisdiction. And because Bowles' error is one of jurisdictional magnitude, he cannot rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. See *Arbaugh,supra,* at 513-514, 126 S.Ct. 1235.

B

[5] Bowles contends that we should excuse his untimely filing because he satisfies the "unique circumstances" doctrine, which has its roots in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962)*(per curiam)*. There, pursuant to then-Rule 73(a) of the Federal Rules of Civil Procedure, a District Court entertained a timely motion to extend the time for filing a notice of appeal. The District Court found the moving party had established a showing of "excusable neglect," as required by the Rule, and granted the motion. The Court of Appeals reversed the finding of excusable neglect and, accordingly, held that the District Court lacked jurisdiction to grant the extension. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 303 F.2d 609, 611-612 (C.A.7 1962). This Court reversed, noting "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect.' " 371 U.S., at 217, 83 S.Ct. 283.

[6][7] Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement. Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the "unique circumstances" doctrine is illegitimate. Given that this Court has applied *Harris Truck Lines* only once in the last half century, *Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964)*(per curiam),* several courts have rightly questioned its continuing validity. See, *e.g., Panhorst v. United States,* 241 F.3d 367, 371 (C.A.4 2001) (doubting "the continued viability of the unique circumstances doctrine"). See also *Houston v. Lack,* 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting) ("Our later cases ... effectively repudiate the *Harris Truck Lines* approach ..."). See also *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 170, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989) (referring to "the so-called 'unique circumstances' exception" to the timely appeal requirement). We see no compelling reason to resurrect the doctrine from its 40-year slumber. Accordingly, we reject Bowles' reliance on the doctrine, and we overrule *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule.

C

If rigorous rules like the one applied today are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits. Even narrow rules to this effect would give rise to litigation testing their reach and would no doubt detract from the clarity of the rule. However, congressionally authorized rulemaking would likely lead to less litigation than court-created exceptions without authorization. And in all events, for the reasons discussed above, we lack present authority to make the exception peti-

tioner seeks.

III

The Court of Appeals correctly held that it lacked jurisdiction to consider Bowles' appeal. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The District Court told petitioner Keith Bowles that his notice of appeal was due on February 27, 2004. He filed a notice of appeal on February 26, only to be told that he was too late because his deadline had actually been February 24. It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch. I respectfully dissent.

I

" 'Jurisdiction,' " we have warned several times in the last decade, " 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *United States v. Vanness,* 85 F.3d 661, 663, n. 2 (C.A.D.C.1996)); *Kontrick v. Ryan,* 540 U.S. 443, 454, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (quoting *Steel Co.*); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 510, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (quoting *Steel Co.*); *Rockwell Int'l Corp. v. United States,* 549 U.S. ----, ----, 127 S.Ct. 1397, 1405, 167 L.Ed.2d 190 (2007) (quoting *Steel Co.*). This variety of meaning has insidiously tempted courts, this one included, to engage in "less than meticulous," *Kontrick,supra,* at 454, 124 S.Ct. 906, sometimes even "profligate ... use of the term," *Arbaugh,supra,* at 510, 126 S.Ct. 1235.

In recent years, however, we have tried to clean up our language, and until today we have been avoiding the erroneous jurisdictional conclusions that flow from indiscriminate use of the ambiguous word. Thus, although we used to call the sort of time limit at issue here "mandatory and jurisdictional," *United States v. Robinson,* 361 U.S. 220, 229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), we have recently and repeatedly corrected that designation as a misuse of the "jurisdiction" label. *Arbaugh,supra,* at 510, 126 S.Ct. 1235 (citing *Robinson* as an example of improper use of the term "jurisdiction"); *Eberhart v. United States,* 546 U.S. 12, 17-18, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)*(per curiam)* (same); *Kontrick,supra,* at 454, 124 S.Ct. 906 (same).

But one would never guess this from reading the Court's opinion in this case, which suddenly restores *Robinson's* indiscriminate use of the "mandatory and jurisdictional" label to good law in the face of three unanimous repudiations of *Robinson's* error. See *ante,* at 2363 - 2364.This is puzzling, the more so because our recent (and, I repeat, unanimous) efforts to confine jurisdictional rulings to jurisdiction proper were obviously sound, and the majority makes no attempt to show they were not.[FN1]

FN1. The Court thinks my fellow dissenters and I are forgetful of an opinion I wrote and the others joined in 2003, which referred to the 30-day rule of 28 U.S.C. § 2107(a) as a jurisdictional time limit. See *ante,* at 2364 (quoting *Barnhart v. Peabody Coal Co.,* 537 U.S. 149, 160, n. 6, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003)). But that reference in *Barnhart* was a perfect example of the confusion of the mandatory and the jurisdictional that the entire Court has spent the past four years repudiating in *Arbaugh,Eberhart,* and *Kontrick.* My fellow dissenters and I believe that the Court was right to correct its course; the majority, however, will not even admit that we deliberately changed course, let alone explain why it is now changing course again.

***2368** The stakes are high in treating time limits as jurisdictional. While a mandatory but nonjurisdictional limit is enforceable at the insistence of a

party claiming its benefit or by a judge concerned with moving the docket, it may be waived or mitigated in exercising reasonable equitable discretion. But if a limit is taken to be jurisdictional, waiver becomes impossible, meritorious excuse irrelevant (unless the statute so provides), and *sua sponte* consideration in the courts of appeals mandatory, see *Arbaugh,supra,* at 514, 126 S.Ct. 1235.[FN2] As the Court recognizes, *ante,* at 2364 - 2365, this is no way to regard time limits set out in a court rule rather than a statute, see *Kontrick,supra,* at 452, 124 S.Ct. 906 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case. Generally speaking, limits on the reach of federal statutes, even nontemporal ones, are only jurisdictional if Congress says so: "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Arbaugh,* 546 U.S., at 516, 126 S.Ct. 1235. Thus, we have held "that time prescriptions, however emphatic, 'are not properly typed "jurisdictional," ' "*id.,* at 510, 126 S.Ct. 1235 (quoting *Scarborough v. Principi,* 541 U.S. 401, 414, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004)), absent some jurisdictional designation by Congress. Congress put no jurisdictional tag on the time limit here.[FN3]

> FN2. The requirement that courts of appeals raise jurisdictional issues *sua sponte* reveals further ill effects of today's decision. Under § 2107(c), "[t]he district court may ... extend the time for appeal upon a showing of excusable neglect or good cause." By the Court's logic, if a district court grants such an extension, the extension's propriety is subject to mandatory *sua sponte* review in the court of appeals, even if the extension was unopposed throughout, and upon finding error the court of appeals must dismiss the appeal. I see no more justification for such a rule than reason to suspect Congress meant to create it.

FN3. The majority answers that a footnote of our unanimous opinion in *Kontrick v. Ryan,* 540 U.S. 443, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004), used § 2107(a) as an illustration of a jurisdictional time limit. *Ante,* at 2364 - 2365 ("[W]e noted that § 2107 contains the type of statutory time constraints that would limit a court's jurisdiction. 540 U.S., at 453, and n. 8, 124 S.Ct. 906"). What the majority overlooks, however, are the post-*Kontrick* cases showing that § 2107(a) can no longer be seen as an example of a jurisdictional time limit. The jurisdictional character of the 30-(or 60)-day time limit for filing notices of appeal under the present § 2107(a) was first pronounced by this Court in *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978). But in that respect *Browder* was undercut by *Eberhart v. United States,* 546 U.S. 12, 126 S.Ct. 403, 163 L.Ed.2d 14 (2005)*(per curiam),* decided after *Kontrick. Eberhart* cited *Browder* (along with several of the other cases on which the Court now relies) as an example of the basic error of confusing mandatory time limits with jurisdictional limitations, a confusion for which *United States v. Robinson,* 361 U.S. 220, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), was responsible. Compare *ante,* at 2363 - 2364 (citing *Browder,Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982)*(per curiam),* and *Hohn v. United States,* 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)), with *Eberhart,supra,* at 17-18, 126 S.Ct. 403 (citing those cases as examples of the confusion caused by *Robinson's* imprecise language). *Eberhart* was followed four months later by *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), which summarized the body of recent decisions in which the Court "clarified that time prescriptions, however emphatic, are

> not properly typed jurisdictional,"*id.*, at 510, 126 S.Ct. 1235 (internal quotation marks omitted). This unanimous statement of all Members of the Court participating in the case eliminated the option of continuing to accept § 2107(a) as jurisdictional and it precludes treating the 14-day period of § 2107(c) as a limit on jurisdiction.

***2369** The doctrinal underpinning of this recently repeated view was set out in *Kontrick:* "the label 'jurisdictional' [is appropriate] not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S., at 455, 124 S.Ct. 906. A filing deadline is the paradigm of a claim-processing rule, not of a delineation of cases that federal courts may hear, and so it falls outside the class of limitations on subject matter jurisdiction unless Congress says otherwise.FN4

> FN4. The Court points out that we have affixed a "jurisdiction" label to the time limit contained in § 2101(c) for petitions for writ of certiorari in civil cases. *Ante,* at 2364 - 2366 (citing *Federal Election Comm'n v. NRA Political Victory Fund,* 513 U.S. 88, 90, 115 S.Ct. 537, 130 L.Ed.2d 439 (1994); this Court's Rule 13.2). Of course, we initially did so in the days when we used the term imprecisely. The status of § 2101(c) is not before the Court in this case, so I express no opinion on whether there are sufficient reasons to treat it as jurisdictional. The Court's observation that jurisdictional treatment has had severe consequences in that context, *ante,* at 2365, n. 4, does nothing to support an argument that jurisdictional treatment is sound, but instead merely shows that the certiorari rule, too, should be reconsidered in light of our recent clarifications of what sorts of rules should be treated as jurisdictional.

The time limit at issue here, far from defining the set of cases that may be adjudicated, is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional, *Day v. McDonough,* 547 U.S. 198, 205, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). Statutes of limitations may thus be waived, *id.,* at 207-208, 126 S.Ct. 1675, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990).

Consistent with the traditional view of statutes of limitations, and the carefully limited concept of jurisdiction explained in *Arbaugh,Eberhart,* and *Kontrick,* an exception to the time limit in 28 U.S.C. § 2107(c) should be available when there is a good justification for one, for reasons we recognized years ago. In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 217, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962)*(per curiam),* and *Thompson v. INS,* 375 U.S. 384, 387, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964)*(per curiam),* we found that "unique circumstances" excused failures to comply with the time limit. In fact, much like this case, *Harris* and *Thompson* involved district court errors that misled litigants into believing they had more time to file notices of appeal than a statute actually provided. Thus, even back when we thoughtlessly called time limits jurisdictional, we did not actually treat them as beyond exemption to the point of shrugging at the inequity of penalizing a party for relying on what a federal judge had said to him. Since we did not dishonor reasonable reliance on a judge's official word back in the days when we ***2370** uncritically had a jurisdictional reason to be unfair, it is unsupportable to dishonor it now, after repeatedly disavowing any such jurisdictional justification that would apply to the 14-day time limit of § 2107(c).

The majority avoids clashing with *Harris* and *Thompson* by overruling them on the ground of their "slumber," *ante,* at 2366, and inconsistency with a time-limit-as-jurisdictional rule.[FN5] But eliminating those precedents underscores what has

become the principal question of this case: why does today's majority refuse to come to terms with the steady stream of unanimous statements from this Court in the past four years, culminating in *Arbaugh* 's summary a year ago? The majority begs this question by refusing to confront what we have said: "in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional." ' " *Arbaugh,* 546 U.S., at 510, 126 S.Ct. 1235 (quoting *Scarborough,* 541 U.S., at 414, 124 S.Ct. 1856). This statement of the Court, and those preceding it for which it stands as a summation, cannot be dismissed as "some dicta," *ante,* at 2363 - 2364, n. 2, and cannot be ignored on the ground that some of them were made in cases where the challenged restriction was not a time limit, see *ante,* at 2364 - 2365.By its refusal to come to grips with our considered statements of law the majority leaves the Court incoherent.

> FN5. With no apparent sense of irony, the Court finds that " '[o]ur later cases ... effectively repudiate the *Harris Truck Lines* approach.' " *Ante,* at 2366 (quoting *Houston v. Lack,* 487 U.S. 266, 282, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (SCALIA, J., dissenting); omission in original). Of course, those "later cases" were *Browder* and *Griggs,* see *Houston,supra,* at 282, 108 S.Ct. 2379, which have themselves been repudiated, not just "effectively" but explicitly, in *Eberhart.* See n. 3, *supra.*

In ruling that Bowles cannot depend on the word of a District Court Judge, the Court demonstrates that no one may depend on the recent, repeated, and unanimous statements of all participating Justices of this Court. Yet more incongruously, all of these pronouncements by the Court, along with two of our cases,[FN6] are jettisoned in a ruling for which the leading justification is *stare decisis,* see *ante,* at 2363 - 2364 ("This Court has long held ...").

> FN6. Three, if we include *Wolfsohn v. Hankin,* 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964)*(per curiam).*

II

We have the authority to recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge.[FN7] Bowles, though, does not have to convince us as a matter of first impression that his reliance was justified, for we only have to look as far as *Thompson* to know that he ought to prevail. There, the would-be appellant, Thompson, had filed post-trial motions 12 days after the District Court's final order. Although the rules said they should have been filed within 10, Fed. Rules Civ. Proc. 52(b) and 59(b) (1964), the trial court nonetheless had "specifically declared that the 'motion for a new trial' was made 'in ample time.' " *Thompson,* 375 U.S., at 385, 84 S.Ct. 397. Thompson relied on that statement in filing a notice of appeal within 60 days of the denial of the post-trial motions but not within 60 days of entry of the original judgment. Only timely post-trial motions affected the 60-day time limit for filing a ***2371** notice of appeal, Rule 73(a) (1964), so the Court of Appeals held the appeal untimely. We vacated because Thompson "relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Id.,* at 387, 84 S.Ct. 397.

> FN7. As a member of the Federal Judiciary, I cannot help but think that reliance on our orders is reasonable. See O. Holmes, Natural Law, in Collected Legal Papers 311 (1920). I would also rest better knowing that my innocent errors will not jeopardize anyone's rights unless absolutely necessary.

Thompson should control. In that case, and this one, the untimely filing of a notice of appeal resulted from reliance on an error by a district court, an error that caused no evident prejudice to the other party. Actually, there is one difference between *Thompson* and this case: Thompson filed his post-trial motions late and the District Court was mistaken when it said they were timely; here, the District Court made the error out of the blue, not on top

of any mistake by Bowles, who then filed his notice of appeal by the specific date the District Court had declared timely. If anything, this distinction ought to work in Bowles's favor. Why should we have rewarded Thompson, who introduced the error, but now punish Bowles, who merely trusted the District Court's statement? FN8

FN8. Nothing in *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989), requires such a strange rule. In *Osterneck,* we described the "unique circumstances" doctrine as applicable "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done." *Id.,* at 179, 109 S.Ct. 987. But the point we were making was that *Thompson* could not excuse a lawyer's original mistake in a case in which a judge had not assured him that his act had been timely; the Court of Appeals in *Osterneck* had found that no court provided a specific assurance, and we agreed. I see no reason to take *Osterneck's* language out of context to buttress a fundamentally unfair resolution of an issue the *Osterneck* Court did not have in front of it. Cf. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) ("[W]e think it generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code").

Under *Thompson,* it would be no answer to say that Bowles's trust was unreasonable because the 14-day limit was clear and counsel should have checked the judge's arithmetic. The 10-day limit on post-trial motions was no less pellucid in *Thompson,* which came out the other way. And what is more, counsel here could not have uncovered the court's error simply by counting off the days on a calendar. Federal Rule of Appellate Procedure 4(a)(6) allows a party to file a notice of appeal within 14 days of "the date when [the district court's] order to reopen is entered." See also 28 U.S.C. § 2107(c)(2) (allowing reopening for "14 days from the date of entry"). The District Court's order was dated February 10, 2004, which reveals the date the judge signed it but not necessarily the date on which the order was entered. Bowles's lawyer therefore could not tell from reading the order, which he received by mail, whether it was entered the day it was signed. Nor is the possibility of delayed entry merely theoretical: the District Court's original judgment in this case, dated July 10, 2003, was not entered until July 28. See App. 11 (District Court docket). According to Bowles's lawyer, electronic access to the docket was unavailable at the time, so to learn when the order was actually entered he would have had to call or go to the courthouse and check. See Tr. of Oral Arg. 56-57. Surely this is more than equity demands, and unless every statement by a federal court is to be tagged with the warning "Beware of the Judge," Bowles's lawyer had no obligation to go behind the terms of the order he received.

I have to admit that Bowles's counsel probably did not think the order might have been entered on a different day from ***2372** the day it was signed. He probably just trusted that the date given was correct, and there was nothing unreasonable in so trusting. The other side let the order pass without objection, either not caring enough to make a fuss or not even noticing the discrepancy; the mistake of a few days was probably not enough to ring the alarm bell to send either lawyer to his copy of the federal rules and then off to the courthouse to check the docket. FN9 This would be a different case if the year were wrong on the District Court's order, or if opposing counsel had flagged the error. But on the actual facts, it was reasonable to rely on a facially plausible date provided by a federal judge.

FN9. At first glance it may seem unreasonable for counsel to wait until the penultimate day under the judge's order, filing a notice of appeal being so easy that counsel should not have needed the extra time. But

> as Bowles's lawyer pointed out at oral argument, filing the notice of appeal starts the clock for filing the record, see Fed. Rule App. Proc. 6(b)(2)(B), which in turn starts the clock for filing a brief, see Rule 31(a)(1), for which counsel might reasonably want as much time as possible. See Tr. of Oral Arg. 6. A good lawyer plans ahead, and Bowles had a good lawyer.

I would vacate the decision of the Court of Appeals and remand for consideration of the merits.

U.S.,2007.
Bowles v. Russell
127 S.Ct. 2360, 168 L.Ed.2d 96, 75 USLW 4428, 07 Cal. Daily Op. Serv. 6807, 2007 Daily Journal D.A.R. 8736, 20 Fla. L. Weekly Fed. S 352

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128 S.Ct. 750, 65 ERC 1481, 76 USLW 4033, 08 Cal. Daily Op. Serv. 389, 2008 Daily Journal D.A.R. 230, 21 Fla. L. Weekly Fed. S 33
(Cite as: 128 S.Ct. 750)

▷
John R. Sand & Gravel Co. v. U.S.
U.S.,2008.

Supreme Court of the United States
JOHN R. SAND & GRAVEL COMPANY, Petitioner,
v.
UNITED STATES.
No. 06-1164.

Argued Nov. 6, 2007.
Decided Jan. 8, 2008.

Background: Lessee under mining lease brought suit against the United States, seeking compensation for taking of its leasehold rights during environmental remediation of landfill operated by lessor on portion of the property. The United States Court of Federal Claims, 62 Fed.Cl. 556, ruled that the United States was not liable to lessee under the Fifth Amendment for the alleged taking of its leasehold interest, and lessee appealed. The Court of Appeals for the Federal Circuit, 457 F.3d 1345, vacated and remanded. Lessee petitioned for certiorari which was granted.

Holding: The Supreme Court, Justice Breyer, held that special statute of limitations governing suits against the United States in the Court of Federal Claims, which sets forth a more absolute, "jurisdictional" limitations period, requires sua sponte consideration of the timeliness of a suit filed in the Court of Federal Claims, despite the government's waiver of the issue.

Affirmed.

Justice Stevens filed dissenting opinion in which Justice Ginsberg joined.

Justice Ginsberg filed dissenting opinion.

West Headnotes

Federal Courts 170B ⇐1109

170B Federal Courts
170BXII Claims Court (Formerly Court of Claims)
170BXII(B) Procedure
170Bk1103 Time to Sue and Limitations
170Bk1109 k. Waiver of Limitations; Congressional Reference Cases. Most Cited Cases
Special statute of limitations governing suits against the United States in the Court of Federal Claims, which sets forth a more absolute, "jurisdictional" limitations period, requires sua sponte consideration of the timeliness of a suit filed in the Court of Federal Claims, despite the government's waiver of the issue.

**751 Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

In a Court of Federal Claims action, petitioner argued that various federal activities on land for which it held a mining lease amounted to an unconstitutional taking of its leasehold rights. The Government initially asserted that the claims were untimely under the court of claims statute of limitations, but later effectively conceded that issue and won on the merits. Although the Government did not raise timeliness on appeal, the Federal Circuit addressed the issue *sua sponte,* finding the action untimely.

Held: The court of claims statute of limitations requires *sua sponte* consideration of a lawsuit's timeliness, despite the Government's waiver of the issue. Pp. 753 - 757.

(a) This Court has long interpreted the statute as setting out a more absolute, "jurisdictional" lim-

itations period. For example, in 1883, the Court concluded with regard to the current statute's predecessor that "it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not." *Kendall v. United States,* 107 U.S. 123, 125-126, 2 S.Ct. 277, 27 L.Ed. 437. See also *Finn v. United States,* 123 U.S. 227, 8 S.Ct. 82, 31 L.Ed. 128, and *Soriano v. United States,* 352 U.S. 270, 77 S.Ct. 269, 1 L.Ed.2d 306. That the statute's language has changed slightly since 1883 makes no difference here, for there has been no expression of congressional intent to change the underlying substantive law. Pp. 753 - 756.

(b) Thus, petitioner can succeed only by convincing the Court that it has overturned, or should overturn, its earlier precedent. Pp. 755 - 757.

(1) The Court did not do so in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435, where it applied equitable tolling to a limitations statute governing employment discrimination claims against the Government. While the *Irwin Court* noted the similarity of that statute to the court of claims statute, the civil rights statute is unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation. Moreover, the *Irwin* Court mentioned *Soriano,* which reflects the particular interpretive history of the court of claims statute, but said nothing about overturning it or any other case in that line. Finally, just as an equitable tolling presumption ***752** could be rebutted by statutory language demonstrating Congress' contrary intent, it should be rebutted by a definitive earlier interpretation finding a similar congressional intent. Language in *Franconia Associates v. United States,* 536 U.S. 129, 145, 122 S.Ct. 1993, 153 L.Ed.2d 132, describing the court of claims statute as "unexceptional" and citing *Irwin* for the proposition "that limitations principles should generally apply to the Government in the same way that they apply to private parties" refers only to the statute's claims-accrual rule and adds little or nothing to petitioner's contention that *Irwin* overruled earlier cases. Pp. 755 - 756.

(2) *Stare decisis* principles require rejection of petitioner's argument that the Court should overturn *Kendall, Finn, Soriano,* and related cases. Any anomaly such old cases and *Irwin* together create is not critical, but simply reflects a different judicial assumption about the comparative weight Congress would likely have attached to competing national interests. Moreover, the earlier cases do not produce "unworkable" law, see, *e.g., United States v. International Business Machines Corp.,* 517 U.S. 843, 856, 116 S.Ct. 1793, 135 L.Ed.2d 124. *Stare decisis* in respect to statutory interpretation also has "special force." Congress, which "remains free to alter what [the Court has] done,"*Patterson v. McLean Credit Union,* 491 U.S. 164, 172-173, 109 S.Ct. 2363, 105 L.Ed.2d 132, has long acquiesced in the interpretation given here. Finally, even if the Government cannot show detrimental reliance on the earlier cases, reexamination of well-settled precedent could nevertheless prove harmful. Overturning a decision on the belief that it is no longer "right" would inevitably reflect a willingness to reconsider others, and such willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability. Pp. 756 - 757.

457 F.3d 1345, affirmed.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, SOUTER, THOMAS, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined. GINSBURG, J., filed a dissenting opinion.

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ant Attorney General, Edwin S. Kneedler, Deputy Solicitor General, Malcolm L. Stewart, Assistant to the Solicitor General, Aaron P. Avila, Attorney Department of Justice Washington, D.C., for Respondent.For U.S. Supreme Court briefs, see:2007 WL 2236607 (Pet.Brief)2007 WL 2825624 (Resp.Brief)2007 WL 3161714 (Reply.Brief)
Justice BREYER delivered the opinion of the Court.

The question presented is whether a court must raise on its own the timeliness of a lawsuit filed in the Court of Federal Claims, despite the Government's waiver of the issue. We hold that the special statute of limitations governing the Court of Federal Claims requires that *sua sponte* consideration.

I

Petitioner John R. Sand & Gravel Company filed an action in the Court of ***753** Federal Claims in May 2002. The complaint explained that petitioner held a 50-year mining lease on certain land. And it asserted that various Environmental Protection Agency activities on that land (involving, *e.g.*, the building and moving of various fences) amounted to an unconstitutional taking of its leasehold rights.

The Government initially asserted that petitioner's several claims were all untimely in light of the statute providing that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. Later, however, the Government effectively conceded that certain claims were timely. See App. 37a-39a (Government's pretrial brief). The Government subsequently won on the merits. See 62 Fed.Cl. 556, 589 (2004).

Petitioner appealed the adverse judgment to the Court of Appeals for the Federal Circuit. See 457 F.3d 1345, 1346 (2006). The Government's brief said nothing about the statute of limitations, but an *amicus* brief called the issue to the court's attention. See *id.*, at 1352. The court considered itself obliged to address the limitations issue, and it held that the action was untimely. *Id.*, at 1353-1360. We subsequently agreed to consider whether the Court of Appeals was right to ignore the Government's waiver and to decide the timeliness question. 550 U.S. ----, 127 S.Ct. 2877, 167 L.Ed.2d 1151 (2007).

II

Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. See, *e.g.*, *United States v. Kubrick,* 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver. See Fed. Rules Civ. Proc. 8(c)(1), 12(b), 15(a); *Day v. McDonough,* 547 U.S. 198, 202, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006); *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations. See, *e.g.*, *Rotella v. Wood,* 528 U.S. 549, 560-561, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000); *Zipes*, *supra,* at 393, 102 S.Ct. 1127; see also *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450-453 (C.A.7 1990).

Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, see, *e.g.*, *United States v. Brockamp,* 519 U.S. 347, 352-353, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997), limiting the scope of a governmental waiver of sovereign immunity, see, *e.g.*, *United States v. Dalm,* 494 U.S. 596, 609-610, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990), or promoting judicial efficiency, see, *e.g.*, *Bowles v. Russell,* 551 U.S. ----, ---- ----, 127 S.Ct. 2360, 2365-66, 168 L.Ed.2d 96 (2007). The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a

waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. See, *e.g., ibid.;* see also *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional." See, *e.g.,Bowles, supra,* at 2364.

This Court has long interpreted the court of claims limitations statute as setting***754** forth this second, more absolute, kind of limitations period.

A

In *Kendall v. United States,* 107 U.S. 123, 2 S.Ct. 277, 27 L.Ed. 437 (1883), the Court applied a predecessor of the current 6-year bar to a claim that had first accrued in 1865 but that the plaintiff did not bring until 1872. *Id.,* at 124, 2 S.Ct. 277; see also Act of Mar. 3, 1863, § 10, 12 Stat. 767 (Rev.Stat. § 1069). The plaintiff, a former Confederate States employee, had asked for equitable tolling on the ground that he had not been able to bring the suit until Congress, in 1868, lifted a previously imposed legal disability. See 107 U.S., at 124-125, 2 S.Ct. 277. But the Court denied the request. *Id.,* at 125-126, 2 S.Ct. 277. It did so not because it thought the equities ran against the plaintiff, but because the statute (with certain listed exceptions) did not permit tolling. Justice Harlan, writing for the Court, said the statute was "jurisdiction[al]," that it was not susceptible to judicial "engraft[ing]" of unlisted disabilities such as "sickness, surprise, or inevitable accident," and that "*it [was] the duty of the court to raise the [timeliness] question whether it [was] done by plea or not.*" *Ibid.* (emphasis added).

Four years later, in *Finn v. United States,* 123 U.S. 227, 8 S.Ct. 82, 31 L.Ed. 128 (1887), the Court found untimely a claim that had originally been filed with a Government agency, but which that agency had then voluntarily referred by statute to the Court of Claims. *Id.,* at 229-230, 8 S.Ct. 82 (citing Act of June 25, 1868, § 7, 15 Stat. 76-77); see also Rev. Stat. §§ 1063-1065. That Government reference, it might have been argued, amounted to a waiver by the Government of any limitations-based defense. Cf. *United States v. Lippitt,* 100 U.S. 663, 669, 15 Ct.Cl. 622, 25 L.Ed. 747 (1880) (reserving the question of the time bar's application in such circumstances). The Court nonetheless held that the long (over 10-year) delay between the time the claim accrued and the plaintiff's filing of the claim before the agency made the suit untimely. *Finn,* 123 U.S., at 232, 8 S.Ct. 82. And as to any argument of Government waiver or abandonment of the time-bar defense, Justice Harlan, again writing for the Court, said that the ordinary legal principle that "limitation ... is a defence [that a defendant] must plead *...has no application to suits in the Court of Claims against the United States.*" *Id.* at 232-233, 8 S.Ct. 82 (emphasis added).

Over the years, the Court has reiterated in various contexts this or similar views about the more absolute nature of the court of claims limitations statute. See *Soriano v. United States,* 352 U.S. 270, 273-274, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957); *United States v. Greathouse,* 166 U.S. 601, 602, 17 S.Ct. 701, 41 L.Ed. 1130 (1897); *United States v. New York,* 160 U.S. 598, 616-619, 31 Ct.Cl. 459, 16 S.Ct. 402, 40 L.Ed. 551 (1896); *De Arnaud v. United States,* 151 U.S. 483, 495-496, 29 Ct.Cl. 555, 14 S.Ct. 374, 38 L.Ed. 244 (1894).

B

The statute's language has changed slightly since *Kendall* was decided in 1883, but we do not see how any changes in language make a difference here. The only arguably pertinent linguistic change took place during the 1948 recodification of Title 28. See § 2501, 62 Stat. 976. Prior to 1948, the statute said that "[e]very claim *...cognizable by* the Court of Claims, shall be forever barred" unless filed within six years of the time it first accrues. Rev. Stat. § 1069 (emphasis added); see also Act of Mar. 3, 1911, § 156, 36 Stat. 1139 ***755** (reenacting

the statute without any significant changes). Now, it says that "[e]very claim of which" the Court of Federal Claims "*has jurisdiction* shall be barred" unless filed within six years of the time it first accrues. 28 U.S.C. § 2501 (emphasis added).

This Court does not "presume" that the 1948 revision "worked a change in the underlying substantive law 'unless an intent to make such a change is clearly expressed.' " *Keene Corp. v. United States,* 508 U.S. 200, 209, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) (quoting *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227, 77 S.Ct. 787, 1 L.Ed.2d 786 (1957) (alterations omitted)); see also No. 308, 80th Cong., 1st Sess., pp. 1-8 (1947) (hereinafter Rep. No. 308) (revision sought to codify, not substantively modify, existing law); Barron, The Judicial Code: 1948 Revision, 8 F.R.D. 439 (1948) (same). We can find no such expression of intent here. The two linguistic forms ("cognizable by"; "has jurisdiction") mean about the same thing. See Black's Law Dictionary 991 (4th ed.1951) (defining "jurisdiction" as "the authority by which courts and judicial officers take *cognizance of* and decide cases" (emphasis added)); see also Black's Law Dictionary 1038 (3d ed.1933) (similarly using the term "cognizance" to define "jurisdiction"). Nor have we found any suggestion in the Reviser's Notes or anywhere else that Congress intended to change the prior meaning. See Rep. No. 308, at A192 (Reviser's Note); Barron, *supra,* at 446 (Reviser's Notes specify where change was intended). Thus, it is not surprising that nearly a decade *after* the revision, the Court, citing *Kendall,* again repeated that the statute's limitations period was "jurisdiction[al]" and not susceptible to equitable tolling. See *Soriano, supra,* at 273-274, 277, 77 S.Ct. 269.

III

In consequence, petitioner can succeed only by convincing us that this Court has overturned, or that it should now overturn, its earlier precedent.

A

We cannot agree with petitioner that the Court already has overturned the earlier precedent. It is true, as petitioner points out, that in *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), we adopted "a more general rule" to replace our prior ad hoc approach for determining whether a Government-related statute of limitations is subject to equitable tolling-namely, "that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.,* at 95-96, 111 S.Ct. 453. It is also true that *Irwin,* using that presumption, found equitable tolling applicable to a statute of limitations governing employment discrimination claims against the Government. See *id.,* at 96, 111 S.Ct. 453; see also 42 U.S.C. § 2000e-16(c) (1988 ed.). And the Court noted that this civil rights statute was linguistically similar to the court of claims statute at issue here. See *Irwin, supra,* at 94-95, 111 S.Ct. 453.

But these few swallows cannot make petitioner's summer. That is because *Irwin* dealt with a different limitations statute. That statute, while similar to the present statute in language, is unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation. Moreover, the Court, while mentioning a case that reflects the particular interpretive history of the court of claims statute, namely *Soriano,* 352 U.S. 270, 77 S.Ct. 269, 1 L.Ed.2d 306, says nothing at all about overturning that or any other case in that line. See ***756**498 U.S., at 94-95, 111 S.Ct. 453. Courts do not normally overturn a long line of earlier cases without mentioning the matter. Indeed, *Irwin* recognized that it was announcing a general prospective rule, see *id.,* at 95, 111 S.Ct. 453, which does not imply revisiting past precedents.

Finally, *Irwin* adopted a "*rebuttable* presumption" of equitable tolling. *Ibid.* (emphasis added). That presumption seeks to produce a set of statutory interpretations that will more accurately re-

flect Congress' likely meaning in the mine run of instances where it enacted a Government-related statute of limitations. But the word "rebuttable" means that the presumption is not conclusive. Specific statutory language, for example, could rebut the presumption by demonstrating Congress' intent to the contrary. And if so, a definitive earlier interpretation of the statute, finding a similar congressional intent, should offer a similarly sufficient rebuttal.

Petitioner adds that in *Franconia Associates v. United States,* 536 U.S. 129, 122 S.Ct. 1993, 153 L.Ed.2d 132 (2002), we explicitly considered the court of claims limitations statute, we described the statute as "unexceptional," and we cited *Irwin* for the proposition "that limitations principles should generally apply to the Government in the same way that they apply to private parties." 536 U.S., at 145, 122 S.Ct. 1993 (internal quotation marks omitted). But we did all of this in the context of rejecting an argument by the Government that the court of claims statute embodies a special, earlier-than-normal, rule as to when a claim first accrues. *Id.,* at 144-145, 122 S.Ct. 1993. The quoted language thus refers only to the statute's claims-accrual rule and adds little or nothing to petitioner's contention that *Irwin* overruled our earlier cases-a contention that we have just rejected.

B

Petitioner's argument must therefore come down to an invitation now to reject or to overturn *Kendall, Finn, Soriano*, and related cases. In support, petitioner can claim that *Irwin* and *Franconia* represent a turn in the course of the law and can argue essentially as follows: The law now requires courts, when they interpret statutes setting forth limitations periods in respect to actions against the Government, to place greater weight upon the equitable importance of treating the Government like other litigants and less weight upon the special governmental interest in protecting public funds. Cf. *Irwin,supra,* at 95-96, 111 S.Ct. 453. The older interpretations treated these interests differently. Those older cases have consequently become anomalous. The Government is unlikely to have relied significantly upon those earlier cases. Hence the Court should now overrule them.

Basic principles of *stare decisis,* however, require us to reject this argument. Any anomaly the old cases and *Irwin* together create is not critical; at most, it reflects a different judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests. Moreover, the earlier cases lead, at worst, to different interpretations of different, but similarly worded, statutes; they do not produce "unworkable" law. See *United States v. International Business Machines Corp.,* 517 U.S. 843, 856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) (internal quotation marks omitted); *California v. FERC,* 495 U.S. 490, 499, 110 S.Ct. 2024, 109 L.Ed.2d 474 (1990). Further, *stare decisis* in respect to statutory interpretation has "special force," for "Congress remains free to alter what we have done." *Patterson v. McLean Credit Union,* 491 U.S. 164, 172-173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989); see also ***757** *Watson v. United States,* --- U.S. ----, ----, 128 S.Ct. 579, 585, ---L.Ed.2d ---- (2007). Additionally, Congress has long acquiesced in the interpretation we have given. See *ibid.; Shepard v. United States,* 544 U.S. 13, 23, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

Finally, even if the Government cannot show detrimental reliance on our earlier cases, our reexamination of well-settled precedent could nevertheless prove harmful. Justice Brandeis once observed that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (dissenting opinion). To overturn a decision settling one such matter simply because we might believe that decision is no longer "right" would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substi-

tute disruption, confusion, and uncertainty for necessary legal stability. We have not found here any factors that might overcome these considerations.

IV

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

Statutes of limitations generally fall into two broad categories: affirmative defenses that can be waived and so-called "jurisdictional" statutes that are not subject to waiver or equitable tolling. For much of our history, statutes of limitations in suits against the Government were customarily placed in the latter category on the theory that conditions attached to a waiver of sovereign immunity "must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States,* 352 U.S. 270, 276, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957); see also *Finn* v. *United States,* 123 U.S. 227, 232-233, 8 S.Ct. 82, 31 L.Ed. 128 (1887); *Kendall* v. *United States,* 107 U.S. 123, 125-126, 2 S.Ct. 277, 27 L.Ed. 437 (1883). But that rule was ignored-and thus presumably abandoned-in *Honda v. Clark,* 386 U.S. 484, 87 S.Ct. 1188, 18 L.Ed.2d 244 (1967),FN1 and *Bowen v. City of New York,* 476 U.S. 467, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986).FN2

FN1. In *Honda,* we concluded, as to petitioners' attempts to recover assets that had been seized upon the outbreak of hostilities with Japan, that it was "consistent with the overall congressional purpose to apply a traditional equitable tolling principle, aptly suited to the particular facts of this case and nowhere eschewed by Congress." 386 U.S., at 501, 87 S.Ct. 1188.

FN2. In *Bowen,* we permitted equitable tolling of the 60-day requirement for challenging the denial of disability benefits under the Social Security Act. We cautioned that "we must be careful not to assume the authority to narrow the waiver that Congress intended, or construe the waiver unduly restrictively." 476 U.S., at 479, 106 S.Ct. 2022 (citation and internal quotation marks omitted).

In *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), we followed the lead of *Bowen* (and, by extension, *Honda*), and explicitly replaced the *Soriano* rule with a rebuttable presumption that equitable tolling rules "applicable to suits against private defendants should also apply to suits against the United States." FN3 We acknowledged***758** that "our previous cases dealing with the effect of time limits in suits against the Government [had] not been entirely consistent,"498 U.S., at 94, 111 S.Ct. 453, and we determined that "a continuing effort on our part to decide each case on an ad hoc basis ... would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress,"*id.,* at 95, 111 S.Ct. 453. We therefore crafted a background rule that reflected "a realistic assessment of legislative intent," and also provided "a practically useful principle of interpretation." *Ibid.*

FN3. During the *Irwin* oral arguments, several Members of the Court remarked on the need to choose between the *Soriano* line of cases and the approach taken in cases like *Bowen.* See Tr. of Oral Arg., O.T.1990, No. 89-5867, pp. 25-26 ("Question: '[W]hat do you make of our cases which seem to go really in different directions. The *Bowen* case, which was unanimous and contains language in it that says statutory time limits are traditionally subject to equitable tolling, and other cases like maybe *Soriano*...which point in the other direction[?]' "); see also *id.,* at 8 ("Question: '... I think we sort of have to

choose between *Soriano* and *Bowen,* don't you think?' ").

Our decision in *Irwin* did more than merely "mentio[n]" *Soriano, ante,* at 756; rather, we expressly declined to follow that case. We noted that the limitations language at issue in *Irwin* closely resembled the text we had confronted in *Soriano;* although we conceded that "[a]n argument [could] undoubtedly be made" that the statutes were distinguishable, we were "not persuaded that the difference between them [was] enough to manifest a different congressional intent with respect to the availability of equitable tolling,"498 U.S., at 95, 111 S.Ct. 453. Having found the two statutes functionally indistinguishable, we nevertheless declined the Government's invitation to follow *Soriano,* and we did not so much as cite *Kendall* or *Finn.* Instead, we adopted "a more general rule to govern the applicability of equitable tolling in suits against the Government,"498 U.S., at 95, 111 S.Ct. 453, and we applied the new presumption in favor of equitable tolling to the case before us.[FN4] Nothing in the framing of our decision to adopt a "general rule" to govern the availability of equitable tolling in suits against the Government, *ibid.,* suggested a carve-out for statutes we had already held ineligible for equitable tolling, pursuant to the approach that we had previously abandoned in *Honda* and *Bowen,* and definitively rejected in *Irwin.*

FN4. In the years since we decided *Irwin,* we have applied its rule in a number of statutory contexts. See, *e.g.,Scarborough v. Principi,* 541 U.S. 401, 420-423, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004) (applying the rule of *Irwin* and finding that an application for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), should be permitted to be amended out of time). Most significantly, in *Franconia Associates v. United States,* 536 U.S. 129, 145, 122 S.Ct. 1993, 153 L.Ed.2d 132 (2002), we affirmed, in the context of 28 U.S.C. § 2501, the rule that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties" (citing *Irwin,* 498 U.S., at 95, 111 S.Ct. 453). Although the Government is correct that the question presented by *Franconia* was when a claim accrued under § 2501, our reliance on *Irwin* undermines the majority's suggestion that *Irwin* has no bearing on statutes that have previously been the subject of judicial construction.

Indeed, in his separate opinion in *Irwin,* Justice White noted that the decision was not only inconsistent with our prior cases but also that it "directly overrule[d]" *Soriano.* 498 U.S., at 98, 111 S.Ct. 453 (opinion concurring in part and concurring in judgment). Neither the Court's opinion nor my separate opinion disagreed with that characterization of our holding. The attempt of the Court today, therefore, to cast petitioner's argument as an entreaty to overrule *Soriano,* as well as *Kendall* and *Finn*-and its response that "[b]asic principles of *stare decisis*... require us to reject this argument,"*ante,* at 756-has a hollow ring. If the doctrine of *stare decisis* supplied a clear answer to the question posed by this case-or if the Government***759** could plausibly argue that it had relied on *Soriano* after our decision in *Irwin*-I would join the Court's judgment, despite its unwisdom.[FN5] But I do not agree with the majority's reading of our cases. It seems to me quite plain that *Soriano* is no longer good law, and if there is in fact ambiguity in our cases, it ought to be resolved in favor of clarifying the law, rather than preserving an anachronism whose doctrinal underpinnings were discarded years ago.[FN6]

FN5. The majority points out quite rightly, *ante,* at 756, that the doctrine of *stare decisis* has " 'special force' " in statutory cases. See *Patterson v. McLean Credit Union,* 491 U.S. 164, 172-173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). But the doctrine should not prevent us from acknowledging when we have already over-

ruled a prior case, even if we failed to say so explicitly at the time. In *Rasul v. Bush,* 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004), for example, we explained that in *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973), we had overruled so much of *Ahrens v. Clark,* 335 U.S. 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), as found that the habeas petitioners' presence within the territorial reach of the district court was a jurisdictional prerequisite. *Braden* held, contrary to *Ahrens,* that a prisoner's presence within the district court's territorial reach was *not* an "inflexible jurisdictional rule," 410 U.S., at 500, 93 S.Ct. 1123. *Braden* nowhere stated that it was overruling *Ahrens,* although Justice Rehnquist began his dissent by noting: "Today the Court overrules *Ahrens v. Clark.*" 410 U.S., at 502, 93 S.Ct. 1123. Thirty years later we acknowledged in *Rasul* what was by then clear: *Ahrens* was no longer good law. 542 U.S., at 478-479, and n. 9, 124 S.Ct. 2686.

Moreover, the logic of the "special force" of *stare decisis* in the statutory context is that "Congress remains free to alter what we have done,"*Patterson,* 491 U.S., at 172-173, 109 S.Ct. 2363. But the amendment of an obscure statutory provision is not a high priority for a busy Congress, and we should remain mindful that enactment of legislation is by no means a cost-free enterprise.

FN6. See Holmes, The Path of the Law, 10 Harv. L.Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past").

With respect to provisions as common as time limitations, Congress, in enacting statutes, and judges, in applying them, ought to be able to rely upon a background rule of considerable clarity. *Irwin* announced such a rule, and I would apply that rule to the case before us.[FN7] Because today's decision threatens to revive the confusion of our pre-*Irwin* jurisprudence, I respectfully dissent.

FN7. The majority does gesture toward an application of *Irwin,* contending that even if *Irwin's* rule is apposite, the presumption of congressional intent to allow equitable tolling is rebutted by this Court's "definitive earlier interpretation" of § 2501, *ante,* at 756. But the majority's application of the *Irwin* rule is implausible, since *Irwin* itself compared the language of § 2501 with the limitations language of Title VII of the Civil Rights Act of 1964, and found that the comparison did *not* reveal "a different congressional intent with respect to the availability of equitable tolling,"498 U.S., at 95, 111 S.Ct. 453.

Justice GINSBURG, dissenting.

I agree that adhering to *Kendall,Finn,* and *Soriano* is irreconcilable with the reasoning and result in *Irwin,* and therefore join Justice STEVENS' dissent. I write separately to explain why I would regard this case as an appropriate occasion to revisit those precedents even if we had not already "directly overrule[d]" them. Cf. *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 98, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (White, J., concurring in part and concurring in judgment).

Stare decisis is an important, but not an inflexible, doctrine in our law. See ***760***Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 405, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is not ... a universal, inexorable command."). The policies underlying the doctrine-stability and predictability-are at their strongest when the Court is asked to change its mind, though nothing else of significance has changed. See Powell, Stare Decisis and Judicial Restraint, 47 Wash.

& Lee L.Rev. 281, 286-287 (1990). As to the matter before us, our perception of the office of a time limit on suits against the Government has changed significantly since the decisions relied upon by the Court. We have recognized that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States,"*Irwin,* 498 U.S., at 95-96, 111 S.Ct. 453, and that "limitations principles should generally apply to the Government in the same way that they apply to private parties,"*Franconia Associates v. United States,* 536 U.S. 129, 145, 122 S.Ct. 1993, 153 L.Ed.2d 132 (2002) (internal quotation marks omitted). See also *Scarborough v. Principi,* 541 U.S. 401, 420-422, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004). It damages the coherence of the law if we cling to outworn precedent at odds with later, more enlightened decisions.

I surely do not suggest that overruling is routinely in order whenever a majority disagrees with a past decision, and I acknowledge that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation,"*Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). But concerns we have previously found sufficiently weighty to justify revisiting a statutory precedent counsel strongly in favor of doing so here. First, overruling *Kendall v. United States,* 107 U.S. 123, 2 S.Ct. 277, 27 L.Ed. 437 (1883), *Finn v. United States,* 123 U.S. 227, 8 S.Ct. 82, 31 L.Ed. 128 (1887), and *Soriano v. United States,* 352 U.S. 270, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957), would, as the Court concedes, see *ante,* at 756,"achieve a uniform interpretation of similar statutory language,"*Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Second, we have recognized the propriety of revisiting a decision when "intervening development of the law" has "removed or weakened [its] conceptual underpinnings." *Patterson,* 491 U.S., at 173, 109 S.Ct. 2363. *Irwin* and *Franconia*-not to mention our recent efforts to apply the term "jurisdictional" with greater precision, see, *e.g., Arbaugh v. Y & H Corp.,* 546 U.S. 500, 515-516, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)-have left no tenable basis for *Kendall* and its progeny.

Third, it is altogether appropriate to overrule a precedent that has become "a positive detriment to coherence and consistency in the law." *Patterson,* 491 U.S., at 173, 109 S.Ct. 2363. The inconsistency between the *Kendall* line and *Irwin* is a source of both theoretical incoherence and practical confusion. For example, 28 U.S.C. § 2401(a) contains a time limit materially identical to the one in § 2501. Courts of Appeals have divided on the question whether § 2401(a)'s limit is "jurisdictional." Compare *Center for Biological Diversity v. Hamilton,* 453 F.3d 1331, 1334 (C.A.11 2006)*(per curiam),* with *Cedars-Sinai Medical Center v. Shalala,* 125 F.3d 765, 770 (C.A.9 1997). See also *Harris v. Federal Aviation Admin.,* 353 F.3d 1006, 1013, n. 7 (C.A.D.C.2004) (recognizing that *Irwin* may have undermined Circuit precedent holding that § 2401(a) is "jurisdictional"). Today's decision hardly assists lower courts endeavoring to answer this question. While holding that the language in § 2501 is "jurisdictional," the Court also implies that *Irwin* governs the ***761** interpretation of all statutes we have not yet construed-including, presumably, the identically worded § 2401. See *ante,* at 756.

Moreover, as the Court implicitly concedes, see *ante,* at 756 - 757, the strongest reason to adhere to precedent provides no support for the *Kendall-Finn-Soriano* line. "*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991). The Government, however, makes no claim that either private citizens or Congress have relied upon the "jurisdictional" status of § 2501. There are thus strong reasons to

abandon-and notably slim reasons to adhere to-the anachronistic interpretation of § 2501 adopted in *Kendall.*

Several times, in recent Terms, the Court has discarded statutory decisions rendered infirm by what a majority considered to be better informed opinion. See, *e.g.,Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. ----, ----, 127 S.Ct. 2705, 2725, 168 L.Ed.2d 623 (2007) (overruling*Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)); *Bowles v. Russell,* 551 U.S. ----, ----, 127 S.Ct. 2360, 2366-67, 168 L.Ed.2d 96 (2007) (overruling*Thompson v. INS,* 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964)*(per curiam),* and *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.,* 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962)*(per curiam)*); *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 42-43, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006) (overruling, *inter alia,Morton Salt Co. v. G.S. Suppiger Co.,* 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363 (1942)); *Hohn v. United States,* 524 U.S. 236, 253, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) (overruling*House v. Mayo,* 324 U.S. 42, 65 S.Ct. 517, 89 L.Ed. 739 (1945)*(per curiam)*). In light of these overrulings, the Court's decision to adhere to *Kendall,Finn,* and *Soriano*-while offering nothing to justify their reasoning or results-is, to say the least, perplexing. After today's decision, one will need a crystal ball to predict when this Court will reject, and when it will cling to, its prior decisions interpreting legislative texts.

I would reverse the judgment rendered by the Federal Circuit majority. In accord with dissenting Judge Newman, I would hold that the Court of Appeals had no warrant to declare the petitioner's action time barred.

U.S.,2008.
John R. Sand & Gravel Co. v. U.S.
128 S.Ct. 750, 65 ERC 1481, 76 USLW 4033, 08 Cal. Daily Op. Serv. 389, 2008 Daily Journal D.A.R. 230, 21 Fla. L. Weekly Fed. S 33

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MEMORANDUM

DATE: October 2, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 03-02

Item No. 03-02 is designed to resolve a circuit split over whether Rule 7 authorizes a court that requires a bond for costs on appeal to include attorney fees as part of the costs. As Part I of this memo notes, the proposed amendment was approved by the Committee in 2003 and was held thereafter to await bundling with other FRAP proposals. In the meantime, there have been two developments that merit consideration. First, during the time since the approval of the proposed amendment, the original evenly-divided circuit split has grown lopsided, with the majority of circuits to have addressed the issue now rejecting the approach that would be taken by the proposed amendment. Part II accordingly assesses whether the Committee's initial determination (that Rule 7 should be amended to make clear that Rule 7 "costs" do not include attorney fees) might be reconsidered in the light of this development in the caselaw. Second, as to the implementation of the proposal, Part III discusses questions about the wording approved in 2003 and suggests alternative wording for the proposed amendment.

I. A brief history of the proposed amendment

The Eleventh Circuit's decision in *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), drew the Committee's attention to a circuit split over whether attorney fees are among the costs for which a bond may be required, under Rule 7, "to ensure payment of costs on appeal." At the time of the Advisory Committee's spring 2003 meeting, the four circuits to have reached the question were evenly split: The Second and Eleventh Circuits had held that such costs did include attorney fees, while the D.C. and Third Circuits had reached the opposite conclusion. The March 2003 minutes describe the Committee's discussion:

> The Committee discussed this issue at some length and reached two conclusions:
>
> First, Rule 7 should be amended to resolve the circuit split. This issue is important, and appellants in the Second and Eleventh Circuits - who might be required to post a bond to secure costs and attorneys' fees amounting to hundreds of thousands of dollars - are treated much differently than similarly situated appellants in the D.C. and Third Circuits - who cannot be required to post a bond to secure anything more than a few hundred dollars in costs.

Second, the amendment to Rule 7 should make it clear that district courts can require appellants to post bonds to secure only what are typically thought of as "costs" (such as the costs identified in Rule 39(e)) and not attorneys' fees - whether or not those attorneys' fees are defined as "costs" in the relevant fee-shifting statute. Adopting the position of the Second and Eleventh Circuits would expand Rule 7 beyond its intended scope and vastly increase the cost of Rule 7 bonds. It would also attach significant consequences to whether a particular fee-shifting statute defines attorneys' fees as "costs," a matter that likely reflects little conscious thought on the part of Congress. In addition, district courts would confront practical problems in trying to determine the size of bond necessary to secure attorneys' fees that will be incurred for an appeal in its infancy. Finally, requiring appellants to post a bond to secure attorneys' fees is almost always unnecessary. In most cases in which an appellant might be held liable under a fee-shifting statute for the attorneys' fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees.[1]

The Committee asked the Reporter to consider how to implement the change. Accordingly, the Reporter presented a proposed amendment at the fall 2003 meeting. The minutes explain the choices that were made in crafting the proposal:

> The amendment cannot simply cross-reference the "costs" mentioned in Rule 39, as Rule 39 does not contain a definition of "costs." The amendment also cannot simply cross-reference the "costs" mentioned in 28 U.S.C. § 1920; although the statute does define "costs," it omits the cost of "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal," which cost is specifically mentioned in Rule 39. The Reporter considered drafting an amendment that would provide, in effect, that "costs" do not include attorney's fees, but a rule that defines a word in terms of what it does not include may open the door to litigation about what it does include. The Reporter said that, in the end, he decided that "costs on appeal" should be defined to mean "the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal."[2]

The Committee unanimously approved the proposed amendment. Due to the practice of "bundling" proposed amendments, the proposed amendment was held to await a time when additional FRAP amendments would be ready to be published for comment.

This spring, the proposal was brought to the Committee's attention along with other

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[1] Minutes of Spring 2003 Meeting of Advisory Committee on Appellate Rules.

[2] Minutes of Fall 2003 Meeting of Advisory Committee on Appellate Rules.

pending items. However, after some discussion, the Committee decided to hold Item 03-02 for further consideration of the amendment's wording.

II. The developing caselaw and the policy arguments for and against the proposed amendment

In the time since the Committee's 2003 vote, two more circuits – the Sixth and the Ninth – have held that Rule 7 "costs" can include attorney fees. Thus, what in 2003 was an even split has become a lopsided one (four to two). It thus may be worthwhile for the Committee to reconsider its decision in order to assure itself that the developing caselaw provides no reason to change its view on the proposed amendment. In addition, when selecting among the available courses of action the Committee may wish to consider questions concerning rulemaking authority under the Rules Enabling Act.

A. Caselaw on the Rule 7 issue

There is no Supreme Court caselaw directly on point, but at the outset it is worth noting the reasoning of *Marek v. Chesny*, 473 U.S. 1 (1985), which has played a key role in the lower courts' discussions of the Rule 7 issue. In *Marek*, the Supreme Court held that Civil Rule 68's reference to "costs"[3] includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute "defines 'costs' to include attorney's fees." *Marek*, 473 U.S. at 9. The Court explained that because neither Rule 68 nor its note defined "costs," and because the drafters of the original Rules were aware of the existence of fee-shifting statutes, "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Id.*

Two circuits – the D.C. Circuit and the Third Circuit – have held that Rule 7 costs cannot include attorney fees. In *In re American President Lines, Inc.*, 779 F.2d 714, 719 (D.C. Cir. 1985) (per curiam), the D.C. Circuit ordered a $10,000 appeal bond requirement to be reduced to $450. The court rejected the district court's justifications for the larger bond amount, including the district court's prediction that the appeal likely would be found frivolous (occasioning an award of damages and costs under Rule 38). Rule 7 "costs," the court explained, "are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." *Id.* at 716.[4] Though *American*

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[3] If a Rule 68 offer of settlement is not accepted, and "[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Fed. R. Civ. P. 68.

[4] However, a later D.C. Circuit opinion held that for purposes of Rule 39(d)'s 14-day time limit on filing the bill of costs, "costs" does include attorney fees. *See Montgomery &*

President Lines was decided some six months after *Marek*, the D.C. Circuit did not discuss *Marek*'s possible relevance to the Rule 7 question. By contrast, when the Third Circuit followed the *American President Lines* approach in *Hirschensohn v. Lawyers Title Insurance Corp.*, 1997 WL 307777 (3d Cir. June 10, 1997) (unreported decision), the court took pains to distinguish *Marek*'s treatment of Civil Rule 68 costs from the question of Appellate Rule 7 costs. The *Hirschensohn* court followed the D.C. Circuit's lead, stating that Rule 7 costs "are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39." *Hirschensohn*, 1997 WL 307777, at *1. The court reasoned that because "[a]ttorneys' fees are not among the expenses that are described as costs for purposes of Rule 39," such fees are likewise not within the scope of Rule 7 costs. *Id.*[5] The court relied on Rule 39's references to particular types of costs as a means of distinguishing *Marek*: "[U]nlike Rule 68, which does not define costs, Rule 39 does so in some detail. Therefore, *Marek* does not require a different result ...." *Hirschensohn*, 1997 WL 307777, at *2.[6]

Four circuits have taken a very different view of *Marek*, reading it to weigh in favor of including attorney fees among Rule 7 costs. The Second Circuit, affirming an order requiring (under Rule 7) a $35,000 bond in a copyright case, reasoned as follows:

Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 785 (D.C. Cir. 1987) (concluding that a "motion for attorneys' fees was subject to Rule 39(d)'s 14-day time limit").

[5] The *Hirschensohn* court relied on its prior holding in *McDonald v. McCarthy*, 966 F.2d 112 (3d Cir. 1992), that Rule 39 "costs" do not include attorney fees:

> [A]n order from this court pursuant to Rule 39 that each party bear its own costs does not foreclose the "prevailing party" from recovering attorneys' fees under section 1988. To hold otherwise would unjustifiably superimpose the language of section 1988, that fees may be awarded as part of costs, on Rule 39 which defines costs as only traditional administrative-type costs, thereby converting the permissive language of section 1988 into a mandatory provision requiring an award of costs in order to recover fees. As there is absolutely no evidence that this was Congress's intention nor would such a holding be reasonable, we decline to so hold. Section 1988 attorneys' fees are not a cost of appeal within the meaning of Rule 39.

McDonald, 966 F.2d at 118.

[6] It may be worth noting that the Rule 7 holding in *Hirschensohn* was an alternative holding; an "additional ground" for the result in that case was the court's holding that "the statutory source cited by defendants for an allowance of counsel fees" – namely, a provision of the Virgin Islands Code – "does not apply to appeals in this Court so as to make attorneys' fees recoverable as Rule 39 costs." *Hirschensohn*, 1997 WL 307777, at *3.

> The Copyright Act, first adopted in 1909, contained section 40, the predecessor to section 505, which similarly provided for attorney's fees as part of the costs.... Thus, the drafters of Rule 7 ... – like the drafters of Rule 68, discussed in *Marek* – were equally aware of the Copyright Act's provision for the statutory award of attorney's fees "as part of the costs" when drafting Rule 7 and not defining costs therein. *See* 17 U.S.C. § 505. *Marek* provides very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7.

Adsani v. Miller, 139 F.3d 67, 73 (2d Cir. 1998). The *Adsani* court noted that neither *American President Lines* nor *Hirschensohn* involved a type of case in which a federal statute would authorize an award of attorney fees, *see Adsani*, 139 F.3d at 73-74, but the *Adsani* court's more central point was that it disagreed with those decisions' view of the interaction between Rules 39 and 7:

> Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure. Rule 39 is divided into five sections. These provide: (a) against whom costs will be taxed, (b) the taxability of the United States; (c) the maximum rate for costs of briefs, appendices and copies of records, (d) the procedure by which a party desiring "such costs" may claim them, and (e) that costs incurred in the preparation and transmission of the record on appeal will be taxed in the district court. *See* Fed.R.App.P. 39(a)-(e). None of these provisions purports to define costs: each concerns procedures for taxing them. Specific costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.

Adsani, 139 F.3d at 74. Thus, the *Adsani* court concluded that "Rule 7 does not have a pre-existing definition of costs any more than Fed.R.Civ.P. 68, the rule interpreted in *Marek*, had its own definition." *Id.*

In *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), the Eleventh Circuit agreed with the Second:

> Federal Rule of Appellate Procedure 7 does not differ from Federal Rule of Civil Procedure 68 in any way that would lead us to adopt a different interpretive approach in this case than was embraced by the Supreme Court in *Marek*. Quite the contrary, close scrutiny reveals that there are several substantive and linguistic parallels between Rule 68 and Rule 7. Both concern the payment by a party of its opponent's "costs," yet neither provision defines the term "costs."... Moreover, just as the drafters of Rule 68 were aware in 1937 of the varying definitions of costs that were contained in various federal statutes, the same certainly can be said for the authors of Rule 7, which bears an effective date of July 1, 1968. As such, the reasoning that guided the *Marek* Court's determination that Rule 68 "costs" are to be defined with reference to the underlying cause of action is equally applicable

in the context of Rule 7.

Pedraza, 313 F.3d at 1332.[7] The *Pedraza* court held, however, that the attorney fees authorized under the Real Estate Settlement Procedures Act did not qualify for inclusion in a Rule 7 bond, because RESPA's language – "costs of the action *together with* reasonable attorneys fees" – treated attorney fees as a separate item rather than a subset of costs. *Pedraza*, 313 F.3d at 1334 (quoting 12 U.S.C. § 2607(d)(5); emphasis in case); *see also id.* ("Each and every statute cited in *Marek* as including attorneys' fees within the definition of allowable costs features either the words 'as part of the costs' or similar indicia that attorneys' fees are encompassed within costs."). More recently, the Eleventh Circuit refined its Rule 7 doctrine in the context of civil rights cases, holding that "a district court [may] require ... that a losing plaintiff in a civil rights case post a Fed. R.App. P. 7 bond that includes the defendant's anticipated appellate attorney's fees" only if the district court makes "a finding ... that the would-be appeal is frivolous, unreasonable, or groundless." *Young v. New Process Steel, LP*, 419 F.3d 1201, 1202 (11th Cir. 2005).

In 2004, the Sixth Circuit joined the Second and Eleventh Circuits in holding that attorney fees come within "costs" for purposes of Rule 7. *See In re Cardizem CD Antitrust Litigation*, 391 F.3d 812, 815, 818 (6th Cir. 2004) (with respect to class action settlement objector's appeal, upholding imposition of $174,429 appeal bond that included "prospective administrative costs and attorneys' fees").[8] Though the *Cardizem* court generally adopted the same reasoning as the *Adsani* and *Pedraza* courts, it did diverge from *Pedraza* in one respect:

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[7] In *Lattimore v. Oman Const.*, 868 F.2d 437, 440 n.6 (11th Cir. 1989), *abrogated on other grounds*, *see McKenzie v. Cooper, Levins & Pastko, Inc.*, 990 F.2d 1183, 1186 (11th Cir. 1993), the Eleventh Circuit – citing a decision of the former Fifth Circuit holding that Rule 39 "costs" did not encompass attorney fees – rejected the contention that a mandate requiring that each party bear its own costs precluded an award of attorney fees under 42 U.S.C. § 2000e-5(k). In *Pedraza*, the court decoupled its reading of Rule 39 "costs" from its reading of Rule 7 "costs": "[T]he exclusion of attorneys' fees from Rule 39 'costs' in no way informs (or purports to inform) the definition of the term 'costs' in Rule 7." *Pedraza*, 313 F.3d at 1330 n.12.

[8] The Sixth Circuit, like a number of other circuits, has held that attorney fees do not count as "costs" for purposes of Rule 39: "As appellate Rule 39 specifically delineates the 'costs' to which it applies, i.e. the 'traditional' costs of printing briefs, appendices, records, etc., the pronouncements of *Marek* render it inappropriate for this court to judicially-amend Rule 39's cost provisions to include § 1988 attorney's fees." *Kelley v. Metropolitan County Bd. of Educ.*, 773 F.2d 677, 682 n.5 (6th Cir. 1985) (holding that a failure to award costs on appeal to a plaintiff does not preclude an award of attorney fees under 42 U.S.C. § 1988). The *Cardizem* court did not explicitly address the possible tension between the view that Rule 39 costs do not include attorney fees and the view that Rule 7 costs can include attorney fees. *Cardizem* cites much of *Pedraza*'s reasoning with approval, so perhaps the *Cardizem* court implicitly adopted the Eleventh Circuit's view that the definition of "costs" for purposes of Rule 7 can differ from the definition of "costs" for purposes of Rule 39.

The *Cardizem* court rejected the contention that the statutory authority for the attorney fee must define the fee as part of the costs. Although the state statute at issue in *Cardizem* (a diversity case) authorized an award of "any damages incurred, including reasonable attorney's fees and costs," the court rejected the appellant's contention that the linguistic distinction between fees and costs barred inclusion of the fees in the Rule 7 bond: "*Marek* does not require that the underlying statute provide a definition for 'costs.' Rather, *Marek* requires a court to determine which sums are 'properly awardable' under the underlying statute, and to include those sums as 'costs' under the procedural rule. *Marek*, 473 U.S. at 9." *Cardizem*, 391 F.3d at 817 n.4.

Most recently, the Ninth Circuit adopted what is now the majority view, holding this summer "that a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond." *Azizian v. Federated Dep't Stores, Inc.*, 2007 WL 2389841, at *1 (9th Cir. Aug. 23, 2007). The *Azizian* court cited four reasons for its holding:

> First, Rule 7 does not define "costs on appeal." At the time of its adoption in 1968, however, a number of federal statutes-including the Clayton Act-had departed from the American rule by defining "costs" to include attorney's fees. *Marek*, 473 U.S. at 8-9....
>
> Second, Rule 39 does not contain any "expression[ ] to the contrary." *See id.* at 9. There is no indication that the rule's drafters intended Rule 39 to define costs for purposes of Rule 7 or for any other appellate rule. The 1967 Rules Advisory Committee note to Rule 39(e) states that "[t]he costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond." Fed. R.App. P. 39(e) advisory committee's note (1967 adoption). We read this language to mean that the costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal. Further, Rule 38 provides that the court of appeals may award "damages and ... costs," which include, according to that rule's advisory committee note, "damages, attorney's fees and other expenses incurred by an appellee." Fed. R.App. P. 38; *id.* advisory committee's note (1967 adoption). The discrepancy between the use of the term "costs" in Rule 39 and its use in Rule 38 strongly suggests that the rules' drafters did not intend for Rule 39 to create a uniform definition of "costs," exclusive of attorney's fees....
>
> Third, while some commentators have criticized *Adsani* and *Pedraza* for "attach[ing] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes," 16A Wright, Miller & Cooper ... § 3953, *Marek* counsels that we must take fee-shifting statutes at their word. 473 U.S. at 9....
>
> Fourth, allowing district courts to include appellate attorney's fees in estimating and ordering security for statutorily authorized costs under Rule 7 comports with their role in taxing the full range of costs of appeal. In practice, district courts are usually responsible at the conclusion of an appeal for taxing all appellate costs, including attorney's fees, available to the prevailing party under a

relevant fee-shifting statute.

Azizian, 2007 WL 2389841, at *5 - *6.

The *Azizian* court also addressed a related question, holding that "a district court may not include in a Rule 7 bond appellate attorney's fees that might be awarded by the court of appeals if that court holds that the appeal is frivolous under Federal Rule of Appellate Procedure 38." *Azizian*, 2007 WL 2389841, at *1. In reaching this conclusion, the *Azizian* court disagreed with the First Circuit, which in a brief per curiam opinion had upheld the imposition of a $5,000 Rule 7 bond (in a case where the motion for the bond relied on Rules 38 and 39) based on the district court's implicit finding "that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility." *Sckolnick v. Harlow,* 820 F.2d 13, 15 (1st Cir. 1987) (per curiam). As the *Azizian* court explained:

> Award of appellate attorney's fees for frivolousness under Rule 38 is highly exceptional, making it difficult to gauge prospectively, and without the benefit of a fully developed appellate record, whether such an award is likely.... Moreover, a Rule 7 bond including the potentially large and indeterminate amounts awardable under Rule 38 is more likely to chill an appeal than a bond covering the other smaller, and more predictable, costs on appeal. Finally, in contrast to ordinary fee-shifting and cost provisions, Rule 38 authorizes an award of appellate attorney's fees not simply as incident to a party's successful appellate defense or challenge of a judgment below, but rather as a sanction for improper conduct on appeal....

Azizian, 2007 WL 2389841, at *8. Thus, the *Azizian* court agreed with *American President Lines*' reasoning that "the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38." *Azizian*, 2007 WL 2389841, at *8 (citing *American President Lines*, 779 F.2d at 717).

B. Reconsidering the merits of the proposed amendment to Rule 7

The changing landscape of the circuit caselaw on the Rule 7 issue provides the Committee with an opportunity to review its decision concerning the proposed amendment. The Committee has a spectrum of options.

One option is to proceed with the amendment as originally conceived (subject to the details of implementation discussed in Part III). Under this model, the amendment would bar the inclusion of any type of attorney fees in a Rule 7 bond for costs on appeal. Such an amendment would remove the disuniformity that has developed among the circuits, and it would eliminate the risk that oversized bond requirements could sometimes chill meritorious appeals. Though

this approach would remove one tool that is currently available (in some circuits) to discourage frivolous appeals and protect appellees from appellants who pose payment risks, other tools would remain to serve those goals. "The traditional countermeasure for an appeal thought to be frivolous is a motion in the appellate court to dismiss, which is available at the outset of the appeal and before expenses thereon begin to mount. Additionally, a monetary remedy is afforded by Federal Appellate Rule 38, which authorizes an assessment of damages and single or double costs, including reasonable attorneys' fees," if the court of appeals finds the appeal frivolous. *In re American President Lines*, 779 F.2d at 717.

A second option would be to amend Rule 7 to explicitly permit the inclusion of attorney fees in the bond, so long as the appellee could be eligible to recover those fees from the appellant if the appeal fails and so long as there is a showing that inclusion is necessary to serve Rule 7's purposes. Such an approach could deter some frivolous appeals and could protect some appellees from the risk that a losing appellant would default on payment of attorney fees once those fees are ultimately assessed. One could argue, as the Eleventh Circuit did, that "the guaranteed availability of appellate attorneys' fees prior to the taking of an appeal will further the goal of providing incentives to attorneys to file (or defend against) such appeals." *Pedraza*, 313 F.3d at 1333. Moreover, if one assumes that Rule 7's purpose is "to protect the rights of appellees brought into appeals courts" by appellants who pose payment risks, *Adsani*, 139 F.3d at 75, then one might conclude – as the *Adsani* court did – that including attorney fees among the "costs" for which a Rule 7 bond may be required furthers the Rule's goal. As noted above, during its 2003 discussion the Advisory Committee reasoned that "[i]n most cases in which an appellant might be held liable under a fee-shifting statute for the attorneys' fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees." *Adsani* itself illustrates, however, that this will not always be the case. In *Adsani*, the copyright plaintiff was overseas, had no assets in the U.S., and had not posted a supersedeas bond with respect to the underlying award of attorney fees against her. *See Adsani*, 139 F.3d at 70. It is true that civil rights fee-shifting statutes such as Section 1988 are asymmetric, such that most awards of attorney fees in civil rights cases will presumably be against defendants, and thus may often be against public entities that will not pose payment risks.[9] But in copyright cases, for

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[9] 42 U.S.C. § 1988(b) provides:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such

example, the statutory authorization for attorney fees operates symmetrically.[10] In antitrust cases the fee-shifting statute appears to be asymmetric,[11] but there seems less reason (than in the case of civil rights litigation) to assume that defendants will never pose payment risks.

The second option, however, would pose some questions of manageability. It may be difficult for a district court to predict the appropriateness and size of an attorney fee award at the very outset of an appeal – particularly where the law governing the fee award requires a showing that the appeal was frivolous. "It is ... for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case. The District Court's bond order effectively preempts this court's prerogative to determine, should Safir's appeal be

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action was clearly in excess of such officer's jurisdiction.

See Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (prevailing plaintiff should ordinarily recover attorney fees under Section 1988 unless special circumstances make such an award unjust); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) ("[t]he plaintiff's action must be meritless in the sense that it is groundless or without foundation" in order for defendant to recover attorney fees under Section 1988).

42 U.S.C. 2000e-5(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." *See Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 417 (1978) ("[U]nder § 706(k) of Title VII a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances."); *id.* at 421 ("[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.").

[10] *See* 17 U.S.C. § 505 ("In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) ("Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion.").

[11] *See* 15 U.S.C. § 15(a) ("Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

found to be frivolous, whether APL is entitled to a Rule 38 recovery." *American President Lines*, 779 F.2d at 717. *But cf. Young*, 419 F.3d at 1207 ("District courts ... have a great deal of experience weighing the merits of potential appeals. In every one of the thousands of proceedings in which a state prisoner denied 28 U.S.C. § 2254 relief or a federal prisoner denied 28 U.S.C. § 2255 relief seeks to appeal, the district court that denied relief must determine whether there is likely to be enough substance to an appeal for one to be allowed.").

The second option would also risk burdening some appellants' right to take a potentially meritorious appeal. If courts were to include attorney fees in the appeal costs to be bonded under Rule 7, and if they did so too frequently and/or set the bond amounts too high, the practice could pose an unfair obstacle to taking an appeal.[12] Though there is generally no constitutional right to take an appeal, Congress has of course conferred that right by statute, and a sufficiently heavy

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[12] Some appellants who might otherwise be required to post a Rule 7 bond might be given in forma pauperis status. *See* Appellate Rule 24(a)(2) ("If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise."); Appellate Rule 24(a)(5) (if district court denies motion, party can move in court of appeals for leave to proceed i.f.p.).

But some litigants that would not qualify for i.f.p. treatment could be deterred from taking an appeal if a Rule 7 bond were set at too high an amount. For one thing, corporations do not qualify for i.f.p. status. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 196 (1993) ("[O]nly a natural person may qualify for treatment *in forma pauperis* under § 1915."). For another, it is not clear whether every natural person who would be burdened by a large appeal bond requirement could qualify for a reduction of that bond through a request for i.f.p. treatment. In refusing to adopt "a general rule requiring a losing plaintiff in a civil rights case to post a bond that includes the defendant's attorney's fees on appeal," the Eleventh Circuit reasoned as follows:

> We are not persuaded by the defendant's assurance that if a plaintiff in a civil rights case cannot afford to post a bond that includes the defendant's anticipated attorney's fees on appeal, the plaintiff can always move to proceed in forma pauperis. *See* Fed. R.App. P. 24. The plaintiffs insist there is a gap between qualifying for in forma pauperis status and being able to post a large bond, and that they fall in it. We need not decide if there are some plaintiffs who are too poor to post a bond but too affluent to qualify for IFP status. *Cf. Page v. A.H. Robins Co.*, 85 F.R.D. 139, 140 (E.D.Va.1980) ("A logical counterpart to Appellate Rule 7 is Appellate Rule 24, which pertains to appeals in forma pauperis."). We need not decide that because even for plaintiffs who can afford to post appeal bonds, the larger the bond amount, the higher the cost of appealing; and the higher the cost of appealing, the greater the disincentive for doing so.

Young, 419 F.3d at 1206 n.1.

burden on that right could in some instances raise constitutional concerns. *Cf. Lindsey v. Normet*, 405 U.S. 56, 77 (1972) ("[I]f a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review .... When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."). But the *Lindsey* Court noted that it did not "question ... reasonable procedural provisions ... to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Lindsey*, 405 U.S. at 78; *cf. Adsani*, 139 F.3d at 79 ("[W]here Adsani has no assets in the United States and failed to adduce credible evidence of an inability to pay, the district court did not abuse its discretion nor violate Adsani's due process rights in imposing an appeal bond of $35,000.").

In the light of the risk that excessively high appeal bond requirements would pose, if attorney fees were to be included among the costs that fall within Rule 7's bond provision, the rule should make clear that attorney fees should be included in a Rule 7 bond only when necessary to fulfil the Rule's goals, and only in an amount necessary to fulfil those goals. "Requiring security for anticipated appellate attorney's fees under Rule 7 may be improper, notwithstanding an applicable fee-shifting provision, where other factors, such as financial hardship, indicate that the bond would unduly burden a party's right to appeal." *Azizian*, 2007 WL 2389841, at *8; *cf. Pedraza*, 313 F.3d at 1333 ("[I]n appropriate qualifying cases-e.g., where there is a significant risk of insolvency on the appellant's part-district courts can require that the fees that ultimately would be shiftable be made available *ab initio*.").

A third option might address some of the concerns noted above by more narrowly targeting particular types of cases where inclusion of projected attorney fees in the Rule 7 bond might be less risky and more manageable. Under this third option, the Committee might choose to amend Rule 7 to permit the inclusion in the bond of some, but not all, types of attorney fees; for example, the amendment could ban inclusion of non-statutory attorney fees and of statutory attorney fees that would be awardable only upon a finding that the appeal had been frivolous or in bad faith, but could permit the inclusion of statutory attorney fees that are presumptively recoverable. This would help to address the question of manageability by barring the inclusion (in the Rule 7 bond) of attorney fees that would be awardable only upon a determination that the appeal was frivolous or otherwise improper. It is worth noting that the Ninth Circuit's *Azizian* decision adopts a variant of this approach, permitting inclusion of statutory attorney fees but barring inclusion of Rule 38 attorney fees, on the ground that imposition of Rule 38 attorney fees requires a finding of "improper conduct on appeal."

If the Committee were inclined to adopt either the second or the third option, it should also consider whether the Rule 7 bond can include only those statutory attorney fees authorized by a statute that linguistically treats the attorney fees as part of the "costs" (the Eleventh Circuit's approach in *Pedraza*), or whether the Rule 7 bond can include all statutory attorney fees – including those authorized by statutory language that treats "attorney fees" and "costs" as separate items (the Sixth Circuit's approach in *Cardizem*). Though Sixth Circuit's approach is

simpler, the Eleventh Circuit's approach is more consistent with *Marek*'s approach to the analogous question in the Civil Rule 68 context. Moreover, the Eleventh Circuit's approach may be most faithful to what should, perhaps, be regarded as congressional intent: If Congress chooses language such as "costs, including attorney fees," that can be read to evince the intent that attorney fees be treated as costs, including for purposes of Rule 7; conversely, a congressional choice of language such as "costs and attorney fees" could be read to indicate an intent that attorney fees be treated as distinct from costs.

A fourth option would be to do nothing. Not amending Rule 7 would avoid the need to choose among the options discussed above, but it would leave in place the disuniformity that prompted the Committee to consider the amendment in the first place. In the light of the present trend, one might predict that additional circuits may adopt the majority view that at least some types of attorney fees can be included in Rule 7 bonds. The majority approach is arguably more faithful to the approach taken in *Marek*, and thus it is likely to be influential in the absence of further rulemaking activity.

A fifth option would be to try to obtain empirical data that might shed light on the other four choices. It is unclear how often courts have required a sizeable Rule 7 appeal bond that includes attorney fees. Nor is it clear which types of cases are most likely to give rise to the imposition of an appeal bond that includes attorney fees, or which types of litigants are likely to be burdened (or, conversely, protected) by the requirement of such a bond.

C. Questions of rulemaking practice

When considering the options reviewed in the prior section, another relevant concern has to do with questions of rulemaking practice. This subsection reviews that issue.

The notion of requiring security for costs on appeal can be traced back to the First Judiciary Act.[13] The Revised Statutes carried forward the security requirement,[14] and Civil Rule 73 as initially adopted reflected that statutory backdrop. Original Civil Rule 73(c) provided:

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[13] Section 22 of the Act provided for certain civil appeals and required that "every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 85.

[14] Section 1000 of the Revised Statutes provided: "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." 1 Rev. Stat. 187 (1878).

> Bond on Appeal. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

The following decade, Congress enacted the 1948 Judicial Code and repealed the statutory appeal bond requirement, evidently because it was thought that this requirement should instead be implemented through the Rules.[15] Accordingly, the 1948 amendment to Civil Rule 73 altered Rule 73(c)'s first sentence to read as follows: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal."[16] Civil Rule 73(c) – as amended in 1966[17] – formed the basis for Appellate Rule 7, which, as originally adopted, read as follows:

> Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent

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[15] *See, e.g., Thrift Packing Co. v. Food Machinery & Chemical Corp.*, 191 F.2d 113, 114 n.3 (5th Cir. 1951) ("Title 28 U.S.C. § 869 (1940), which provided that a bond for costs on appeal must be given by an appellant, was repealed by the 1948 revision because its provisions covered a subject more appropriately regulated by rule of court.").

[16] *See* 1948 Committee Note to Civil Rule 73(c) ("R.S. § 1000, Title 28, U.S.C., § 869 (1946), which provided for cost bonds, is repealed and its provisions are not included in revised Title 28. Since the Revisers thought that this should be controlled by rule of court as in the case of supersedeas bond, see subdivision (d), no amendment to Title 28 will be proposed to restore the omission. The requirement of a cost bond should, therefore, be incorporated in the rule, and the amendment so provides.").

[17] *See* 1966 Committee Note to Civil Rule 73(c) ("The additions to the first sentence permit the deposit of security other than a bond and eliminate the requirement of security in cases in which the appellant has already given security covering the total cost of litigation at an earlier stage in the proceeding (a common occurrence in admiralty cases) and in cases in which an appellant, though not exempted by law, is nevertheless not subject to costs under the rules of the courts of appeals.").

> security shall be in the sum or value of $ 250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $ 250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

The 1979 amendments deleted most of the text of original Rule 7 and substituted the following:

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

As the 1979 Committee Note explained:

> The amendment would eliminate the provision of the present rule that requires the appellant to file a $ 250 bond for costs on appeal at the time of filing his notice of appeal. The $ 250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $ 250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

The 1998 restyling, which was intended to produce no change in substance, gave Rule 7 its current wording:

> In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. Rule 8(b) applies to a surety on a bond given under this rule.

This history suggests two inferences that are relevant to the present discussion. First, the history of Rule 7 and of its predecessor provision (Civil Rule 73(c)) sheds no direct light on whether attorney fees should be encompassed within the term "costs." But, second, the history of the rule provisions and their statutory predecessors indicates that the idea of requiring security for costs on appeal dates back to the time of the first Congress under the Constitution. One might thus infer that every Congress since that time – including those that enacted statutes providing for the recovery of attorney fees as part of the "costs" – legislated against that background

assumption. If that were so, then one might infer that Congress's intent – in enacting a statute that provides for the recovery of attorney fees as part of the "costs" of an action – was that such "costs" could be the subject of an appeal bond requirement.

If such an inference is persuasive, then one might question whether the amendment of Rule 7 to exclude attorney fees from the "costs" that can be the subject of a Rule 7 appeal bond might raise questions under the Rules Enabling Act. 28 U.S.C. § 2072(b) provides, of course, that rules adopted pursuant to the Enabling Act process "shall not abridge, enlarge or modify any substantive right." Though the contours of this limit are somewhat indeterminate, there is an argument that rulemaking that alters the congressional choices in the area of fee shifting steps close to the boundary of the Enabling Act's delegation of authority.[18]

The counter-argument, however, would be that it is chimerical to speak of congressional "choices" concerning whether Rule 7 bonds for costs on appeal should include attorney fees. Even if Congress's choice of language (e.g., "costs including attorney fees" instead of "costs and attorney fees") can be taken to indicate an intent that attorney fees be treated as "costs" for purposes of the Civil Rules,[19] it seems less likely that legislators considered the question of whether the attorney fees in question were to be included among the cost for which a Rule 7 appeal bond could be required. Moreover, one might argue that if, as *Marek* holds, a Civil Rule 68 offer of judgment can cut off a statutory right to attorney fees, the rulemakers would be within their authority to amend Appellate Rule 7 to exclude attorney fees from the costs for which a bond on appeal can be required. After all, the *Marek* majority implicitly rejected a compelling argument (by the dissent) that the majority's interpretation of Civil Rule 68 "would produce absurd results that would turn [fee-shifting] statutes like § 1988 on their heads and plainly violate the restraints imposed on judicial rulemaking by the Rules Enabling Act," *Marek*, 473 U.S. at 21 (Brennan, J., joined by Marshall & Blackmun, JJ., dissenting). If *Marek*'s interpretation of Civil Rule 68 causes no Enabling Act problems, one might argue that neither would the proposed amendment to Appellate Rule 7.

One might, on the other hand, counter this *Marek*-based Enabling Act argument by noting a distinction between the two issues: In *Marek* the majority reasoned that it should include attorney fees within Rule 68 "costs" in part in order to give effect to Congress's choice (in certain

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[18] *See, e.g.*, Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 Am. J. Comp. L. 675, 694 (1997) ("An important lesson of the [Civil] Rule 68 experience in the 1980's is precisely that, because fee-shifting can consequentially affect substantive social policy decisions even when masquerading as a sanction, it is a matter for Congress.").

[19] *Cf. Marek*, 473 U.S. at 9 ("Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit, such fees are subject to the cost-shifting provision of Rule 68. This 'plain meaning' interpretation of the interplay between Rule 68 and § 1988 is the only construction that gives meaning to each word in both Rule 68 and § 1988.").

statutes such as Section 1988) to use language indicating that attorney fees are a subset of costs. In the Rule 7 context, one might argue that the way to give effect to that congressional choice is likewise to include such attorney fees within the "costs" for which a Rule 7 appeal bond can be required. That indeed is a central element of the reasoning of the circuits on that side of the Rule 7 circuit split. In this view, it's excluding the attorney fees from those Rule 7 costs that would change the landscape in a way that could be seen to run counter to congressional intent. But, of course, the persuasiveness of this argument depends on one's willingness to assume that rather subtle differences in a fee statute's wording reflect a congressional choice with respect to Rule 7 cost bonds on appeal.

Reasonable minds, accordingly, might differ as to whether such an amendment would raise Enabling Act concerns. If the Committee is inclined to amend Rule 7 to exclude attorney fees from the scope of appeal bonds, it might be useful to consider whether to include in the Committee Note language that would draw the attention of other actors in the rulemaking process to this question.[20]

III. The wording of the proposed amendment

As noted above, the proposed amendment, as approved by the Advisory Committee in 2003, read:

Rule 7. Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. As used in this rule, "costs on appeal" means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of

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[20] One precedent might be the 1993 amendments that added Civil Rule 4(k)(2) (the provision authorizing federal courts to assert territorial jurisdiction with respect to federal claims against defendants who are "not subject to the jurisdiction of the courts of general jurisdiction of any state"). The 1993 Committee Note to Civil Rule 4 opens as follows:

> SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved, the Committee nevertheless recommends adoption of the balance of the rule, with subdivision (k)(1) becoming simply subdivision (k). The Committee Notes would be revised to eliminate references to subdivision (k)(2).

premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Rule 8(b) applies to a surety on a bond given under this rule.

The Committee briefly discussed, at the spring 2007 meeting, whether it makes sense for the proposed language to include a reference to "the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal." The 2003 minutes quoted in Part I of this memo indicate that this phrase was included so as not to omit a category of costs specifically mentioned in Rule 39[21] but not listed in 28 U.S.C. § 1920.[22]

The question raised at the spring 2007 meeting is whether a party who is required to post a bond or other security under Rule 7 would ever be required to pay, as part of the costs on appeal, the cost of obtaining a supersedeas bond or other bond to preserve rights pending appeal. Ordinarily, the person who would be required to post a Rule 7 bond is the same person who would incur the cost of obtaining a bond to preserve rights pending appeal – namely, the appellant.[23] It would therefore ordinarily make no sense to include the cost of the supersedeas

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[21] Rule 39(e) states: "(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal."

[22] Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
> (1) Fees of the clerk and marshal;
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[23] Civil Rule 62(d) provides: "Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective

bond among the costs for which a Rule 7 bond is required.

But before concluding that the phrase should be deleted from the proposed amendment, it is necessary to consider whether there might be any conceivable circumstances in which the costs of a supersedeas bond (or other bond to preserve rights pending appeal) might be recoverable by someone who could invoke Rule 7 to require the posting of a bond for costs on appeal. Two possible configurations, each involving cross-appeals, seem potentially relevant.

Suppose, as a first example, that Smith sues Jones for $ 100,000 and recovers $ 50,000. Smith appeals, challenging the award as too low. Jones cross-appeals, challenging the decision to hold him liable at all. Jones wishes to obtain a stay of execution pending disposition of the appeal and cross-appeal. Here we should note that there is apparently a circuit split as to whether Jones must obtain a supersedeas bond in order to obtain a stay of execution in this situation.[24] Let us assume that *Smith v. Jones* is being litigated in a circuit that requires Jones to obtain a supersedeas bond. The district court sets the amount of the supersedeas bond (which Jones must obtain in order to get a stay of execution) at $ 60,000. On appeal, Jones wins: The court of appeals reverses, holding that Jones is not liable to Smith. Let us assume that under FRAP 39(a), costs on appeal are to be taxed against Smith.[25] Under FRAP 39(e), those costs include the cost that Jones incurred in obtaining a supersedeas bond. Does this mean that–at the time when Smith filed his initial appeal–Jones could have asked the court to require that Smith, as a condition of taking Smith's appeal, post a Rule 7 bond to ensure payment of the cost of the supersedeas bond that Jones would have to obtain in order to stay the judgment pending Jones' cross-appeal? I am not aware of caselaw discussing this, and neither the text nor the notes of Rule 7 or its

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when the supersedeas bond is approved by the court."

[24] The Fourth Circuit has taken the view that "where the prevailing party is the first to take an appeal, no supersedeas bond can be required of the losing party when it subsequently files its own appeal, because the execution of the judgment has already been superseded by the prevailing party's appeal." *Tennessee Valley Authority v. Atlas Mach. & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986). But in the First, Fifth and Seventh Circuits, an appeal by a party who has won in the district court does not prevent enforcement of the judgment unless "the theory of the appeal is inconsistent with enforcement in the interim." *Trustmark Ins. Co. v. Gallucci*, 193 F.3d 558, 559 (1st Cir. 1999) (quoting *BASF Corp. v. Old World Trading Co.*, 979 F.2d 615, 617 (7th Cir. 1992); *see also Enserch Corp. v. Shand Morahan & Co.*, 918 F.2d 462, 464 (5th Cir. 1990).

[25] FRAP 39(a) provides: "(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise: (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise; (2) if a judgment is affirmed, costs are taxed against the appellant; (3) if a judgment is reversed, costs are taxed against the appellee; (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders."

predecessor provision in former Civil Rule 73 shed light on it. But if we presume that the purpose of Rule 7 is to ensure that the appellee will be reimbursed for the costs it incurs in defending against the appellant's appeal, the answer would seem to be no: The cost of the supersedeas bond is not a cost that Jones incurs as a result of Smith's appeal; Jones would incur the cost whether or not Smith appealed, because either way Jones would have to obtain the bond in order to obtain a stay of execution pending Jones' appeal (or cross-appeal, as the case may be). Thus, this first example does not seem to warrant inclusion of the supersedeas bond language in the Rule 7 amendment.

Let us take as a second example the same case, but with the timing of the appeals reversed: Jones appeals (challenging the finding of liability) and Smith cross-appeals (challenging the award as too low). Jones obtains a stay of execution by posting a supersedeas bond, the amount of which is set at $ 60,000. Can Jones ask the court to require Smith, as a condition of taking the cross-appeal, to post a Rule 7 bond that includes the cost of the supersedeas bond as a cost on appeal? A threshold question is whether Smith, the cross-appellant, counts as an "appellant" of whom a Rule 7 bond can be required. I am not aware of caselaw discussing this question (but I have not performed an exhaustive search).[26] Because a cross-appellant can be liable for costs under Rule 39(a), one could argue that the court should have authority to require the cross-appellant to post a bond to secure payment of any costs the appellant-cross-appellee incurs that are attributable to the cross-appeal. But it would not make sense to require the cross-appellant to post a bond to ensure payment of costs attributable solely to the appellant's appeal, since appellees in general are not subject to Rule 7's bond requirement. The supersedeas bond, in our second hypothetical, constitutes a cost attributable to Jones' appeal, not to Smith's cross-appeal; Jones would have to post the supersedeas bond in order to get the stay of execution whether or not Smith cross-appealed. Thus, it would seem illogical to require Smith to post a Rule 7 bond that included the cost of Jones' supersedeas bond.

It would seem, then, unnecessary to mention supersedeas bonds in Rule 7. It remains to ask whether the answer should differ as to "other bonds to preserve rights pending appeal." This category presumably includes bonds that a court might require under Civil Rule 62(c) in order suspend, change, restore or grant injunctive relief pending appeal.[27] Here, again, the party obtaining the bond would presumably be the party taking the appeal. And, again, even if the issue arose in a case involving cross-appeals, the configurations would be similar to those discussed in hypotheticals one and two, above. Thus, it seems that the language concerning

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[26] Rule 28.1 addresses other aspects of cross-appeal procedure, but does not address this question.

[27] Civil Rule 62(c) provides in relevant part: "When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party."

bonds can be deleted from the proposed amendment, which would now read:

Rule 7. Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. As used in this rule, "costs on appeal" means the costs that may be taxed under 28 U.S.C. § 1920. Rule 8(b) applies to a surety on a bond given under this rule.

IV. Conclusion

The developing circuit caselaw on whether attorney fees can be included among the amounts for which a Rule 7 appeal bond can be required indicates that this is an issue that warrants the Committee's attention. The fact that the circuit split now is four to two in favor of permitting the inclusion of at least some types of attorney fees in Rule 7 bonds suggests that the Committee should re-weigh its 2003 determination concerning the proposed amendment to exclude such fees from Rule 7 bonds. The issues raised by the proposal are complex, and it may be useful to obtain empirical data concerning the contexts in which Rule 7 bonds are currently required, and the frequency with which attorney fees are included when setting the amount of such bonds (in circuits where the inclusion of such fees is permitted).

MEMORANDUM

DATE: October 2, 2007

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-F

Judge Jerry Smith has suggested that the Committee consider amending Appellate Rule 35(e) so that the procedure with respect to responses to requests for hearing or rehearing en banc will track the procedure set by Appellate Rule 40(a)(3) with respect to responses to requests for panel rehearing. Rule 40(a)(3) provides: "Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request."[1] Rule 35(e) parallels the first of these principles, providing that "[n]o response may be filed to a petition for an en banc consideration unless the court orders a response." But Rule 35(e) fails to state whether the court may or should grant en banc consideration without first ordering a response to the petition. Judge Smith suggests that Rule 35(e) should be amended "to state that ordinarily the court will not rehear without allowing a response."

Part I of this memo reviews the history of Rules 35 and 40. Part II notes that five circuits have local provisions assuring that a response will ordinarily be requested prior to the grant of rehearing en banc, while seven other circuits have no pertinent provision (and one circuit has a provision that likely assures that answers are requested fairly often if the court is leaning toward granting rehearing en banc). Part III concludes by considering arguments for and against amending Rule 35 to track Rule 40's approach.

I. A brief history of Rules 35 and 40

The difference between Rules 35 and 40 (on the subject of responses) apparently stemmed from the fact that the original Rule 35 contemplated "suggestions" for rehearing en banc which – because they were often ancillary to petitions for panel rehearing – frequently required no response. The Advisory Committee – during the work that produced the restyling of the Appellate Rules – considered and specifically rejected the idea that Rule 35 should be revised

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[1] A related concept can be seen in Rule 21(b)(1), which provides – with respect to mandamus petitions – that "[t]he court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time." Rule 21' s requirement that the court order an answer to a mandamus petition (if it does not deny the petition) dates back to that Rule's adoption.

to eliminate the difference.

Language similar to current Rule 40(a)(3) was included in Rule 40 as originally adopted.[2] The Note explained that the principle reflected practice in some circuits and in the Supreme Court:

> This [i.e., the general approach taken by Rule 40] is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3) .... It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

Rule 35, as initially adopted, "authorize[d] a suggestion [for en banc consideration], impose[d] a time limit on suggestions for rehearings in banc, and provide[d] that suggestions w[ould] be directed to the judges of the court in regular active service."[3] The text of original Rule 35 said nothing about responses to a suggestion for rehearing en banc, but the Note explained:

> In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled "petition for rehearing in banc." Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion does not affect the finality of the judgment or the issuance of the mandate, and the final sentence of the rule expressly so provides.

In 1979, Rule 35(b) was amended to provide that "[n]o response shall be filed [to a suggestion for hearing or rehearing en banc] unless the court shall so order." The 1979 Committee Note explained: "Under the present rule there is no specific provision for a response to a suggestion that an appeal be heard in banc. This has led to some uncertainty as to whether such a response may be filed. The proposed amendment would resolve this uncertainty." Neither the text of the amendment nor the Note, however, addressed the question of whether the court should grant en banc consideration without ordering a response to the suggestion.

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[2] Original Rule 40(a) read in part: "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

[3] 1967 Committee Note to Rule 35.

The 1998 amendments to Rule 35 made substantive changes in addition to the restyling. Those substantive changes did not directly address the issue of grants in the absence of responses. But one goal of the 1998 amendments was to make the procedures for seeking rehearing en banc parallel those for seeking panel rehearing: "One of the purposes of the substantive amendments is to treat a request for a rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41."[4] Thus, for example, the Note explained that the substitution of the term "petition" for the term "suggestion" "reflects the Committee's intent to treat similarly a petition for panel rehearing and a request for a rehearing en banc."[5]

During the deliberations over the restyling of the Appellate Rules, the Committee discussed the difference between Rules 35(e) and 40(a)(3), and specifically determined not to eliminate that difference:

> The difference between 35(e) and 40(a)(3) was discussed. Rule 35(e) says that a response to a petition may not be filed unless the court orders a response. Rule 40(a)(3) also says that an answer may not be filed absent court permission, but that a panel rehearing ordinarily will not be granted in the absence of the court's request for an answer. The consensus was that the distinctions are appropriate. When an en banc rehearing is granted, it is not as important that the winning party have an opportunity to speak before the court grants the rehearing. In those instances the winner will be heard during the rehearing. If a panel rehearing is granted, however, the court usually enters a new dispositive judgment and the winning party should have an opportunity to be heard before the new judgment is entered.[6]

II. Current circuit practices

A slight majority of the circuits – namely, the First,[7] Second, Fourth, Fifth,[8] Tenth,

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[4] 1998 Committee Note to Rule 35.

[5] Id.

[6] Minutes of the Advisory Committee on Appellate Rules, April 3 & 4, 1997, 1997 WL 1056234, at *13.

[7] First Circuit IOP X.B. provides simply: "Unless the court requests, no response to a petition is permitted."

[8] Fifth Circuit Rule 35.3 provides that "[n]o response to a petition for en banc consideration will be received unless requested by the court."

Eleventh[9] and Federal Circuits – have no local provision assuring that a response will be requested before rehearing en banc is granted. Five circuits – the D.C.,[10] Sixth,[11] Seventh,[12]

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[9] Eleventh Circuit Rule 35-7 provides: "A response to a petition for en banc consideration may not be filed unless requested by the court."

[10] D.C. Circuit Rule 35 covers petitions for panel rehearing and rehearing en banc; subdivision (d) provides in part: "A petition for rehearing ordinarily will not be granted, nor will an opinion or judgment be modified in any significant respect in response to a petition for rehearing, in the absence of a request by the court for a response to the petition." The D.C. Circuit Handbook provides:

> As in the case of petitions for panel rehearing, the rules do not provide for a response to a petition for rehearing en banc, except by request of the Court. If any member of the Court wishes a response, the Clerk will enter an order to that effect. There is no oral argument on the question whether rehearing en banc should be granted.
>
> .... If a judge calls for a vote on the petition for rehearing en banc, the Clerk's Office transmits electronically to the full Court a new vote sheet, along with any response to the petition ordered by the Court. The question now is whether there should be a rehearing en banc. On this question only active judges of the Court may vote, and a majority of all active judges who are not recused must approve rehearing en banc in order for it to be granted.

[11] Sixth Circuit IOP 35(d) provides: "When a poll is requested, the clerk will ask for a response to the petition if none has been previously requested."

[12] Seventh Circuit IOP 5 provides in part:

> (a) Request for Answer and Subsequent Request for Vote. If a petition for rehearing en banc is filed, a request for an answer (which may be made by any Seventh Circuit judge in regular active service or by any member of the panel that rendered the decision sought to be reheard) must be made within 10 days after the distribution of the en banc petition. If an answer is requested, the clerk shall notify the prevailing party that an answer be filed within 14 days from the date of the court's request. Within 10 days of the distribution of the answer, any judge entitled to request an answer, may request a vote on the petition for rehearing en banc.
>
> (b) Request for Vote When No Answer Requested. Ordinarily an answer will be requested prior to a request for a vote. A request for a vote on the petition (which may be made by any judge entitled to request an answer) must be made within 10 days from the distribution of the petition. If a vote is so requested, the clerk shall notify the prevailing party that an answer to the petition is due within 14 days.

Eighth,[13] and Ninth[14] Circuits – currently have local provisions indicating that the court will not (or ordinarily will not) grant rehearing en banc without ordering a response to the petition. In addition, the Third Circuit IOPs take an approach that probably leads the court to invite a response, in many instances, before granting a petition for rehearing en banc.[15] As a point of comparison, Supreme Court Rule 44.3 provides: "The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response."

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[13] Eighth Circuit IOP IV.D. provides in part:

> The judges have two weeks to review the petition and request a poll or a response. Unless a judge requests a poll or otherwise indicates the petition for rehearing en banc deserves more consideration, the clerk automatically enters an order denying petitions for rehearing 21 days after circulation to the court. If a poll is requested on a petition for rehearing en banc, each active judge casts a vote. When a poll is requested, the clerk's office will request the opposing party file a response to the petition for rehearing. No response is permitted absent the court's request. A rehearing en banc is granted if a majority of judges in regular active service vote affirmatively.

[14] Ninth Circuit Rule 35-2 provides:

> Where a party petitions for hearing or rehearing en banc, the Court will not order a hearing or rehearing without giving the other parties an opportunity to express their views whether hearing or rehearing en banc is appropriate. Where no petition for en banc review is filed, the Court will not ordinarily order a hearing or rehearing en banc without giving counsel an opportunity to respond on the appropriateness of such a hearing.

[15] Third Circuit IOP 9.5 concerns "Rehearing En Banc on Petition by Party"; IOP 9.5.6 provides:

> If four active judges vote to request an answer to the petition or if there are a total of four votes for an answer or for rehearing, provided that there is at least one vote for an answer, the authoring judge enters an order directing such an answer within fourteen (14) days from the date of the order. The Clerk forwards the answer to the active judges with the request that they notify the authoring judge within ten (10) days if they vote to grant the petition. A judge who does not desire rehearing is not expected to respond. Copies of the answer are sent as a courtesy to any senior judge or visiting judge who was a member of the panel which heard and decided the case. In death penalty cases, the times set forth herein may be reduced pursuant to Local Appellate Rule Misc. 111.7(b).

III. Discussion

As five circuits have already recognized, there is a good argument to be made for assuring the parties that the court ordinarily will not order rehearing en banc without ordering a response. This assures the party opposing rehearing that – though it is not allowed to submit a response unless asked – it will be asked to respond if the court is inclined to grant rehearing en banc. Such an assurance could help parties to feel that they are being treated fairly; and requesting a response could help to inform the court's consideration of whether to grant rehearing en banc. A response may help to illuminate whether the standards for granting rehearing en banc are met.[16] From the court's point of view, it is difficult to imagine a downside to the proposed provision. It is true that the court would presumably feel obliged to review the response, but in a case significant enough to warrant a grant of rehearing en banc, that would not seem to be objectionable. Requesting a response would occasion some delay prior to the grant of rehearing en banc, but that delay presumably would not be great.

On the other hand, it is possible to distinguish rehearing en banc from panel rehearing, and to argue that requesting a response prior to the grant of rehearing is more important in the latter than in the former context. As Committee members observed during the 1990s discussion noted in Part I, the grant of rehearing en banc will offer the party favored by the panel decision a chance to defend the panel decision in its en banc brief. By contrast, the court may grant panel rehearing and alter the disposition of the appeal without requesting further briefing (subsequent to the petition and response);[17] thus, it is particularly important to provide an opportunity to respond to a petition for panel rehearing prior to a grant of such rehearing. Also, because the grounds for panel rehearing are considerably broader than those for rehearing en banc, and can

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[16] Rule 35(a) provides: "An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Rule 35(b)(b) provides: "The petition must begin with a statement that either: (A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue."

[17] Rule 40(a)(4) provides: "(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following: (A) make a final disposition of the case without reargument; (B) restore the case to the calendar for reargument or resubmission; or (C) issue any other appropriate order."

include a contention that the panel erred in its treatment of the relevant facts and/or law,[18] a response may be particularly helpful because of counsel's familiarity with the record and the doctrinal issues in the case.

[18] Rule 40(a)(2) provides: "The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended ...."

H

Warren v. American Bankers Ins. of Florida
C.A.10 (Colo.),2007.

United States Court of Appeals,Tenth Circuit.
Kirk WARREN, Plaintiff-Appellant/Cross-Appellee,
v.
AMERICAN BANKERS INSURANCE OF FLORIDA, Defendant-Appellee/Cross-Appellant.
Nos. 06-1305, 06-1440.

Oct. 30, 2007.

Background: Passenger injured in automobile accident sued as alleged insured under resident relative provision of three family members' automobile insurance policies, all issued by same insurer. The United States District Court for the District of Colorado, Richard P. Matsch, J., granted insurer's motion to dismiss without prejudice, but did not enter judgment on separate document, and denied passenger's motion to reconsider filed four days after appeal was filed.

Holdings: The Court of Appeals, Baldock, Circuit Judge, held that:
(1) entry of separate judgment was required following entry of dismissal order;
(2) dismissal order was not final judgment within exception to separate judgment rule; and
(3) motion to reconsider would be construed as motion to alter or amend "judgment."

Vacated and remanded.

West Headnotes

[1] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Court of Appeals reviews question of law de novo.

[2] Federal Courts 170B ⚿681.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(F) Effect of Transfer and Supersedeas or Stay
170Bk681 Effect of Transfer of Cause or Proceedings Therefor
170Bk681.1 k. In General. Most Cited Cases
Generally, notice of appeal divests the district court of jurisdiction over substantive claims. F.R.A.P.Rule 4(a)(4), 28 U.S.C.A.

[3] Federal Civil Procedure 170A ⚿2626

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(F) Entry, Record and Docketing
170Ak2626 k. Mode and Sufficiency. Most Cited Cases
Rule providing that every judgment and amended judgment must be set forth on separate document is a mechanical rule that must be mechanically applied to avoid uncertainties as to the date a judgment is entered. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

[4] Federal Civil Procedure 170A ⚿2626

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(F) Entry, Record and Docketing
170Ak2626 k. Mode and Sufficiency. Most Cited Cases

Federal Courts 170B ⚿654

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case

170Bk652 Time of Taking Proceeding
170Bk654 k. Commencement of Time in General. Most Cited Cases
Strict application of rule providing that every judgment and amended judgment must be set forth on separate document eliminates any question as to when the clock for filing post judgment motions and appeals begins to tick. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

[5] Federal Civil Procedure 170A ⚿2626

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(F) Entry, Record and Docketing
170Ak2626 k. Mode and Sufficiency. Most Cited Cases
District court was required to enter separate judgment, under governing rule, following entry of order dismissing for lack of ripeness alleged insured's suit against insurer, pursuant to resident relative provision of three family members' automobile insurance policies, for insured's injuries suffered in automobile accident, even though dismissal order was not judgment adjudicating merits of insured's claims. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

[6] Federal Civil Procedure 170A ⚿2626

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(F) Entry, Record and Docketing
170Ak2626 k. Mode and Sufficiency. Most Cited Cases
"Separate judgment rule," providing that every judgment and amended judgment must be set forth on separate document, applies to a district court order dismissing a case for want of subject matter jurisdiction. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

[7] Federal Civil Procedure 170A ⚿2626

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(F) Entry, Record and Docketing
170Ak2626 k. Mode and Sufficiency. Most Cited Cases
Nothing in rule providing that every judgment and amended judgment must be set forth on separate document exempts district court cases decided on procedural grounds apart from their underlying merits from the dictates of the separate judgment rule. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

[8] Federal Civil Procedure 170A ⚿2626

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(F) Entry, Record and Docketing
170Ak2626 k. Mode and Sufficiency. Most Cited Cases
District court's order dismissing for lack of ripeness alleged insured's suit against insurer, pursuant to resident relative provision of three family members' automobile insurance policies, for insured's injuries suffered in automobile accident, was not final judgment within exception to rule providing that every judgment and amended judgment must be set forth on separate document, since order contained both a discussion of court's reasoning and dispositive legal analysis.

[9] Federal Civil Procedure 170A ⚿2626

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(F) Entry, Record and Docketing
170Ak2626 k. Mode and Sufficiency. Most Cited Cases
Final orders containing neither a discussion of the district court's reasoning nor any dispositive legal analysis can act as final judgments, exempted from rule providing that every judgment and amended judgment must be set forth on separate document, if such orders are intended as the court's final directive and are properly entered on the docket. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

[10] Federal Civil Procedure 170A ⚿2368.1

170A Federal Civil Procedure
170AXVI New Trial

170AXVI(C) Proceedings
170Ak2368 Motion and Affidavits
170Ak2368.1 k. In General. Most Cited Cases

Federal Civil Procedure 170A ⚷2659

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2659 k. Motion, Complaint or Bill. Most Cited Cases
Because the grounds differ for rule governing motion for new trial or to alter or amend judgment, if filed before or within 10 days following entry of judgment, and rule governing motion for relief from judgment, if filed subsequent to 10-day period, district courts must evaluate post-judgment motions filed within 10 days of judgment based on the reasons expressed by the movant, not the timing of the motion. Fed.Rules Civ.Proc.Rules 59, 60, 28 U.S.C.A.

[11] Federal Civil Procedure 170A ⚷1842

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1839 Vacation
170Ak1842 k. Proceedings for Vacation. Most Cited Cases
Motion to reconsider district court's order dismissing suit for lack of ripeness would be construed as motion to alter or amend "judgment," since district court failed to enter separate judgment following entry of dismissal order, and motion to reconsider, raising purported errors of law normally raised in motion to alter or amend judgment, was filed before entry of separate judgment. Fed.Rules Civ.Proc.Rules 58, 59(e), 28 U.S.C.A.

[12] Federal Courts 170B ⚷669

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk669 k. Commencement and Running of Time for Filing; Extension of Time. Most Cited Cases
Timely filing of a notice of appeal of a judgment of district court, followed by the timely filing of a motion to alter or amend judgment, tolls the notice of appeal and does not confer jurisdiction on the Court of Appeals until the district court enters an order disposing of the motion. F.R.A.P.Rule 4(a)(4)(A), 28 U.S.C.A.; Fed.Rules Civ.Proc.Rule 59, 28 U.S.C.A.

***1240** Robert B. Carey (Julie B. Cliff with him on the briefs), The Carey Law Firm, Colorado Springs, CO, for Plaintiff-Appellant/Cross-Appellee.
Billy-George Hertzke (Arthur J. Kutzer, Senter, Goldfarb & Rice, LLC, Denver, CO, and Walter D. Willson, Wells, Marble & Hurst, PLLC, Jackson, MS, with him on the briefs), Senter, Goldfarb & Rice, LLC, Denver, CO, for Defendant-Appellee/Cross-Appellant.

Before KELLY, BALDOCK, and BRISCOE, Circuit Judges.

***1241** BALDOCK, Circuit Judge.
[1] The overriding issue before us is whether the district court, having failed to enter a separate judgment, lacked subject matter jurisdiction over Plaintiff's "motion to reconsider" its final decision, where Plaintiff filed a notice of appeal four days before filing the motion. The district court held the notice of appeal divested it of jurisdiction to reconsider its dismissal of Plaintiff's action for lack of ripeness. Our review of this legal question is de novo. *See Mann v. Boatright,* 477 F.3d 1140, 1145 (10th Cir.2007). For the reasons which follow, we vacate the district court's order on Plaintiff's "motion to reconsider," which we construe as a motion to alter or amend the "judgment," and remand for further consideration consistent with this opin-

ion.

I.

In September 2002, Plaintiff Kirk Warren was seriously injured in an automobile accident in Colorado. At the time of the accident, Plaintiff was a passenger in his brother's vehicle. Liberty Mutual Fire Insurance Company was the vehicle's insurer. In September 2004, Plaintiff filed this diversity action under 28 U.S.C. § 1332 against Defendant American Bankers Insurance Company. Plaintiff alleged his status as an insured under a "resident relative" provision of three other family members' respective insurance policies, all issued by American Bankers. Plaintiff sought, among other things, reformation of the three policies to include extended personal injury protection (PIP) and uninsured motorist coverage compliant with Colorado law. A year later, Plaintiff filed a separate diversity action against Liberty Mutual for extended PIP coverage under his brother's vehicle insurance policy. *See Warren v. Liberty Mut. Fire Ins. Co.,* No. 05-CV-1891 (D.Colo., filed Sept. 29, 2005).

While both cases were pending, the Colorado Court of Appeals decided *DiCocco v. National Gen. Ins. Co.,* 140 P.3d 314 (Colo.App.2006). Upon facts similar to those presented here, *DiCocco* upheld the dismissal of claims against an excess insurer pending resolution of claims against the primary insurer. The court held "damages claims against an excess insurer are not ripe until the plaintiff has exhausted the primary insurance coverage." *Id.* at 319. The state court further held "a claim for declaratory relief is not ripe unless the plaintiff can show there is a reasonable likelihood that the excess policy will be reached." *Id.* Citing *DiCocco,* American Bankers filed a motion near the eve of trial to dismiss Plaintiff's action pursuant to Fed.R.Civ.P. 12(b)(1) for lack of ripeness. The district court granted American Bankers' motion to dismiss without prejudice based upon its view that American Bankers was an excess insurer and *DiCocco* was "controlling law."

The district court entered its dismissal order on June 23, 2006. The court, however, never entered its judgment on a separate document. *See*Fed.R.Civ.P. 58 ("Every judgment ... must be set forth on a separate document...."). On July 24, 2006 (July 23 fell on a Sunday), Plaintiff filed a notice of appeal to the Tenth Circuit. Four days later, on July 28, Plaintiff filed a "motion to reconsider" in the district court raising purported errors of law. American Bankers moved to strike the motion. According to American Bankers, Plaintiff's notice of appeal deprived the district court of jurisdiction. Plaintiff responded that the notice of appeal was simply a precautionary measure because the court had not entered a separate judgment. The district court subsequently denied Plaintiff's "motion to reconsider" for lack of jurisdiction:

> No separate entry [of judgment under Rule 58] was required in this case because there was no judgment adjudicating***1242** the merits of any of the Plaintiff's claims in that this Court's order dismissed the entire civil action for lack of subject matter jurisdiction.... This Court could not enter a judgment in a case in which it has no jurisdiction. Accordingly, the notice of appeal was timely filed and did deprive this Court of jurisdiction to consider the motion for reconsideration.

Warren v. American Bankers Ins. Co., No. 04-CV-1876, Order at 1-2 (D.Colo., filed Sept. 19, 2006). Plaintiff filed a timely amended notice of appeal from the denial of its "motion to reconsider" on October 19, 2006.

II.

At the outset, Plaintiff submits the district court erred when it held his first notice of appeal deprived it of jurisdiction to address the substance of his subsequently filed "motion to reconsider." According to Plaintiff, a notice of appeal filed prior to entry of a separate judgment does not "ripen" until entry of judgment or 150 days have elapsed since entry of the court's final decision. *See*Fed. R.App. P. 4(a)(2), (a)(7)(A)(ii). In other words, Plaintiff as-

serts his notice of appeal had no effect whatsoever on the district court's jurisdiction to address his motion because the court had not entered a separate judgment. Plaintiff asks us to remand this matter to the district court for a proper consideration of his motion-a motion based in part on legal arguments addressing ripeness which the district court had no opportunity to consider in the first instance.

A.

[2] We first consider whether Fed.R.Civ.P. 58 required the district court to enter a separate judgment in this case. *If* the separate judgment rule, as the district court suggests, does not apply to dismissals based on want of subject matter jurisdiction, then the court was correct in holding it lacked jurisdiction to address a "motion to reconsider" filed four days after the notice of appeal and thirty-five days after the court's dismissal order. *See*Fed. R.App. P. 4(a)(4) (addressing the effect of a motion on a notice of appeal); *United States v. Prows,* 448 F.3d 1223, 1228 (10th Cir.2006) (recognizing the general rule that a notice of appeal divests the district court of jurisdiction over substantive claims). Our analysis then necessarily begins with the requirements of Fed.R.Civ.P. 58.

[3][4] Rule 58 generally provides that "[e]very judgment and amended judgment *must* be set forth on a separate document ...." (emphasis added). Rule 58 is a "mechanical rule" that must be "mechanically applied" to avoid uncertainties as to the date a judgment is entered. *United States v. Indrelunas,* 411 U.S. 216, 222, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973), *disavowed in part on other grounds, Bankers Trust Co. v. Mallis,* 435 U.S. 381, 386 n. 7, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam). Strict application of Rule 58 eliminates any question as to when the clock for filing post judgment motions and appeals begins to tick. Orders disposing of certain enumerated motions, including post judgment motions under Fed.R.Civ.P. 59 and 60, are excepted from Rule 58's separate judgment requirement. *See*Fed.R.Civ.P. 58(a)(1)(A)-(E). Notably, an order dismissing an action for lack of subject matter jurisdiction is not an order expressly excepted from Rule 58's separate judgment requirement.[FN1]

FN1. For purposes of appellate jurisdiction, a party-at least prior to the 2002 amendments to Rule 58(b)-could waive Rule 58's separate judgment requirement: "[I]f the only obstacle to appellate review is the failure of the district court to set forth its judgment on a separate document, there would appear to be no point in obliging appellant to undergo the formality of obtaining a formal judgment." *Mallis,* 435 U.S. at 386, 98 S.Ct. 1117 (internal quotations omitted), *called into doubt by Outlaw v. Airtech Air Conditioning and Heating, Inc.,* 412 F.3d 156, 162-163 (D.C.Cir.2005) (Roberts, J.). Under *Mallis,* we have appellate jurisdiction per 28 U.S.C. § 1291 to consider Plaintiff's appeal despite the district court's failure to enter a separate Rule 58 judgment following entry of its dismissal order. Moreover, even assuming the 2002 amendments to Rule 58(b) supercede *Mallis,* we have appellate jurisdiction in this case because 150 days have elapsed since the district court entered its dismissal order. *See*Fed. R.App. P. 4(a)(7)(A)(ii); *Outlaw,* 412 F.3d at 163. Our jurisdiction encompasses the district court's denial of Plaintiff's "motion to reconsider" for lack of subject matter jurisdiction because Plaintiff filed an amended notice of appeal within thirty days after entry of the order denying the motion. *See*Fed. R.App. P. 4(a)(4)(B)(ii).

***1243** [5][6] We are aware of no authority, and the district court cited none, supporting the proposition that Rule 58's mandate applies only to a final decision adjudicating the merits of a controversy. Specifically, we have located no case, and the district court cited none, holding that Rule 58's separ-

ate judgment rule does not apply to a district court order dismissing a case for want of subject matter jurisdiction. At least two of our sister circuits, however, have applied the separate judgment rule where the district court dismissed the action under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. *See Allah v. Superior Court,* 871 F.2d 887, 889-90 (9th Cir.1989); *Caperton v. Beatrice Pocahontas Coal Co.,* 585 F.2d 683, 687-90 (4th Cir.1978).

[7][8][9] Legions of district court cases are decided on procedural grounds apart from their underlying merits. Nothing in Rule 58 exempts such decisions from the dictates of the separate judgment rule. We can easily envision the inevitable confusion over application of the federal rules' various time limits for motions and appeals if we began, on a case-by-case basis, to create judicial exceptions to the separate judgment rule-exceptions not expressly provided for in Rule 58.[FN2] This case is a good example of that. To avoid such confusion, we strictly adhere to the Supreme Court's directive to apply Rule 58 "mechanically." *See Indrelunas,* 411 U.S. at 222, 93 S.Ct. 1562.We conclude the district court's final decision dismissing Plaintiff's case for lack of subject matter jurisdiction, or more particularly for lack of ripeness, required entry of a separate judgment consistent with Fed.R.Civ.P. 58.

> FN2. The one judicial exception to Rule 58 we have endorsed is for final orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis. Such orders "can act as final judgments if they are intended as the court's final directive and are properly entered on the docket." *Trotter v. University of New Mexico,* 219 F.3d 1179, 1183 (10th Cir.2000) (internal quotations omitted). In this case, the district court's dismissal order contains both a discussion of its reasoning and a dispositive legal analysis, and thus cannot serve as a final judgment.

B.

[10] Because the district court erroneously failed to enter a separate judgment following the entry of its dismissal order, our next task is to discern the true nature of Plaintiff's "motion to reconsider." For nearly twenty years, beginning with *Wilson v. Al McCord Inc.,* 858 F.2d 1469, 1478 (10th Cir.1988), we have admonished counsel that the Federal Rules of Civil Procedure do not recognize that creature known all too well as the "motion to reconsider" or "motion for reconsideration." Of course, a district court always has the inherent power to reconsider its interlocutory rulings, and we encourage a court to do so where error is apparent. *See K.C. 1986 Ltd. P'ship v. Reade Mfg.,* 472 F.3d 1009, 1017 (8th Cir.2007). But a motion ***1244** asking a court to reconsider a final decision, upon which final judgment has been or should have been entered, generally arises in only one of two ways: (1) under Fed.R.Civ.P. 59 as a motion for a new trial or to alter or amend the judgment, if filed before or within ten days following entry of the judgment, or (2) under Fed.R.Civ.P. 60 as a motion for relief from judgment, if filed subsequent to the ten day period. *See Price v. Philpot,* 420 F.3d 1158, 1167 n. 9 (10th Cir.2005).[FN3]

> FN3. In *Jennings v. Rivers,* 394 F.3d 850, 854-56 (10th Cir.2005), we recognized that a "motion to reconsider" filed prior to or within ten days of entry of judgment may on occasion be construed as one arising under Rule 60. Because the grounds for Rule 59 and 60 motions differ, district courts must "evaluate post-judgment motions filed within ten days of judgment based on the reasons expressed by the movant, not the timing of the motion." *Id.* at 855.

[11] In this case, confusion ensued because the district court failed to enter a separate judgment following entry of its dismissal order. Perhaps Plaintiff's best course would have been to ask the district court pursuant to Fed.R.Civ.P. 58(d) to enter a separate judgment. Instead, Plaintiff chose

to file a notice of appeal and, subsequently, a "motion to reconsider." Fortunately, this is not the first time we have encountered a scenario where a plaintiff filed a "motion to reconsider" a district court's final decision absent entry of a separate Rule 58 judgment. In *Hilst v. Bowen,* 874 F.2d 725 (10th Cir.1989) (per curiam), the district court granted defendant's motion to dismiss for lack of subject matter jurisdiction. Fourteen days later, plaintiff filed a "motion for reconsideration." Six days thereafter, the court entered a separate judgment pursuant to Rule 58 (an entry that we did not question). We construed plaintiff's motion as one to alter or amend the "judgment" under Fed.R.Civ.P. 59(e). We reasoned that "[a]lthough Rule 59 motions are to be served not later than ten days after entry of judgment, ... this ten-day limit sets only a maximum period and does not preclude a party from making a Rule 59 motion before formal judgment has been entered." *Id.* at 726. Similarly, in this case Plaintiff filed his "motion to reconsider," raising purported errors of law normally raised in a Rule 59(e) motion, before entry of a separate Rule 58 judgment. Applying *Hilst,* we too construe such motion as a timely filed motion to alter or amend the "judgment" under Rule 59(e).

C.

Our final task is to determine what effect, if any, Plaintiff's previously filed notice of appeal had on the district court's jurisdiction to address his Rule 59(e) motion. First, Fed. R.App. P. 4(a)(1) generally provides that a notice of appeal must be filed with the district clerk within 30 days after entry of the judgment. Second, Fed. R.App. P. 4(a)(2) provides "[a] notice of appeal filed after the court announces a decision ... but before the entry of judgment ... is treated as filed on the date of and after the entry." *See FirsTier Mtg. Co. v. Investors Mtg. Ins. Co.,* 498 U.S. 269, 276, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991). If, as here, the district court never enters a separate Rule 58 judgment, then judgment is deemed entered 150 days after entry of the court's final decision or order. *See*Fed. R.App. P. 4(a)(7)(A)(ii); *Outlaw v. Airtech Air Conditioning and Heating, Inc.,* 412 F.3d 156, 162-63 (D.C.Cir.2005) (Roberts, J.).

[12] Third, Fed. R.App. P. 4(a)(4)(A) provides, among other things, that if a party timely files a Rule 59(e) motion, the time to file an appeal runs from the date the court enters the order disposing of the ***1245** motion. The Advisory Committee Notes to Rule 4(a)(4)'s 1993 amendments specifically address the situation before us: "A notice [of appeal] filed before the filing of one of the specified motions [including a Rule 59(e) motion] ... is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals." *See Ross v. Marshall,* 426 F.3d 745, 751-52 (5th Cir.2005) (the timely filing of a motion listed in Rule 4(a)(4)(A) suspends a notice of appeal until the motion is disposed of, regardless of whether the motion is filed before or after the notice of appeal); *United States v. Silvers,* 90 F.3d 95, 98 (4th Cir.1996) (the timely filing of a notice of appeal, followed by the timely filing of a Rule 59 motion, tolls the notice of appeal and does not confer jurisdiction on the court of appeals until the district court enters an order disposing of the motion). This makes perfect sense because the purpose of Rule 59 is to provide the district court an opportunity to correct its own errors, which in turn spares the parties and the court of appeals the burden of unnecessary appellate proceedings. *See Petru v. City of Berwyn,* 872 F.2d 1359, 1361 (7th Cir.1989).

III.

In sum, Plaintiff's notice of appeal had no effect on the district court's jurisdiction to address his "motion to reconsider" because the district court never entered a separate judgment and 150 days had not elapsed since entry of the court's dismissal order. *See*Fed. R.App. P. 4(a)(7)(A)(ii). Plaintiff timely filed his "motion to reconsider," or more appropriately his Rule 59(e) motion, albeit thirty-five days after the court entered its dismissal order. *See*

Hilst, 874 F.2d at 726. In hindsight, the district court should have entered a separate Rule 58 judgment promptly after it entered its order dismissing Plaintiff's action. Because the court failed to do so, a procedural quagmire arose. Awaiting entry of judgment, Plaintiff filed a premature notice of appeal and then a "motion to reconsider." Plaintiff's premature notice of appeal was further suspended when Plaintiff filed his "motion to reconsider." Because Plaintiff's notice of appeal was suspended, the district court retained jurisdiction to rule upon the merits of Plaintiff's "motion to reconsider." *See Ross,* 426 F.3d at 751-52; *Silvers,* 90 F.3d at 98.

Accordingly, the district court's order denying Plaintiff's "motion to reconsider" is hereby vacated. This cause is remanded for consideration of that motion consistent with the foregoing opinion. On remand, the district court, in considering the continuing viability of its dismissal order and the issue of whether Plaintiff's action is ripe for adjudication, should first inquire into the present status of Plaintiff's district court action against Liberty Mutual Fire Insurance Company. Resolution of that action could render moot the seminal question of whether Plaintiff's action against American Bankers is ripe. If Plaintiff's action against Liberty Mutual remains unresolved, the court should address the arguments raised in Plaintiff's "motion to reconsider." Because American Bankers' motion for attorney fees and costs, the subject of cross-appeal 06-1440, is dependent on the continuing viability of the court's underlying dismissal order, we also vacate the order of the district court denying said motion.

VACATED and REMANDED.

C.A.10 (Colo.),2007.
Warren v. American Bankers Ins. of FL
507 F.3d 1239

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Warren v. American Bankers Ins. Co. of Florida D.Colo.,2006.
Only the Westlaw citation is currently available.
United States District Court,D. Colorado.
Kirk WARREN, Plaintiff,
v.
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, Defendant.
Civil Action No. 04-cv-01876-RPM.

June 23, 2006.
Order denying reconsideration, Sept. 19, 2006.

Co Horgan, Robert Bruce Carey, Hagens Berman Sobol Shapiro, LLP, Phoenix, AZ, Julie Bettencourt Cliff, Carey Law Firm, Colorado Springs, CO, for Plaintiff.
Arthur Joel Kutzer, Billy-George Hertzke, Senter, Goldfarb & Rice, LLC, Denver, CO, Walter D. Willson, Wells Marble & Hurst, PLLC, Jackson, MS, for Defendant.

ORDER OF DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

RICHARD P. MATSCH, Senior District Judge.
***1** Although this civil action has been pending since September 10, 2004, and at a pretrial conference held on May 4, 2006, was determined to be ready for trial to the Court on the issue of reformation of the three insurance policies in dispute, the defendant filed a motion to dismiss under Fed.R.Civ.P. 12(b)(1) on May 26, 2006, based on a decision of the Colorado Court of Appeals in *DiCocco v. National Gen. Ins. Co.*, --- P.3d ----, 2006 Colo.App. LEXIS 698 (2006). The plaintiff responded, asserting that dismissal would be improper under that decision because there is a reasonable likelihood that the excess policy will be reached, contending that the losses of Kirk Warren would exceed extended PIP benefit if the policy issued by Liberty Mutual Fire Insurance Company, the insurer of the vehicle in which the plaintiff was riding as passenger when injured, is reformed with an aggregate of $200,000.00 as enhanced benefits. That policy is the subject of Civil Action No. 05-cv-01891-EWN-MEH in which Kirk Warren and Kurt Warren are plaintiffs and Liberty Mutual Fire Insurance Company is the defendant. In the Preliminary Pretrial Order, entered therein on May 30, 2006, it is clear that the plaintiffs there, including Kirk Warren, are claiming that the policy should be reformed without limitation on the amount of coverage. Additionally, the plaintiff in this case is not seeking declaratory judgment but is seeking recovery of his losses.

The plaintiff also contends that the Court should not dismiss its claims for bad faith breach of insurance contract. That argument assumes that the contract has been reformed but that claim is what is not ripe under the holding in *DiCocco.*

In this Court's view, *DiCocco* is controlling law with respect to this case and it is therefore

ORDERED that this civil action is dismissed, without prejudice, for lack of subject matter jurisdiction.

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND DEFENDANT'S MOTION FOR FEES AND COSTS

On June 23, 2006, this Court entered an order dismissing this civil action, without prejudice, for lack of subject matter jurisdiction. That order was based on a decision of the Colorado Court of Appeals of May 18, 2006, which the Court accepted as controlling law in this case. The plaintiff filed a motion for reconsideration of that order on July 28, 2006, after filing a notice of appeal on July 24, 2006. The defendant moved to strike the plaintiff's motion for reconsideration because the notice of appeal deprived this court of further jurisdiction. The plaintiff responded that the notice of appeal was filed only as a precautionary measure because no

judgment was entered as a separate document under Fed.R.Civ.P. 58(a). No separate entry was required in this case because there was no judgment adjudicating the merits of any of the plaintiff's claims in that this Court's order dismissed the entire civil action for lack of subject matter jurisdiction. Rule 4(a)(1) of the Federal Rules of Appellate Procedure expressly provides for the filing of a notice of appeal within 30 days after the judgment or order appealed from is entered. Judgment and order are stated in the disjunctive. This Court could not enter a judgment in a case in which it has no jurisdiction. Accordingly, the notice of appeal was timely filed and did deprive this Court of jurisdiction to consider the motion for reconsideration.

***2** The defendant on July 7, 2006, filed a motion for fees and costs under C.R.S. § 1317201, relating to the dismissal of a tort action. This civil action included claims other than tort claims. That statute and related Colorado statutes regarding costs is not applicable in this case because the dismissal was for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1). While the statute refers to a dismissal of a tort action on a motion prior to trial under Rule 12(b) of the Colorado Rules of Civil Procedure, and while those rules also contain a Rule 12(b)(1) for dismissal for lack of subject matter jurisdiction, the principal authority cited in support of the motion is *Houdek v. Mobile Oil Corp.*, 879 P.2d 417 (Colo.App.1994), a case that was dismissed under Rule 12(b)(5) for failure to state a claim upon which relief could be granted because the tort claims were preempted by federal law. In this Court's view, applying the literal language of the state statute to this dismissal which occurred late in the proceedings because of a new decision of the Colorado Court of Appeals which this Court adopted as defeating subject matter jurisdiction would be unreasonable and not within the legislative purpose of discouraging unnecessary litigation of tort claims.

Upon the foregoing, it is

ORDERED that the plaintiff's motion for reconsideration is denied and it is

FURTHER ORDERED that the defendant's motion for fees and costs is denied.

D.Colo.,2006.
Warren v. American Bankers Ins. Co. of Florida
Slip Copy, 2006 WL 4968123 (D.Colo.)

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C
U.S. v. Craig
C.A.7 (Wis.),2004.

United States Court of Appeals,Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Kenneth N. CRAIG, Defendant-Appellant.
No. 03-2424.

Argued April 20, 2004.
Decided May 13, 2004.

Background: Defendant was convicted on guilty plea in the United States District Court for the Eastern District of Wisconsin, Charles N. Clevert, J., of being felon in possession of firearm, and filed pro se notice of appeal.

Holding: The Court of Appeals, Easterbrook, Circuit Judge, held that defendant's failure to comply with mailbox rule by failing to aver that first-class postage for his notice of appeal had been prepaid could not take advantage of rule.

Dismissed.

West Headnotes

[1] Time 378 ⇐3.5

378 Time
378k3.5 k. Mailbox Rule in General. Most Cited Cases
(Formerly 378k3)
Federal mailbox rule does not depend on whether prisoner is represented or unrepresented, but rather on whether prisoner meets conditions of governing rule. F.R.A.P.Rule 4(c), 28 U.S.C.A.

[2] Criminal Law 110 ⇐1081(4.1)

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1081 Notice of Appeal
110k1081(4) Time of Giving
110k1081(4.1) k. In General. Most Cited Cases
Federal prison inmate who failed to comply with mailbox rule by failing to aver that first-class postage for his notice of appeal had been prepaid could not take advantage of rule. F.R.A.P.Rule 4(c), 28 U.S.C.A.

***739** Michelle L. Jacobs (argued), Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee.
Pamela Pepper (argued), Milwaukee, WI, for Defendant-Appellant.

Before EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge.
Charged with possessing a firearm despite being a convicted felon, see 18 U.S.C. § 922(g), Kenneth Craig pleaded guilty and was sentenced to 57 months' imprisonment. At the conclusion of sentencing, Craig announced that he did not want to appeal. Just in case, however, the judge told Craig that his lawyer would continue to represent him through the period allowed for appeal and would file a notice at his request. Craig said that he understood.

The judgment was entered on March 12, 2003, so the time for appeal expired on March 26. See Fed. R.App. P. 4(b)(1)(A)(i), 26(a). On April 8 a notice of appeal, signed by Craig personally, arrived at the district court. When we directed the parties to address the question whether the appeal is timely, Craig's lawyer asked the district judge for a 30-day extension under Rule 4(b)(4). The application represented that Craig had changed his mind while in prison and then prepared and mailed a notice on his own because he thought that his lawyer would no longer represent him. The district court denied this motion, ruling that changing one's mind after the

time for appeal has expired is not "good cause" for an extension, and that Craig is in no position to plead ignorance in light of the information furnished in open court.

Despite this ruling, Craig has bombarded us with additional statements and affidavits in an effort to show an entitlement to an appellate decision. The latest asserts that he put the notice of appeal in the prison mail system on March 20, while time remained, and that he acted *pro se* not because of any misunderstanding but because he feared that he would not be able to reach counsel by phone before the time for appeal expired. We directed the parties to brief the jurisdictional question along with the merits-which we need not reach.

Having told the district judge that he changed his mind and mailed his notice after the time for appeal expired, Craig now tells us that he appealed in time after all-if he really did deposit the notice on March 20 and if he is entitled to the ***740** benefit of the "mailbox rule" for prisoners. See Fed. R.App. P. 4(c). We doubt that a litigant who says one thing to the district judge in an effort to get an extension of time should be allowed to advance an inconsistent view of the facts after the district judge says no. Perhaps these seemingly divergent assertions could be reconciled on the ground that Craig wrongly thought that the time expired before March 20 because he does not understand how the federal rules calculate time. Sentencing took place on March 6, but the clock does not start until a judgment is entered on the docket, and when the time is 10 days or fewer intermediate weekends and holidays are excluded. Thus "10 days" ran from March 6 to March 26, while a layperson might have supposed that the time expired on March 16. It does not matter. We may suppose that things happened exactly as Craig now says-notice deposited in the prison mail system on March 20 but delayed in transit to the district court. That is not enough to make the appeal timely.

[1] The United States contends that the appeal is late because the mailbox rule applies only if the prisoner is unrepresented. As we said in *United States v. Kimberlin,* 898 F.2d 1262, 1265 (7th Cir.1990), a prisoner who has the assistance of counsel need only pick up the phone. Craig did not try that route, and the United States contends that he therefore cannot take advantage of the mailbox rule. Yet *Kimberlin* addressed the status of the mailbox rule when it was a matter of common law, having been invented in *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Rule 4 was rewritten in 1993 (and revised in 1998) not only to make the mailbox rule official but also to impose some limits. Rule 4(c)(1) requires a prisoner to use a legal-mail system if the prison has one. (This provides verification of the date on which the notice was dispatched.) If the prison lacks such a system: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." *Ibid.*

Today the mailbox rule depends on Rule 4(c), not on how *Kimberlin* understood *Houston.* Rule 4(c) applies to "an inmate confined in an institution". Craig meets that description. A court ought not pencil "unrepresented" or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd. Craig therefore is entitled to use the mailbox rule. Accord, *United States v. Moore,* 24 F.3d 624, 626 n. 3 (4th Cir.1994).

[2] Still, to get its benefit he had to comply with it, and he did not-not when he filed the appeal, and not in the ensuing year. His affidavit states that he deposited the notice in the prison mail system on March 20, 2003, but not that he prepaid first-class postage. Rule 4(c)(1) requires the declaration to state only two things; 50% is not enough. The postage requirement is important: mail bearing a stamp gets going, but an unstamped document may linger. Perhaps that is exactly what happened: Craig may have dropped an unstamped notice of appeal into the prison mail system, and it took a while to get him to add an envelope and stamp (or to debit his

prison trust account for one). The mailbox rule countenances *some* delay, but not the additional delay that is inevitable if prisoners try to save 37¢ plus the cost of an envelope. Rule 4(c)(1) is clearly written; any literate prisoner can understand it (and Craig is literate). Respect for the text of Rule 4(c) means that represented prisoners can use the opportunity it creates; respect for the text equally means that prisoners must use that opportunity ***741** in the way the rule specifies. If we were authorized to revise the rule (which we are not), we would be more likely to interpolate "unrepresented" in front of "inmate" than to delete the phrase "and state that first-class postage has been prepaid."

Craig's notice of appeal was untimely, and his appeal is dismissed.

C.A.7 (Wis.),2004.
U.S. v. Craig
368 F.3d 738, 58 Fed.R.Serv.3d 309

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H

Ingram v. Jones
C.A.7 (Ill.),2007.

United States Court of Appeals,Seventh Circuit.
Edmund INGRAM, Petitioner-Appellant,
v.
Eddie JONES, Warden, Respondent-Appellee.
Malcolm Rush, Petitioner-Appellant,
v.
Matthew J. Frank, Respondent-Appellee.
Nos. 06-2766, 06-2879.

Argued Sept. 19, 2007.
Decided Nov. 14, 2007.
As Amended Dec. 7, 2007.
Rehearing and Rehearing En Banc Denied Dec. 18, 2007.FN*

FN* The Hon. Joel M. Flaum did not participate in the consideration or decision of this case.

Background: Two state prisoners filed petitions for writs of habeas corpus. The United States District Court for the Northern District of Illinois, Samuel Der-Yeghiayan, J., 2005 WL 2614854, dismissed first prisoner's petition and United States District Court for the Eastern District of Wisconsin, J.P. Stadtmueller, J., 2006 WL 1389117, dismissed second prisoner's petition. Petitioners appealed.

Holdings: In consolidated appeal, the Court of Appeals, Bauer, Circuit Judge, held that:
(1) first prisoner's notice of appeal was timely since it appeared as though he used prison's mailing system, but
(2) second prisoner's supplemental declaration which contained false statement did not establish timely filing of notice of appeal under prisoner mailbox rule.

Appeal granted in part and dismissed in part.

West Headnotes

[1] Federal Courts 170B ⚿667

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk667 k. Filing, Service and Return. Most Cited Cases
Prisoner mailbox rule provides that a notice of appeal filed by a prisoner is deemed filed on the date the prisoner deposits the notice in the prison mail system, and not on the date when it is received by the clerk of the court. F.R.A.P.Rule 4(c)(1), 28 U.S.C.A.

[2] Time 378 ⚿3.5

378 Time
378k3.5 k. Mailbox Rule in General. Most Cited Cases
(Formerly 310k4(12))
Prisoner mailbox rule requires a prisoner to use a legal mailing system if the prison has one. F.R.A.P.Rule 4(c)(1), 28 U.S.C.A.

[3] Habeas Corpus 197 ⚿819

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)1 In General
197k817 Requisites and Proceedings for Transfer of Cause
197k819 k. Time for Proceeding. Most Cited Cases
Prisoner's notice of appeal from dismissal of habeas petition was timely since it appeared as though he used prison's mailing system, as required by prisoner mailbox rule; although prisoner's legal mail log did not reflect any mailing during time frame at issue, his prison account was not charged for postage during that time and prisoner was not obligated to

pay for postage for legal mail, and appeal was delivered to district court. F.R.A.P.Rule 4(c)(1), 28 U.S.C.A.

[4] Federal Courts 170B ⇐667

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk667 k. Filing, Service and Return. Most Cited Cases
If a prison does not have a legal mailing system, a prisoner is required to show, through a declaration or notarized statement, that his notice of appeal was timely filed in order to benefit from the prisoner mailbox rule. F.R.A.P.Rule 4(c)(1), 28 U.S.C.A.

[5] Habeas Corpus 197 ⇐819

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)1 In General
197k817 Requisites and Proceedings for Transfer of Cause
197k819 k. Time for Proceeding. Most Cited Cases
Prisoner's supplemental declaration which falsely stated that postage for notice of appeal was prepaid because prison had precommitment to paying his postage did not establish timely filing of notice of appeal under prisoner mailbox rule; prison did not have separate legal mailing system or provide free postage for all legal mail of inmates, and prisoner had exceeded his loan allowance for legal mail. F.R.A.P.Rule 4(c)(1), 28 U.S.C.A.

[6] Prisons 310 ⇐4(12)

310 Prisons
310k4 Regulation and Supervision
310k4(10) Access to Courts and Public Officials
310k4(12) k. Communication with Courts, Officers, or Counsel. Most Cited Cases
Although prisoners have right of access to courts, they do not have right to unlimited free postage.

***642** Eugene Volokh (argued), University of California, School of Law, Los Angeles, CA, for Petitioners-Appellants.
Leah C. Myers (argued), Office of the Attorney General, Chicago, IL, for Respondent-Appellee.
Marguerite M. Moeller (argued), Office of the Attorney General Wisconsin Department of Justice, Madison, WI, for Matthew J. Frank.

Before BAUER, MANION, and WOOD, Circuit Judges.

BAUER, Circuit Judge.
Prisoners Edward Ingram and Malcolm Rush appeal their respective district courts' decisions denying their petitions for writs of habeas corpus.[FN1] Both Ingram and Rush filed their notices of appeal more than 30 days after their judgments. In this consolidated appeal, we asked the parties to address appellate jurisdiction in light of Fed. R.App. P. 4(c)(1)'s language that an inmate's notice of appeal "is timely if it is deposited in the institution's internal mail system on or before the last day for filing," although both Ingram and Rush admittedly failed to affix first-class postage at the time their notices were deposited for mailing.

FN1. Ingram and Rush are represented on this appeal by the same attorney, Eugene Volokh.

Because we find that Ingram's notice of appeal was timely, we have jurisdiction to hear his appeal.[FN2] Because we find that Rush's petition was untimely, we affirm the denial of his petition.

FN2. Respondent-Appellee Jones concedes in his brief that Ingram's notice of appeal is timely.

I. Background

Edmund Ingram was a prisoner at Stateville Correctional Center ("Stateville"), in Joliet, Illinois.[FN3] On October 14, 2005, the district court for the Northern District of Illinois entered judgment dismissing Ingram's habeas petition. Ingram's notice of appeal from that order was filed in the district court on November 18, 2005. Because Ingram's notice was not filed within 30 days of the judgment, we ordered him to file either (1) a memo addressing our jurisdiction; or (2) a declaration or notarized statement, setting forth the date the notice was deposited in the prison's mailing system, and stating whether first-class postage was prepaid, pursuant to Fed. R.App. P. 4(c)(1). On July 14, 2006, Ingram filed a "Jurisdictional Memorandum/Declaration," stating that he deposited his notice of appeal in the prison mail system on November 11, 2005, but failing to disclose whether or not postage was prepaid when he placed it in the prison mailbox.

> FN3. On July 13, 2007, we granted a motion filed by Terry McCann, Warden of Stateville, for permission to move Ingram to Pontiac Correctional Center, in Pontiac, IL, and ordered the clerk to substitute Eddie Jones, Warden of Pontiac, as respondent-appellee.

On July 18, 2006, we ordered Ingram to file a supplemental declaration setting forth the date of deposit and stating whether postage was prepaid. On August 2, 2006, Ingram filed a "Supplemental Notarized Statement," setting forth the date of deposit and that postage was "not prepaid," but it was "processed and paid by the Institution, Stateville C.C."

Malcolm Rush is a prisoner at Waupun Correctional Institution ("Waupun"), in Waupun, Wisconsin. On May 17, 2006, the district court for the Eastern District of Wisconsin entered judgment dismissing Rush's habeas petition. Rush's notice of appeal was filed in the district court on June 23, 2006. Because Rush's notice was ***643** not filed within 30 days of the judgment dismissing his petition, we also ordered him to file either (1) a memo addressing our jurisdiction; or (2) a declaration or notarized statement, setting forth the date the notice was deposited in the prison's mailing system, and stating whether first-class postage was prepaid, pursuant to Fed. R.App. P. 4(c)(1). On August 2, 2006, Rush filed a declaration stating that he had deposited his notice of appeal in the prison mail system on June 9, 2006, along with a request for "a legal loan exemption for postage payments, pursuant to DOC 309.51."[FN4] Rush also stated that first-class postage was not paid until on or after June 19, 2006.

> FN4. Inmates without sufficient funds in their general account can receive a loan for up to $200 to pay for legal correspondence. Wis. Admin. Code § DOC 309.51. Any request to exceed the loan limit must be for an "extraordinary need," and is submitted to the warden for his approval. *Id.*

On September 22, 2006, on our own motion, we (1) consolidated both appeals to determine appellate jurisdiction; (2) appointed counsel to both appellants; and (3) ordered briefing limited to the issue of appellate jurisdiction, in light of Fed. R.App. P. 4(c)(1)'s language that an inmate's notice of appeal "is timely if it is deposited in the institution's internal mail system on or before the last day for filing."

Prior to filing any briefs with this Court, on January 24, 2007, Ingram executed a final "Supplemental Declaration," stating that he deposited his notice of appeal in the prison mailing system on November 11, 2005, first-class postage was prepaid by the prison, and the prison had precommitted to paying for prisoners' legal mail without any need for the prisoner to attach a stamp. Similarly, on January 26, 2007, Rush executed a final "Supplemental Declaration," stating that he deposited his notice of appeal in the prison mailing system on June 9, 2006, first-class postage was prepaid by the prison, and the prison had precommitted to paying for legal mail "under those circumstances specified by Wis. Admin. Code § 309.51, without any need for the prisoner to attach a stamp."

II. Discussion

In addressing the issue of appellate jurisdiction, both Ingram and Rush argue that (1) the first sentence of Fed. R.App. P. 4(c)(1) is the only mandatory sentence in the Rule, and because their notices of appeal were deposited in the prison mailing systems on or before the last day of filing, they are timely; and that (2) the third sentence of Rule 4(c)(1) is permissive, in that an inmate *may* file, but is not required to file, either a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid; or that (3) even if the third sentence of Rule 4(c)(1) is mandatory, both prisoners fulfilled the requirement by filing supplemental declarations that satisfied the two requirements of the third sentence of the Rule.

[1] The first sentence of Fed. R.App. P. 4(c)(1) states: "If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing." Rule 4(c)(1), also known as the "prisoner mailbox rule," provides that a notice of appeal filed by a prisoner is deemed filed on the date the prisoner deposits the notice in the prison mail system, and not on the date when it is received by the clerk of the court. *Houston v. Lack,* 487 U.S. 266, 275-76, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988).

***644** [2] The second sentence of the Rule states: "If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." Rule 4(c)(1) requires a prisoner to use a legal mailing system if the prison has one. *United States v. Craig,* 368 F.3d 738, 740 (7th Cir.2004). In the context of this appeal, Stateville has a separate legal mailing system; Waupun does not.

The third sentence of the Rule states: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746, or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." Rule 4(c)(1)"requires the declaration to state two things: 50% is not enough. The postage requirement is important: mail bearing a stamp gets going, but an unstamped document may linger." *Craig,* 368 F.3d at 740.

A. Edmund Ingram

[3] Respondent-Appellee Jones concedes that Ingram's notice of appeal was timely, because Ingram appeared to use Stateville's legal mailing system.FN5 We agree. Rule 4(c)(1) requires a prisoner to use a legal mailing system if the prison has one. *Craig,* 368 F.3d at 740. Stateville has a separate legal mailing system, in which legal mail is logged on a prisoner's legal mail card. Ingram's legal mail log did not reflect any mailing in November 2005.FN6 However, his account was not charged for postage during that time, nor was he obligated to pay for postage for his legal mail.FN7 The notice of appeal was delivered to the district court on November 18, 2005. Thus the logical inference would be that Ingram used the legal mailing system, as he did not personally pay for his postage. We find that Ingram's notice of appeal was deposited on November 11, 2005 in Stateville's legal mailing system. Therefore, he satisfies the second sentence of Rule 4(c)(1) and receives the benefit of the Rule, without our consideration of the third sentence.

> FN5. Initially, when Ingram filed his "Supplemental Notarized Statement" on August 2, 2006, Jones filed a response, arguing that the appeal should be dismissed for lack of jurisdiction because first-class postage was not prepaid, as required by Fed. R.App. P. 4(c)(1).
>
> FN6. Ingram's declaration, notarized statement, and brief to this Court does not assert that Ingram satisfied Rule 4(c)(1) by

using Stateville's legal mailing system.

FN7. Pursuant to a 1981 consent decree, Stateville is obligated to provide appropriate envelopes and pay for postage for all legal mail of the inmates.

B. Malcolm Rush

First, Rush argues that his notice was deposited within thirty days of the district court's judgment, and therefore it was timely and that Rush should not be required to do anything further. While it is true that Rush deposited his notice in the mailing system on time, he is not exempt from compliance with the other requirements of the Rule. As we held in *Craig,* a prisoner may receive the benefit of the prison mailbox rule if he complies with its requirements, which includes filing a declaration or notarized statement. 368 F.3d at 740.

[4] Rush argues that the third sentence of the Rule gives the prisoner the option of filing a declaration or notarized statement, in order to establish a timely filing. This position is inconsistent with our decision in *Craig,* where we held that if a prison does not have a legal mailing system, the prisoner is required to show, through a declaration or notarized statement, that his notice was timely filed in ***645** order to benefit from the mailbox rule. 368 F.3d at 740; *see also United States v. Ceballos-Martinez,* 387 F.3d 1140, 1145 (10th Cir.2004) ("If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid.") (emphasis in original); *Grady v. United States,* 269 F.3d 913, 918 (8th Cir.2001) ("[T]he prison mailbox rule ... consist[s] of two requirements. A prisoner must have actually deposited his legal papers with the warden by the last day for filing with the clerk. And the prisoner must at some point attest to that fact in an affidavit or notarized statement."). Waupun does not have a separate legal mailing system, so Rush was required to comply with the third sentence of the Rule in order to receive its benefits.

[5][6] Finally, Rush argues that his supplemental declaration fulfills the third sentence of the Rule, in that it sets forth a date of deposit, June 9, 2005, and that he states postage was prepaid, because at the time of deposit, Waupun had precommitted to paying his postage. This statement is not true. Although prisoners have right of access to courts, they do not have right to unlimited free postage. *Gaines v. Lane,* 790 F.2d 1299, 1308 (7th Cir.1986). Unlike Stateville, Waupun does not have a separate legal mailing system, nor does Waupun provide free postage for all legal mail of inmates. Prisoners are required to pay for their own legal correspondence, and are given a $200 loan allowance for supplies, photocopies, and postage for this purpose. In the event that a prisoner exceeds his allowance, he may request a loan exemption from the warden if the prisoner demonstrates an "extraordinary need." Wis. Admin. Code § DOC 309.51.

The underlying issue is whether Rush's statement in his declaration that "postage was prepaid by the institution" satisfies the requirement of the third sentence of Rule 4(c)(1) if the institution was not, in fact, obligated to pay for the postage at the time of deposit. At the time Rush deposited his notice, his postage was not prepaid by the institution, although he indicated that it was prepaid. Waupun was not precommitted to pay for his postage. Furthermore, Rush had exceeded his $200 loan balance, and had not received an exemption from the warden at the time he deposited his notice.[FN8] The statement in Rule 4(c)(1) that "first-class postage has been prepaid" encompasses the notion that the postage has actually been prepaid, either by the prisoner or by the institution. While the declaration need not be deposited concurrently with the notice of appeal, he must ensure that the statement is true as of the time the notice is deposited. "Respect for the text of Rule 4(c) means that represented prisoners can use the opportunity it creates; respect for the text equally means that prisoners must use that opportunity in the way the rule specifies." *Craig,* 368 F.3d at 740. If we allowed prisoners to file declarations under Rule 4(c)(1) and assert a blanket state-

ment that "postage has been prepaid" without verifying that they have the funds or the entitlement to do so, we would give them our stamp of approval to violate the timeliness requirement of the Rule. Postage was not prepaid at the time of deposit because Rush did not secure his right to an exemption for a loan from the warden. Therefore the statement in his declaration that Waupun had "precommitted" to paying for ***646** the postage as of June 9, 2006, is not true, and does not satisfy the requirements of Rule 4(c)(1).

> FN8. The warden's letter granting an exemption for a loan is dated June 19, 2006, ten days after Rush deposited his notice of appeal.

III. Conclusion

For the aforementioned reasons, we affirm the dismissal of Malcolm Rush's petition because his notice of appeal was untimely. We do have appellate jurisdiction over Edmund Ingram's notice of appeal because it was timely, and we order the parties to brief the issues on the merits.

C.A.7 (Ill.),2007.
Ingram v. Jones
507 F.3d 640

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Comments

COMMENTS SUBMITTED ON

PROPOSED APPELLATE RULES AMENDMENTS PUBLISHED FOR COMMENT

07-AP-001 THROUGH 07-AP-019

AUGUST 2007 - FEBRUARY 2008

07-CV-015 (Bucholz/DOJ)
07-CR-005 (Vorbobyov)
07-CR-010 (Bottei)
07-CR-013 (Luby)

07-AP-001
07-CV-001

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Subject Comments on new proposed rules

I have two comments, in addition to one I submitted earlier:

1. The change in FRAP 27, from 8 court days to 10 calendar days, will have the result of generally shortening the amount of time available to respond to motions in courts of appeals. If the motion is not served by hand, when the 3 days for electronic or mail service are added, there will be 13 calendar days to respond under the new rule. Under the current rule, when the three days are added, the result is: 14 days to respond if the motion is served on a Monday, 13 if on a Tuesday, 15 if on a Wednesday, 15 if on a Thursday, and 17 if on a Friday (assuming, in all cases, that there is no intervening holiday).

While some appellate motions are quite simple and easy to respond to, others motions are major substantive motions that require a long time to properly respond. For example, there are motions to dismiss cases based on mootness, standing, and other jurisdictional grounds, and even motions for summary affirmance or reversal. On the other hand, procedural motions are ones that practitioners tend to respond to quickly anyway, because appellate courts often rule on them quickly without necessarily awaiting a response.

I would therefore suggest changing the general response time of FRAP 27 to a higher number, such as 12 or 14 calendar days. An alternative would be to provide different response times for substantive and procedural motions, such as 7 calendar days for procedural ones and 21 for substantive ones (though I realize that it might take some work to create a rule that clearly distinguishes substantive and procedural motions).

2. I suggest setting up some sort of formal procedure, with deadlines, for individual district courts and courts of appeals to amend their local rules in response to the change from court to calendar days in the new rules. Many district courts have their own rules for matters such as the times to file a response to a motion. Some of the rules have periods that are ten days or less, and the effective lengths of these periods will be drastically shortened when the new federal rules go into effect. To ensure that local courts adjust the time periods in their rules appropriately in response to the new federal rules, and that local practitioners aren' t hit with any unfortunate surprises when the new federal rules go into effect, local district and appellate courts should be given a specific time frame to adopt revisions to their rules after the new federal rules are approved. And the new federal rules should not go into effect until after the deadline for local courts to adopt changes to their rules passes.

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Subject comment on time-counting rules

With respect to the proposed time-counting amendments, the new rules should be revised to clarify how to properly add the three days that must be added based on mail or electronic service. There can be confusion on this point both right now and under the new rules. Consider the following example (under the proposed new rules):

A motion in a court of appeals is served by mail on Wednesday, September 5. Is it proper to add the three days for mail service to the 10-day default period to respond (of the proposed new rules) to get a 13-day period, and count 13 days from September 5 so that the opposition brief is due Tuesday, September 18? Or is it correct to first determine when the original 10-day period would expire, which would be Monday, September 17 (because the 10 days run to Saturday, September 15, which is not a business day), and then count three days from Monday, September 17, to get a due date of Thursday, September 20?

Under the current Appellate Rule 26(c), it seems the due date is September 18, if the rule is read literally, as the rule states that the three days are "added to the prescribed period." But, under the current Rule 6 of the Federal Rules of Civil Procedure, if we were considering a September 5 filing in a district court and the local rule required a response within 10 calendar days, then the due date (if you read Rule 6 literally) would seem to be September 20, as Rule 6 provides that "3 days are added after the period would otherwise expire under Rule 6(a)."

I suggest that the amended rules clarify the working of the 3-day rule so that it is clear and is consistent among the district and appellate rules.

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COMMENTS OF THE COMMITTEE ON CIVIL LITIGATION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ON THE PROPOSED TIME-COMPUTATION AMENDMENTS

The Committee on Civil Litigation of the United States District Court for the Eastern District of New York respectfully submits the following comments on the proposed time-computation amendments which were circulated for public comment in August 2007 by the Standing Committee on Rules of Practice and Procedure.

1. The Proposed Time-Computation Amendments Would Cause Serious Practical Disruptions That Would Outweigh Their Theoretical Benefits

By changing the current rule under which intermediate Saturdays, Sundays, and holidays are not counted in computing time period of ten days or less, the proposed time-computation amendments would cause serious practical problems. Judicial officers, court personnel, and practitioners have become familiar with the existing time-computation rule over the course of many years. They have learned to rely upon it as a default rule which will apply unless other specific dates are set by the court. Statutes, local rules, standard-form orders, and practitioners' forms have all evolved against the backdrop of the current rule. Any change in the current time-computation rule would lead to significant disruptions while the new rule is promulgated, disseminated, absorbed, and assimilated into practice. The new rule would continue to be a trap for the unwary for an extended period.

The Committee does not believe that there are significant problems in practice under the current time-computation rule. It is simple and easy to apply

for lawyers and nonlawyers alike. To the extent that the current rule requires resort to a calendar to determine which intermediate days fall on weekends or holidays, the same would also be true under the proposed amended rule, under which time periods that end on a weekend or a holiday are extended to the next business day.

To the extent that there is any concern that some lawyers and court personnel may have difficulty making the necessary computations under the existing time-computation rule – which we have not observed to be the case – a more efficient solution would be to incorporate the necessary software for making such computations directly into the Electronic Case Filing system, thus providing an authoritative means of making and recording the necessary computations.

2. The Proposed Time-Computation Amendments Do Not Adequately Mitigate the Adverse Effects That Would Be Caused by Their Introduction

The Committee recognizes that the drafters of the proposed time-computation amendments have sought to mitigate their adverse effects by, for example, lengthening most five-day periods to seven days and lengthening most ten-day periods to fourteen days. These changes, however, would only offset the adverse effects caused by including weekend days in the new time computations. They would not offset other significant adverse effects of the new rule, including its application to holiday periods and its effect on time periods prescribed by statutes and by local rules.

A. Time Periods That Include Holidays

One would like to believe that motions served on the eve of holiday

periods would be a problem seldom met with and easily solved. Sadly, the Committee's experience teaches that this is not always the case. By including intervening holidays in the time computation, the proposed amendments would exacerbate this problem.

Consider, for example, a motion with a ten-day response period (which, as noted below, is more reflective of current practice than the four-day period prescribed by Fed. R. Civ. P. 6(d)) which is served by hand at 5:00 P.M. on Christmas Eve. Even the current exclusion of holidays does not begin to offset the burden and disruption of responding to such a motion during the year-end holiday period. Including holidays in the time computation would make matters even worse.

B. Time Periods Prescribed by Statute

Large numbers of short time periods are prescribed by statutes that have been enacted against the backdrop of the present time-computation rule. With commendable industry, the Standing Committee has tabulated some (but not all) of these statutes in a 108-page attachment to its proposal. Our Committee believes that, if the proposed amendments are transmitted to Congress (which our Committee hopes will not occur), they should be transmitted with a provision that they will only become effective if Congress passes and the President signs a technical corrections bill making corresponding changes in all the statutory time periods listed by the Standing Committee, as well as in all other litigation-related statutory time periods of ten days or less that can be unearthed by exhaustive research. Otherwise, these statutory time periods will cause persons relying upon

the existing time-computation rule that they have known and used for many years to incur a serious risk of losing substantive rights.

C. Time Periods Prescribed by Local Rule

For the same reasons, no new time-computation rule should become effective without corresponding changes in time periods of ten days or less that are contained in local rules, standing orders, and standard-form orders. Ensuring that such changes are made in a timely fashion, and are publicized to everyone who needs to be aware of them, would be a monumental task in itself.

In addition, any amendments should clarify whether district courts may continue to have local rules that measure time periods in business days. One such local rule is Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which (in the Committee's experience) has worked satisfactorily for more than a decade since it was adopted in its current form in 1997.

3. The Committee Supports the Proposed Lengthening of Certain Time Periods

As part of the time-computation project, the Rules Committees have reviewed the time periods provided in the existing rules, and have proposed certain changes in those time periods that are independent of the merits of the time-computation project itself. Although our Committee is unable to support the time-computation project generally, it does support some of the independent changes that have been proposed in certain time periods.

The Committee supports the lengthening of the time periods for moving and responding papers in civil motions under Fed. R. Civ. P. 6(d) from five days

and one day to fourteen days and seven days, as a more realistic reflection of the time needed for most motions. Although our Committee is not unanimous on this point, we suggest that the Civil Rules Committee may wish to consider specifying a longer period for substantive motions than for discovery motions, as is done, for example, by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York.

The Committee also supports the lengthening of the time for post-trial motions under Fed. R. Civ. P. 50, 52, and 59 from ten days to 30 days. Again, this is a more realistic time period than is provided by the present rules.

4. Time Periods That Count Backward Should Be Changed to Time Periods That Count Forward

When a time period which counts backward ends on a weekend or holiday, the proposed amendments would continue to count backward until a weekday is reached. This would exacerbate the adverse effects of the proposed amendments by shortening still further a response period that may already be shorter than it would be under the current rules.

In addition, when time periods are counted backward, the rules contain no provisions for giving the other parties extra days when service is made by mail. Nor is it clear how a workable rule could be drafted that would do this.

The way to avoid these and other practical problems caused by counting backward is to amend the rules that currently count backward so that they count forward. As a practical matter, the most important rule that would be affected by this change is Fed. R. Civ. P. 6(d), which currently determines the times for serving motion papers on civil motions by counting backwards from "the time

specified for hearing" (despite the fact that most civil motions today are not determined at a hearing). How Fed. R. Civ. P. 6(d) could be amended to count forward is demonstrated by Local Civil Rule 6.1 of the United States District Courts for the Southern and Eastern Districts of New York, which was amended in 1997 to do exactly that, and which has worked smoothly for more than a decade.

5. Conclusion

We thank the Standing Committee for the opportunity to comment on the proposed time-computation amendments. For the reasons set forth above, although we support changes in the time periods in certain rules, we urge the Standing Committee to disapprove the time-computation amendments as a whole.

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07-CV-004

07-CR-003

07-AP-003

07-BR-015

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Subject August 2007 Rules Package

I have only a few brief comments on these proposals.

The time-computation rules are nicely done. I recommended changes along these lines during my time on the Standing Committee and am pleased to see that the task is largely complete. These amendments should take effect in 2009, "only" 16 years after a majority of the Standing Committee urged that changes of this kind be accomplished as soon as possible.

The benefits of using real days are so apparent that I am left to scratch my head about the survival (and proposed amendment in this cycle) of Fed. R. App. P. 26(c), which adds 3 days whenever time is calculated from a document's service rather than its filing. Why should this rule persist? Build the time into the deadline for briefs; don't leave it up in the air whether three days should be added to some other period. (For 3 days are *not* added if the document is "delivered" on the service date.)

The rule makes little sense. It was originally designed to accommodate delay in the Postal Service. Today briefs and similar documents regularly are delivered by FedEx or courier; increasingly they are delivered electronically with zero waiting. Yet Rule 26(c), which says that no days are added if a courier plops the document on counsel's desk, provides that 3 days *are* added if the document arrives as an email attachment, or via message from a court's e-filing site That's inconsistent.

My court has concluded that the entire routine is absurd and has overridden Rule 26(c)--not by a local rule, which wouldn't be cricket (see Fed. R. App. P. 47(a)(1)), but by setting a briefing schedule by order in almost every case. Each order gives a date on which the brief must be *filed*

When a deadline applies to filing rather than service, Rule 26(c) drops out of the picture. Although the Seventh Circuit has been doing this for more than 20 years, lawyers regularly are confused by the difference between "filing" dates, to which Rule 26(c) does not apply, and "service" dates, to which it does, so each of these orders includes a warning that the conversion to a filing date means that no time is added on account of service by mail.

That the Seventh Circuit must add this proviso to each order shows the potential for confusion caused by the differing rules for computation of time following filing versus service.

Note, by the way, that the three extra days *also* interferes with the goal of allocating time in 7-day parcels, which then end on weekdays. Adding three days to a 30-day or 45-day period is not likely to increase the chance that the last day will be a weekend, but adding 3 days to a 14-day period (used for some motions) will.

So the Standing Committee should complete the time-computation project by rescinding rather than amending Rule 26(c), with adjustments in other deadlines if appellees and respondents otherwise would have too little time.

One other brief comment, concerning both Fed. R. App. P. 4(a)(1)(B) and Fed. R. App. P. 40(a)(1). The draft amendments to these two rules refer to "the United States; a United States agency; [and] a United States officer". United States is a proper noun; the first usage ("the United States") is therefore correct. Treating a proper noun as an adjective ("a United States agency") is not correct; it is an example of noun plague. We should not have stylistic backsliding so soon after the style project rewrote all of these rules. "Federal agency" is better, using a real adjective as an adjective. If you have some compelling need to use "United States," then say "agency of the United States" (etc.). Sometimes Congress writes this error into a statute ("United States Court of Appeals"), and there is nothing the judiciary can do about the legislature's poor drafting. But the Constitution gets it right ("We the People of the United States"; "the Congress of the United States"; "the judicial Power of the United States"; "the Chief Justice of the United States"), and the federal judiciary should do no less

Frank H. Easterbrook

07-AP-004 07-BK-007 07-CR-004 07-CV-005

07-BR-023

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Subject Comments on proposed rule amendments

The Proposed Amendments are helpful and I support their adoption

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07-AP-005 07-BK-008 07-CR-006 07-CV-006

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January 14, 2008

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Dear Mr McCabe
You and your committee have invited me to submit comments from time to time on various Proposed Amendments. I have been favorably impressed each time. I believe,however, those involved in the current assignment are the most impressive.

Thank you for inviting me to submit comments.

Addressing Rule 4,Rules of Appellate Procedure, line 14, I look with favor on increasing the time from 10 to 14 days. However, to assure even a more liberal time frame,I suggest your Committee consider making it 21 days. Three weeks do not seem too long to grant the maximum reasonable time element.

The committee Note on page 145 is clarifying and supported.

On Rule 22, it is my judgment it is well put as shown and I do not suggest any changes.

Passing to Rule 26, page 47, deleting "calendar" is well taken.

Does the Committee not feel a specific reference to providing for the effect if the 3rd day falls on a weekend or a holiday should be inserted? This, of course, is provided for elsewhere but it may be it should be inserted in Rule 26 to make it read

> (line) "* * * pre scribed period extended to the next business day if the 3rd day falls on a holiday or non-business day or * * * * * "

I have no suggestions speaking to Rule 40 or the new Rule 12.1.

Passing to Bankruptcy Rules, my only observation is to express my favoravble reaction to the revisions in Official Form 8 and new Official Form 27 as written. The provisions addressing these Forms are supported.

Turning to Civil Rules,I recommend adding this following "requires" online 13, page 270:

> " * * * except increasing the ad damnum at the beginning of the trial. Such amendments must be effected at least 30 days prior to trial except with consent of defense counsel or (unless the court orders it)

On page 296, line 5,I suggest the committee add this, in substance, following "unnecessary": * * * unless leave is granted on the party's motion or (unless the court orders it).

It appears the other Civil Rules described on the cover are supported as set out and Ihave no sugestions for additions or modifications.

Passing to Criminal Rules: It is my judgment that the Rules set forth on the cover are well taken as drawn, including any modifications the Committee has determined upon.

I look with respectful favor on the inclusion of the materials in "Attachment", beginning of page 348. Reviewing the pages following page 348 generates my favorable consideration of the materials furnished.

Resonating the lead paragraph in this letter, it is my judgment the Proposed Amendments in this assignment are impresssive and I thank you again for inviting me to take part in this project.

Respectfully

Jack E Horsley

JACK E HORSLEY

JEH:mm

GESS MATTINGLY & ATCHISON, PSC
A TRADITION of EXCELLENCE

January 25, 2008

Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Proposed Federal Rules Published August 15, 2007

To Whom It May Concern:

I appreciate and applaud the work of the Judicial Conference Advisory Committee in proposing changes to the federal rules relating to time periods and time computation. In general, I support these changes. However, there is one issue with the proposed rules which I wanted to bring to your attention for your further consideration.

Most people today would agree that a day begins at midnight and ends at 11:59:59 p.m. local time. Several of the proposed rules define the "last day" for electronic filing or other purposes as ending "at midnight." I think this is an error. I believe these rules instead should state "at 11:59:59 p.m." rather than "at midnight." This would affect FRCP 6(a)(4)(A), FRCrP 45(a)(4)(A), FRAP 26(a)(4)(A) and (B), and FRBP 9006(a)(4)(A) and perhaps others. May I suggest that you review all of the proposed rules where the word "midnight" appears to be sure it is being used correctly? Otherwise, I fear there may be a lot confusion about filing deadlines. If a filing deadline is midnight of a particular day, for practical purposes that would mean the deadline is actually the day (or evening) before the particular day.

Again, thank you for the important work that you do.

Kind regards,

Stephen P. Stoltz

SPS:mcf
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Robert
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To Rules_Comments@ao uscourts gov

cc

Subject August 2007 Proposed Timing Rules Changes

07-AP-007 07-BK-011 07-CV-008

Dear Members of the Rules Committee, 07-CR-008

I offer three comments

1 Title 28 U S C § 636(b)(1) *must* be changed from 10 days to 14 days for making Objections to Magistrate Judge rulings in order to achieve consistency with the proposed changes in FRCP 6 & 72, FRCrP 59, and Rule 8 of the §2254 and §2255 Rules, as has been mentioned in the Committee Comments

2 Since other significant time periods are being considered for change, it would be worthwhile to consider the merits and demerits of changing the short time period for filing Objections to rulings by Magistrate Judges when the rulings address case-dispositive matters For example, under the current rules, if a Magistrate Judge issues a Report & Recommendation on a case-dispositive issue such as a civil motion to dismiss or motion for summary judgment, a Social Security Appeal, a Bankruptcy appeal, or a petition for habeas corpus relief, an aggrieved party has only 10 days (not including intervening Saturdays, Sundays, and holidays, etc) to file an appeal (or "Objections") These types of decisions are often worthy of significant research, effort and reflection, since they may deal with numerous or complex issues For this reason alone, justice may demand a longer appeal time for litigants The short time line (14 calendar days under the proposed Rule changes) may work even harsher effects on prisoner litigants who may receive delayed notice of Magistrate Judge decisions due to the imponderables of prison mail systems

There is already a natural division addressing the time for Objections between FRCP Rule 72(a) and (b) Rule 72(b) would be an appropriate place to insert a more generous time period for objecting to potentially dispositive rulings of a Magistrate Judge, such as 28 days (a multiple of 7) or 30 days (a common practice) In the interests of fairness to prisoner litigants, some courts already include a 30-day time period for Objections within the court order or R&R. For consistency, amendments would also be required to Rule 8 of the §2254 and §2255 Rules as well as 28 U S C 636(b)(1)

3 It is not clear whether the proposed FRCP Rule 6 timing amendments retain, or discard, the extra 3 days provided in current Rule 6(d) and former Rule 6(e) The proposed Civil Rule 6 does not appear to address the subject in the way that the proposed Appellate Rule 26(c) does Perhaps subsection (d) of Civil Rule 6 is meant to be left as it currently exists

I would suggest it be given a state funeral and then forgotten Currently, it is the subject of much confusion and debate among litigants It occassionaly spawns needless motions to strike the filing that looks "late" but is not It is not needed when a document is served electronically but the existing rule still grants 3 extra days Questions abound from the rule Does a party receive the 3 extra days when it is the court that is serving an order electronically? If a plaintiff serves a motion by mail or by e-mail under proposed civil Rule 6 on Monday, February 11th 14 days before a hearing scheduled for Monday, February 25th by when must the defendant file his or her response brief? Under the proposed amendments, would it be Tuesday, February 19th (because seven days prior to the hearing counting backwards would be Monday, February 18th, which is a holiday, which would requiring counting backward to the next business day of Friday, February 15th, plus 3 additional days because of mail/email service which would land back on the holiday Monday, February 18th, moving forward this time to the next day the Clerk's Office is open for business, *i e*, Tuesday, February 19th)? If the 3-day rule applies when an opposition brief must be filed, then a court may not receive the full 7 days' time consideration prior to a hearing If the 3-day rule does not apply, then a responding party may have a very short window between receipt of a motion and the time for filing a response

Whatever the intent of the proposed amendments, an official Committee Note would be extremely helpful

Sincerely,

Robert J Newmeyer

Administrative Law Clerk for the
Honorable Roger T Benitez
United States District Judge
United States District Court
Southern District of California

"Carol Bonifaci"
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02/04/2008 01 31 PM

To <Rules_Comments@ao.uscourts gov >
cc
Subject Comment on proposed changes to FRAP 26

07-AP-008 **07-BK-012** **07-CV-009** **07-CR-009**

I welcome any attempt to make the federal rules on computation of time more consistent and comprehensible

If I understand the Committee correctly, under the proposed new rule a deadline written as "no later than 30 days before X" would be subject to the rule, and, assuming X is set for Monday, December 1, 2008, the putative deadline of November 1, 2008, which is a Saturday, would move forward to Monday, November 3, 2008.

On the other hand, a deadline written as "no later than November 1, 2008" would *not* be subject to the rule, and thus since November 1, 2008, is a Saturday, the actual deadline would move backward to Friday, October 31, 2008.

I foresee continuing confusion. The proposed new language under (a) could still lead one to think that the deadlines in orders giving an actual date are subject to the rule. I would like the rule to state clearly at the outset that it does *not* apply to any deadline for which an actual date has been set, and only applies where the period is stated in hours, days or longer units. This is perhaps implied but only set out clearly in the Committee Note: "The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set." Such language should be moved into the Rule.

It is good that the new rules will be more consistent in themselves, but as the Committee points out, these rules will also apply to court orders, which are typically ginned out using various date algorithms Sometimes orders are written in actual date mode, and sometimes in period-of-time mode. It would be a great help to those of us working in the trenches if the way this affects computation of time were made crystal clear. Then perhaps courts would take note and adjust their orders accordingly.

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February 8, 2008

07-AP-009

BY ELECTRONIC MAIL

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: ***Proposed Amendment to Fed. R. App. P. 4(a)(4)(B)***

Dear Mr. McCabe:

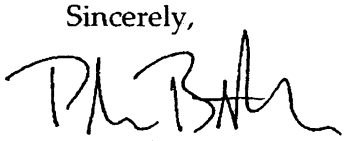
The Advisory Committee's proposed amendments to the Federal Rules of Appellate Procedure are welcome. I write only because the Committee's proposed amendment to Rule 4(a)(4)(B) carries an unintended consequence.

Under the amended rule, the losing party may appeal from an order resolving one of the tolling motions listed in Rule 4(a)(4)(A). The notice of appeal must be filed within 30 days of the entry of that order. If the district court elects to enter an amended judgment reflecting its order, the losing party's 30-day period to appeal from the amended judgment also runs from the entry of the order. Tethering the time to appeal from the *amended judgment* to the entry of the *order* poses a problem in cases where the amended judgment is not entered until more than 30 days after the entry of the order. In this situation, it is literally impossible for the losing party to file a timely notice of appeal from the amended judgment—the amended judgment will not have come into existence by the time the notice must be filed.

This is not a matter of idle curiosity. I face a comparable issue in a current case. Other litigants will face this issue whenever the district court affords the prevailing party ample time (say, two weeks) to propose an amended judgment and, in turn, allows the losing party ample time (say, another two weeks) to file objections to that proposal, before the district court finally rules on the objections and enters the amended judgment.

One solution to this quandary is to delete entirely the language "or a judgment's alteration or amendment upon such a motion" from the amended rule. Frankly, this language appears to be unnecessary. In most cases, the district court does not enter an amended judgment after ruling on tolling motions. In the few cases where the district court does enter an amended judgment, the losing party could file a separate notice of appeal from the amended judgment if the amendment is substantive. Absent the language quoted above, by operation of Rule 4, the losing party could timely file that separate notice of appeal within 30 days of the entry of the amended judgment.

Sincerely,



Peder K. Batalden

PKB/klt

Public Citizen Litigation Group's
Comments on Proposed Time-Computation Amendments

In general, Public Citizen Litigation Group supports the days-are-days approach and amending the rules to provide that most time periods be 7, 14, or 21 days. We note, however, that the committee's desire that due dates land on week days will only be fully realized in the relatively rare circumstance where the relevant filing is delivered non-electronically to the adverse party on the date of service. We also agree with most of the particular proposed amendments, which, in general, are accomplished by moving up to the next closest increment (*e.g.*, the period to seek permission to appeal under FRCP 23(f) moves from 10 days to 14 days).

We disagree, however, with the recommendation that the 10-day periods for filing "tolling" motions under FRCP 50, 52, and 59 become 30-day periods. We also disagree with the recommendation that a Rule 60(b) motion filed within 30 days of entry of judgment cut off the running of the appeal period. For the reasons that follow, we recommend a 21-day period for all of these motions.

The only justification provided for more than doubling the effective period for filing a post-judgment "tolling" motion is the committee's brief statement that "[e]xperience has proved that in many cases it is not possible to prepare a satisfactory post-judgment motion in 10 days, even under the former rule that excluded intermediate Saturdays, Sundays, and legal holidays." For 35 years, our office has engaged in a wide range of complex federal litigation, and we file and respond to a fair number of "tolling" motions, particularly Rule 59(e) motions. Although the current 10-day period is tight, we have never found it unmanageable. We acknowledge, however, that the current deadline may make it difficult to file some post-trial motions, particularly those under Rules 50 and 52. Nevertheless, we are concerned that a 30-day period will unnecessarily delay the proceedings and may even encourage litigants to file unwarranted post-judgment motions. Moreover, we do not think it is a good idea for the filing period for post-judgment motions to be the same as the filing period for appeal in most cases. A 30-day period for filing "tolling" motions guarantees that some parties will file those motions on the same day that other parties in the same case file appeals. On the other hand, if, as under current law, the period for filing post-judgment motions is substantially shorter than that for filing an appeal, once a motion is filed, all

litigants will know that they do not need to file an appeal, if at all, until after the motion is decided. Although an appeal filed before the disposition of a "tolling" motion is effective once the motion is decided, FRAP 4(a)(4)(B)(i), that is no reason to implement a rule that will significantly increase the number of instances in which appeals and post-judgment motions are pending simultaneously. At the very least, circuit clerks will have to send out forms to litigants prematurely, and litigants will have to fill them out prematurely. In sum, we think that a 21-day period better balances the needs of all litigants and the courts.

Brian Wolfman – February 11, 2008

07-AP-011

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February 12, 2008

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Comments on Proposed Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe.

Enclosed are the comments of Public Citizen Litigation Group on the proposed amendments to the Federal Rules of Appellate Procedure. Thank you for your consideration of these comments

Sincerely,

/s/

Brian Wolfman

Public Citizen Litigation Group's
Comments on Proposed FRAP Amendments

Proposed Rule 12.1 (Indicative Rulings)

• We share the concern expressed in the proposed committee note that, because of the potential loss of appellate jurisdiction over the initial appeal (and, thus, the issues raised in that appeal), a remand terminating all appellate proceedings should occur "only when the appellant has stated clearly its intention to abandon the appeal." As the committee explains, that is a serious concern because if the first appeal is terminated, the appellant might be "limited to appealing [only] the denial of the postjudgment motion." The committee note does not say *how* an appellant should express an intent to abandon an appeal, and, moreover, an advisory committee note is not binding. We believe that this problem should be resolved in the Rule itself, by inserting the following as the penultimate sentence of proposed Rule 12.1(b): "The court of appeals shall not dismiss the appeal unless, in the notice referred to in subdivision (a), the appellant expressly requests that the appeal be dismissed."

• The proposed committee note also states that when a motion is filed in the district court during the pendency of an appeal, litigants should "bear in mind" that a separate notice of appeal may be necessary "to challenge the district court's disposition of the motion." We believe that the committee note should remind litigants that an *amended* notice of appeal may be filed in this circumstance. That is a worthwhile reminder because an amended notice of appeal does not require a new filing fee. *See* FRAP 4(a)(4)(B)(iii).

• We have one stylistic suggestion regarding Rule 12.1(a): Change "because of an appeal that has been docketed" to "because an appeal has been docketed."

Proposed Amendment to Rule 4(a)(4)(B)(ii)

We have no quarrel with the proposed wording change. We question, however, whether this subdivision serves a useful purpose. In 1993, Rule 4 was amended to provide that a notice of appeal filed before disposition of one of the "tolling" post-judgment motions becomes effective upon disposition of the motion. FRAP 4(a)(4)(B)(i). That Rule presumes that appellants intend to pursue their initial appeals after disposition of post-judgment motions. That makes sense because the appellee is not prejudice by that presumption, and, if the appellant does not want to pursue the initial appeal after disposition of a post-trial motion, it can simply abandon that appeal.

But why not go further and provide that the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion? To be sure, that order could not have been referenced in the appellant's original notice of appeal, *see* FRAP 3(c)(1)(B), but that "failure" of notice would not prejudice the appellee. After all, because all interlocutory orders are said to merge into the final judgment, and many appealable orders resolve numerous contested issues, Rule 3(c)(1)(B) – which requires only that the notice of appeal designate "the judgment, order, or part thereof being appealed" – does not actually put the appellee or the court on notice of the issues to be raised on appeal. Rather, the appellee generally is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk. *Cf.* FRAP 10(b)(3)(A). In any event, it is difficult to see what benefit flows from requiring the appellant to file another notice of appeal (or an amended notice) or what harm is caused by allowing the original notice of appeal to serve as an appeal from the order disposing of a post-judgment motion. In sum, our

amendment would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts.

Proposed Amendments to Rules 4(a)(1)(B)(iv) and 40(a)(1)(D)

In general, we support this amendment. We have one concern about its wording. Assume that an appeal is taken 31 days after judgment is entered by the district court or a petition for rehearing is filed 15 days after judgment is entered by the court of appeals. Assume further that the case is one in which, to quote the proposed Rules, the plaintiff alleges that the defendant is a "a United States officer or employee" and suit has been brought against that officer or employee in his or her individual capacity based on an "act or omission [allegedly] occurring in connection with duties performed on the United States' behalf." What if the court of appeals holds that the act or omission did *not* occur in connection with duties performed on the United States' behalf? Does that mean the court of appeals did not have jurisdiction over the appeal because it was filed late or that the rehearing petition was untimely? We assume that is not the committee's intent, but the Rule could be read that way. And there could be an adverse consequence of reading it that way. If the court finds that the officer or employee was not acting in connection with his or her official duties, the officer or employee might still be held individually liable on some other basis (such as under state common law), and we would not want a situation in which the court felt it lacked power to act on the ground that the appeal or rehearing petition was filed too late. We believe that any ambiguity can be resolved by replacing "occurring in connection" with "alleged to have occurred in connection."

Brian Wolfman – February 12, 2008

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February 12, 2008

Via Electronic and First Class U.S. Mail

Peter G McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re Comments on Proposed Amendments

Dear Mr McCabe

After reviewing the preliminary draft of proposed amendments to the Federal Rules of Civil Procedure, including the proposed time-computation amendments, I am writing to submit the following comments and suggestions

1. Federal Rule of Civil Procedure 15(a)

The proposed amendment to Rule 15(a) would meet its stated objectives to clarify and simplify the procedures for amendment as a matter of course. I am in favor of this amendment insofar as it would treat a motion to dismiss and an answer the same way. There is no sound basis for the disparity of treatment under the current rule Moreover, the proposed amendment would clarify the procedures by specifically addressing both responsive pleadings and motions under Rule 12(b), (e) or (f).

I am not, however, in favor of the proposed amendment to Rule 15(a) insofar as it would permit amendment once as a matter of course within twenty-one days after service of either a responsive pleading or a motion under Rule 12. Instead, I would suggest a proposed amendment that would permit amendment of a pleading where a responsive pleading is allowed once as a matter of course only until such responsive pleading or a motion under Rule 12 is filed My firm frequently files motions to dismiss complaints filed against its clients before filing responsive pleadings My experience has been that, even if leave of court is required to file an amended pleading, the first motion for leave to amend is often granted I believe that if leave is required any time after a responsive pleading or Rule 12 motion plaintiffs would be encouraged to take greater care in framing the first amended complaint. In addition, my suggestion would provide better protection to defendants by the closer scrutiny that follows where plaintiffs seek leave to amend more than once.

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2. Time-Computation Rules

The proposed time-computation rules could also simplify the method of computing all periods of time, including short time periods, with its "days-are-days" approach. I understand that the days-are-days approach would be almost entirely offset – as to rule-based periods – by amendments that lengthen most short rule-based deadlines. I am concerned, however, that the proposed time-computation rules would govern a number of statutory deadlines that do not themselves provide a method for computing time. I am concerned also that the proposed time-computation rules may cause hardship if short time periods set in local rules are not adjusted accordingly. Therefore, I would suggest that the proposed time-computation rules not be implemented unless and until the Standing Committee is sure that it will receive the necessary cooperation from Congress and the local rules committees to meet the desired objective of simplification.

Please do not hesitate to contact me if you have any questions. Thank you for all of the work that the Committee has done in an effort to clarify and simplify the rules.

Very truly yours,

Robert M. Steptoe, Jr.

RMS,JR:mo

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07-AP-013 07-CR-012

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February 14, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, DC 20544

Re: Proposed Amendments to Fed. R. App. P. 22(b)
and Rule 11(a) of the Habeas Rules

Dear Mr. McCabe:

Thank you for the opportunity to comment on the proposed amendments to Fed. R. App. P 22(b) and Rule 11(a) of the Rules Governing Proceedings under 28 U.S.C. §§ 2254 and 2255. These amendments would eliminate the existing requirement that a habeas petitioner file a notice of appeal from any adverse decision before the district court must determine whether a certificate of appealability, pursuant to 28 U.S.C. § 2253(c), should issue. Under the proposed amendments, the district court, instead, would be required to issue or deny a certificate automatically whenever it enters a final decision adverse to a habeas petitioner. Although we share the Committee's goals of expediting habeas proceedings and avoiding unnecessary remands in appeals where no certificate has been issued, we are concerned that proposed amendments would (1) impose unnecessary burdens on district court judges and (2) dramatically increase the number of habeas appeals filed in courts of appeal.

"Each year, state prisoners file more than 18,000 petitions seeking habeas corpus relief. This constitutes 1 out of every 14 cases filed in the United States district courts." Nancy J. King et al., *Final Technical Report: Habeas Litigation in U.S District Courts* (2007) http://www.law.vanderbilt.edu/article-search/article-detail/download.aspx?id=1639. On average, each petition contains 4 claims for relief. *Id.* at 28. A recent empirical study of nearly 37,000 non-capital habeas petitions filed by state prisoners during 2003 and 2004 establishes that petitioners filed notices of appeal in only 34.8% of decided cases. *Id.* at 53. Thus, under the existing version of Fed. R. App. P. 22(b)(1), district court judges must make a § 2253(c) determination in only 34.8% of cases decided adversely to petitioners.

Under the proposed amendments, however, district court judges would be mandated to make that determination in 100% of cases decided adversely to petitioners, even though empirical data indicates that 65.2% of non-capital habeas petitioners will never file a notice of appeal.

Furthermore, under the proposed amendments, district court judges would be required to make their § 2253(c) determinations without any opportunity for input from petitioners or their counsel. This too imposes potentially needless burdens on district court judges because, in our experience in litigating thousands of habeas corpus cases in the District of Massachusetts, petitioners often narrow the claims on which they seek issuance of a certificate in light of the district court's decision or respondent's objections. The proposed amendments would deprive district court judges of this input and, instead, require them to address all of the claims contained in a petition, even though petitioners -- if given the opportunity -- might voluntarily have withdrawn one or more of those claims.

We also are concerned that the proposed amendments may increase the number of appeals filed by habeas petitioners. Petitioners who might not otherwise have pursued an appeal may, under the proposed amendments, be encouraged to file an appeal because of the district court's issuance of a certificate under § 2253(c)'s very flexible standard. This result threatens to undermine one of the primary goals of the Antiterrorism and Effective Death Penalty Act of 1996, which was to promote the finality of state-court criminal convictions.

There are, we think, less troublesome and burdensome ways to achieve the Committee's goals of expediting habeas appeals and avoiding remands in cases where petitioner fails to obtain a § 2253(c) determination from the district court. No appeal by a petitioner should be entered on the docket of the court of appeals until the district court clerk forwards to the court of appeals clerk a copy of the certificate, notice of appeal, and other parts of the district-court record. This requirement is imposed by the existing language of Fed. R. App. P. 22(b)(1) but, in our experience, rarely followed in practice. Consequently, habeas appeals frequently are docketed in the court of appeals based merely on petitioner's filing of a notice of appeal, without any certificate having been issued by the district court. Stricter compliance with Rule 22(b)(1)'s existing requirements would eliminate this problem, without imposing any additional and potentially unnecessary burdens on district court judges.

In short, we urge the Committee to reject the proposed amendments. The same objectives can be achieved by requiring district court and appellate court clerks to more strictly enforce the existing provisions of Fed. R. App. P. 22(b)(1). We hope these comments will be useful to the Committee and appreciate this opportunity to share our views on these important amendments.

Respectfully submitted,

MARTHA COAKLEY
Attorney General of Massachusetts

James J. Arguin
Assistant Attorney General
Chief, Appeals Division
Criminal Bureau

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 14, 2008 07-AP-014

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on proposed amendments to the Federal Rules of Appellate Procedure. As the nation's principal litigator in the federal courts, the Department has a strong and longstanding interest in participating in the rules amendment process, and in sharing with the Committee on Rules of Practice and Procedure its experiences with the rules and describing how its practice could be affected by the proposed amendments.

This letter addresses the Committee's proposed amendments to FRAP 4 and 40, and proposed FRAP 12.1. The Department of Justice is sending a separate letter to the Committee to address the proposed "time computation" amendments.

As explained below, the Department supports the proposed amendments to FRAP 4 and 40 (both of which evolved from proposals by the Department), and, while we support the new proposed FRAP 12.1, we urge an amendment to the draft Committee Note accompanying that rule.

1. The Committee has proposed amendments to FRAP 4(a)(1)(B) and FRAP 40(a)(1) in order to make clear that additional notice-of-appeal and rehearing-petition time limits apply in cases involving "a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." We support both of these changes.

Currently, FRAP 4(a)(1) provides that in a civil case a notice of appeal generally must be filed with the district court within thirty days after the judgment or order appealed from is entered. See FRAP 4(a)(1)(A). However, "[w]hen the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." FRAP 4(a)(1)(B). This extended time for filing a notice of appeal in cases in which the United States is a party recognizes the Federal Government's need to review the case, determine whether an appeal is warranted, and secure approval from the Solicitor General.

FRAP 40(a)(1) states that "a petition for panel rehearing may be filed within 14 days after entry of judgment," unless this time is altered by court order or local rule. "But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment * * * ." Ibid. The forty-five day period, "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Rule 40, Advisory Committee Notes, 1994 Amendment.

Although the extended filing times in FRAP 4 and 40 clearly apply to appeals involving a federal officer sued in his official capacity, neither rule explicitly extends these filing times to appeals in which a United States officer or employee is sued in an individual capacity for actions that occur in the performance of his official duties. As a result, the proper deadline by which to file a notice of appeal or petition for rehearing is an issue that frequently arises in Bivens appeals. Clarification of the rules would allow the Government to utilize the extended filing times intended for appeals in which the United States participates. Currently, out of an abundance of caution, the Government's general practice in Bivens appeals is to file notices of appeal within thirty days or seek extensions of the fourteen-day limit for petitions for rehearing, in order to avoid any possibility of litigation over timeliness.

We note that the same rationale for providing an extended deadline in FRAP 4 and 40 to appeals in which "the United States or its officer or agency is a party" supports an extended deadline for appeals in which the United States may participate because of its representation of an officer or employee sued in his individual capacity. See 28 C.F.R. § 50.15(a) (federal officer or employee sued in individual capacity is eligible for representation when his actions "reasonably appear to have been performed within the scope of the employee's employment" and representation is in the interest of the United States). When a United States officer or employee is sued in his individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, and the Government decides to provide representation to the officer or employee, the Government, as in any other appeal to which it is a party, requires time to conduct a review of the case, determine whether appeal or rehearing is appropriate, and seek approval from the Solicitor General.

Further, such amendments would maintain consistency between the FRAP and the Federal Rules of Civil Procedure, governing district court matters. FRCP 12(a) sets forth the relevant periods in which a defendant must serve an answer to a complaint in district court. FRCP 12(a) provides that the default period is twenty days, but that, when "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity" is the defendant, the period is extended to sixty days. Similar to the current versions of FRAP 4 and 40, FRCP 12, prior to an amendment in 2000, provided that "[t]he United States or an officer or agency thereof" was entitled to sixty days to file an answer; the former version of the rule did not specify whether this extended time to file also applied to a case in which the defendant was a United States

officer or employee sued in his individual capacity for acts performed within the scope of his employment. In the 2000, however, FRCP 12(a)(3)(B) was added to remedy this situation.

FRCP 12(a)(3)(B) now provides that the extended sixty-day period applies to a suit against "[a]n officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The rationale for adopting this amendment was that in cases involving a United States officer or employee sued in his individual capacity for actions arising out of the performance of his official duties, "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee." FRCP 12, Advisory Committee Notes, 2000 Amendment. Moreover, "[i]f the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." Ibid.

Therefore, because the Federal Rules of Civil Procedure have been amended to clarify that an extended filing time for the United States, its agencies, or officers should also apply to district court filings in a case involving a United States officer or employee sued in his individual capacity for actions occurring in the performance of his official duties, the proposed amendments to FRAP 4 and FRAP 40 would be consistent with the rules governing the district courts, and will serve important policy interests.

2. Acting on a suggestion originally made by the Solicitor General, the Committee is proposing a new appellate rule setting out a procedure for "indicative rulings" by the district courts. These are tentative rulings issued by the district courts in response to motions after a trial court has lost jurisdiction because of the filing of a notice of appeal. All of the Circuits have established procedures through case law for dealing with such motions, under which a district court can indicate that it would be inclined to grant, for example, a motion under FRCP 60(b) if it still had jurisdiction. We proposed a new FRAP provision to describe and govern this practice because so many practitioners seemed unaware of it.

The Appellate and Civil rules committees ultimately agreed to recommend new provisions in the FRAP and FRCP concerning indicative rulings. As currently framed, proposed FRAP 12.1 is broadly worded, and would appear to cover civil as well as criminal cases. This broad coverage causes concern for the Department, and we therefore urge that the Committee Note for proposed FRAP 12.1 be changed to read as follows, in pertinent part: "Appellate Rule 12.1 is limited to the Civil Rule 62.1 context and to newly discovered evidence motions under Criminal Rule 33(b)(1), as provided in *United States v. Cronic*, 466 U.S. 648, 667 n.42(1984), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. 3582(c)."

We make this proposal after extensive consultations with our criminal law experts within the Justice Department, including in the United States Attorneys' offices throughout the United States. Their broad experience makes clear that the issue of possible indicative rulings legitimately arises

only in the context of FRCrP 33(b)(1) (dealing with motions for a new trial based on newly discovered evidence), FRCrP 35(b) (dealing with motions by the Government for a reduced sentence because of a defendant's substantial assistance), and 18 U.S.C. 3582(c) (dealing with motions for a reduction in sentence from the Director of the Bureau of Prisons or based on a retroactive guidelines amendment); we are not aware of any other types of motions in criminal cases for which an indicative ruling might be appropriate. We are concerned that, without the change to the Committee Note that we are urging, the federal district courts will be swamped with inappropriate motions by prisoners acting pro se who do not understand the limited purposes for which indicative rulings are warranted.

Accordingly, our proposed amendment to the Committee Note would make clear that motions under FRCrP 33(b)(1), FRCrP 35(b), and 18 U.S.C. 3582(c) are covered by the new indicative rulings rule, but that the new rule does not otherwise apply broadly to motions outside the civil context. (Note that there is no reason to include FRCrP 35(a) within the coverage of the new rule because FRAP 4(b)(5) already makes clear that a trial court retains jurisdiction to rule on motions under FRCrP 35(a) (motions to correct clear sentencing errors).) With the change to the Committee Note described above, the Department recommends that FRAP 12.1 be adopted.

Very respectfully,

Paul D. Clement
Solicitor General

FDIC

Federal Deposit Insurance Corporation
550 17th Street NW, Washington, D C 20429-9990

07-BK-018 07-CR-014 07-CV-016

07-AP-015

Legal Division

February 15, 2008

Submitted by E mail attachment.

Peter G. McCabe, Secretary
Judicial Conference Advisory Committee
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Comments, Proposed Changes to Federal Rules and Statutes
To Effect Uniform Time Computation.

Dear Mr. McCabe:

We appreciate the opportunity to comment on proposed changes to the Federal Rules of Criminal, Appellate, Bankruptcy, and Civil Procedure concerning uniform time computation.

We have no comment to your proposals insofar as they attempt to clarify and make uniform the time computations under the Federal Rules of Appellate and Civil Procedure. Our only suggestion is, if you amend the language in the standard U.S. District Court Form 3 (Summons), you may wish to include a paragraph that references federal defendants, who have a full 60 days to respond as opposed to the standard 21 days you are proposing. This language is absent from the current summons form

You also propose to submit to Congress for conformity various federal statutes that contain short time provisions for responses to or appeals from agency action, including selected provisions of the Federal Deposit Insurance Act as amended: 12 U.S.C. §§ 1817(j)(5), 1818(a)(8)(D), (c)(2), and (f). The FDIC asks that you not submit these four statutory provisions for legislative revision. Calculation of these statutory time periods is not presently linked to any time computation rules in the Federal Rules of Appellate or Civil Procedure. The Federal Deposit Insurance Corporation and other banking agencies employ calendar days in their computations of time to respond to regulatory and enforcement decisions and the time periods set by Congress were determined accordingly This method of computation does not appear to have caused confusion among the affected public.

If you have any questions or concerns regarding this matter, please feel free to contact Dina Biblin, (703) 562-2372, Colleen Boles, (703) 562-2374, or me.

Sincerely,

s/ Richard J. Osterman
RICHARD J. OSTERMAN, JR.
Acting Deputy General Counsel
Litigation Branch

Office of the Deputy Attorney General
Washington, D.C. 20530

February 15, 2008

Mr. Peter G. McCabe
Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Justice Department Comments on Time-Computation Rules Proposal

Dear Mr. McCabe:

The Department appreciates the opportunity to submit comments on the proposed revisions to the time-computation provisions found in the Appellate, Bankruptcy, Civil, and Criminal Rules. The Department fully supports the Committee's intention to simplify these provisions and eliminate inconsistencies among them found throughout the federal rules, and appreciates the considerable effort expended by the Committee in this proposal. The Department recognizes that this effort has been part of a broader initiative by the Committee to make the rules more accessible to practitioners and to reduce the time, energy, and anxiety expended in interpreting and applying the rules to practice.

We support the Committee's goals in simplifying the time-computation provisions; however, the Department is very concerned about the interplay of the proposed amendment with both existing statutory time periods and local rules. We are especially concerned that moving to a "days are days" approach, if applied to statutes whose statutorily prescribed time periods remain the same, would effectively shorten the time periods now allowed. This suggests that, just as the Committee is proposing to lengthen many time periods in the rules to compensate for the proposed change in the time-computation provisions, similar changes should be addressed in relevant statutory and local rule provisions before a new time-computation rule is made applicable. If the proposed amendment to the Rules is enacted without first securing the necessary adjustments to relevant statutory time periods, we fear that the purposes and policies underlying at least some of the relevant statutes may be frustrated. Moreover, were statutory deadlines simply exempted from the new time-computation provisions, the interplay from retaining two different operative regimes for time computation would create greater confusion and uncertainty, contrary to the Committee's good intentions in proposing these changes.

We ultimately would hope that any change in the Rules is conditioned on first securing Congressional action that adjusts statutory time periods. In the absence of such Congressional action, we have some doubt that it would be wise to proceed with the Rule change and we are skeptical that it would be wise to proceed with a Rule change trusting that the necessary statutory changes would be secured at some future point, after the time-computation changes become operative. In this regard, we note that the Committee has done prodigious work in identifying at least some 168 statutes, so far, that contain deadlines that would require lengthening The Department is concerned that were the proposed changes to the time-computation provisions to take effect in the near future there would not be adequate time to ensure appropriate changes to these statutory time periods. Thus, before undertaking the proposed changes, the Department would urge the Committee to work with the appropriate congressional committees in an effort to ensure that, in the future, the necessary statutory revisions would come on-line in conjunction with any changes to the time-computation provisions. Absent such harmonization, the Department fears that the proposed time-computation revisions could prove unworkable. In sum, we support the Committee's goals but we believe that the time-computation provisions should not be amended absent corresponding legislation. Absent corresponding legislation, we would likely favor retaining the status quo.

Similarly, as to the local rules, it will be important to inform the District and Circuit courts around the country of the new time-computation rule under consideration and to alert them to the necessity of beginning the process to change existing time periods under their local rules, to take effect with the adoption of any new national rule. It would be appropriate for the Committee to make clear that individual courts may not impose, by local rule or general order, time periods that conflict with those in the federal rules.

Finally, the Department believes that the adoption of new time-computation provisions should be preceded by ample time for education of the bar. Although we agree that the Committee's proposal will result in new rules that are clearer for future generations of lawyers, this will work a substantial change in a practice dating back some 60 years. Lawyers and Judges alike will need to be educated on this change so that deadlines are not missed and unduly short deadlines are not inadvertently imposed.

The Department appreciates the opportunity to share these comments with the Committee, and looks forward to continuing to work with the Committee on this and other proposals.

Sincerely,

Craig S. Morford
Acting Deputy Attorney General

07-AP-017

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON APPELLATE COURTS

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San Francisco, CA 94105-1639
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February 15, 2008

Via E-Mail: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposed Time-Computation Amendments to the Federal Rules of Appellate Procedure

Dear Mr. McCabe:

The State Bar of California's Committee on Appellate Courts appreciates the opportunity to submit its comments on the proposed time-computation amendments to the Federal Rules of Appellate Procedure. The Committee supports the proposed time-computation amendments. The "days-are-days" approach simplifies how deadlines are computed and eliminates the counterintuitive results of the existing time-computation system. It is also sensible to lengthen the short deadlines to offset the "days-are-days" time-computation approach.

Disclaimer

This position is only that of the State Bar of California's Committee on Appellate Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

Blair W. Hoffman, Chair
The State Bar of California
Committee on Appellate Courts

7th Circuit Bar Association

The Seventh Circuit Bar Association

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Chicago, IL 60604
admin@7thcircuitbar.org

07-BR-036

07-CV-018

07-AP-018

BY ELECTRONIC DELIVERY TO:
Rules_Comments@ao.uscourts.gov

To: **Committee on Rules of Practice and Procedure, Judicial Conference of the United States**

From: **Thomas J. Wiegand, Chair**
Seventh Circuit Bar Association, Rules and Practice Committee

Re: **Proposed Amendments to Federal Rules**

Date: **February 15, 2008**

On August 15, 1997, the Judicial Conference Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules published proposed amendments to those Rules, and solicited comments from the bench and bar. The leadership of the Seventh Circuit Bar Association wanted to promote awareness among, and encourage comments from, its membership. On December 4, 2007, the Seventh Circuit Bar sponsored a lunchtime program where seasoned practitioners in each of these four practice areas presented an overview of the proposed changes and solicited any comments or discussion. Our members were able to attend either in person, at the Chicago office of Winston & Strawn LLP, or electronically from their computers through a "webinar" connection that allowed a live feed of the presentation and the ability to submit questions electronically in writing. This was the first year we have attempted this format, and are pleased that about 40 attorneys attended, including two sitting judges. We recommend this format to other federal bar associations.

Most of the proposed changes were received at the session with little or no comment, but a few of them led to interesting comments that we believe are important to forward to you:

New Civil Rule 62.1 and new Appellate Rule 12.1: It appeared that these new rules are aimed primarily or exclusively at motions pursuant to civil Rule 60. If that indeed is the case, then the new rules or the comments might mention that fact, so as to avoid a variety of other motions being made under the new rules, such as motions for fees.
Appellate Rule 4(a)(4)(B)(ii): Participants doubted whether the proposed change to this Rule for amending notices of appeal would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party

always will file an amended notice of appeal in order to avoid any risk of waiving an issue on appeal. The suggestion for avoiding this was to amend the Rule to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal.

Bankruptcy Rule 8002: The existing Rule allows 10 days in which to file an appeal from the judgment or order of a bankruptcy court. Proceeding on an expedited basis through the appeal process is a hallmark of bankruptcy practice and is often necessary in cases in which an entity operating in bankruptcy is depending on the resolution of a significant business matter before the bankruptcy court. However, as part of the time computation project, it is proposed to extend this period from 10 to 14 days. Some attorneys attending the meeting were strongly concerned that the reduction of this period would disrupt long-standing expectations regarding the pace of a bankruptcy case (and particularly a corporate restructuring case) and slow the bankruptcy appellate process without conferring on the parties or the courts any demonstrable benefit. As an alternative it was suggested, consistent with the desire to move to multiples of 7, to change the time period to 7 days. This period would come closer to maintaining current practice while also rendering its duration consistent with the time computation project's general goal of uniformity.

"Hours-are-hours": Also related to the time computation project, it was noted that the "hours-are-hours" approach to computing time would conflict with how Civil Rule 30(d)(2)'s 7-hour limit for depositions is calculated. (The advisory committee's notes to the 2000 amendment of Rule 30 state that only the time taken for the actual deposition, not including lunch or other breaks, counts toward the 7 hours, and case law states that the deposition is to occur in one day.) While there was no unanimous view, some present at our session suggested that adopting the "hours-are-hours" approach to the 7-hour deposition would be a beneficial change, as 7 hours of actual testimony in one day, with a single witness being asked questions by a single examiner, can be difficult.[1] It may be that no further comment is needed, as no change is being proposed to the 7-hour limit of Rule 30(d)(2). Yet if an overall explanation is anywhere offered for the time computation project, the Committee might desire to make clear whether any change is intended for calculating the 7-hour period in Rule 30(d)(2).

Civil Rule 15: Finally, one change that received strong support at the session was the proposed change to Civil Rule 15, requiring that a party desiring to amend a complaint after a responsive pleading is filed must seek leave of court. This promotes economy and eliminates delay where a Rule 12 motion is filed in response to the original complaint and the amendments ultimately do not alter the bases for the Rule 12 motion.

We thank the Advisory Committees for all of the hard work they have done in developing the proposed amendments, and hope these comments prove helpful. Please feel free to contact me if we can provide any further comment or explanation.

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[1] On the assumption that changing how to calculate the 7-hour period is outside of this year's proposed changes to the Civil Rules, some members believe that changing either the 7-hour duration in Rule 30(d)(2), or how to calculate it, should be considered by the Committee in the future

Jordan Center
For Criminal Justice and Penal Reform
P.O. Box 45903
Philadelphia, PA 19149-5903
Jordancenter@comcast.net

07-AP-019
07-CV-020
07-CR-016

Re: Comments, August 2007 Proposed Rule Amendments

To: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts

Dear Mr. McCabe:

Attached please find the comments of the Jordan Center for Criminal Justice and Penal Reform on the Committee's Proposed Rules Amendments published August 15, 2007.

Thank you for your consideration.

Sincerely,

Mark Jordan,
Policy Advisor

COMMENTS OF
JORDAN CENTER FOR
CRIMINAL JUSTICE AND PENAL REFORM

ON

PROPOSED RULES AMENDMENTS
PUBLISHED AUGUST 15, 2007

INTRODUCTION

The Jordan Center for Criminal Justice and Penal Reform ("Jordan Center") was established in January 2006 by supporters of imprisoned civil rights and social justice activist Mark Jordan following his 2005 wrongful conviction of murder in federal court. The Jordan Center seeks to foster and advance progressive criminal justice and penal reforms consistent with the nation's founding principles of liberty and freedom. The Jordan Center fulfills this mission through a variety of means that include public education, grassroots activism, litigation support services, rulemaking participation, and legislative monitoring, proposals and support.

The following comments are submitted in response to the August 2007 request for comment to proposed rules amendments published by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

COMMENTS

1. Proposed Amendments to Rule 15, Fed. R. Civ. P.

The Committee proposes amending Rule 15(a)(1), which currently permits a party to amend a pleading without leave of court once as a matter of course at any time, provided a responsive pleading has not been filed and the action has not been calendared, to impose a new 21-day time limit. We believe this amendment will result in far greater hardships than the benefits contemplated and is not judicially economical.

Specifically, the proposed amendment creates a gap from 21 days following service to the filing of a responsive pleading (if permitted) or a Rule 12 motion to dismiss in which an amended pleading may not be filed as a matter of course. Such a scheme creates anomalies and burdensome situations in which a party files a demand or complaint and 22 days or more later realizes a defect necessitating amendment. Under the current Rule, the party may simply file an amended pleading. Under the proposed rule, however, the party must either seek leave to amend pursuant to Rule 15(a)(2) or take the simpler course that is more burdensome to the respondent of awaiting the responsive pleading or motion to dismiss and then filing the amended pleading to which respondent must respond or move to dismiss anew. For this reason, we object to placing a time limitation on the first amendment preceding the responsive pleading.

We also believe that the proposed 21-day deadline set forth in proposed amended Rule 15(a)(1)(B) is too short and should be extended to 28 days. Our experience is that under the current 20-day rule, litigants seeking to amend a pleading in response to a responsive pleading routinely seek extensions of time for within which to do so. Moreover, a responsive pleading or motion to dismiss will often point out deficiencies that not only require amendment but also further factual investigation that may dramatically affect the legal landscape of an action. Accordingly, the time should be extended from 20 to 28 days.

2. Proposed Amendments to Rule 41, Fed. R. Crim. P.

We strongly object to the broad language proposed to become new Rule 41(e)(2)(B) as inherently inconsistent with the particularity requirement of the Fourth Amendment by implicitly authorizing routine seizure of electronic storage media as opposed to particularized information from the storage media for which probable cause might be reasonably believed to exist. The Committee, we respectfully suggest, erroneously appears to assume the constitutionality of such a generalized information storage media warrant issue scheme.

The Constitution provides that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV. The requirement protects against those "wide-ranging exploratory searches the Framers [of the Constitution] intended to prohibit," (Maryland v. Garrison, 480 U.S. 79, 84 (1987)), and against "general, exploratory rummaging in a person's belongings," (Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (plurality opinion)), and "prevents the seizure of one thing under a warrant describing another." Andersen v. Maryland, 427 U.S. 463, 480 (1976).

Implicit in the proposed rule is a complete disregard for the Fourth Amendment's particularity requirement to the extent that it authorizes routine and wholesale seizure of information storage media, likely to include multiple files and subfiles for which probable cause will be absent. *See, e.g.*, United States v. Weber, 923 F.2d 1338, 1344 (9th Cir. 1990) (warrant authorizing search for obscene materials insufficiently particular because agent's affidavit did not provide evidence agents would find anything but child pornography materials defendant ordered through government-generated advertisements).

Moreover, in the realm of electronic information storage media, we are usually talking about expressive materials protected by the First Amendment, a warrant permitting the seizure of which must set forth the information to be taken with the "most scrupulous exactitude." Stanford v. Texas, 379 U.S. 476, 485-86 (1965); *see also* Marcus v. Search Warrant, 367 U.S. 717, 722 (1961).

A genuine fear is that the existence of a rule implicitly sanctioning broad electronic information storage media warrants will result in watering down the Fourth Amendment's protections, resulting in seizure of vast amounts of information for which no particular basis exists to justify a search and seizure. The Committee Notes are illustrative of this disregard for the Fourth Amendment, incorporating the argument that it is "impractical for law enforcement to review all of the information during execution of the warrant at the search location" and presuming a "need for a two-step process," including seizure of the entire storage medium for review at some unspecified later date without deadline. We respectfully do not believe the Committee should disregard longstanding Fourth Amendment rights simply because evolving technologies have made respecting them less practical for law enforcement. Rather, we believe the proper approach, should the people be so willing to sacrifice a constitutional right for the sake of making it easier on law enforcement to rummage through their personal effects, or to otherwise keep to date with emerging technologies, is to amend the Constitution to meet any such negotiation, but certainly not through judicial rulemaking.

The Committee justifies this entire storage media approach by analogizing to "when business papers or other documents are seized," and again referencing impracticality considering the volume of information. The analogy is inapt. Absent a "permeated with fraud" business records exception to the particularity requirement, such an analogy is improper. *See, e.g.*, United States v. Kow, 58 F.3d 423, 428 (9th Cir. 1995) (warrant authorizing seizure of virtually every business record insufficiently particular); United States v. Fuccillo, 808 F.2d 173, 176-77 (1st Cir. 1987) (warrants authorizing seizure of stolen cartons of clothing insufficiently particular because warrants contained no information enabling agents to differentiate seizable and non-seizable cartons). Indeed, even the "permeated with fraud" exception does not provide full support for the analogy. *See* In re Grand Jury Investigation Concerning Solid State Devices, Inc., 130 F.3d 853, 856 (9th Cir. 1997) (warrant authorizing seizure of broad array of documents and data storage equipment insufficiently particular because no probable cause to believe majority of suspect's operations fraudulent).

While it is true that in very limited circumstances the Fourth Amendment permits the seizure of an entire class of items, that is only true where probable cause exists as to the entire class. *See* Andersen, 427 U.S. at 480. *See also* Voss v. Bergsgaard, 774 F.2d 402, 405-06 (10th Cir. 1985) (warrant authorizing seizure of all records relating to violation of tax laws resulting in seizure of all organizational records and documents not sufficiently particular because no probable cause that fraud permeated every aspect of organization).

From the face of the proposed rule, and certainly the Committee Notes, it would appear the rule was written by a group of biased ex-prosecuting officials and, in any event, certainly pro "law enforcement," willing to readily sacrifice—or in lawyering lingo "balance" away—individual liberties guaranteed by the Constitution whenever compliance is thought to be "impractical." Indeed, the Committee Notes read like a United States Attorney's Office memorandum, and do not once acknowledge Fourth Amendment implications.

A more accurate analogy is warrants for hard copy files and counsels against such broad "all files" warrants outside of the permeated with fraud exception. Where the subject items are tangible, hard copy business records, and the warrant applies only to part of that class, as it generally must, the warrant must provide a means of distinguishing the information that may be seized from that which may not. *See* Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987). Notably, such broad entire storage media warrants contemplated by the proposed rule will regularly and certainly violate the Privacy Protection Act, 42 U.S.C. § 2000aa, allowing such statutorily protected material to be swept up with the generalized electronic information storage media warrant.

Accordingly, to the extent the proposed rule would expressly incorporate electronic information storage media, rather than particular information, we believe the rule should not be adopted. Such a rule would encourage the few wayward courts that have taken an anti-Fourth Amendment, pro-police state approach to Rule 41, authorizing the seizure of electronic information despite a lack of probable cause as to the particular information.

We hope, in this regard, the Committee will agree it is not a policing agency nor an advocate for the Executive Branch of government, and will instead recommend the proposed Rule not be adopted and concern itself less with what may or may not be practical for police and prosecutors and more concerned with the constitutional rights and liberties which the Founders of our nation have seen fit to secure its citizens. Consistent with the preservation and safeguarding of those rights and liberties, we ask the Committee to reject that portion of the proposed rule authorizing "the seizure of electronic storage media" as opposed to particular "electronically stored information."

Our second objection is to the lack of custody and disposal controls over electronic information that might be copied, as implicitly authorized by Rule 41(F)(1)(B), especially should a rule allowing for broad media storage items be endorsed. The obvious concern here, implicating First, Fourth and Fifth Amendment concerns, is that information or storage media is copied pursuant to a broad warrant that may or may not be supportable by probable cause and may contain information outside the purpose of the warrant and maintain or use that copied information for general intelligence or other unauthorized or illicit purposes, possibly even making its way into some inter-agency database. Accordingly, unless some mandatory controls are in place to safeguard against such abuses, we believe the Rule should not be adopted.

Finally, we strongly object to the lack of a set time period for within which to return seized materials. The Committee again sides with and pleads the case for law enforcement and other anti-privacy special interests, offering that the sheer size and storage capacity of media, encryption and booby traps will overburden computer labs. However, no logical and rational distinction can be made between electronic information and its hard copy counterpart. The Committee is concerned that setting a time period for return "could result in frequent petitions to the court for additional time." When considering First, Fourth and Fifth Amendment rights, however, we see no problem with such frequent petitions and the government should be forced to continuously justify the failure to return innocuous information every step of the way.

3. **Proposed Amendments to Rule 11 of Rules Governing Section 2254 and 2255 Cases.**

We object to the proposed amendments to Rule 11 of the Rules Governing Section 2254 and 2255 Cases. They are unnecessary and unduly burdensome. Irrespective of whether a district court judge issues a certificate of appealability, and even if that judge denies such certificate, the petitioner may still appeal the decision and ask a circuit judge to issue the certificate regardless of the lower court's position.

Moreover, requiring judges entering adverse final orders to contemporaneously issue or deny a certificate of appealability deprives, possibly in an unconstitutional fashion, the parties of the opportunity to brief and be heard on the issue, and preserve arguments for appeal.

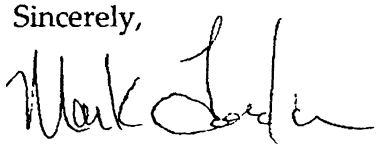
Accordingly, we suggest the Rule not be adopted. Alternatively, we suggest the Court, before issue or denial of a certificate of appealability, first be required to permit the parties to show cause why a certificate of appealability should not issue.

4. **Rule 29(e), Fed. R. App. P.**

The Appellate Rules Committee previously considered Rule 29(e)'s seven-day deadline for amicus brief filings, but decided not to change the rule. We believe this to be a mistake. The current deadline is often impossible to meet and presumes, often incorrectly, that amicus will be operating in conjunction with a party and therefore familiar with the litigation and have ready access to the record on appeal. We therefore encourage the Committee to revisit this issue and consider changing the deadline from 7 to 14 days.

We thank the Committee for its consideration.

Sincerely,



Mark Jordan,
Policy Advisor

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, DC 20530

07-CV-015

February 15, 2008

Mr. Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D C. 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on proposed amendments to the Federal Rules of Civil Procedure. As the nation's principal litigator in the Federal courts, the Department has a strong and longstanding interest in participating in the rules amendment process, and in sharing with the Committee its experiences with the Rules and describing how its practice could be affected by the proposed amendments.

This letter addresses the Committee's proposed amendments to Rules 8(c), 13(f), 15(a), and 81, and proposed Rule 62 1 The Department of Justice is sending a separate letter to the Committee that addresses the proposed "time computation" amendments.

Proposed Amendment to Rule 8(c)

The Standing Committee has proposed that "discharge in bankruptcy" be removed from the list of affirmative defenses in Rule 8(c). The draft Committee Note explains that, "[u]nder 11 USC § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt," operates as an injunction against actions "to collect, recover, or offset a discharged debt," and "[t]hese consequences cannot be waived." The Note adds that if a claimant persists in an action on a discharged claim, the "effect of the discharge ordinarily is determined by the bankruptcy court that entered the discharge, not the court in the action on the claim "

The Department opposes this change. If, however, the change is adopted, it should be accompanied by a Committee Note to the effect that "the intent of the change is only to require that creditors plead that the debt was excepted from discharge, and not meant to imply that a determination of nondischargeability must first be obtained from a bankruptcy court."

First, the underlying premise for the change is incorrect, and omitting this affirmative defense will have unanticipated consequences, particularly if it is not accompanied with a Committee Note clarifying that the sole intent of the change is to require creditors to plead that a debt was excepted from discharge The Note should clarify that the change is not meant to suggest that determinations of dischargeability must first be obtained from a bankruptcy court. The change will cause confusion with respect to tax and other federal debts.

The proposal appears to be based, in part, on incorrect interpretations of 11 U.S.C. § 524 and related provisions – either the incorrect assumption that *all* debts are discharged by a general discharge, the incorrect assumption that dischargeability determinations are within the *exclusive* jurisdiction of bankruptcy courts, or a failure to understand that the anti-waiver clause at the end of § 524(a) is concerned with *contractual* waivers and not with future litigation in which dischargeability may be a legitimate issue and on which a litigant may and should in fact be bound by its failure to raise the defense.

The fact that judgments in violation of § 524 are "void" does not necessarily eliminate the appropriateness of the affirmative defense in Rule 8(c), and certainly cannot mean that every post-discharge judgment on every pre-petition debt is void absent a prior determination of dischargeability from the bankruptcy court Section 524, by its terms, limits the voidness to "any debt discharged under section 727, 944, 1141, 228, or 1328." Where it is not clear whether a debt is discharged, or instead is excepted from discharge, the need to raise the issue is not eliminated. The purpose of including discharge as an affirmative defense in Rule 8(c) was to recognize that whether a debt has or has not been discharged by the entry of a bankruptcy discharge is often hotly disputed on potentially numerous grounds.[1]

Section 523 generally governs what debts are discharged. It requires that creditors commence, in a short time after a bankruptcy case is filed, proceedings to preserve from discharge limited kinds of debts. Debts included in this limited category of debts that must be declared nondischargeable by a bankruptcy court during the bankruptcy case have varied over the years and currently cover only debts under § 523(a)(2), (4), or (6) and, even as to those three provisions, there is an exception for regulatory receivers such as those for the FDIC. The exceptions to discharge referenced in 523(c), *and only those exceptions*, are within the exclusive jurisdiction of bankruptcy courts to determine. If grounds for non-dischargeability listed in § 523(a)(2), (4), or (6) are not timely asserted in an adversary complaint in the bankruptcy court, a creditor cannot later assert those exceptions to discharge.

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[1] *See Mickowski v Visi-Trak Worldwide, LLC*, 415 F.3d 501, 506 (6th Cir 2005) (purpose of Rule 8(c)'s requirement to plead discharge is to give plaintiff notice of defense and a chance to argue, if he or she can, why it lacks merit).

But many other debts excepted from discharge are automatically excepted by operation of law and there is no requirement to bring any proceeding within any deadline. One category of debts not governed by § 523(c) is tax debts governed by § 523(a)(1). There are frequently disputes about whether a tax debt has been discharged -- most often (but not exclusively) with respect to whether the debtor made any willful attempt to defeat the tax within the meaning of § 523(a)(1)(C).

In addition, debts are not discharged if a creditor is not given notice of the bankruptcy case in time to file a claim. 11 U.S.C. § 523(a)(3). Disputes can arise on whether a creditor was provided with due notice. In a case where a creditor was not provided with notice, the creditor may be unaware of the bankruptcy and therefore cannot be expected to assert an exception to discharge in a complaint. In that context, it is particularly appropriate to place on the debtor the burden of raising the issue as an affirmative defense (and then proving that notice was given). A debtor who responds to a post-discharge complaint on a debt that may well be excepted from discharge, fails to raise discharge as a defense, and suffers a judgment, should not be permitted years later to insist that the judgment is void.[2]

The Ninth Circuit Bankruptcy Appellate Panel has ruled that Rule 8(c)'s inclusion of discharge as an affirmative defense was invalidated, not by the 1978 Code, but by the 1970 amendment to § 14f of the "old" Bankruptcy Act of 1898, which made judgments for discharged debts "void." *In re Gurrola*, 328 B.R. 158, 170 (9th Cir BAP 2005) Some legislative history to the 1970 amendment to old Act § 14f, quoted in *Gurrola*, suggests that at least some in Congress believed the amendment would enable debtors to ignore post-discharge lawsuits on discharged debts and then collaterally attack default judgments. Even if *Gurrola* is correct in its reading of amended § 14f, it appears that, whatever may have been the situation between 1970 and 1978, the 1978 Code plainly envisioned that non-bankruptcy courts would have concurrent jurisdiction

[2] The phrase "judgment at any time obtained," in § 524, is similar to one in § 14f of the "old" Bankruptcy Act of 1898, which voided "any judgment theretofore or thereafter obtained in any other court." But it is not clear from this language that it covers *all* judgments in suits *begun* after discharge. To the contrary, the language in the old Act referred only to debts "not excepted from discharge" – similar to the way that § 524 refers only to "any debt discharged under" the various discharge provisions. Thus, § 524 begs the question as to whether a particular debt was discharged, at least where the ground for an exception is one other than in § 523(a)(2), (4), or (6) The phrase "at any time obtained" in § 524, and the similar one referring to post-discharge judgments in old § 14f, are nevertheless appropriate because the general discharge lifts the stay, which could result in a creditor resuming a pre-petition suit, which could then result in a post-discharge judgment, based on an answer filed pre-petition that of course would not have raised discharge affirmatively Alternatively, if the void language is also deemed to refer to judgments based on post-discharge complaints, it is logically limited only to those debts for which there is no colorable exception to discharge.

to determine whether at least certain types of debts were or were not discharged in a prior bankruptcy. This is confirmed by § 523(c)'s inclusion of only limited discharge exceptions under the requirement that a creditor obtain a ruling during the bankruptcy case and from the bankruptcy court.

Gurrola suggests that Congress in 1970 was concerned that some creditors would rely on Rule 8(c) deliberately to bring lawsuits on discharged debts, hope the debtor would default, and then argue the debt was revived. This concern is not realistic, at least under the modern Code. Courts can sanction creditors for willful violations of the discharge injunction, and we believe that is sufficient to deter deliberate efforts by creditors to use Rule 8(c) inappropriately.[3] Also, default judgments present a special situation that is easily remedied without change to Rule 8(c). The debtor can invoke Rule 60(b) and demonstrate that the judgment is truly "void" – *i.e.*, that there was no colorable exception to discharge requiring litigation in good faith, or can seek relief in the bankruptcy court to enforce the discharge injunction.

The non-exclusive jurisdiction of bankruptcy courts over dischargeability issues is confirmed by 28 U.S.C. § 1334(b), which states that district courts sitting in bankruptcy (and the bankruptcy courts as units thereof) have "original but not exclusive jurisdiction over all civil proceedings arising under title 11, or arising in or related to cases under title 11." Language almost identical to this was first enacted in 1978 as 28 U.S.C. § 1471(b) and later revised slightly in the 1984 bankruptcy amendments as part of dealing with the fallout of the Supreme Court's decision in *Northern Pipeline Construction Co v Marathon Pipe Line Co.*, 458 U.S. 50 (1982), limiting the authority of Article I judges. The 1978 legislative history explains that "the phrase 'arising under title 11'" refers to "any matter under which a claim is made under a provision of title 11." S Rep. 95-989, at 154 (1978), *reprinted in* 1978 U.S.C.C.A.N., at 5787, 5940. A dischargeability proceeding is thus the quintessential example of a civil proceeding "arising under title 11" since the cause of action is created by section 523. Accordingly, the enactment of explicitly "not exclusive" jurisdiction over dischargeability actions in 1978 as modified slightly in 1984 undermines the reliance by the *Gurrola* court on the 1970 amendment to old Act § 14f to arrive at the proposition that discharge is no longer a proper affirmative defense to an action on a debt outside the bankruptcy forum.

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[3] *See, e g , In re Zilog, Inc.*, 450 F 3d 996, 1007 (9th Cir. 2006); *In re Pratt*, 462 F.3d 14, 17 (1st Cir. 2006); *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 445 (1st Cir 2000); *Matter of Rosteck*, 899 F.2d 694, 698 (7th Cir. 1990); *but see Pertuso v Ford Motor Credit Co* , 233 F 3d 417, 423 (6th Cir. 2000) (holding that there is no private damages action under § 524) In *Walls v Wells Fargo Bank, N A* , 276 F.3d 502, 507 (9th Cir. 2002), the Ninth Circuit indicated its agreement with the reasoning of *Pertuso* with respect to the existence of a statutory action, but held that courts could nevertheless use the compensatory civil contempt remedy.

Insofar as section 524(a)'s "void" language is limited to *discharged* debts and section 523 does not vest exclusive jurisdiction to determine dischargeability in bankruptcy courts, it is clear that a non-bankruptcy court's judgment on a post-discharge complaint for a debt that was at least arguably excepted from discharge must be accorded *res judicata* effect.[4] If the discharge defense is, however, removed from the list of affirmative defenses in Rule 8(c), the Committee Note should explain that the deletion is only meant to shift the burden of pleading nondischargeability to a plaintiff/creditor. It should not leave open any possible inference of enabling a debtor to ignore a post-discharge action on a debt completely, at least where a creditor's claim of nondischargeability is plausible. The current proposal seems to reflect the view that debtors may ignore post-discharge actions, and the inclusion of its proposed Note with the removal of discharge from Rule 8(c), would therefore create significant problems

The invalidation of waivers in final clause of § 524(a), which first appeared in the 1978 Code, also does not justify eliminating a discharge as an affirmative defense under Rule 8(c). The phrase "whether or not discharge of such debt is waived" is intended to address contractual waivers, and not the failure of a debtor to plead discharge in a future lawsuit, reflecting that the traditional definition of "waiver" is a voluntary relinquishment of a known right.[5] The House and Senate reports explain that the provision operates as an injunction against the collection of a discharged debt "whether or not the debtor has waived discharge of the debt involved," and that "[t]he change is consonant with the new policy forbidding binding reaffirmation agreements . . . and is intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it."[6] The phrase operated to void pre-bankruptcy agreements that debts will be nondischargeable, and also bolsters the procedural requirements for reaffirmation agreements.

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[4] If the court is a state court, the judgment must be accorded full faith and credit (and many state courts have their own rules regarding affirmative defenses that include bankruptcy discharge). *See* U.S. Const., Art. IV, Sec. 1. Only in those instances where there is no colorable exception to discharge (*i.e.*, where the creditor had notice of the bankruptcy and the debt is of a kind that is necessarily discharged unless a timely § 523(c) action was brought in a bankruptcy case) is there any basis to claim that a judgment on a pre-petition debt in an action commenced post-discharge is invariably "void."

[5] *See Black's Law Dictionary* 1611 (8th ed 2004). The failure to plead a defense is *treated* as or *deemed* to be a "waiver," but a procedural default is different from a true "voluntary relinquishment" of a "legal right or advantage."

[6] H.R. Rep No. 95-595 at 365-66 (1977); S Rep. No. 95-989 at 80 (1978), *reprinted in* 1978 U S.C.C.A.N., at 5787, 5866 The reports explain that "[t]he language 'whether or not discharge of such debt is waived' is intended to prevent waiver of discharge of a particular debt from defeating the purposes of this section. It is directed at waiver of discharge of a particular debt, not waiver of discharge in toto as permitted under section 727(a)(9) " *Ibid.*

See § 523(c), (d). There is no indication that Congress was referring to anything other than express waivers, or that it meant to alter the longstanding practice of requiring a debtor to plead discharge in defense to a judicial action to collect a debt that might in fact not be discharged.[7]

The Code should not be read "to effect a major change in pre-Code practice" unless the change is the subject of "at least some discussion in the legislative history." *Dewsnup v. Timm*, 502 U S. 410, 419 (1992). It is settled law that bankruptcy and non-bankruptcy courts have concurrent jurisdiction to determine whether specific exceptions to discharge apply to a particular debt. There is no reason for this concurrent jurisdiction to be viewed as altered by the enactment of the 1978 Code or the 1970 amendment to § 14f of the old Act. To the contrary, the fact that § 523(c) is limited to contentions governed by § 523(a)(2), (4), or (6), coupled with the language of 28 U.S.C. § 1334(b) discussed above, suggests that Congress intended there to be concurrent jurisdiction in all other circumstances.

More broadly, if a debt falls within any discharge exception other than the paragraphs listed in § 523(c) over which bankruptcy courts have exclusive jurisdiction, the bankruptcy court's jurisdiction over dischargeability disputes is not exclusive and creditors or debtors may raise issues of dischargeability at any time and in any court in which a creditor has brought suit.[8] As the Committee Note to Bankruptcy Rule 4007(b) states, "[j]urisdiction over this issue [of dischargeability] on these debts is held concurrently by the bankruptcy court and any appropriate nonbankruptcy forum." Rule 4007(b) was adopted after the enactment of the 1978 Code.

The Advisory Committee's proposal also may generate much unnecessary litigation because the elimination of the discharge language will prompt more bankruptcy debtors to allege,

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[7] *Gurrola* reads the just-quoted House and Senate reports as support for precluding a "waiver" by the failure to plead discharge. This is an unreasonable reading of language referring to "whether the debtor has waived," adding that the provision is consistent with restrictions on reaffirmation agreements, and then adding that the clause is targeted at waivers of discharge of "particular" debts in contrast to a full discharge waiver. A full discharge waiver requires an explicit statement of waiver. By analogy, the reports contemplate precluding limited express waivers (unless reaffirmation procedure is followed).

[8] *See Whitehouse v. LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002) ("at their option, creditors seeking a nondischargeability determination need not submit to the jurisdiction of the bankruptcy court, but instead may invoke the jurisdiction of any appropriate nonbankruptcy forum either before or after the bankruptcy proceeding has been closed.") (emphasis added); *Accord In re Doerge*, 181 B.R. 358, 364 n.9 (Bankr. S D Ill 1995) (citing *In re Canganelli*, 132 B.R 369, 385 n 3 (Bankr. N.D Ind. 1991)); *BCCI Holdings (Luxembourg), S.A. v. Clifford*, 964 F.Supp. 468, 481 (D.D.C. 1997); *In re Massa*, 217 B.R. 412, 421 (Bankr W D N Y. 1998), *aff'd*, 187 F 3d 292 (2d Cir. 1999).

and some courts likely to assume (just as the Committee apparently has) that suits to obtain judgment on pre-petition debts are invariably violations of the discharge injunction in § 524, whenever the debt is ultimately determined to have been discharged. In fact, as long as there is a good faith claim that a debt was not discharged, a suit for a judgment, as a predicate to any effort to collect the debt, should not be viewed as a violation of § 524.[9]

Special problems will arise with respect to tax debts. The United States frequently files a suit in two counts, one of which will be to set aside a fraudulent transfer from a taxpayer to a relative, and the other of which will be to seek a personal judgment against the taxpayer, using the fact of the fraudulent transfer as a primary premise for the contention that the taxpayer made a willful attempt to defeat payment of the tax within the meaning of § 523(a)(1)(C), so that the debt has not been discharged in the taxpayer's bankruptcy case. The debtor will frequently rush into bankruptcy court and file a motion to reopen the bankruptcy case to file a complaint to determine dischargeability. A dispute will then ensue over whether the bankruptcy court or district court should proceed first. If the bankruptcy court refuses to yield to the prior jurisdiction of the district court (as has happened on occasion), or if the district court thinks that the matter is more appropriate for a bankruptcy court, the government is then placed in a situation where it can lose on dischargeability in bankruptcy court and be collaterally estopped against the fraudulent transferee whereas, if it wins dischargeability, the fraudulent transferee will not be bound by the bankruptcy court's judgment, since the transferee cannot be made a party in the bankruptcy court proceeding on dischargeability. Thus, in order to recover fraudulently transferred assets, the United States may have to win at two trials the issue of whether the debtor fraudulently transferred the subject assets Based on such concerns, we have generally been successful in persuading bankruptcy courts to "stand down" and allow a district court action to proceed rather than attempt to enjoin it and proceed first. In those disputes, the ability to point to Rule 8(c) has been crucial to our ability to convince both courts that it is appropriate for the district court to handle the dischargeability issue as a defense to the count seeking judgment personally against the taxpayer/debtor.

The Department believes that it is appropriate to maintain discharge as an affirmative defense and thus to consider it waived if it is not raised, particularly given that some creditors will not have been given notice of the bankruptcy. It is still likely that courts would allow a debtor to reopen a judgment under Rule 60(b) to claim discharge if the debtor could show some reason for not having raised it, and at least in situations where there has been a default judgment

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[9] *See In re Massa*, 217 B.R. 412, 421 (Bankr W D.N.Y 1998) (because creditor could raise § 523(a)(3) dischargeability issue in collection suit, "until such a determination was made, further proceedings to collect the Addonas Claim and have the issue of dischargeability determined pursuant to Section 523(a)(3)(B) were not in violation of Section 524(a) or the Discharge Order"), *aff'd*, 187 F.3d 292 (2d Cir. 1999)

due to the failure of the debtor to appear. But those issues are best left to judicial discretion under Rule 60(b).[10]

Although there are a couple of exceptions (the Ninth Circuit BAP being one), most courts have not seen any reason to question the rule that discharge in bankruptcy is an affirmative defense – a rule not just of *federal* procedure but also one applicable in most states – and have enforced the rule appropriately without any grossly inequitable results.[11] And, those courts that

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[10] For example, it would be one thing to permit a debtor to reopen a judgment on a debt if the creditor had been notified of the bankruptcy and the debt is of a kind that was clearly discharged (*e g.*, the kind of debt that requires a creditor's adversary complaint under § 523(c) to survive discharge). It would be quite another thing to hold that even where a creditor's complaint mentions the bankruptcy and alleges that the debt was not discharged (as Tax Division complaints often do), and where the debt is not covered by § 523(c), a debtor served with process may ignore the suit, suffer a default judgment, and then file a dischargeability complaint in the bankruptcy court or even a Rule 60(b) motion in the district court and claim a right to litigate the issue of dischargeability with no excuse for not having timely answered the complaint.

[11] On the side enforcing Rule 8(c) are *Bauers v. Board of Regents of University of Wisconsin*, 33 Fed. Appx. 812, 817 (7th Cir. 2002) (because Chapter 7 debtor-employee did not raise her discharge in bankruptcy as an affirmative defense to her employer's counterclaim, debtor was deemed to have waived the defense); *In re Kahl*, 240 B.R. 524, 530 (Bankr E.D. Pa. 1999) ("undue hardship" exception to general nondischargeability of student loan is not self-effectuating; rather, it is up to the debtor either to bring an adversary proceeding to determine whether student loan debt is dischargeable, or to plead and prove dischargeability of debt as affirmative defense in action brought by creditor in state court); *In re Sunbrite Cleaners, Inc* , 284 B.R 336, 342 (N.D N.Y. 2002) (affirming bankruptcy court's refusal to consider creditor's post-confirmation assertion of nondischargeability due to lapse of jurisdiction, holding that issue could be raised by debtor as a defense in post-bankruptcy litigation, whether before a federal district or state court); *Allender v. Fields*, 800 N.E.2d 584, 585 (Ind. App. 2003) (reversing state court order granting post-judgment relief to debtor who failed to plead discharge as affirmative defense required by Indiana trial rule and where claim was arguably not discharged due to failing to list creditor on bankruptcy schedule). *See also Sparks v Booth*, 232 S.W.3d 853, 870 (Tex. App. Dallas 2007); *Systrends, Inc. v. Group 8760, LLC*, 959 So.2d 1052, 1064 (Ala. 2006); *McWherter v. Fischer*, 126 P.3d 330, 331 (Colo. App. 2005).

A case reaching the view that the failure to plead discharge is irrelevant is *Standifer v State*, 3 P.3d 925, 927-28 (Alaska 2000). The court held that a default judgment obtained after service by publication was void due to lack of subject matter jurisdiction in view of § 524(a), even though there could have been a good faith dispute on the issue of dischargeability in the state court. It reversed a ruling that the debtor could not reopen the default to litigate the issue of

have undermined the rule have, in our view, done so unnecessarily to avoid inequitable results that could readily have been avoided without undermining the rule – for example by using Rule 60(b) to vacate default judgments.

As the Committee essentially acknowledges, present Rule 8(c) does not appear to have caused any substantial problems. But, in the Department's judgment, eliminating the reference to discharge will cause problems. If the Committee agrees with the Department's concerns regarding the concurrent jurisdiction of bankruptcy and non-bankruptcy courts over dischargeability questions, but nevertheless concludes that a change is required to place the burden to plead nondischargeability on plaintiffs, then a Committee Note should explain the reason for the change., *i.e.*, it is simply intended to require nondischargeability to be pleaded by a creditor-plaintiff, and not intended to suggest that such a suit in a district court would be inappropriate.

Proposed Amendment to Rule 13(f)

The Standing Committee has proposed that Rule 13(f) be deleted. The Committee's reasoning is that this provision is basically redundant of Rule 15, which sets out the standards for pleading amendments. The Department supports this change. The Department agrees with the Committee's reasoning.

Proposed Amendment to Rule 15(a)

The Committee has proposed that Rule 15(a) be amended to modify when a pleading can be amended without leave of court. Under the current Rule, a party may amend its pleadings once "as a matter of course at any time before a responsive pleading is served," or, if the pleading is one to which no responsive pleading is permitted and the case has not been placed on the court's trial calendar, the party may amend the pleadings "at any time within 20 days after it is served."

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dischargeability The result in the case appears correct, but for the wrong reason. The result appears correct because, in a situation where there is no actual service, and no actual notice of service by publication, a litigant should always be able to reopen a default unless the dispute is over property that is under the *in rem* jurisdiction of the court. But grounding the decision on the notion that there is no subject matter jurisdiction causes two problems First, it means that even if the debtor had been served and appeared, the only proper result was dismissal, even if the debt was in fact excepted from discharge Second, it would mean that, even if the debtor had answered the complaint and litigated the merits of the debt for years without raising discharge and then lost, the debtor could raise the issue for the first time on appeal Once it is recognized that a state court can determine the dischargeability of a debt, there is simply no reason to allow a litigant who fails to raise the issue prior to a judgment to then raise it for the first time on appeal (or worse, perhaps, collaterally attack the judgment).

In contrast, under this proposal, a pleading to which a responsive pleading is required (such as a complaint or a cross- or counter-claim) can be amended once as a matter of course 21 days after service of a responsive pleading, or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. The amended rule also would delete the current reference to a "trial calendar" because many courts do not have a central trial calendar.

The Department supports this change. The Committee seeks to address what it considers to be the anomalous treatment of a party's right to amend its pleading, one that depends on whether the opposing party has served a response (such as an answer) or has moved to dismiss. In doing so, the Committee achieves some measure of certainty, by giving the party a 21-day "window" within which to make its amendment.

Proposed Amendment to Rule 81

The Standing Committee has proposed that Rule 81 be amended to expand the definition of the term "state" to include, where appropriate, any "commonwealth" or "territory" of the United States. In brackets, the Committee also asks whether the term "possession" should be included in that definition.

The Department supports the application of the term "state" to both a commonwealth and territory. This will eliminate any uncertainty as to the status of Puerto Rico, the Virgin Islands, and Guam and the Northern Mariana Islands, all of which have district courts.

With respect to the use of the term "possession," the Committee acknowledges that its research has not shown that any "possessions" currently exist. The only possible land that could fit this definition is American Samoa. The Department notes its concern that the term "possession" might be interpreted - incorrectly - to include United States military bases overseas. We understand that the United States military's control over such bases is addressed through agreements with the foreign nations upon whose land the base is situated. The Department opposes including the term "possession" in the amended Rule.

Proposed new Civil Rule 62.1

The Standing Committee has proposed a new Rule 62.1, which would clarify the procedure under which a district court could decide a timely motion for post-judgment relief that it otherwise would lack authority to grant because of the pendency of an appeal The Appellate Rules also would be amended, through a new Rule 12.1, to provide procedures in the court of appeals to address this issue

The Department supports this proposed Rule This Rule arises out of a specific recommendation to the Standing Committee by then-Solicitor General Seth Waxman in 2000

The Department has been working with the Civil Rules Committee on the development of this proposal for several years. It should be beneficial to practitioners, who generally do not know how to address motions issues while a case is pending on appeal, and it will provide clarity to both the district courts and courts of appeal in addressing such motions

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We thank the Committee for this opportunity to share our views. If you have any further questions, or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,

Jeffrey S. Bucholtz
Acting Assistant Attorney General
Civil Division

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Deadline for Commenting on Federal Appellate Rule Amendments Is Fast Approaching

Howard J. Bashman
Special to Law.com
02-04-2008

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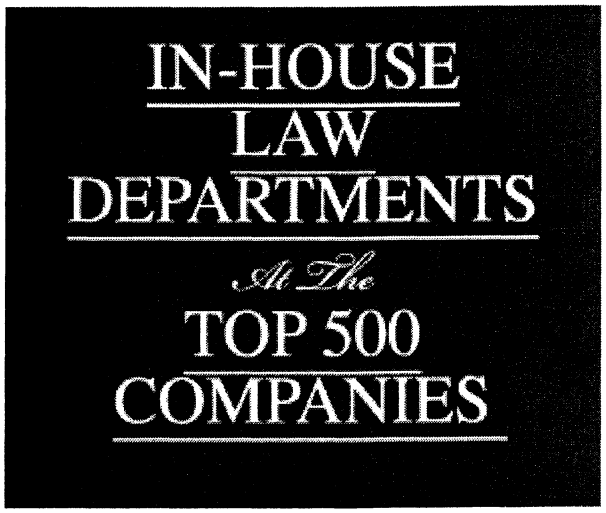
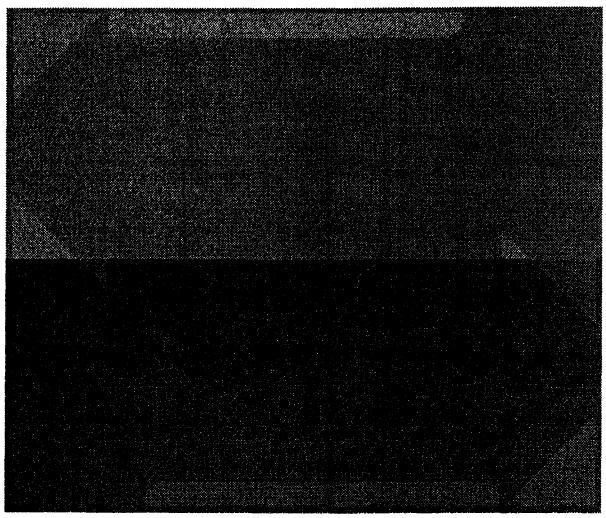


Although the next wave of significant proposed amendments to the Federal Rules of Appellate Procedure are not likely to go into effect until December 2009, now is the time to focus on the details of these changes. The deadline for public comment on the proposals is this month -- Feb. 15, to be precise.



The most significant change under consideration to the federal appellate rules, and the rules governing procedure before the federal district courts, would alter the method of calculating deadlines. Currently, relatively short time periods -- say 10 days -- are calculated by omitting intervening weekends and holidays. That means a supposed 10-day period actually gives a litigant at least two weeks to complete the task in question. By contrast, longer periods, such as a 30-day period, are calculated without omitting intervening weekends and holidays.

The rule changes under consideration would simplify the math by requiring that all days be counted in calculating deadlines, regardless of the period's length. To make up for the issue of intervening weekends and holidays, shorter deadlines will be lengthened, in an effort to render the net impact of the rule change essentially neutral.

Some trial court deadlines of importance to appellate advocates will be significantly lengthened. Currently, in civil cases, the deadline for filing post-judgment motions for a new trial, to change a trial judge's non-jury factual findings, for judgment as a matter of law, and to alter or amend the judgment is 10 days after entry of the judgment. Because this period is calculated without counting weekends and holidays, it translates into at least a two-week window in which to prepare and file these motions.

The rule amendments under consideration would change the Federal Rule of Civil Procedure to allow a period 30 days after the entry of judgment in which to file these motions. This substantially expanded time in which to file post-judgment motions will allow for those motions to be better researched and reasoned, and may encourage more attorneys who represent parties who lost at the trial court level to obtain appellate counsel's assistance in preparing those motions.

One concern relating to this change is that the deadline for appeal in civil cases in which the federal government is not a party is also 30 days after the trial court's entry of judgment. Thus, once these rule changes take effect, the deadline for filing a timely notice of appeal in many civil cases will be the same as the deadline for filing a timely post-judgment motion. What makes this problematic, in my view, is that a timely-filed post-judgment motion in a civil case postpones the deadline for all parties to file a notice of appeal until 30 days after the district court rules on the post-judgment motion.

Imagine a civil case in which both the plaintiff and the defendant have reason to appeal. Under the rules as they now stand, if the plaintiff does not need to file a post-judgment motion in order to preserve the issues it intends to raise for appeal, the plaintiff can wait until the 10-day deadline for timely post-judgment motions has expired to see whether the defendant has filed such a motion. If the defendant did file a timely post-judgment motion, the deadline for the plaintiff's notice of appeal would be postponed until 30 days after the district court rules on the defendant's motion. And if the defendant did not file a timely post-judgment motion, then the plaintiff still has plenty of time before the original deadline for its notice of appeal is due to expire.

Once the proposed rule changes take effect, however, if the defendant waits until the last possible moment to file a timely post-judgment motion, the plaintiff will have no choice but to file its notice of appeal within 30 days of the district court's original entry of judgment. Yet a timely post-judgment motion that one party files prevents another party's notice of appeal from taking immediate effect, placing the notice of appeal instead into a form of suspended animation. The previously filed notice of appeal then springs back into action once the district court decides the other party's post-judgment motion. If the deadline for post-judgment motions is the same 30-day period as the deadline for a notice of appeal, federal appellate courts will have to carry on their dockets many more of these "premature" appeals in suspended animation until district courts have ruled on timely filed post-judgment motions.

The proposed time calculation amendments to the FRAP also define the allowable deadline for taking an action. Where electronic filing is allowed, a filing due in a federal district court is due by midnight in that court's time zone. Similarly, where an electronic filing is due in a federal appellate court, the deadline is midnight at the federal appellate court's principal office.

A separate set of amendments that do not principally concern time calculation are also subject to the Feb. 15 comment deadline. These amendments include a proposal, Federal Rule of Appellate Procedure 12.1, that would set forth the procedure that parties should follow if a federal district court indicates it would grant a party's motion but lacks the power to do so after control over the case is vested in a federal appellate court because an appeal has been taken.

This set of proposed rule changes also clarifies how to calculate the three-day period added to existing deadlines for responding to documents that other parties have served by means other than hand delivery.

For more information on the proposed FRAP changes, you may access the material as follows:

-- FRAP changes dealing principally with calculation of time

-- FRAP changes not dealing principally with calculation of time

-- FRCP changes of interest to appellate practitioners

Comments on any or all of these rule changes can be submitted via e-mail to Rules_Comments@ao.uscourts.gov.

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01/16/2008 11 26 AM

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cc
Subject comment on the proposed change to Section 2254 Rule 11

07-CR-005

Good morning,

I am a criminal appellate practitioner A portion of my practice is devoted to handling of 2254 appeals by appointment of the 9th Circuit

I have concerns about the proposal to change the Certificate of Appealability (COA) requirement by requiring COA issuance at the time of district court judgment The existing rule, which gives the appellant an opportunity to do so post-judgment, is better, for several reasons From the court's perspective, it gives the judge an opportunity to step away from the case for a few days and perhaps look at it with a fresh eye Also, from the habeas petitioner's perspective, particularly those who are incarcerated, it gave them an opportunity to get to the law library and prepare a more effective argument as to why COA should be granted. It also gave them an opportunity to secure counsel. It would be unfair to ignore the realities of incarcerations and the burdens they place on pro se litigants.

In addition, as a practical matter, the proposed rule would create a rather awkward procedure When the district court issues a judgment, it does not always adopt the magistrate's report and recommendation completely Thus, under the new procedure, when the habeas petitioner files his or her objections to the R&R, he or she would have to make an anticipatory request for the COA even though R&R may not be fully adopted by the district court This procedure would, at best, be ineffective, and, at worst, effectively eliminate the petitioner's opportunity to request a COA

Finally, there seems to be no reason to change the existing rule - it works just fine

Thank you for your time

Gene Vorobyov
Attorney at Law

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February 7, 2008

Committee On Rules Of Practice And Procedure
Of The United States Judicial Conference
Washington, DC 20544

07-CR-010

Re: Comment To Proposed Rule 11,
Rules Governing Section 2254 Cases In The United States District Courts

To The Committee:

Currently an Assistant Federal Public Defender in Nashville, Tennessee, I have litigated federal habeas corpus cases since 1989 and have trained attorneys on habeas corpus procedure in general, and certificates of appealability in particular. Recently, I assisted Vanderbilt Law Professor Nancy King as a member of the Advisory Committee for her 2007 Report *Habeas Litigation In U. S. District Courts*.[1] Having had nearly two decades of experience in federal habeas corpus proceedings, I would like to express my concern about Proposed Rule 11 to the *Rules Governing Section 2254 Cases In The United States District Courts*

Proposed Rule 11 provides that a United States District Judge, upon entering a "final order adverse to the petitioner" must simultaneously "either issue or deny a certificate of appealability." I see flaws in this proposed process that arise from two sources: (1) It is the petitioner who bears the burden of showing entitlement to a certificate; (2) Such entitlement is governed by a standard that differs from the standard for granting habeas relief.

The standards for securing habeas relief and for securing a certificate of appealability (COA) are distinct.[2] The COA inquiry does not ask whether the petitioner wins, but whether the district court's denial of relief is either debatable among reasonable jurists or wrong,[3] or whether the issues are

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[1] Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Nat'l Ctr. for State Courts, *Final Technical Report: Habeas Litigation in U.S. District Courts* (2007).

[2] *Miller-El v. Cockrell*, 537 U.S. 322, 336-338 (2003).

[3] *Miller-El*, 537 U.S. at 338; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

adequate to deserve further consideration.[4] The COA standard is such, because "After all, when a COA is sought, the whole premise is that the prisoner has already failed in th[e] endeavor" of demonstrating entitlement to relief.[5]

The burden of making the COA showing, however, lies with the petitioner.[6] To make that showing, the petitioner must perform analysis which differs from his or her argument for relief on the merits. While a district court's ruling on the merits is governed by circuit and Supreme Court precedent, otherwise non-precedential rulings from other courts (including other circuits, district courts, and possibly state courts) may properly inform the district court's COA determination. In practice, I have seen how decisions from such courts can demonstrate that reasonable jurists have decided an issue differently.[7] In addition, actual COA determinations on identical or similar issues by other federal courts are relevant to a district court's COA determination, though such COA determinations (especially from other circuits) would simply not be relevant to the district court's merits ruling.

I see the following practical problems with Proposed Rule 11:

1. The essence of due process is the right to be heard following notice.[8] Proposed Rule 11, however, would deny the petitioner the opportunity to meet his or her burden of showing entitlement to a certificate under *Slack* and *Miller-El*. Indeed, where a petitioner has argued for relief and is awaiting a decision, there is no opportunity (or need) to research or brief how the district court's denial of relief is wrong or debatable. That need only arises if the district court actually denies relief. Were the district court to deny a certificate when denying relief under the proposed rule, the petitioner is not (and by definition cannot be) given notice and opportunity to be heard on his or her entitlement to a COA. The Committee ought not approve a rule that denies a petitioner the fundamental opportunity to be heard.

2. Proposed Rule 11 also portends complications in many situations, given the complexity of many habeas corpus cases. Experience teaches that most cases involve multiple claims, and different claims are often denied on different grounds – on perhaps one

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[4] *Slack*, 529 U.S. at 484; *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983).

[5] *Miller-El*, 537 U.S. at 337, *quoting Barefoot*, 463 U.S. at 893 n 4.

[6] *Miller-El*, 537 U.S. at 338 ("The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."); *Slack*, 529 U.S. at 484.

[7] *See e.g.*, *Garrott v United States*, 238 F.3d 903, 905 (7th Cir. 2001)(per curiam)("We think, however, an issue may be deemed 'substantial' if other courts of appeals disagree with this circuit's approach.").

[8] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

or more procedural grounds (statute of limitations, procedural default, non-exhaustion) and/or on the merits. Under the proposed rule, the district court would receive absolutely no input about applying *Slack* and *Miller-El* to different claims, which may be denied on differing grounds. This lack of input increases the likelihood of error in the district court's COA assessment.

3. Significantly, under new Rule 11, unless the district court actually grants the certificate when denying relief, a petitioner's first opportunity to research, brief, and argue entitlement to a certificate will be in the court of appeals. This is inefficient, especially where Congressional intent has been that district courts make the COA determination in the first instance.[9] The Advisory Committee appropriately notes that the COA determination should be made "when the issues are fresh." While Proposed Rule 11 would require prompt rulings, such rulings risk being not fully informed, unless the district court independently undertakes additional research necessary to make the COA determination. As a practical matter, one would hardly expect busy district courts, upon denying relief on the merits based on Supreme Court and circuit precedent, to assume the additional burden of analyzing case law from other circuits, districts, and states which, as noted *supra*, properly inform the COA determination. Even so, it is clear that the first fully briefed application of *Slack* will occur in the court of appeals. The court of appeals, however, is obviously less familiar with a case than the district court. Again, this increases the likelihood of inaccuracy in the COA determination. Because the district court is in the best position to make the COA determination, the rules should insure that the district court makes a fully informed COA assessment in the first instance. Proposed Rule 11 does not insure this

To guarantee a more fully informed yet efficient COA process in the district courts, I would suggest that Proposed Rule 11 be modified as follows:

1. If the district court wishes to grant a certificate of appealability on a particular claim when it denies relief, the district court should be allowed to do so. In situations where the district court grants a COA, there is no harm to the petitioner in granting a COA without hearing from the petitioner. This will also obviate any further briefing of issues that the district court acknowledges satisfy *Slack*.

2. If the district court denies relief, however, the petitioner should be allowed a time certain (such as the time in which to file a motion to alter or amend under Fed.R.Civ.P. 59) in which to specifically ask for a certificate of appealability on any issues that have not already received a certificate when relief was denied. In fact, one judge in our district routinely issues similar types of orders upon the denial of habeas relief, requiring the

[9] *See e.g*, *Hunter v. United States*, 101 F.3d 1565 (11th Cir. 1996)(en banc)(detailing history of district courts initially considering applications for certificates of appealability or probable cause to appeal).

petitioner to file a COA application within a certain period of time.[10] This particular practice has undoubtedly assisted the district court, and it has guaranteed the petitioner the right to be heard.

By allowing the petitioner a reasonable time to research and brief the issues for the district court, any new rule would not suffer from the various deficiencies noted *supra*: It would allow the district court to rule while the issues are fresh, the COA proceedings would still be expedited, and the court in the best position to address the entitlement to a COA (the district court) will be allowed to make an informed decision with input from the petitioner.

Such a rule, I believe, satisfies the concerns of the Advisory Committee, increases the accuracy of the COA determination, and insures fundamental fairness to the petitioner. It is also a practice which has effectively existed in the First Circuit since 1999. See 1st Cir.R. 22.1(a)(petitioner should promptly file application for certificate of appealability in district court, and district court must thereafter state issues on which certificate is granted); D.Me.R. 83.10 (petitioner should promptly apply for certificate from district judge who refused the writ); D.P R. R 83.9 (same).

I would therefore propose that the Standing Committee consider, as an alternative, a rule similar to the following, which accommodates the competing concerns.

Rule 11 Certificate Of Appealability

(a) When the judge enters a final order adverse to the petitioner, if the judge independently determines that a claim raised by the petitioner involves a substantial showing of the denial of a constitutional right, the judge shall issue a certificate of appealability on any such claim(s), stating the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2).

(b) If, when entering a final order adverse to the petitioner, the judge does not grant a certificate of appealability as to any particular claim under subsection (a), the petitioner shall have ___ days from the entry of the final order to file with the district court a separate application for certificate of appealability. In any such application, the petitioner shall identify and/or brief those claims upon which the petitioner seeks a certificate under 28 U.S.C. §2253(c)(2). No such application is required.

(c) After the filing of a separate application under subsection (b), or if no such application is filed within the time allowed by that subsection, the judge shall

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[10] *See e g , Strouth v. Bell*, M.D.Tenn.No. 3:00-cv-00836, R. 122 (Feb. 4, 2008); *Caldwell v Lewis*, M.D.Tenn. No. 2:05-cv-00004, R. 72 (Jan. 10, 2008); *Pinchon v Myers*, M.D.Tenn.No. 3:01-cv-00237, R. 67 (Nov. 28, 2007); *Franks v Lindamood*, M.D Tenn.No. 1:06-cv-00018, R. 25 (Oct. 16, 2007); *Bell v. Bell*, M.D.Tenn.No. 3:95-cv-00600, R. 128 (Mar. 25, 2004).

promptly rule on the petitioner's entitlement to a certificate of appealability on remaining claims, and must either issue or deny a certificate. If granting a certificate, the judge must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2).

I hope these comments are of assistance to the Committee. Thank you for your consideration.

Very truly yours,

Paul R. Bottei
Assistant Federal Public Defender

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07-CR-013

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February 15, 2008

United States Judicial Conference
Committee on Rules of Practice and Procedure
Washington, DC 20544

Re: Proposed Amendment to Rule 11 Governing Section 2254 Cases

To the Committee:

Formerly known as the Missouri Capital Punishment Resource Center, the Public Interest Litigation Clinic represents numerous death-sentenced inmates in Missouri and neighboring states. With the help of a grant from the Administrative Office of the U.S. Courts, the Clinic additionally consults other attorneys in capital habeas cases throughout the federal Eighth Circuit, publishes and updates a litigation manual, and produces a bimonthly newsletter detailing the most relevant developments in this ever-changing and highly specialized area of law.

I write with great concern about Proposed Rule 11 Governing Section 2254 Cases, and in particular, the proposed requirement that a district court simultaneously grant or deny a certificate of appealability alongside its ruling on the merits. The concern is particularly weighty in Missouri cases. The Eighth Circuit does not generally present reasons for denying COA applications, even in capital cases. Consequently, a number of Missouri capital inmates have been denied federal appellate review without explanation, including Ralph Davis, David Leisure, Samuel Smith, James Johnson, Michael Roberts and Milton Griffin-El. A seventh such inmate, Darrell Mease, was denied a COA but avoided execution when former Governor Mel Carnahan commuted his sentence upon the in-person request of Pope John Paul II. An eighth capital inmate, Leon Taylor, has been denied a COA by a panel of the Eighth Circuit, and is now in the process of seeking rehearing. (Eight Circuit Case No. 07-2882). Prisoners who are denied appellate review without explanation must then petition for *certiorari* without benefit of a reasoned judgment to attack. The point is simply that a district court's decision to grant or deny a COA carries tremendous and often final consequences. The decision ought to be carefully reached with full and fair participation of the

litigants.

Proposed Rule 11, by contrast, deprives the prisoner of a reasonable opportunity to be heard before the district court makes the weightiest of decisions. It goes without saying that the standard governing issuance of a COA differs from that governing the petitioner's entitlement to relief. Before suffering the denial of a COA, the prisoner should be afforded the opportunity to explain why at least *some* of his or her claims warrant further review. For that matter, capital habeas petitions frequently involve twenty, thirty or even more claims. The very purpose of the COA requirement is to winnow down the case in order to facilitate appellate review. This process should include the participation of the prisoner, who is in the best position to explain to the district court why two, three or four of his or her claims are at least debatable.

Worse still, the proposed rule deprives a petitioner of the opportunity to cite post-petition developments in support of focused arguments that particular claims warrant appellant review. Such intervening developments might include Supreme Court and other federal appellate case law, questionable or challengeable procedural rulings made by the district court (such as denying a hearing or discovery), facts arising from ongoing investigation, and most importantly, the actual reasoning employed by the district court's final order. Indeed, the very standard governing the issuance of a COA asks whether "reasonable jurists would find the *district court's assessment* of the constitutional claims debatable or wrong," or alternatively, whether "jurists of reason would find it debatable *whether the district court was correct* in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (emphases added). Since a COA rests upon the soundness of the *district court's* reasoning, it is passing strange for the court to deny a COA before the parties even know what the relevant reasoning is, much less before they have the opportunity to comment upon it.

I sympathize with the concerns for delay and remand that appear to motivate the proposed amendment. However, these same concerns could be addressed by fixing a deadline by which the prisoner could apply for a COA after judgment. Possible deadlines might be fifteen days (or half the time for filing a notice of appeal), or perhaps ten days (the time for moving to alter or amend the judgment under Rule 59(e).

I thank the committee for inviting and considering these comments, and hope that they are of assistance.

Sincerely yours,

Joseph W. Luby
Acting Executive Director