JUDGE BRETT M. KAVANAUGH

SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 12(b)

COMMITTEE AND OTHER ORGANIZATIONAL MATERIAL

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Report of the Advisory Committee on Appellate Rules

DATE: May 22, 2018

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 6, 2018, in Philadelphia, Pennsylvania. It approved proposed amendments falling into four categories.

First, it approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to (1) electronic service (Rules 3 and 13) and (2) disclosure statements (Rules 26.1, 28, and 32).

Second, it approved a proposed amendment that had previously been submitted to the Supreme Court but withdrawn for revision and for which it now seeks final approval. This proposed amendment, discussed in Part III of this report, relates to proof of service (Rule 25(d)).

Third, it approved proposed amendments, not previously published for comment, that it views as conforming and technical amendments for which it seeks final approval. These proposed amendments, discussed in Part IV of this report, relate to proof of service (Rules 5, 21, 26, 32, and 39).

Fourth, it approved proposed amendments for which it seeks approval for publication. These proposed amendments, discussed in Part V of this report, relate to length limits applicable to responses to petitions for rehearing (Rules 35 and 40).

The Committee also considered several other items, removing three of them from its agenda. These items are discussed in Part VI of this report.

II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 3, 13, 26.1, 28, and 32. These amendments were published for public comment in August 2017.

The proposed amendments to Rules 3 and 13—both of which deal with the notice of appeal—are designed to reflect the move to electronic service. Rule 3 currently requires the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

There were no public comments on the proposed amendments to Rules 3 and 13, and the Committee seeks final approval for them as published.

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of

~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

The proposed amendment to Rule 26.1 would change the disclosure requirements designed to help judges decide if they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term "corporate disclosure statement" to "disclosure statement."

There were no public comments on the proposed amendments to Rules 28 and 32. The Committee seeks final approval for Rule 28 as published and Rule 32 in a slightly-modified form discussed in Part IV, *infra*.

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~ disclosure statement if required by Rule 26.1;

* * * * *

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;

- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

There were four comments, however, regarding the proposed amendment to Rule 26.1. First, the National Association of Criminal Defense Lawyers (NACDL) suggested that language be added to the Committee Note to help deter overuse of the government exception in the proposed subsection (b) dealing with organizational victims in criminal cases. Second, Charles Ivey suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. Professor Elizabeth Gibson, the reporter to the Bankruptcy Rules Committee, was consulted in response to this comment. Third, journalist John Hawkinson objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the Committee Note was required to understand it. Finally, Aderant CompLaw suggested language changes to eliminate any ambiguity about who must file a disclosure statement.

The Committee revised the proposed amendment to Rule 26.1 and accompanying Committee Note, in response to these comments.

The Committee Note was revised to follow more closely the Committee Note for Criminal Rule 12.4 and account for the NACDL comment.

Professor Gibson suggested that no change was needed in response to the Ivey comment, but did suggest that Rule 26.1(c) be revised to address a potential gap in the proposed amendment, and the Committee agreed. In particular, the published proposal required that certain parties "must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must" provide particular information. That language was changed to require that certain parties "must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a)."

In an effort to clarify the proposed amendment in response to the Hawkinson and Aderant CompuLaw comments, the Committee took what in the published version had been a separate subparagraph 26.1(d) dealing with intervenors and folded it into a new last sentence of 26.1(a). In addition, the phrase "wants to intervene" was changed to "seeks to intervene" in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but not truly "want" to intervene. Other stylistic changes were made as well.

The Committee seeks final approval for Rule 26.1 as revised.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporations and Intervenors. Any nongovernmental ~~corporate~~ corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Cases. In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).

~~(b)~~(d)Time for Filing; Supplemental Filing. ~~A party must file the~~The Rule 26.1~~(a)~~ statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must include the statement~~ be included before the table of contents~~.~~ in the principal brief; and

(3) ~~A party must supplement its statement~~ be supplemented whenever the information ~~that must be disclosed~~ required under Rule 26.1~~(a)~~ changes.

~~(c)~~(e)Number of Copies. If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~ an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an "interest that could be affected substantially by the outcome of the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

> Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.
>
> New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."
>
> New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.
>
> Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Attachment B1 to this report contains the text of the proposed amendments to Rules 3, 13, 26.1, 28, and 32.

III. Action Item for Final Approval After Withdrawal and Revision

The Committee seeks final approval for a proposed amendment to Rule 25(d). This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court, but after discussion at the January 2018 meeting was withdrawn for revision with the expectation that a revised version would be presented at the June 2018 meeting.

This proposed amendment to Rule 25(d) is designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version was withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The prior version provided, "A paper presented for filing other than through the court's electronic-filing system must contain either of the following: * * * " As revised, the proposed amendment provides, "A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system: * * * "

Rule 25. Filing and Service

* * * * *

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with [Rule 25(a)(2)(A)(ii)][1], the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

* * * * *

Attachment B2 to this report contains the text of the proposed amendment to Rule 25(d).

IV. Action Item for Final Approval Without Public Comment

Rules 5 (appeals by permission), 21 (extraordinary writs), 26 (computing time), Rule 32 (form of papers), and 39 (costs), all currently contain references to "proof of service." If the proposed amendment to Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Committee seeks final approval of what it views as technical and conforming amendments to these Rules. Some stylistic changes are proposed as well.

These amendments were also discussed at the January 2018 meeting of the Standing Committee, and comments were provided by the style consultants at that meeting, with the expectation that revised versions would be presented at the June 2018 meeting.

Rule 5 would no longer require that a petition for permission to appeal "be filed with the circuit clerk with proof of service." Instead, it would provide that "a party must file a petition with the circuit clerk and serve it on all other parties ***."

[1] An amendment to include this corrected citation has been approved by the Supreme Court.

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition ~~for permission to appeal. The petition must be filed~~ with the circuit clerk ~~with proof of service~~ and serve it on all other parties to the district-court action.

* * * * *

Similarly, the phrase "proof of service" in Rule 21(a) and (c) would be deleted and replaced with the phrase "serve it on" and "serving it."

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~ the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

The term "proof of service" would also be deleted from Rule 26(c). Stylistically, the expression of the current rules for when three days are added would be simplified: "When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)."

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time ~~a~~After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~, unless the paper is delivered on the date of service stated in the proof of service. For purposes of this~~

~~Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service~~.

* * * * *

Rule 32(f) lists the items that are excluded when computing any length limit. One such item is "the proof of service." To take account of the frequent occasions in which there would be no such proof of service, the article "the" is proposed to be deleted. And given that change, the Committee agreed that it made sense to delete all of the articles in the list of items. If both this proposed amendment and the other proposed amendment to Rule 32 (discussed in Part II above) are approved, the two sets of changes should be merged.

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ cover page;
- ~~a [corporate]~~[2] disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificate~~s~~ of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

The phrase "with proof of service" would also be deleted from Rule 39 and replaced with the phrase "and serve ***."

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk~~, with proof of service,~~ and serve an itemized and verified bill of costs.

* * * * *

[2] The word "corporate" is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

Attachment B3 to this report contains the text of the proposed amendments to Rules 5, 21, 26, 32, and 39.

V. Action Item for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 35 and 40. These amendments would create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but none stated for responses to those petitions. While some courts of appeals routinely include a length limit in the order permitting the filing, and experienced practitioners understand that in the absence of such an order the length limits for the petitions themselves apply, the Committee believes that it would be good to have the length limit stated in the rules themselves.

The Committee also observed that Rule 35 (which deals with en banc determinations) uses the term "response," while Rule 40 (which deals with panel rehearing) uses the term "answer." The proposed amendment would change Rule 40 to make it consistent with Rule 35, with both using the term "response."

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Rule 40. Petition for Panel Rehearing

* * * * *

(a) Time to File; Contents; ~~Answer~~ Response; Action by the Court if Granted

* * * * *

(3) **~~Answer~~ Response.** Unless the court requests, no ~~answer~~ response to a petition for panel rehearing is permitted. ~~But o~~ Ordinarily, rehearing will not be granted in the absence of such a request. If a

response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

* * * * *

Attachment B4 to this report contains the text of the proposed amendments and the proposed Committee Notes to Rules 35 and 40.

VI. Information Items

The Committee's consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21. An appropriate subcommittee has been formed.

A subcommittee has also been formed to consider whether any amendments are appropriate in light of the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will consider whether it would be appropriate to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. Ordinarily, under the merger doctrine, an appeal from a final judgment brings up interlocutory orders supporting that judgment. But under a line of cases in the Eighth Circuit, if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, a negative inference is drawn that other, unmentioned, orders are not being appealed.

A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion. On the other hand, there may be situations in which judicial approval of settlements is required.

The Committee decided to remove three items from its agenda.

First, a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology, especially with briefs that cite to the electronic record of the district court, will transform how appendices are done and may solve the problem. Therefore, the Committee decided to remove this matter from the agenda, but revisit it in three years.

Second, the Committee considered a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. In light of how few cases in the courts of appeals involve amicus briefs, and the very different amicus practice in the Supreme Court, the Committee decided to take this matter off the agenda.

Third, the Committee had been considering issues involving costs on appeal, and previously asked the Civil Rules Committee for feedback. The Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works. Accordingly, the Committee decided to remove the matter from its agenda.

Finally, the Committee considered the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. While this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved, the Committee decided that this matter is appropriately handled by the Civil Rules Committee. The Committee expects to keep an eye on the trap-for-the-unwary concern and may consider whether provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

A draft of the minutes from the Committee's April 6, 2018 meeting is included at Attachment C.

TAB 2B

THIS PAGE INTENTIONALLY BLANK

TAB B1

THIS PAGE INTENTIONALLY BLANK

Attachment 1

Proposed Amendments Previously Published for Public Comment

and

Submitted to the Standing Committee for Final Approval

(Rules 3, 13, 26.1, 28, and 32)

THIS PAGE INTENTIONALLY BLANK

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

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals

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

named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of ~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends," and delete language requiring certain forms of service, to allow electronic service. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

THIS PAGE INTENTIONALLY BLANK

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) **Notice of Appeal; How Filed.** The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

Committee Note

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comments

No comments were submitted.

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporations and Intervenors. Any nongovernmental ~~corporate~~ corporation that is a party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation. The same requirement applies to a nongovernmental corporation that seeks to intervene.

(b) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement that identifies any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required

by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Cases. In a bankruptcy case, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that (1) identifies each debtor not named in the caption and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a).

~~(b)~~(d)Time for Filing; Supplemental Filing. ~~A party must file the~~The Rule 26.1~~(a)~~ statement must:

(1) be filed with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing~~.~~;

(2) ~~Even if the statement has already been filed, the party's principal brief must include the statement~~

be included before the table of contents~~.~~ in the principal brief; and

(3) ~~A party must supplement its statement~~be supplemented whenever the information ~~that must be disclosed~~required under Rule 26.1~~(a)~~ changes.

~~(c)~~(e) **Number of Copies.** If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, ~~the party must file~~an original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

These amendments are designed to help judges determine whether they must recuse themselves because of an "interest that could be affected substantially by the outcome of the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(c) (2009).

Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) corresponds to the disclosure requirement in Criminal Rule 12.4(a)(2). Like Criminal Rule 12.4(a)(2), subdivision (b) requires the government to identify organizational victims to help judges comply with their obligations under the Code of Judicial Conduct. In some cases, there are many organizational victims, but the effect of the crime on each one is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."

New subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals. Subdivision (c) also imposes disclosure requirements concerning the ownership of corporate debtors.

Subdivisions (d) and (e) (formerly subdivisions (b) and (c)) apply to all the disclosure requirements in Rule 26.1.

Changes Made After Publication and Comment

- Instead of adding a separate subsection (d) to deal with intervenors, a sentence dealing with intervenors is added to the end of subsection (a) stating that the requirement of subsection (a) applies to a

nongovernmental corporation that seeks to intervene. The title of subsection (a) is changed accordingly, and "corporate party" is changed to "corporation that is a party." The phrase "wants to intervene" is changed to "seeks to intervene."

- The term "bankruptcy proceeding" is changed to "bankruptcy case" in subsection (c). The requirements of identifying debtors not named in the caption and providing information about corporate debtors are separately numbered. A cross-reference to the information required by subsection (a) is added, and the material that repeated the information required in subsection (a) is deleted.
- The timing requirements for filing the disclosure statement are broken out into separately-numbered subsections and the language simplified.
- The Committee Note is reorganized to reflect that the provision dealing with intervenors is no longer in a separate subsection, to include an overview paragraph, and to align with the Committee Note to the proposed 2018 amendment to Criminal Rule 12.4(a)(2).

Summary of Public Comment

Peter Goldberger, National Association of Criminal Defense Lawyers (AP-2017-0002-0007)—Language be added to the Committee Note to help deter overuse of the "good cause" exception regarding identification of organizational victims.

Charles Ivey (AP-2017-0002-0005)—Language should be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings under 11 U.S.C. § 303 and petitioning creditors be identified.

John Hawkinson, freelance journalist (AP-2017-0002-0008)—The requirements imposed on an intervenor should be clear from the text of the rule itself without having to read the Committee Notes.

Ellie Bertwell, Aderant CompuLaw (AP-2017-0002-0006)— Language should be added to eliminate any ambiguity about who must file a disclosure statement.

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~disclosure statement if required by Rule 26.1;

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

THIS PAGE INTENTIONALLY BLANK

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a ~~corporate~~disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of Rule 26.1.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

No comments were submitted.

TAB B2

THIS PAGE INTENTIONALLY BLANK

Attachment 2

Proposed Amendment Previously Submitted

to the

Supreme Court but Withdrawn for Revision

and

Submitted After Revision

to the

Standing Committee For Final Approval

(Rule 25(d)[*])

[*] This amendment proposed to Rule 25(d) is drafted on the assumption that the proposed amendment to Rule 25(d) promulgated by the Supreme Court in April of 2018, which corrects a citation in Rule 25(d)(2), is not rejected by Congress.

THIS PAGE INTENTIONALLY BLANK

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 25. Filing and Service

* * * * *

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of

* New material is underlined in red; matter to be omitted is lined through.

the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with [Rule 25(a)(2)(A)(ii)][*], the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

* * * * *

Committee Note

The amendment conforms Rule 25 to other federal rules regarding proof of service. As amended, subdivision (d) eliminates the requirement of proof of service or acknowledgment of service when filing and service is made through a court's electronic-filing system. The notice of electronic filing generated by the court's system serves that purpose.

[*] An amendment to include this corrected citation has been approved by the Supreme Court.

TAB B3

THIS PAGE INTENTIONALLY BLANK

Attachment 3

Proposed Conforming and Technical Amendments

Not Previously Published for Public Comment

and

Submitted to the Standing Committee for

Final Approval

(Rules 5, 21, 26, 32*, and 39)

* This amendment proposed to Rule 32 is drafted on the assumption that the other proposed amendment to Rule 32, concurrently being submitted to the Standing Committee, is adopted.

THIS PAGE INTENTIONALLY BLANK

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

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition ~~for permission to appeal. The petition must be filed~~ with the circuit clerk ~~with proof of service~~and serve it on all other parties to the district-court action.

* * * * *

Committee Note

Subdivision (a)(1) is amended to delete the reference to "proof of service" to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

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

THIS PAGE INTENTIONALLY BLANK

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~the petition with the circuit clerk ~~with proof of service on~~and serve it on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service~~and serving it on the

respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

* * * * *

Committee Note

The term "proof of service" in subdivisions (a)(1) and (c) is deleted to reflect amendments to Rule 25(d) that eliminate the requirement of a proof of service when filing and service are completed using a court's electronic filing system.

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time ~~a~~After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)~~, unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service~~.

* * * * *

Committee Note

The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision to conform to the amendments to Rule 25(d).

THIS PAGE INTENTIONALLY BLANK

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ cover page;
- ~~a [corporate]~~[*] disclosure statement;
- ~~a~~ table of contents;
- ~~a~~ table of citations;
- ~~a~~ statement regarding oral argument;
- ~~an~~ addendum containing statutes, rules, or regulations;
- certificate~~s~~ of counsel;
- ~~the~~ signature block;
- ~~the~~ proof of service; and

[*] The word "corporate" is proposed to be deleted in another amendment submitted concurrently to the Standing Committee.

- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The amendment to subdivision (f) does not change the substance of the current rule, but removes the articles before each item because a document will not always include these items.

Rule 39. Costs

* * * * *

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk~~, with proof of service,~~ and serve an itemized and verified bill of costs.

* * * * *

Committee Note

In subdivision (d)(1) the words "with proof of service" are deleted and replaced with "and serve" to conform with amendments to Rule 25(d) regarding when proof of service or acknowledgement of service is required for filed papers.

THIS PAGE INTENTIONALLY BLANK

TAB B4

THIS PAGE INTENTIONALLY BLANK

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

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court's permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

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

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if a court orders one.

Rule 40. Petition for Panel Rehearing

* * * * *

(a) Time to File; Contents; ~~Answer~~Response; Action by the Court if Granted

* * * * *

(3) **~~Answer~~Response.** Unless the court requests, no ~~answer~~response to a petition for panel rehearing is permitted. ~~But o~~Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

* * * * *

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if a court orders a response. The amendment also changes the language to refer to a "response," rather than an "answer," to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

TAB 2C

THIS PAGE INTENTIONALLY BLANK

FRAP Item	Proposal	Source	Current Status
11-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
13-AP-H	Consider possible amendments to FRAP 41 in light of *Bell v. Thompson*, 545 U.S. 794 (2005), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18

FRAP Item	Proposal	Source	Current Status
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
15-AP-A/H	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18

FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Approved by the Supreme Court 5/18
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18

FRAP Item	Proposal	Source	Current Status
11- AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17 Post Standing Committee 1/18, Rule 25(d)(1) amendment removed from Supreme Court package for reconsideration in spring 2018 Final approval of subsection (d)(1) for submission to Standing Committee 4/18
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17 Final approval for submission to Standing Committee 4/18

FRAP Item	Proposal	Source	Current Status
18-AP-B	Rules 35 and 40 – regarding length of responses to petitions for rehearing	Department of Justice	Discussed at 4/18 meeting. Proposed draft for publication approved for submission to Standing Committee 4/18.
16-AP-D	Rule 3(c)(1)(B) and the Merger Rule	Neal Katyal	Discussed at 11/17 meeting and a subcommittee formed to consider issue. Discussed at 4/18 meeting, and continued review.
17-AP-G	Rule 42(b)–discretionary "may" dismissal of appeal on consent of all parties	Christopher Landau	Discussed at 11/17 meeting and a subcommittee was formed to review. Discussed at 4/18 meeting and continued review.
18-AP-A	Rules 35 and 40 – Comprehensive review	Department of Justice	Discussed at 4/18 meeting. Subcommittee formed.
17-AP-F	Rule 29 – letters of blanket consent	Stephen E. Sachs	Discussed at 4/18 meeting and removed from agenda.
Costs on appeal suggestion	Whether Rule 7 needs to be amended to deal with whether attorneys' fees are included in costs on appeal.	Committee	Discussed at 11/17 meeting. Referred to the Civil Rules Committee. Note this issue was previously discussed at the 10/16 meeting. Discussed at 4/18 meeting and removed from agenda.
Review of rules regarding appendices	New business from 11/17 meeting	Committee	Discussed at 11/17 meeting and a subcommittee was formed to review. Discussed at 4/18 meeting and removed from agenda. Will reconsider in three years.

THIS PAGE INTENTIONALLY BLANK

TAB 2D

THIS PAGE INTENTIONALLY BLANK

Minutes of the Spring 2018 Meeting of the

Advisory Committee on the Appellate Rules

April 6, 2018

Philadelphia, Pennsylvania

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Friday, April 6, 2018, at approximately 9:00 a.m., at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli. Solicitor General Noel Francisco was represented by H. Thomas Byron III.

Also present were Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Patricia S. Dodszuweit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules; Bridget M. Healy, Attorney Advisor, RCSO; Marie Leary, Research Associate, Advisory Committee on the Appellate Rules; Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure; Patrick Tighe, Rules Law Clerk, RCSO; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules, participated in part of the meeting by telephone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He introduced Edward Hartnett, the new Reporter, and Patricia S. Dodszuweit, the former chief deputy clerk and now the Clerk of United States Court of Appeals for the Third Circuit and Clerk of Court Representative. He thanked Bridget Healy, Shelly Cox, and Rebecca Womeldorf for organizing the meeting. He then briefly reminded everyone of the rule making process under the Rules Enabling Act, and noted that

the only amendment to the Federal Rules of Appellate Procedure that took effect on December 1, 2017, was an amendment to FRAP 4(a)(4)(B) that restored subsection (iii).

II. Approval of the Minutes

The draft minutes of the November 8, 2017, Advisory Committee meeting were corrected to reflect that Kevin Newsome was appointed to the United States Court of Appeals for the Eleventh Circuit, and approved as amended.

III. Discussion Items

A. Proposed Amendments to Rules 3, 13, 26.1, 28, and 32, Published for Public Comment in August 2017, Particularly Proposal to Amend Rule 26.1 to Provide More Information Relevant to Recusal (08-AP-A; 08-AP-R; 11-AP-C)

Judge Chagares noted that there were no public comments on the proposed amendments to Rules 3, 13, 28, and 32, and no member of the Committee had any objection to them. He then opened discussion of the proposed amendment of Rule 26.1, dealing with disclosures designed to help judges decide if they must recuse themselves. This proposed amendment had been published for public comment, and was being considered in light of those comments.

Before turning to the particular proposals, an attorney member asked whether information about third-party funding of litigation showed up anywhere to inform recusal decisions. Judge Campbell noted that this issue was under active consideration by the Civil Rules Committee. Mr. Coquillette noted that the issue was also under consideration by state legislatures and bar associations. Those who oppose requiring disclosure observe that judges would not invest in third-party litigation funders, but a judge member pointed out that their relatives might.

Judge Chagares then turned to 26.1, noting that the version before the Committee had been revised in light of the comments and the input of Ms. Struve and the style consultants. In particular, the published version had a separate subparagraph 26.1(d) dealing with intervenors; for clarity that was folded into a new last sentence of 26.1(a).

Judge Chagares identified a glitch in the version of 26.1(a) in the agenda book (page 125). It refers to any "nongovernmental corporation to a proceeding." The glitch could be fixed by adding the word "party," so that it would read "nongovernmental corporate party to a proceeding." Judge Campbell noted that it

could also be fixed by adding the phrase "that is a party," so that it would read "nongovernmental corporation that is a party to a proceeding." The Committee was content with either phrasing, leaving the matter to coordination with the Committee on Bankruptcy Rules.

An attorney member questioned whether the word "proceeding" should be changed to "case," for consistency with Rule 26.1(c). Judge Pepper stated that the Bankruptcy Committee wanted to be sure that the 26.1(c) provision dealing with bankruptcy refer to "case" rather than "proceeding," but that "proceeding" was appropriate for 26.1(a), because there may be proceedings in the courts of appeals that are not cases. Judge Campbell advocated not changing things that don't need changing, and the Committee decided to leave the word "proceeding."

An academic member observed that a proposed intervenor may seek intervention because of a need to protect its interests, but not truly "want" to intervene, and therefore suggested changing the word "wants" to "seeks" in the final sentence of 26.1(a). The Committee agreed, so that the final sentence would read, "The same requirement applied to a nongovernmental corporation that seeks to intervene."

Turning to 26.1(b), dealing with organizational victims in criminal cases, Judge Chagares noted that the only proposed change from the published version was stylistic. Rule 26.1(c), dealing with bankruptcy cases, had a stylistic change from the published version that replaced redundant language with a cross-reference to 26.1(a). In keeping with the wishes of the Bankruptcy Committee, "proceeding" in this subsection was changed to "case," to avoid confusion with the term "adversary proceeding" in bankruptcy cases.

The reporter pointed out that the phrasing of the version of 26.1(d) before the Committee was problematic in that 26.1(d)(3) provided that the "statement must . . . supplement the statement," and suggested it be changed to the "statement must . . . be supplemented." An attorney member noted that a 26.1(d)(2) had a similar problem, in that it provided that the "statement must . . . include the statement," and suggested that it be changed to the "statement must . . . be included."

Turning to the Committee Note, a judge member asked if the word "mainly" was needed, and another judge member suggested striking it. An attorney member pointed to the need to restore the word "of" to the phrase "disclosure of the names of all the debtors." Another attorney member suggested that the phrase "the names of the debtors" should be restored, because the pronoun "they" might be read to refer to "bankruptcy cases," rather than the intendent referent "the names of the debtors." Invoking the rule of the last antecedent, a judge member agreed.

As so amended, the Committee agreed to forward the proposed amendment to Rule 26.1 to the Standing Committee.

B. Proposal to Amend Rule 25(d) to Eliminate Unnecessary Proofs of Service in Light of Electronic Filing (and Technical Conforming Amendments to Rules 5, 21, 26, 32, and 39) (11-AP-D)

Judge Chagares explained that this proposal was designed to eliminate unnecessary proofs of service in light of electronic filing. A prior version of this amendment to Rule 25(d) was approved by the Standing Committee and sent to the Supreme Court, but withdrawn in order to take account of the possibility that a document might be filed electronically but still need to be served other than through the court's electronic filing system on a party (e.g., a pro se litigant) who does not participate in electronic filing. The version before the Committee (page 137 of the agenda book) is designed to be consistent with other Rules. It requires that a paper presented for filing must have an acknowledgement or proof of service "if it was served other than through the court's electronic filing system." In response to a question from Judge Campbell, it was confirmed that this version is consistent with the Bankruptcy Rule.

The Committee had no concern with conforming amendments to Rules 5, 21, 39 eliminating references to "proof of service." Judge Campbell raised a concern about the conforming amendment to Rule 26, asking whether the three-day rule should apply to all papers served electronically or only those served through the court's electronic filing system, given that a party might not serve until several days after filing. After several members of the Committee observed that the clock under Rule 26(c) starts upon service, not filing, the Committee agreed that there was no need to change the version of Rule 26(c) as proposed on page 155 of the agenda book. At the suggestion of an academic member of the Committee, the last clause of the Committee Note—which refers to a court's electronic filing system—was deleted.

The Committee approved the elimination of the articles from the list of items in Rule 32(f), and also eliminated the first sentence of the Committee Note referring to proof of service.

Judge Chagares confirmed that the prior reporter had done a global search for "proof of service," so that these are the only needed conforming amendments.

The Committee agreed that these were technical amendments, so that, in its view, there was no need for further public comment.

C. Rule 3(c)(1)(B) and the Merger Rule (16-AP-D)

Professor Sachs reported on behalf of the subcommittee formed to study the designation of the judgment or order appealed from in a notice of appeal. Under the merger doctrine, an appeal from a final judgment brings up interlocutory orders supporting that judgment. But there is a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. That is, a negative inference is drawn that other, unmentioned, orders are not being appealed.

The subcommittee's work led it to other adjacent issues, including the proper handling of a notice of appeal when the district court did not enter a separate judgment. The subcommittee sought to get a sense of the Committee as to the extent of the problem, and whether the focus should be on the narrow issue that prompted the agenda item or on these broader issues.

Professor Struve pointed out that there is a great deal of confusion in this area, including the proper handling of appeals from post-judgment orders where the party is really seeking review of the underlying prior order, and appeals from an initial order but not an order denying reconsideration (or vice versa). It is nonetheless quite challenging to draft a rule that fixes these problems without creating new ones.

An attorney member stated that the line of cases in the Eighth Circuit is problematic and somewhat terrifying, because clients often question whether a simple notice of appeal from a final judgment is enough, and seek to have particular orders mentioned to make sure they are covered. Looking under this rock, however, revealed lots of other problems. Judge Chagares noted that in all his years on the bench, he had seen a problem regarding the order designated only once.

A judge member asked whether this was a jurisdictional matter that could only be handled by Congress. Several members of the Committee responded that issues involving the content of the notice of appeal, as opposed to the time for appeal, were not jurisdictional. Professor Sachs suggested that one approach might be to broadly authorize amendments to notices of appeal, but that allowing amendments out of time might raise jurisdictional and supersession issues.

An attorney member stated that the current Rule, which tells the reader to "designate the judgment, order, or part thereof being appealed," is very ambiguous. It is written to cover both appeals from final judgments and appeals from interlocutory orders, and gives no indication that an appeal from a final judgment brings up prior interlocutory orders. It invites the inexperienced lawyer to list everything. But a rule cannot explain the entire merger doctrine. A different attorney member suggested that a Rule could state that an appeal from a final judgment brings up the final judgment and all interlocutory orders, but Professor Struve noted that the merger doctrine doesn't cover all prior orders. Professor Sachs

raised the question of whether the merger doctrine also applies when an appeal is properly taken from an interlocutory order.

A judge member suggested that, from the appellee's perspective, it would be good to know what is actually being appealed. Attorney members noted that the question of what issues will be raised on appeal is addressed in subsequent filings.

The reporter suggested that perhaps the Rule should call on the appellant to designate simply the *appealable* judgment or order, leaving to the merger doctrine the question of what issues are *reviewable* on appeal from that appealable judgment or order.

As for the question of whether to address the broader issues or only the narrow issues, and even whether a rogue line of cases in one circuit justifies a Rule change, Judge Chagares reminded the Committee that upending an established Rule, at times, can cause more confusion than clarity. Justice French agreed to join the subcommittee.

D. Improving Appendices

Judges Chagares observed that a subcommittee had been formed to look into the problem of appendices being too long and including much irrelevant information. But changes in technology may solve the problem.

Ms. Dodszuweit stated that the Clerks recommend waiting. The technology is changing quickly, and electronic appendices, with briefs that cite to the electronic record of the district court, will make for a great shift in how appendices are done.

A judge member noted that the biggest problem is duplication. An attorney member reminisced about appendices that ran 20,000 pages, but that current practice of a proof brief, with an appendix that includes what is actually cited, avoids that problem.

Judge Campbell stated that trial exhibits are not placed on the electronic docket, but are frequently put in electronic form for use of the jury. Perhaps they should be put on the electronic docket.

The Committee decided to remove this matter from the agenda, but revisit it in three years.

E. Dismissals under Rule 42(b) (17-AP-G)

Mr. Landau reported for the subcommittee examining Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation

signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The parallel Supreme Court Rule (Rule 46.1), by contrast, uses the word "will" rather than "may." The discretion found in Rule 42(b) can make settlement difficult, because the client lacks certainty, and may result in a court improperly issuing an advisory opinion.

A judge member asked whether there was ever a legitimate reason to not dismiss. The reporter asked whether laws that require judicial approval of settlements, such as the Tunney Act, apply to settlements on appeal. Others raised the possibility of class actions. Judge Campbell stated that class actions are dealt with in forthcoming Civil Rules.

An attorney member stated that some judges are concerned with what appear to be conflicts of interest between attorneys with institutional interests who want to flush a case after oral argument and the client who is being sold out. Mr. Coquillette stated that such a lawyer would be violating lots of rules of professional conduct, and that there are other remedies for such behavior. Judge Kozinski once wrote a dissent contending that an attorney with an institutional interest was giving up on a case with no gain to the client in return, prompting an attorney member to ask how the judge could know that there was no gain in return.

The subcommittee will continue its examination.

F. Rule 29 Blanket Consent to Amicus Briefs (17-AP-F)

Professor Sachs presented a proposal, modelled on the Supreme Court rules, to amend Rule 29 to allow parties to file blanket consent to amicus briefs. A blanket consent procedure would reduce the burden on amici and parties in seeking and providing individualized consent, and perhaps on the court deciding motions if consent is not obtained in time. Mr. Byron noted that there are some cases in which the Department of Justice has to respond to many emails seeking consent, and this amendment would help a little, but that the emails are not much of a burden so that it isn't really needed.

Ms. Dodszuweit reported that there were about 100 cases in that past five years in the Court of Appeals for the Third Circuit with even one amicus brief. She also reported that, under current practice, if the Clerk were to receive a blanket consent letter, it would be noted on the docket and the Clerk would act in accordance with it.

In light of the very different amicus practice in the Supreme Court compared to the courts of appeals, the Committee decided to take this matter off the agenda, with thanks to Professor Sachs for raising the issue.

G. Costs on Appeal

This matter had previously been referred to the Civil Rules Committee for feedback. Judge Chagares reported that the Civil Rules Committee asked this Committee to wait to see how the proposed amendment to Fed. R. Civ. P. 23(e)(5) works.

Accordingly, the Committee decided to remove the matter from its agenda.

H. Supreme Court Decision in *Hall v. Hall*

The reporter presented a discussion of the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. The reporter noted that this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved.

The Committee decided that this matter is appropriately handled by the Civil Rules Committee, while some members suggested keeping an eye on the trap-for the-unwary concern and looking to see if the provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

I. Length of Answers/Responses to Petitions Under Rules 35 and 40 (18-AP-A and 18-AP-B)

Mr. Byron presented a proposal to add length limitations to the answers/responses to petitions for rehearing and rehearing en banc under Rules 35 and 40. He noted that experienced practitioners understand that the length limitations for the petitions themselves apply, but that it would be good to have this stated in the Rules themselves.

Judge Chagares noted that the draft before the Committee offered two alternative phrasings. As for Rule 35, the Committee opted for "The length

limitations in Rule 35(b)(2) apply to a response." As for Rule 40, the Committee opted for "The requirements of Rule 40(b) apply to a response to a petition for panel rehearing."

A judge member noted that his court always puts a length limitation in the order permitting the filing. Mr. Byron responded that not all courts of appeals do so.

Mr. Byron added that it might be appropriate to undertake a more comprehensive review of Rules 35 and 40, perhaps drawing on the different structure of Rule 21.

The reporter presented a second issue. Rule 35 uses the term "response," while Rule 40 uses the term "answer." He suggested that Rule 40 be changed to "response," pointing to Black's Law Dictionary definitions of the two terms. Ms. Dodszuweit suggested that Rule 35 be changed to "answer," pointing to the use of "answer" in other Rules to designate a document filed only with the Court's permission in response to a petition. The reporter noted that the Supreme Court Rules use the term "response" for a document filed only with the Court's permission in response to a petition, and that Fed. R. App. P. 32(c)(2) refers to "a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition."

The Committee opted for the word "response" in both the Rule and the Committee Note, and deleted some unnecessary words in the proposed Note. Despite some concerns about the proposed Note stating that the Advisory Committee changed the language for stylistic reasons, the Committee decided to leave in that language—which was modelled on language from the Restyling Project—pending review by the style consultants. (18-AP-A).

The Committee also decided to pursue a more general study of Rules 35 and 40, and Danielle Spinelli was added to the subcommittee. (18-AP-B).

IV. New Matters

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would increase efficiency and promote the just, speedy, and inexpensive resolution of cases. Mr. Landau noted that the Supreme Court had distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017). He suggested that the Committee might want to align the Rule with the statute, correcting for divergence that had occurred over time.

A subcommittee was formed, consisting of Mr. Landau, Judge Kavanaugh, and Judge Chagares.

V. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and the meeting. He announced that the next meeting would be held on October 26, 2018, in Washington, DC.

The Committee adjourned at approximately 12:30 p.m.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID G. CAMPBELL
CHAIR

REBECCA A. WOMELDORF
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

MICHAEL A. CHAGARES
APPELLATE RULES

SANDRA SEGAL IKUTA
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: **Hon. David G. Campbell, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Michael A. Chagares, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on the Appellate Rules**

DATE: **December 6, 2017**

I. Introduction

The Advisory Committee on the Appellate Rules met on November 8, 2017, in Washington, D.C. At this meeting, the Advisory Committee considered five items. In part II of this memorandum, the Advisory Committee presents one of these items—a proposal to amend Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) to address references to "proof of service"—for discussion by the Standing Committee. In part III of this memorandum, the Advisory Committee presents the other four items for the Standing Committee's information. The Advisory Committee also encloses with this memorandum the draft minutes from its meeting and an updated table of agenda items.

II. Discussion Item: Proposal to Amend Rules 5(a)(1), 21(a)(1) & (c), 26(c), 32(f), and 39(d)(1) to Address References to "Proof of Service"

The recently proposed amendments to Appellate Rule 25(d)—which are now before the Supreme Court—will eliminate the requirement of proof of service when a party files a paper

using the court's electronic filing system.[1] The elimination of this requirement is potentially problematic for Appellate Rules 5(a)(1), 21(a)(1) and (c), 26(c), and 39(d)(1) because they all refer to "proof of service." The Advisory Committee accordingly proposed changes to each of these rules. At the meeting, Judge Campbell observed that the proposals might be properly seen as technical corrections made in light of the recently proposed amendments to Rule 25. He therefore suggested that it might not be necessary to publish them for additional comments. The Advisory Committee recommends this approach to the Standing Committee.

A. Rule 5(a)(1)

Rule 5(a)(1) requires a party requesting permission to appeal to file a petition "with proof of service on all other parties." This requirement of proof of service is problematic for two reasons. First, Rule 5(a)(1) contains no exception for petitions filed electronically. Second, addressing proof of service in Rule 5(a)(1) is unnecessary because Rule 25(d) separately specifies when proof of service is required. A solution to both of these problems is to delete the reference

---

[1] The pending proposed amendment to Rule 25(d) is as follows:

Rule 25

* * * * *

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic-filing system must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)~~(B)~~(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

* * * * *

The Advisory Committee proposed this amendment to Rule 25(d) to match a comparable amendment to Civil Rule 5(d)(1)(B), which if approved will say: "No certificate of service is required when a paper is served by filing it with the court's electronic-filing system."

to proof of service in Rule 5(a)(1), leaving the requirement of proof of service to Rule 25(d). The Advisory Committee proposes the following amendment:

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk ~~with proof of service~~ and served on all other parties to the district-court action.

* * * * *

Committee Note

The words "with proof of service" in subdivision (a)(1) are deleted because Rule 25(d) specifies when proof of service is required for filed papers. Under Rule 25(d), proof of service is not required when a party files papers using the court's electronic filing system.

B. Rule 21(a)(1) and (c)

Rule 21 concerns writs of mandamus, writs of prohibition, and other extraordinary writs. Subdivisions (a)(1) and (c) require the party petitioning for one of these writs to file the petition with "proof of service." These requirements are problematic for the same reason that the requirement in Rule 5(d)(1) is problematic. They make no exception for petitions filed using the court's electronic filing system, and they are unnecessary because Rule 25(d) specifies when proof of service is required. A solution is to delete the reference to proof of service. The Advisory Committee proposes the following changes:

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~ the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service on~~ and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

Committee Note

The words "with proof of service" in subdivision (a)(1) and (c) are deleted because Rule 25(d) specifies when proof of service is required for filed papers. Under Rule 25(d), proof of service is not required when a party files papers using the court's electronic filing system.

C. Rule 26(c)

Rule 26(c) affords a person who has been served with a paper three additional days to act beyond the otherwise applicable time limit, unless the paper "was delivered on the date of service stated in the proof of service." The rule further provides that a paper served electronically is to be treated as being delivered on the date of service stated in the proof of service. The references to proof of service are problematic because, under the proposed revision to Rule 25(d), proof of service is not required when a party files papers using the court's electronic filing system. As described in the attached minutes, the Advisory Committee considered several approaches for amending Rule 26(c) to address this issue. The Advisory Committee decided that the best approach was to rewrite the rule to say expressly that three days are added unless the paper is served electronically or unless the paper is delivered on the date stated in the proof of service. The Advisory Committee proposes the following amendment:

Rule 26. Computing and Extending Time

*** * * * ***

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served with a paper, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~unless the paper is delivered on the date of service stated in the~~

~~proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service~~.

The Advisory Committee did not approve a Committee Note for the amendment proposed above. An appropriate note, however, might explain the purpose and function of the proposed amendment as follows: "The amendment in subdivision (c) simplifies the expression of the current rules for when three days are added. In addition, the amendment revises the subdivision so that it can apply even when there is no proof of service."

D. Rule 32(f)

Rule 32 addresses the forms of briefs, appendices, and other papers. The Advisory Committee first determined that the phrase "the proof of service" in Rule 32(f) should be changed to "a proof of service" because there will not always be a proof of service. Further consideration led the Committee to conclude that two other uses of the word "the" should also be changed to "a" for the same reason. The Advisory Committee proposes the following amendments:

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ **a** cover page;
- a corporate disclosure statement;[2]
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ **a** signature block;

---

[2] The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

• ~~the~~ **a** proof of service; and

• any item specifically excluded by these rules or by local rule.

The Advisory Committee did not approve a Committee Note for the amendment proposed above. An appropriate Committee Note might explain: "The amendment to subdivision (f) does not change the substance of the current rule. It changes the references to 'the cover page,' 'the signature block,' and 'the proof of service' to 'a cover page,' 'a signature block,' and 'a proof of service' because a paper will not always include these three items."

E. Rule 39(d)

Rule 39 addresses costs. Subdivision (d) requires a party who wants costs to be taxed to file a bill of costs "with proof of service." Addressing proof of service in this subdivision is unnecessary because Rule 25(d) specifies when a proof of service is required and does not require a proof of service when a party uses the court's electronic filing system. A solution to this problem would be to delete the words "with proof of service." The Advisory Committee proposes the following amendment:

Rule 39. Costs

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk~~, with proof of service,~~ an itemized and verified bill of costs.

Committee Note

In subdivisions (d)(1) the words "with proof of service" are deleted because Rule 25(d) specifies when proof of service is required for filed papers.

III. Information Items: Other Matters Discussed at the November 8, 2017 Meeting

The Advisory Committee discussed four additional items at its November 8, 2017 meeting. The Advisory Committee describes these items here for the information of the Standing Committee but does not propose any amendments at this time. The enclosed minutes summarize other matters considered at the Advisory Committee's meeting.

A. Item No. 09-AP-B: Revisiting Proposals to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs Without Leave of the Court or Consent of the Parties

Rule 29(a) allows the federal and state governments to file amicus briefs without leave of the court or consent of the parties. In 2009, the Committee received proposals to amend Rule 29(a) to extend this privilege to federally recognized Indian tribes and to cities. The Committee discussed this matter at several meetings and solicited input from the Courts of Appeals. At its April 2012 meeting, however, the Advisory Committee decided to postpone action on the item. Judge Jeffrey Sutton, who was then the chair of the Advisory Committee, wrote a letter to the chief judges of each of the Courts of Appeals explaining that the Committee would revisit the item in five years. As five years have now passed, the Advisory Committee resumed its consideration of the item at its November 2017 meeting. Following a discussion recounted in the attached draft minutes, the Committee decided to remove the item from its Agenda. The sense of the Committee was that the proposed amendments likely would have little practical effect.

B. Item No. 16-AP-D: Rule 3(c)(1)(B) and the Merger Rule

The Advisory Committee received a proposal to revise Appellate Rule 3(c)(1)(B) to eliminate a potential trap for the unwary. Rule 3(c)(1)(B) requires a notice of appeal to "designate the judgment, order, or part thereof being appealed." In the Eighth Circuit, a notice of appeal that designates an order in addition to the final judgment excludes by implication any other order on which the final judgment rests. The proposal suggests that such a forfeiture is not justified by the policies underlying Rule 3(c)(1)(B). The Advisory Committee has formed a subcommittee to study this issue.

C. Suggestion Regarding Possible Amendments to Rules 10, 11, and 12 to Address Electronic Records

The Advisory Committee received a suggestion from within the Department of Justice that Appellate Rules 10, 11, and 12 may require amendment in light of increased electronic filing. These Rules concern the content, forwarding, and filing of the record on appeals from a district court in non-bankruptcy cases. At its November meeting, the Advisory Committee considered proposing amendments to these Rules so that they would not require the District Court to "send" the record to the Court of Appeals. In the future, the District Court might simply make the record available on its computer system without actually "sending" it. But the sense of the Advisory Committee was that no changes were necessary at this time and that the Committee should wait for further developments before proposing changes to these rules.

D. Discussion of a Circuit Split on Whether Attorney's Fees Are "Costs On Appeal" Under Rule 7

Appellate Rule 7 provides: "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." A circuit split has arisen on the question of whether attorney's fees may be included in the amount of a bond. The Advisory Committee has formed a subcommittee to investigate this issue. The subcommittee intends to consult with the Civil Rules Advisory Committee because proposed changes may affect practice in the District Courts.

Enclosures:

1. Draft Minutes from the November 8, 2017 Meeting of the Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee

TAB 7B

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules
Table of Agenda Items —December 2017

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17

FRAP Item	Proposal	Source	Current Status
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

FRAP Item	Proposal	Source	Current Status
13-AP-H	Consider possible amendments to FRAP 41 in light of *Bell v. Thompson*, 545 U.S. 794 (2005), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
15-AP-C	Consider amendment to Rule 31(a)(1)’s deadline for reply briefs	Appellate Rules Committee	Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17

FRAP Item	Proposal	Source	Current Status
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee Draft approved for submission to Standing Committee 05/17 Draft approved for publication by Standing Committee 06/17 Draft published for public comment 08/17
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments Revised draft approved by the Standing Committee 06/17 Draft approved by the Judicial Conference and submitted to the Supreme Court 09/17
16-AP-D	Amend Rule 3(c)(1)(B) to address the Merger Rule	Neal Katyal, Esq. Sean Marotta, Esq.	Discussed and retained on agenda 11/17
17-AP-F	Amend Rule 29(a)(2) to address blanket letters of consent	Prof. Stephen E. Sachs	Awaiting initial discussion

TAB 7C

THIS PAGE INTENTIONALLY BLANK

DRAFT Minutes of the Fall 2017 Meeting of the
Advisory Committee on the Appellate Rules

November 8, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on the pellate s, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, vember 8, 2017, at 9:00 a.m., at the Thurgood Marshall Federal Judicial B lding in Washington, C.

In addition to Judge Chagares, the following memb of the Advisory Committee on th Appellate Rules were present: Judge Jay S. Bybee, Just Judith L. Fren Judge Brett M. Kavanaugh, Christopher Landau, Esq., Judge Stephen J h Murphy , Professor Stephen E. Sachs, and Danielle Spinelli, Esq. Solicitor General Noel F is was represented by Douglas Letter, Esq. and H. Thomas Byron III, Esq.

Also present were: Judge David Ca ll Chair, Standing mmittee on the Rules of Practice and Procedure; Professor Daniel Coquill eporter, Stand g Committee on the Rules of Practice and Procedure; Ms. Shelly Cox, Admin Specialist, Rules Committee Support Office of the Administrative Office he U Courts (RC O); Ms. Lauren Gailey, former Rules Law Clerk R Judge Frank Hull, Member, Standing Committee on the Rules of Practice and P cedure d Liaison Me ber, Advisory Committee on the Appellate Rules; Bridget M. H aly, Esq., At ney Advisor, CSO; Marie Leary, Esq., Research Associate, Advisory Comm ee on the App te Rules; Profe or Gregory E. Maggs, Reporter, Advisory Committee on Appellate R Pamela P pper, Member, Advisory Committee on the Bankruptcy Rules d Liais Member, Adv y Committee on the Appellate Rules; Patrick Tighe, Rules Law Cl CSO; Marcia M. Waldron, Clerk of Court Representative, Advisory Com the Appel Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing mmittee on Rules of tice and Procedure and Rules Committee Officer.

Professor Ca rine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedu participated by telephone.

I. roduction

J agares opened the meeting and greeted everyone. Judge Chagares welcomed Judge Jay Bybee, Chris Landau, Esq., and Danielle Spinell, Esq., as new members of the Committee, and Judge Frank Hull, as a new liaison member from the Standing Committee. He noted that Clerk of Court Marcy Waldron will be completing her service for the Advisory Committee, and thanked her for her contributions.

Judge Chagares noted that the President had appointed or nominated several members of the Committee to judicial offices. Former Advisory Committee Chair Neil Gorsuch was elevated to the Supreme Court, former Committee member Kevin Newsom was appointed to the U.S. Court of Appeals for the Eighth Circuit, former Committee member Amy Coney Ba tt is a nominee for a judgeship on the U.S. Court of Appeals for the Seventh Circuit, fo r Committee member Alison Eid is a nominee for a judgeship on the U.S. Court of Appeal r the Tenth Circuit, former Committee member Gregory Katsas is a nominee for a jud hip the U.S. Court of Appeals for the D.C. Circuit, and Committee reporter Gregory aggs is a minee for a judgeship on the U.S. Court of Appeals for the Armed Forces.

II. Approval of the Minutes

An error in the spelling of Acting Solicitor Gen l Jeffrey B. W name in the draft minutes of the May 2017 meeting of the Advisory Comm ee was no and corrected. A motion to approve the draft minutes was then made, second and proved.

III. Report on June 2017 Meeting of th Standing Committee

The reporter presented a report of action by the Standin Committee at its June 2017 meeting. As described in the Advisor Committee g Book at 31, the Advisory Committee recommended that the Standing C mmitt (1) send pr posed amendments to Appellate Rules 8, 11, 25 8 1, 29, 31, 39 1, and Forms 4 and 7 to the Judicial Conference of the Uni States (2) publish oposed amendments to Appellate Rules 3, 13, 26.1, 28, and 32 fo ublic comme The Standin Committee approved these recommendations at its June 2017 eting with the nor changes n d in the Agenda Book.

IV. Discussion It

A 09-AP-B: P osal to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicu iefs with Leave of Court or Consent of Parties

Judge Chaga presented discussion Item 09-AP-B, which concerns a proposal to allow Indian tribes and citie o file amicus briefs under Rule 29 without leave of the court or the sent of the parties *ee* Agenda Book at 131. Judge Chagares noted that the Committee had las nsidered the i ue in 2012. At that time, the Committee took no action and recommended revisi the iss n 2017. Judge Chagares suggested that the question for the Committee now was whe t matter should be pursued or removed from the Committee's agenda.

Mr. Letter recounted some of the history of the matter. He said that some judges were concerned that Indian tribes should be accorded the same dignity as other sovereigns under Rule

29. He informed the Committee that the Solicitor General saw no need for amending Rule 29 but would not oppose the amendment if the judges supported it.

An attorney member said that she wondered why Indian tribes were not treat the same as states and the United States. If the policy is to allow sovereigns to file, then it uld be consistent to add Indian Tribes. Cities, however, would not need to be includ because they are subdivisions of states.

Mr. Coquillette recounted that Judge Sutton had spent a lot of time checking w judges and Indian tribes about the matter and had concluded that this wa more of an academic i e than a practical one. Mr. Coquillette recalled that research co not locate any instance in h an Indian tribe was denied leave to file an amicus brief. B Mr. Coquillette said that allowing cities to file amicus briefs without leave of the court or ty consent mi cause problems.

A judge member observed that Indian tribes, unlike t s s and the United States, typically hire law firms to represent them. Accordingly, there be more recusal issues arising out of amicus briefs filed by Indian tribes han amicus briefs filed tates or the United States.

Mr. Letter noted that foreign natio are sove nd are not pe itted to file amicus briefs without leave of the court or consent the parties noted that the United States generally does not oppose amicus briefs.

An attorney m ber ask or clarificati on the rules on when counsel for an amicus would require recu Judge Cha es and Judg all said that their Courts of Appeals generally treat a cus briefs the s me as other brie The attorney member also asked what percentage of m ons to file a i b i f are denied. The clerk representative said that they were seldom deni nless y caused a re or were not in conformity with the rules. The attorney member also how the word "state" in Rule 29 is defined. Mr. Letter said that Rule 1(b) he term "st to include territories, Puerto Rico, and D.C.

Judge Cam ell discus the recently proposed amendments to Rule 29. The amendments would ow a court to strike or deny leave to file an amicus brief if the brief would cause a recusal. But se amendments do not apply to amicus briefs filed by states or the United tes. They therefor would also not apply to Indian tribes if the rule were amended to treat In tribes like th ates and the United States.

A d member moved that the Committee not act on the proposal given the general tenor of the omments. The motion was seconded and then passed. Judge Chagares said that the matter could be brought up again in the future if the Committee desired.

B. Potential Amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) Regarding Proof of Service

The reporter introduced a new matter concerning potential amendments to R s 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) regarding proof of service. *See* Agend ook at 131. He explained that proposed changes to Rule 25(d) will eliminate the requirem of a proof of service when a paper is presented for filing other than through the court's tr filing system. Accordingly, slight changes to other rules that address proof of service ght be n sary.

The Committee first discussed the proposed amendments Rule 25(d). The cler representative was concerned that the proposed amendment m ht not address situations in h some parties were served electronically and some parties w e served non-electronically. The Committee noted the potential issue. But the sense of t Committee wa take no action at this time because the proposed amendment to Rule 25(d) tches the oposed amendment to Civil Rule 5(d)(1)(B), and both proposals are currently bef he preme Court. The Committee may wish to revisit the issue if actual problems aris the future.

The Committee considered and a ro he proposed chang o Rule 5(a)(1). *See* Agenda Book at 180-81.

The Committee considered the propo chan to Rule 2 *see* Agenda Book at 181-82, and approved the changes htly modified style consultants. The approved version of the proposal reads as f ows:

Rule 21 rits of Manda us and Prohib on, and Other Extraordinary Writs

(a) Mand u r Prohibition to a Court: Petition, Filing, Service, and ting.

(party pe ning for a writ of mandamus or prohibition directed to a court mu file ~~a~~ the petition with the circuit clerk ~~with proof of service on~~ and serve it on parties to the proceeding in the trial court.

* * * * *

(c) O r Extraordinary Writs. An application for an extraordinary writ oth an one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service on~~ and serving it on the respondents.

Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

Committee Note

The words "with proof of service" in subdivision (a)(1) and (c) are del d because Rule 25(d) specifies when proof of service is required for fil pers. Under Rule 25(d), proof of service is not required when a party f paper ing the court's electronic filing system.

The Committee next addressed the proposed change Rule 26(c). *See* Agenda Book 183-84. The reporter noted that the style consultants had commended two versions of more extensive revisions for Rule 26(c), which had previous een circulat y email to the Committee members.[1] Discussion of the issue revealed d tisfact with both the original proposal and the style consultants' proposed revisions becaus were too complicated. An attorney member said that lawyers look at this rule whenever they le a brief, and the rule must be easier to understand.

---

[1] The style c sultants' fir proposed re on of Rule 26(c) would read as follows:

When rty may or mu act within a spec period after being served, 3 days are adde er the pe expire under Rule 26(a). But three days are no ded he paper:

(1) is d red on the date of service stated in the service;

(2) is serv lectronically without using the court's electronic-filing system which e it is treated as delivered on the date of service stated in the service

(3) is rved electronically by using the court's electronic-filing system—in which event i treated as delivered on the date of filing.

T tyle consultants ternative revision of Rule 26(c) would read as follows:

s Rul 6(c) applies only when a paper is not served electronically. When a pa ay or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service.

The Committee then took a brief recess. During the recess, an alternative was drafted, printed, and circulated to the Committee. The Committee approved this alternative proposal subject to minor adjustments. As approved, the proposal reads as follows:

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served with a paper, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~unless the paper is delivered on the date stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date stated in the proof of service~~.

The Committee did not approve a revised Committee Note during the meeting.

The Committee considered an amendment to Rule 32(f). *See* Agenda Book at 184-85. The Committee first determined that the phrase "the proof of service" should be changed to "a proof of service" because there will not always be a proof of service. Further consideration led the Committee to conclude that two other uses of the word "the" should also be changed to "a" for the same reason. As approved by the Committee, the proposed change to Rule 32 reads as follows:

Rule 32. Form of Briefs, Appendices, and Other Papers

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ **a** cover page;
- a corporate disclosure statement;[2]
- a table of contents;

[2] The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ **a** signature block;
- ~~the~~ **a** proof of service; and
- any item specifically excluded by these rules or by local rule.

The Committee discussed and approved the propose hange to Rule 39. *See* Agenda Book at 185.

After the Committee considered and proposed all e cha s above, Judge Campbell observed that they might be properly seen as technical correc the Rules to conform to the amendments to Rule 25(d). As a result, he did not see the need ublish them for additional comments. The sense of the Committee recommend this app ch to the Standing Committee.

C. Item No. 16-AP-D: Appellate Rule c)(1)(B) nd the er Rule

Judge Chagares p ted a new pr sal, prepared by former Committee member Neal Katyal, regardi Rule 3(c)(B) and the M ger Rule. *See* Agenda Book at 189.

Mr. By expressed cau on in taking actio o address the interpretation of Rule 3(c)(1)(B). He w oncerne at th the Eighth Circuit, upon closer examination, might not be so clea di gent from the decisions of other Courts of Appeals. He explained that the is often some ertainty as to whether a particular order is a final order. He also said th here w her cases ere it would be appropriate to inquire into the party's intent. Judge hagares agreed d said tha vising the rule would be a really complex matter.

An attorney m mber said that the issue is often very fact-specific. He explained: "If you y I am appealing or A and order B, then it is clear that you are not appealing order C." An a mic member sa that it should be clearer what is a final order. Mr. Letter said that lawyers often ke a belt-a suspenders approach, and say that they are appealing the final judgment and specific ders

Following the discussion, Judge Chagares asked for the views of the Committee. An academic member proposed further study. Mr. Letter suggested that the main point should be to

make the rules clearer. The Chair formed a subcommittee to consider the matter further. The members of the subcommittee are Mr. Letter, Mr. Byron, and Mr. Landau.

D. New Discussion Item Regarding Possible Amendments to Rules 10, 11, a d 12

Mr. Byron led the discussion of a new suggestion for amending Rules 11, and 12 to address electronic records. *See* Agenda Book at 197. He explained that th R s were mostly directed to clerks of court. Accordingly, the initial question is whether ctronic r rds currently present a problem for the clerks.

The clerk representative informed the Committee that had spoken to clerks of co from other Courts of Appeals. The other clerks did not ha any objection to changing the wor "send" to "make available" in Rules 10, 11, and 12 as p posed. But sh rther noted that various Courts of Appeals follow different approaches o hether th strict Courts or the Courts of Appeals do relevant tasks with respect to records e s gested that, in the future, records might be kept in a central repository and might not be mitted from District Courts to Courts of Appeals. Accordingly, by the ti e the proposed amend t works it way through the system, it might be obsolete. She also n d here are still many er records, especially in state habeas corpus cases.

Judge Chagares asked whether there a risk f upsetting hat is now a stable system. A liaison member was con d that if the Di i Court did not send the record, but merely made it available, the ord mig be incomple Judge Chagares said that it was not clear that a problem needs to fixed and th any amendm t might soon be obsolete.

The sen of the comm take the matter off the agenda.

E. New Discuss m Regarding a Circuit Split on Whether Attorney's Fees Are on Appe Under Rule 7

Judge Cha es presen matter concerning a circuit split on whether attorney's fees are "costs on appeal nder Rule 7. *See* Agenda Book at 223. He thanked Ms. Gailey, the former Rules clerk, fo er research into the matter. He noted that the Committee previously had sidered the issue, d thanked Ms. Struve for finding memoranda on the subject that the Co ittee previou considered. Summarizing the research, he explained that the U.S. Court of App ls for th hird Circuit appears to be an outlier, but has taken a position only in a non-preceden nion.

Ms. Struve said that the question was a perennial issue. An attorney member asked why the question was addressed in the Appellate Rules instead of the Civil Rules. He suggested that

Civil Rule 62 should address the question. A judge member agreed with this point. The clerk representative said that few cases involve bonds.

An academic member said that it was unclear to him how the issue comes up The Rule refers to costs, not fees, and usually the law distinguishes between costs and fees e said that maybe the solution would be to remove the word "costs" and specify more cle y what should and what should not be covered.

Judge Campbell said that the rule formerly provided for an automatic $250 bo He said that there now may be strategic use of the rule to require a large b d to prevent the othe rty from appealing. He also said that many of the cases citing th les deal with class action objectors. He suggested asking Mr. Edward Cooper, the r rter for the Civil Rules Advisory Committee, for his opinion.

The sense of the Committee was to keep this matter the genda and ask the Civil Rules Committee for its opinion.

V. New Matters

Judge Chagares led a discussion of p sible new hat the Committee might want to take up. He said that he recently had spok to the merican Ac demy of Appellate Lawyers (AAAL) and that they wer erned with thr tters. First, the AAAL wants to clarify when a cross-appeal is neces y. The AL believe at cross-appeals often are filed just to avoid the risk that one mi be needed. econd, the A L was concerned about judges considering facts that are no the record. Th AAAL though at the court should provide some sort of notice to the pa s before doi i j dge member pointed out that there was the possibility of seeking reheari Third e AAAL was erned about courts' sua sponte consideration of legal issues. The AA inks parties should receive notice and opportunity to be heard. Judge Cha d that the A L had not yet submitted any proposals to the Committee.

Judge Cha es next su sted that the Committee might review the rules regarding the appendix. In his exp ence, much of what is in the appendix is unnecessary. He suggested that it might be best to req e the appendix to be filed seven days after the last brief. An attorney mber said that the e as written is often not followed. He believed that it is better to have a de d appendix th only contains what is cited in the brief (including some context). But Mr. Letter d that a ential problem with a deferred appendix is that the parties then have to file a revised b t cites the appendix. The clerk representative agreed that this is a problem, especially w en trying to docket briefs. She said that in the future, briefs will contain hyperlinks to the actual record, and appendices therefore might be unnecessary.

An attorney member said that every Court of Appeals now has its own rules on appendices. Mr. Byron predicted that most Courts of Appeals would be unlikely to want to change their local rules. The attorney member responded that it might still be better to have an improved default rule. The Chair formed a subcommittee to study the issue. The m bers of the subcommittee are Mr. Letter, Mr. Byron, Ms. Spinelli, and Judge Bybee.

Judge Chagares asked whether members of the Committee had ide o proving the efficiency of appellate litigation. An attorney member raised the issue how mu iscretion clerks have under Rule 42(b) in not allowing parties to dismiss a case after they have led. A liaison member said that a request to dismiss is often "subject to lement agreements b g executed." Ms. Struve said that there are very few cases that y leave to dismiss. Mr. Le said that sometimes judges say something like "the govern nt should not be settling on these terms." An academic member said that there are some uations in whi ettlements must be reviewed and others when they should not be reviewed. Byron a d whether it is necessary to have both parties sign the request for dismissal. A judge mb sked whether the matter should be addressed in the Civil Rules. The chair formed a su mmittee to study the issue. The members of the subcommittee are Mr. Landau, Judge Kavanaugh, d Mr. Letter.

VI. Information About the Activities of e Othe mittees

Judge Campbell reported that the Civ Rules visory Committee is looking at multi-district litigation, int tory appeals, r arty funding of litigation, and pilot programs aimed at imp ving di very and ma g litigation quicker.

Judge C pbell reported t the Evidence les Advisory Committee is looking at issues under R 404(b), 702 d He noted hat one recommendation is to refine the analysis with resp o spe c kinds of evi e like fingerprints, bite marks, etc.

Campbell rted that the Criminal Rules Advisory Committee is looking for b ter ways to p ect coope rs in criminal cases. He said that there were hundreds of instances in which operators e threatened or killed based on information included in court records.

Judge Campb also observed that the House has passed bills that could affect appeals. HR 5 could mak ery class certification appealable as of right and would limit the kinds of classe at could certified. The other legislation would address current rules requiring complete ty, which are often manipulated. Another bill would alter Rule 11 standards.

VII. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and meeting. He also thanked Ms. Waldron for all of her contributions to the Committee. He announced that the next meeting will be held on April 6, 2018 in Philadelphia.

The Committee adjourned at 12:15 pm.

Advisory Committee on Procedures Meeting December 2017

Judge Kavanaugh opened the meeting by endorsing the view that there be some certainty in the allocation of rebuttal time during oral arguments. Currently, it is often the case that the main arguments cut into the rebuttal time reserved by the arguing attorney. Rebuttal time then depends on the grace of the presiding judge.

Federal Public Defender, A.J. Kramer, who was unable to attend, sent word that he would like the court to consider revealing the identity of the oral argument panels earlier than the current 30 days before the argument date. No reason or time frame was suggested.

The group discussed briefing in multi-party - usually regulatory agency - cases. Mandatory joint briefs are very challenging for practitioners and in the view of some of the attendees, the quality of briefing sometimes suffers because parties must make compromises on the content of the brief that affects the clarity of the briefing. One suggestion was that the Court consider allowing separate briefs for petitioners but set an overall word limit for the parties to allocate by negotiation and agreement.

A government attorney asked that the Court remember to give parity for the answering brief in multi-party cases and noted that the government ordinarily favors mandatory joint briefing as, in the government's view, it forces petitioners to refine their challenges and arguments.

The Clerk noted that the Court tends to look more favorably on parties who present detailed briefing format proposals with specific explanations and justification for separate briefs and additional word allocations.

Some members suggested that something more be added to the Handbook of Internal Practices and Procedures to assist in preparing briefing format proposals.

[Note: This may be a good idea, the Handbook gives very general guidance in this area. I note, however, the boilerplate in the order we use to solicit formats gives more specific instructions. The boiler plate in the order says:

"The parties are strongly urged to submit a joint proposal and are reminded that the court looks with extreme disfavor on repetitious submissions and will, where appropriate, require a joint brief of aligned parties with total words not to exceed the standard allotment for a single brief. Whether the parties are aligned or have disparate interests, they must provide detailed justifications for any request to file separate briefs or to exceed in the aggregate the standard word allotment. Requests to exceed the standard word allotment must specify the word allotment necessary for each issue."]

One member who had served as court-appointed amicus raised the question of waiver and forfeiture in the context of briefing an appeal where the Special Panel had granted summary affirmance in part and sent the rest of the case on for full briefing and argument. She noted that the partial summary affirmance could complicate the briefing by the amicus and consideration by the merits panel.

A government attorney noted their continuing concerns about allowing pro se briefs in criminal appeals where appellants had appointed counsel.

A number of members discussed scheduling of cases for oral argument. In some circuits the Clerk's Office gives notice of cases tentatively scheduled for argument during a certain time period and allow parties give notice of unavailability for that time period. In this Circuit, the Court encourages counsel to notify the Clerk's Office of their unavailabilties when a briefing schedule is issued.

While some attendees found this Court's practice sufficient, others found it burdensome.

[Note: Advance notice of tentative scheduling could be problematic in this Circuit. I think scheduling "Court weeks" could make this easier in other circuits - Court weeks are set far in advance and counsel can plan accordingly even before "tentative notice." This court sits throughout the month nine months of the year. Secondly, this Court's smaller caseload makes a difference. When we recently put together the February sitting calendar, we had only four eligible cases that were not assigned. Since then we've had to use two of those cases to substitute for postponed cases. It could be difficult to fill the calendar if we allowed counsel to opt out of a tentative calendar at will. Finally, sending out tentative scheduling notices until the argument calendar was filled each month would probably increase the workload of our small Clerk's Office staff.]

Their was some discussion concerning preparation of, and citation to, appendices and joint appendices and filing in paper as opposed to electronic versions. Judge Kavanaugh noted the Judicial Conference Appellate Rules Committee is considering issues relating to appendices.

A member asked whether the court could reconsider its prohibition on reading and reviewing notes in the Courtroom.

[Note: Pursuant to your conversation with the Chief Judge, this prohibition has been lifted, staff have been briefed, and the USMS have been notified so that the CSOs can be briefed. Staff will remind the CSOs going forward.]

Some attendees asked that the Court give longer advance notice when a case scheduled for argument is to be removed from the calendar and considered on the brief pursuant to Rule 34(j).

A member urged the Court to routinely vacate agency rules or regulation when the Court rules against the agency. Judge Kavanaugh noted that an across the board rule would be difficult to craft because such dispositions were often fact specific.

The meeting ended with a discussion of amici briefs. One member suggested the Court might be too lenient in allowing amici briefs generally and another suggested the court might be more lenient in allowing amici to file in response to or in support of petitions for rehearing en banc.

Mark Langer, December 29, 2017

DRAFT Minutes of the Fall 2017 Meeting of the
Advisory Committee on the Appellate Rules

November 8, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on the Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Thursday, November 8, 2017, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Jay S. Bybee, Justice Judith L. French, Judge Brett M. Kavanaugh, Christopher Landau, Esq., Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, and Danielle Spinelli, Esq. Solicitor General Noel Francisco was represented by Douglas Letter, Esq. and H. Thomas Byron III, Esq.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on the Rules of Practice and Procedure; Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, former Rules Law Clerk, RCSO; Judge Frank Mays Hull, Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Marie Leary, Esq., Research Associate, Advisory Committee on the Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Patrick Tighe, Rules Law Clerk, RCSO; Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Professor Catherine T. Struve, Associate Reporter, Standing Committee on the Rules of Practice and Procedure, participated by telephone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. Judge Chagares welcomed Judge Jay Bybee, Chris Landau, Esq., and Danielle Spinell, Esq., as new members of the Committee, and Judge Frank Hull, as a new liaison member from the Standing Committee. He noted that Clerk of Court Marcy Waldron will be completing her service for the Advisory Committee, and thanked her for her contributions.

Judge Chagares noted that the President had appointed or nominated several members of the Committee to judicial offices. Former Advisory Committee Chair Neil Gorsuch was elevated to the Supreme Court, former Committee member Kevin Newsom was appointed to the U.S. Court of Appeals for the Eighth Circuit, former Committee member Amy Coney Barrett is a nominee for a judgeship on the U.S. Court of Appeals for the Seventh Circuit, former Committee member Alison Eid is a nominee for a judgeship on the U.S. Court of Appeals for the Tenth Circuit, former Committee member Gregory Katsas is a nominee for a judgeship on the U.S. Court of Appeals for the D.C. Circuit, and Committee reporter Gregory Maggs is a nominee for a judgeship on the U.S. Court of Appeals for the Armed Forces.

II. Approval of the Minutes

An error in the spelling of Acting Solicitor General Jeffrey B. Wall's name in the draft minutes of the May 2017 meeting of the Advisory Committee was noted and corrected. A motion to approve the draft minutes was then made, seconded, and approved.

III. Report on June 2017 Meeting of the Standing Committee

The reporter presented a report of the action taken by the Standing Committee at its June 2017 meeting. As described in the Advisory Committee Agenda Book at 31, the Advisory Committee recommended that the Standing Committee (1) send proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7 to the Judicial Conference of the United States and (2) publish proposed amendments to Appellate Rules 3, 13, 26.1, 28, and 32 for public comment. The Standing Committee approved these recommendations at its June 2017 meeting with the minor changes noted in the Agenda Book.

IV. Discussion Items

A. Item 09-AP-B: Proposal to Amend Rule 29 to Allow Indian Tribes and Cities to File Amicus Briefs without Leave of Court or Consent of Parties

Judge Chagares presented discussion Item 09-AP-B, which concerns a proposal to allow Indian tribes and cities to file amicus briefs under Rule 29 without leave of the court or the consent of the parties. *See* Agenda Book at 131. Judge Chagares noted that the Committee had last considered the issue in 2012. At that time, the Committee took no action and recommended revisiting the issue in 2017. Judge Chagares suggested that the question for the Committee now was whether the matter should be pursued or removed from the Committee's agenda.

Mr. Letter recounted some of the history of the matter. He said that some judges thought that Indian tribes should be accorded the same dignity as other sovereigns under Rule 29. He

informed the Committee that the Solicitor General saw no need for amending Rule 29 but would not oppose the amendment if the judges supported it.

An attorney member said that she wondered why Indian tribes were not treated the same as states and the United States. If the policy is to allow sovereigns to file, then it would be consistent to add Indian Tribes. Cities, however, would not need to be included because they are subdivisions of states.

Mr. Coquillette recounted that Judge Sutton had spent a lot of time checking with judges and Indian tribes about the matter and had concluded that this was more of an academic issue than a practical one. Mr. Coquillette recalled that research could not locate any instance in which an Indian tribe was denied leave to file an amicus brief. But Mr. Coquillette said that allowing cities to file amicus briefs without leave of the court or party consent might cause problems.

A judge member observed that Indian tribes, unlike most states and the United States, typically hire law firms to represent them. Accordingly, there may be more recusal issues arising out of amicus briefs filed by Indian tribes than amicus briefs filed by states or the United States.

Mr. Letter noted that foreign nations are sovereign and are not permitted to file amicus briefs without leave of the court or consent of the parties. He also noted that the United States generally does not oppose amicus briefs.

An attorney member asked for clarification on the rules on when counsel for an amicus would require recusal. Judge Chagares and Judge Hall said that their Courts of Appeals generally treat amicus briefs the same as other briefs. The attorney member also asked what percentage of motions to file an amicus brief are denied. The clerk representative said that they were seldom denied unless they caused a recusal or were not in conformity with the rules. The attorney member also asked how the word "state" in Rule 29 is defined. Mr. Letter said that Rule 1(b) defines the term "state" to include territories, Puerto Rico, and D.C.

Judge Campbell discussed the recently proposed amendments to Rule 29. The amendments would allow a court to strike or deny leave to file an amicus brief if the brief would cause a recusal. But these amendments do not apply to amicus briefs filed by states or the United States. They therefore would also not apply to Indian tribes if the rule were amended to treat Indian tribes like the states and the United States.

A judge member moved that the Committee not act on the proposal given the general tenor of the comments. The motion was seconded and then passed. Judge Chagares said that the matter could be brought up again in the future if the Committee desired.

B. Potential Amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) Regarding Proof of Service

The reporter introduced a new matter concerning potential amendments to Rules 5(a)(1), 21(a)(1) and (c), 26(c), 32(f), and 39(d)(1) regarding proof of service. *See* Agenda Book at 131. He explained that proposed changes to Rule 25(d) will eliminate the requirement of a proof of service when a paper is presented for filing through the court's electronic filing system. Accordingly, slight changes to other rules that address proof of service might be necessary.

The Committee first discussed the proposed amendments to Rule 25(d). The clerk representative was concerned that the proposed amendment might not address situations in which some parties were served electronically and some parties were served non-electronically. The Committee noted the potential issue. But the sense of the Committee was to take no action at this time because the proposed amendment to Rule 25(d) matches the proposed amendment to Civil Rule 5(d)(1)(B), and both proposals are currently before the Supreme Court. The Committee may wish to revisit the issue if actual problems arise in the future.

The Committee considered and approved the proposed changes to Rule 5(a)(1). *See* Agenda Book at 180-81.

The Committee considered the proposed changes to Rule 21, *see* Agenda Book at 181-82, and approved the changes as slightly modified by the style consultants. The approved version of the proposal reads as follows:

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

(a) Mandamus or Prohibition to a Court: Petition, Filing, Service, and Docketing.

(1) A party petitioning for a writ of mandamus or prohibition directed to a court must file ~~a~~ the petition with the circuit clerk ~~with proof of service on~~ and serve it on all parties to the proceeding in the trial court.

* * * * *

(c) Other Extraordinary Writs. An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk ~~with proof of service on~~ and serving it on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b).

Committee Note

The words "with proof of service" in subdivision (a)(1) and (c) are deleted because Rule 25(d) specifies when proof of service is required for filed papers. Under Rule 25(d), proof of service is not required when a party files papers using the court's electronic filing system.

The Committee next addressed the proposed changes to Rule 26(c). *See* Agenda Book at 183-84. The reporter noted that the style consultants had recommended two versions of more extensive revisions for Rule 26(c), which had previously been circulated by email to the Committee members.[1] Discussion of the issue revealed dissatisfaction with both the original proposal and the style consultants' proposed revisions because they were too complicated. An attorney member said that lawyers look at this rule whenever they file a brief, and the rule must be easier to understand.

---

[1] The style consultants' first proposed revision of Rule 26(c) would read as follows:

> When a party may or must act within a specific period after being served, 3 days are added after the period would otherwise expire under Rule 26(a). But three days are not added if the paper:
>
> (1) is delivered on the date of service stated in the service;
>
> (2) is served electronically without using the court's electronic-filing system in which event it is treated as delivered on the date of service stated in the service; or
>
> (3) is served electronically by using the court's electronic-filing system in which event it is treated as delivered on the date of filing.

The style consultants' alternative revision of Rule 26(c) would read as follows:

> This Rule 26(c) applies only when a paper is not served electronically. When a party may or must act within a specified time after being served, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service.

The Committee then took a brief recess. During the recess, an alternative was drafted, printed, and circulated to the Committee. The Committee approved this alternative proposal subject to minor adjustments. As approved, the proposal reads as follows:

Rule 26. Computing and Extending Time

* * * * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served with a paper, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a) ~~unless the paper is delivered on the date of service stated in the proof of service. For purposes of this Rule 26(c), a paper that is served electronically is treated as delivered on the date of service stated in the proof of service~~.

The Committee did not approve a revised Committee Note during the meeting.

The Committee considered an amendment to Rule 32(f). *See* Agenda Book at 184-85. The Committee first determined that the phrase "the proof of service" should be changed to "a proof of service" because there will not always be a proof of service. Further consideration led the Committee to conclude that two other uses of the word "the" should also be changed to "a" for the same reason. As approved by the Committee, the proposed change to Rule 32 reads as follows:

Rule 32. Form of Briefs, Appendices, and Other Papers

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- ~~the~~ **a** cover page;
- a corporate disclosure statement;[2]
- a table of contents;
- a table of citations;

---

[2] The Standing Committee has published for public comment a proposal that will change "corporate disclosure statement" to "disclosure statement."

- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- ~~the~~ **a** signature block;
- ~~the~~ **a** proof of service; and
- any item specifically excluded by these rules or by local rule.

The Committee discussed and approved the proposed change to Rule 39. *See* Agenda Book at 185.

After the Committee considered and proposed all of the changes above, Judge Campbell observed that they might be properly seen as technical correction to the Rules to conform to the amendments to Rule 25(d). As a result, he did not see the need to publish them for additional comments. The sense of the Committee was to recommend this approach to the Standing Committee.

C. Item No. 16-AP-D: Appellate Rule 3(c)(1)(B) and the Merger Rule

Judge Chagares next presented a new proposal, prepared by former Committee member Neal Katyal, regarding Rule 3(c)(1)(B) and the Merger Rule. *See* Agenda Book at 189.

Mr. Byron expressed caution in taking action to address the interpretation of Rule 3(c)(1)(B). He was concerned that the case law in the Eighth Circuit, upon closer examination, might not be so clearly divergent from the decisions of other Courts of Appeals. He explained that there is often some uncertainty as to whether a particular order is a final order. He also said that there were other cases where it would be appropriate to inquire into the party's intent. Judge Chagares agreed, and said that revising the rule would be a really complex matter.

An attorney member said that the issue is often very fact-specific. He explained: "If you say I am appealing order A and order B, then it is clear that you are not appealing order C." An academic member said that it should be clearer what is a final order. Mr. Letter said that lawyers often take a belt-and-suspenders approach, and say that they are appealing the final judgment and specific orders.

Following the discussion, Judge Chagares asked for the views of the Committee. An academic member proposed further study. Mr. Letter suggested that the main point should be to make the rules clearer. The Chair formed a subcommittee to consider the matter further. The members of the subcommittee are Mr. Letter, Mr. Byron, Mr. Landau, and Prof. Sachs.

D. New Discussion Item Regarding Possible Amendments to Rules 10, 11, and 12

Mr. Byron led the discussion of a new suggestion for amending Rules 10, 11, and 12 to address electronic records. *See* Agenda Book at 197. He explained that these Rules were mostly directed to clerks of court. Accordingly, the initial question is whether electronic records currently present a problem for the clerks.

The clerk representative informed the Committee that she had spoken to clerks of court from other Courts of Appeals. The other clerks did not have any objection to changing the word "send" to "make available" in Rules 10, 11, and 12 as proposed. But she further noted that various Courts of Appeals follow different approaches on whether the District Courts or the Courts of Appeals do relevant tasks with respect to records. She suggested that, in the future, records might be kept in a central repository and might not be transmitted from District Courts to Courts of Appeals. Accordingly, by the time the proposed amendment works it way through the system, it might be obsolete. She also noted that there are still many paper records, especially in state habeas corpus cases.

Judge Chagares asked whether there was a risk of upsetting what is now a stable system. A liaison member was concerned that if the District Court did not send the record, but merely made it available, the record might be incomplete. Judge Chagares said that it was not clear that a problem needs to be fixed and that any amendment might soon be obsolete.

The sense of the committee was to take the matter off the agenda.

E. New Discussion Item Regarding a Circuit Split on Whether Attorney's Fees Are "Costs on Appeal" Under Rule 7

Judge Chagares presented a matter concerning a circuit split on whether attorney's fees are "costs on appeal" under Rule 7. *See* Agenda Book at 223. He thanked Ms. Gailey, the former Rules clerk, for her research into the matter. He noted that the Committee previously had considered the issue, and thanked Ms. Struve for finding memoranda on the subject that the Committee previously considered. Summarizing the research, he explained that the U.S. Court of Appeals for the Third Circuit appears to be an outlier, but has taken a position only in a non-precedential opinion.

Ms. Struve said that the question was a perennial issue. An attorney member asked why the question was addressed in the Appellate Rules instead of the Civil Rules. He suggested that Civil Rule 62 should address the question. A judge member agreed with this point. The clerk representative said that few cases involve bonds.

An academic member said that it was unclear to him how the issue comes up. The Rule refers to costs, not fees, and usually the law distinguishes between costs and fees. He said that maybe the solution would be to remove the word "costs" and specify more clearly what should and what should not be covered.

Judge Campbell said that the rule formerly provided for an automatic $250 bond. He said that there now may be strategic use of the rule to require a large bond to prevent the other party from appealing. He also said that many of the cases citing the rules deal with class action objectors. He suggested asking Mr. Edward Cooper, the reporter for the Civil Rules Advisory Committee, for his opinion.

The sense of the Committee was to keep this matter on the Agenda and ask the Civil Rules Committee for its opinion.

V. New Matters

Judge Chagares led a discussion of possible new matters that the Committee might want to take up. He said that he recently had spoken to the American Academy of Appellate Lawyers (AAAL) and that they were concerned with three matters. First, the AAAL wants to clarify when a cross-appeal is necessary. The AAAL believes that cross-appeals often are filed just to avoid the risk that one might be needed. Second, the AAAL was concerned about judges considering facts that are not in the record. The AAAL thought that the court should provide some sort of notice to the parties before doing this. A judge member pointed out that there was the possibility of seeking rehearing. Third, the AAAL was concerned about courts' sua sponte consideration of legal issues. The AAAL thinks parties should receive notice and opportunity to be heard. Judge Chagares said that the AAAL had not yet submitted any proposals to the Committee.

Judge Chagares next suggested that the Committee might review the rules regarding the appendix. In his experience, much of what is in the appendix is unnecessary. He suggested that it might be best to require the appendix to be filed seven days after the last brief. An attorney member said that the rule as written is often not followed. He believed that it is better to have a deferred appendix that only contains what is cited in the brief (including some context). But Mr. Letter said that a potential problem with a deferred appendix is that the parties then have to file a revised brief that cites the appendix. The clerk representative agreed that this is a problem, especially when trying to docket briefs. She said that in the future, briefs will contain hyperlinks to the actual record, and appendices therefore might be unnecessary.

An attorney member said that every Court of Appeals now has its own rules on appendices. Mr. Byron predicted that most Courts of Appeals would be unlikely to want to

change their local rules. The attorney member responded that it might still be better to have an improved default rule. The Chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Letter, Mr. Byron, Ms. Spinelli, and Judge Bybee.

Judge Chagares asked whether members of the Committee had ideas for improving the efficiency of appellate litigation. An attorney member raised the issue of how much discretion clerks have under Rule 42(b) in not allowing parties to dismiss a case after they have settled. A liaison member said that a request to dismiss is often "subject to settlement agreements being executed." Ms. Struve said that there are very few cases that deny leave to dismiss. Mr. Letter said that sometimes judges say something like "the government should not be settling on these terms." An academic member said that there are some situations in which settlements must be reviewed and others when they should not be reviewed. Mr. Byron asked whether it is necessary to have both parties sign the request for dismissal. A judge member asked whether the matter should be addressed in the Civil Rules. The chair formed a subcommittee to study the issue. The members of the subcommittee are Mr. Landau, Judge Kavanaugh, and Mr. Letter.

VI. Information About the Activities of the Other Committees

Judge Campbell reported that the Civil Rules Advisory Committee is looking at multi-district litigation, interlocutory appeals, third-party funding of litigation, and pilot programs aimed at improving discovery and making litigation quicker.

Judge Campbell reported that the Evidence Rules Advisory Committee is looking at issues under Rules 404(b), 702, and 609. He noted that one recommendation is to refine the analysis with respect to specific kinds of evidence like fingerprints, bite marks, etc.

Judge Campbell reported that the Criminal Rules Advisory Committee is looking for better ways to protect cooperators in criminal cases. He said that there were hundreds of instances in which cooperators were threatened or killed based on information included in court records.

Judge Campbell also observed that the House has passed bills that could affect appeals. HR 985 could make every class certification appealable as of right and would limit the kinds of classes that could be certified. The other legislation would address current rules requiring complete diversity, which are often manipulated. Another bill would alter Rule 11 standards.

VII. Adjournment

Judge Chagares thanked Ms. Womeldorf and her staff for organizing the dinner and meeting. He also thanked Ms. Waldron for all of her contributions to the Committee. He announced that the next meeting will be held on April 6, 2018 in Philadelphia.

The Committee adjourned at 12:15 pm.

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, Chair
Advisory Committee on Appellate Rules

RE: Addendum to the Report of the Advisory Committee on Appellate Rules

DATE: June 11, 2017

I. Introduction

Following publication of the Agenda Book for the June 12 meeting of the Standing Committee, the Advisory Committee on Appellate Rules decided to recommend minor revisions to the text of the proposed amendments for final approval to Appellate Rule 25 and 41. This memorandum describes and explains those revisions. The complete revised text of the proposed amendments for final approval of these rules are attached to this memorandum.

Also attached to this memorandum is the text of proposed amendments for final approval to Rules 28.1 and 31. Although the Advisory Committee's Report presents and describes these proposed amendments, separate copies of their texts were not included in the Agenda Book.

II. Revisions to Appellate Rule 25

The Advisory Committee recommends revising three subdivision headings in Appellate Rule 25 so that they match the corresponding headings in Civil Rule 5 (see Agenda Book at 423). The recommended revisions are as follows:

- The header for subdivision (a)(2)(B)(i), as shown in the Agenda Book at 121, lines 70-71, should be changed from "**By a Represented Person—Required; Exceptions**" to "**By a Represented Person—Generally Required; Exceptions**."

- The header for subdivision (a)(2)(B)(ii), as shown in the Agenda Book at 121, lines 78-79, should be changed from "**Unrepresented Person—When Allowed or Required**" to "**By an Unrepresented Person—When Allowed or Required**."

- The header for subdivision (a)(2)(B)(iv), as shown in the Agenda Book at 122, line 95, should be changed from "**Same as Written Paper**" to "**Same as a Written Paper**."

The Advisory Committee also recommends revising the subdivision of Rule 25 addressing electronic signatures to match the corresponding provision in Bankruptcy Rule 5005(a)(2)(C). Rule 25(a)(2)(B)(iii), as shown in the Agenda Book at 122, lines 89-94, provides:

> An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

The recommended revision is to delete the word "authorized" so that the subdivision would provide:

> A~~n authorized~~ filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

II. Revision to Rule 41(b)

The Advisory Committee also recommends minor revisions to the version of Rule 41(d) shown in the Agenda Book at 139-141. Based on comments from the Style Consultants and further reflection by the Committee, the Advisory Committee recommends adding headings to subdivisions (d)(1), (d)(2), (d)(3), and (d)(4) and rewriting subdivision (d)(2). The changes would not alter the substance of the proposal. As revised, the recommended final text of Rule 41 is as follows:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

* * * * *

(d) **Staying the Mandate Pending a Petition for Certiorari.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) **Motion to Stay.** A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in

the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) **Duration of Stay; Extensions.** The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) ~~unless~~ the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition for a writ of certiorari in the Supreme Court has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed~~. In that case~~, in which case the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) **Security**. The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) **Issuance of Mandate**. The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

Attachments

1. Revised Text of Proposed Amendments to Rule 25 and 41 for Final Approval (Including Summaries of Public Comment).

2. Text of Proposed Amendments to Rule 28.1 and 31 for Final Approval (Including Summaries of Public Comment)

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness.**

(A) **Nonelectronic Filing.**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C)(A)(iii). A paper ~~filed~~not filed electronically by an inmate is timely if it is deposited in the institution's

internal mail system on or before the last day for filing and:

~~(i)~~ it is accompanied by: ~~•~~ a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or ~~•~~ evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

~~(ii)~~ the court of appeals exercises its discretion to permit the later filing of a declaration or notarized

statement that satisfies Rule 25(a)(2)~~(C)(i)~~(A)(iii).

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person—Generally Required; Exceptions.** A person

represented by an. attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **By an Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** A filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

(iv) **Same as a Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not

presented in proper form as required by these rules or by any local rule or practice.

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

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days~~; or~~.

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means

that the person to be served consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~filing, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic-filing system must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

Changes Made After Publication and Comment

- In subdivision (a)(2)(C), the location of the proposed additional words "not filed electronically" are moved because of amendments to this subdivision that became effective in December 2016.
- Subdivision (a)(2)(B)(iii) is rewritten to change the standard for what constitutes a signature.
- Subdivision 25(c)(2) is rephrased for clarity.
- The headings of subdivisions (a)(2)(B)(i),(ii), and (iv) are revised.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—In proposed rule 25(c)(2), a comma is needed after "user"; a comma is needed after "system"; and the word "served" should be inserted after "person."

Ms. Cheryl L. Siler, Aderant CompuLaw (AP-2016-0002-0009)—Subdivision 25(c)(2) should be revised to be uniform with proposed Civil Rule (5)(b)(2).

Mr. Michael Rosman (AP-2016-0002-0010)—Subdivision 25(a)(2)(B)(iii) does not define "user name" or "password." A person filing a paper might not yet be an attorney of record. The subdivision does not address in a clear manner the requirements for documents (like agreements) that should be signed by both parties.

Heather Dixon, Esq. (AP-2016-0002-0014)—The signature provision should be revised to make it clear that the attorney's user name and password are not to be included in the signature block.

New York City Bar Association (AP-2016-0002-0017)— Rule 25(a)(2)(B)(iii) could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed.

Sai (AP-2016-0002-0018)—The amendments should (1) remove the presumptive prohibition on pro se use of electronic filing and instead grant presumptive access; (2) treat pro se status as a rebuttably presumed good cause for nonelectronic filing; (3) require courts to allow pro se access on par with attorney filers; (4) permit individualized

prohibitions for good cause, e.g,. for vexatious litigants; (5) change and conform the "signature" paragraph with Federal Rule of Civil Procedure 5.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The elimination of the requirement of a certificate of service for electronically served documents should be made. The proposed rule on filing by unrepresented parties is satisfactory. The proposed amendment overlooks an important change applicable to filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require service on all parties of papers filed not only by parties but also by non-parties.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay~~

~~of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) **Motion to Stay.** A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) **Duration of Stay; Extensions.** The stay must not exceed 90 days, unless:

(A) the period is extended for good cause; or

(B) ~~unless~~ the party who obtained the stay ~~files a petition for the writ and so~~ notifies the circuit clerk in writing within the period of the stay:

(i) that the time for filing a petition for writ of certiorari in the Supreme Court has been extended, in which case the stay continues for the extended period; or

(ii) that the petition has been filed~~. In that case~~, in which case the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) **Security.** The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) **Issuance of Mandate.** The court of appeals must issue the mandate immediately ~~when~~on receiving a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Three changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it

seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Under the new subdivision (d)(2)(B)(i), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time

fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

Changes Made After Publication and Comment

- In subdivision (b), the proposed additional sentence is deleted. The proposed sentence would have provided that a court may extend the time when the mandate must issue only in extraordinary circumstances.
- A new clause is added to subdivision (d)(2) that extends a stay automatically if the time for filing a certiorari petition is extended.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—A court of appeals might wish to extend the mandate even if extraordinary circumstances do not exist. For example, when a party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as "extraordinary circumstances."

Catherine O'Hagan Wolfe, United States Court of Appeals for the Second Circuit (AP-2016-0002-0006)— All the active judges of the U.S. Court of Appeals for the Second Circuit and all the senior judges who have had the

opportunity to review Judge Newman's comment endorse his call for reconsideration of Rule 41(b).

Zachary Shemtob, New York City Bar Association (AP-2016-0002-0006)—We agree with the comments submitted by Judge Newman and recommend that the Committee delete the proposed last sentence to Rule 41(b).

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The "extraordinary circumstances" standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in capital cases.

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

Changes Made After Publication and Comment

None.

Summary of Public Comments

- **The Pennsylvania Bar Association (AP-2016-0002-0012)**—The amendments are reasonable in light of the December 1, 2016 amendment to Rule 26(c).

- **National Association of Criminal Defense Counsel (AP-2016-0002-0019)**—The additional days for filing reply briefs will enhance the ability of practitioners to manage their workloads and improve the quality of reply briefing.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within ~~14~~21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

Changes Made After Publication and Comment

None.

Summary of Public Comments

- **The Pennsylvania Bar Association (AP-2016-0002-0012)**—The amendments are reasonable in light of the December 1, 2016 amendment to Rule 26(c).

- **National Association of Criminal Defense Counsel (AP-2016-0002-0019)**—The additional days for filing reply briefs will enhance the ability of practitioners to manage their workloads and improve the quality of reply briefing.

replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it parallels the Civil Rules provision from which it was drawn. Because "within" might be read as barring filing before the paper is served, "no later than" is substituted to ensure that it is proper to file a paper before it is served.

The second sentence of subsection (b)(1), which states that no certificate of service is required when service is made using the court's electronic filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that ~~the user name and password of an attorney of record serves as the attorney's~~ a filing made through a person's electronic-filing account, together with the person's name on a signature block, serves as the person's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

MEMORANDUM

TO: **Hon. David G. Campbell, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Michael A. Chagares, Chair**
Advisory Committee on Appellate Rules

RE: **Report of the Advisory Committee on Appellate Rules**

DATE: **May 22, 2017**

I. Introduction

The Advisory Committee on the Appellate Rules met on May 2, 2017, in Washington, D.C. At this meeting, the Advisory Committee considered six sets of proposed amendments that the Standing Committee published for public comment in August 2016, decided to propose two new sets of amendments for publication, and considered several additional items on its agenda.

Part II of this memorandum concerns the six sets of proposed amendments published for public comment. These proposed amendments would:

(A) extend the time for filing reply briefs to 21 days under Appellate Rules 28.1 and 31;

(B) delete a question in Appellate Form 4 that asks a movant seeking to proceed in forma pauperis to provide the last four digits of his or her social security number;

(C) conform Appellate Rules 8(a) & (b), 11(g), and 39(e) to the proposed revision of Civil Rule 62(b) by altering clauses that use the term "supersedeas bond";

(D) allow a court to prohibit or strike the filing of an amicus brief based on party consent under Appellate Rule 29(a) when filing the brief might cause a judge's disqualification;

(E) revise Appellate Rule 25 to address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5; and

(F) address stays of the mandate under Appellate Rule 41.

As described below, in light of public comments, the Advisory Committee recommends no changes to the first two of these published proposals and recommends minor revisions of the other proposals.

Part III of this memorandum concerns the two new proposed sets of amendments that the Advisory Committee recommends publishing for public comment. These new amendments would:

(A) change the terms "mail" and "mailing" to "send" and "sending" in Appellate Rules 3(d) and 13(c); and

(B) require additional disclosures to aid judges in deciding whether to recuse themselves under Appellate Rule 26.1.

Part IV of this memorandum presents information about other matters the Advisory Committee is considering. The attached table of agenda items and draft minutes of the April meeting provide additional details of the Advisory Committee's activities. The Advisory Committee will hold its next meeting in October or November 2017.

II. Action Items: Amendments Previously Published for Public Comment

In August 2016, the Standing Committee published six sets of proposed amendments for public comment. Based on the comments received, the Advisory Committee now makes the following recommendations for amendments to the Appellate Rules.

A. Rules 31(a)(1) & 28.1(f)(4)—Extension of time to file reply briefs

In August 2016, the Standing Committee published proposed amendments to Appellate Rules 31(a)(1) and 28.1(f)(4). These rules currently provide only 14 days after service of the response to file a reply brief in appeals and cross-appeals. Previously, parties effectively had 17 days because Rule 26(c) formerly gave them three additional days in addition to the 14 days in Rules 31(a)(1) and 28.1(f)(4). The Advisory Committee concluded that effectively shortening the period for filing from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days.

The Advisory Committee received comments on the published proposal from the Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers. These comments both supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendments. The proposed amendments (with changes shown in lines 9 and 25) are as follows:

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief,

and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within ~~14~~21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

B. Form 4—Removal of request for Social Security number digits

In August 2016, the Standing Committee published for public comment a proposed amendment to Appellate Form 4. Litigants seeking permission to proceed in forma pauperis must complete this Form. Question 12 of the Form currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee investigated the matter and reported that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question can be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the lack of need for obtaining the last four digits of social security numbers, the Advisory Committee recommended deleting this question.

Following publication of the proposal, the Advisory Committee received comments on the proposal from The World Privacy Forum and the National Association of Criminal Defense Lawyers. Both comments supported the proposal. The Advisory Committee therefore recommends no changes to the proposed amendment. The proposed amendment is as follows:

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * * * *

12. State the city and state of your legal residence.

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

~~Last four digits of your social-security number: _____~~

C. Rules 8(a) & (b), 11(g), & 39(e)—References to Supersedeas Bonds

In August 2016, the Standing Committee published for public comment proposed amendments to Rules 8(a) & (b), 11(g), and 39(e). These amendments conform the Appellate Rules to a proposed change to Civil Rule 62(b). Civil Rule 62(b) currently provides: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments will eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security."

The Pennsylvania Bar Association submitted the only public comment on the proposal. It supported the proposed amendments without change "because they bring the [Appellate] rules into conformity with current practice."

The Advisory Committee recommends no changes to the proposals to amend Rules 8(a), 11(g), and 39(e), but recommends revising the proposed amendments to Rule 8(b) in two ways. First, to make Rule 8(b) conform to proposed amendments with Civil Rule 65.1, the Advisory Committee recommends rephrasing the heading and the first sentence to refer only to "security" and "security provider" (and not mention specific types of security, such as a bond, stipulation, or other undertaking). The Advisory Committee agrees with the Civil Rules Advisory Committee that this phrasing is simpler and less limiting. Second, the Advisory Committee recommends revising the third sentence of Rule 8(b) by changing the word "mail" to "send." This change will conform Rule 8(b) to the proposed amendments to Rule 25 that permit electronic filing and service. In addition, the Advisory Committee recommends modifying the Committee Note to explain these two revisions.

The proposed amendments (with revisions indicated by footnotes) are as follows:

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * * * *

(B) approval of a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment; or

* * * * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

* * * * *

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~ security in the district court.

(b) Proceeding Against a ~~Surety~~ Security Provider. If a party gives security ~~in the form of a bond, a stipulation, or other undertaking~~ with one or more ~~sureties~~ security providers, each ~~surety~~ provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting ~~the surety's~~ its liability on the security ~~bond or undertaking~~ may be served.[1] On motion, a ~~surety's~~ security provider's liability may be enforced in the

[1] In the proposed amendments published for public comment, the first sentence of Rule 8(b) said: "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security, ~~a stipulation, or other undertaking~~ with one or more sureties or other security providers, each ~~surety~~ provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting ~~the surety's~~ its liability on the security ~~bond or undertaking~~ may be served."

district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly ~~mail~~ send[2] a copy to each ~~surety~~ security provider whose address is known.

Committee Note[3]

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security." The term "security" in the amended subdivision (b) includes but is not limited to the examples of security (i.e., "a bond, a stipulation, or other undertaking") formerly listed in subdivision (b). The word "mail" is changed to "send" to avoid restricting the method of serving security providers. Other Rules specify the permissible manners of service.

Rule 11. Forwarding the Record

* * * * *

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment; or

---

[2] The proposed amendment published for public comment did not change the word "mail."

[3] The Committee Note published for public comment included only the first two sentences. The last two sentences are new.

• for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 39. Costs

* * * * *

(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~~ security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

D. Rule 29(a)—Limitations on Amicus Briefs filed by Party Consent

In August 2016, the Standing Committee published for public comment proposed amendments to Appellate Rule 29(a). Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." Several courts of appeals, however, have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. These local rules conflict with Rule 29(a) because Rule 29(a) imposes no limit on the filing of a brief with party consent. The Advisory Committee decided that Rule 29(a) should be amended to allow courts to prohibit or strike the filing of an amicus brief. The proposed amendment accomplishes this result by adding an exception providing "that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge's disqualification."

At its May 2017 meeting, the Advisory Committee decided to revise its proposed amendment to Rule 29 for two reasons. First, other amendments to Rule 29 took effect in December 2016. These other amendments renumbered Rule 29's subdivisions and provided new rules for amicus briefs during consideration of whether to grant rehearing. As a result, the Advisory Committee now recommends moving the exception from the former subdivision (a) to the new subdivision (a)(2) and copying this exception into the new subdivision (b)(2). These changes do not alter the meaning or function of the exception. Second, the Advisory Committee recommends rephrasing the exception to improve its clarity. As revised, the exception would authorize a court of appeals to "prohibit the filing of or strike" an amicus brief (rather than "strike or prohibit the filing of" the brief). The new word order makes the exception more chronological without changing the meaning or function of the proposed amendment. The revised proposal is as follows:

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus~~-curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may prohibit

the filing of or strike an amicus brief that would result in a judge's disqualification.[4]

* * * * *

(b) During Consideration of Whether to Grant Rehearing.

(1) Applicability. This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus ~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court, except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification.[5]

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

The Advisory Committee received six comments on the proposed amendment. Five of these comments oppose creating an exception that would allow a court of appeals to prohibit the filing of or strike an amicus brief filed by party consent. Associate Dean Alan B. Morrison of the George Washington University Law School, the Pennsylvania Bar Association, the Federal Bar Council, and Heather Dixon, Esq., assert in their comments that the proposed amendment is unnecessary because amicus briefs that require the recusal of a judge are rare. They further assert that the exception could

[4] The proposed amendment published for public comment said "strike or prohibit the filing of" instead of "prohibit the filing of or strike."

[5] The proposal published for public comment did not include the amendments to this subdivision because the subdivision did not go into effect until December 2016.

be wasteful. An amicus curiae may pay an attorney to write a brief and a court then might strike the brief. The amicus curiae likely would not know the identity of the judges on the appellate panel when filing the brief and would have no options once the court strikes the brief. The Advisory Committee understands these considerations but has concluded that the exception is necessary given the existence of local rules that currently contradict Rule 29. The Committee has no information suggesting the local rules actually have caused any problems.

Second, Judge Jon O. Newman of the U.S. Court of Appeals for the Second Circuit comments that the proposed amendment should not change "amicus-curiae brief" to "amicus brief." He explains: "It's a 'friend of the court brief,' not a 'friend brief.'" The Committee understands the criticism but recommends the change for consistency. Rule 29, as revised in December 2016, now uses the term "amicus-curiae brief" in two instances and the term "amicus brief" in six instances. The Committee believes that changing the two instances of "amicus-curiae brief" to "amicus brief" is the most straightforward solution to this problem.

E. Rule 25—Electronic Filing, Signatures, Service, and Proof of Service

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 25. The proposed amendment to subdivision (a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers non-electronically and also provides for exceptions for good cause and by local rule. The proposed amendment to subdivision (a)(2)(B)(iii) addresses electronic signatures. The proposed amendment to subdivision (c)(2) addresses electronic service through the court's electronic-filing system or by using other electronic means that the person to be served consented to in writing. The proposed amendment to subdivision (d)(1) requires proof of service of process only for papers that are not served electronically.

After receiving public comments and conferring with the other Advisory Committees, the Appellate Rules Advisory Committee recommends minor revisions of the proposed amendments for three reasons. First, amendments that became effective in December 2016 altered the text of subdivision (a)(2)(C), which addresses inmate filings. This change requires a slight relocation of the proposed amendment as shown below.

Second, public comments criticized the signature provision in the proposed new subdivision (a)(2)(B)(iii). Reporter Ed Cooper of the Civil Rules Advisory Committee has summarized the three primary concerns as follows:

> First, [the provision] might be misread to require that the user name and password appear on the signature block. . . . Second, the ever-changing world of security for electronic communications may mean that courts will move toward means of authentication more advanced than user names and logins. . . . Third, concerns were

expressed about the means of becoming an attorney of record before, or with, filing the initial complaint.

The Advisory Committee recommends replacing the language published for public comment with a new provision drafted jointly with the other Advisory Committees. This new provision would provide: "An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature."

Third, a comment regarding punctuation revealed an ambiguity in the clause-structure of the proposed Appellate Rule 25(c)(2). The intent was to indicate two methods of serving a paper, not three or four. But the language is ambiguous because the proposals use the word "by" four times. The Advisory Committee recommends addressing this ambiguity by separating the two methods of service using "(A)" and "(B)." The revised provision would provide: "Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

As revised in these three ways, the proposal to amend Rule 25 is now as follows:

Appellate Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness.**

(A) **Nonelectronic Filing.**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but such filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate Filing.**[6] If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)~~(C)~~(A)(iii). A paper ~~filed~~not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

~~(i)~~• it is accompanied by: ~~•~~ a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or ~~•~~ evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

~~(ii)~~• the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)~~(C)(i)~~(A)(iii).

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic~~

[6] The amendment to subdivision (a)(2)(C) as proposed for public comment said: "A paper ~~filed~~ not filed electronically by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. 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." The revision reflects the amendment to subdivision (a)(2)(C) that became effective in December 2016.

~~means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person—Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

• may file electronically only if allowed by court order or by local rule; and

• may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.[7]

(iv) **Same as Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

---

[7] The proposed amendment published for public comment said: "The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature."

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

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~ Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days~~; or~~.

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.[8]

[8] The proposed amendment published for public comment said: "Electronic service may be made by sending a paper to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing."

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a ~~party~~person must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~ filing or sending, unless the ~~party~~person making service is notified that the paper was not received by the ~~party~~person served.

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following if it was served other than through the court's electronic-filing system:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

The Advisory Committee received public comments that criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. These comments argued that unrepresented parties generally should have the right to file electronically, which is much less expensive than filing non-electronically. The Advisory Committee considered these arguments at its October 2016 and Spring 2017 meetings but decided not to change the proposed amendment. The Advisory Committee remains concerned about possible difficulties that unrepresented parties might have in using electronic filing and about the difficulty of holding them accountable for abusing the filing system.

One public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which addresses filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 published for public comment. The Committee will study the proposal as a new matter.

F. Rule 41—Stays of the mandate

In August 2016, the Standing Committee published proposed amendments to Appellate Rule 41, which concerns the content, issuance, effective date, and stays of the mandate. The Standing Committee received five public comments about the proposed amendments to Rule 41. In light of these comments, the Advisory Committee recommends two revisions.

First, the Advisory Committee recommends revising subdivision (b) by deleting the previously proposed sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." Comments submitted by Judge Jon O. Newman and Chief Judge Robert A. Katzmann of the U.S. Court of Appeals for the Second Circuit argue that the sentence is problematic because courts might wish to extend the time for good cause

even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc. The Advisory Committee agrees with these comments. The Advisory Committee believes that the new requirement that a court can extend a stay only "by order" provides sufficient protection against improper extensions.

Second, the Advisory Committee recommends revising subdivision (d)(2)(B), which will become subdivision (d)(2) under the proposed amendment. The National Association of Criminal Defense Lawyers (NACDL) has argued that the proposed amendments do not address a gap in the current rules. The comment explains: "Where a Justice [of the Supreme Court] has deemed an extension of the certiorari period to be appropriate, it should not be necessary also to move the Court of Appeals for an extension of the stay of mandate. Rather, the stay should automatically continue for the same period for which the time to file a timely cert. petition has been extended." The Advisory Committee agrees with this suggestion and has added new clause in subdivision (d)(2) that will extend a stay automatically if a Justice of the Supreme Court extends the time for filing a petition for certiorari.

As revised in these two ways, the proposal to amend Rule 41 is now as follows:

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.[9]

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate Pending a Petition for Certiorari.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of~~

[9] The amendment published for public comment contained this additional sentence: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)."

~~mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless

(i) the period is extended for good cause;

(ii) the period for filing a timely petition is extended, in which case the stay will continue for the extended period;[10] or

(iii) ~~unless~~ the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay~~. In that case~~, in which case the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

[10] This clause is new. It was not part of the proposed amendments published for public comment.

Committee Note

Subdivision (b).[11] Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as

[11] This portion of the Committee Note has been revised to remove discussion of the formerly proposed sentence allowing a court to delay issuance of the mandate only in exceptional circumstances.

subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

Under subdivision (d)(2)(ii), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.[12]

---

[12] This sentence is new. It was not included Committee Note published for public comments in August 2016.

III. Action Items: New Amendments Proposed for Publication

The Advisory Committee recommends that the Standing Committee publish two new sets of proposed amendments for public comment. The amendments concern the use of the word "mail" in Rules 3(d) and 13(c) and corporate disclosures under Rule 26.1.

A. Rules 3(d) & 13(c)—Changing "Mail" to "Send"

In August 2016, the Standing Committee published proposed changes to Appellate Rule 25 to address the electronic filing and service of documents.[13] In light of the proposed changes to Rule 25, the Advisory Committee subsequently considered whether other Rules that require parties to "mail" documents also should be amended. Following its study of all the rules that use the word "mail," the Advisory Committee recommends changes to Rules 3(d) and 13(c).

Rule 3(d) concerns the clerk's service of the notice of appeal. The Advisory Committee concluded that subdivisions (d)(1) and (3) need two changes. The proposed changes are shown below. First, in lines 5 and 18, the words "mailing" and "mails" should be replaced with "sending" and "sends" to make electronic filing and service possible. Second, as indicated in lines 8-9, the portion of subdivision (d)(1) providing that the clerk must serve the defendant in a criminal case "either by personal service or by mail addressed to the defendant" should be deleted. These changes will eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~ sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to~~

[13] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27 (August 2016) (proposed revision of Appellate Rule 25), http://www.uscourts.gov/file/20163/download.

~~the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~ sends copies, with the date of ~~mailing~~ sending. Service is sufficient despite the death of a party or the party's counsel.

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends" to make electronic service possible. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

Rule 13 concerns appeals from the Tax Court. This rule uses the word "mail" in both its first and second sentences. Changing the reference in the first sentence as shown in the discussion draft below would allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. The second sentence expresses a rule that applies when a notice is sent by mail, which is still a possibility. Accordingly, the Advisory Committee does not recommend a change to the second sentence.

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~

sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

ADVISORY COMMITTEE NOTE

The amendment to subdivison (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

Four other Rules also use the term "mail." Rules 8 and 25 are addressed in Part II.C. and II.D. of this memorandum above. Rule 4(c) concerns appeals by inmates confined in an institution. As amended in December 2016, Rule 4(c) provides in part: "If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1)." Rule 4(c)(1) specifies the rules for when mail deposited by inmates is timely. Rule 4(c) does not appear to require any changes. The Rule does not require filing by mail but instead establishes principles that apply when inmates use an institution's system for legal mail (which they may continue to do notwithstanding the changes to Rule 25). Rule 26, as amended in 2016, specifies rules for computing and extending time. Subdivision (a)(4)(C) defines the term "last day" as follows:

> Unless a different time is set by a statute, local rule, or court order, the last day ends: . . . (C) for filing under Rules 4(c)(1), 25(a)(2)(B), and 25(a)(2)(C)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system . . . .

Although this provision uses the words "mail" and "mailing," it does not require revision. The Rule specifies the method for calculating time when mail is used. It does not specify when mail may or may not be used.

B. Disclosure Requirements under Rule 26.1

Since 2008, the Advisory Committee has carried on its agenda a matter concerning disclosure requirements under Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements, as explained in a 1998 Advisory Committee note, is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify them from hearing an appeal.

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require.

At its October 2016 meeting, the Advisory Committee tabled consideration of proposed amendments to Rule 26.1(a) and 29(c), which would have required disclosures concerning publicly held entities other than corporations and concerning judges and witnesses in prior proceedings. The Committee determined that the burdens imposed by those additional disclosure requirements outweighed the benefits.

The Advisory Committee, however, proposes adding a new subdivision (b) requiring disclosure of organizational victims in criminal cases. This new subdivision (b) conforms Rule 26.1 to the amended version of Criminal Rule 12.4(a)(2) that was published for public comment in August 2016. The only differences are the introductory words "In a criminal case" and the reference to "Rule 26.1(a)" instead of Criminal Rule 12.4(a)(1).

The Advisory Committee proposes adding a new subdivision (c) requiring disclosure of the name of the debtor or debtors in bankruptcy cases when they are not included in the caption. The caption might not include the name of the debtor in appeals from adversary proceedings, such as a dispute between two of the debtor's creditors. *See, e.g.*, *Meyers Law Grp., P.C. v. Diversified Realty Servs., Inc.*, 647 F. App'x 736, 738 (9th Cir. 2016) (adversary proceeding in bankruptcy of Greg James Ventures LLC).

The Advisory Committee considered requiring additional disclosures in bankruptcy cases, including disclosure of (a) each committee of creditors, (b) the parties to any adversary proceeding, and (c) any active participants in a contested matter. But in consultation with representatives of the Bankruptcy Rules Advisory Committee, the Advisory Committee decided not to require these disclosures. Requiring disclosure of each committee of creditors would be over-inclusive because the members of a committee of creditors would not necessarily have any interest in a particular appeal. Disclosure of parties to any adversary proceeding and active participants in a contested matter is unnecessary because appellate judges do not need the names of other adversaries and other participants in contested matters if those matters are not before the court.

Current subdivision (b) addresses supplemental filings. The Advisory Committee considered amending this subdivision to make it conform to proposed amendments to Criminal Rule 12.4(b) published for public comment in August 2016. The Criminal Rules Advisory Committee, however, has informed the Advisory Committee that it intends to scale back its proposed revision of Criminal Rule 12.4(b) and recommends no changes to the Appellate Rules.

The Advisory Committee recommends moving current subdivisions (b) and (c) to the end of Rule 26.1 by designated them as subdivisions (e) and (f). These provisions address supplemental filings and the number of copies that must be filed. Moving the subdivisions will make it clear that they apply to all of the disclosure requirements.

The proposed amendments to Rule 26.1 are as follows:

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporate Party. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor, the trustee, or, if neither is a party, the appellant must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must also identify any parent corporation and any publicly held corporation that holds 10 percent or more of its stock, or must state that there is no such corporation.

(d) Intervenors. A person who wants to intervene must file a statement that discloses the information required by Rule 26.1.

~~(b)~~**(e) Time for Filing; Supplemental Filing.** A party must file the Rule 26.1~~(a)~~ statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its

statement whenever the information that must be disclosed under Rule 26.1~~(a)~~ changes.

~~(c)~~**(f) Number of Copies.** If the Rule 26.1~~(a)~~ statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

COMMITTEE NOTE

The new subdivision (b) follows amendments to Criminal Rule 12.4(a)(2). It requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. The new subdivision (c) requires disclosure of the name of all of the debtors in bankruptcy proceedings. The names of the debtors are not always included in the caption in appeals of adversary proceedings. The new subdivision (d) requires intervenors to make the same disclosures as parties. Subdivisions (e) and (f) now apply to all of the disclosure requirements.

Changing Rule 26.1's heading from "Corporate Disclosure Statement" to "Disclosure Statement" will require conforming amendments to Rules 28(a)(1) and 32(f). References to "corporate disclosure statement" must be changed to "disclosure statement." The following proposed drafts show the required changes in lines 4 and 16.

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~ disclosure statement if required by Rule 26.1;

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of the title of Rule 26.1.

Rule 32. Form of Briefs, Appendices, and Other Papers

* * * * *

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of the title of Rule 26.1.

For the reasons explained above, the Advisory Committee recommends that the Standing Committee publish for public comment the proposed amendments to Rules 26.1 and the conforming changes to Rules 27, 28, and 32.

IV. Information Items

At its May 2017 meeting, the Advisory Committee considered four additional items. Item 16-AP-C concerned a proposal to amend Rules 32.1 and 35 to require courts to designate orders granting or denying rehearing as "published" decisions. The Advisory Committee determined that the proposed revisions were unnecessary because these orders are already available on Pacer and in commercial databases. Item 16-AP-D concerned a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). The Advisory Committee removed this item from its agenda because the Civil Rules Advisory Committee had decided not to pursue the proposal. Item 17-AP-A concerned a proposal to amend Rules 4 and 27 to address certain types of subpoenas. The Advisory Committee removed this item from its agenda because the proposed amendments appeared to rest on a misunderstanding of the cited Rules. Item 17-AP-B concerned a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. The Advisory Committee discussed the matter at length but decided against pursuing it. Members of the Advisory Committee expressed concern about adding more technical rules that attorneys might have difficulty following and about directing counsel on matters of advocacy.

The Advisory Committee continues to study possible ways to reduce the cost and increase the speed of federal appellate litigation. At the spring 2017 meeting, the Advisory Committee discussed the collateral order doctrine, a list of suggestions submitted by the American Academy of Appellate Lawyers (AAAL), and a proposal to provide properly formatted word-processing templates of briefs and other documents. Although the Advisory Committee did not develop any specific proposals at the May 2017 meeting, the Advisory Committee's work on the subject of increasing the speed and efficiency of appellate litigation will continue.

Enclosures:

1. Draft Minutes from the May 2, 2017 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Revised Text of Proposed Amendments Published in August 2016
4. Text of New Items Proposed for Publication

THIS PAGE INTENTIONALLY BLANK

TAB 2B

THIS PAGE INTENTIONALLY BLANK

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

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * * * *

(B) approval of a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or

* * * * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

---

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

* * * * *

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~security in the district court.

(b) Proceeding Against a ~~Surety~~Security Provider. If a party gives security ~~in the form of a bond, a stipulation, or other undertaking~~ with one or more ~~sureties~~security providers, each ~~surety~~provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting ~~the surety's~~its liability on the security~~bond or undertaking~~ may be served. On motion, a ~~surety's~~security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly ~~mail~~

send a copy to each ~~surety~~security provider whose address is known.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security." The word "mail" is changed to "send" to avoid restricting the method of serving security providers. Other Rules specify the permissible manners of service.

Changes Made After Publication and Comment

- The heading and first sentence of subdivision (b) are changed to refer only to "security" and "security provider" and do not mention specific types of security (such as a bond, stipulation, or other undertaking) or specific types of security providers (such as a surety).
- In the third sentence of subdivision (b), the word "mail" is changed to "send."

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments bring Rule 8 into conformity with current practice.

Rule 11. Forwarding the Record

* * * * *

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Changes Made After Publication and Comment

None.

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments bring Rule 11 into conformity with current practice.

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness.**

(A) **Nonelectronic Filing.**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically

is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 25(a)(2)(C)(A)(iii). A

paper ~~filed~~not filed electronically by an inmate is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

~~(i)~~• it is accompanied by: ~~•~~ a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or ~~•~~ evidence (such as a postmark or date stamp) showing that the paper was so deposited and that postage was prepaid; or

~~(ii)~~• the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 25(a)(2)~~(C)~~(i)(A)(iii).

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a~~

~~written paper for the purpose of applying these rules.~~

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person—Required; Exceptions.** A person represented by an. attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and

- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing.** An authorized filing made through a person's electronic-filing account, together with the person's name on a signature block, constitutes the person's signature.

(iv) **Same as Written Paper.** A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single

judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of

Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days~~; or~~.

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service of a paper may be made (A) by sending it to a registered user by filing it with the court's electronic-filing system or (B) by sending it by other electronic means that the person to be served consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier.

Service by electronic means is complete on ~~transmission~~filing, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic-filing system must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of

the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes

exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

Changes Made After Publication and Comment

- In subdivision (a)(2)(C), the location of the proposed additional words "not filed electronically" are moved because of amendments to this subdivision that became effective in December 2016.
- Subdivision (a)(2)(B)(iii) is rewritten to change the standard for what constitutes a signature.
- Subdivision 25(c)(2) is rephrased for clarity.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—In proposed rule 25(c)(2), a comma is needed after "user"; a comma is needed after "system"; and the word "served" should be inserted after "person."

Ms. Cheryl L. Siler, Aderant CompuLaw (AP-2016-0002-0009)—Subdivision 25(c)(2) should be revised to be uniform with proposed Civil Rule (5)(b)(2).

Mr. Michael Rosman (AP-2016-0002-0010)—Subdivision 25(a)(2)(B)(iii) does not define "user name" or "password." A person filing a paper might not yet be an attorney of record. The subdivision does not address in a clear manner the requirements for documents (like agreements) that should be signed by both parties.

Heather Dixon, Esq. (AP-2016-0002-0014)—The signature provision should be revised to make it clear that the attorney's user name and password are not to be included in the signature block.

New York City Bar Association (AP-2016-0002-0017)—Rule 25(a)(2)(B)(iii) could be read to mean that the attorney's user name and password should be included on any paper that is electronically filed.

Sai (AP-2016-0002-0018)—The amendments should (1) remove the presumptive prohibition on pro se use of electronic filing and instead grant presumptive access; (2) treat pro se status as a rebuttably presumed good cause for nonelectronic filing; (3) require courts to allow pro se access on par with attorney filers; (4) permit individualized prohibitions for good cause, e.g,. for vexatious litigants; (5) change and conform the "signature" paragraph with Federal Rule of Civil Procedure 5.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The elimination of the requirement of a certificate of service for electronically served documents should be made. The proposed rule on filing by unrepresented parties is satisfactory. The proposed amendment overlooks an important change applicable to

filings by non-parties. Rule 25(b) has not been, but should be, amended in the same manner as the concurrently proposed amendment to Criminal Rule 45, so as to require service on all parties of papers filed not only by parties but also by non-parties.

Rule 29. Brief of an Amicus Curiae

(a) **During Initial Consideration of a Case on the Merits.**

(1) Applicability. This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus-~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing<u>, except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification</u>.

* * * * *

(b) During Consideration of Whether to Grant Rehearing.

(1) Applicability. This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) When Permitted. The United States or its officer or agency or a state may file an amicus-~~curiae~~ brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court, except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification.

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

Changes Made After Publication and Comment

- The word order of the proposed exception allowing a court to "prohibit the filing of or strike" an amicus brief was changed for stylistic purposes.
- The placement of the proposed exception was moved from subdivision (a) to subdivision (a)(2) because of amendments that took effect in December 2016.
- The proposed exception in subdivision (a)(2) was also added to the new subdivision (b)(2) created by amendments that took effect in December 2016.
- The phrase "amicus-curiae brief" is shortened to "amicus brief" in subdivision (b)(2) for consistency with other subdivisions.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—The word "curiae" should not be deleted. It's a "friend of the court brief," not a "friend brief."

Associate Dean Alan B. Morrison (AP-2016-0002-0003)—The likelihood of a strategic attempt to file an amicus brief that would cause the recusal of a judge is very small. The parties typically do not know the identity of the judges on the panel until shortly before the deadline for filing, and they also typically do not know the judge's recusal policies. The possible benefits of the rule do not outweigh its costs. Preventing the recusal of a judge might require all the money and effort put into an amicus brief to be wasted.

The Pennsylvania Bar Association (AP-2016-0002-0012)—Neither the amicus nor its counsel have any idea whether the filing of the brief would trigger recusal of a judge who ultimately would be assigned to the case. It seems unreasonable under such circumstances to prohibit or strike the amicus brief, instead of simply allowing the judge to recuse.

Federal Bar Council (AP-2016-0002-0013)—The changes may be unnecessary. Several of the local rules only address amicus briefs filed at the stage of rehearing or rehearing en banc. The new subdivision (b) of Rule 29 now addresses such filings. The Advisory Committee should wait until the courts of appeals have had sufficient experience with the new Appellate Rule 29(b) to assess whether it adequately addresses the problem of amicus briefs that might cause recusals.

Heather Dixon, Esq. (AP-2016-0002-0014)—The subdivision should be rewritten to say that once a panel of judges has been assigned to a case, amicus curiae briefing

that would result in recusal of an assigned judge will only be permitted where the amicus curiae brief would (a) provide the court with substantial assistance in understanding the issues presented by the parties, or (b) would shed light on a matter of broad public concern that (i) is reasonably expected to be directly impacted by the court's decision and (ii) has not been made known to the court by the parties' briefing.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The amendment should be rewritten to emphasize that the only reasons for striking brief are interests in case-processing or a substantiated concern about judge-shopping.

THIS PAGE INTENTIONALLY BLANK

Rule 39. Costs

* * * * *

(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~~security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended,

Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Changes Made After Publication and Comment

None.

Summary of Public Comments

The Pennsylvania Bar Association (AP-2016-0002-0012)—The proposed amendments to Rule 39 bring the rules into conformity with current practice.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order.

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless

(i) the period is extended for good cause;

(ii) the period for filing a timely petition is extended, in which case the stay will continue for the extended period; or

(iii) unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately ~~when~~on receiving a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a

petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time

fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

Under subdivision (d)(2)(ii), if the court of appeals issues a stay of the mandate for a party to file a petition for certiorari, and a Justice of the Supreme Court subsequently extends the time for filing the petition, the stay automatically continues for the extended period.

Changes Made After Publication and Comment

- In subdivision (b), the proposed additional sentence is deleted. The proposed sentence would have provided that a court may extend the time when the mandate must issue only in extraordinary circumstances.
- A new clause is added to subdivision (d)(2) that extends a stay automatically if the time for filing a certiorari petition is extended. None.

Summary of Public Comments

Judge Jon O. Newman, U.S. Court of Appeals for the Second Circuit (AP-2016-0002-0006)—A court of appeals might wish to extend the mandate even if extraordinary circumstances do not exist. For example, when a party has not filed a petition for panel rehearing or a petition for rehearing en banc, a court of appeals sometimes delays issuance of the mandate because one or more members of the court of appeals are considering whether to request a poll of active judges to consider a rehearing in banc or

because the court has ordered a rehearing en banc on its own motion and is considering the disposition of such a rehearing. Neither of these circumstances would qualify as "extraordinary circumstances."

Catherine O'Hagan Wolfe, United States Court of Appeals for the Second Circuit (AP-2016-0002-0006)— All the active judges of the U.S. Court of Appeals for the Second Circuit and all the senior judges who have had the opportunity to review Judge Newman's comment endorse his call for reconsideration of Rule 41(b).

Zachary Shemtob, New York City Bar Association (AP-2016-0002-0006)—We agree with the comments submitted by Judge Newman and recommend that the Committee delete the proposed last sentence to Rule 41(b).

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The "extraordinary circumstances" standard for withholding issuance of a mandate is too restrictive and too strong in its wording to cover all the unanticipated circumstances that might arise, particularly in capital cases.

THIS PAGE INTENTIONALLY BLANK

Form 4. Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis

* * * * *

12. State the city and state of your legal residence.

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

~~Last four digits of your social security number: _____~~

Changes Made After Publication and Comment

None.

Summary of Public Comments

Pam Dixon, World Privacy Forum (AP-2016-0002-0008)—The proposed amendment should be made. Collection and maintenance of any personally identifiable information (such as a SSN, whether whole or partial) creates a concern about personal privacy. A social security number does a poor job of identification and authentication. The consensus of clerks of court is that the last four digits of a SSN serve no purpose and could be eliminated.

National Association of Criminal Defense Counsel (AP-2016-0002-0019)—The amendment should be made.

THIS PAGE INTENTIONALLY BLANK

TAB 2C

THIS PAGE INTENTIONALLY BLANK

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

Rule 3. Appeal as of Right—How Taken

* * * * *

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals

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

named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~sends copies, with the date of ~~mailing~~sending. Service is sufficient despite the death of a party or the party's counsel.

* * * * *

Committee Note

Amendments to Subdivision (d) change the words "mailing" and "mails" to "sending" and "sends" to make electronic service possible. Other rules determine when a party or the clerk may or must send a notice electronically or non-electronically.

THIS PAGE INTENTIONALLY BLANK

Rule 13. Appeals From the Tax Court

(a) Appeal as of Right.

* * * * *

(2) Notice of Appeal; How Filed. The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by ~~mail addressed~~sending it to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

* * * * *

Committee Note

The amendment to subdivision (a)(2) will allow an appellant to send a notice of appeal to the Tax Court clerk by means other than mail. Other rules determine when a party must send a notice electronically or non-electronically.

THIS PAGE INTENTIONALLY BLANK

Rule 26.1 ~~Corporate~~ Disclosure Statement

(a) ~~Who Must File~~Nongovernmental Corporate Party. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

(c) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor, the trustee, or, if neither is a

party, the appellant must file a statement that identifies each debtor not named in the caption. If the debtor is a corporation, the statement must also identify any parent corporation and any publicly held corporation that holds 10 percent or more of its stock, or must state that there is no such corporation.

(d) **Intervenors.** A person who wants to intervene must file a statement that discloses the information required by Rule 26.1.

~~(b)~~**(e)** **Time for Filing; Supplemental Filing.** A party must file the Rule 26.1~~(a)~~ statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement

whenever the information that must be disclosed under Rule 26.1~~(a)~~ changes.

~~(c)~~**(f)** **Number of Copies.** If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

The new subdivision (b) follows amendments to Criminal Rule 12.4(a)(2). It requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. The new subdivision (c) requires disclosure of the name of all of the debtors in bankruptcy proceedings. The names of the debtors are not always included in the caption in appeals of adversary proceedings. The new subdivision (d) requires intervenors to make the same disclosures as parties. Subdivisions (e) and (f) now apply to all of the disclosure requirements.

THIS PAGE INTENTIONALLY BLANK

Rule 28. Briefs

(a) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a ~~corporate~~ disclosure statement if required by Rule 26.1;

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of the title of Rule 26.1.

THIS PAGE INTENTIONALLY BLANK

Rule 32. Form of Briefs, Appendices, and Other Papers

(f) Items Excluded from Length. In computing any length limit, headings, footnotes, and quotations count toward the limit but the following items do not:

- the cover page;
- a ~~corporate~~ disclosure statement;
- a table of contents;
- a table of citations;
- a statement regarding oral argument;
- an addendum containing statutes, rules, or regulations;
- certificates of counsel;
- the signature block;
- the proof of service; and
- any item specifically excluded by these rules or by local rule.

* * * * *

Committee Note

The phrase "corporate disclosure statement" is changed to "disclosure statement" to reflect the revision of the title of Rule 26.1.

TAB 2D

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules
Table of Agenda Items —May 2017

FRAP Item	Proposal	Source	Current Status
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 06/17 for submission to Standing Committee
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Draft approved 05/17 for resubmission to Standing Committee following public comments
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
13-AP-H	Consider possible amendments to FRAP 41 in light of *Bell v. Thompson*, 545 U.S. 794 (2005), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments

FRAP Item	Proposal	Source	Current Status
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved for publication by Standing Committee 01/16 Draft approved 05/17 for resubmission to Standing Committee following public comments
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16 Draft approved 05/17 for submission to Standing Committee
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/16 Revised draft approved 05/17 for resubmission to Standing Committee following public comments

THIS PAGE INTENTIONALLY BLANK

TAB 2E

THIS PAGE INTENTIONALLY BLANK

DRAFT Minutes of the Spring 2017 Meeting of the
Advisory Committee on the Appellate Rules

May 2, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, May 2, 2017, at 9:30 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Professor Stephen E. Sachs. Acting Solicitor General Jeffrey B. Hall was represented by Douglas Letter, Esq., and H. Thomas Byron III, Esq. Justice Judith L. French and Neal Katyal, Esq., participated by telephone. Kevin C. Newsom, Esq., was absent.

Also present were: Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure, participated by video conference. The following persons participated by telephone: Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Elisabeth A. Shumaker, former Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He expressed congratulations to Justice Neal Gorsuch, the past chair of the Advisory Committee, on his appointment to the Supreme Court, and thanked him for his leadership, his wisdom, and all of his contributions as chair. He thanked Rebecca Womeldorf and her staff for organizing the meeting. He also thanked former attorney member Gregory Katsas and former clerk representative Betsy Shumaker, who have completed their service on the Committee. He also noted that this would be the final meeting for attorney members Neal Katyal and Kevin Newsom and liaison member

Gregory Garre, whose terms of service are expiring, and expressed his gratitude for their many contributions to the Committee.

II. Approval of Minutes

A motion to approve the draft minutes of the October 2016 meeting of the Advisory Committee was made, seconded, and approved.

III. Action Items

A. Item 12-AP-D (Rules 8, 11, and 39)

Mr. Byron presented Item 12-AP-D , which concerns the proposed amendments to Appellate Rules 8, 11, and 39 that were published for public comment in August 2016. The amendments eliminate references to "supersedeas bonds" so that the Appellate Rules will conform to a proposed amendment to Civil Rule 62(a). Materials concerning the item begin at page 82 of the Agenda Book.

The reporter reminded the Advisory Committee that Rule 8(b) corresponds to Civil Rule 65.1. He then informed the Advisory Committee that the Civil Rules Advisory Committee has approved a version of Civil Rule 65.1 that uses only the generic terms "security" and "security provider," and does not mention examples of specific types of security (e.g., bonds) or security providers (e.g., sureties). The Advisory Committee then discussed and approved a revised version of Rule 8(b), shown on page 84 of the Agenda Book, that follows the same approach as Civil Rule 65.1.

Mr. Byron suggested amending the Committee Note to make clear that the term "security" in the draft of Rule 8(b) includes but is not limited to the types of security previously listed expressly in Rule 8(b), namely, bonds, stipulations, and undertakings. The Committee approved this suggestion. The Committee also approved changing the word “mail” to “send” in line 11 of the draft on page 84.

The Advisory Committee decided to recommend that the Standing Committee approve (1) the amended version of Rule 8, (2) the amended Committee Note, and (3) the versions of Rules 11 and 39 that were published in August 2016.

B. Item 11-AP-D (Rule 25)

The reporter presented Item 11-AP-D, which concerns the proposed amendments to Appellate Rule 25 that were published for public comment in August 2016. The amendments

address electronic filing, service, and signatures. Materials concerning the item begin at page 112 of the Agenda Book. The Advisory Committee then discussed issues concerning three subdivisions:

Rule 25(a)(2)(B)(iii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(iii) and its counterparts in the Civil, Criminal, and Bankruptcy Rules. The Advisory Committee then approved the revised version of Rule 25(a)(2)(B)(iii) that appears on page 113 of the Agenda Book, which accords with revisions recommended by the other Advisory Committees.

Rule 25(c)(2). The reporter explained that a public comment had revealed that the published version of Rule 25(c)(2) was difficult to understand. The Committee then approved the proposed revision that appears on page 115 of the Agenda Book. The reporter agreed to coordinate this change with the Bankruptcy Rules Advisory Committee, which is considering a very similar rule.

Rule 25(a)(2)(B)(ii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. The Advisory Committee previously had considered but rejected these objections at its October 2016 meeting. The Advisory Committee decided not to recommend changes to the published version of this subdivision.

The reporter explained that one public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which concerns filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 that were published for public comment. The reporter and Mr. Letter agreed to study the proposal as a new matter and report back to the Committee at its next meeting.

The Advisory Committee decided to recommend that the Standing Committee approve the proposed amendments to Rule 25, with the revisions discussed above.

C. Item 15-AP-C (Rules 28.1 and 31)

Judge Chagares presented Item 15-AP-C, which concerns the proposed amendments to Appellate Rules 28.1 and 31 that were published for public comment in August 2016. The amendments would extend the time for filing reply briefs to 21 days. Materials concerning the item begin at page 214 of the Agenda Book.

The reporter explained that all public comments had supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approved the proposed amendments as published.

D. Item 14-AP-D (Rule 29)

Judge Chagares presented Item 14-AP-D, which concerns the proposed amendments to Appellate Rule 29 that were published for public comment in August 2016. The amendments would authorize courts by order or rule to strike or prohibit the filing of amicus briefs that would disqualify a judge. Materials concerning the item begin at page 224 of the Agenda Book.

Judge Chagares began by explaining that Rule 29 had been revised and renumbered for other reasons in December 2016. As a result, the changes proposed for public comment will now have to be made to the new subdivision (a)(2), instead of the old subdivision (a). The discussion draft on page 224 shows the change.

Judge Chagares then identified three issues for consideration: (1) whether the Advisory Committee should approved the proposed changes to subdivision (a)(2); (2) whether subdivision (a)(2) should be reworded; and (3) whether subdivision (b)(2) should also be amended.

A judge member said that the proposed change to subdivision (a)(2) is well grounded and well thought out. He asserted that the changes proposed to subdivision (a)(2) should also apply to the new subdivision (b)(2), which concerns amicus briefs on rehearing. He further suggested that the phrase "may strike of prohibit the filing of" should be reworded to say "may prohibit the filing of or strike" because putting the words in that order was more chronological. The Advisory Committee agreed.

A judge member asked whether it was necessary to allow a court to strike a brief filed during the rehearing stage because a brief can be filed only with leave.

Mr. Letter supported the published amendment but noted that it authorized non-uniform rules. An academic member discussed the Federal Bar Council's argument that existing local rules on the subject might not be inconsistent with the current Rule 29(a)(2). A judge member, however, said that the Advisory Committee needed to act because some local rules are now inconsistent.

An attorney member asked whether local rules might allow a court to prohibit a government amicus brief. A judge member said that he did not think that local rules could authorize a court to strike a government brief. No one knew of a situation in which a local rule had been applied to the government.

The Advisory Committee considered Judge Newman's comment arguing that "amicus-curiae brief" should not be changed to "amicus brief"in subdivision (a)(2). While the Committee sees the argument for this position, it observed that the December 2016 amendments had already changed "amicus-curiae brief" to "amicus brief" in other subdivisions of Rule 29. The proposed change was therefore necessary for consistency.

Following this discussion, the Advisory Committee approved the following four changes to the amendments published in August 2016. First, in light of the December 2016 revision of Rule 29, the amendments originally proposed for former subdivision (a) will be made to subdivision (a)(2). Second, the word order of the amendment in subdivision (a)(2) will be changed to "except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification." Third, the same "except" clause will be added to the end of subdivision (b)(2). Fourth, in subdivision (b)(2), the term "amicus-curiae brief" will be changed to "amicus brief."

E. Item 13-AP-H (Rule 41)

Judge Kavanaugh presented Item 13-AP-H, which concerns the proposed amendments to the Appellate Rule 41 that were published for public comment in August 2016. The amendments address stays of the mandate. Materials concerning the item begin at page 268 of the Agenda Book.

Judge Kavanaugh first discussed the comments of Judge Newman and the comments on behalf of the Second Circuit. These comments opposed the proposal to add a sentence to Rule 41(b) saying: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." The comments asserted that courts might wish to extend the time for good cause even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc.

Two judge members of the Advisory Committee expressed agreement with Judge Newman's comments. An academic member asked whether the standard in Rule 41(b) should be changed to "good cause." A judge member responded that a court would be unlikely to extend issuance of the mandate absent good cause. A judge member said that the original proposal to require exceptional circumstances arose from a concern that judges were delaying the mandate because they did not like the result of a case. Mr. Letter agreed that this was the original concern. A judge member said that adding the proposed words "by order" in the previous sentence of proposed Rule 41(b) would discourage extending the mandate for improper purposes. Another judge member agreed. Following this discussion, the Advisory Committee decided to recommend that the Standing Committee remove the proposed last sentence of Rule 41(b).

Judge Kavanaugh then discussed the National Association of Criminal Defense Lawyers (NACDL)'s proposal for modifying Rule 41(d). The proposal, as shown on page 271 of the Agenda Book, would not allow a stay to exceed 90 days when a Justice of the U.S. Supreme Court extends the time for filing a petition for writ of certiorari.

A judge member commented that the proposal addresses a situation that sometimes arises. Mr. Letter thought it was a good idea and that there would be no downside to adding the language. An attorney member also thought that it would be a good idea.

A judge member asked whether the wording was appropriate. Another judge member said that the language does not fully address the problem. He explained that the stay should be entered automatically if a circuit justice has extended the time for filing a petition. He said that the Advisory Committee ought to make the rule self-executing. The Advisory Committee agreed with this position. It will consider by email an amended proposal to achieve the desired result.

F. Item 15-AP-E (Form 4)

Judge Chagares presented Item 15-AP-E, which concerns a proposed amendment to Form 4 that was published for public comment in August 2016. The amendment would delete a question that asks applicants for leave to proceed in forma pauperis to provide the last four digits of their social security numbers. Materials concerning the item begin at page 330 of the Agenda Book. Judge Chagares explained that all public comments supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approve the proposal as previously published.

G. Items 08-AP-A, 11-AP-C, and 15-AP-D (Rule 3, et al.)

The reporter presented Items 08-AP-A, 11-AP-C, and 15-AP-D, which concern new proposals for amending Rules 3(d), 8(b), and 13(c) to change the words "mail" and "mailing" to "send" and "sending." Materials concerning these items begin at page 352 of the Agenda Book. The reporter reminded the Advisory Committee that it had approved changes to Rule 3(d) at its Fall 2016 meeting, but decided to search the rules for other instances of the word "mail" and "mailing" before making a recommendation to the Standing Committee. Following brief discussion, the Advisory Committee agreed to recommend that the Standing Committee publish for public comment the proposed changes to Rule 3(d) and Rule 13(c) as shown on 353-356 of the Agenda Book. The amendment to Rule 8(b) should be made in connection with Item 12-AP-D (discussed above).

H. Item 08-AP-R (Rule 26.1)

Judge Chagares presented Item 08-AP-R which concerns the disclosures required by Rule 26.1. Materials concerning the item begin at page 360 of the Agenda Book. The reporter reviewed the previous decisions by the Advisory Committee and then raised the pending issues identified in his memorandum.

The Advisory Committee agreed to change the title of Rule 26.1 from "Corporate Disclosure Statement" to "Disclosure Statement" as shown in the discussion draft on page 362 of the Agenda Book. An attorney member recommended searching the Appellate Rules for cross-references to Rule 26.1 that might need to be changed.

The Advisory Committee next considered the proposed amendments to Rule 26.1(b). The reporter reminded the Advisory Committee that these amendments were designed to conform to proposed amendments to Criminal Rule 12.4(b). The reporter told the Advisory Committee that the reporter for the Criminal Rules Advisory Committee had informed him the Criminal Rules Advisory Committee had trimmed back the published version of Rule 12.4 so that it would simply track the current Civil Rule. Because of this change of direction, the reporter for the Criminal Rules Advisory Committee has recommended that no changes are needed in the Appellate Rules or other rules. The Advisory Committee therefore decided not to amend the title of Rule 26.1(b) or the text of Rule 26.1(b)'s last sentence.

A judge member suggested that Rule 26.1(b) should be moved to the end of Rule 26.1 so that it would clearly apply to all of the disclosure requirements in Rule 26.1, and not just to Rule 26.1(a). This proposal would also require revising the lettering of the subdivision and changing the reference to "Rule 26.1(a)" to "this Rule." The Advisory Committee agreed with this suggestion and the reporter agreed to prepare a draft.

The reporter next asked the Advisory Committee members if they wished to discuss the proposals for creating new subdivisions (d) and (f) to address organizational victims and intervenors. The Advisory Committee approved the drafts of these provisions on page 363 of the Agenda Book at its October 2016 meeting. A judge member said that he saw no reason not to adopt the changes. The Advisory Committee agreed.

The Advisory Committee then discussed the revised proposal to create a new subdivision (e) to address disclosures in bankruptcy cases. The reporter and Judge Chagares described their conversations about the issue with representatives from the Bankruptcy Rules Advisory Committee. Judge Campbell suggested changing line 2 to say ". . . if neither the debtor nor the trustee is a party . . . ." The Advisory Committee approved the proposal to create subdivision (d) and asked the reporter to confer with the Style Consultants.

III. Discussion Items

A. Item 16-AP-C (Rules 32.1 and 35)

The reporter presented Item 16-AP-C, a new proposal to require courts to designate orders granting or denying rehearing as "published" decisions so that they would be easier to locate. Materials concerning the proposal begin at page 398 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

B. Item 16-AP-D (Rule 28(j))

Judge Chagares presented Item 16-AP-D, a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). Materials concerning the proposal begin at page 408 of the Agenda Book. The reporter informed the Advisory Committee that the Civil Rules Advisory Committee had decided to remove the item from its agenda. The Appellate Rules Advisory Committee therefore also agreed to remove this item from its agenda.

C. Item 17-AP-A (Rules 4 and 27)

The reporter presented Item 17-AP-A, a new proposal that concerns subpoenas. Materials concerning the proposal begin at page 414 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

D. Item 17-AP-B (Rule 28)

Judge Chagares introduced Item 17-AP-B, a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. Materials concerning the proposal begin at page 420 of the Agenda Book. The proponent of the proposal, Style Consultant Bryan Garner, spoke to the Advisory Committee by telephone.

Mr. Garner explained that the precise question to be decided on appeal is the most important matter for an appellate court, but the wording of the question presented is often poorly phrased. He said that the manner of stating a question is not just a matter of presentation. On the contrary, it is a subject that directly affects the administration of justice. Mr. Garner asserted that the question presented should be moved to the front of the brief. He said that the fact that judges often don't pay attention is evidence that questions are not presented well. He said it was important to include examples of how to state the question presented in the Appellate Rules. He also said that the Rule could be made precatory rather than mandatory by including the words "preferably" or "preferably should," in proposed subdivisions (a)(1) and (a)(1)(D) on page 425 of the Agenda Book.

A judge member asked Mr. Garner if he thought that questions should never start with "whether." Mr. Garner said yes, explaining that the single sentence fragment necessarily precludes any discussion of the facts.

A judge member expressed concern that lawyers have difficulty complying with technical rules. He also said that a party could use the proposed technique of stating the question presented under the current Rules. He felt that it was a question of advocacy. He did not think it was possible to make lawyers better advocates by changing the Appellate Rules.

Another judge thought that it would make sense to move the statement of the question presented up to the front of the brief. He also thought Mr. Garner was correct in asserting that many issue statements are poor and could be improved.

Mr. Letter said that if judges found the proposal useful, then he would support it. An attorney member agreed that the Rules should impose a word limit on the statement of the question presented.

A judge member identified a different problem in many briefs. He said that it is often difficult to determine which issues have to be decided if others are decided (e.g., "If we agree on issue #1, do we have to reach issue #2?").

An attorney member agreed that the statement of the questions presented are often a problem. But he did not think that the proposed codification would help.

Two judge members thought that moving the statement of the question presented to the front of the brief would not be beneficial.

Following this discussion, the consensus was that the Advisory Committee should not go forward with the proposal. The Committee will remove it from the Table of Agenda Items.

IV. Improving Efficiency in Federal Appellate Litigation

The Committee next considered suggestions for improving efficiency in federal appellate litigation.

A. Collateral Order Doctrine

Professor Stephen E. Sachs presented his extensively researched memorandum on the Collateral Order Doctrine, which starts on page 432 of the Agenda Book. He first discussed the difficulty that appellate courts have in balancing factors to determine whether an order is

appealable. He suggested that to improve the situation, it might be possible to come up with a list of orders that are automatically appealable. But before going forward, he said that it might be valuable to obtain empirical evidence about these orders.

A judge member was concerned that the empirical study would be a very large undertaking. Mr. Letter said that he and a former Advisory Committee member, Mr. Katsas, previously investigated a similar proposal. They found that coming up with an improved rule was too difficult because the circumstances varied so much. But he said that their lack of success was not a good reason not to look into the matter.

Two judge members agreed that Rule 23(f) is not popular. Professor Sachs elaborated further on how it might be possible to list some orders that are definitely appealable and some that are not, but otherwise leave the multi-factor test in place. Mr. Byron was worried that this might be difficult.

Two judge members expressed doubt about whether more resources should be devoted to this project. Another judge said that he did not think that changing the rule would make the appellate system more efficient. He further observed that proposed federal legislation may address this topic.

Following this discussion, the Advisory Committee decided not to include the matter on its agenda.

B. Suggestions of the American Academy of Appellate Lawyers

Judge Chagares presented the suggestions of the American Academy of Appellate Lawyers (AAAL), which appear in a memorandum beginning on page 474 of the Agenda Book.

After summarizing the memorandum, Judge Chagares asked the Advisory Committee about the proposal regarding pre-argument focus letters. A judge member said that such letters are often a good idea, but the proposal is not a good topic for a Rule. A judge member said that increased use of focus letters might be suggested to appellate judges as a good practice without changing the Appellate Rules.

An academic member next discussed the proposal concerning judicial notice. He said that there was already a rule on judicial notice, and perhaps judges were just misapplying the rules. An attorney member agreed with the AAAL that some bad practices existed, but did not think that the Appellate Rules needed to address them.

A judge member said that reply briefs are abused. But he did not think a satisfactory rule could be proposed.

Following the discussion, the Advisory Committee decided not to add any of the AALS's suggestions to its agenda at this time.

C. Suggestion Regarding Appellate Rule 47

Professor Sachs finally discussed the possibility of a rule requiring Circuit Courts to post on their website templates of briefs that comply with local rules. He suggested that litigants could download the templates and add the content of the brief. The templates would have all the proper word-processing formatting. The former clerk representative said that the Tenth Circuit does not have templates but they send litigants a checklist. She also said that they make one sample brief available. The current clerk representative said that the Third Circuit's practice is the same. She also worried about the inflexibility of templates. She was also concerned about phone calls from people complaining that the template might not work.

Professor Sachs said that if there was an error in the template, there would be a safe harbor rule. So if there was a problem, the lawyer would be safe. But Professor Sachs said that the proposal only makes sense if clerks often reject briefs. Mr. Letter said that many briefs filed in federal circuits are bounced for not being compliant.

VI. Concluding Remarks

The Administrative Office law clerk reported that she is working on a memorandum regarding Rule 7. Mr. Letter and Mr. Katyal reported that they are working on a memorandum regarding a problem that may arise when a party makes an interlocutory appeal of only one issue in a case that involved multiple appellate issues. Professor Sachs and the reporter said that they would investigate new language from Rule 41(d).

Judge Chagares thanked all of the members of the Advisory Committee and the staff of the Administrative Office. He noted the Committee will miss Mr. Katyal, Mr. Garre, and others who are completing their service.

The meeting of the Advisorty Committee adjourned at 12:30 p.m.

Minutes of the Spring 2017 Meeting of the
Advisory Committee on the Appellate Rules

May 2, 2017
Washington, D.C.

Judge Michael A. Chagares, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on the Appellate Rules to order on Tuesday, May 2, 2017, at 9:30 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Chagares, the following members of the Advisory Committee on the Appellate Rules were present: Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Professor Stephen E. Sachs. Acting Solicitor General Jeffrey B. Wall was represented by Douglas Letter, Esq., and H. Thomas Byron III, Esq. Justice Judith L. French and Neal Katyal, Esq., participated by telephone. Kevin C. Newsom, Esq., was absent.

Also present were: Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on the Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Professor Gregory E. Maggs, Reporter, Advisory Committee on the Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Officer.

Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure, participated by video conference. The following persons participated by telephone: Judge Pamela Pepper, Member, Advisory Committee on the Bankruptcy Rules and Liaison Member, Advisory Committee on the Appellate Rules; Elisabeth A. Shumaker, former Clerk of Court Representative, Advisory Committee on the Appellate Rules; and Marcia M. Waldron, Clerk of Court Representative, Advisory Committee on the Appellate Rules.

I. Introduction

Judge Chagares opened the meeting and greeted everyone. He expressed congratulations to Justice Neil Gorsuch, the past chair of the Advisory Committee, on his appointment to the Supreme Court, and thanked him for his leadership, his wisdom, and all of his contributions as chair. He thanked Rebecca Womeldorf and her staff for organizing the meeting. He also thanked former attorney member Gregory Katsas and former clerk representative Betsy Shumaker, who have completed their service on the Committee. He also noted that this would be the final meeting for attorney members Neal Katyal and Kevin Newsom and liaison member Gregory Garre, whose terms of service are expiring, and expressed his gratitude for their many contributions to the Committee.

II. Approval of Minutes

A motion to approve the draft minutes of the October 2016 meeting of the Advisory Committee was made, seconded, and approved.

III. Action Items

A. Item 12-AP-D (Rules 8, 11, and 39)

Mr. Byron presented Item 12-AP-D, which concerns the proposed amendments to Appellate Rules 8, 11, and 39 that were published for public comment in August 2016. The amendments eliminate references to "supersedeas bonds" so that the Appellate Rules will conform to a proposed amendment to Civil Rule 62(a). Materials concerning the item begin at page 82 of the Agenda Book.

The reporter reminded the Advisory Committee that Rule 8(b) corresponds to Civil Rule 65.1. He then informed the Advisory Committee that the Civil Rules Advisory Committee has approved a version of Civil Rule 65.1 that uses only the generic terms "security" and "security provider," and does not mention examples of specific types of security (e.g., bonds) or security providers (e.g., sureties). The Advisory Committee then discussed and approved a revised version of Rule 8(b), shown on page 84 of the Agenda Book, that follows the same approach as Civil Rule 65.1.

Mr. Byron suggested amending the Committee Note to make clear that the term "security" in the draft of Rule 8(b) includes but is not limited to the types of security previously listed expressly in Rule 8(b), namely, bonds, stipulations, and undertakings. The Committee approved this suggestion. The Committee also approved changing the word “mail” to “send” in line 11 of the draft on page 84.

The Advisory Committee decided to recommend that the Standing Committee approve (1) the amended version of Rule 8, (2) the amended Committee Note, and (3) the versions of Rules 11 and 39 that were published in August 2016.

B. Item 11-AP-D (Rule 25)

The reporter presented Item 11-AP-D, which concerns the proposed amendments to Appellate Rule 25 that were published for public comment in August 2016. The amendments address electronic filing, service, and signatures. Materials concerning the item begin at page 112 of the Agenda Book. The Advisory Committee then discussed issues concerning three subdivisions:

Rule 25(a)(2)(B)(iii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(iii) and its counterparts in the Civil, Criminal, and Bankruptcy Rules. The Advisory Committee then approved the revised version of Rule 25(a)(2)(B)(iii) that appears on page 113 of the Agenda Book, which accords with revisions recommended by the other Advisory Committees.

Rule 25(c)(2). The reporter explained that a public comment had revealed that the published version of Rule 25(c)(2) was difficult to understand. The Committee then approved the proposed revision that appears on page 115 of the Agenda Book. The reporter agreed to coordinate this change with the Bankruptcy Rules Advisory Committee, which is considering a very similar rule.

Rule 25(a)(2)(B)(ii). The reporter explained how public comments had criticized the published version of Rule 25(a)(2)(B)(ii), which concerns filing by unrepresented parties. The Advisory Committee previously had considered but rejected these objections at its October 2016 meeting. The Advisory Committee decided not to recommend changes to the published version of this subdivision.

The reporter explained that one public comment recommended adding a provision to Rule 25 that is similar to Criminal Rule 49(d), which concerns filings by non-parties. The Advisory Committee decided that this proposal went beyond the scope of the amendments to Rule 25 that were published for public comment. The reporter and Mr. Letter agreed to study the proposal as a new matter and report back to the Committee at its next meeting.

The Advisory Committee decided to recommend that the Standing Committee approve the proposed amendments to Rule 25, with the revisions discussed above.

C. Item 15-AP-C (Rules 28.1 and 31)

Judge Chagares presented Item 15-AP-C, which concerns the proposed amendments to Appellate Rules 28.1 and 31 that were published for public comment in August 2016. The amendments would extend the time for filing reply briefs to 21 days. Materials concerning the item begin at page 214 of the Agenda Book.

The reporter explained that all public comments had supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approved the proposed amendments as published.

D. Item 14-AP-D (Rule 29)

Judge Chagares presented Item 14-AP-D, which concerns the proposed amendments to Appellate Rule 29 that were published for public comment in August 2016. The amendments would authorize courts by order or rule to strike or prohibit the filing of amicus briefs that would disqualify a judge. Materials concerning the item begin at page 224 of the Agenda Book.

Judge Chagares began by explaining that Rule 29 had been revised and renumbered for other reasons in December 2016. As a result, the changes proposed for public comment will now have to be made to the new subdivision (a)(2), instead of the old subdivision (a). The discussion draft on page 224 shows the change.

Judge Chagares then identified three issues for consideration: (1) whether the Advisory Committee should approved the proposed changes to subdivision (a)(2); (2) whether subdivision (a)(2) should be reworded; and (3) whether subdivision (b)(2) should also be amended.

A judge member said that the proposed change to subdivision (a)(2) is well grounded and well thought out. He asserted that the changes proposed to subdivision (a)(2) should also apply to the new subdivision (b)(2), which concerns amicus briefs on rehearing. He further suggested that the phrase "may strike or prohibit the filing of" should be reworded to say "may prohibit the filing of or strike" because putting the words in that order was more chronological. The Advisory Committee agreed.

A judge member asked whether it was necessary to allow a court to strike a brief filed during the rehearing stage because a brief can be filed only with leave.

Mr. Letter supported the published amendment but noted that it authorized non-uniform rules. An academic member discussed the Federal Bar Council's argument that existing local rules on the subject might not be inconsistent with the current Rule 29(a)(2). A judge member, however, said that the Advisory Committee needed to act because some local rules are now inconsistent.

An attorney member asked whether local rules might allow a court to prohibit a government amicus brief. A judge member said that he did not think that local rules could authorize a court to strike a government brief. No one knew of a situation in which a local rule had been applied to the government.

The Advisory Committee considered Judge Newman's comment arguing that "amicus-curiae brief" should not be changed to "amicus brief"in subdivision (a)(2). While the Committee sees the argument for this position, it observed that the December 2016 amendments had already changed "amicus-curiae brief" to "amicus brief" in other subdivisions of Rule 29. The proposed change was therefore necessary for consistency.

Following this discussion, the Advisory Committee approved the following four changes to the amendments published in August 2016. First, in light of the December 2016 revision of Rule 29, the amendments originally proposed for former subdivision (a) will be made to subdivision (a)(2). Second, the word order of the amendment in subdivision (a)(2) will be changed to "except that a court of appeals may prohibit the filing of or strike an amicus brief that would result in a judge's disqualification." Third, the same "except" clause will be added to the end of subdivision (b)(2). Fourth, in subdivision (b)(2), the term "amicus-curiae brief" will be changed to "amicus brief."

E. Item 13-AP-H (Rule 41)

Judge Kavanaugh presented Item 13-AP-H, which concerns the proposed amendments to the Appellate Rule 41 that were published for public comment in August 2016. The amendments address stays of the mandate. Materials concerning the item begin at page 268 of the Agenda Book.

Judge Kavanaugh first discussed the comments of Judge Newman and the comments on behalf of the Second Circuit. These comments opposed the proposal to add a sentence to Rule 41(b) saying: "The court may extend the time only in extraordinary circumstances or under Rule 41(d)." The comments asserted that courts might wish to extend the time for good cause even if exceptional circumstances do not exist. For example, a court might wish to poll members about rehearing a case en banc.

Two judge members of the Advisory Committee expressed agreement with Judge Newman's comments. An academic member asked whether the standard in Rule 41(b) should be changed to "good cause." A judge member responded that a court would be unlikely to extend issuance of the mandate absent good cause. A judge member said that the original proposal to require exceptional circumstances arose from a concern that judges were delaying the mandate because they did not like the result of a case. Mr. Letter agreed that this was the original concern. A judge member said that adding the proposed words "by order" in the previous sentence of proposed Rule 41(b) would discourage extending the mandate for improper purposes. Another judge member agreed. Following this discussion, the Advisory Committee decided to recommend that the Standing Committee remove the proposed last sentence of Rule 41(b).

Judge Kavanaugh then discussed the National Association of Criminal Defense Lawyers (NACDL)'s proposal for modifying Rule 41(d). The proposal, as shown on page 271 of the Agenda Book, would allow a stay to exceed 90 days when a Justice of the U.S. Supreme Court extends the time for filing a petition for writ of certiorari.

A judge member commented that the proposal addresses a situation that sometimes arises. Mr. Letter thought it was a good idea and that there would be no downside to adding the language. An attorney member also thought that it would be a good idea.

A judge member asked whether the wording was appropriate. Another judge member said that the language does not fully address the problem. He explained that the stay should be entered automatically if a circuit justice has extended the time for filing a petition. He said that the Advisory Committee ought to make the rule self-executing. The Advisory Committee agreed with this position. It will consider by email an amended proposal to achieve the desired result.

F. Item 15-AP-E (Form 4)

Judge Chagares presented Item 15-AP-E, which concerns a proposed amendment to Form 4 that was published for public comment in August 2016. The amendment would delete a question that asks applicants for leave to proceed in forma pauperis to provide the last four digits of their social security numbers. Materials concerning the item begin at page 330 of the Agenda Book. Judge Chagares explained that all public comments supported the proposal. The Advisory Committee decided to recommend that the Standing Committee approve the proposal as previously published.

G. Items 08-AP-A, 11-AP-C, and 15-AP-D (Rule 3, et al.)

The reporter presented Items 08-AP-A, 11-AP-C, and 15-AP-D, which concern new proposals for amending Rules 3(d), 8(b), and 13(c) to change the words "mail" and "mailing" to "send" and "sending." Materials concerning these items begin at page 352 of the Agenda Book. The reporter reminded the Advisory Committee that it had approved changes to Rule 3(d) at its Fall 2016 meeting, but decided to search the rules for other instances of the word "mail" and "mailing" before making a recommendation to the Standing Committee. Following a brief discussion, the Advisory Committee agreed to recommend that the Standing Committee publish for public comment the proposed changes to Rule 3(d) and Rule 13(c) as shown on pages 353-56 of the Agenda Book. The amendment to Rule 8(b) should be made in connection with Item 12-AP-D (discussed above).

H. Item 08-AP-R (Rule 26.1)

Judge Chagares presented Item 08-AP-R, which concerns the disclosures required by Rule 26.1. Materials concerning the item begin at page 360 of the Agenda Book. The reporter reviewed the previous decisions by the Advisory Committee and then raised the pending issues identified in his memorandum.

The Advisory Committee agreed to change the title of Rule 26.1 from "Corporate Disclosure Statement" to "Disclosure Statement" as shown in the discussion draft on page 362 of the Agenda Book. An attorney member recommended searching the Appellate Rules for cross-references to Rule 26.1 that might need to be changed.

The Advisory Committee next considered the proposed amendments to Rule 26.1(b). The reporter reminded the Advisory Committee that these amendments were designed to conform to proposed amendments to Criminal Rule 12.4(b). The reporter told the Advisory Committee that the reporter for the Criminal Rules Advisory Committee had informed him the Criminal Rules Advisory Committee had trimmed back the published version of Rule 12.4 so that it would simply track the current Civil Rule. Because of this change of direction, the reporter for the Criminal Rules Advisory Committee has recommended that no changes are needed in the Appellate Rules or other rules. The Advisory Committee therefore decided not to amend the title of Rule 26.1(b) or the text of Rule 26.1(b)'s last sentence.

A judge member suggested that Rule 26.1(b) should be moved to the end of Rule 26.1 so that it would clearly apply to all of the disclosure requirements in Rule 26.1, and not just to Rule 26.1(a). This proposal would also require revising the lettering of the subdivision and changing the reference to "Rule 26.1(a)" to "this Rule." The Advisory Committee agreed with this suggestion and the reporter agreed to prepare a draft.

The reporter next asked the Advisory Committee members if they wished to discuss the proposals for creating new subdivisions (d) and (f) to address organizational victims and intervenors. The Advisory Committee approved the drafts of these provisions on page 363 of the Agenda Book at its October 2016 meeting. A judge member said that he saw no reason not to adopt the changes. The Advisory Committee agreed.

The Advisory Committee then discussed the revised proposal to create a new subdivision (e) to address disclosures in bankruptcy cases. The reporter and Judge Chagares described their conversations about the issue with representatives from the Bankruptcy Rules Advisory Committee. Judge Campbell suggested changing line 2 to say ". . . if neither the debtor nor the trustee is a party . . . ." The Advisory Committee approved the proposal to create subdivision (d) and asked the reporter to confer with the Style Consultants.

III. Discussion Items

A. Item 16-AP-C (Rules 32.1 and 35)

The reporter presented Item 16-AP-C, a new proposal to require courts to designate orders granting or denying rehearing as "published" decisions so that they would be easier to

locate. Materials concerning the proposal begin at page 398 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

B. Item 16-AP-D (Rule 28(j))

Judge Chagares presented Item 16-AP-D, a new proposal to amend the Civil Rules to include a provision similar to Appellate Rule 28(j). Materials concerning the proposal begin at page 408 of the Agenda Book. The reporter informed the Advisory Committee that the Civil Rules Advisory Committee had decided to remove the item from its agenda. The Appellate Rules Advisory Committee therefore also agreed to remove this item from its agenda.

C. Item 17-AP-A (Rules 4 and 27)

The reporter presented Item 17-AP-A, a new proposal that concerns subpoenas. Materials concerning the proposal begin at page 414 of the Agenda Book. The Advisory Committee decided to remove the item from its agenda based on considerations identified in the reporter's memorandum.

D. Item 17-AP-B (Rule 28)

Judge Chagares introduced Item 17-AP-B, a new proposal for amending Rule 28 to specify the manner of stating the question presented in appellate briefs. Materials concerning the proposal begin at page 420 of the Agenda Book. The proponent of the proposal, Style Consultant Bryan Garner, spoke to the Advisory Committee by telephone.

Mr. Garner explained that the precise question to be decided on appeal is the most important matter for an appellate court, but the wording of the question presented is often poorly phrased. He said that the manner of stating a question is not just a matter of presentation. On the contrary, it is a subject that directly affects the administration of justice. Mr. Garner asserted that the question presented should be moved to the front of the brief. He said that the fact that judges often don't pay attention is evidence that questions are not presented well. He said it was important to include examples of how to state the question presented in the Appellate Rules. He also said that the Rule could be made precatory rather than mandatory by including the words "preferably" or "preferably should," in proposed subdivisions (a)(1) and (a)(1)(D) on page 425 of the Agenda Book.

A judge member asked Mr. Garner if he thought that questions should never start with "whether." Mr. Garner said yes, explaining that the single sentence fragment necessarily precludes any discussion of the facts.

A judge member expressed concern that lawyers have difficulty complying with technical rules. He also said that a party could use the proposed technique of stating the question presented under the current Rules. He felt that it was a question of advocacy. He did not think it was possible to make lawyers better advocates by changing the Appellate Rules.

Another judge thought that it would make sense to move the statement of the question presented up to the front of the brief. He also thought Mr. Garner was correct in asserting that many issue statements are poor and could be improved.

Mr. Letter said that if judges found the proposal useful, then he would support it. An attorney member agreed that the Rules should impose a word limit on the statement of the question presented.

A judge member identified a different problem in many briefs. He said that it is often difficult to determine which issues have to be decided if others are decided (e.g., "If we agree on issue #1, do we have to reach issue #2?").

An attorney member agreed that the statement of the questions presented are often a problem. But he did not think that the proposed codification would help.

Two judge members thought that moving the statement of the question presented to the front of the brief would not be beneficial.

Following this discussion, the consensus was that the Advisory Committee should not go forward with the proposal. The Committee will remove it from the Table of Agenda Items.

IV. Improving Efficiency in Federal Appellate Litigation

The Committee next considered suggestions for improving efficiency in federal appellate litigation.

A. Collateral Order Doctrine

Professor Stephen E. Sachs presented his extensively researched memorandum on the Collateral Order Doctrine, which starts on page 432 of the Agenda Book. He first discussed the difficulty that appellate courts have in balancing factors to determine whether an order is appealable. He suggested that to improve the situation, it might be possible to come up with a list of orders that are automatically appealable. But before going forward, he said that it might be valuable to obtain empirical evidence about these orders.

A judge member was concerned that the empirical study would be a very large undertaking. Mr. Letter said that he and a former Advisory Committee member, Mr. Katsas, previously investigated a similar proposal. They found that coming up with an improved rule was too difficult because the circumstances varied so much. But he said that their lack of success was not a good reason not to look into the matter.

Two judge members agreed that Rule 23(f) is not popular. Professor Sachs elaborated further on how it might be possible to list some orders that are definitely appealable and some that are not, but otherwise leave the multi-factor test in place. Mr. Byron was worried that this might be difficult.

Two judge members expressed doubt about whether more resources should be devoted to this project. Another judge said that he did not think that changing the rule would make the appellate system more efficient. He further observed that proposed federal legislation may address this topic.

Following this discussion, the Advisory Committee decided not to include the matter on its agenda.

B. Suggestions of the American Academy of Appellate Lawyers

Judge Chagares presented the suggestions of the American Academy of Appellate Lawyers (AAAL), which appear in a memorandum beginning on page 474 of the Agenda Book.

After summarizing the memorandum, Judge Chagares asked the Advisory Committee about the proposal regarding pre-argument focus letters. A judge member said that such letters are often a good idea, but the proposal is not a good topic for a Rule. A judge member said that increased use of focus letters might be suggested to appellate judges as a good practice without changing the Appellate Rules.

An academic member next discussed the proposal concerning judicial notice. He said that there was already a rule on judicial notice, and perhaps judges were just misapplying the rules. An attorney member agreed with the AAAL that some bad practices existed, but did not think that the Appellate Rules needed to address them.

A judge member said that reply briefs are abused. But he did not think a satisfactory rule could be proposed.

Following the discussion, the Advisory Committee decided not to add any of the AALS's suggestions to its agenda at this time.

C. Suggestion Regarding Appellate Rule 47

Professor Sachs finally discussed the possibility of a rule requiring Circuit Courts to post on their website templates of briefs that comply with local rules. He suggested that litigants could download the templates and add the content of the brief. The templates would have all the proper word-processing formatting. The former clerk representative said that the Tenth Circuit does not have templates but they send litigants a checklist. She also said that they make one sample brief available. The current clerk representative said that the Third Circuit's practice is the same. She also worried about the inflexibility of templates. She was also concerned about phone calls from people complaining that the template might not work.

Professor Sachs said that if there was an error in the template, there would be a safe harbor rule. So if there was a problem, the lawyer would be safe. But Professor Sachs said that the proposal only makes sense if clerks often reject briefs. Mr. Letter said that many briefs filed in federal circuits are bounced for not being compliant.

VI. Concluding Remarks

The Administrative Office law clerk reported that she is working on a memorandum regarding Rule 7. Mr. Letter and Mr. Katyal reported that they are working on a memorandum regarding a problem that may arise when a party makes an interlocutory appeal of only one issue in a case that involved multiple appellate issues. Professor Sachs and the reporter said that they would investigate new language from Rule 41(d).

Judge Chagares thanked all of the members of the Advisory Committee and the staff of the Administrative Office. He noted the Committee will miss Mr. Katyal, Mr. Garre, and others who are completing their service.

The meeting of the Advisorty Committee adjourned at 12:30 p.m.

MEMORANDUM

TO: **Hon. David G. Campbell, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Neil M. Gorsuch, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **December 7, 2016**

I. Introduction

The Advisory Committee on Appellate Rules met on October 18, 2016, in Washington, D.C. At this meeting, the Advisory Committee considered one action item and six discussion items. The action item concerned a proposed amendment to Appellate Rule 3 that would eliminate a requirement of "mailing" a notice of appeal. The discussion items concerned security provided on appeal, corporate disclosures, class action settlement objectors, electronic filing by pro se litigants, circuit splits over the meaning of several Appellate Rules, and initiatives to improve the efficiency of federal appellate litigation.

The Advisory Committee now presents five information items to the Standing Committee and no action items. Although the Advisory Committee agreed with a proposed amendment to Rule 3, the Advisory Committee decided not to present the proposal to the Standing Committee at this time. Instead, the Advisory Committee plans to study all of the references to "mail" and "mailing" in the Appellate Rules and then present a more complete proposal to the Standing Committee.

Detailed information about the Advisory Committee's activities can be found in the attached draft of the minutes of the October 18, 2016 meeting and in the attached agenda. The Advisory Committee has scheduled its next meeting for May 3, 2017, in San Diego, California.

II. Information Items

A. Items 08-AP-A, 11-AP-C, and 15-AP-D (Electronic Filing and Service of a Notice of Appeal)

In August 2016, the Standing Committee published proposed changes to Appellate Rule 25 to address the electronic filing and service of documents.[1] In light of the proposed changes to Rule 25, the Advisory Committee subsequently considered whether Rules 3(a) and (d) should also be amended. Rule 3(a) addresses the filing of a notice of appeal. Rule 3(d) concerns the clerk's service of the notice of appeal.

The Advisory Committee concluded that subdivision (a) requires no amendment, but that subdivisions (d)(1) and (3) need two changes. The proposed changes are shown in the discussion draft below. First, in lines 10 and 22, the words "mailing" and "mails" should be replaced with "sending" and "sends" to make electronic filing and service possible. Second, as indicated in lines 13-14, the portion of subdivision (d)(1) saying that the clerk must serve the defendant in a criminal case "either by personal service or by mail addressed to the defendant" should be deleted. These changes will eliminate any requirement of mailing. The clerk will determine whether to serve a notice of appeal electronically or non-electronically based on the principles in revised Rule 25.

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

* * *

(d) Serving the Notice of Appeal.

---

[1] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 27 (August 2016) (proposed revision of Appellate Rule 25), http://www.uscourts.gov/file/20163/download.

(1) The district clerk must serve notice of the filing of a notice of appeal by ~~mailing~~ sending a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant~~, either by personal service or by mail addressed to the defendant~~. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk ~~mails~~ sends copies, with the date of ~~mailing~~ sending. Service is sufficient despite the death of a party or the party's counsel.

The Advisory Committee discussed and tentatively approved these suggested changes to Rule 3(d), but decided to postpone sending any proposal to the Standing Committee. Instead, the Advisory Committee has decided to study all references to "mail" in the Appellate Rules and then make a comprehensive recommendation to the Standing Committee.

B. Item No. 12-AP-D (Civil Rule 62 / Appeal Bonds)

In August 2016, the Standing Committee also published proposed changes to Appellate Rule 8(b), which concerns proceedings to enforce the liability of a surety or other security provider who provides security for a stay or injunction pending appeal.[2] The Advisory Committee subsequently learned of a problem in the published draft. The first clause of the first sentence of the proposed revision of Rule 8(b) mentions four forms of security (i.e., "a bond, other security, a stipulation, or other undertaking"), but the second clause mentions only two (i.e., "a bond or undertaking"). The Advisory Committee discussed the problem at its October 2016 meeting and tentatively decided that

[2] *See id.* at 21 (proposed revision of Appellate Rule 8).

it should be corrected by rephrasing the first sentence of the recently published proposed version of Rule 8(b) as indicated in the discussion draft below:

Rule 8. Stay or Injunction Pending Appeal

* * *

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, a stipulation, an undertaking, or other security, ~~a stipulation, or other undertaking~~ with one or more sureties or other security providers, each provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as its agent on whom any papers affecting its liability on the security ~~bond or undertaking~~ may be served. On motion, a security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each security provider whose address is known.

The indicated revision lists the possible forms of security in a more logical order in the first clause and then refers to them generically as "the security" in the second clause. Although the Advisory Committee believes that these corrections will address the problem, the Committee has decided to postpone acting on the proposed changes until it receives all public comments on the published version of Rule 8(b).

C. Item No. 08-AP-R (Disclosure Statements)

In August 2016, the Standing Committee published proposed changes to Criminal Rule 12.4, which concerns disclosure statements.[3] At its October 2016 meeting, the Advisory Committee tentatively decided to recommend conforming amendments to Appellate Rule 26.1. As shown in the discussion draft below, the changes would modify subdivision (b) and add a new subdivision (d).

Rule 26.1. Corporate Disclosure Statement

* * *

[3] *See id.* at 251 (proposed revision of Criminal Rule 12.4).

(b) Time ~~for~~ to File~~ing~~; ~~Supplemental~~ Later Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must ~~supplement~~ file a statement at a later time promptly if the party learns of any additional required information or any changes in required information ~~upon its statement whenever the information that must be disclosed under Rule 26.1(a) changes~~.

* * *

(d) Organizational Victim in a Criminal Case. In a criminal case, unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 26.1(a) to the extent it can be obtained through due diligence.

In this discussion draft, the heading and third sentence of subdivision (b) match the proposed revision of Criminal Rule 12.4(b)(2). Subdivision (d) matches the proposed revision of Criminal Rule 12.4(a)(2), with only minor differences necessary for adapting the provision to the Appellate Rules. The words "in a criminal case" are added to the heading and the first sentence, and the subdivision refers to "the information required by Rule 26.1(a)" instead of Criminal Rule 12.4(a)(1). The Advisory Committee decided to wait before proposing these conforming amendments to Rule 26.1 to the Standing Committee until receipt of all public comments on the proposed revision of Criminal Rule 12.4.

In addition to these changes, the Advisory Committee previously had contemplated making changes to the basic disclosure requirement in Rule 26.1(a) and adding a new section specifically addressing disclosures in bankruptcy cases. The Advisory Committee tabled those proposals at its October 2016 meeting. The Advisory Committee determined that the burdens imposed by the proposed additional disclosure requirements in Rule 26.1(a) would outweigh the likely benefits. The Advisory Committee remains open to a more targeted approach to amending Rule 26.1(a), but does not currently plan to pursue one. The Advisory Committee further decided not to create special disclosure rules for bankruptcy cases absent a recommendation from the Advisory Committee on Bankruptcy Rules.

The Advisory Committee tentatively approved a proposal that would expressly impose a disclosure requirement on persons who want to intervene. The proposal would add the following new subdivision to Rule 26.1:

(f) Intervenors. A person who wants to intervene must file a statement that discloses the information required by Rule 26.1.

Although intervention at the appellate level is rare, three circuits have a local rule imposing disclosure requirements on intervenors that are the same as if they had been a party initially. The phrase "a person who wants to intervene" comes from Rule 15.1(d). Separately, the Advisory Committee is considering proposals regarding disclosures for persons filing amicus briefs.

D. Item No. 12-AP-F (Class Action Settlement Objectors)

In August 2016, the Standing Committee published a proposed revision of Civil Rule 23 to address objections to class action settlements.[4] At its October 2016 meeting, the Advisory Committee considered whether the proposed changes to Rule 23 would require conforming amendments to the Appellate Rules. The sense of the Committee was that no amendments are necessary. The Advisory Committee therefore has removed this item from its Agenda.

E. Item Nos. 15-AP-A, 15-AP-E, 15-AP-H (Electronic Filing by Pro Se Litigants)

As mentioned above, in August 2016, the Standing Committee published a proposed revision of Appellate Rule 25 to address electronic service and filing.[5] Proposed subdivision (a)(2)(B)(ii) will leave in place the current requirement that unrepresented parties may file papers electronically only if allowed by court order or local rule. At its October 2016 meeting, the Advisory Committee considered whether to reopen this question for further consideration in light of several suggestions submitted by members of the public. The sense of the Advisory Committee was not to recommend any additional changes. The Committee, however, will not take any action with respect to the published revised version of Rule 25 until it receives all public comments.

III. Other Matters

[4] *See id.* at 211 (proposed revision of Civil Rule 23).

[5] *See id.* at 27 (proposed revision of Appellate Rule 25).

At its October 2016 meeting, the Advisory Committee studied two additional matters for possible future inclusion on its agenda. First, the Committee looked at several circuit splits under the Appellate Rules. These splits are about: (1) whether delay by prison authorities in delivering the order from which an inmate wishes to appeal can be used in computing the time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. The Committee decided to investigate the first two circuit splits further but concluded that amending Rule 39(a)(4) would not be an appropriate way to address the third circuit split. Second, the Committee discussed several law review articles proposing ways to make appellate litigation faster and less expensive. As recounted in the minutes, the Committee decided to seek additional information before taking action and will address the matter again at future meetings.

Enclosures:
1. Draft Minutes from the October 18, 2016 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee

THIS PAGE INTENTIONALLY BLANK

TAB 4B

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules
Table of Agenda Items —December 2016

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16

FRAP Item	Proposal	Source	Current Status
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16

FRAP Item	Proposal	Source	Current Status
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15

FRAP Item	Proposal	Source	Current Status
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee Approved for publication by Standing Committee 06/16
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16 Discussed and retained on agenda 10/16

FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved for submission to Standing Committee 4/16 Approved for publication by Standing Committee 06/14
16-AP-C	Suggestion to amend Federal Rules of Appellate Procedure 32.1 and 35 to require publication of orders granting rehearing en banc, etc.	Eric Bravo, Esq.	Awaiting initial discussion
16-AP-D	Suggestion to amend Federal Rule of Appellate Procedure 28 to address how supplemental authority is to be filed, whether a response is permitted, whether a reply is permitted, etc.	John Vail, Esq.	Awaiting initial discussion

THIS PAGE INTENTIONALLY BLANK

TAB 4C

THIS PAGE INTENTIONALLY BLANK

DRAFT Minutes of the Fall 2016 Meeting of the
Advisory Committee on Appellate Rules

October 18, 2016
Washington, D.C.

Judge Neil M. Gorsuch, Chair, Advisory Committee on Appellate Rule alled the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, Octobe 8, 2016, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D C

In addition to Judge Gorsuch, the following members of the Advisory Committee on Appellate Rules were present: Judge Michael A. Chagares, J ice Judith L. Frenc Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavana h, Judge Stephen Joseph M phy III, Kevin C. Newsom, Esq., Judge Brett M. Kavanaugh d Professor Stephen E. Sachs. Acting Solicitor General Ian Heath Gershengorn was represent by Dougl Letter, Esq., and H. Thomas Byron III, Esq.

Also present were: Judge David G C mpbell, Chair, S ding Committee on Rules of Practice and Procedure; Professor Daniel R Coqu te Reporter, S nding Committee on Rules of Practice and Procedure; Ms. Shelly Cox, dministra ecialist, Rules Committee Support Office of the Administrative Office of the U Cou (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Gar q., Member nding Committee on the Rules of Practice and Procedure and Liaison Me ber, Ad ory Comm ee on Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCS ; Marie Lea Esq., Resea h Associate, Advisory Committee on Appellate Rules; Professor G ory E. Mag Reporter, Ad isory Committee on Appellate Rules; Scott Myers, Esq., Attorney dvisor CSO; E h A. Shumaker, Clerk of Court Representative, Advisory Committee on A late Rules; and Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules & Proce re and Rules Committee Officer. Judge Pamela Pepper, Member, Advis y Committee Bankrup y Rules and Liaison Member, Advisory Committee on Appellate Rul , participated by te phone.

I. Intr uctions

Judge orsuc began the meeting by welcoming Judge Campbell, Justice French, Judge Pepper, Professo achs, and Ms. Shumaker to their first meeting of the Advisory Committee. He thanked Ms. Cox and Ms. Womeldorf for organizing the meeting and setting up a dinner that took place the evening before.

Judge Campbell greeted the Committee Members and said it was a privilege to be involved in the process. Ms. Womeldorf then introduced the staff of the Administrative Office. Every person present at the meeting then introduced himself or herself. Judge Gorsuch then expressed his

gratitude to Judge Colloton, the former chair of the Advisory Committee, for clearing much of the Committee's agenda before his term expired. Judge Gorsuch further thanked Judge Jeffrey Sutton, the former chair of the Standing Committee, for his assistance with the Advisory Committee's work.

II. Public Comment on Proposed Amendments to Rule 29

In August 2016, the Standing Committee published a proposed amend nt to Rule 29(a).[1] The change would authorize a court of appeals to "strike or prohibit the filin f an amicus brief that would result in a judge's disqualification." The Advisory Committe d comments on this proposed change from Associate Dean Alan Morrison of the Georg ashing n University Law School, who also filed written comments prior to the meeting.[2] Dean Morrison a rted that there was no need for the amendment, that the amendment would not lve the problem tha is intended to solve, that the amendment might deprive the courts of in mation, and that the amen ent will deny amici the opportunity to be heard.

A judge member mentioned that the proposed am dm nt was largely a codification of existing local rules. Dean Morrison responded that he had nev seen a recusal based on an amicus brief. He asserted that most attorneys file icus briefs well bef knowing who the judges are. Accordingly, a client might hire a lawyer write ief and then ve the brief stricken. Dean Morrison asserted that there would be nothin that the a y could do about the possibility that the amicus brief might be stricken either before r afte ling it. D an Morrison also pointed out that the Supreme Court receives m micus briefs the appellate courts, that all of its Justices are known at the time of filing nd that cusal base n amicus briefs has never been a problem even though the Supreme C rt does not ve a rule lik he one proposed.

Dean Morrison knowl ged that causing a recusal could possibly be a problem when a case is reheard en and said that his written comments address this issue. He also said that a brief g filed at t panel stage and then stricken when the case is reheard en banc. An attorn member ask whether, the time an amicus brief is stricken, it would be too late to file a s titute brief. Dean Morrison s id that it would be too late. The attorney member also noted wh there is more than o amicus or more than one lawyer on the amicus brief, it might be unclear

[1] *See* C mi e on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 41 (August 2016) [hereinafter August 2016 Proposed Amendments] (proposed revision of Appellate Rule 29), http://www.uscourts.gov/file/20163/download.

[2] *See* Comment from Alan Morrison, https://www.regulations.gov/document?D=USC-RULES-AP-2016-0002-0003.

who caused the recusal. An academic member asked how often judges recuse themselves. Dean Morrison did not have the statistics. The Advisory Committee took Dean Morrison's comments under advisement and will decide what action to take after the public comment period on Rule 29 ends on February 15, 2017.

III. Approval of Minutes of Spring 2016 Meeting and Report on June 2016 Meeting of the Standing Committee

The Committee approved the Minutes of the April 5, 2016 Mee g f the Advisory Committee, with the correction of one typographical error on page 7.[3] he rep er mentioned that Judge Colloton had communicated with the chief judges of the various circuits ab t Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees) the April 2016 Min s indicated he would. Judge Gorsuch recounted items of interest from e June 2016 meeting of th tanding Committee.

IV. Action Item—Item 11-AP-C (Amendments to Rule (a) nd (d))

Judge Gorsuch introduced this mat which concerns am dments to Rules 3(a) and 3(d) to eliminate references to "mailing."[4] The A visory mmittee first ussed the proposed change to Rule 3(a). The clerk representative sugge d elimina he proposed word "nonelectronic" in line 6 of the discussion draft because it might c use co usion. A attorney member suggested that "hard copy" might be a better w A judge me r then asked whether attorneys reading the rule might think that hard copie would a ays be need d. Judge Campbell asked whether the confusion might lead to extra pap being filed i he court. T clerk representative said that she did not think so. Judge Campbell so asked wh her the second entence of Rule 3(a) was needed at all, given that clerks can provid e nece ary copi clerk representative said it probably would not make a difference. A jud ember worried about imposing additional burdens on the clerks of court. Th y Commi e then discussed the proposed changes to Rule 3(d). The reporter explai d the purpos f the am dments. The clerk representative expressed agreement with the pro sal.

llowing the di ssion, the Advisory Committee voted to recommend the proposed changes t ule 3(d) bu ot to recommend any changes to Rule 3(a). But rather than sending the

[3] *See* Advisory Committee on Rules of Appellate Procedure, Fall 2016 Meeting at 33 [hereinafter Fall 2016 Agenda Book] (draft minutes of the April 2016 meeting of the Advisory Committee), www.uscourts.gov/file/20243/download.

[4] *See id.* at 51 (memorandum on Item 11-AP-C).

proposal to the Standing Committee, the Advisory Committee decided to hold the matter until the spring. In the meantime, the Advisory Committee asked the reported to study all references to "mail" in the appellate rules and to prepare a memorandum suggesting revisions. At the Spring 2017 meeting, the Advisory Committee will determine whether to change other rules along with Rule 3(d). It was also the sense of the Advisory Committee that district court judges should be consulted about whether any alternative changes to Rule 3(a) should be considered.

V. Discussion Items

A. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)

The Reporter introduced Item No. 12-AP-D, which co rns the treatment of peal bonds under Civil Rule 62 and Appellate Rule 8.[5] As explained in e memorandum addressing is issue, there is a discrepancy between the first and second claus f the first sentence of the version of Rule 8(d) recently published for public comment.[6] The memo dum sug sted four possible options for addressing the discrepancy.

An attorney member said that he f rred the third op because it would correct all problems addressed in the memorandum. I respo o a question f a judge member about the term "security" in line 27, the attorney mem er said th word "security" in line 27 refers to "security" in line 21. Another attorney memb expla ed the his ory of the rule. Judge Campbell asked whether Rule 8(d) sho atch Civil l 62.1 by saying "bond, undertaking, or other security" (but not "stipulat n"). An torney me ber expressed concern about limiting Rule 8(d) in this way. The Com ttee then co idered addi nal proposals for redrafting the first sentence of Rule 8(d) so that orms of secu ty were listed in he first clause and then referred to generically in the second clause as he sec ty.

Fol f rther dis sion, the sense of the Committee was to change the first clause of Rule 8) to say "If rty give ecurity in the form of a bond, a stipulation, an undertaking, or oth security~~, a stipula , or othe undertaking~~ with . . ." and to change the second clause to say "af ting its liability on e security ~~bond or undertaking~~ may be served . . . ." The Advisory Comm e decided to po one submitting the proposed changes to the Standing Committee until it receives l public comments on the recently published version of Rule 8.

[5] *See id.* at 73 (memorandum on Item No. 12-AP-D).

[6] *See* August 2016 Proposed Amendments, *supra* note 1, at 21-23 (proposed revision of Rule 8).

B. Item No. 08-AP-R (disclosure requirements)

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures.[7] The Advisory Committee first considered the proposed changes to Rule 26.1(a).[8] A judge member expressed the view that the current rule should not be changed. An attorney member said that the coverage of the phrase "related matter" in (a)(2)-(4) "could be immense." Another attorney member said that D.C. Circuit loc ules use the term "entity" because that term appears in the financial disclosure form. A j ge member said that requiring the disclosure of the names of lawyers, witnesses, and judges be very burdensome in bankruptcy cases because there could be ten related matters in a ma r chapt 11 reorganization. Another judge member said that deciding what is a "related matter" would be very fficult without more guidance. He then expressed doubt that the Committee uld go forward with e proposal. Another judge member explained that the guiding thought as that judges don't want to ig into a case and then find out that there was a problem; he said e term "relat d state matter" was drafted with habeas cases in mind. He thought more disclosur ould be h pful. Judge Campbell asked why Professor Daniel Capra had written the original mem and m about this item. An attorney member explained that there were complaints by judges that th did not have enough disclosure up front. The clerk representative said that th ersion of Rule 26) in the Agenda Book would generate many questions to clerks of court bout is a "related tter." An attorney member said that the costs appeared to be larger than e benefit clerk member also said that there is already a "certificate of interested parties" that filed d that is u d for recusal purposes. Another attorney suggested that unless th dges see a st need for additional disclosure, then the lawyers

---

[7] *See* Fall 20 Agenda B note 3, at 89 (memorandum on Item No. 08-AP-R).

[8] The discussion d f f Rule 26.1(a) under consideration read as follows:

Rule 26.1. ~~C orate~~ D losure Statement

(a) Who Must File; <u>What Must Be Disclosed</u>. Any ~~nongovernmental corporate~~ party to a proceed g in a court of appeals must file a statement that lists:

<u>(1)</u> ny parent corporation<u>,</u> and any publicly held ~~corporation~~ <u>entity,</u> ~~that owns 10% or m re of its stock~~ <u>that has a 10% or greater ownership interest in the party</u> or tates at there is no such corporation or <u>entity</u>;

<u>(2) the names of all judges in the matter and in any related [state] matter;</u>

<u>(3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter [and any related matter]; and</u>

<u>(4) the names of all witnesses who have testified on behalf of the party in the matter [and any related matter].</u>

would rather not have it. A judge member said that there could be a benefit to judges and taxpayers, but recognized that it was burdensome. Following discussion, the Advisory Committee approved a motion to table further consideration of amendments to Rule 26.1(a). The Advisory Committee determined that the burdens imposed by the proposed additional disclosure requirements in Rule 26.1(a) would outweigh the likely benefits. The Advisory Committee remains open to a more targeted approach to amending Rule 26.1(a), but does not currently plan to pursue one.

The Advisory Committee next considered the proposed changes Rule 26.1(d). The reporter explained that the language of the current discussion draft is d from the recently published proposed revision of Criminal Rule 12.4(a)(2).[9] The Co mittee cussed the matter briefly and then approved the proposed amendment.

The Advisory Committee then considered the discu on draft of Rule 26.1(b). T reporter explained that the proposed changes in this discussion ft would par ially conform Rule 26.1(b) to the recently published proposed revision of Criminal ule 12.4(b A judge member spoke in favor of the proposed changes to both the title and the text o e r e. Following further discussion, the Advisory Committee voted in favor of the proposed amen ent.

The Advisory Committee next co idere discussion ft of Rule 26.1(e), which concerns disclosures in bankruptcy cases. A udge mem id that the Advisory Committee on Appellate Rules might not want to take the lead n this atter. An cademic member suggested that the bankruptcy courts might n d a rule bec they would already know the information. A judge member responded t at a ban ptcy cour ould know the names of debtors at the time the case was filed but wou not know a ditional info ation until it was developed later in the case. A judge member sai hat the propo l had been prompted by an ethics opinion. Judge Chagares and Judge Pepper voluntee d to di ss the m rther with members of the Advisory Committee on Bankruptcy Rules. Th e of the Committee was to table consideration of Rule 26.1(e) until the Advis ittee on B kruptcy Rules provides a recommendation.

The Advisory Co mittee ne t considered the discussion draft of Rule 26.1(f), which would imp e disclosure require nts on persons who want to intervene. The reporter explained the draft. Follow g a brief discussi n, the Advisory Committee voted in favor of the proposed amendment.

[9] *See* August 2016 Proposed Amendments, *supra* note 1, at 251-253 (proposed revision of Criminal Rule 12.4).

[10] *See id.*

The Advisory Committee then considered the discussion draft of Rule 26.1(g), which would prevent local rules from increasing or decreasing the disclosure requirements of Rule 26.1(a). Following discussion, the Committee decided to remove section (g) because the section would only make sense if section (a) would be amended.

The Advisory Committee next considered the discussion draft of Rule 29(c)(1).[11] This provision would require persons who file amicus briefs to make the same disclo es required under the discussion draft of Rule 26.1(a). The Committee concluded that the ame ment was not needed because the proposal to amend Rule 26.1(a) had been tabled. The Commi herefore also decided to table the proposal to amend Rule 29(c)(1).

Finally, the Advisory Committee considered the discus n draft of Rule 29(c) (D), which would require a statement about whether a lawyer or legal ganization authored the bri n whole or in part, and, if so, identifies each such lawyer or legal ganization Following brief discussion, the Advisory Committee rejected the change because th did not s m to be a huge need for it and because party briefs do not require this.

C. Item No. 12-AP-F (class actio tlement objectors

The Advisory Committee next cons ered Item 12 AP-F, which concerns a possible problem with some objections to class action s tleme s.[12] Follo ing a brief discussion, the sense of the Advisory Committee w hat this item uld be removed from the agenda because the Advisory Committee on th Civil R les has ful addressed the matter in the recently published provision to Rule 23.[13] he Advisor Committee c ncluded that no conforming amendment to the Appellate Rules wa ecessary.

D. Item Nos. 15-A , 15-AP-E, 15-AP-H (electronic filing by pro se litigants)

he Advisory ommitte ext considered Item Nos. 15-AP-A, 15-AP-E, and 15-AP-H.[14] Th three items conc proposa to modify the Appellate Rules so that they generally would

---

[11] Fall 2016 genda Book, *supra* note 3, at 93.

[12] *See* F 2 16 Agenda Book, *supra* note 3, at 133 (memorandum on Item No. 12-AP-F).

[13] *See* August 2016 Proposed Amendments, *supra* note 1, at 211 (proposed revision of Civil Rule 23).

[14] *See* Fall 2016 Agenda Book, *supra* note 3, at 145 (memorandum on Items Nos. 15-AP-A, 15-AP-E, 15-AP-H).

allow pro se litigants to file documents electronically. The Committee considered but did not approve these proposals when addressing the recent changes to Appellate Rule 25. The published proposed revision of Rule 25 retains the current rule that unrepresented parties may file papers electronically only if allowed by court order or local rule.[15] One judge member thought the Committee should resume consideration of this matter, but the sense of the Committee was to remove the item from the agenda. Representatives from the Administrative Office said that they would continue to look at the subject of pro se filing and report back to the Co mittee.

The Committee then took a break for lunch.

E. Circuit Splits over the Meaning of Appellate Rules 4(c), 7, and 39((4)

When the meeting resumed, the Committee discuss three circuit split on the int retation of the Appellate Rules and considered whether to add th m to its Age da.[16] The Committee first considered a circuit split under Rule 4(c). Judge Gorsu introduc the issue and explained that appellate courts disagree about whether the period for filin n ce of appeal may be extended if prison officials delay in notifying an inmate of the entry of a j ment or appealable decision. Mr. Byron said that the Bureau of Prisons had fl d two issues. Firs would be difficult to track and provide evidence of when an inmate actually eceiv tice of the dis t court's entry of judgment. Second, a prisoner's assertion of a delay coul e burden o prison staff. A judge member said that the Third Circuit's decision was made bef e *Bow s v. Russ ll*, 551 U.S. 205 (2007), and the relevant arguments might not h been raised ge Campbell said that it would be rare for this issue to arise in a criminal ase. N ecision w made about including this issue on the agenda. For the spring meeting he reporter ll determine ow often this issue arises in civil cases.

The Committe en dis sed a cir it under Rule 7 about whether the costs for which a bond may be required u Rule 7 can include attorney's fees. Some circuits take the position that, wher fee shift statute, the bond on appeal can cover the fees. The D.C. and Third Circui disagree, rea ing that quiring a bond to cover attorney's fees might deter non-frivolous app ls. A judge memb noted tha the Third Circuit opinion was not published. Judge Campbell ask how often district urts award fees before the appeal. The clerk representative said that attorne fees cases usual come to the appellate courts independently. Mr. Byron also wondered how often ese cases a e. No decision was made about including this issue on the agenda. For the spring m ing, th reporter will determine how often this issue arises.

---

[15] *See* August 2016 Proposed Amendments, *supra* note 1, at 271 (proposed revision of Appellate Rule 25).

[16] *See* Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

The Committee then considered a circuit split about whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. An academic member asked what the objection would be to giving the district court discretion to decide. Judge Campbell asked whether the word "court" refers to the appellate court or to the district court. A member suggested that the historical sections in Moore's Federal Practice and Wright & Miller might have some history on this topic. Following discussion, the Committee decided not to put this issue on the agenda.

F. Initiatives to Improve the Efficiency of Federal Appeals

The Advisory Committee next considered the subject of how mendm s to the Appellate Rules might lower costs and make appeals faster and more efficient.[17] Judge Go ch introduced the subject and referred to the law review cited in the reporter' memorandum on th bject. Mr. Letter said the Committee already had looked into the interl utory appeals issue. A Judg Member said that some of Martin Siegel's suggestions might be id s to send to Chief Judges of each circuit. Professor Coquillete said that the Civil Rules Committ had dropp d a number of forms because they were difficult to update. But he said that forms ma g l gation more efficient might be beneficial. Judge Campbell said that he would inquire about w ther any of the proposed steps had been taken.

A judge member suggested the rules ould requ introduction and summary together in the brief and not separately. Another judge m mber ked whet r there might be ways to address interlocutory appeals. An atto member said l rules on contents of briefs are a problem. As examples, he mentioned th the cir its have di rent rules on parallel citations and ways to cite the record or trial. Prof sor Sachs v unteered to s dy interlocutory appeals and report back to the Advisory Committ Judge Kav augh voluntee d to work with the representatives from the Department of Justice the is s of sect briefs and citations.

VI. New B

Judge Gorsuch vited me bers of the Advisory Committee to propose possible new bus ss for the Committ to consider.

M Katyal said hat the Eighth Circuit has a trap for the unwary. If a party seeks an interlocutory peal o one issue, the party then cannot later appeal other issues. Other circuits have a different rule. ge Gorsuch said that the topic will be on the agenda for the spring meeting and that the spring agenda book will include a memorandum on the subject prepared by Mr. Katyal.

[17] *See* Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

Prof. Coquillette said that it would be better for a committee to resolve this issue than to wait for the Supreme Court to resolve it through litigation.

Mr. Katyal separately discussed variations in the circuits on Appellate Rule 30 concerning joint appendices. He cited the example of whether supplemental joint appendices are allowed by motion or by right. Another issue is whether the joint appendix can be deferred until after all the briefs come in. Mr. Letter and Prof. Coquillette both supported the suggestion at the Committee should consider this issue. Ms. Shumaker agreed. Judge Chagares and Judge avanaugh, and others thought the Committee should consider the matter. Judge Campbell aske ther electronic filing would affect joint appendices. Ms. Shumaker said that hyperlinkin etwee lectronically filed briefs and the record will be possible in the future, and said that the Second and th Circuit are already experimenting with a system. Judge Chagares said that re should not be a r prohibiting all paper. Judge Murphy said that this is one of the most co plicated things appellate la rs have to deal with. He saw the benefit of a national rule but th ght that such a rule might affect lawyers who know only the local practice. Judge Gorsuch ask Mr. Lett and Mr. Katyal to prepare a memorandum for the spring meeting.

Mr. Byron suggested another item ew business. He d that Rule 45 and Rule 40(b) provide lengths for rehearing en banc petiti s but for responses he clerk representative said that the responding party just follows the peti ner's limi said that although it seems like there is a gap, the issue has not been a problem. Gi n tha he rule w just amended and there was no confusion, the sense of the C ittee was tha h proposed item should not be included on the agenda.

Judge Gorsu announced at the Commit e had received a request to make a rule that courts publish orders g ting e anc hea he worry is that a lawyer (or another court) will rely on a panel decision w knowing that rehearing en banc had been granted. A judge member believed th sensible quest. Mr. Byron said that a rule requiring publication might raise contro rsy and that ublicatio is an unusual term given that most documents are available on Pa . Judge Gorsuch a ed the cle k representative for guidance. She said that Westlaw decides wh rder to publish, no he court. Mr. Letter said that maybe this is an issue for which a letter should written. Mr. B on asked whether there was a problem requiring publication. A judge member s d that a 7th ircuit local rule says that it must be published in the Federal Reporter. These orders app on Pacer. Mr. Byron and Mr. Letter said they will work with others in investigating thi ue.

Finally, the Advisory Committee considered Ms. Shumaker's memorandum in the Agenda Book.[18] The memorandum explains that Rules 10, 11, 27, and 30 do not account (or do not account fully) for electronic records. She said that the current situation is difficult to address. Judge Campbell said that the Civil Rules contained too many references to paper to correct but they did not cause many problems. The clerk representative said that on appeal the problems are greater. The sense of the Committee was that this is a topic to look into; there should be an inventory of what has to be changed. The clerk representative and reporter will make a list of all pl s where the rules have to be changed to bring them into conformity with current practice with t trying to change the practice.

VII. Adjournment

The meeting adjourned at 2:10 p.m.

[18] *See id.* at 183 (memorandum on Potential Fed. R. App. P. Updates).

Minutes of the Fall 2016 Meeting of the
Advisory Committee on Appellate Rules

October 18, 2016
Washington, D.C.

Judge Neil M. Gorsuch, Chair, Advisory Committee on Appellate Rules, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, October 18, 2016, at 9:00 a.m., at the Thurgood Marshall Federal Judicial Building in Washington, D.C.

In addition to Judge Gorsuch, the following members of the Advisory Committee on Appellate Rules were present: Judge Michael A. Chagares, Justice Judith L. French, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, Kevin C. Newsom, Esq., and Professor Stephen E. Sachs. Acting Solicitor General Ian Heath Gershengorn was represented by Douglas Letter, Esq. and H. Thomas Byron III, Esq.

Also present were: Judge David G. Campbell, Chair, Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette, Reporter, Standing Committee on Rules of Practice and Procedure; Ms. Shelly Cox, Administrative Specialist, Rules Committee Support Office of the Administrative Office of the U.S. Courts (RCSO); Ms. Lauren Gailey, Rules Law Clerk, RCSO; Gregory G. Garre, Esq., Member, Standing Committee on the Rules of Practice and Procedure and Liaison Member, Advisory Committee on Appellate Rules; Bridget M. Healy, Esq., Attorney Advisor, RCSO; Marie Leary, Esq., Research Associate, Advisory Committee on Appellate Rules; Professor Gregory E. Maggs, Reporter, Advisory Committee on Appellate Rules; Scott Myers, Esq., Attorney Advisor, RCSO; Elisabeth A. Shumaker, Clerk of Court Representative, Advisory Committee on Appellate Rules; and Rebecca A. Womeldorf, Esq., Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer. Judge Pamela Pepper, Member, Advisory Committee on Bankruptcy Rules and Liaison Member, Advisory Committee on Appellate Rules, participated by telephone.

I. Introductions

Judge Gorsuch began the meeting by welcoming Judge Campbell, Justice French, Judge Pepper, Professor Sachs, and Ms. Shumaker to their first meeting of the Advisory Committee. He thanked Ms. Cox and Ms. Womeldorf for organizing the meeting and setting up a dinner that took place the evening before.

Judge Campbell greeted the Committee Members and said it was a privilege to be involved in the process. Ms. Womeldorf then introduced the staff of the Administrative Office. Every person present at the meeting then introduced himself or herself. Judge Gorsuch then expressed his gratitude to Judge Colloton, the former chair of the Advisory Committee, for clearing much of the

Committee's agenda before his term expired. Judge Gorsuch further thanked Judge Jeffrey Sutton, the former chair of the Standing Committee, for his assistance with the Advisory Committee's work.

II. Public Comment on Proposed Amendments to Rule 29

In August 2016, the Standing Committee published a proposed amendment to Rule 29(a).[1] The change would authorize a court of appeals to "strike or prohibit the filing of an amicus brief that would result in a judge's disqualification." The Advisory Committee heard comments on this proposed change from Associate Dean Alan Morrison of the George Washington University Law School, who also filed written comments prior to the meeting.[2] Dean Morrison asserted that there was no need for the amendment, that the amendment would not solve the problem that it is intended to solve, that the amendment might deprive the courts of information, and that the amendment will deny amici the opportunity to be heard.

A judge member mentioned that the proposed amendment was largely a codification of existing local rules. Dean Morrison responded that he had never seen a recusal based on an amicus brief. He asserted that most attorneys file amicus briefs well before knowing who the judges are. Accordingly, a client might hire a lawyer to write a brief and then have the brief stricken. Dean Morrison asserted that there would be nothing that the attorney could do about the possibility that the amicus brief might be stricken either before or after filing it. Dean Morrison also pointed out that the Supreme Court receives more amicus briefs than the appellate courts, that all of its Justices are known at the time of filing, and that recusal based on amicus briefs has never been a problem even though the Supreme Court does not have a rule like the one proposed.

Dean Morrison acknowledged that a brief causing a recusal could possibly be a problem when a case is reheard en banc and said that his written comments address this issue. He also said that a brief might be filed at the panel stage and then stricken when the case is reheard en banc. An attorney member asked whether, at the time an amicus brief is stricken, it would be too late to file a substitute brief. Dean Morrison said that it would be too late. The attorney member also noted when there is more than one amicus or more than one lawyer on the amicus brief, it might be unclear who caused the recusal. An academic member asked how often judges recuse themselves. Dean

---

[1] *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure 41 (August 2016) [hereinafter August 2016 Proposed Amendments] (proposed revision of Appellate Rule 29), http://www.uscourts.gov/file/20163/download.

[2] *See* Comment from Alan Morrison, https://www.regulations.gov/document?D=USC-RULES-AP-2016-0002-0003.

Morrison did not have the statistics. The Advisory Committee took Dean Morrison's comments under advisement and will decide what action to take after the public comment period on Rule 29 ends on February 15, 2017.

III. Approval of Minutes of Spring 2016 Meeting and Report on June 2016 Meeting of the Standing Committee

The Committee approved the Minutes of the April 5, 2016 Meeting of the Advisory Committee, with the correction of one typographical error on page 7.[3] The reporter mentioned that Judge Colloton had communicated with the chief judges of the various circuits about Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees) as the April 2016 Minutes indicated he would. Judge Gorsuch recounted items of interest from the June 2016 meeting of the Standing Committee.

IV. Action Item—Item 11-AP-C (Amendments to Rules 3(a) and (d))

Judge Gorsuch introduced this matter, which concerns amendments to Rules 3(a) and 3(d) to eliminate references to "mailing."[4] The Advisory Committee first discussed the proposed change to Rule 3(a). The clerk representative suggested eliminating the proposed word "nonelectronic" in line 6 of the discussion draft because it might cause confusion. An attorney member suggested that "hard copy" might be a better word. A judge member then asked whether attorneys reading the rule might think that hard copies would always be needed. Judge Campbell asked whether the confusion might lead to extra paper being filed in the court. The clerk representative said that she did not think so. Judge Campbell also asked whether the second sentence of Rule 3(a) was needed at all, given that clerks can provide the necessary copies. The clerk representative said it probably would not make a difference. A judge member worried about imposing additional burdens on the clerks of court. The Advisory Committee then discussed the proposed changes to Rule 3(d). The reporter explained the purpose of the amendments. The clerk representative expressed agreement with the proposal.

Following the discussion, the Advisory Committee voted to recommend the proposed changes to Rule 3(d) but not to recommend any changes to Rule 3(a). But rather than sending the proposal to the Standing Committee, the Advisory Committee decided to hold the matter until the

---

[3] *See* Advisory Committee on Rules of Appellate Procedure, Fall 2016 Meeting at 33 [hereinafter Fall 2016 Agenda Book] (draft minutes of the April 2016 meeting of the Advisory Committee), www.uscourts.gov/file/20243/download.

[4] *See id.* at 51 (memorandum on Item 11-AP-C).

spring. In the meantime, the Advisory Committee asked the reporter to study all references to "mail" in the appellate rules and to prepare a memorandum suggesting revisions. At the Spring 2017 meeting, the Advisory Committee will determine whether to change other rules along with Rule 3(d). It was also the sense of the Advisory Committee that district court judges should be consulted about whether any alternative changes to Rule 3(a) should be considered.

V. Discussion Items

A. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)

The Reporter introduced Item No. 12-AP-D, which concerns the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8.[5] As explained in the memorandum addressing this issue, there is a discrepancy between the first and second clauses of the first sentence of the version of Rule 8(d) recently published for public comment.[6] The memorandum suggested four possible options for addressing the discrepancy.

An attorney member said that he preferred the third option because it would correct all problems addressed in the memorandum. In response to a question from a judge member about the term "security" in line 27, the attorney member said that the word "security" in line 27 refers to "security" in line 21. Another attorney member explained the history of the rule. Judge Campbell asked whether Rule 8(d) should match Civil Rule 65.1. An attorney member expressed concern about limiting Rule 8(d) in this way. The Committee then considered additional proposals for redrafting the first sentence of Rule 8(d) so that all forms of security were listed in the first clause and then referred to generically in the second clause as "the security."

Following further discussion, the sense of the Committee was to change the first clause of Rule 8(b) to say "If a party gives security in the form of a bond, a stipulation, an undertaking, or other security~~, a stipulation, or other undertaking~~ with . . ." and to change the second clause to say "affecting its liability on the security ~~bond or undertaking~~ may be served . . . ." The Advisory Committee decided to postpone submitting the proposed changes to the Standing Committee until it receives all public comments on the recently published version of Rule 8.

---

[5] *See id.* at 73 (memorandum on Item No. 12-AP-D).

[6] *See* August 2016 Proposed Amendments, *supra* note 1, at 21-23 (proposed revision of Rule 8).

B. Item No. 08-AP-R (disclosure requirements)

This item concerns proposed revisions to Appellate Rules 26.1 and 29(c), which require parties and amici curiae to make certain disclosures.[7] The Advisory Committee first considered the proposed changes to Rule 26.1(a).[8] A judge member expressed the view that the current rule should not be changed. An attorney member said that the coverage of the phrase "related matter" in (a)(2)-(4) "could be immense." Another attorney member said that D.C. Circuit local rules use the term "entity" because that term appears in the financial disclosure form. A judge member said that requiring the disclosure of the names of lawyers, witnesses, and judges could be very burdensome in bankruptcy cases because there could be ten related matters in a major chapter 11 reorganization. Another judge member said that deciding what is a "related matter" would be very difficult without more guidance. He then expressed doubt that the Committee should go forward with the proposal. Another judge member explained that the guiding thought was that judges don't want to dig into a case and then find out that there was a problem; he said the term "related state matter" was drafted with habeas cases in mind. He thought more disclosure could be helpful. Judge Campbell asked why Professor Daniel Capra had written the original memorandum about this item. An attorney member explained that there were complaints by judges that they did not have enough disclosure up front. The clerk representative said that the version of Rule 26.1(a) in the Agenda Book would generate many questions to clerks of court about what is a "related matter." An attorney member said that the costs appeared to be larger than the benefits. The clerk member also said that there is already a "certificate of interested parties" that is filed and that is used for recusal purposes. Another attorney suggested that unless the judges see a strong need for additional disclosure, then the lawyers

---

[7] *See* Fall 2016 Agenda Book, *supra* note 3, at 89 (memorandum on Item No. 08-AP-R).

[8] The discussion draft of Rule 26.1(a) under consideration read as follows:

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File; <u>What Must Be Disclosed</u>. Any ~~nongovernmental corporate~~ party to a proceeding in a court of appeals must file a statement that lists:

<u>(1)</u> any parent corporation<u>,</u> and any publicly held ~~corporation~~ <u>entity,</u> ~~that owns 10% or more of its stock~~ <u>that has a 10% or greater ownership interest in the party</u> or states that there is no such corporation or <u>entity</u>;

<u>(2) the names of all judges in the matter and in any related [state] matter;</u>

<u>(3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter [and any related matter]; and</u>

<u>(4) the names of all witnesses who have testified on behalf of the party in the matter [and any related matter].</u>

would rather not have it. A judge member said that there could be a benefit to judges and taxpayers, but recognized that it was burdensome. Following discussion, the Advisory Committee approved a motion to table further consideration of amendments to Rule 26.1(a). The Advisory Committee determined that the burdens imposed by the proposed additional disclosure requirements in Rule 26.1(a) would outweigh the likely benefits. The Advisory Committee remains open to a more targeted approach to amending Rule 26.1(a), but does not currently plan to pursue one.

The Advisory Committee next considered the proposed changes to Rule 26.1(d). The reporter explained that the language of the current discussion draft is copied from the recently published proposed revision of Criminal Rule 12.4(a)(2).[9] The Committee discussed the matter briefly and then approved the proposed amendment.

The Advisory Committee then considered the discussion draft of Rule 26.1(b). The reporter explained that the proposed changes in this discussion draft would partially conform Rule 26.1(b) to the recently published proposed revision of Criminal Rule 12.4(b).[10] A judge member spoke in favor of the proposed changes to both the title and the text of the rule. Following further discussion, the Advisory Committee voted in favor of the proposed amendment.

The Advisory Committee next considered the discussion draft of Rule 26.1(e), which concerns disclosures in bankruptcy cases. A judge member said that the Advisory Committee on Appellate Rules might not want to take the lead on this matter. An academic member suggested that the bankruptcy courts might not need a rule because they would already know the information. A judge member responded that a bankruptcy court would know the names of debtors at the time the case was filed but would not know additional information until it was developed later in the case. A judge member said that the proposal had been prompted by an ethics opinion. Judge Chagares and Judge Pepper volunteered to discuss the matter further with members of the Advisory Committee on Bankruptcy Rules. The sense of the Committee was to table consideration of Rule 26.1(e) until the Advisory Committee on Bankruptcy Rules provides a recommendation.

The Advisory Committee next considered the discussion draft of Rule 26.1(f), which would impose disclosure requirements on persons who want to intervene. The reporter explained the draft. Following a brief discussion, the Advisory Committee voted in favor of the proposed amendment.

---

[9] *See* August 2016 Proposed Amendments, *supra* note 1, at 251-53 (proposed revision of Criminal Rule 12.4).

[10] *See id.*

The Advisory Committee then considered the discussion draft of Rule 26.1(g), which would prevent local rules from increasing or decreasing the disclosure requirements of Rule 26.1(a). Following discussion, the Committee decided to remove section (g) because the section would only make sense if section (a) would be amended.

The Advisory Committee next considered the discussion draft of Rule 29(c)(1).[11] This provision would require persons who file amicus briefs to make the same disclosures required under the discussion draft of Rule 26.1(a). The Committee concluded that the amendment was not needed because the proposal to amend Rule 26.1(a) had been tabled. The Committee therefore also decided to table the proposal to amend Rule 29(c)(1).

Finally, the Advisory Committee considered the discussion draft of Rule 29(c)(5)(D), which would require a statement about whether a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization. Following brief discussion, the Advisory Committee rejected the change because there did not seem to be a huge need for it and because party briefs do not require this.

C. Item No. 12-AP-F (class action settlement objectors)

The Advisory Committee next considered Item No.12-AP-F, which concerns a possible problem with some objections to class action settlements.[12] Following a brief discussion, the sense of the Advisory Committee was that this item should be removed from the agenda because the Advisory Committee on the Civil Rules has fully addressed the matter in the recently published amendment to Rule 23.[13] The Advisory Committee concluded that no conforming amendment to the Appellate Rules was necessary.

D. Item Nos. 15-AP-A, 15-AP-E, 15-AP-H (electronic filing by pro se litigants)

The Advisory Committee next considered Item Nos. 15-AP-A, 15-AP-E, and 15-AP-H.[14] These three items concern proposals to modify the Appellate Rules so that they generally would

---

[11] *See* Fall 2016 Agenda Book, *supra* note 3, at 93.

[12] *See* Fall 2016 Agenda Book, *supra* note 3, at 133 (memorandum on Item No. 12-AP-F).

[13] *See* August 2016 Proposed Amendments, *supra* note 1, at 211 (proposed revision of Civil Rule 23).

[14] *See* Fall 2016 Agenda Book, *supra* note 3, at 145 (memorandum on Items Nos. 15-AP-A, 15-AP-E, 15-AP-H).

allow pro se litigants to file documents electronically. The Committee considered but did not approve these proposals when addressing the recent changes to Appellate Rule 25. The published proposed revision of Rule 25 retains the current rule that unrepresented parties may file papers electronically only if allowed by court order or local rule.[15] One judge member thought the Committee should resume consideration of this matter, but the sense of the Committee was to remove the item from the agenda. Representatives from the Administrative Office said that they would continue to look at the subject of pro se filing and report back to the Committee.

The Committee then took a break for lunch.

E. Circuit Splits over the Meaning of Appellate Rules 4(c), 7, and 39(a)(4)

When the meeting resumed, the Committee discussed three circuit splits on the interpretation of the Appellate Rules and considered whether to add them to its Agenda.[16] The Committee first considered a circuit split under Rule 4(c). Judge Gorsuch introduced the issue and explained that appellate courts disagree about whether the period for filing a notice of appeal may be extended if prison officials delay in notifying an inmate of the entry of a judgment or appealable decision. Mr. Byron said that the Bureau of Prisons had flagged two issues. First, it would be difficult to track and provide evidence of when an inmate actually receives notice of the district court's entry of judgment. Second, a prisoner's assertion of a delay could be burdensome to prison staff. A judge member said that the Third Circuit's decision was made before *Bowles v. Russell*, 551 U.S. 205 (2007), and the relevant arguments might not have been raised. Judge Campbell said that it would be rare for this issue to arise in a criminal case. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises in civil cases.

The Committee then discussed a circuit split under Rule 7 about whether the costs for which a bond may be required under Rule 7 can include attorney's fees. Some circuits take the position that, where there is a fee shifting statute, the bond on appeal can cover the fees. The D.C. and Third Circuits disagree, reasoning that requiring a bond to cover attorney's fees might deter non-frivolous appeals. A judge member noted that the Third Circuit opinion was not published. Judge Campbell asked how often district courts award fees before the appeal. The clerk representative said that attorney's fees cases usually come to the appellate courts independently. Mr. Byron also wondered how often these cases arise. No decision was made about including this issue on the agenda. For the spring meeting, the reporter will determine how often this issue arises.

---

[15] *See* August 2016 Proposed Amendments, *supra* note 1, at 271 (proposed revision of Appellate Rule 25).

[16] *See* Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

The Committee then considered a circuit split about whether an appellate court in awarding costs under Rule 39(a)(4) must specify the specific costs to be taxed. An academic member asked what the objection would be to giving the district court discretion to decide. Judge Campbell asked whether the word "court" refers to the appellate court or to the district court. A member suggested that the historical sections in Moore's Federal Practice and Wright & Miller might have some history on this topic. Following discussion, the Committee decided not to put this issue on the agenda.

F. Initiatives to Improve the Efficiency of Federal Appeals

The Advisory Committee next considered the subject of how amendments to the Appellate Rules might lower costs and make appeals faster and more efficient.[17] Judge Gorsuch introduced the subject and referred to the law review cited in the reporter's memorandum on the subject. Mr. Letter said the Committee already had looked into the interlocutory appeals issue. A judge member said that some of Martin Siegel's suggestions might be ideas to send to the Chief Judge of each circuit. Professor Coquillette said that Rule 84 and the Rule 84 forms were abrogated. But he said that forms making litigation more efficient might be beneficial. Judge Campbell said that he would inquire about whether any of the proposed steps had been taken.

A judge member suggested the rules should require an introduction and summary together in the brief and not separately. Another judge member asked whether there might be ways to address interlocutory appeals. An attorney member said local rules on contents of briefs are a problem. As examples, he mentioned that the circuits have different rules on parallel citations and ways to cite the record or trial. Professor Sachs volunteered to study interlocutory appeals and report back to the Advisory Committee. Judge Kavanaugh volunteered to work with the representatives from the Department of Justice on the issues of sections of briefs and citations.

VI. New Business

Judge Gorsuch invited members of the Advisory Committee to propose possible new business for the Committee to consider.

Mr. Katyal said that the Eighth Circuit has a trap for the unwary. If a party seeks an interlocutory appeal on one issue, the party then cannot later appeal other issues. Other circuits have a different rule. Judge Gorsuch said that the topic will be on the agenda for the spring meeting and that the spring agenda book will include a memorandum on the subject prepared by Mr. Katyal. Prof. Coquillette said that it would be better for a committee to resolve this issue than to wait for the Supreme Court to resolve it through litigation.

---

[17] *See* Fall 2016 Agenda Book, *supra* note 3, at 163 (memorandum on circuit splits).

Mr. Katyal separately discussed variations in the circuits on Appellate Rule 30 concerning joint appendices. He cited the example of whether supplemental joint appendices are allowed by motion or by right. Another issue is whether the joint appendix can be deferred until after all the briefs come in. Mr. Letter and Prof. Coquillette both supported the suggestion that the Committee should consider this issue. Ms. Shumaker agreed. Judge Chagares and Judge Kavanaugh, and others thought the Committee should consider the matter. Judge Campbell asked whether electronic filing would affect joint appendices. Ms. Shumaker said that hyperlinking between electronically filed briefs and the record will be possible in the future, and said that the Second and Ninth Circuit are already experimenting with a system. Judge Chagares said that there should not be a rule prohibiting all paper. Judge Murphy said that this is one of the most complicated things appellate lawyers have to deal with. He saw the benefit of a national rule but thought that such a rule might affect lawyers who know only the local practice. Judge Gorsuch asked Mr. Letter and Mr. Katyal to prepare a memorandum for the spring meeting.

Mr. Byron suggested another item of new business. He said that Rule 45 and Rule 40(b) provide lengths for rehearing en banc petitions but not for responses. The clerk representative said that the responding party just follows the petitioner's limit. She said that although it seems like there is a gap, the issue has not been a problem. Given that the rule was just amended and there was no confusion, the sense of the Committee was that this proposed item should not be included on the agenda.

Judge Gorsuch announced that the Committee had received a request to make a rule that courts publish orders granting en banc hearing. The worry is that a lawyer (or another court) will rely on a panel decision without knowing that rehearing en banc had been granted. A judge member believed that this is a sensible request. Mr. Byron said that a rule requiring publication might raise controversy and that "publication" is an unusual term given that most documents are available on Pacer. Judge Gorsuch asked the clerk representative for guidance. She said that Westlaw decides what order to publish, not the court. Mr. Letter said that maybe this is an issue for which a letter should be written. Mr. Byron asked whether there was a problem requiring publication. A judge member said that a 7th Circuit local rule says that it must be published in the Federal Reporter. These orders do appear on Pacer. Mr. Byron and Mr. Letter said they will work with others in investigating this issue.

Finally, the Advisory Committee considered Ms. Shumaker's memorandum in the Agenda Book.[18] The memorandum explains that Rules 10, 11, 27, and 30 do not account (or do not account fully) for electronic records. She said that the current situation is difficult to address. Judge Campbell said that the Civil Rules contained too many references to paper to correct but they did not

[18] *See id.* at 183 (memorandum on Potential Fed. R. App. P. Updates).

cause many problems. The clerk representative said that on appeal the problems are greater. The sense of the Committee was that this is a topic to look into; there should be an inventory of what has to be changed. The clerk representative and reporter will make a list of all places where the rules have to be changed to bring them into conformity with current practice without trying to change the practice.

VII. Adjournment

The meeting adjourned at 2:10 p.m.

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **May 18, 2016**

I. Introduction

The Advisory Committee on Appellate Rules met on April 5, 2016 in Denver, Colorado. At this meeting and in subsequent email votes, the Committee decided to propose four sets of amendments for publication. As discussed in Part II below, these amendments would:

(1) conform Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to the proposed revision of Civil Rule 62 by altering clauses that use the term "supersedeas bond";

(2) allow a court to prohibit or strike the filing of an amicus brief based on party consent under Appellate Rule 29(a) when filing the brief might cause a judge's disqualification;

(3) delete a question in Appellate Form 4 that asks a movant seeking to proceed in forma pauperis to provide the last four digits of his or her social security number; and

(4) revise Appellate Rule 25 to address electronic filing, signatures, service, and proof of service in a manner conforming to the proposed revision of Civil Rule 5.

Part III of this memorandum presents several information items. One item concerns whether Appellate Rules 26.1 and 29(c) should require litigants to make additional disclosures to aid judges in deciding whether to recuse themselves.

Detailed information about the Committee's activities can be found in the attached draft of the minutes of the April meeting and in the attached agenda. The Committee has scheduled its next meeting for October 13-14, 2016, in Washington, D.C. Judge Neil Gorsuch will preside as the new chair of the Advisory Committee.

II. Action Items – for Publication

The Appellate Rules Committee presents the following four action items for publication.

A. Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), 39(e)(3): Revising clauses that use the term "supersedeas bond" to conform with the proposed revision of Civil Rule 62(b) [Item 12-AP-D]

The Advisory Committee on Civil Rules is proposing amendments to Civil Rule 62, which concerns stays of judgments and proceedings to enforce judgments. Rule 62(b) currently says: "If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . ." The proposed amendments will eliminate the antiquated term "supersedeas" and allow an appellant to provide "a bond or other security." A letter of credit is one possible example of security other than a bond.

The Appellate Rules use the term "supersedeas bond" in Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3). These rules must be amended to conform to the revision of Civil Rule 62(b). Most of the required amendments merely change the term "supersedeas bond" to "bond or other security," with slight variations depending on the context. The proposed amendments to Rule 8(b) are a little more complicated. Rule 8(b) provides jurisdiction to enforce a supersedeas bond against the "surety" who issued the supersedeas bond. Because Rule 62(b) now authorizes both bonds and other forms of security, the term "surety" is now too limiting. For example, the issuer of a letter of credit is not a surety. The Committee proposes amending Rule 8(b) so that the terms encompass sureties and other security providers.

The Committee intends to conform the Appellate Rules to proposed Civil Rule 62 and does not intend any other change in meaning. The Committee has spelled out this objective in the Advisory Committee Notes.

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * *

(B) approval of a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment; * * *

* * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

* * *

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~ security in the district court.

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, ~~or~~ stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~ provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~ its agent on whom any papers affecting the ~~surety's~~ its liability on the bond or undertaking may be served. On motion, a ~~surety's~~ security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the district clerk, who must promptly mail a copy to each surety whose address is known.

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 11. Forwarding the Record

* * *

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~ bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 39. Costs

* * *

(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~~ security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

B. Rule 29(a): Limitations on the Filing of Amicus Briefs by Party Consent [Item 14-AP-D]

Appellate Rule 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." Several circuits have adopted local rules that forbid the filing of a brief by an amicus curiae when the filing could cause the recusal of one or more judges. For example, Second Circuit Local Rule 29.1(a) says: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." The D.C., Fifth, and Ninth Circuits have similar local rules. These rules are inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties.

The Advisory Committee presented a proposed amendment to Rule 29(a) in January 2016. Members of the Standing Committee made suggestions concerning the text and raised some policy questions that warranted further discussion. The Advisory Committee considered these matters at its April 2016 meeting and now submits a revised proposal for publication.

1. *Revised Proposal for Publication*

The Advisory Committee submits the following revised proposal for publication. The proposal differs from the January 2016 proposal in three ways. First, the proposed amendment no longer specifies that courts must act "by local rule." Courts may act by local rule, order, or any other means. Second, the revision modifies the text to clarify that local courts may both prohibit the filing of a brief that would cause recusal and also strike a brief after it has been filed if the potential for disqualification is discovered later in a screening process. Third, the rule contains two minor stylistic changes: deletion of a hyphen between "amicus curiae" and changing of the phrase "disqualification of a judge" to "a judge's disqualification."

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted.** The United States or its officer or agency or a state may file an amicus curiae[1] brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may strike[2] or may prohibit[3] the filing of an amicus brief that would result in a judge's disqualification.[4]

* * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.[5]

2. *Four Additional Issues Raised at the January 2016 Standing Committee*

The Advisory Committee also considered four additional issues raised at the January 2016 Standing Committee meeting. First, a member of the Standing Committee asked whether Rule 29(a)

---

[1] The Style Consultants proposed removing the hyphen between the words "amicus-curiae" in line 3. The words "amicus curiae" without a hyphen appear in the title of the Rule and in line 4. For consistency, they should all be the same.

[2] The word "strike" is new. At the January 2016 meeting, a member of the Standing Committee raised a question whether the power to "prohibit" a filing was sufficient if a court does not realize that a brief creates a recusal problem until after the brief has already been filed. The revised language would allow the court to "strike" the brief.

[3] The January 2016 version of this rule said ". . . may by local rule prohibit . . . ." A member of the Standing Committee proposed deleting the words "by local rule" in line 6 so that judges could act either by order in an individual case or by creating a local rule.

[4] The Style Consultants proposed replacing the words "disqualification of a judge" with "a judge's disqualification." Members of the Standing Committee supported this change.

[5] The Advisory Committee revised this note at its April 2016 meeting.

should announce a national rule instead of leaving the matter to local rules or court orders. The Committee decided that this is a matter appropriately left to the discretion of local circuits.

Second, a member of the Standing Committee also asked whether Rule 29(a) should be simplified so that it allows filing of an amicus brief only by leave of court. The Committee believes that the United States or a State should be permitted to file without leave of court and thus does not favor adding a universal requirement to obtain leave of court.

Third, a consultant to the Standing Committee raised a policy objection to allowing a court to prohibit the filing of an amicus brief that would cause a judge's disqualification. The objection was that a court might block an amicus brief that raises an awkward but important issue about disqualification that the parties themselves do not wish to raise. In such situations, the parties may consent to having an amicus curiae raise the issue. The Advisory Committee considered this potential objection but concluded that local circuits should be permitted to conclude that the benefits of avoiding recusals in a three-judge panel or an en banc court outweigh the potential benefits of an amicus brief.

Fourth, the Style Consultants suggested a revision to the clause beginning with the word "except" in line 5. They proposed ending the second sentence with the word "filing" and creating a new sentence beginning with the word "But." At its April 2016 meeting, the Committee discussed the matter at length and rejected the proposed revision. The Committee believed that the proposed third sentence (beginning with "But") contradicted the categorical grant of permission in the proposed second sentence. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398-99 (2010) ("The Federal Rules regularly use 'may' to confer categorical permission, as do federal statutes that establish procedural entitlements.") (citations omitted). Another proposed alternative of breaking the section into subdivisions would add unnecessary complexity. The Committee thus decided to approve the original a version with the "except" clause. This formulation is consistent with existing Appellate Rules, e.g., Fed. R. App. P. 25(a)(5), 28(b), 28.1(a), (c)(2), (c)(3), (d), and other respected texts, e.g., U.S. Const. Art. I, § 6, cl.1, Art. III, § 3, cl. 2.

C. Form 4: Removal of Question Asking Petitioners Seeking to Proceed in forma Pauperis to Provide the Last Four Digits of their Social Security Numbers [Item 15-AP-E]

Litigants seeking permission to proceed in forma pauperis must complete Appellate Form 4. Question 12 of Appellate Form 4 currently asks litigants to provide the last four digits of their social security numbers. The clerk representative to the Advisory Committee has investigated the matter and reports that the general consensus of the clerks of court is that the last four digits of a social security number are not needed for any purpose and that the question could be eliminated. Given the potential security and privacy concerns associated with social security numbers, and the

lack of need for obtaining the last four-digits of social security numbers, the Committee proposes to amend Form 4 by deleting this question. The proposed deletion is as follows:

Form 4. Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis

* * *

12. State the city and state of your legal residence.

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

~~Last four digits of your social-security number: _____~~

D. Revision of Appellate Rule 25 to address Electronic Filing, Signatures, Service, and Proof of Service [Items 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H]

At its April 2016 meeting, the Appellate Rules Committee reviewed the Civil Rules Committee's progress on revising Civil Rule 5 to address electronic filing, signatures, service, and proof of service. The Committee then decided to propose revisions of Appellate Rule 25 that would follow the proposed revisions of Civil Rule 5 as closely as possible while maintaining the current structure of Appellate Rule 25.

The proposed revision of Appellate Rule 25 has four key features. First, proposed Rule 25(a)(2)(B)(i) addresses electronic filing by generally requiring a person represented by counsel to file papers electronically. This provision, however, allows everyone else to file papers nonelectronically and also provides for exceptions for good cause and by local rule. Second, proposed Rule 25(a)(2)(B)(iii) addresses electronic signatures by specifying that when a paper is filed electronically, the "user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature." Third, proposed Rule 25(c)(2) addresses electronic service by saying that such service "may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing." Fourth, proposed Rule 25(d)(1) is revised to make proof of service of process required only for papers that are not served electronically.

Appellate Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper[6] required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.[7]

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~ For a paper not filed electronically,[8] filing may be accomplished by mail addressed to the clerk, but such filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** A paper not filed electronically ~~filed~~ by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the

---

[6] The term "paper" includes electronically filed documents under Appellate Rule 25(a)(2)(B)(iv).

[7] Appellate Rules 25(a)(2)(A) & (B) follow the approach of proposed Civil Rule 5(d)(2) and (3), addressing nonelectronic filing and electronic filing in separate sections.

[8] This rule follows the approach of proposed Civil Rule 5(d)(2), which uses the term "paper not filed electronically."

benefit of this rule. 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.

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~[9]

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person — Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **Unrepresented Person — When Allowed or Required.** A person not represented by an attorney:

• may file electronically only if allowed by court order or by local rule; and

[9] The subject of Appellate Rule 25(a)(2)(D) will be addressed in Appellate Rule 25(a)(2)(B).

• may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing**. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(iv) **Same as Written Paper**. A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

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

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy

on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~ Nonelectronic service[10] may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days; ~~or~~

~~(D) by electronic means, if the party being served consents in writing.~~[11]

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~[12] Electronic service may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.[13]

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and cost, service on a party

---

[10] Proposed Civil Rule 5(b)(2) addresses both electronic and non-electronic service. To retain the structure of the current Appellate Rule 25(c), the proposed revision addresses nonelectronic service in Rule 25(c)(1) and electronic service in Rule 25(c)(2).

[11] The proposed Appellate Rule 25(c)(2) makes the current Appellate Rule 25(c)(1)(D) unnecessary.

[12] The deleted clause is similar to the deleted clause in Civil Rule 5(b)(3).

[13] This sentence comes from proposed Civil Rule 5(b)(2)(E).

must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~ filing, unless the party making service is notified that the paper was not received by the party served.[14]

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic filing system[15] must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

---

[14] This provision is similar to the last clause of Civil Rule 5(b)(2)(E).

[15] A paper filed through the court's electronic filing system does not need to include this information because the electronic filing system will automatically provide it.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

III. Information Items

A. Disclosure Requirements under Rules 26.1 & 29(c) [Item 08-AP-R]

Since 2008, the Advisory Committee has carried on its agenda a matter concerning disclosure requirements under Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements, as explained in a 1998 Advisory Committee note, is to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify them from hearing an appeal.

In recent meetings, the Committee has considered whether to amend Rules 26.1 and 29(c) to require additional disclosures. The primary impetus for the discussion is a collection of local rules that require litigants to make disclosures that go beyond what Appellate Rules 26.1 and 29(c) require. If some circuits have concluded that more disclosure is necessary to allow an informed decision on recusal or disqualification, then should the national rules require disclosure of this information in every circuit? In each instance, the Committee has sought to assess both the benefits of additional requirements and the burden on litigants.

The Committee has not developed a firm view on whether amendments are warranted. What follows are the Committee's most recent discussion drafts of Rules 26.1 and 29(c). The Committee welcomes any feedback from the Standing Committee on the merit of requiring additional disclosures in the federal rules.

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File; What Must Be Disclosed. Any ~~nongovernmental corporate~~[16] party to a proceeding in a court of appeals must file a statement that lists:

(1) any parent[17] corporation, and any publicly held ~~corporation~~ entity,[18] ~~that owns 10% or more of its stock~~ that has a 10% or greater ownership interest in the party or states that there is no such corporation or entity;

(2) the names of all judges[19] in the matter[20] and in any related state matter;

(3) the names of all lawyers and legal organizations that have appeared or are expected to appear for the party in the matter; and

* * *

[16] At the April 2016 meeting, it was the sense of the Committee that this rule no longer should apply only to corporations because the proposed new disclosure requirements now extend to facts beyond corporate ownership.

[17] The Committee considered but rejected a suggestion that litigants must disclose not only parent corporations but also "affiliates." The Committee was unsure how to define affiliates and worried about the burden of such a disclosure requirement.

[18] The Committee is unsure whether Rule 26.1 should require litigants to identify publicly held entities other than corporations (e.g., limited liability partnerships, etc.). The Fourth Circuit requires litigants to disclose whether "10% or more of the stock of a party/amicus [is] owned by a publicly held corporation or *other publicly held entity*." U.S. Court of Appeals for the Fourth Circuit, Disclosure of Corporate Affiliations Form, http://www.ca4.uscourts.gov/docs/pdfs/discl.pdf?sfvrsn=10 (emphasis added).

[19] The October 2015 discussion draft said "trial judges."

[20] The Committee considered other possible words, such as "case" or "proceeding," but concluded that "matter" was best because it would cover appeals from matters before agencies.

(d) Organizational Victim in a Criminal Case. In a criminal case if an organization is a victim of [the alleged] criminal activity, the government must file a statement identifying the victim, unless the government shows good cause for not complying with this requirement.[21] If the organizational victim is a corporation or publicly held entity, the statement must also disclose the information required by Rule 26.1(a)(1) to the extent it can be obtained through due diligence.

(e) Bankruptcy Proceedings. In a bankruptcy proceeding, the debtor or the trustee of the bankruptcy estate—or the appellant if the debtor or trustee is not a party—must file a statement that lists:

(1) any debtor not named in the caption;

(2) the members of each committee of creditors;

(3) the parties to any adversary proceeding; and

(4) any active participants in a contested matter.

(f) Intervenors. A person who wants to intervene must file a statement that discloses the information required by Rule 26.1.

Committee Note

ALTERNATIVE A: Drawing on local rules, the amendment requires additional disclosures that may inform a judge's decision about whether recusal is warranted.

ALTERNATIVE B: Under federal law and ethical standards, judges must decide whether to recuse themselves from participating in cases for various reasons. Before this amendment, Rule 26(a) required corporations to disclose only "any parent corporation and any publicly held corporation that owns 10% or more of its stock." Local rules of court have attempted to help judges determine whether recusal is necessary by requiring the parties to make additional disclosures. The amendment to subdivision (a) follows the lead of these local rules by requiring the listed additional

[21] The bracketed phrase is based on a recent discussion draft of a proposed amendment to Criminal Rule 12.4. In the Appellate Rules version, the "good cause" exception appears at the end of the sentence rather than the start because of other words at the start of the sentence. No difference in meaning is intended.

disclosures. Subdivision (d) requires disclosure of organizational victims in criminal cases because a judge might have an interest in one of the victims. But the disclosure requirement is relaxed in situations in which disclosure would be overly burdensome to the government. For example, thousands of corporations might be the victims of a criminal antitrust violation, and the government may have great difficulty identifying all of them. Subdivision (e) is based on local rules and requires disclosures unique to bankruptcy cases. Subdivision (f) imposes disclosure requirements on a person who wants to intervene so that judges may decide whether they are disqualified from ruling on the intervention motion.

Rule 29. Brief of an Amicus Curiae

* * *

(c) **Contents and Form.** * * * An amicus brief need not comply with Rule 28, but must include the following:

(1) ~~if the amicus curiae is a corporation,~~ a disclosure statement with the information required of parties by Rule 26.1(a)(1), unless the amicus curaie is an individual or governmental unit;

* * *

(5) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

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

(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) a person— other than the amicus curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; and

(D) a lawyer or legal organization authored the brief in whole or in part, and, if so, identifies each such lawyer or legal organization.

Committee Note

Subdivision (c)(1) conforms this rule with the amendment to Rule 26.1(a). Subdivision (c)(5)(D) expands the disclosure requirements to include disclosures about the lawyers and legal organizations who participated in writing an amicus brief because a judge also may need this information in order to decide whether recusal is required.

B. Miscellaneous Items

The Committee discussed five other agenda items at its April 2016 meeting. Item No.12-AP-F concerned proposed amendments to Civil Rule 23 to address class action settlement objectors. The Civil Committee's latest proposal would require a district court to approve any payment offered to a class action objector for withdrawing an objection. The proposal would not require amendment of the Appellate Rules. After considering the matter, the sense of the Committee was that an Appellate Rule is not warranted, and that the matter ultimately is a policy question for the Civil Rules Committee.

Item No. 16-AP-A was a proposal to extend the period of filing a notice of appeal in a criminal case from 14 days to 30 days. The Committee previously considered and rejected essentially the same proposal. Item No. 11-AP-E concerned a suggestion that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Committee discussed Item No.11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action. After reviewing considerations on both sides, and the history of Item No. 11-AP-E, the Committee decided to take no action and to remove Item No. 16-AP-A from its agenda.

Item No. 12-AP-B concerned a proposal to add a parenthetical phrase to the instructions that accompany Question 4 on Appellate Form 4. The amended instruction would read as follows:

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding (not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255), you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have

multiple accounts, perhaps because you have been in multiple institutions,

attach one certified statement of each account.

The proposed parenthetical phrase is consistent with case law and may prevent some confusion. But after discussing the matter, the Committee decided not to amend the form because the current language already tracks the applicable statute on disclosure, 28 U.S.C. § 1915(a)(2),[22] and the burden imposed by mistaken filing of unnecessary account statements is not great. The Committee agreed to remove this item from its agenda.

Item No. 15-AP-F concerned recovery of the $500 docketing fee as a cost. Most circuits have interpreted Rule 39(e)(4) as implicitly making the docketing fee a cost that is taxable in the court of appeals. At least three circuits, however, require appellants to recover this fee in the district court. The sense of the Committee was that no amendment to Appellate Rule 39(e)(4) is necessary because the majority of courts are correctly interpreting the Rule. The Committee decided to remove this item from the agenda and asked the Chair to bring the matter to the attention of the chief judges of the circuits.

The Committee also considered a memorandum prepared by Mr. Derek Webb, who is a law clerk to Judge Sutton. The memorandum listed a number of possible circuit splits on issues arising under the Appellate Rules. Mr. Webb suggested three issues that might warrant inclusion on the Committee's agenda in the future: (1) whether delay by prison authorities in delivering the order from which a prisoner wishes to appeal should be counted in computing time for appeal under Rule 4; (2) whether the costs for which a bond may be required under Rule 7 include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the appellate court or the district court. The Committee thought the incoming Chair and the Reporter could decide whether to include any of these matters on the discussion agenda for the October 2016 meeting.

Enclosures:

1. Draft Minutes from the April 5, 2016 Meeting of Appellate Rules Committee
2. Agenda Table for the Appellate Rules Committee
3. Text of Proposed Revisions for Publication

[22] Section 1915(a)(2) says: "A prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor . . . shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice."

THIS PAGE INTENTIONALLY BLANK

TAB 3B

THIS PAGE INTENTIONALLY BLANK

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 8. Stay or Injunction Pending Appeal

(a) Motion for Stay.

(1) **Initial Motion in the District Court.** A party must ordinarily move first in the district court for the following relief:

* * * * *

(B) approval of a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or

* * * * *

(2) **Motion in the Court of Appeals; Conditions on Relief.** A motion for the relief mentioned in Rule 8(a)(1) may be made to the court of appeals or to one of its judges.

* * * * *

* New material is underlined in red; matter to be omitted is lined through.

(E) The court may condition relief on a party's filing a bond or other ~~appropriate~~security in the district court.

(b) Proceeding Against a Surety or Other Security Provider. If a party gives security in the form of a bond, other security, ~~or~~stipulation, or other undertaking with one or more sureties or other security providers, each ~~surety~~provider submits to the jurisdiction of the district court and irrevocably appoints the district clerk as ~~the surety's~~its agent on whom any papers affecting ~~the surety's~~its liability on the bond or undertaking may be served. On motion, a ~~surety's~~security provider's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice that the district court prescribes may be served on the

district clerk, who must promptly mail a copy to each surety whose address is known.

* * * * *

Committee Note

The amendments to subdivisions (a)(1)(B) and (b) conform this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

THIS PAGE INTENTIONALLY BLANK

Rule 11. Forwarding the Record

* * * * *

(g) Record for a Preliminary Motion in the Court of Appeals. If, before the record is forwarded, a party makes any of the following motions in the court of appeals:

- for dismissal;
- for release;
- for a stay pending appeal;
- for additional security on the bond on appeal or on a ~~supersedeas~~bond or other security provided to obtain a stay of judgment; or
- for any other intermediate order—

the district clerk must send the court of appeals any parts of the record designated by any party.

Committee Note

The amendment of subdivision (g) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended, Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness**.

(A) **Nonelectronic Filing**

~~(A)~~(i) **In general.** ~~Filing~~For a paper not filed electronically, filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

~~(B)~~(ii) **A brief or appendix.** A brief or appendix not filed electronically

is timely filed, however, if on or before the last day for filing, it is:

~~(i)~~• mailed to the clerk by ~~First-Class Mail~~first-class mail, or other class of mail that is at least as expeditious, postage prepaid; or

~~(ii)~~• dispatched to a third-party commercial carrier for delivery to the clerk within 3 days.

~~(C)~~(iii) **Inmate filing.** A paper ~~filed~~not filed electronically by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day

for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. 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.

~~(D) **Electronic filing.** A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.~~

~~A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.~~

(B) **Electronic Filing and Signing.**

(i) **By a Represented Person—Required; Exceptions.** A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(ii) **Unrepresented Person—When Allowed or Required.** A person not represented by an attorney:

- may file electronically only if allowed by court order or by local rule; and
- may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(iii) **Signing**. The user name and password of an attorney of record, together with the attorney's name on a signature block, serves as the attorney's signature.

(iv) **Same as Written Paper**. A paper filed electronically is a written paper for purposes of these rules.

(3) **Filing a Motion with a Judge.** If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge; the judge must note the filing date on the motion and give it to the clerk.

(4) **Clerk's Refusal of Documents.** The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(5) **Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of

Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

(b) Service of All Papers Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) ~~Service~~Nonelectronic service may be any of the following:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) by mail; or

(C) by third-party commercial carrier for delivery within 3 days; or.

~~(D) by electronic means, if the party being served consents in writing.~~

(2) ~~If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)~~ Electronic service may be made by sending it to a registered user by filing it with the court's electronic-filing system or by using other electronic means that the person consented to in writing.

(3) When reasonable considering such factors as the immediacy of the relief sought, distance, and

cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court.

(4) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on ~~transmission~~filing, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of Service.

(1) A paper presented for filing other than through the court's electronic filing system must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)~~(2)(B)~~(2)(A)(ii), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

(e) Number of Copies. When these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Committee Note

The amendments conform Rule 25 to the amendments to Federal Rule of Civil Procedure 5 on electronic filing, signature, service, and proof of service. They establish, in Rule 25(a)(2)(B), a new national rule that generally makes electronic filing mandatory. The rule recognizes exceptions for persons proceeding without an attorney, exceptions for good cause, and variations established by local rule. The amendments establish national rules regarding the methods of signing and serving electronic documents in Rule 25(a)(2)(B)(iii) and 25(c)(2). The amendments dispense with the requirement of proof of service for electronic filings in Rule 25(d)(1).

THIS PAGE INTENTIONALLY BLANK

Rule 29. Brief of an Amicus Curiae

(a) **When Permitted.** The United States or its officer or agency or a state may file an ~~amicus curiae~~amicus curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may strike or may prohibit the filing of an amicus brief that would result in a judge's disqualification.

* * * * *

Committee Note

The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification.

THIS PAGE INTENTIONALLY BLANK

Rule 39. Costs

* * * * *

(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~~security to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Committee Note

The amendment of subdivisions (e)(3) conforms this rule with the amendment of Federal Rule of Civil Procedure 62. Rule 62 formerly required a party to provide a "supersedeas bond" to obtain a stay of the judgment and proceedings to enforce the judgment. As amended,

Rule 62(b)(2) allows a party to obtain a stay by providing a "bond or other security."

Form 4. Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis

* * * * *

12. State the city and state of your legal residence.

Your daytime phone number: (___) _____

Your age: _____ Your years of schooling: _____

~~Last four digits of your social security number: _____~~

THIS PAGE INTENTIONALLY BLANK

TAB 3C

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules
Table of Agenda Items —April 2016

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16

FRAP Item	Proposal	Source	Current Status
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15

FRAP Item	Proposal	Source	Current Status
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Discussed by Standing Committee 1/16 but not approved Draft approved 04/16 for submission to Standing Committee
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15 Draft approved 04/16 for submission to Standing Committee
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15 Approved by Judicial Conference 09/15 Transmitted to the Supreme Court 10/15
15-AP-C	Consider amendment to Rule 31(a)(1)'s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee Approved by Standing Committee 01/16
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15 Discussed and retained on agenda 04/16
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15 Partially removed from Agenda and draft approved 10/16 for submission to Standing Committee
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15

TAB 3D

THIS PAGE INTENTIONALLY BLANK

Submitted by the Council to the Members of
The American Law Institute
for Consideration at the Ninety-Third Annual Meeting on May 16, 17, and 18, 2016

THE AMERICAN LAW INSTITUTE

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

Tentative Draft No. 1

(April 15, 2016)

SUBJECTS COVERED

The Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1600 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

The American Law Institute

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes
Tentative Draft No. 1

Comments and Suggestions Invited

We welcome written comments on this draft. They may be submitted via the website project page or sent via email to PLELcomments@ali.org. Comments will be forwarded directly to the Reporters, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

Unless expressed otherwise in the submission, individuals who submit comments authorize The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author. Comments will be accessible on the website's project page as soon as they are posted by ALI staff. You must be signed in to submit or view comments.

Reporter
Professor Edward B. Foley
Ohio State University,
Michael E. Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Email: foley.33@osu.edu

Director
Professor Richard L. Revesz
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: director@ALI.org

Associate Reporter
Professor Steven F. Huefner
Ohio State University,
Michael E. Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Email: huefner.4@osu.edu

Deputy Director
Ms. Stephanie A. Middleton
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: smiddleton@ALI.org

Reporters' Conflicts of Interest

The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

REPORTER

EDWARD B. FOLEY, Ohio State University, Michael E. Moritz College of Law, Columbus, OH

ASSOCIATE REPORTER

STEVEN F. HUEFNER, Ohio State University, Michael E. Moritz College of Law, Columbus, OH

ADVISERS

FRANK SULLIVAN, JR., Indiana University, Robert H. McKinney School of Law, Indianapolis, IN
JOHN J. SULLIVAN, Service Employees International Union, Washington, DC
JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
PATRICIA M. WALD, Washington, DC

LIAISONS

For the National Center for State Courts
REBECCA GREEN, William & Mary Marshall-Wythe School of Law, Williamsburg, VA
For the National Conference of State Legislatures
WENDY UNDERHILL, Denver, CO

MEMBERS CONSULTATIVE GROUP

Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes
(as of February 26, 2016)

MARC T. AMY, Louisiana Court of Appeal, Third Circuit, Abbeville, LA
JOHN FOX ARNOLD, St. Louis, MO
WILLIAM G. ARNOT, Houston, TX
WILLIAM T. BARKER, Chicago, IL
MARIALYN BARNARD, Texas Fourth Court of Appeals, San Antonio, TX
SIMON K. BARSKY, Valley Village, CA
DEBRA LYN BASSETT, Los Angeles, CA
WARREN BELMAR, Palm Beach, FL
MARK I. BERNSTEIN, Court of Common Pleas, First Judicial District, Philadelphia, PA
ASHUTOSH A. BHAGWAT, Davis, CA
SANFORD L. BOHRER, Miami, FL
EMMET J. BONDURANT II, Atlanta, GA
DAVID M. BRODSKY, Johns Island, SC
DAVID JOHN BURMAN, Seattle, WA
TOM CAMPBELL, Orange, CA
ELENA A. CAPPELLA, Philadelphia, PA
PETER H. CARSON, San Francisco, CA
NICOLE B. CASAREZ, Houston, TX
HENRY L. CHAMBERS, JR., Richmond, VA
ERIC A. CHIAPPINELLI, Lubbock, TX
NEIL HOWARD COGAN, Costa Mesa, CA
ANNE E. COHEN, New York, NY
DAVID K. COHEN, Chevy Chase, MD
NEIL B. COHEN, Brooklyn, NY
DENNIS R. CONNOLLY, Princeton, NJ
MICHAEL A. COOPER, New York, NY
RICHARD D. CRAIG, Oklahoma City, OK
MICHAEL CROMMELIN, Melbourne, Australia
JOSIAH M. DANIEL III, Dallas, TX
JACK DAVIES, Minneapolis, MN
KIMBERLY A. DEMARCHI, Phoenix, AZ
SUZANNE M. DUGAN, Washington, DC
LINDA S. EADS, Dallas, TX
GEORGE E. EDWARDS, Indianapolis, IN
JOSEPH P. ESPOSITO, Washington, DC
IRA M. FEINBERG, New York, NY
JOSEPH Z. FLEMING, Miami, FL
C. ALLEN FOSTER, Washington, DC
STEVEN I. FRIEDLAND, Greensboro, NC
FAITH E. GAY, New York, NY
E. DUNCAN GETCHELL, JR., Richmond, VA
JOSEPH GOLDBERG, Albuquerque, NM
PHILIP S. GOLDBERG, Washington, DC
NICOLE A. GORDON, New York, NY
DAVID M. GOSSETT, Washington, DC
MICHAEL GREENWALD, Philadelphia, PA
CHARLES E. GRIFFIN, Ridgeland, MS
SETH GROSSMAN, San Francisco, CA
KEVIN J. HAMILTON, Seattle, WA
TERESA WILTON HARMON, Chicago, IL
ALLISON HAYWARD, Cambria, CA
OTTO J. HETZEL, Washington, DC
W. WILLIAM HODES, Lady Lake, FL
KATHLEEN J. HOPKINS, Seattle, WA
EDWIN E. HUDDLESON, Washington, DC
RICHARD H. HUNTER, St. Croix, U.S. VI
VINCENT R. JOHNSON, San Antonio, TX
ANTHONY JOHNSTONE, Missoula, MT
JOSEPH A. KANEFIELD, Phoenix, AZ
ROBERT M. KAUFMAN, New York, NY
EVELYN V. KEYES, Texas First Court of Appeals, Houston, TX
MARK R. KILLENBECK, Fayetteville, AR
DANIEL J. KRISCH, Hartford, CT
RONALD J. KROTOSZYNSKI, Tuscaloosa, AL
PETER B KUTNER, Norman, OK
EDWARD LABATON, New York, NY
OTHNI J. LATHRAM, Tuscaloosa, AL
JOHN P. LAVELLE, JR., Philadelphia, PA
JOHN K. LAWRENCE, Ann Arbor, MI
BILL LANN LEE, Berkeley, CA
MATTHEW HOWARD LEMBKE, Birmingham, AL
SETH R. LESSER, Rye Brook, NY
DAVID L. LEWIS, New York, NY
PETER LINZER, Houston, TX
ANN M. LOUSIN, Chicago, IL
HOUSTON PUTNAM LOWRY, Hartford, CT
MYLES V. LYNK, Tempe, AZ
C. SCOTT MARAVILLA, Washington, DC
RAYMOND B. MARCIN, Washington, DC
MARY MASSARON, Bloomfield Hills, MI
LORELIE S. MASTERS, Washington, DC
LLOYD H. MAYER, Notre Dame, IN
THOMAS WM. MAYO, Dallas, TX
ROBERT LEE MCCURLEY, Tuscaloosa, AL
BEVERLY MCQUEARY SMITH, Jersey City, NJ

LAWRENCE F. MEEHAN, Philadelphia, PA
MICHAEL J. MEEHAN, Tucson, AZ
BRUCE P. MERENSTEIN, Philadelphia, PA
THOMAS BUTLER MERRITT, Littleton, NH
LUTHER T. MUNFORD, Ridgeland, MS
CYNTHIA E. NANCE, Fayetteville, AR
RICHARD L. NEUMEIER, Boston, MA
ROBERT G. NEWMAN, San Antonio, TX
JAMES M. O'FALLON, Eugene, OR
KATHLEEN M. O'SULLIVAN, Seattle, WA
ELIZABETH PENDO, St. Louis, MO
W. MICHEL PIERSON, Circuit Court for Baltimore City, Eighth Judicial Circuit, Baltimore, MD
MICHAEL J. PITTS, Indianapolis, IN
ROGER V. PUGH, New York, NY
MARGARET JANE RADIN, Ann Arbor, MI
BERNARD D. REAMS, JR., San Antonio, TX
JOE R. REEDER, Washington, DC
RICHARD C. REUBEN, Columbia, MO
AUGUSTIN RIVERA, JR., Corpus Christi, TX
JAMES L. ROBERTSON, Jackson, MS
JONATHAN C. ROSE, Washington, DC
ROBIN S. ROSENBAUM, U.S. District Court, Southern District of Florida, Fort Lauderdale, FL
RONALD D. ROTUNDA, Orange, CA
MARGARET M. RUSSELL, Santa Clara, CA
KAREN J. SARJEANT, Silver Spring, MD
RONNA G. SCHNEIDER, Cincinnati, OH
ANDREW G. SCHULTZ, Albuquerque, NM
HERMAN SCHWARTZ, Washington, DC
LESLIE SCOTT, Jackson, MS
JOHN A. SEBERT, Evanston, IL
PAUL M. SECUNDA, Milwaukee, WI
GARY E. SHERMAN, Wisconsin Court of Appeals, District IV, Madison, WI
RICHARD G. SINGER, Camden, NJ
ARTHUR B. SPITZER, Washington, DC
H. MARK STICHEL, Baltimore, MD
ELIZABETH S. STONG, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY
GUY MILLER STRUVE, New York, NY
DANIEL M. TRAYNOR, Devils Lake, ND
WILLIS R. TRIBLER, Chicago, IL
H. WOODRUFF TURNER, Pittsburgh, PA
MARK V. TUSHNET, Cambridge, MA
TIMOTHY M. TYMKOVICH, U.S. Court of Appeals, Tenth Circuit, Denver, CO
R. PATRICK VANCE, New Orleans, LA
BILL WAGNER, Tampa, FL
WENONA YVONNE WHITFIELD, Carbondale, IL
L. KINVIN WROTH, South Royalton, VT
DAVID P. YAFFE, Los Angeles, CA
JOHN HARDIN YOUNG, Rehoboth Beach, DE
ERIC H. ZAGRANS, Cleveland, OH

The bylaws of The American Law Institute provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council." Each portion of an Institute project is submitted initially for review to the project's Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute's Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission. The status of this Draft is indicated on the front cover and title page.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

The Council approved the initiation of this project in October 2010. Reporter Edward B. Foley presented a preview of this project at the 2011 Annual Meeting. The Reporters gave a report on this project, centered on the Model Calendar for the Resolution of Disputed Presidential Elections and Expedited Procedures for an Unresolved Presidential Election, at the 2012 Annual Meeting.

Earlier versions of some of the material contained in Part I can be found in Council Draft No. 1 (2015), Preliminary Draft No. 3 (2015), Preliminary Draft No. 2 (2014), and Preliminary Draft No. 1 (2013). Earlier versions of some of the material contained in Part III can be found in Council Draft No. 2 (2015) and Preliminary Draft No. 3 (2015).

Principles (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute's Principles projects. The Institute's Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called "Principles of Corporate Governance and Structure: Restatement and Recommendations," but in the course of development the title was changed to "Principles of Corporate Governance: Analysis and Recommendations" and "Restatement" was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable "Principles" project.

The "Principles" approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute's first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of "rules of statewide application," as explained in the following provision:

> **§ 1.01 Rules of Statewide Application**
>
> **(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.**
>
> **(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.**
>
> Principles of the Law of Family Dissolution: Analysis and Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family Dissolution: Analysis and Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

"Principles" may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute's Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

Foreword

Principles of the Law, Election Administration, is The American Law Institute's first foray into this area, which is essential to the proper functioning of our democracy. The project was launched in 2010 under the leadership of Reporter Edward B. Foley and Associate Reporter Steven F. Huefner, both of The Ohio State University Moritz College of Law. The project has focused on two areas of great importance: non-precinct voting and the resolution of disputed elections.

Voting before the election day, either by mail or at locations of early in-person voting, has become an important part of our electoral landscape. Just this month, we got a powerful illustration of this phenomenon when a candidate who had withdrawn from the presidential primary race nevertheless got a substantial proportion of the vote in a state in which many votes had been cast well before the election day.

In turn, disputed elections have played a large role in our national consciousness over the last two decades, mostly as a result of the 2000 presidential election but also because of high-profile senatorial and gubernatorial elections. As the project evolved, we decided to split up the second topic into a general set of principles for the resolution of any disputed election and a specific code for the resolution of disputed presidential elections. Presidential elections present distinct issues for a number of reasons, including the importance of what is at stake, the very compressed five-week period that Congress provided for the task, and the potential legal risks of not having procedures in place when the dispute arises.

This Annual Meeting will be the second one to focus on this project. In 2012, the Reporters presented a report on their early work on the resolution of disputed presidential elections. Much progress has been made in the intervening four years. After several productive meetings with a terrific group of Advisers and Members Consultative Group, and multiple considerations by the Council, the Reporters have now submitted for approval two of what have become the project's three parts: Principles of Non-Precinct Voting (Part I) and Procedures for the Resolution of a Disputed Presidential Election (Part III). At the next Annual Meeting, they will present Principles for the Resolution of Ballot Counting Disputes (Part II) and seek final approval for the project.

We are very grateful to Professors Foley and Huefner for all the hard work that they have done to get us to this stage. We are also very grateful to the Advisers and Members Consultative Group. Listening to a number of the most prominent lawyers associated with the litigation strategies of the two major parties come together to solve vexing problems of our democracy should make us all very proud of our ALI work.

RICHARD L. REVESZ
Director
The American Law Institute

April 6, 2016

TABLE OF CONTENTS

REPORTERS' MEMORANDUM

TENTATIVE DRAFT NO. 1

PRINCIPLES OF THE LAW
ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES

PART I. PRINCIPLES OF NON-PRECINCT VOTING: EARLY IN-PERSON VOTING AND OPEN ABSENTEE VOTING

AND

PART III. PROCEDURES FOR THE RESOLUTION OF A DISPUTED PRESIDENTIAL ELECTION

We are pleased to present Tentative Draft No. 1 of *Principles of the Law, Election Administration*. The draft is provided for consideration at the May 2016 Annual Meeting. The paragraphs below summarize the work to-date on the project, and offer an overview of the material contained in Tentative Draft No. 1.

Project Background

1. When the ALI decided to undertake this *Principles of the Law, Election Administration* project in 2010, it represented the Institute's first foray into the field of election law. In part, that was because for much of the Institute's existence the political question doctrine had caused courts to eschew intervening in this field. Relatedly, many specific topics in the field have a strong partisan valence, making it difficult to find agreement on neutral principles. But an acceleration of judicial involvement in matters of election law in recent decades had made clear the potential value of an ALI project in this area. (For more elaboration of these points, see our article in the *Brooklyn Law Review* 2014 symposium about the work of the ALI: Steven F. Huefner & Edward B. Foley, *The Judicialization of Politics: The Challenge of the ALI* Principles of Election Law *Project*, 79 Brook. L. Rev. 551 (2014).

2. From the outset, the contours of the project reflected the judgment that, given the potential for partisan conflict over many questions in the field of election law, the ALI should move into the field carefully. The project therefore would not address contested topics such as campaign finance regulation, redistricting, or voter identification, and instead would concentrate on two topics on which widespread agreement might be more easily reached. One topic, comprising Part I of the project, concerns principles to guide the structuring of absentee and early voting processes, as alternatives to traditional Election Day in-precinct

voting. The other component, now comprising Parts II and III of the project, concerns principles to guide the post-election resolution of ballot-counting disputes. (Actual fights over the counting of ballots, once they materialize, are highly contentious, but ironically they represent one promising area for bipartisan agreement: the arguments that candidates and their attorneys make in these disputes are almost entirely dependent on whether they are ahead or behind in the particular dispute, not on ideological or partisan considerations. Thus, when endeavoring to decide ahead of time what would be sound principles and rules for the adjudication of disputes, both Democrats and Republicans can make judgments free from knowing whether they would be ahead or behind in a particular election.)

Work To-Date

3. We are now bringing to you Parts I and III, both of which reflect substantial and helpful input from the Advisers, Members Consultative Group, and Council. The reason we are not bringing Part II at the same time reflects a decision to bifurcate Parts II and III, based on a strong recommendation to this effect from the Advisers and Members Consultative Group.

4. Originally, the plan with respect to the topic of ballot-counting disputes was to develop a single comprehensive document that would cover both presidential and non-presidential elections. In December 2014, however, at a meeting of the Advisers and Members Consultative Group, the widespread consensus was that presidential elections called for a distinctive set of procedures that should be developed separately from general principles concerning ballot counting.

5. Presidential elections face unique scheduling challenges, which make it extraordinarily difficult to complete an adjudication of ballot-counting disputes within the limited timeframe established by Congress. While the principles we have developed and continue to refine for Part II are prototypical principles and appropriately flexible, the procedures in Part III are much more "rule-like," given the need to establish in advance a set of clear and specific processes adequate to the challenge of resolving a disputed presidential election. Specifically, these Part III procedures reflect the complexity of the "engineering" task involved in creating a schedule to accommodate three distinct phases of a presidential election dispute in the five weeks available under the federal Electoral Count Act.

6. In September 2015, we presented Preliminary Draft No. 3 to the project's Advisers and Members Consultative Group. This draft contained a largely complete version of Part I, as well as still-developing versions of now-bifurcated Parts II and III.

7. Once it was clear that there should be a separate Part III for presidential elections, it also became apparent that it would be highly advantageous (if possible) to complete Part III, which was already much closer to being ready, in advance of the 2016 presidential election,

even if it would not be feasible to finish Part II at the same time. Accordingly, Part III became bifurcated from Part II not just substantively, but also in the timing of its development.

8. Given the upcoming 2016 presidential election, the widespread consensus of the project's Reporters, Advisers, and Members Consultative Group was that it would be highly desirable to present Part III to the members at the Annual Meeting this May, so that if the membership approved it, Part III could then help to guide states to prepare themselves for the risk of a disputed presidential election in November 2016. Beyond enabling states to consider the promulgation of procedures for this purpose during the summer and early fall of 2016, Part III might also serve to assist state and federal judges, as well as state and local officials responsible for election administration, on how to handle scheduling difficulties and other matters in the event that a disputed presidential election occurs in November.

9. Part II is thus now moving on a separate track, with the plan of presenting a revised draft of Part II at a joint meeting of the Advisers and MCG in June 2016. Thus, Part II is not being presented to members at the 2016 Annual Meeting.

10. In October 2015, after revising Part I in light of the September 2015 meeting, we presented Council with Council Draft No. 1, consisting only of Part I—Early In-Person Voting and Open Absentee Voting. Council approved this draft of Part I for presentation at the 2016 Annual Meeting.

11. At the January 2016 Council meeting, we presented Council with Council Draft No. 2, which contained a complete draft of Part III—Procedures for a Presidential Recount. Council also approved this draft of Part III for presentation along with the draft of Part I at the 2016 Annual Meeting.

Overview of Part I

12. Part I of the project, concerning "Early In-Person Voting and Open Absentee Voting," responds to the dramatic increase and continuing interest across the country over the past two decades in the use of non-precinct voting options. Indeed, a majority of states now provides voters with one or both of these alternatives. The principles of Part I are designed both to assist states that have already adopted these alternatives to continue to refine their implementation, as well as to provide guidance to states that might yet adopt one or both methods.

13. Part I embodies a commitment to the value of bipartisanship upon which this project has always been premised, as reflected for instance in the composition of its group of Advisers. From the outset, we have recognized that for the ALI's work on the topic of election law to be influential, it must command the respect of both major parties in our political system.

More than that, our efforts at identifying sound principles have been guided by the overarching norm that a well-functioning democracy involves robust electoral competition between two or more parties, and specifically in the American context that the ground rules for this competition must be seen as fair by the two major parties, rather than as the imposition of one party's preferred rules upon the other.

14. Part I reflects a high degree of consensus, developed with the input of two Council meetings and four meetings of the Advisers and Members Consultative Group, on many though not all of the matters it addresses. Where clear consensus has been more difficult to achieve, we have sought to develop principles that will best promote not only the accessibility and convenience of early voting, but also its security, integrity, and overall fairness.

15. After this project began, the specific issue of early voting has become something of a partisan punching bag, caught up in the "voting wars" that have been afflicting American politics since 2000 (although not nearly to the same extent as issues such as voter identification or same-day voter registration). In choosing to address early and absentee voting, along with the resolution of disputed elections, the hope had been that the ALI's first forays into the domain of election law would avoid issues fraught with partisan tensions, and instead would address issues on which bipartisan consensus might be more easily achieved. Yet with respect to early voting specifically, political events since the inception of this project have to some extent changed the climate in which we have been operating. Nonetheless, as Reporters, we have endeavored as best we can to maintain a steadfast commitment to bipartisanship, as described in paragraph 13 above. Where it has been impossible to achieve unanimity among our Advisers on a particular point, we have adopted the position that we think most sound given the relevant considerations, without regard to partisan considerations.

16. As a result, the principles of Part I deviate from what would be identified as the "party line" of each party with respect to the matter of early voting. In other words, if one were to evaluate the draft we have prepared from a purely partisan perspective, each major party would have reason to think that the draft fell short of the party's currently espoused preferred position. We believe, however, that the principles that the draft articulates are fair to both sides, and also are conducive to the healthy functioning of the electoral system as a whole, to the benefit of the public interest at large. We hope that these principles can gain acceptance in that spirit.

17. Sections 101, 102, and 103 of Part I contain definitions and general principles. Sections 104 through 106 then contain principles applicable to what Part I defines as "early in-person voting," a type of voting designed to provide voters with a range of additional voting days and hours that replicate the Election Day voting experience. Next, §§ 107 through 110 contain principles applicable to what Part I defines as "open absentee voting," a type of absentee voting open to any voter without a requirement that the voter claim some impediment to Election Day voting (as typically has been required for absentee voting). Open

absentee voting is often popularly termed "no excuse" absentee voting. Finally, § 111 calls for the collection of specific types of election-related data, reflecting the fact that voting methods will continue to evolve and can best be refined only when thoroughly understood.

18. Notwithstanding the increasing popularity of early in-person voting and open absentee voting, at the time that Council approved this project, one initial decision (with which we continue to agree) was that the ALI should not take a position on the advisability of a state adopting either early in-person voting or open absentee voting. Rather, the purpose of the principles in Part I is to provide guidance about how a state can best implement either of these alternatives *if* it chooses or has chosen to do so.

19. Section 103 expresses this principle of state discretion, and the Comment to that Section is intended to help states in their exercise of that discretion by identifying various relevant considerations, including some of the potential drawbacks of these alternative voting methods, in addition to the more obvious benefits of increased voter convenience and potential administrative efficiencies and cost savings. Both the black letter and the associated Comment of § 103 reflect our view that states should be aware of and attentive to both the pros and cons of various voting options. These provisions have received strong endorsement from many though not all of the Advisers, in addition to receiving Council approval.

20. The other point on which it was somewhat difficult to reach consensus concerned the time period for early in-person voting. Section 104 recommends a period that begins at least 10 days before Election Day and continues through the second day before Election Day. Some urged us to recommend a longer period, in order to help more voters. Others urged us to stop early voting sooner, in order to give election officials more time to transition between the processes of early voting (processes that take place in only a few locations, in contrast to regular Election Day processes, which occur in numerous individual voting precincts). Although arguments can be made in support of and in opposition to each of these positions, the content of § 104 reflects our balancing of multiple, often competing, concerns, including voting convenience and access, voting security and integrity, fairness to all voters, and administrative burden.

Overview of Part III

21. Part III of the project, concerning "Procedures for the Resolution of a Disputed Presidential Election," reflects the fact that presidential election disputes are unique. Among other distinctions, they require a specific set of procedural rules carefully designed to enable a state to resolve a presidential election dispute within the extraordinarily tight schedule set by the Constitution and Congress. The bifurcation described above between Parts II and III reflects the need for two different sets of black-letter text, one for elections generally, and another for presidential elections specifically.

22. Accordingly, the Comments and Reporters' Notes for Part III are intended to support Part III's black-letter provisions independently, without reference to Part II. Nonetheless, these Comments and Reporters' Notes have been drafted with the expectation that eventually they will sit beside, and indeed follow, the Comments and Reporters' Notes for the principles contained in Part II. And because Part II will be the more comprehensive document—applicable to elections generally, and encompassing substantive principles for the counting of ballots, as well as procedural principles concerning the adjudication of ballot-counting disputes—the current draft of Part III reflects a judgment that additional background information will be more suitably presented in the Reporters' Notes to Part II, rather than in the Reporters' Notes to Part III.

23. Given Part III's particular design to address the unique timetable of a disputed presidential election, we have deemed it important to begin it with a thorough introductory explanation of the background circumstances, including the applicable constitutional and congressional requirements, that give rise to its necessity in the event of a presidential-election dispute.

24. This memorandum will not endeavor to repeat that Introductory Note, except to summarize its overarching point: the extraordinary challenge of completing the resolution of a disputed presidential election within the five-week window that Congress has provided (or to stretch it out one more week, to meet the constitutional requirement that all states cast their Electoral College votes on the same date) requires a detailed scheme to coordinate all the essential pieces needed for this situation—including a recount, the canvassing of returns, and a potential judicial contest of the result. It simply does not suffice for a state statute merely to decree, as some do, that the adjudication of a vote-counting dispute in a presidential election must conclude by the congressionally (or constitutionally) specified date. A simple decree of this nature does not provide the mechanism for making compliance feasible. Instead, all the intricate moving pieces (each complicated enough by itself) must be constructed in advance and designed so as to work together and reach fruition in an incredibly compressed amount of time.

25. As described in the Introductory Note to Part III, as well as throughout its Comments and Reporters' Notes, this undertaking is in the nature of an engineering project—and a daunting one at that. Thus, if the Procedures that are set forth in Part III seem complex, there is at least some assurance in knowing that this complexity, while inevitable, has been managed in a particular way by design and thus serves a purpose. It is much better than the false hope of decreeing that the entire dispute-resolution process must end five weeks after Election Day, but then providing no mechanism to enable a state to carry out that command.

26. To aid in understanding the basic structure of the mechanisms generated by this engineering project, Part III contains (immediately following its Introductory Note) a set of three

schematic calendars representing the relationships among the various portions of the procedures for resolving a disputed presidential election. A link to these calendars also is posted on the ALI web pages; the color-coding may help readers better visualize the engineering structure of Part III and its Procedures.

PART I. PRINCIPLES OF NON-PRECINCT VOTING: EARLY IN-PERSON VOTING AND OPEN ABSENTEE VOTING

Introductory Note on Scope: The principles of this Part are intended for use by jurisdictions that wish to use absentee-voting or early-voting options as a supplement to in-person precinct-based voting on Election Day. These principles are not designed for jurisdictions (like the states of Colorado, Oregon, and Washington, as well as some local jurisdictions in other states) that conduct elections entirely "by mail." (The locution "all-vote-by-mail" is frequently used for these elections, although this is something of a misnomer, given that these elections are generally structured to allow voters to return voted ballots either by mail or by dropping them off in person.)

Furthermore, the principles of this Part are designed to apply to absentee- and early-voting processes that are available to all voters. Different principles may apply to forms of absentee voting designed for narrower classes of voters, such as absentee voting available only to military and overseas voters, or only to voters with disabilities or medical conditions that make it difficult or impossible for them to vote in person at the polls on Election Day. For these classes of voters, the burdens and benefits of absentee voting may well need to be balanced differently than for voters who could readily vote in person on Election Day.

Nevertheless, many of the principles of this Part, particularly those designed for early in-person voting, could also be applicable to in-person precinct-based voting on Election Day. When relevant, the Comment portions of this Part include brief remarks about this potential additional applicability.

The principles of this Part apply both to voting for the purpose of electing public officials, as well as to voting for the purposes of determining ballot initiatives, referenda, and other measures placed before the electorate, or whether to recall a public official. Following common parlance, this Part often uses the term "election" to cover all of these types of citizen participation in democratic government, even though it may be somewhat inapt to speak of the "election" of a ballot measure or of a recall of a public official.

Relationship to Principles of the Law, Election Administration: Parts II and III: The principles of this Part are intended to operate either independently of or in conjunction with Parts II and III of this Principles of the Law, Election Administration project.

§ 101. Definitions

(a) "Absentee voting" means voting that occurs on or before Election Day by allowing a voter to obtain a paper or electronic ballot for all offices and matters for which the voter would be eligible to vote on Election Day, and then allowing the voter to mark the ballot outside the presence of election officials and return it by an approved method to the voter's Local Election Authority for verification and counting.

(b) "Chief Elections Officer" means the state's highest authority, often the Secretary of State and in some states a multimember body, responsible for supervising the administration of elections in the state.

(c) "Early in-person voting" means voting that occurs before Election Day by allowing a voter to appear in person, at a location designated by the voter's Local Election Authority as an early-voting location, and there to obtain and cast in the presence of election officials a secret ballot for all offices and matters for which the voter would be eligible to vote on Election Day.

(d) "Election Day" means the single day established by law for voters to cast their ballots in a particular election by presenting themselves in person at a voting precinct. In jurisdictions permitting early in-person voting, Election Day is the last day on which voters may cast a ballot in that particular election. For federal elections, Congress has established Election Day as the first Tuesday after the first Monday in November in each even calendar year.

(e) "Local Election Authority" means a local agency of government responsible for administering, through a clerk's office, board of elections, or comparable administrative body, the voting processes established by law for the election of public officials and determination of ballot issues.

(f) "Local election jurisdiction" means the geographic area served by a Local Election Authority.

(g) "Open absentee voting" means absentee voting available to any voter, without a showing that the voter faces an impediment to voting in person at the voter's assigned precinct on Election Day.

(h) "UOCAVA voter" means a voter eligible to take advantage of the voting processes available to military and overseas citizens under the Uniformed and

Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff et seq., and associated state legislation.

(i) "Voter" means an individual who satisfies the eligibility standards and the voter-registration requirements necessary to vote in a given election in the individual's local election jurisdiction.

Comment:

a. Confronting inconsistencies of usage. Voting terminology is not consistent across jurisdictions. In many states, "absentee voting" describes a type of voting by mail, while in other states the same term includes voting that occurs in person before Election Day. For purposes of these Principles, the definition of "absentee voting" distinguishes it as a type of voting that is allowed to occur outside the presence of election officials, in contrast to early in-person voting, which should always occur in the presence and under the supervision of election officials.

Although election officials supervise the casting of ballots in all forms of "in-person voting," it is important to note that the voter is still afforded the privacy of a secret ballot, typically either by voting behind a curtain or by standing at a voting machine that is situated and screened for the purpose of protecting the voter's privacy (as well as by voting using equipment that prevents the subsequent association of an identifiable voter with the voter's ballot selections). Indeed, a main purpose and feature of in-person voting is to assure that the voter receives the benefit of this privacy, both for the individual voter's own sake and for the sake of the integrity of the election as a whole, as discussed further in connection with § 103 below.

Traditionally, absentee voting was available only to voters who claimed some impediment to voting in person at a precinct polling place on Election Day. Over time, the number of grounds for requesting an absentee ballot has expanded in many jurisdictions, until in recent decades an increasing number of states have made absentee voting available to any voter, regardless of whether the voter claimed any difficulty in voting on Election Day. This is what these Principles call "open absentee voting," often popularly termed "no excuse absentee voting." Many of the principles concerning open absentee voting also could apply to excuse-based versions of absentee voting, but this Part focuses on open absentee voting because of its widespread use to increase voting convenience and to reduce Election Day pressure at the polls.

States with open absentee voting also are distinct from states with "all-vote-by-mail" elections, in which little or no in-person precinct voting occurs and instead all voters receive a mailed ballot, to vote at their convenience and return by Election Day, either by mailing back the

voted ballot or by dropping it off at a designated location. As explained in the Scope Note at the outset, these Principles are not designed for jurisdictions with all-vote-by-mail elections.

In many states, the term "early voting" is used as an equivalent of what these Principles call "early in-person voting," which describes a type of voting that occurs before Election Day at a designated voting location in the presence of election officials. But "early voting" can also be used to describe voting by absentee ballot, a type of voting that also generally occurs before Election Day (even if some states permit absentee voters to return their ballots, and therefore even to vote them, on Election Day itself). To avoid ambiguity, this project uses "early in-person voting" to describe more precisely what is often popularly called "early voting." This is a method of voting that mimics the Election Day in-person voting process, except that it occurs before Election Day, and typically in only a few centralized locations in each local election jurisdiction rather than in every precinct.

b. Absentee voting and electronic voting. Although absentee voting traditionally has involved returning voted ballots to election officials either by mail or by hand, this Section's definition of "absentee voting" is sufficiently broad also to encompass voting in which absentee ballots are returned electronically, in order to accommodate states that choose to permit electronic return. The American Law Institute, however, is not taking a position on whether states should allow the electronic return of voted ballots. As the Reporters' Note explains further, the reliability and security of electronic voting remain controversial, even as some jurisdictions have begun to allow some forms of electronic voting, at least for some voters (primarily military and overseas voters).

Much less controversy surrounds the electronic transmission of absentee-ballot *applications* (which today are almost universally available online), and somewhat less controversy surrounds the electronic transmission of blank absentee ballots (which federal law already requires states to offer to military and overseas voters). In years to come, technological developments and social and cultural changes could lead to the widespread adoption of remote electronic voting as well. Of course, such a development could dramatically reshape the entire election administration landscape, to the point that both early in-person voting and open absentee voting might become obsolete, replaced by an all-electronic remote-voting system. But until that occurs, it will remain important to ensure that early- and absentee-voting processes are sound.

c. New voting modalities. Meanwhile, a different type of transition in voting modalities is already underway, which also has the potential to blur the lines between absentee, early, and

Election Day voting. Much of the voting equipment that most Local Election Authorities purchased more than a decade ago with federal funds under the Help America Vote Act of 2002 is reaching the end of its useful life. As election authorities scramble to figure out how to replace this equipment without new federal funding, election officials increasingly are seeking ways to conduct elections using off-the-shelf hardware rather than customized voting equipment.

One approach under consideration would be to rely on electronic tablets or comparable personal electronic devices as a ballot-marking tool, loaded with a specialized software application that allows voters electronically to mark and then, when connected to a printer, to print a machine-readable paper ballot. If widely adopted, this approach could result in all voters—absentee, early, and Election Day—marking their ballots in the same way, whether remotely or in a designated voting center, and then delivering their ballots either (1) by appearing at a designated voting location to print, review, and turn them in, on or before Election Day, or (2) by printing and reviewing the ballots at home or elsewhere before returning them by mail or courier.

For purposes of these Principles, one important issue to consider in connection with the development of this or any other potential new mode of voting involves the distinction that the above definitions observe between voting that occurs under official supervision and voting that is unsupervised. As further described in the Comment to § 103, supervision is an effective means of reducing errors, fraud, and inappropriate influence. To the extent that voting processes are unsupervised, alternative means of reducing or mitigating these problems should be identified.

d. Local Election Authority. In most states, the Local Election Authorities responsible for administering the voting processes will be county clerks' offices or county boards of election (or similar bodies organized at county level). In a handful of states, including Connecticut, Massachusetts, Michigan, New Hampshire, and Wisconsin, the Local Election Authorities will be municipal or township level clerks' offices or boards of election (or similar bodies). Minnesota is something of a hybrid, with municipalities and counties sharing responsibility for polling-place operations.

REPORTERS' NOTE

The variation in terminology across jurisdictions complicates the effort to achieve uniformity and consistency. For instance, Maine currently offers what this Section's definitions would classify as "early in-person voting," but which Maine calls "in-person absentee voting." Maine Department of the Secretary of State, *Early Voting in Maine*, http://www.maine.gov/sos/cec/elec/voter-info/earlyvoting.html (last visited Mar. 5, 2016).

Indeed, Maine is one of a number of states that are often classified as having early voting, even though they "do not have Early Voting in the traditional sense," because "within a certain period of time before an election they do allow a voter to apply in person for an absentee ballot." National Conference of State Legislatures, *Absentee and Early Voting*, http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx (Jan. 5, 2016). These usage inconsistencies also complicate efforts to compare data and monitor and measure the effectiveness of various voting arrangements.

Similar confusion sometimes affects discussion about "electronic" voting, a phrase that variously can mean (1) voting over the Internet, (2) voting by e-mail, (3) voting by fax machine, or even (4) in-person voting on an electronic touch screen. Distinguishing between these usages is critical, particularly in discussions of voting security. As detailed in the Reporters' Note for § 109, many states allow UOCAVA voters to use e-mail or fax to return voted absentee ballots, and Alaska allows all voters to upload pdfs of voted ballots to a secure website (after waiving their right to a secret ballot). In 2012, New Jersey also permitted voting by e-mail and fax as an emergency response to the disruptions to voters and polling places that Hurricane Sandy caused. See *The Perfect Storm: Voting in New Jersey in the Wake of Superstorm Sandy* 6-8, Oct. 2014, available at https://law.newark.rutgers.edu/files/RutgersLawHurricaneSandyReport.pdf. But voting over the Internet remains a rarity, in part because of serious concerns about its integrity and security. See, e.g., U.S. Vote Foundation, *The Future of Voting: End-to-End Verifiable Internet Voting*, July 2015, available at https://www.usvotefoundation.org/E2E-VIV (last visited Mar. 5, 2016) (describing results of a two-year analysis of the prospects of secure Internet voting); Verified Voting Blog, *Statement on the Dangers of Internet Voting in Public Elections*, Feb. 15, 2013, available at https://www.verifiedvoting.org/statement-on-the-dangers-of-internet-voting-in-public-elections/; National Institute of Standards and Technology, *Security Considerations for Remote Electronic UOCAVA Voting*, Feb. 2011, available at http://www.nist.gov/itl/vote/upload/NISTIR-7700-feb2011.pdf.

One specific basis for substantial concern about the security of Internet voting arose out of a 2010 pilot project in Washington, D.C., when election officials conducted a test of Internet voting and invited outside experts to attempt to break the test's security protocols. To the chagrin of the test's organizers, University of Michigan graduate students in computer science, along with their professor, succeeded in penetrating the security barriers and manipulating the results at will, apparently without detection. See Sarah Wheaton, *Voting Test Falls Victim to Hackers*, N.Y. TIMES, Oct. 8, 2010, at A12, available at http://www.nytimes.com/2010/10/09/us/politics/09vote.html.

Other countries, however, have tried to move towards Internet voting. Beginning in 2005, for instance, Estonia has conducted several national elections over the Internet. See Brad Plumer, *Estonia Gets to Vote Online. Why Can't America?*, WASH. POST, Nov. 6, 2012, available at http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/06/estonians-get-to-vote-online-why-cant-america/. Meanwhile, in Canada a number of local elections have been conducted over the Internet since 2003. See Nicole Goodman, *Issues Guide: Internet Voting* 2, Nov. 2012, available at http://www.parliament.uk/documents/speaker/digital-democracy/Internet

Voting_Issues_Guide_December_7__2012.pdf ("There have been more instances of binding local elections using Internet voting in Canada than any other country worldwide."). But serious concerns also have been raised about these efforts. See, e.g., Vanessa Teague & J. Alex Halderman, *Security Flaw in New South Wales Puts Thousands of Online Votes at Risk*, FREEDOM TO TINKER, Mar. 22, 2015, at https://freedom-to-tinker.com/blog/teaguehalderman/ivote-vulnerability/ (finding flaws in new Internet voting system deployed in New South Wales in March 2015); Drew Springall, et al., *Security Analysis of the Estonian Internet Voting System*, in PROCEEDINGS OF THE 21ST ACM CONFERENCE ON COMPUTER AND COMMUNICATIONS SECURITY (CCS'14), Nov. 2014, available at https://jhalderm.com/pub/papers/ivoting-ccs14.pdf (finding several sources of vulnerability in Estonian Internet voting system and recommending its discontinuation). Meanwhile, most experts in the United States remain skeptical, and there is clearly no consensus about the security of Internet voting. For a succinct yet relatively comprehensive comparison of the risks and benefits of Internet voting, see *A Comparative Assessment of Electronic Voting, Part II: Benefits, Drawbacks, and Risks Associated with Internet Voting* (at http://www.elections.ca/content.aspx?section=res&dir=rec/tech/ivote/comp&document=benefit&lang=e), a report produced by Elections Canada, Canada's nonpartisan independent agency that administers its federal elections. Because of the United States' status as a leading global superpower, its electoral systems are an especially inviting target for international attempts to disrupt U.S. governance; consequently, even if other nations prove successful in implementing electronic voting, their experience may not easily transfer to the United States, at least not without an assessment of the additional risks.

With respect to the possibility that existing categories and modes of voting may become obsolete, an experiment now underway in Los Angeles County—the nation's largest local election jurisdiction—is particularly worthy of observation. Election administrators there are in the middle of a multi-year effort (expected to be in limited rollout in 2018 and in widespread use by 2020) to develop a means of conducting elections using ballot-marking software that could be used on a variety of platforms, including voter-owned devices such as iPads and electronic tablets. Voters could mark their ballots at the time and place of their choosing, at their leisure, and then deliver their votes by taking their marking device to a designated voting station to print their official ballot. See J.B. Wogan, *L.A. County Designs a Whole New Voting System*, GOVERNING (July 7, 2014), available at http://www.governing.com/topics/politics/gov-why-los-angeles-county-wants-to-design-a-new-voting-system.html. Other election jurisdictions likewise have been considering ways to deploy "off-the-shelf" solutions, including voter-owned equipment, once their existing voting devices become obsolete. See Katy Owens Hubler, *Voting: What's Next*, STATE LEGISLATURES, July-Aug. 2014 (describing Johnson County, Kansas election administrator's exploration of similar options); see also *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 41 ("PCEA Report") (2014) (describing possibility of marking sample ballot at home, then electronically transferring pre-selected choices to actual physical ballot at polling place). One concern in connection with these experiments is the extent to which ballot secrecy

might be compromised: when a ballot is marked electronically, a voter's selections will be captured in electronic memory, which might be vulnerable to subsequent exposure.

§ 102. Obligation to Avoid Partisanship and Undue Burden in the Voting Process

(a) Decisions about how to structure early in-person voting and open absentee voting should be made without partisanship.

(b) States and local election jurisdictions should avoid imposing undue burdens on voters seeking to participate in the voting process, and states should ensure that local election jurisdictions have sufficient resources to enable each voter who desires to vote in person the opportunity to do so without an undue burden. Ordinarily, a wait of greater than 30 minutes at the polls constitutes an undue burden.

Comment:

a. Partisanship in election administration. Decisions about election administration and the mechanics of voting are inevitably fraught with concern that they may unfairly advantage a specific political party (or candidate or issue). Ideally, therefore, the responsibility for these decisions ought to rest with independent civil servants not affiliated with any political party (or candidate or issue). Yet most states administer their elections under the direction of an elected Secretary of State, elected on a partisan ballot, who functions as the state's Chief Elections Officer. In turn, most local election jurisdictions are under the administration of partisan officials (often working in boards composed of representatives of each major political party). Unfortunately, the risk of partisanship in election administration is exacerbated when an elected official aligned with a political party exercises discretionary control over aspects of the voting process.

States therefore ought to take seriously the need to minimize the potential for partisan influence in election processes. States that continue to rely on partisan elected officials as election administrators should implement other procedures to check the ability of these officials to use their position for the benefit of a specific party (or candidate or issue). For instance, at least in some states or political cultures this concern can be moderated somewhat by processes that involve multiple political parties jointly overseeing election administration, as when canvassing boards composed of representatives of all major or relevant political parties work together to certify election results, or when changes to election laws receive bipartisan legislative support or reflect widely agreed-upon best practices. More generally, the ideal of avoiding partisanship in all aspects of election administration simply must be recognized and promoted as a foundational principle.

Transparency in election administration is another important safeguard against partisan manipulation. A transparent process allows and invites the public to observe both the process by which the rules and procedures of election administration are structured, and how those rules and procedures are implemented.

Decisions about how to structure early in-person voting and open absentee voting, though they represent only a portion of the election process, also must be governed by this foundational principle of avoiding partisanship in election administration. Even if this ideal of nonpartisanship is largely unenforceable except through additional specific provisions, it nonetheless remains an overarching aspiration worthy of explicit recognition. Structural decisions should be shaped by a desire to facilitate political participation in a manner that ensures public confidence in the integrity of the outcome. The remaining principles of this Part provide some reference points for achieving this result.

b. Undue burden. In recent years, voters in many locations have confronted polling-place lines of several hours or more. Significant polling-place delays can discourage any voter, but they are especially problematic because of their disproportionate impact on voters with limited free time or little schedule flexibility, whom they may effectively disenfranchise.

Long voting lines can be the result of various factors, including lengthy ballots, misallocations of polling equipment among various polling places, equipment failures, poll-worker problems, voter ignorance, and higher-than-expected voter turnout. Many of these factors are amenable to advance planning and management in order to protect the ability of voters to exercise their fundamental voting rights without burdensome delay or other difficulty. Accordingly, this Section establishes the aspirational principle that a sound election system ordinarily will not require voters to wait longer than 30 minutes to vote, whether on Election Day or during a period of early in-person voting. (The failure to meet this aspirational principle, without more, is not intended to create any actionable legal claim.)

With respect to Election Day voting, states may find that they can best achieve this goal not only through the careful deployment of additional equipment and personnel on Election Day, but also through the development of alternatives to Election Day voting. Indeed, open absentee voting and early in-person voting have both become more common in recent years partly because of their potential to reduce or eliminate these substantial Election Day waiting times.

Election officials typically will face the greatest difficulty meeting this aspirational goal on the first and last days of the early-voting period, as well as at the beginning and end of

Election Day. Local officials of course should do their best to allocate their resources to minimize waiting times during all periods of peak demand, including at the ends of the regular- and early-voting periods, and state officials should ensure that local election officials have the necessary resources to do so. Sound resource management should include not only reasonable steps to anticipate voter turnout accurately, including through effective use of the data collected under § 111, but also efforts to publicize expected and actual wait times at all hours of the voting period, and otherwise to channel voter turnout into manageable patterns.

The principle of avoiding unduly burdening voters is especially relevant to determining the days and hours of early voting, under § 104, as well as the location(s) where early voting occurs, under § 105.

c. Applicability to traditional Election Day voting. Election Day voting also should be structured to avoid both partisan bias and undue burdens on voters. As the Presidential Commission on Election Administration recommended in its 2014 final report, the aspirational principle of eliminating waiting times greater than 30 minutes is fully applicable to Election Day voting. Indeed, this Section contemplates that early in-person voting and open absentee voting, as alternatives to Election Day voting, may be desirable in part to help avoid undue Election Day burdens. Sound resource management, aided by effective collection and use of data, as further addressed in § 111, can also assist in this regard on Election Day.

REPORTERS' NOTE

Although excessive partisanship in election administration is difficult enough to identify, let alone to remedy, the problem should be acknowledged. This Section's aspirational principle of avoiding partisan manipulation of the mechanics of early and absentee voting stops short of some recent efforts to impose an enforceable nonpartisanship requirement in matters of election administration, as for instance in Florida's Fair Districts amendment of 2010. That state constitutional amendment, which provides that Florida's congressional and state legislative districts are to be drawn without "intent to favor or disfavor a political party," was the basis for a 2015 state supreme court decision invalidating the congressional district map. See League of Women Voters v. Detzner, No. SC14-1905 (Fla. July 9, 2015) available at http://www.floridasupremecourt.org/decisions/2015/OP-SC14-1905_LEAGUE%20OF%20WOMEN%20VOTERS_JULY09.pdf. In contrast, the ALI's aspirational principle declares the importance of avoiding partisanship in matters of early and absentee voting, and then leaves it to legislators, election administrators, and other public officials to strive to conform to that principle.

This Section's adoption of a 30-minute period as a reasonable polling-place waiting time matches the recommendation concerning Election Day voting of the Presidential Commission on

Election Administration, as contained in its January 2014 final report. See *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* (2014). The Commission's central task was to address the problem of long lines that had occurred at scattered polling places in the 2012 presidential election on Election Day itself (as had also occurred in the 2008 and 2004 presidential elections). See id. at 1, 13. As part of addressing this issue, the Commission undertook first to establish what a reasonable Election Day wait time was, concluding "that, as a general rule, no voter should have to wait more than half an hour in order to have an opportunity to vote" on Election Day. Id. at 14. The Commission's report then included a number of recommendations intended to help local jurisdictions reduce waiting times at polling places to achieve this standard. See id. at 36-45.

Although the Presidential Commission's focus was on reducing Election Day lines, not on reducing early-voting waiting times, this Section adopts the same standard for early voting. Of course, as the Commission noted, longer polling-place waiting times may be more tolerable for early voters than for Election Day voters, given Election Day voters' relative lack of personal choice about when to go to the polls, compared to early voters' ability to choose the most convenient voting opportunity from among a range of possibilities. See id. at 56. Nevertheless, longer waits at the polls also may discourage some potential early voters from voting. Moreover, there is independent value in having a single standard of a generally acceptable waiting period for both early and Election Day voting, provided election officials can meet the standard without inappropriate difficulty.

Some local election officials have hesitated to embrace the Commission's 30-minute standard, largely out of concern that jurisdictions having difficulty meeting the standard would require additional resources beyond the control of local officials. Their concern has been heightened by the apprehension that if those resources were not forthcoming, local officials would bear the brunt of the blame for not meeting the standard. But most jurisdictions already meet this standard for most voters, and the Commission concluded that the standard should be generally achievable if the Commission's various recommendations for improving polling-place operations were adopted. Similar polling-place practices likewise should minimize waiting times at early-voting locations.

Like the principle of avoiding partisan considerations, the 30-minute principle also is aspirational. It acknowledges that extraordinary situations may sometimes make it difficult to meet this standard. For instance, the Presidential Commission suggested that an equipment breakdown, or a full busload of voters arriving en masse at a polling place, could put the 30-minute standard out of reach for some voters, notwithstanding appropriate polling-place preparation and management. See id. at 14. Nevertheless, election authorities should prepare for such contingencies, and strive to meet the 30-minute standard whenever feasible.

§ 103. Decision to Adopt Early In-Person Voting or Open Absentee Voting

States and Local Election Authorities should make voting convenient and accessible while protecting its security and integrity, including by providing voters well-structured alternatives to Election Day voting whenever appropriate. Whether to adopt early in-person voting or open absentee voting (or both) is a policy judgment left to the discretion of each state, subject to the principles described in § 102, any applicable federal laws or requirements, and the state's ability to manage either (or both) of these alternative voting processes effectively, securely, and with integrity.

Comment:

a. State discretion. Unique historical, political, and cultural traditions may shape a state's choice of voting methods, including a state's decision whether to allow its voters to use nontraditional methods of voting without appearing at a precinct on Election Day. This Section encourages states to consider alternatives to Election Day voting in order to enable as many voters as possible to participate conveniently by reducing Election Day waiting periods at the polls and by providing additional voting opportunities for voters for whom Election Day voting is difficult or inconvenient. This Section does not address considerations relevant to determining how to structure an absentee-voting process for the much smaller subset of voters who are not able to vote in person on Election Day, a topic that is beyond the scope of this Part.

Early in-person voting and open absentee voting both have the potential to further the goal of enabling more voters to vote conveniently, and may also provide other advantages, as described below in Comments *b* and *c*. These nontraditional voting methods also may have some disadvantages, including prolonging the voting season, thereby complicating political campaigns and increasing campaign costs; diminishing the virtues of civic participation that can come from gathering at the polls on Election Day; and causing some voters to vote on the basis of incomplete information. In addition, early in-person voting and open absentee voting each has its own specific disadvantages, as also described below in Comments *b* and *c*.

Thus, this Part does not take a position on whether a state should adopt either early in-person voting or open absentee voting. Each state should decide what voting options are most appropriate for it, in light of each state's unique electoral traditions and political culture. Comments *b* and *c* below describe a few specific considerations, which may affect individual states differently.

b. Considerations relevant to early in-person voting. Early in-person voting obviously assists voters whose schedules make Election Day voting difficult or inconvenient. In addition, by providing voters with alternative voting days, early voting can reduce Election Day crowds and other pressures at the polling place. However, an early-voting option must be designed so that its days and hours, taken as a whole in conjunction with Election Day voting, provide all types and classes of voters with substantively equivalent voting opportunities. Accordingly, §§ 104 through 106 of this Part include principles intended to ensure that a state that chooses to offer early in-person voting does so fairly, particularly by establishing a variety of voting times that can accommodate the schedules of the full range of voters. As discussed further in § 104, these early-voting times should include meaningful amounts of evening and weekend voting hours, in addition to regular daytime hours.

A state considering whether to offer early in-person voting will want to balance its benefits, in terms of voter convenience and reduced Election Day pressures, with its potential disadvantages. In addition to the disadvantages that absentee and early in-person voting share, identified in Comment *a* above, early in-person voting's additional downsides include: possible increases in personnel costs to staff the days and hours of early voting, depending on the staffing model used; the prospect of long lines at early-voting centers; and more opportunities for misconduct (deliberate or accidental) by election officials charged with conducting the early-voting operations. Extending the voting period increases the burden of protecting ballots and voting equipment from tampering or damage. Because early voting produces a significant increase in the interval between casting and counting votes, a jurisdiction's chain-of-custody procedures must be especially robust to safeguard the integrity of those votes during the entire early-voting period.

c. Considerations relevant to open absentee voting. Like early in-person voting, open absentee voting also affords voters the convenience of an alternative to Election Day voting, and may thereby also reduce Election Day crowds. In addition, open absentee voting allows voters to vote from home, at a chosen hour, and without time pressure. These circumstances may make it easier for many voters to consider their choices carefully, and even to seek additional background information while they are in the midst of marking their ballot. Absentee voting may also be cheaper and more efficient for governments to administer than traditional in-person voting. Yet because absentee voting happens away from the supervision of election officials, it also has several potential downsides compared to in-person voting. These downsides,

summarized in the following paragraphs, are most pronounced for absentee voters who could have voted in person if they wished, rather than for voters for whom absentee voting is their only reasonable voting option. In the latter case, the necessity of an absentee-voting option will usually trump the disadvantages. But when what is at issue—as in this Part—is open absentee voting available for convenience to all voters, the question of how to weigh its advantages and disadvantages is likely to be more difficult. For states that decide to offer open absentee voting, §§ 107 through 110 of this Part provide guidance for maximizing its benefits while minimizing its drawbacks.

One downside of open absentee voting involves three categories of "lost" votes. First, an absentee ballot may simply be lost in the mail or delayed beyond the deadline, thereby completely disenfranchising the voter who cast it. Second, in every election, local election officials receive a number of voted absentee ballots that are ineligible for counting because voters have failed to properly complete the transmission envelope (or authentication sleeve), whether by forgetting to sign the transmission envelope, omitting other information necessary to confirm the voter's identity, providing incorrect information, or failing to have the ballot properly witnessed. Although states can and should reduce these lost votes by developing mechanisms to permit voters to correct these absentee-voting errors, as § 110(g) provides, these particular errors simply do not occur when a voter appears in person before an election official to receive and cast a ballot, whether at an Election Day polling place or at an early-voting location. Any problems determining the eligibility of an in-person voter can be resolved on the spot, without the possibility of a lost vote through the voter's clerical error in completing an absentee-ballot-transmission envelope. Once an in-person voter is allowed to vote, the voter generally can be confident that the ballot will be counted (except in the case of a voter required to cast a provisional ballot rather than a regular ballot).

Third, absentee ballots are much more susceptible to lost votes as a result of "residual voting" problems. These are problems pertaining to the marking of the ballot itself. When an in-person voting process is well structured, in-person voters are more able to identify whether they have accidentally voted for too many candidates in a particular race ("overvoted"), as well as whether they have unintentionally neglected to make a choice in any race ("undervoted"). Electronic voting machines and optical scanning equipment used at the moment the voter submits the marked ballot can alert in-person voters to these "residual voting" problems before a voter completes the voting process, thereby allowing the voter to correct the mistakes. In

contrast, absentee balloting does not permit correction of residual voting errors (something that is true even if, as § 110(g) provides, the absentee-voting process gives absentee voters a subsequent opportunity to correct clerical errors on their transmission envelopes). This problem is also present when absentee voters drop off their ballots at a designated location rather than mailing them; the residual voting problem would not arise, however, with the use of technology permitting voters to mark their ballots at home and then insert or upload them in a vote-tabulating machine at a designated polling site, provided the tabulating machine was set up to alert voters to overvotes and undervotes.

In addition, absentee voting poses a greater risk than in-person voting of voter fraud, as well as undue influence. First, because of the lack of voting privacy, an absentee voter can be coerced or pressured into voting the ballot in a certain way, whether through intimidation, other undue influence, or outright vote buying. In contrast, in-person voting, because of ballot secrecy, grants each voter the privacy to cast a ballot without any unwanted external pressure or influence. Requirements that an absentee voter obtain a witness to the proper casting of the ballot, or personally affirm that the votes have not been procured through fraud or undue influence, may reduce but cannot eliminate the potential for this type of fraud and undue influence. However, as discussed in the Comments to § 109, witness requirements may undercut the convenience that open absentee voting is designed to provide.

Second, an absentee ballot can be misdirected to and cast by someone other than the legitimate voter for whom the ballot is intended. This second type of voter fraud is most troubling when someone is able to submit multiple false absentee-ballot applications on behalf of a number of unknowing voters, or otherwise to come into possession of a number of absentee ballots. Careful processing of absentee-ballot applications and returned absentee ballots may help reduce but cannot eliminate the incidence of this second type of fraud.

d. Applicability to traditional Election Day voting. The principle that states should make voting convenient and accessible while protecting its security and integrity, though for purposes of this Part specifically intended to foster the development of sound alternatives to Election Day voting, of course is also generally applicable to all aspects of the voting process.

REPORTERS' NOTE

Since 1969, when the Supreme Court resolved the case of McDonald v. Board of Election Commissioners, settled law has been that a voter does not have a constitutional right to an absentee ballot. 394 U.S. 802 (1969). Instead, absentee voting has been understood to be an accommodation that states could choose to provide for selected categories of voters. Likewise,

the questions of whether to offer and how to structure early in-person voting have also been presumed to be matters of state policy, not of federal law.

This project continues to presume state discretion in these matters, and to presume that federal law will impose no obligation for states to provide a certain form or amount of either early or absentee voting. However, this presumption has recently been challenged. See NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (affirming federal-district-court order granting preliminary injunction against Ohio's reduction of early-voting period from 35 days to 28 days, on basis that reduction violated both Equal Protection and section 2 of Voting Rights Act), *stay granted*, Husted v. NAACP, 135 S. Ct. 42 (2014); League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224 (4th Cir. 2014) (confronting similar challenge to North Carolina's reduction of number of early-voting days, but declining to issue preliminary injunction on this issue because of immediacy of pending election).

Whether to offer early-voting options in the first instance is likely to remain a matter of state policy, unless a plaintiff can show that the limited availability of voting on Election Day (for instance because of resource constraints associated with operating polling places) amounts to a form of disenfranchisement, cf. League of Women Voters v. Ohio, 548 F.3d 463 (6th Cir. 2008), or the Supreme Court were to revisit its absentee-voting jurisprudence in light of the increasingly widespread use of non-precinct voting. But on the assumption that a state offers robust voting opportunities on Election Day, of the type historically understood to be constitutionally sufficient, a state would not be constitutionally obligated to add early voting. Furthermore, future judicial reviews of reductions in early voting are likely to turn on specific facts, with the determination of legality under either the Equal Protection Clause or the Voting Rights Act depending on the perceived reason for the reduction. If a state scaled back early voting in conformance with a set of best practices or neutral guidelines (potentially including these Principles), a court might be reluctant to intrude upon state discretion, even if it would be prepared to invalidate a comparable reduction apparently done for partisan motive.

This Principles project thus presumes that states will retain the discretion to decide whether to adopt either early in-person voting or open absentee voting, but takes no position on the advisability of either option for any given state.

Recent trends, however, have run strongly in favor of both of these options. Thirty-five U.S. jurisdictions now allow early in-person voting or open absentee voting for at least some elections, as a supplement to their traditional in-person Election Day voting: Twenty-seven states and the District of Columbia allow both early in-person voting and open absentee voting, while an additional seven states allow early in-person voting but not open absentee voting. (In addition, as noted in the Introductory Note on Scope, Washington, Oregon, and Colorado now vote entirely by mail, as is also true for some purely local elections in other states). See National Conference of State Legislatures, *Absentee and Early Voting*, http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx (Jan. 5, 2016). However, in 2014 voters in Connecticut and Missouri rejected ballot measures that also would have paved the way for early voting. For a more complete history of the development of early voting and absentee voting, see, e.g., Paul Gronke & Eva Galanes-Rosenbaum, *The Growth of Early and Non-Precinct Place*

Balloting: When, Why, and Prospects for the Future, in AMERICA VOTES! A GUIDE TO ELECTION LAW AND VOTING RIGHTS 261, 268-272 (Ben Griffith ed., 2008); Paul Gronke, *Early Voting Reforms and American Elections*, 17 WM. & MARY BILL RTS. J. 423, 423-424 (2008); JOHN C. FORTIER, ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS (2006).

Informed opinion also increasingly supports these nontraditional voting options. For instance, in its 2014 report, the Presidential Commission on Election Administration encouraged states to adopt methods of open absentee voting and early voting. See *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* ("*PCEA Report*") 54-58 (2014). The Lawyers' Committee for Civil Rights also has spoken in favor of both of these options, including in its presentation to the Presidential Commission. See Lawyers' Committee for Civil Rights Under Law, *Recommendations and Case Studies Presented to the Presidential Commission on Election Administration* 4, 14 (2013), available at https://www.supportthevoter.gov/files/2013/06/Recommendations-to-the-Presidential-Commission-on-Election-Administration.pdf. Also in 2014, the Bipartisan Policy Center's Commission on Political Reform similarly encouraged states to adopt early voting. See Bipartisan Policy Center's Commission on Political Reform, *Governing in a Polarized America: A Bipartisan Blueprint to Strengthen Our Democracy* 42-43 (2014), available at http://bipartisanpolicy.org/library/governing-polarized-america-bipartisan-blueprint-strengthen-our-democracy/; see also Diana Kasdan, *Early Voting: What Works*, Brennan Center for Justice (Report, Oct. 31, 2013), at 5-7, available at https://www.brennancenter.org/sites/default/files/publications/VotingReport_Web.pdf (promoting advantages of early in-person voting).

It may be unrealistic, however, to expect these options to increase voter participation, rather than simply to enhance voting convenience. To date, empirical evidence has been mixed about whether expanded opportunities for early voting and open absentee voting increase turnout. Although one literature review in 2008 concluded that "convenience voting has a small but statistically significant impact on turnout, with most estimates of the increase in the 2%-4% range," this figure apparently was driven mostly by turnout increases in jurisdictions conducting elections entirely by mail. See Paul Gronke, Eva Galanes-Rosenbaum, Peter A. Miller & Daniel Toffey, *Convenience Voting*, 11 ANN. REV. POL. SCI. 437, 442-443 (2008); see also Alan S. Gerber, Gregory A. Huber, & Seth J. Hill, *Identifying the Effects of Elections Held All-Mail on Turnout: Staggered Reform in the Evergreen State*, 1 POL. SCI. RES. & METH. 91 (2012) (finding two percent to four percent turnout increase as a result of Oregon shifting to all-vote-by-mail elections). Three of the same authors found no turnout increases from early voting or open absentee voting. See Paul Gronke, Eva Galanes-Rosenbaum & Peter A. Miller, *Early Voting and Turnout* (2007); see also Robert M. Stein & Gregory Von Nahme, *Voting at Non-Precinct Polling Places: A Review and Research Agenda*, 10 ELEC. L.J. 307, 307 (2011) ("few researchers have found that any form of non-precinct voting has had a significant or large effect on voter turnout"); FORTIER, supra, at 40-45 (summarizing literature on turnout effects of absentee and early voting). Furthermore, one recent study suggested that robust early voting in some instances "rob[s] Election Day of its stimulating effects" and results in a net *decrease* in total electoral

participation, as more voters stay away from the polls on Election Day than take advantage of early-voting opportunities. See Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95, 108 (2014); but see Michael P. McDonald, Enrijeto Shino & Daniel A. Smith, *Convenience Voting and Turnout: Reassessing the Effects of Election Reforms* (unpublished manuscript 2015) (criticizing methodology of Burden, et al., study). Finally, some recent empirical research suggests that although early voting alone may not increase turnout, at least some states may achieve modest increases in turnout by increasing the number of early-voting locations. See Elliott B. Fullmer, *Early Voting: Do More Sites Lead to Higher Turnout?*, 14 ELEC. L.J. 81 (2015).

Some earlier studies of the impact of absentee voting by mail also concluded that the practice generally did not expand the electorate. See Adam J. Berinsky, Nancy Burns & Michael W. Traugott, *Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Vote-by-Mail Systems*, 65 PUB. OP. Q. 178, 194 (2001). However, some contrary results have suggested that absentee voting does increase turnout, but primarily in local elections, with little turnout effects in presidential elections, for which the turnout ceiling may already have been reached. For instance, one study comparing California "mail-ballot" precincts with "polling place" precincts found a slight decrease in voter turnout among precincts in which all voters returned their ballots by mail in presidential and gubernatorial elections in 2000 and 2002, but a 7.6 percent increase in turnout in local special elections, which have lower turnout rates to begin with. See Thad Kousser & Megan Mullin, *Does Voting by Mail Increase Participation? Using Matching to Analyze a Natural Experiment*, 15 POLITICAL ANALYSIS 428, 441-442 (2007); see also Robert M. Stein & Patricia A. Garcia-Monet, *Voting Early But Not Often*, 78 SOC. SCI. Q. 657, 665, 669 (1997) (finding early voting to have only "very marginal" effect on turnout in 1992 Texas presidential election, but predicting greater impact in local elections).

While evidence of increased voter turnout from either early or absentee voting is inconclusive, there is reliable evidence that absentee voting produces lost votes. The Election Assistance Commission's 2012 Election Administration and Voting Survey reported that in the 2012 general election, nationwide over 250,000 absentee ballots returned by voters were rejected by election officials (in addition to close to 700,000 more absentee ballots that were undeliverable or spoiled). See U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, Sept. 2013, at 11, 39 & Table 32, available at http://www.eac.gov/assets/1/Page/990-050%20EAC%20VoterSurvey_508Compliant.pdf. Although the primary reason ballots were rejected was that they missed the deadline, substantial numbers of ballots also were rejected because they lacked signatures or contained nonmatching signatures; in combination, these two categories of signature problems accounted for more rejected ballots than did missed deadlines. See id. at 11, 41-46 & Tables 33a-c. An analysis of the 2008 presidential election similarly concluded that an estimated 800,000 absentee ballots were rejected nationwide, amounting to about 2.8 percent of an estimated total of approximately 29 million absentee ballots returned to election officials for counting. See Charles Stewart III, *Adding Up the Costs and Benefits of Voting By Mail*, 10 ELEC. L.J. 297, 299 (2011); Charles

Stewart III, *Losing Votes by Mail* ("*Losing Votes*"), 13 N.Y.U. J. LEGIS. & PUB. POL'Y 573, 589 (2010).

A recent analysis of California absentee voting also concluded that one percent of returned absentee ballots, representing almost 70,000 voters, went uncounted in the 2012 general election, and that in the 2010 general and 2014 primary elections close to three percent of returned absentee ballots were uncounted. See The California Civic Engagement Project, *California's Uncounted Vote-By-Mail Ballots: Identifying Variation in County Processing*, Sept. 2014, at http://regionalchange.ucdavis.edu/ourwork/UCDavisVotebyMailBrief2.pdf; see also California Voter Foundation, *Improving California's Vote-by-Mail Process: A Three-County Study* (Aug. 14, 2014), available at http://calvoter.org/issues/votereng/votebymail/study/execsummary.html (concluding that 0.8 percent of returned absentee ballots went uncounted in three California counties across four elections). Primary causes again included ballots arriving late, ballots lacking a voter signature, and ballots bearing a signature determined not to match the voter signature on file. See id. Even when the number of lost absentee ballots is only a fraction of a percent of the total votes cast, in a close race the lost ballots can easily surpass the margin of victory.

For instance, the 2008 Minnesota race for a U.S. Senate seat between Al Franken and Norm Coleman offers a prime example of the problem of lost absentee ballots, in the context of a margin of victory completely dwarfed by the number of lost absentee ballots. After a seven-month battle in state court, which turned primarily on disputes about whether to count approximately 2000 rejected absentee ballots, Franken ultimately won the race by 312 votes. Yet Minnesota election officials had rejected a total of about 12,000 returned absentee ballots, most of which the contestants conceded were ineligible for counting under state law. See Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELEC. L.J. 129, 145-154 (2011).

For other descriptions of the problem of lost absentee votes, see, e.g., Pam Fessler, *Want Your Absentee Vote to Count? Don't Make These Mistakes*, National Public Radio, Oct. 22, 2014, at http://www.npr.org/2014/10/22/358108606/want-your-absentee-vote-to-count-don't-make-these-mistakes (reporting on general problem of lost absentee votes, and quoting director of California Voter Foundation: "It's absolutely heartbreaking. Because the only thing worse than people not voting is people trying to vote and having their ballots go uncounted.... And most of these people have no idea that their ballots are not getting counted"); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7, 2012, at A1, available at http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0 (discussing general problem, and quoting Florida election official: "The more people you force to vote by mail, the more invalid ballots you will generate."); Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots*, 47 AM. J. POL. SCI. 46, 50 (2003) (reporting that in 2000 election in Louisiana, absentee ballots accounted for four percent of total turnout but 31 percent of voided ballots).

In addition to the problem of returned but uncountable absentee ballots, many more absentee ballots are sent to voters but never returned. For instance, in the 2012 presidential election, of the roughly 33 million absentee ballots sent out to voters, almost 5.4 million ballots were not returned. See U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey,* supra, at 10-11, 39 & Table 32. In the 2008 election, an estimated 2.9 million absentee ballots were sent out but never received back by election officials. See Stewart, *Losing Votes*, supra, at 589. These "lost votes" could occur because (1) the ballot never reached the voter, (2) the ballot reached the voter but the voter did not attempt to vote and return it, or (3) the voter voted and attempted to return the ballot but it was never received by election officials. See id. at 582, 590; see also *PCEA Report*, supra, at 58 (describing need for increased safeguards for voting-by-mail, including online ballot-tracking system, because of various ways ballots can be lost). Unfortunately, it is difficult to determine how many of these lost votes are traceable to each of these possible causes, and problems with mail delivery in either direction presumably cause only a fraction of this total. For the remainder, a voter's choice not to vote an absentee ballot perhaps should not be treated any differently from a voter's choice to stay away from the polls, except insofar as a voter's specific request for an absentee ballot indicates that the voter at least once had some interest in casting a ballot in that particular election. Of course, voters can change their minds about voting after submitting an absentee-ballot application; yet there must be a presumption in favor of participation for anyone making the effort to submit the application. Thus, some significant fraction of these 2.9 million unreturned absentee ballots represents voters whose reliance on absentee voting resulted in their not casting a counted vote in the 2008 election. Cf. id. at 590 (describing implausibility of attributing all of these nonreturned ballots to voters' decisions not to vote, and concluding that regardless of caveats, "the magnitude of the [lost absentee vote] phenomenon demands attention").

With respect to the possibility of uncorrected overvoting and undervoting on absentee ballots, to date no empirical analysis concerning the races at the top of the ticket has found that the problem is any greater among absentee voters than in-person voters, though studies have been limited by the lack of detailed data. See Stewart, *Losing Votes*, supra, at 591-592. With respect to down-ballot races, absentee voting in theory might reduce intentional undervoting, if some absentee voters are able to take additional time to consider their choices for down-ballot races, when these same voters might have deliberately skipped these races had they been voting in the voting booth under time pressure. Nevertheless, in an analysis of the 2008 election in San Francisco, absentee voters were roughly twice as likely not to return all pages of a multi-page ballot than were in-person voters. See Stewart, *Losing Votes*, supra, at 593-595. Unfortunately, data for analysis has again been difficult to obtain.

Of course, if in-person voting methods are poorly designed or implemented, well-designed absentee ballots could provide a superior option. See, e.g., Laurin Frisina, Michael C. Herron, James Honaker & Jeffrey B. Lewis, *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006 Midterm Elections in Florida*, 7 ELEC. L.J. 25, 26, 31-32 (2008) (observing that in 2006 race for Florida's 13th congressional district, absentee (optical-scan) ballots had far fewer undervotes than votes cast in person (both early and on Election Day) on touchscreen

machines in Sarasota County, because touchscreen machines confusingly displayed multiple races on same screen). But this is an unlikely juxtaposition.

Apart from the potential for lost votes, there also is widespread consensus that absentee voting is much more vulnerable to voting fraud and voter coercion than in-person voting. See FORTIER, supra, at 53-56 (2006); U.S. ELECTION ASSISTANCE COMMISSION, ELECTION CRIMES: AN INITIAL REVIEW AND RECOMMENDATIONS FOR FUTURE STUDY 7 (2006); see also *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* (Carter-Baker Commission), Sept. 2005, at 46, available at http://www.eac.gov/assets/1/AssetManager/Exhibit%20M.PDF ("Absentee ballots remain the largest source of potential voter fraud."). For instance, Professor Heather Gerken, an election-law expert, has noted that "all the evidence of stolen elections involves absentee ballots and the like," and Professor Justin Levitt (now Deputy Assistant U.S. Attorney General), also an election-law expert, has described absentee voting as "a system known to succumb to fraud more frequently." See Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7, 2012, at A1, available at http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0 (quoting Professors Gerken and Levitt). Similarly, Professor Daniel Lowenstein, another election-law expert, observed that "absentee balloting . . . provides far more opportunity for fraud and intimidation than on-site voter fraud." See Natasha Khan & Corbin Carson, *New Database of US Voter Fraud Finds No Evidence that Photo ID Laws are Needed*, NBC NEWS, Aug. 11, 2012, at http://investigations.nbcnews.com/_news/2012/08/11/13236464-new-database-of-us-voter-fraud-finds-no-evidence-that-photo-id-laws-are-needed (quoting Professor Lowenstein). As Judge Posner has observed, "absentee voting is to voting in person as a take-home exam is to a proctored one." Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004).

Specific examples of fraud and coercion in absentee voting abound, particularly in municipal elections. For instance, in 2012, a Florida woman was charged with possessing 31 completed absentee ballots and forging an elderly voter's signature. See Adam Liptak, supra. Also in 2012, Florida election officials detected a computer hacker's fraudulent attempt to obtain several thousand absentee ballots through the Miami-Dade elections website. See Patricia Mazzei, *The Case of the Phantom Ballots: An Electoral Whodunit*, MIAMI HERALD, Feb. 23, 2013, at http://www.miamiherald.com/news/politics-government/article1947622.html. In 2005, the Detroit City Clerk ran an "ambassador" program in which emissaries of the Clerk's office, dispatched to the residences of absentee voters ostensibly to assist them with the voting process, were observed encouraging voters to vote for specific candidates, including the Clerk. See Taylor v. Currie, 743 N.W.2d 571, 575-576 (Mich. Ct. App. 2007); STEVEN F. HUEFNER, DANIEL P. TOKAJI, & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 97 (2007). In the Miami mayoral race in 1997, a Florida appellate court invalidated all absentee ballots on the basis that a large number of ballots favoring the apparent victor had been cast fraudulently. See In re *Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997 Election for Miami, Fla.*, 707 So. 2d 1170, 1174 (Fla. Dist. Ct. App. 1998). In a Georgia county commissioner's race in 1996, "supporters on both sides

openly bid against each other to buy absentee votes," among other absentee-balloting fraud. United States v. McCranie, 169 F.3d 723, 726 (11th Cir. 1999).

A systematic investigation of voter fraud conducted by News21, as part of the Carnegie-Knight Initiative on the Future of Journalism Education, found 491 reported cases of absentee-voting fraud since 2000 (compared to 10 cases of in-person voter-impersonation fraud). See Khan & Carson, supra. Additional examples of improper influence or fraud in absentee voting include Qualkinbush v. Skubisz, 826 N.E.2d 1181, 1206 (Ill. App. 2004) (describing candidate's improper "target[ing] [of] elderly individuals in an effort to persuade or influence them into voting for [candidate]," "punch[ing] the ballots for voters," observing "how they cast their ballots and rendering their ability to vote in secret null," and "mail[ing] most of the ballots in violation of the Election Code"), and Pabey v. Pastrick, 816 N.E.2d 1138, 1151 (Ind. 2004) (affirming the trial court's findings that "pervasive fraud" had "perverted the absentee voting process" and "subjected the naïve, the neophytes, the infirm and the needy to unscrupulous election tactics").

Given the instances of absentee-voting fraud, states ought to be concerned about the risks of absentee ballots falling into the wrong hands. A number of the principles of §§ 107-110 of this Part are designed to help reduce these risks.

As a final note, though absentee voting is typically viewed as cheaper to administer than in-person voting, at least some jurisdictions report that early in-person voting is cheaper than absentee voting. See James Nord, *Most States Have Both Early and No-Excuse Absentee Balloting, But Not Minnesota*, MINNPOST.COM, June 17, 2013, at http://www.minnpost.com/effective-democracy/2013/06/most-states-have-both-early-and-no-excuse-absentee-balloting-not-minneso (reporting cost estimates of Ramsey County and Blue Earth County Elections Managers). The separate question of whether early in-person voting is cheaper than traditional polling-place voting receives mixed answers from election officials. See Diana Kasdan, *Early Voting: What Works*, The Brennan Center for Justice (Report, Oct. 31, 2013), at 8. However, careful empirical studies of the financial effects of early in-person voting and open absentee voting have not been done. Cf. Gronke, et al., *Convenience Voting*, supra, at 448-449 (quoting election administration expert Thad Hall as saying, "The costs of elections has been referred to as the 'holy grail' of election administration research because so little is known about the subject.").

§ 104. Days and Hours of Early In-Person Voting

(a) For a regular federal, statewide, or local election, and for a run-off or special election for either a federal office or a statewide office, a uniform statewide period of early in-person voting should begin by the 10th calendar day before Election Day, and should continue daily through the second calendar day before Election Day.

(b) For a run-off or special election not covered in subsection (a), as soon as is practicable after the offices to be decided are fixed, the state's Chief Elections Officer, in consultation with Local Election Authorities, should establish the days of a uniform period of early in-person voting, to include the final weekend before Election Day.

(c) For each day of a uniform period of early in-person voting established under subsection (a) or (b), the state's Chief Elections Officer, in consultation with Local Election Authorities, should establish and publicize in advance the hours during which voters in each local election jurisdiction may participate in early voting. These hours may vary from local election jurisdiction to local election jurisdiction, according to the following principles consistently applied throughout the state:

(1) The specific hours of early voting for a given local election jurisdiction should reasonably accommodate the daily schedules of the voters in that jurisdiction, including where appropriate by providing weekday early-voting opportunities outside of regular business hours, as well as weekend early-voting hours, for voters for whom early voting during regular business hours is difficult.

(2) In local election jurisdictions serving urbanized areas (as classified by the U.S. Census Bureau), the specific hours of early voting should include a substantial amount of weekday early-voting hours outside of regular business hours, and a meaningful amount of weekend early-voting hours on each weekend day.

(3) The total number of hours of early in-person voting, and the distribution of those hours, should be designed to ensure compliance with the principles of § 102.

(4) Local election jurisdictions should avoid unnecessary variation in their early-voting hours from day to day during the early-voting period.

(5) In any statewide election, variations among local election jurisdictions in the number of hours available for early in-person voting should be designed to provide all voters in the state, regardless of locality, substantively equivalent opportunities to cast a ballot through early in-person voting, with the recognition that this equivalence is not necessarily achieved through an equal number of hours.

(d) On all days of early in-person voting, a voter who is waiting in line to vote at an early in-person voting location at the time designated as the end of that day's period of voting hours should be allowed to vote that day.

Comment:

a. Applicability to different types of elections. The minimum 10-day period of early in-person voting specified in subsection (a) applies to: (1) all regular primary elections and regular general elections for all federal, statewide, and local offices or issues; and (2) any run-off election or special election for a federal or statewide office. Subsection (b) permits the state's Chief Elections Officer to depart from the 10-day minimum of subsection (a) for run-off and special elections for local offices, including run-off or special elections for seats in the state legislature. The Chief Elections Officer may establish a uniform period of early in-person voting for each of the elections covered under subsection (b) on an election-by-election basis, taking into account the circumstances of the particular election as well as resource constraints; this subsection does not require that the Chief Elections Officer specify the same uniform period for every election covered under the subsection.

b. Federal law and early-voting periods. Some recent litigation in federal courts, invoking both the Equal Protection Clause and the Voting Rights Act, has sought to establish a right under federal law to certain periods of early voting, or at least a right that such periods not be shortened without cause after having once been adopted. (See the Reporters' Note to § 103.) But until comparable claims are definitively resolved otherwise, this Section will assume that federal law does not impose one standard for how much early voting a state must provide (assuming the state has opted to permit any early voting), and that instead this is a policy matter for the state to decide. This Section further recognizes that this policy choice is not amenable to a one-size-fits-all policy recommendation, but, as with the choice of whether to offer early voting

at all, also will implicate different concerns in different states as a result of culture, history, and demographics. Nevertheless, this Section identifies several principles that should guide a state's structuring of its early-voting period.

c. Policy preferences influencing early-voting period. As mentioned in Comment *a* to § 103, one downside of early in-person voting (as well as of absentee voting) is that many early voters will cast their ballots without the benefit of late-breaking news and information about candidates and issues. The longer the early (or absentee) voting period, the greater the potential information gap between early (or absentee) voters and Election Day voters. A prolonged early-voting period therefore is undesirable (as also is a prolonged period of open absentee voting, which similarly encourages voters to cast their absentee ballots well before Election Day). At the same time, the early in-person voting period needs to be long enough to provide a critical mass of voters with a meaningful alternative to Election Day voting. Early voting also should be structured to accommodate the schedules of the full range of voters, and not in a way that provides additional convenience to only some subset of the electorate. For some voters, it may suffice to have the alternative of several additional weekdays on which to vote. But for other voters, the only meaningful alternative may be to have the opportunity to vote on weekends. The period from the 10th day through the second day before a typical Tuesday election therefore is an appropriate period because it includes two full weekends and five weekdays, without extending too far in advance of Election Day.

Although a prolonged period of early voting may not be desirable, this Section takes no position on the ideal number of early-voting days, nor does it specify an outer limit before which date it is too early to start early voting. States that wish to extend early in-person voting earlier than the 10th day before Election Day should consider the trade-offs in doing so. In addition to the information gap described above, these trade-offs also include increased costs to local election jurisdictions, as well as making it more difficult for candidates to introduce themselves to voters in a timely fashion and other complications to the campaign cycle, which can lead to increased expenses for candidates. But for states that also offer open absentee voting, another relevant consideration, which could support a longer period of early voting, is to align the period of absentee voting with the period of early in-person voting. By providing early in-person opportunities as soon as absentee voting is available, states with both options would enable the earliest voters to take advantage of the increased reliability of in-person voting, rather than

offering only the absentee-voting option to those who are not willing or able to wait until a later date when a shorter period of early voting begins.

This Section's prescribed early-voting period does not include the Monday before Election Day so that election officials will have a full day to transition from early voting to precinct voting. Though some election officials have expressed an interest in having two full days (or longer) for this transition, many have indicated that the transition work can be accomplished in one day (and indeed early voting in a number of states already occurs even on the final Monday before Election Day). To the extent that some jurisdictions today are genuinely unable to complete this transition work in one day, improvements in the technology of election administration will likely make it easier and faster in the future. Moreover, including the final weekend in the period of early voting is valuable for several reasons. For those voters for whom a weekend voting option is important, the last weekend permits them to vote based on information much more contemporaneous with the information available to Election Day voters, compared to the information available if their only weekend voting option is nine or 10 days before the election. Voter interest in final-weekend voting is confirmed by high voter turnout on these days in those jurisdictions in which it has been offered. Excluding the final Sunday from the early-voting period would be likely both to increase voter confusion about early-voting opportunities and also to reduce the effectiveness of early voting in easing Election Day crowds.

d. Policy preferences influencing early-voting hours. While it is important, both for purposes of fundamental fairness and for purposes of voter awareness, for a state to establish a uniform *period* of early in-person voting, subsection (c) reflects the view that providing voters with equal access to early-voting opportunities can be accomplished without requiring equal *hours* of early voting at every location. A number of election officials and administrators have expressed the view that they can better serve the needs of their local voters by retaining some flexibility in when they must staff an early-voting location, noting in particular that the needs of voters in urban and suburban areas can be very different from the needs of voters in rural areas. Subsection (c) therefore offers this flexibility, with some constraints to ensure that early voting provides a meaningful alternative to Election Day voting and that the total hours of early voting (in combination with the number and placement of early-voting locations, as governed by § 105) suffice to meet demand. This Section provides that state election officials should work with Local Election Authorities to structure specific early-voting hours to meet the needs of the voters that each Local Election Authority serves. Subsection (c)(2) further provides that specifically in

urban and suburban jurisdictions (areas the U.S. Census Bureau classifies as "urbanized"), early-voting hours should include ample early-morning, evening, and weekend voting opportunities. At least under current voting processes and systems, these densely populated jurisdictions should offer voters a minimum of six hours of voting on each weekday of early voting, including substantial numbers of hours outside regular business hours, and a minimum of 12 total hours of voting during each weekend of early voting, with at least four hours of voting on each weekend day. State oversight of this process should promote similarity among similarly situated local election jurisdictions, while still permitting appropriate local variation.

Of course, a state could choose to mandate uniform hours of early voting. But the principle specified in subsection (c) seeks to generate a robust system of early voting without mandating a one-size-fits-all approach that could burden some Local Election Authorities, especially in rural areas, or else underserve urban and suburban voters. In large population centers where more voters must be accommodated, Local Election Authorities may offer more early-voting hours. Local Election Authorities also may offer more early-voting hours during general elections than during primary elections, or during presidential elections than during other elections, because of the greater number of voters who tend to participate in these elections. Consistent with the principle of § 102(b), the precise hours should be set so that the resources of a Local Election Authority are effectively used to provide voters with meaningful alternatives to Election Day voting and spare voters from burdensome waiting times. Election officials also should ensure that early-voting hours are well-publicized.

e. Applicability to traditional Election Day voting. The hours of Election Day voting should also be well-publicized, but should be uniform throughout the state, in contrast to the flexibility this Section offers to set early-voting hours to meet the needs of local jurisdictions. The principle that voters who are waiting to vote at their polling place at the time the polls are scheduled to close are permitted to cast their ballot after the closing time is already universally recognized on Election Day.

REPORTERS' NOTE

Of the 35 jurisdictions that currently offer some amount of early in-person voting, at least 13 (Alaska, Arkansas, California, D.C., Indiana, Iowa, Kansas, Maine, Minnesota, Nebraska, Oklahoma, Vermont, and Wyoming) have statutes that permit early voting to occur on the day before Election Day, at least for general elections. Meanwhile, in both 2012 and 2014, Ohio also offered early in-person voting on the day before Election Day, but did so as a result of court order, rather than pursuant to state statute. See Obama for Am. v. Husted, 697 F.3d 423, 425 (6th

Cir. 2012); Ohio Secretary of State, Directive 2014-30, Sept. 29, 2014. (In 2008 and 2010, Ohio also offered early in-person voting on the last weekend before the election, at least in some localities within the state.) In 2015, Ohio entered into a consent decree that includes a commitment to offer early voting on the weekend and Monday before Election Day for all elections through 2018. Three other states with early voting on the Monday before Election Day (Arkansas, Minnesota, and Oklahoma) do not have early-voting hours on the preceding Sunday. Six other early-voting states currently provide for an end to early voting on the final Saturday (Florida, Hawaii, Illinois, New Mexico, North Carolina, and West Virginia), while seven states (Arizona, Georgia, Idaho, Massachusetts, Texas, Utah, and Wisconsin) end early voting on the final Friday. In several states, Local Election Authorities decide when to conduct early voting. See Long Distance Voter, *Early Voting Calendar*, http://www.longdistancevoter.org/early_voting_calendar (last updated Mar. 13, 2016); National Conference of State Legislatures, *Absentee and Early Voting*, http://www.ncsl.org/legislatures-elections/elections/absentee-and-early-voting.aspx (Jan. 5, 2016).

Because early in-person voting generally occurs in large, multi-precinct early-voting centers (as discussed in § 105), rather than in individual voting precincts, election officials will often require some time to transition between early voting and Election Day voting. The amount of time necessary for this transition will vary depending on the size of the election jurisdiction, the voting systems in use, the number of early-voting centers, the methods for tracking registered voters, the staff available, and other factors. Nevertheless, this Section reflects the view that a state that chooses to implement early voting should be able to complete this transition work in one day, the Monday before Election Day. To the extent that this is not yet achievable for a particular jurisdiction, improvements in record-keeping processes and software, as well as in other voting-related systems and technology, are likely in the near future to reduce the required transition time, so that a one-day transition will become increasingly achievable for future elections (perhaps even to the point that every jurisdiction choosing to offer early voting could allow it to continue through the day before Election Day, as a number of early-voting states already do).

According to the Presidential Commission on Election Administration, the average period of early voting (among states that offer it) is 19 days; however, there is "considerable variation." See PCEA Report, supra, at 56. Vermont, the earliest state, permits early voting to begin 45 days before Election Day. See Vermont Secretary of State, *Absentee Voting*, at https://www.sec.state.vt.us/elections/voters/absentee-voting.aspx (last updated Mar. 1, 2016). Meanwhile, the final report of the Bipartisan Policy Center's Commission on Political Reform recommended that all states provide seven to 10 days of early voting, see Bipartisan Policy Center's Commission on Political Reform, *Governing in a Polarized America: A Bipartisan Blueprint to Strengthen Our Democracy* ("*Bipartisan Blueprint*") 42-43 (2014); while a 2013 report from the Brennan Center recommended two weeks of early voting, see Diana Kasdan, *Early Voting: What Works*, The Brennan Center for Justice (Report, Oct. 31, 2013), at 12. The Commission on Political Reform also recommended that early voting be offered on all seven days of the week. See *Bipartisan Blueprint*, supra, at 42; see also Kasdan, supra, at 12 (noting

that eight of nine states with the highest early-voting turnout in the last two presidential elections held weekend early voting).

While the principles of this Section call for an early-voting period of at least 10 days, some observers have recommended that the early-voting period be *no longer* than 10 days. See, e.g., JOHN FORTIER, ABSENTEE AND EARLY VOTING 75 (2006). A primary reason for a shorter early-voting period is to preserve greater uniformity in the information that voters use to make their choice, rather than to have larger information disparities across time. See, e.g., Fiona Stokes, *Early Voting Put on Hold on St. Croix*, V.I. DAILY NEWS, Oct. 27, 2014, available at https://www.highbeam.com/doc/1P2-37325625.html (discussing problem of striking candidate from ballot after early voting has begun). Candidates may have greater difficulty introducing themselves to voters in a timely manner, for instance through candidate debates, forums, rallies, and advertising, when the voting period extends across many weeks. Some empirical research confirms that a longer period of pre-Election Day voting can adversely affect election outcomes because Election Day voters will have additional information not available to some early voters, including that certain candidates have dropped out. See Marc Meredith & Neil Malhotra, *Convenience Voting Can Affect Election Outcomes*, 10 ELEC. L.J. 227 (2011). A longer period of early voting also may impose additional costs on groups formally observing the election, as provided in § 106(e), who may need to recruit additional polling-place observers to serve throughout the period. The American Law Institute, however, has not taken a position on the ideal number of early-voting days.

Although the general trend has been an expansion in the availability of early voting, in the 2012 and 2014 election cycles several early-voting states chose to reduce their early-voting periods. In 2014, for instance, many Florida counties reduced the number of days and hours of early voting, while increasing the number of early-voting locations. See Aaron Deslatte, *Early-Voting Sites Increase; But Hours, Days Drop*, ORLANDO SENTINEL, Sept. 29, 2014, at http://insurancenewsnet.com/oarticle/2014/09/29/early-voting-sites-increase-but-hours-days-drop-a-561071.html#.VDKzaqPD-70. In 2013, North Carolina also reduced its early-voting days. See League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224, 230-232 (4th Cir. 2014) (describing enactment of House Bill 589). In 2012, the Ohio legislature eliminated the final weekend and final Monday of early voting (the change at the center of the case of Obama for America v. Husted, mentioned above), but a federal district court issued a preliminary injunction restoring it for the 2012 election. See Obama for America v. Husted, 888 F. Supp. 2d 897 (S.D. Ohio 2012), aff'd, 697 F.3d 423 (6th Cir. 2012). In June 2014, the district court issued a permanent injunction requiring Ohio to offer early voting on the final three days before Election Day. See Obama for America v. Husted, 2014 WL 2611316 (S.D. Ohio 2014).

The Ohio legislature also approved many other changes to election administration before the 2012 election, including a reduction of the start of early voting from 35 days before Election Day to 28 days before Election Day. However, after this measure became the subject of a public referendum, the Ohio legislature repealed it, see Sub. S.B. 295, Ohio Gen. Assembly (2012), and early voting in 2012 once again began 35 days prior to Election Day, as it had in 2008. In 2014, the Ohio legislature again reduced the early-voting period from 35 days to 28 days, while the

Secretary of State imposed uniform statewide early-voting hours that in some Ohio counties resulted in a reduction from previous elections in the available hours of early voting. See Am. S.B. 238, Ohio Gen. Assembly (2014); Ohio Secretary of State, Directive 2014-17, June 17, 2014.

Shortly before the November 2014 election, a federal district court issued a preliminary injunction against enforcing Ohio's reductions in early-voting opportunities, on the basis that the reductions were likely to violate both section 2 of the Voting Rights Act and the Constitution's Equal Protection Clause. See NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014). The Sixth Circuit initially affirmed the district court's restoration of the 35-day early-voting period. See NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014). But on the day before early voting would have started, the Supreme Court stayed the district court's preliminary injunction, effectively allowing the reduced 28-day early-voting period to govern the November 2014 election. See Husted v. NAACP, 135 S. Ct. 42 (2014). In response to the stay, the Sixth Circuit then vacated its affirmation of the preliminary injunction. See NAACP v. Husted, Case No. 14-3877, Order, Oct. 1, 2014 (6th Cir.), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Ohio53_000.pdf. The request for permanent injunctive relief was eventually settled with an agreement, through 2018, for a uniform statewide four-week period of early-voting days and hours. See NAACP v. Husted, Case No. 2:14-CV-404, Settlement Agreement, Apr. 16, 2015 (S.D. Ohio), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/NAACP111-2.pdf.

What *hours* of early voting to offer is a separate question from how many days to provide. Substantial variation also exists with respect to this characteristic across the jurisdictions now conducting early voting, with 14 states requiring or permitting Local Election Authorities to offer early voting outside regular business hours. See Kasdan, supra, at 13. However, providing early voting outside regular business hours is "standard among the states with the highest [early in-person voting] turnout in the last two presidential elections." Id. At present, some states (Colorado, Florida, Georgia, Illinois, Nevada, New Mexico, North Carolina, Tennessee, Utah) leave the hours to each local election jurisdiction, while others (Arkansas, D.C., Louisiana) establish uniform statewide hours. See id. at 13-14, 29 n.72.

While it is important that the days on which early voting is offered be uniform throughout a state, in most states it is neither necessary nor cost-effective to require that all local election jurisdictions provide the same hours of early voting. Cf. Corning v. Board of Elections of Albany County, 88 A.D.2d 411 (N.Y. App. Div. 1982) (upholding variation across counties in Primary Election Day voting hours against Equal Protection challenge two decades before Bush v. Gore), aff'd, 57 N.Y.2d 746 (N.Y. Ct. App. 1982). Instead, as long as the variation is consistent with the principle of subsection (c)(5) that voters in all jurisdictions have substantively equivalent opportunities to cast a ballot, each local election jurisdiction's early-voting hours should be set to suit local needs, and to meet the principle of § 102(b) that waiting times not exceed 30 minutes. In most states, substantial variation exists in the size of local election jurisdictions, and urban districts with significantly more voters may require additional hours of early voting to meet demand. Setting a uniform statewide standard sufficient to accommodate the early-voting needs

of large urban or suburban populations could unreasonably burden rural election jurisdictions. See National Conference of State Legislatures, *Worlds Apart: Urban and Rural Voting*, THE CANVASS, Oct. 2014, at http://www.ncsl.org/research/elections-and-campaigns/states-and-election-reform-the-canvass-september-october-2014.aspx#World%27s%20Apart. Accordingly, early-voting hours should be set primarily to provide substantial equality in voting opportunity between voters, not equality between characteristics of election jurisdictions. See Richard L. Hasen, *When is Uniformity of People, Not Counties, Appropriate in Election Administration? The Cases of Early and Sunday Voting*, UNIVERSITY OF CHICAGO LEGAL FORUM 4-7 (2016). But within each local jurisdiction, the established hours should be consistent over multiple days, as much as is reasonably possible. See Kasdan, supra, at 13.

§ 105. Locations of Early In-Person Voting

Local Election Authorities should establish and publicize in advance the voting location(s) where voters in each local election jurisdiction may participate in early in-person voting, according to the following principles:

(a) Voting locations should have sufficient equipment and staff to avoid waiting times of greater than 30 minutes, consistent with the principle of § 102(b).

(b) When appropriate, whether for administrative efficiency, voter convenience, or to advance the principles of § 102, a Local Election Authority should establish multiple voting locations.

(c) When establishing voting locations other than its regular business office(s), a Local Election Authority should select locations that are easy for voters to reach by their ordinary means of transportation without long travel times.

(d) Voting locations should be accessible and in compliance with the Americans with Disabilities Act and other governing law.

Comment:

a. Local flexibility to meet demand. Local Election Authorities must have the flexibility to locate their early-voting centers in ways that respond to the geographic and demographic features of their respective jurisdictions, and to their anticipated voter turnout for each specific election. Large urban jurisdictions face circumstances substantially different from smaller rural jurisdictions. Nevertheless, it is important that all Local Election Authorities follow some common guiding principles. In particular, Local Election Authorities should make every reasonable effort to anticipate and meet the demand for early voting in a manner that avoids substantial wait times. Careful collection and analysis of data from past local elections, as provided in § 111, coupled with use of well-designed models of turnout, can assist local jurisdictions to anticipate demand. As provided in § 102(b), 30 minutes of waiting time should be the outside limit. To the extent that this may be most difficult on the first or last days of early voting, when demand typically is the greatest, efforts should be made to publicize and encourage voters to take advantage of lighter days of the early-voting period.

b. Selection of appropriate locations. In many local election jurisdictions, the site of early voting is likely to be the regular business office of the local election administration, such as a

county clerk's office. In urban jurisdictions, as well as in jurisdictions with multiple scattered population centers, election officials may conclude that they can better serve early voters at another location, or by establishing multiple locations, including in privately owned facilities. This Section makes clear that these locations should be conveniently located and well-publicized. They should also be accessible to voters with disabilities, in compliance with the Americans with Disabilities Act, and also should comply with other governing law, including the Voting Rights Act. Consistent with the principle of § 102(a), decisions concerning where to establish these alternative locations must not be made in order to favor the voters of one party or candidate. Especially in large urban centers, GIS (geographic information system) and other analytical tools may assist in making siting decisions.

c. Applicability to traditional Election Day voting. The principles of this Section are equally applicable to the location of Election Day polling places.

REPORTERS' NOTE

Because early voting typically occurs in only a fraction of the voting locations that are used for Election Day voting, it requires early voters to find and travel to a location other than their assigned voting precinct. Early voters thus face two distinct costs: identification (or search) costs, and transportation costs. See Robert M. Stein & Greg Vonnahme, *Polling Place Practices and the Voting Experience*, in THE MEASURE OF AMERICAN ELECTIONS 166, 171 (Barry C. Burden & Charles Stewart III eds., 2014). Minimizing each of these costs is important to successful early voting.

While there is little definitive evidence that the availability of early voting in general increases voter turnout, a recent study reported that increasing the number of early-voting locations could produce modest increases in turnout. See Elliott B. Fullmer, *Early Voting: Do More Sites Lead to Higher Turnout?*, 14 ELEC. L.J. 81 (2015). There also is some evidence that the specific location of early-voting centers can affect turnout, and in particular that placing early-voting centers in locations that voters already frequent, such as shopping centers, can increase turnout. See Robert M. Stein & Patricia A. Garcia-Monet, *Voting Early But Not Often*, 78 SOC. SCI. Q. 657, 668 (1997); see also Diana Kasdan, *Early Voting: What Works*, The Brennan Center for Justice (Report, Oct. 31, 2013), at 15 & n.95 (citing several studies of impact of polling location on turnout). But there also is some evidence to suggest that early-voting locations can be marginally more difficult for voters to find. See Stein & Vonnahme, supra, at 180. Thus, it is important that Local Election Authorities select suitable early-voting locations and publicize these locations effectively.

Several early-voting states—especially those with high early-voting rates—have statutory requirements concerning the location of early-voting sites. For instance, Florida provides that county election supervisors may establish satellite early-voting locations in specified types of public buildings, and that such "sites must be geographically located so as to provide all voters in

the county an equal opportunity to cast a ballot, insofar as practicable." FLA. STAT. ANN. § 101.657. New Mexico provides that its county clerks must "ensure that voters have adequate access to alternate voting locations for early voting . . . , taking into consideration population density and travel time . . . ." N.M. STAT. ANN. § 1-6-5.6. New Mexico also is one of several states that establish a required number of early-voting locations on the basis of the population. See GA. CODE ANN. § 21-2-382(b); N.M. STAT. ANN. § 1-6-5.7(B); TEX. ELEC. CODE ANN. § 85.062(d). West Virginia requires consideration of the "neutrality" of satellite early-voting locations, evaluated in terms of distance from the main early-voting location, population distribution, party ratios, and turnout. See W. VA. CODE R. § 153-13-3.3; see also Kasdan, supra, at 15 ("Fair and equitable siting policies are critical to the successful administration of [early in-person voting].").

In contrast, an inappropriate approach would be to select early-voting sites with a deliberate intent to exclude certain categories of voters. For instance, in a recent case, a North Carolina court reviewed a county board of elections' adoption of a new early-voting plan. The court concluded that the "major purpose" of the plan was to eliminate the early-voting location on the campus of Appalachian State University, solely "to discourage student voting." See Anderson v. North Carolina State Board of Elections, No. 14-CVS-012648, Order at 2 (N.C. Super. Ct. Oct. 13, 2014), available at http://electionlawblog.org/wp-content/uploads/20141013-NC-early-vote.pdf. Concluding that this action infringed upon the constitutional right to vote, the court ordered the county to restore at least one early-voting site to the university's campus. See id. at 2-3. The North Carolina Supreme Court subsequently stayed the order, pending appeal, but the state board of elections used its own authority to restore the campus early-voting site for the 2014 general election. See Laura Leslie, *App State Voting Site Survives Legal Fight*, NC CAPITOL, Oct. 22, 2014, at http://www.wral.com/app-state-gets-early-voting-site-/14105557/.

Local Election Authorities naturally will have additional flexibility in identifying appropriate early-voting locations if they are able to use private facilities, such as unused office buildings, shopping centers, malls, and religious facilities, in addition to government locations. See, e.g., Kasdan, supra, at 14 (describing local election administrators' view that "non-government facilities were valuable early voting sites"). Although some states limit early-voting locations to public buildings, most states with high rates of early voting allow use of private facilities. See id.

Particularly in large population centers, there also may be an inverse relationship between the number of early-voting locations available and the hours of early voting needed to minimize waiting times. Local Election Authorities should be free to meet demand for early voting either with additional voting locations or with extra hours, as most appropriate. Cf. Aaron Deslatte, *Early-Voting Sites Increase; But Hours, Days Drop*, ORLANDO SENTINEL, Sept. 29, 2014, at http://insurancenewsnet.com/oarticle/2014/09/29/early-voting-sites-increase-but-hours-days-drop-a-561071.html#.VDKzaqPD-70 (discussing Florida's decision to give Local Election Authorities more discretion to control both the hours and days of early voting and the number of early-voting locations).

§ 106. Processes of Early In-Person Voting

(a) Wherever possible, Local Election Authorities should use the same voting equipment, ballots, forms, and other materials for early in-person voting that they use for Election Day voting.

(b) Early in-person voters should be subject to the same voter identification requirements applicable to Election Day voting, and also should be subject to the same punishments for voter impersonation or voting fraud applicable to Election Day voting.

(c) Local Election Authorities should update their poll books or voter files daily during the period of early voting.

(d) Any individual who seeks to vote at an early-voting location but is not allowed to cast a regular ballot should be permitted to cast a provisional ballot, to be evaluated according to the same eligibility rules as provisional ballots cast on Election Day, subject to the qualification that no provisional ballot cast at an early-voting location should be rejected solely because of the location at which it was cast.

(e) Local Election Authorities should provide opportunities for outside observers to monitor early in-person voting that are substantially equivalent to the opportunities provided for monitoring Election Day voting.

(f) Local Election Authorities must structure early-voting operations to afford voters privacy when voting and instill confidence that voting will be secure and fair.

(g) Local Election Authorities must not tally votes cast through early in-person voting until the close of polls on Election Day.

(h) The state's Chief Elections Officer must establish procedures to ensure that Local Election Authorities will secure all voting equipment, ballots, and other materials used for early in-person voting against tampering, loss, and damage throughout the period of early in-person voting.

Comment:

a. Make early voting like Election Day voting. Early in-person voting can offer voters the same protections that in-precinct Election Day voting offers, particularly with respect to a secret ballot, the identification and correction of overvotes and undervotes, and the opportunity to cast a provisional ballot when a voter's eligibility to vote is questioned. In order to best provide these

protections, the early in-person voting experience should be as similar as possible to that of Election Day voting. Of course, voting fraud must be similarly prohibited, and election authorities should ensure that their protocols for detecting attempts at voter impersonation are also in place for all periods of early voting. Accordingly, Local Election Authorities ordinarily should use the same identification requirements, privacy protections, voting equipment (whether optical-scan ballots, electronic touch screens, or otherwise), and polling-place management processes that they use on Election Day.

In particular, if early voters cast a paper-based absentee ballot that is not contemporaneously fed through a scanner in order to identify overvotes and undervotes, one of the potential advantages of early in-person voting is lost. Contemporaneous scanning of early ballots to detect such residual votes therefore should be encouraged. To the extent that a voter might experience it as a violation of the voter's privacy to have a poll worker involved in the process of machine scanning of a voted ballot to identify overvotes or undervotes, election jurisdictions could consider allowing voters to forgo the option of a contemporaneous scan, if they wish, or instead to feed their optical-scan ballots through an automated scanner without supervision, with instructions that after scanning they are free to void their ballot and request a new one for any reason.

Daily updating of poll books and other records is important not only for purposes of security and integrity, but also for purposes of resource allocation. As the early-voting period progresses, accurate records about participation can assist local election officials in deploying staff and equipment. Local Election Authorities might also choose to make these records contemporaneously available to the public, for instance for purposes of get-out-the-vote drives, but should feel no obligation to do so if it would add to the administrative burdens.

Early voters who are denied a ballot, whether because they are unable to satisfy an identification requirement, because their name cannot be found in the poll book, or for any other reason, should be allowed to cast a provisional ballot, just like Election Day voters who are denied a regular ballot. However, poll workers should be trained to help early voters who are denied a ballot to determine whether their best option is to cast a provisional ballot, or instead is to seek to remedy whatever deficiency has caused them to be denied a ballot, for instance by obtaining an acceptable form of identification. Voters who are confident that they can remedy the deficiency and easily return to an early-voting location or an Election Day polling place to cast a regular ballot on or before Election Day should be encouraged to do so, rather than to cast

a provisional ballot. As Election Day draws closer, however, early voters denied a regular ballot may find the alternative of voting a provisional ballot increasingly attractive, as the remaining early-voting opportunities dwindle. Uniform procedures should be established for poll workers in these situations, to ensure that poll workers give voters accurate and complete information and do not substitute their judgment for that of the voter. In particular, if a voter must cast a provisional ballot because the poll workers cannot identify the voter as properly registered, the poll workers should help the voter understand how to make an inquiry with the Local Election Authorities concerning the status of the voter's registration. Maximizing the time available for a voter to resolve uncertainty about the voter's registration status increases the likelihood that, if the mistake is the government's, it will be corrected at least within the period available for the verification of provisional ballots, even if not soon enough to permit the voter to cast a regular ballot.

In order to comply with subsection (f), Local Election Authorities should select early-voting sites, under § 105, that have the physical capacity to afford privacy to early voters, and that will maximize election officials' ability to maintain the security and fairness of the voting process by conducting that process in a regular, consistent, and professional manner.

b. Applicability to traditional Election Day voting. Most of the principles of this Section are either peculiar to the early-voting process, or depend on conducting early voting according to established Election Day processes. Of note, however, is that Election Day processes should also be structured to obtain the benefits of identifying and correcting overvotes and undervotes. Additionally, just as early-voting poll workers should be trained to assist early voters with the provisional balloting process, poll workers on Election Day should be similarly trained. The principle that voting operations must afford voters privacy and instill confidence in the security and fairness of the process also is critically important to Election Day voting as well.

REPORTERS' NOTE

Many "best practices" and other recommendations exist for the conduct of in-precinct Election Day voting. See, e.g., *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 32 (2014); U.S. Election Assistance Commission, *Election Management Guidelines: Polling Place and Vote Center Management*, available at http://www.eac.gov/assets/1/workflow_staging/Page/266.PDF. Many of these same recommendations are applicable to early in-person voting.

However, because early voting typically occurs in only a fraction of the locations in which Election Day voting occurs, early-voting centers must be able to produce a number of different ballot formats or styles, supplying to each voter the specific ballot appropriate for the

voter's precinct. Jurisdictions using electronic touch-screen equipment usually can do this quickly and easily. With the right equipment and preparation, jurisdictions using optical-scan ballots printed "on-demand" also can produce the appropriate paper-ballot form for a given voter easily and relatively quickly, though the printing time can be 20 to 30 seconds per voter, not nearly as fast as the several seconds required to load the correct electronic ballot on a touch-screen machine. See Connie B. McCormack, *Florida's Transition from Touch Screens to Op Scan Paper Ballots for Early Voting: A Snapshot Review in Two Counties*, Sept. 23, 2008, at 2.

The use of the same equipment for early voting as for Election Day voting will have less value if a Local Election Authority is using optical-scan ballots without in-precinct scanning. Jurisdictions relying on optical-scan ballots without in-precinct scanners therefore should move to using in-precinct scanners for both Election Day and early voters, if possible. But even for jurisdictions that already use in-precinct scanning, it may require additional resources and planning to develop the ability also to scan all early ballots at the moment the voters finish marking them at an early-voting location, given the number of ballot styles that a single early-voting center may need to process. Because current scanning equipment may be limited in terms of the number of ballot styles that any one machine can accommodate, multiple scanners may need to be available.

It is important to distinguish between the process of scanning ballots at the time they are voted for the purpose of identifying overvotes and undervotes, and the potentially independent process of scanning ballots to record and tally the votes as part of determining the election outcomes. In order to protect against potential election distortions, including both the shaping of campaign behavior and the possibility of voting fraud in response to the leaking or publicizing of early-vote results, early votes should not be tallied until the close of the polls on Election Day. This means not only that daily interim results should not be released, but also that protocols should be established that prevent even the inadvertent calculation of machine tallies until Election Day. That is not to prevent Local Election Authorities, if they wish, from running voted optical-scan ballots through a scanner on an ongoing basis throughout the period of early voting for the purpose of uploading the voters' selections to an electronic file, as long as the electronic processing software and related protocols do not allow the generation or reporting of a running tally until the conclusion of Election Day voting. With that proviso, Local Election Authorities are free to stage the uploading of the contents of early ballots to a tabulating program as they wish. But regardless of whether a jurisdiction tabulates early votes on a rolling basis (without generating any reports or allowing anyone to access any running tallies), or waits until the close of the polls to begin tabulating them, state and local election officials must ensure that the early-voting equipment and ballots are secure throughout the early-voting period. Determining the most appropriate security measures will depend on the mode(s) of voting.

The poll books or lists of those who have voted should be updated daily throughout the early-voting period. A primary reason for doing so is to increase election officials' ability to prevent a voter from casting multiple ballots on different days, an action that otherwise might go undetected until all early-voting records are reconciled much later in the process. Additionally, a process of regular updating can help election officials anticipate turnout patterns, and ease the

task of preparing accurate poll books for Election Day use. Accordingly, most early-voting jurisdictions are already doing this. See Kasdan, supra, at 16.

Today, a key feature of Election Day voting is that poll workers must supply a provisional ballot to any voter who wishes to vote but who is denied the opportunity to cast a regular ballot, as required by the Help America Vote Act of 2002 ("HAVA"). Specifically, HAVA section 302(a) provides:

> If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot . . . .

42 U.S.C. § 15482(a), 116 Stat. 1666, § 302(a) (2002). Though there may be ambiguity about whether Congress intended for HAVA's provisional ballot alternative also to apply to early voting, the HAVA text itself is in no way limited to Election Day voting. Moreover, sound practice would suggest that a provisional ballot should be available to any voter who has attempted to vote but been denied a ballot. It is then up to the voter to decide, in both Election Day and early voting, whether to vote the provisional ballot, or instead to seek to remedy whatever eligibility defect exists before the opportunity to vote a regular ballot expires. Unfortunately, in both Election Day and early voting, election officials are not always aware of or do not always follow HAVA's provisional-balloting requirements. Accordingly, subsection (d) of this Section is intended to help ensure that Local Election Authorities also make provisional ballots easily available to any early voters who might use them.

§ 107. Period of Open Absentee Voting

(a) For a regular federal, state, or local election, absentee ballots for voters who wish to participate in open absentee voting should be transmitted to voters no later than four weeks (28 days) before Election Day, or in the case of a voter who applies for an absentee ballot after that date, within 24 hours of receiving the absentee-ballot application.

(b) For a run-off or special election for a federal, state, or local office, absentee ballots for voters who wish to participate in open absentee voting should be transmitted to voters by the later of either four weeks (28 days) before Election Day or as soon as is practicable after the offices to be decided are fixed, or in the case of a voter who applies for an absentee ballot after that date, within 24 hours of receiving the absentee-ballot application.

Comment:

a. Prolonged period of absentee voting not desirable. Under federal law, absentee ballots for military and overseas voters must be available at least 45 days before a regularly scheduled election. The period of open absentee voting for other voters could easily mirror this period (and in a number of states does so in fact). Yet for the vast majority of voters not facing the difficulties that typical military and overseas voters face in receiving and returning their ballots in a timely fashion, it remains important to keep election season from expanding too dramatically. Furthermore, the 45-day requirement remains a challenge for some jurisdictions, even though most states have been readily able to comply with it for their military and overseas voters.

Specifying that absentee ballots for use by open absentee voters need not be ready sooner than 28 days before Election Day helps preserve a more traditional election season than would adopting a more extended period of absentee voting. This enhances the degree to which voters act on the basis of similar information and permits campaigns to target potential supporters more efficiently. As noted in Comment *c* to § 104, "The longer the early (or absentee) voting period, the greater the potential information gap between early (or absentee) voters and Election Day voters. A prolonged early-voting period therefore is undesirable (as also is a prolonged period of open absentee voting, which similarly encourages voters to cast their absentee ballots well before Election Day)." These same considerations of course might counsel an even shorter period of open absentee voting, akin to the period (a minimum of 10 days) that § 104 recommends for

early in-person voting. Yet it may simply not be realistic to restrict the period for open absentee voting so narrowly, given not only the existence of deeply engrained expectations of month-long absentee voting in many jurisdictions, but also the time required for Local Election Authorities to conduct the administrative tasks associated with processing a large volume of open absentee voting (tasks that include processing absentee-ballot applications, confirming voter eligibility, sending ballots out, matching returned ballots with applications, reconfirming voter eligibility, and contacting voters whose voted ballots are deficient to inform them of opportunities to correct their ballots), as well as the additional time required for voters to receive and return their ballots by mail.

REPORTERS' NOTE

For the 27 states and the District of Columbia that have open absentee voting, the period of absentee voting (measured from the date when absentee ballots are available) ranges from 21 days before Election Day (Hawaii, Kansas, Nevada) to 60 days before Election Day (North Carolina). See *Early Voting Calendar, 2014*, EARLY VOTING INFORMATION CENTER, at http://reed.edu/earlyvoting/calendar/ (last visited Mar. 5, 2016). At least 11 states and the District of Columbia begin absentee voting 45 days or more before Election Day, while only five states begin absentee voting less than 28 days before Election Day. See id. But as described in Comment *b* to § 104, a prolonged period of pre-Election Day voting is undesirable to the extent that it results in some voters casting different votes than they might have cast in light of additional information that would have been available to them had they waited until closer to Election Day to vote. Determining the period of absentee voting will therefore involve a balancing of voter convenience (and election-official convenience as well) with this interest in grounding the fundamental act of democratic governance in a shared civic understanding.

Maintaining an accurate, user-friendly website about the absentee-voting process that includes up-to-date information about all the candidates and issues is one helpful step that election officials can take to reduce some of the potential problems of a long period of absentee voting. See, e.g., National Conference of Commissioners on Uniform State Laws, THE UNIFORM MILITARY AND OVERSEAS VOTERS ACT § 16(d) (2010), at http://www.uniformlaws.org/shared/docs/military%20and%20overseas%20voters/umova_final_10.pdf (requiring any Local Election Authority that maintains a website to post updated election notices to its site). In some locations this may be best accomplished at the local level, while in other cases it may be best handled (or at least coordinated) at the state level. In addition, when candidates and issues change (for instance through court action or candidate withdrawal), or ballot defects are identified after some absentee ballots have been sent out, election officials should take other reasonable steps to alert voters, including by e-mail to the extent possible.

§ 108. Applications for Open Absentee-Voting Ballots

(a) The state's Chief Elections Officer should develop an official absentee-ballot application for use throughout the state for all federal, state, and local elections that is simple and clear. The application should not require an applicant to provide any more information than is necessary to determine the applicant's voting eligibility and the subsequent validity of a voted absentee ballot. A downloadable version of the application should be publicly available on the Internet.

(b) A state with both open absentee voting and early in-person voting should not automatically send an absentee-ballot application to all voters, but instead should send an application only to a voter who requests one. A state with open absentee voting but without early in-person voting may send an absentee-ballot application to all voters in the state.

(c) A voter should be allowed to return a completed absentee-ballot application to the voter's Local Election Authority starting at least 30 days before Election Day, and continuing through no later than three days before Election Day (except in the case of a voter with a permanent disability or other condition that makes it difficult or impossible to vote in person, or a voter covered by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq., for whom states may develop separate procedures to allow the later return of a completed absentee-ballot application).

(d) A voter should be allowed to return a completed absentee-ballot application to the voter's Local Election Authority only by mail delivery, a commercial courier service, or personally by hand, except in a jurisdiction that has chosen to allow the electronic return of completed absentee-ballot applications. The voter's agent also may hand deliver the completed application, but no agent should be permitted to deliver more than two completed applications on the same day. A completed application returned by mail or courier may not be accompanied in the same envelope by another voter's completed absentee-ballot application.

(e) Each state must ensure that its criminal law retains specific prohibitions against any person submitting an absentee-ballot application in the name of any other person, and against submitting an absentee-ballot application with knowledge of its falsity, including knowledge that the applicant is not a qualified voter.

(f) Unless the applicant expresses a contrary preference on the application, an application for an absentee ballot for a primary election should also constitute an application for an absentee ballot for the ensuing general election, and an application for an absentee ballot for any general, primary, or special election should also constitute an application for any run-off election necessary to conclude the election. Absentee-ballot applications should include a clear notice to the applicant of this effect.

(g) Only a voter with a permanent disability or other condition that makes it difficult or impossible to vote in person, as well as a voter covered by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq., should be able to request status as a "permanent" absentee voter for all future elections conducted by the voter's jurisdiction, and thereby receive an absentee ballot for each future election without needing to reapply for an absentee ballot.

(h) A voter other than one described in subsection (g) should be able to request status as a "standing" absentee voter for all future elections conducted by the voter's jurisdiction, for the limited purpose of automatically receiving an *application* for an absentee ballot for each future election. In order to receive the absentee ballot itself, the voter should be required to complete a new absentee-ballot application for each election in which the voter desires to cast an absentee ballot, except as provided in subsection (f).

Comment:

a. Simplicity of application process. A simple, uniform absentee-ballot application is important for several reasons. It will assist local election officials to process applications quickly and accurately, thereby reducing potential problems. In addition, many questions concerning the validity of absentee ballots involve discrepancies between information about the voter already on file with the Local Election Authority, information collected with the ballot application, and information subsequently supplied by the voter on the ballot-transmission envelope. A lean and user-friendly absentee-ballot application can help diminish these problems by reducing confusion and by priming voters to supply the same pertinent and accurate information at each stage. Online absentee-ballot applications, already in use in several jurisdictions, hold additional promise for streamlining the application process and assisting voters to provide all necessary information completely and accurately. Necessary information includes contact information for

communicating efficiently with the applicant, although election authorities should ensure that phone numbers, e-mail addresses, and other private voter information remain private.

As part of developing simple, uniform absentee-ballot applications and transmission envelopes, states should continue to explore improved methods of voter identification. Thumb-print matching or unique voter ID numbers could soon replace the voter signatures and driver's-license and social-security numbers commonly used to identify absentee voters today. Whatever method a state chooses should be convenient, reliable, and easily available to all voters.

b. Automatic transmission of absentee-ballot applications. Because of the greater security and reliability of in-person voting over absentee voting, as discussed in the Comments to § 103, open absentee voting should be used with moderation in states that also offer early in-person voting. Among other concerns, widespread distribution of absentee ballots increases the potential that absentee ballots will be intercepted and cast fraudulently. Accordingly, this Section provides that states that offer both early in-person voting and open absentee voting should not automatically send an absentee-ballot application to all voters. However, a state without early in-person voting may choose to do so.

This Section permits a single application for an absentee ballot to suffice for multiple elections only within the same election cycle, and requires most voters affirmatively to opt back into the absentee-voting process in future election cycles, rather than being classified as a permanent absentee voter. However, it does allow voters to request classification as a "standing" absentee voter, a voter sufficiently interested in absentee voting in future elections to be sent a new absentee-ballot *application* for each election. Election authorities also may choose to inform voters that the absentee-ballot application is readily available online, and thereby relieve voters from requiring the Local Election Authority to send a new application for each election or election cycle. But automatic transmission of absentee ballots themselves for subsequent elections, without a voter's specific request, can readily result in having excess ballots in circulation, partly as a result of voters who move between elections. This can give rise to two distinct problems: (1) an increase in the number of voters who, when they appear at the polls, are required to vote a provisional ballot because the Local Election Authority has previously sent them an absentee ballot; and (2) the possibility that absentee ballots will not reach their intended recipient and will be voted fraudulently.

c. Other steps to minimize absentee-voting mischief. In addition to disfavoring the automatic transmission of unvoted absentee ballots to voters who have not requested them for a

specific election cycle, this Section includes other provisions designed to reduce the potential for misuse of the absentee-voting process. In particular, subsection (d) prohibits batch submission of absentee-ballot applications, whether personally or by mail, because of the risk that the applications may be part of an effort to acquire multiple absentee ballots to be voted fraudulently. The subsection provides a limited exception that permits designated agents (such as spouses, other relatives, or friends) to deliver no more than two applications on the same day. Meanwhile, subsection (e) makes explicit that it must be unlawful to submit a fraudulent absentee-ballot application in any manner. States presumably will have specified criminal penalties, consistent with their overall criminal law, for violations of this principle. States should also develop other screens and protocols for identifying suspicious absentee-ballot applications, and devote appropriate resources to review these suspicious applications.

REPORTERS' NOTE

As is also discussed in the Reporters' Note to § 109, an essential virtue in the absentee-voting process is simplicity and clarity in the associated paperwork. The relatively high rate at which voted absentee ballots go uncounted remains a concern, and one of the primary causes is voter error in completing the paperwork. For instance, in the November 2012 presidential election, nationwide over 250,000 absentee ballots returned by voters were rejected. See U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, Sept. 2013, at 11, 39 & Table 32, available at http://www.eac.gov/assets/1/Page/990-050%20EAC%20VoterSurvey_508Compliant.pdf. Ballots that lacked signatures and ballots with nonmatching signatures were the second- and third-most-common reasons that absentee ballots were rejected, after ballots that missed the deadline. See id. at 11, 41-46 & Tables 33a-c. Accordingly, both the absentee-ballot application and the absentee-ballot-transmission envelopes should be carefully designed to be user-friendly and to guide voters to the successful completion of the voting process, ensuring not only that voters sign both the application and the ballot, but that other identifying information is correct.

However, minimizing the number of invalid ballots is not the only goal of a simplified application process. Another is to facilitate the number of voters able to take advantage of the option of open absentee voting. One obvious way to increase absentee participation would be to send an absentee ballot to every voter. (In essence, this is what the handful of states that have adopted "all-vote-by mail" elections are doing; those states no longer conduct polling-place voting, making the mailed ballot the only voting option.) But automatically putting an absentee ballot in the hands of every voter, without the cessation of all in-precinct voting on Election Day (as has occurred in the few all-vote-by-mail states), would risk confusion among voters, complicate the work of election officials (who would essentially need to give a provisional ballot to every voter who appeared in person to vote on Election Day, until it was clear which voters had not returned their absentee ballots), and heighten concerns that actual ballots could be intercepted and misused.

Accordingly, a much more attractive option would be to send an application for an absentee ballot to all voters. Although subsection (b) otherwise leaves it to state discretion to decide whether to do so, it urges states not to do so if they also offer early in-person voting, because the risks of lost ballots, residual votes, improper influence, and vote fraud are all lower in in-person voting. See Reporters' Note to § 103, supra. Open absentee voting may still offer a unique form of convenience for some voters, who prefer it over early in-person voting, but these voters then should personally opt to participate in this mode of voting. Subsections (g) and (h) allow states to create mechanisms for certain voters who wish always to vote absentee to receive either ballots or applications for absentee ballots automatically, but in most cases obligate the voter affirmatively to submit the application itself each election cycle, in order to limit the number of actual ballots in circulation for a given election to only those voters who either have explicitly requested them for that election, or have a demonstrated need for them because of a continuing impediment that makes it difficult or impossible for them to vote in person. Jurisdictions that send absentee-ballot applications automatically should adopt best practices to manage their registered voter files in order to minimize the number of applications sent to outdated addresses.

Subsection (f) represents a modest departure from this principle, but only for a single election cycle (primary election, general election, and run-off election, if necessary) involving the same set of offices and issues, and only with clear notice to the voter. However, under subsection (f) there is still some risk that a voter who requested and voted an absentee ballot for a primary election will forget having made that request, overlook the arrival of the absentee ballot for the general election, and be required to vote a provisional ballot in the general election when attempting to vote an in-person ballot (either early or on Election Day). To reduce this risk, states should consider including a checkbox on the absentee-ballot application that the voter can mark in order to opt out of the default posture of subsection (f), and instead elect to receive an absentee ballot only for the primary election. This Section contemplates but does not require this option on the application, although states should consider its desirability.

Subsection (d) also is intended to help limit the number of actual ballots in public circulation, outside the control of election officials, to only those individuals who have in fact decided to take advantage of open absentee voting. Of course, it is perfectly conceivable that any number of otherwise valid absentee-ballot applications could be bundled for efficient hand delivery, without giving rise to any improprieties. But when absentee-ballot applications are allowed to be submitted in batches, the risk is much greater that the applications may be part of a scheme to manipulate the absentee-voting process in some manner, for instance by gaining access to a sufficient number of votes to swing an election. See, e.g., Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES, Oct. 7, 2012, at A1, available at http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?pagewanted=all&_r=0 (describing arrest of Florida voter for possessing 31 marked absentee ballots); Scott Fallon & Josh Gohlke, *Candidate Subject to Fraud Probe: Absentee Ballot Requests Called Faulty in Paterson*, N.J. REC., May 9, 2002 (describing investigation of mayoral candidate who sent requests for 275 absentee ballots); cf. Taylor v.

Currie, 743 N.W.2d 571, 575-576 (Mich. Ct. App. 2007) (removing city clerk from election duties for absentee-voting-process abuses, abetted by sending absentee-ballot applications to all voters).

Another option for returning absentee-ballot applications involves electronic submission. Although most states have been reluctant to adopt electronic methods of returning voted ballots, most states are now embracing electronic methods of providing absentee-ballot applications to voters, and several private organizations now operate websites with downloadable absentee-ballot applications for each U.S. jurisdiction. See, e.g., U.S. Vote Foundation, *Absentee Ballot Request and Voter Registration Services for All U.S. Voters in All States at Home and Abroad*, at https://www.usvotefoundation.org (last visited Mar. 5, 2016). A growing minority of states, including Alaska, Florida, Louisiana, Maryland, Minnesota, and Utah, also permit voters to *return* absentee-ballot applications electronically. See National Conference of State Legislatures, *Absentee and Early Voting, No-Excuse Absentee Voting*, available at http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx (Jan. 5, 2016); State of Alaska Division of Elections, *Absentee Voting by Electronic Transmission*, available at http://www.elections.alaska.gov/vi_bb_by_fax.php (last visited Mar. 5, 2016); Maine.gov, *Absentee Ballot Request*, at https://www.maine.gov/cgi-bin/online/AbsenteeBallot/index.pl?c=1, then click on "All Other Voters Online Request" (last visited Mar. 5, 2016).

Meanwhile, some states have been developing electronic options for transmitting blank (unvoted) ballots. Since 2010, federal law has required states to offer electronic transmission of both applications and blank ballots to military and overseas voters. See 42 U.S.C. § 1973ff-1(a)(6), (a)(7), & (e). But the continuing degree of concern surrounding the security of electronic transmission of voting materials—and the prospect of more ballots than necessary being in public circulation outside of official control—merit caution concerning the general use of electronic means of transmitting unvoted ballots.

§ 109. Voting and Returning Open Absentee Ballots

(a) The state's Chief Elections Officer should assist Local Election Authorities to develop absentee ballots and absentee-ballot-transmission envelopes that are simple and clear, in conjunction with the development of simple and clear absentee-ballot applications under § 108. To the extent feasible, the information required on ballot-transmission envelopes should correspond to the information required on the absentee-ballot applications.

(b) Identification and authentication requirements for a voted absentee ballot should not impose unnecessary burdens on the voter or require the voter to provide any more information than is necessary to determine the validity of a voted absentee ballot (including information to permit efficient communication with the voter).

(c) Authentication requirements for a voted absentee ballot should include the voter's oath or affirmation that the voter cast the ballot without any coercion or other undue influence that affected the voter's choices.

(d) Any requirement that, in addition to the voter's oath or affirmation described in subsection (c), a witness also attest to the authenticity of a voted absentee ballot should not require that the witness be a notary public or a registered voter, and should otherwise be structured to minimize the burden on the voter.

(e) A voter should be allowed to return a voted absentee ballot to the voter's Local Election Authority only by mail delivery, a commercial courier service, or personally by hand, except in a jurisdiction that has chosen to allow the electronic return of voted absentee ballots. The voter's agent also may hand deliver the voted absentee ballot, but no agent should be permitted to deliver more than two voted absentee ballots on the same day. A voted absentee ballot returned by mail or courier may not be accompanied in the same transmission envelope or mailing envelope by another voted absentee ballot.

(f) Each state must ensure that its criminal law retains specific prohibitions against any person voting an absentee ballot in the name of any other person, or submitting an absentee ballot with knowledge of its invalidity.

(g) To be valid, a voted absentee ballot either must be received by an appropriate election official by the close of the polls on Election Day, or be postmarked before Election Day and received by the appropriate election official by

the close of business on the day before the deadline for completion of the local canvass. Absentee ballots received after Election Day without a postmark (other than those ballots cast by military or overseas voters covered by their own special absentee-voting rules) must not be counted.

(h) The state's Chief Elections Officer, in cooperation with Local Election Authorities, should develop a tracking system that will allow any voter who has applied for an absentee ballot to determine the status of the ballot. The system should permit voters to determine, either online or by telephone: (i) whether the application has been received; (ii) whether the application is valid; (iii) whether and when an absentee ballot has been sent to the voter; (iv) whether the voter's completed absentee-ballot-transmission envelope and accompanying voted ballot have been received; (v) whether the transmitted ballot is valid and will be counted; (vi) for an invalid ballot, what remedial steps, if any, are available for the voter to correct any deficiencies; and (vii) whether the ballot has been counted. Within 48 hours of any official determination or action described in items (i) through (vii) above, Local Election Authorities should update the tracking information to reflect that determination or action.

Comment:

a. Voter-friendly absentee balloting materials and requirements. As noted in the Comment to § 108, many questions concerning the validity of absentee ballots involve discrepancies between information supplied by the voter on the ballot-transmission envelope and information already on file with local election officials. Other questions concerning the validity of absentee ballots involve voter failures to properly complete the ballot-transmission envelope. Both problems are exacerbated if the transmission envelope or other accompanying documentation is unnecessarily complex. These materials, like their counterparts in the ballot application, also should be simple, user-friendly, and designed to correspond to the absentee-ballot application. One approach to the design of these materials is the sample absentee-ballot-transmission envelope in the Illustration below (which represents an internal envelope that in turn would typically be placed within an outer mailing envelope to protect the privacy of the voter's identifying information).

Election officials also should be alert to the possibility that new technologies will provide superior methods for verifying both the identity of absentee voters and the validity of their

ballots. For instance, the use of bar codes on absentee-ballot envelopes may facilitate the matching of absentee-ballot applicants with voted absentee ballots, reducing the number of lost absentee votes. Other innovations to reduce the errors that contribute to lost votes are also likely. In addition, jurisdictions that wish to facilitate matching of ballots with applications by affixing on the absentee-ballot return envelope an official label containing the absentee voter's name and address should be allowed to do so, as long as the voter is still required to supply specific identifying information, such as the voter's date of birth and state-identification-card (driver's-license) number or social-security number (last four digits). However, third parties should not be allowed to prepare or complete any portions of a voter's absentee-ballot envelope (other than when a voter asks a friend or family member, functioning as the voter's agent, to help complete the ballot envelope).

In some jurisdictions, requirements that an absentee voter complete the ballot in the presence of a notary, who could attest to both the identity of the voter and the fact that the voter was not paid or pressured to vote in a particular way, have given way to simpler witness requirements, or to no witness or notary requirement at all. It therefore is more important than ever that the voter's oath or affirmation on the transmission envelope provide clear notice to the voter of the expectation that the voter will cast the ballot without improper pressure or influence. If signed (or otherwise authenticated, for instance with a thumbprint) under penalty of perjury, a clear statement to this effect (as also exemplified in the sample in the Illustration below) ought to mitigate the need for a requirement that a third party witness the voter's casting of the absentee ballot. Nevertheless, this Section permits a state that wishes to do so to continue to impose witness requirements as one means of reducing the risk of absentee-ballot fraud and undue influence, provided the voter can meet the witness requirement without substantial inconvenience, cost, or other burden.

Local Election Authorities also should ensure that absentee voters receive clear instructions concerning the ballot-return process, including notice of the deadline for returning an absentee ballot, and of the amount of postage required (although local election jurisdictions also should consider paying for postage deficiencies, rather than returning a ballot with insufficient postage to the sender). Among other places, the deadline could be printed on the ballot return envelope, as in the Illustration below. These instructions should also explain how voters can access the tracking system described in subsection (h) to determine the status of their

voted ballot. Many states and local election jurisdictions already are using or developing some form of absentee-ballot tracking systems.

b. Steps to minimize absentee-voting mischief. This Section provides that voters should be responsible for returning their own absentee ballot, in order to reduce the risk of fraudulent casting of absentee ballots by persons other than eligible voters, especially in batches or groups. Subsection (f) also makes explicit that it must be unlawful to submit a fraudulent absentee ballot. States presumably will have specified criminal penalties, consistent with their overall criminal law, for violations of this principle.

In addition, in order to reduce the risk that absentee votes will be unfairly or fraudulently cast after unofficial Election Day results are known, this Section provides that all absentee ballots must establish their timeliness on their face, either by a postmark no later than the day before Election Day, or by arriving at the local election office before the close of the polls on Election Day. To the extent that automated postal equipment may not always provide a sufficient postmark, and when compliance with the ballot return deadline might otherwise be at risk, ballot instructions could encourage voters to either purchase a dated postage label at a U.S. Postal Service vending machine or customer service window, or ask a postal worker to "hand-cancel" (put a postmark on) a mailed absentee ballot. A dated waybill from a commercial courier service showing that the voted absentee ballot was sent to the local election office before Election Day, as well as a U.S. Postal Service ID Tag (if one has been added to the envelope) with a bar code that establishes that the ballot was mailed before Election Day, should be treated like a valid postmark. But no one (other than a voter already in line at poll closing time) should be permitted to cast a ballot after the polls close.

The Section offers an additional accommodation to absentee voters who vote right before Election Day by permitting their ballots, if properly postmarked, to arrive after Election Day, up through the day before the local canvassing deadline. Of course, for these late-arriving ballots it may be difficult or impossible to provide voters an opportunity to correct deficiencies under § 110(g).

Illustration:

Sample Absentee-Ballot-Transmission Envelope

[see page 67]

REPORTERS' NOTE

Many of the principles in this Section represent a balancing of convenience and risk. Furthermore, this balancing reflects the fact that when a close race (one within the "margin of litigation") becomes the subject of an election contest, legal claims are often likely to involve the absentee-voting process. For instance, several recent election contests have depended at least in part on disputes about the eligibility of hundreds or thousands of initially uncounted absentee ballots, with the question of their eligibility in turn involving fact-intensive ballot-specific inquiries about the adequacy of signatures or other identifying information on the absentee-ballot-transmission envelopes, or the timeliness of their casting. See, e.g., Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129, 145-154 (2011) (discussing several thousand initially rejected absentee ballots at issue in Coleman v. Franken election contest); RICHARD L. HASEN, THE VOTING WARS 26-28 (2012) (discussing dispositive impact of late-arriving absentee ballots in 2000 Florida presidential election); cf. Ohio ex rel. Skaggs v. Brunner, 120 Ohio St. 3d 506, 512-517 (Ohio 2008) (addressing issue of whether to count approximately 1000 provisional ballots of questionable eligibility, an issue analogous to many questions of absentee-ballot eligibility); Ohio ex rel. Skaggs v. Brunner, 549 F.3d 468, 470-471 (6th Cir. 2008) (describing same issue). When local election rules call for extraneous information on these envelopes, or are unclear about what constitutes a valid absentee ballot, it multiplies the number of absentee ballots that can become the focus of post-election litigation. Accordingly, this Section calls for simplification in the process of casting an absentee ballot, subject to important protections intended to guard against potential problems or abuses.

In particular, to manage one of the primary vulnerabilities of absentee voting—that voters may be improperly influenced or coerced in the marking of their ballots—it remains essential that each voter swear or affirm at the time of casting the ballot, by signing a declaration on the ballot-transmission envelope, that the votes represent the voter's personal preferences, "not the results of coercion or improper influence." Another means of policing this concern is to require that a witness also sign a supporting statement on the ballot-transmission envelope confirming that the voter's execution of the ballot was independent, uncoerced, and uninfluenced. Indeed, for similar reasons it was once commonplace to require a notary public to witness the execution of an absentee ballot, although today these requirements are widely seen as unduly burdensome. As a result, no state permitting open absentee voting has a notarization requirement (Mississippi, which restricts absentee voting to voters with an impediment to voting in person, is today the only state that requires a notary public to witness an absentee ballot), while only three states with open absentee voting (Alaska, Minnesota, and Wisconsin) have a witness requirement. But a witness requirement can be an effective means of solemnizing the process of casting an absentee ballot appropriately, provided the witness undertakes the responsibility seriously, and the requirement is structured so as not to unnecessarily burden the absentee voter.

For fraud-prevention reasons similar to those described in the Reporters' Note to § 108, it also is important that absentee voters be personally responsible for returning their voted absentee ballots, and that they not allow their voted ballots to be returned in batches. See, e.g., Ben

Kochman, *Bronx Politician Hector Ramirez Busted on Voter Fraud Charges*, N.Y. DAILY NEWS, May 20, 2015, available at http://www.nydailynews.com/new-york/nyc-crime/bronx-politician-hector-ramirez-busted-fraud-charges-article-1.2229187 (describing scheme to collect, vote, and return dozens of voters' absentee ballots); Michael Moss, *Absentee Votes Worry Officials as Nov. 2 Nears*, N.Y. TIMES, Sept. 13, 2004 (describing election officials' worries about misdirection and other manipulations of voted absentee ballots). The Section provides a limited exception that permits agents (such as spouses, other relatives, or friends) to deliver no more than two voted absentee ballots on the same day.

This Section seeks to further reduce the potential for absentee-voting fraud by requiring that voted absentee ballots either be received by the Local Election Authority before the polls close, or that they bear a postmark no later than the day before Election Day and arrive before the last day of the local canvass. Without these constraints, in close races there might be increased temptation to engage in figurative ballot-box stuffing by harvesting and casting previously uncast absentee ballots in the hours and days immediately after a preliminary result is announced on Election Night. Of course, the obvious alternative is to require that all absentee ballots be received by Election Day at the offices of the Local Election Authority. But provided that it can be done securely, permitting late-arriving absentee ballots allows more absentee voters to participate in the election without having to cast their ballots so far in advance of Election Day. The postmark requirement for late-arriving ballots therefore represents another balancing of risk and voter convenience. Although a postmark requirement may result in the occasional invalidation of an absentee ballot that was in fact cast before Election Day but failed to be accurately postmarked, local election jurisdictions can take steps to minimize these lost ballots, for instance through careful design of the return envelopes, coordination with the U.S. Postal Service, and careful instruction to the voters. See Ohio Secretary of State, Directive 2016-03, Jan. 29, 2016.

For a few states, requiring the acceptance of absentee ballots only through the day before their local canvassing deadline will not provide the complete benefit. While today most states provide from one to three weeks for the canvass, a handful of states encourage or require the canvass to occur within only a couple of days after Election Day (while at the other extreme a few states have a month-long canvass). See National Association of Secretaries of State, *Summary: State Election Canvassing Timeframes*, Nov. 1, 2010) available at http://www.nass.org/reports/surveys-a-reports/. States with short local canvassing periods could consider extending them, as any additional time between the deadline for late-arriving absentee ballots and the deadline for completion of the canvass will provide absentee voters greater opportunity to correct errors in their absentee ballots, as contemplated in § 110(g).

As noted in the Comments to § 101, the ALI has not taken a position on the advisability of returning voted absentee ballots electronically. Alaska, however, allows any voter to return ballots by fax or online. See State of Alaska Division of Elections, *Absentee Voting by Electronic Transmission*, at http://www.elections.alaska.gov/vi_bb_by_fax.php (last visited Mar. 5, 2016); National Conference of State Legislatures, *Electronic Transmission of Ballots*, available at http://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx (Feb. 5, 2016).

Moreover, many states are moving to electronic options for their UOCAVA voters. For instance, Arizona, Colorado, Delaware, the District of Columbia, Idaho, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Utah, Washington, and West Virginia allow UOCAVA voters, in at least some circumstances, to return voted ballots via e-mail, and Arizona also has developed an online system for UOCAVA voters to return voted ballots. See National Conference of State Legislatures, *Electronic Transmission of Ballots*, available at http://www.ncsl.org/research/elections-and-campaigns/internet-voting.aspx (Feb. 5, 2016). In New Jersey, UOCAVA voters can vote by e-mail, but they must also send a hard copy of the ballot via postal mail. See id. Utah also allows voters with a disability to return voted ballots via e-mail or fax. See id.

§ 110. Processing and Counting Voted Absentee Ballots

(a) Voted absentee ballots should be collected, processed, and counted at one central location in each local election jurisdiction.

(b) Each Local Election Authority should establish an absentee-ballot-counting board, evenly balanced in its representation of the relevant political parties, to conduct the processing and counting of voted absentee ballots. Members of the absentee-ballot-counting board should be specially trained in their duties before the period of absentee voting begins.

(c) Before the period of open absentee voting begins, the state's Chief Elections Officer should determine whether gaps exist in the statutorily prescribed procedure for absentee-ballot-counting boards to follow in determining whether a voted absentee ballot is valid and eligible for counting, and should fill any gaps by prescribing clear rules designed to further the following purposes:

(1) ensure confidence that each counted ballot was properly cast by an eligible voter;

(2) ensure that no tampering has occurred to any ballot;

(3) prevent the invalidation of any ballot for noncompliance with procedures that do not directly bear on purpose (1) or (2); and

(4) identify precisely those categories of errors or deficiencies affecting the validity of a voted absentee ballot that voters may correct, and how they may be corrected.

(d) Although the absentee-ballot-counting board must not count voted absentee ballots before Election Day, it should begin verifying the validity of as many voted absentee ballots as possible and processing those ballots on a rolling basis before Election Day. By the end of Election Day, the counting board should have verified the validity of all absentee ballots received before Election Day.

(e) If it is timely, a voted absentee ballot should be classified as valid unless:

(1) the voter is not registered to vote or not qualified to vote, except if a preponderance of the evidence establishes that a qualified voter submitted a valid registration application that, because of an error committed by a government official, did not result in the voter appearing in the state's voter-registration database;

(2) no name or other identifier appears on the absentee-ballot-transmission envelope, making it impossible to verify its validity;

(3) the absentee-ballot-transmission envelope lacks the voter's signature or authentication (including the oath or affirmation specified in § 109(c));

(4) the voter has failed to provide an acceptable form of voter identification, if any is required;

(5) the absentee-ballot-transmission envelope lacks the signature of a witness, if a witness is required;

(6) the absentee ballot is one of multiple ballots cast by the same voter in the same election;

(7) the voter returned the absentee ballot using an intermediary other than as allowed in § 109(e);

(8) the absentee ballot is accompanied by another voted absentee ballot inside the same absentee-ballot-transmission envelope or mailing envelope, as prohibited in § 109(e), except that two voted absentee ballots authenticated as having been submitted by two voters in the same household are not invalid under this rule unless the preponderance of evidence suggests that the ballots were cast under circumstances inconsistent with the ballots containing the voluntary choices of the eligible voters who cast the ballots;

(9) the absentee-ballot-transmission envelope arrived unsealed and the preponderance of evidence suggests that the ballot was cast under circumstances inconsistent with the ballot containing the voluntary choices of the eligible voter who cast the ballot; or

(10) clear and convincing evidence otherwise establishes that the absentee ballot was cast under circumstances inconsistent with the ballot containing the voluntary choices of the eligible voter who cast the ballot, including duress, coercion, or bribery.

(f) When an absentee-ballot-counting board determines that a voted absentee ballot is invalid, within 24 hours the Local Election Authority should inform the voter of this determination, using the contact information that the voter has specified on the ballot-transmission envelope.

(g) If the invalidity is a result of the voter's clerical error or other correctable error or deficiency on the transmission envelope, including the lack of the voter's signature or authentication on the envelope, the voter's failure to provide an acceptable form of voter identification, or the lack of a witness signature (if required), the Local Election Authority must allow the voter an opportunity to correct the problem before the earlier of the 10th day after Election Day or the completion of the local canvass of the election, and must inform the voter of this opportunity, using the contact information that the voter has specified on the ballot-transmission envelope. If a voter sufficiently corrects an error or deficiency, the ballot must then be validated, counted, and included in the local canvass.

(h) A voter who does not take advantage of the error-correction opportunity provided in subsection (g) may not subsequently seek to correct an invalid ballot during any other post-election dispute-resolution processes, and an uncorrected ballot should not be counted.

(i) Members of the public, representatives of candidates and political parties, journalists, and other interested observers should have a reasonable opportunity to observe and participate in the process by which the absentee-ballot-counting board determines the validity of voted absentee ballots, as well as in the process by which the board counts absentee ballots, provided that these observers do not harass or interfere with members of the absentee-ballot-counting board or other public employees assisting in these processes.

(j) The state's Chief Elections Officer should establish clear rules for Local Election Authorities to follow to ensure that voted absentee ballots are protected against loss, damage, or manipulation, including clear chain-of-custody procedures for all voted absentee ballots and ballot-transmission envelopes.

Comment:

a. Consistency in processing absentee ballots is essential. A lack of consistency in the processing of absentee ballots invites controversy and suspicion concerning election outcomes whenever the margin of victory is smaller than the number of absentee ballots cast, as confirmed by many of the problems identified and examples discussed in the Reporters' Notes to §§ 103 and 108-110, as well as in Part II: Principles for the Resolution of Ballot-Counting Disputes. Accordingly, because open absentee voting inevitably entails a substantial number of absentee

ballots, it is critical to establish a sound process for counting these absentee ballots. This Section provides that a sound process begins by centralizing the counting function away from local precincts, in order to reduce variation and to "professionalize" the counting function through specialized training of local counting boards, balanced among relevant political parties (including the possibility of minor party representation on a counting board, when such representation is appropriate).

Additionally, clear and easily administrable standards for the counting boards to follow in identifying a valid ballot must be established, in advance. Subsection (e) identifies 10 categories of invalid absentee ballots, and provides that all other timely received absentee ballots are valid. The 10 categories are designed to match a similar set of principles in Part II of Principles of the Law, Election Administration. As explained in more detail in Part II, a person challenging the validity of an absentee ballot either on the basis that it arrived in an unsealed envelope, or that it does not reflect the voluntary choices of the eligible voter who cast it, bears the burden of proving the invalidity of the ballot. Because an unsealed ballot-transmission envelope creates an initial indication that the ballot may not be reliable, such a ballot should be invalidated if a preponderance of evidence suggests that the ballot does not accurately reflect the selections made by the voter because it was cast under circumstances inconsistent with the ballot containing the eligible voter's voluntary choices. Multiple ballots returned in the same envelope, in violation of the principle of § 109(e), are presumptively invalid, although subsection (e) of this Section recognizes a specific exception to this rule for voters in the same household, again unless a preponderance of additional evidence suggests that the ballots were cast under circumstances inconsistent with the ballots containing the eligible voters' voluntary choices. Otherwise, clear and convincing evidence is required to invalidate a ballot on the basis that the ballot was cast under circumstances inconsistent with it containing the eligible voter's voluntary choices.

In addition to employing a dedicated absentee-ballot-counting board, a sound process for counting absentee ballots also provides an opportunity for public oversight of all phases of the counting process, as specified in subsection (i). This includes an opportunity for representatives of candidates and political parties to participate in all of the board's determinations of the validity of voted absentee ballots, whether the board makes these determinations before Election Day, on Election Day, or after Election Day.

b. Opportunity to correct errors. It also is important that the additional steps required to ensure confidence in the legitimacy of absentee voting not function to disenfranchise legitimate

voters. One tool for reducing unnecessary disenfranchisement is to allow voters to correct errors in their absentee-ballot-transmission envelopes, provided this correction can occur in a reasonable time. Subsection (g) establishes the 10th day after Election Day as the final day for this error correction, at least in the many jurisdictions whose canvassing process is 10 days or longer. This deadline would provide even those voters whose absentee ballot arrived at the Local Election Authority after Election Day (as permitted under § 109(g)) some chance to correct errors.

This error-correction opportunity pertains only to errors on the transmission envelope, because election officials can identify these errors before removing the voted ballot from the transmission envelope. Errors in the marking of the absentee ballot itself, including overvoting in a particular race, or failure to specify a vote in a given race (undervoting), are not correctable.

In order to facilitate the rapid resolution of post-election disputes, subsection (h) provides that a voter who does not correct the voter's own error during the correction period should be precluded from seeking to correct the error during subsequent proceedings. However, if election officials have incorrectly determined that a voter's absentee ballot is invalid, the voter should be allowed to seek to correct the election officials' error at any stage of post-election proceedings. Thus, the limitation of the error-correction opportunity in subsection (h) applies only to errors that are committed by the voter, for which an error-correction opportunity exists under subsection (g).

c. Maintaining the integrity of absentee-balloting materials. Finally, given the likelihood that absentee ballots will be intensively scrutinized in a disputed election, both the ballots themselves and the accompanying documentation required to ascertain their validity must be protected for subsequent review and analysis. It therefore is essential for the state's Chief Elections Officer to establish clear chain-of-custody procedures, particularly for the subset of absentee ballots whose eligibility for counting is in doubt, as well as protocols for maintaining the integrity of these ballots.

Illustrations:

A critical element of processing absentee ballots is for each Local Election Authority to follow uniform standards, clearly defined in advance. These standards, which need to be set in each state, should specify what errors or deficiencies render a ballot uncountable, and to what extent and how absentee voters may correct these errors or deficiencies. By way of illustration:

1. Absentee-ballot defects that, with sufficient notice and opportunity, presumably could be corrected include ballots that arrive without:
   - the voter's signature;
   - an identifiable address of the voter, if other contact information is available; or
   - a required identification number.
2. Absentee-ballot defects that presumably are not correctable include ballots that arrive:
   - after Election Day, if without a valid postmark (except for military and overseas ballots, for which the voter's affirmation of voting the ballot by the deadline is sufficient);
   - as part of a prohibited bulk submission; or
   - without a valid witness signature, when required.

For those defects in Illustration 1, the state should establish a process for notifying the voter of the defect and permitting the voter to correct it, provided the correction can be made before the local canvassing deadline.

REPORTERS' NOTE

In many states, the processing and counting of voted absentee ballots occurs in the precincts to which the absentee voters are assigned. While this may make sense from the standpoints of both distributing the workload and keeping the votes where they belong, it has proven to be less satisfactory than a more centralized approach. Minnesota's difficulty processing absentee ballots fairly and consistently in the 2008 election, which became apparent in the contest over its U.S. Senate seat, is instructive. One key problem was that Minnesota tasked poll workers in each local precinct, at the end of a long Election Day, to conduct the processing and counting of the absentee ballots cast by voters in that precinct. The result was wide variation in standards and an unacceptably high error rate. See Edward B. Foley, *The Lake Wobegone Recount: Minnesota's Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129, 139-141, 162 (2011). In response, Minnesota amended its absentee-ballot-counting process to require central counting by a specially trained absentee-ballot-counting board. See MINN. STAT. ANN. § 203B.121 (2011).

These Principles likewise call for centralized processing and counting, conducted publicly by a counting board with balanced representation of all relevant parties. Centralization not only will eliminate precinct-by-precinct variations, but also will facilitate the thorough training of absentee-ballot-counting boards, the more rapid incorporation of improvements in technology, and a more open and public process. None of these improvements, however, lessens

the need to establish, in advance of the election, clear rules—preferably in statute—for the processing and counting of absentee ballots.

Furthermore, as with early in-person voting, no interim tallying of votes should occur, for the reasons discussed in the Reporters' Note to § 106. Instead, both for reasons of efficiency and in order to facilitate the notification of voters whose absentee ballots are deficient, local election officials should promptly determine the validity of the voted ballots, on a rolling basis as absentee ballots arrive, but then either hold the ballots themselves for counting until the close of the polls, or feed the ballots through a tabulating machine that can record the ballot choices without allowing election officials or anyone else to access any running tallies until the close of polls on Election Day. Of course, as with early in-person ballots, election officials must secure the absentee ballots and any tabulating equipment throughout the period of absentee voting.

The final safeguard for absentee voting is that voters be provided an opportunity to correct clerical mistakes or inadvertent omissions that would otherwise render their absentee ballots invalid. As noted in the Reporters' Note to § 103, absentee votes "lost" to such mistakes often occur in sufficient volume to affect the outcomes in close races. Yet without notice of a deficiency, many absentee voters are unaware when their ballot has not been counted. This Section accordingly calls for a process that will notify absentee voters of such deficiencies, and that also will allow the voters to remedy these deficiencies, provided they can do so without delaying the official canvass. Some states may wish to adjust their canvassing timeline and processes in order to facilitate this error correction.

This error-correction process not only will protect each individual voter by reducing the chances of the voter's effective disenfranchisement, but also should shrink the number of absentee ballots potentially at issue in a post-election dispute. However, in furtherance of this second goal, it is important that voters not be able to defer their opportunity to correct deficient absentee ballots until an election contest is underway. Instead, the corrections must be made before the canvass ends, at which point the opportunity to correct should lapse.

§ 111. State and Local Data-Collection Responsibilities

(a) Local Election Authorities should maintain detailed records concerning open absentee voting and early in-person voting, including:

(1) The number of early in-person voters at each early in-person voting location on each day of the early in-person voting period, and the hours that the location was open each day;

(2) The waiting times that voters experienced at specified regular times throughout each day of the early in-person voting period;

(3) The number of provisional ballots cast at early-voting locations, the reason(s) for their use, and their resolution;

(4) The number of valid votes cast for each candidate and for or against each ballot issue through early in-person voting;

(5) The number of absentee-ballot applications the local election jurisdiction received, the date when the jurisdiction received each application, and the jurisdiction's disposition of each application;

(6) The number of voted absentee ballots returned, and the date when the local election jurisdiction received each voted absentee ballot;

(7) The number of voted absentee ballots initially deemed ineligible for counting;

(8) The number of those ballots included in paragraph (7) because of errors that the election authority permits voters to correct;

(9) The number of those ballots identified in paragraph (8) that were corrected and counted;

(10) The number of valid votes cast for each candidate and for or against each ballot issue through the absentee ballots; and

(11) The estimated costs and cost savings associated with any alternatives to Election Day voting in use in the local election jurisdiction.

(b) To permit more extensive analysis of the extent of early in-person voting and open absentee voting, whenever appropriate the data maintained under subsection (a) should be reported at the precinct level, rather than at the aggregated level of the local election jurisdiction.

(c) As soon as reasonably possible, and no later than 180 days after an election, state election officials should collect and organize the data gathered in subsection (a) and make the data publicly available for study and analysis, including in electronic form for data that is maintained electronically.

(d) For purposes of comparison, Local Election Authorities also should maintain and make publicly available for study and analysis detailed records concerning Election Day voting, including:

(1) The number of voters voting at each precinct on Election Day;

(2) Waiting times that voters experienced at each precinct at specified regular times throughout Election Day; and

(3) The number of provisional ballots cast at each precinct on Election Day, the reason(s) for their use, and their resolution.

(e) State and local election officials should study and analyze the data collected in subsection (a), and should review independent studies and analyses of this data, in order to adjust early in-person voting procedures and open absentee voting procedures for future elections, as appropriate to help avoid delays in voting and otherwise to further the purposes of this Part.

Comment:

a. Data needed for improvements. Because voting technologies and processes continue to evolve rapidly, accurate and current information about how the processes are working is critical both to sound implementation at the local level and to appropriate modification at the state level. Voter needs and preferences also may shift over time in ways that can be more easily identified and managed when good data is collected and analyzed. Furthermore, today's increasingly powerful tools for collecting and analyzing large data sets have as-yet untapped promise to advance the understanding and management of election processes, provided that complete and reliable data is available.

Particularly as it pertains to the continuing improvement of nontraditional voting options, part of the value of collecting and maintaining good data about the processes of early voting and open absentee voting will derive from being able to compare this data with comparable data concerning aspects of Election Day voting.

Increased computerization of election processes creates the potential for readily capturing and analyzing additional detail about the voting experience, at the level of each voter's

individual voting transaction, without placing additional burdens on poll workers. However, vendors who produce election-administration technologies have often been reluctant to make this electronic information readily available to election administrators. Accordingly, to facilitate improvements in the collection, analysis, and reporting of election data, election officials should consider building into their vendor contracts a requirement that vendors make all transactional data logs available to the Local Election Authorities for easy download using a common data format, and provide software to analyze the data, as appropriate.

REPORTERS' NOTE

Until recently, comprehensive and reliable data about the conduct of American elections has been hard to come by, although for more than a decade the academic community has clamored for better data about election administration. See, e.g., THE MEASURE OF AMERICAN ELECTIONS xvii, 3 (Barry C. Burden & Charles Stewart III eds., 2014); R. MICHAEL ALVAREZ, LONNA RAE ATKESON, & THAD E. HALL, EVALUATING ELECTIONS: A HANDBOOK OF METHODS AND STANDARDS 1-9 (2012); Charles Stewart III, *Losing Votes*, supra Reporters' Note to § 103, at 591-592, 597; Charles Stewart, *Thoughts on the GAO Report on Wait Times*, Election Updates Blog, Oct. 3, 2014, at http://electionupdates.caltech.edu/2014/10/03/thoughts-gao-report-long-lines/. Government officials and interest groups also have increasingly recognized the value of good data about election administration. See, e.g., U.S. Election Assistance Commission, *4 Tips for Making Election Data Pay Off*, July 2014, at http://www.eac.gov/assets/1/Documents/DataPayOff[4]_Compliant.pdf; The Pew Center on the States, *Election Administration by the Numbers: An Analysis of Available Datasets and How to Use Them*, i-ii (2012) available at http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewElectionsByTheNumberspdf.pdf. The Presidential Commission on Election Administration also has called for better data collection and analysis, bemoaning the "data vacuum" in election administration and urging the deployment of data analytics in the understanding and improvement of election administration. See *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 67 (2014).

Undoubtedly, the "data vacuum" concerning matters of election administration has been improving in recent years. The United States Election Assistance Commission already collects important data about the conduct of federal elections, particularly in the form of its biennial *Election Administration and Voting Surveys*. See, e.g., U.S. Election Assistance Commission, *The 2014 EAC Election Administration and Voting Survey Comprehensive Report*, June 2015, available at http://www.eac.gov/assets/1/Page/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf; U.S. Election Assistance Commission, *2012 Election Administration and Voting Survey*, Sept. 2013, available at http://www.eac.gov/assets/1/Page/990-050%20EAC%20VoterSurvey_508Compliant.pdf. Additionally, in 2008 and 2012, the Survey of the Performance of American Elections ("SPAE"), a private academic study, collected

information from the perspective of the voters. Yet as a coauthor of the SPAE put it, "even the best source of nationally comparable data about election administration contains important gaps and inconsistencies." Stewart, *Losing Votes*, supra, at 597. For instance, much of the currently available data is reported inconsistently, or is aggregated at the county level (or at the municipal level in states that conduct elections at that level), rather than at the precinct level, or is not even reported at the level of the local election jurisdiction. See *Election Administration by the Numbers*, supra, at 11-15; THE MEASURE OF AMERICAN ELECTIONS, supra, at 14-15.

Data collection and analysis will inevitably continue to improve. Nevertheless, this Section aims to promote more rapid improvements in early and absentee voting by specifying key categories of data that local and state election authorities should maintain, and by providing that election authorities share this data publicly. The categories of data specified in § 111(a) reflect the key desires of many empirical researchers, and when systematically collected and analyzed should promote better understanding and refinement of the processes of early and absentee voting.

ABSENTEE-BALLOT-TRANSMISSION ENVELOPE*

PLEASE COMPLETE CAREFULLY

Voter Name _____

Voter Address _____

_____

Voter Email/Phone (preferred contact) _____

Date of Birth _____

Last four digits of SSN _____

OR

Driver's License Number _____
(or State ID Number)

Today's Date _____

I swear or affirm, under penalties of perjury and election falsification, that I am responsible for the votes on the ballot enclosed in this identification envelope, and that these votes represent my independent choices, not the results of coercion or improper influence.

I also swear or affirm, under penalties of perjury and election falsification, that all of the information given above is true and correct to the best of my knowledge.

Voter Signature **X** _____

TO BE VALID, YOUR VOTED BALLOT MUST BE RECEIVED BY ELECTION DAY OR POSTMARKED ***BEFORE*** *ELECTION DAY*

The purpose of this sample of the front of an absentee-ballot-transmission envelope is to offer a model of simplicity in absentee-ballot authentication materials. It is not intended to suggest that a state should require use of Driver's License numbers or the last four digits of a voter's social security number as a means of identifying the voter, or that a state should use a particular form of oath or affirmation.

PART III. PROCEDURES FOR THE RESOLUTION OF A DISPUTED PRESIDENTIAL ELECTION

Introductory Note: These Procedures for the Resolution of a Disputed Presidential Election (hereinafter "Procedures") address the unique challenges that exist when a presidential election remains unsettled more than 24 hours after the polls have closed and, despite the reporting of preliminary returns on Election Night and into the next day, one (or both) of the two leading candidates has issued a public statement proclaiming that the race is not yet over. This situation raises the possibility that the unsettled election will turn into a disputed election, as occurred in 2000, with the candidates and their campaigns using available procedures, including judicial litigation, in an effort to secure a victory. Although the phenomenon of candidates and their partisan supporters fighting over the counting of ballots is hardly unique to presidential elections, the imperative of resolving this kind of dispute in a presidential election within the limited time constraints imposed by the federal Constitution and related statutory provisions of federal law presents a scheduling difficulty inapplicable to any other elective office. These Procedures address that difficulty.

Constitutional background. The relevant parts of the U.S. Constitution are sparse. Article II says that "[e]ach State shall appoint" its presidential electors "in such Manner as the Legislature thereof may direct," but goes on to provide that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." The Twelfth Amendment, adopted after the crisis over the election of 1800, states:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, . . . and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the

> highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

The Twentieth Amendment, adopted during the Great Depression to shorten the gap between the November date on which voters cast their ballots and the inauguration of the new President, specifies that "[t]he terms of the President and the Vice President shall end at noon on the 20th day of January." Although the Twentieth Amendment goes on to provide for the contingency of an Acting President "[i]f a President shall not have been chosen before the time fixed for the beginning of his term," the Constitution clearly creates the expectation that any dispute over a presidential election be conclusively resolved before the new President is to take office at noon on January 20.[1] Moreover, in the modern era, the political urgency of resolving a disputed presidential election before Inauguration Day would make untenable the contemplation of any procedures thereafter to change the result of that particular presidential election.

Even apart from the outer limit of Inauguration Day, the weight of history suggests that compliance with the federal Constitution requires a state to resolve any dispute over the choice of its presidential electors, including any controversy over counting of ballots cast by citizens for a presidential candidate's slate of electors, before the nationally uniform day on which the presidential electors in all states must meet to cast their official Electoral College votes. This point turned out to be the decisive one in the resolution of the disputed 1876 presidential election. To facilitate the resolution of that dispute, Congress adopted a special Electoral Commission comprising five Senators, five Representatives, and five Justices. The composition of the Commission was evenly balanced between five Republicans and five Democrats from

[1] The text of the Twentieth Amendment contains a potentially confusing distinction between the possibility that by noon on January 20 "a President shall not have been *chosen*" and the possibility that "a President elect shall fail to have *qualified*" (emphasis added in both instances). Having made this distinction, the Amendment goes on to state that "the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have *qualified*, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have *qualified*." But the Amendment does not go on to state what happens if neither a President nor Vice President shall have been *chosen*. Presumably, the same power of Congress to provide by law "who shall then act as President" would apply in this circumstance.

Congress, two Justices perceived as Republican and two perceived as Democrats, with the fifth Justice to be an independent. When the Justice expected to fill the independent slot declined to serve, Justice Joseph Bradley was called upon to play this role. With the other members splitting seven-seven along partisan lines as anticipated, Justice Bradley's determination became dispositive. Justice Bradley's pivotal reasoning rested on the proposition that any proceedings that occur in a state after the constitutionally uniform date for the casting of votes by the presidential electors are null and void. "To allow a State legislature in any way to change the appointment of electors after they have been elected and given their votes, would," Justice Bradley explained, "subvert the design of the Constitution in requiring all the electoral votes to be given on the same day." Justice Bradley also made clear that his reasoning applied to judicial proceedings, as well as legislative enactments, within a state: "No tampering of the result can be admitted after the day fixed by Congress for casting the electoral votes."

Justice Bradley's opinion is not binding on Congress in future elections in any formal sense. Indeed, in 1960, Hawaii engaged in recount proceedings after the nationally uniform date for the meeting of presidential electors that year. Whereas the state's official votes as of that date were cast for Nixon, the subsequent recount proceedings purported to change the state's electoral votes to Kennedy. But Hawaii's electoral votes did not matter one way or the other to the outcome of the 1960 presidential election; Kennedy had a majority even if Hawaii was awarded to Nixon. When it came time for Congress to count the electoral votes from the states on January 6, 1961, Nixon himself as the sitting Vice President—and thus President of the Senate—announced that he was accepting the electoral votes from Hawaii in favor of Kennedy. In this respect, Nixon acted directly contrary to the precedent set by Justice Bradley; the Hawaii votes for Kennedy were entirely null and void under Bradley's dispositive reasoning. But Nixon also publicly announced that his acceptance of the Hawaii votes for Kennedy was "without the intent of establishing a precedent." Thus, what happened regarding Hawaii—inconsequential as it was to the outcome of the 1960 election—cannot be seen as undermining Justice Bradley's constitutional reasoning that determined the result of the 1876 election. At the present point in U.S. history, then, the best constitutional analysis is that (as Justice Bradley explained) a state is obligated to resolve all disputes regarding the appointment of its presidential electors before the nationally uniform date on which they must cast their official Electoral College votes.

Congressionally specified dates for presidential elections. Exercising the authority granted it in Article II, Congress has set as the date for the appointment of the presidential electors "the Tuesday next after the first Monday in November"[2]—what is commonly known as Election Day, since it is the same day on which voters cast their ballots in congressional elections, and because all states have chosen to appoint their presidential electors by a popular vote of the same electorate that casts congressional ballots. Also pursuant to its Article II authority, Congress has made "the first Monday after the second Wednesday in December" the nationally uniform day on which "[t]he electors of President and Vice President of each State shall meet and give their votes."[3] The arithmetic of the calendar means that there is always an interval of six weeks minus one day between the Tuesday in November on which citizens cast their popular votes for presidential candidates—technically, votes for presidential electors who have pledged to support their party's presidential candidate—and the Monday in December on which the duly appointed presidential electors, pursuant to that popular vote in November, cast their official Electoral College votes for president.

Six weeks (minus one day) is not a lot of time for resolving a dispute over the counting of ballots in a major statewide election. Recent history confirms this commonsense point. In 2004, Washington State had a disputed gubernatorial election. The state's voters cast their ballots for governor at the same time as they voted for president that year, on Tuesday, November 2. Six weeks (minus one day) later, on Monday, December 13, when the presidential electors in the state and all across the country met to cast their Electoral College votes, Washington's gubernatorial election remained unresolved. It was still in the midst of a statewide manual recount. That recount would not end until over two weeks later, on Thursday, December 30, and the candidate who prevailed in that manual recount (Christine Gregoire, the Democrat) was *not* the candidate who had prevailed in the previous machine recount (Dino Rossi, the Republican). Thus, if the dispute had involved a presidential rather than a gubernatorial election, and if all proceedings after December 13 had been constitutionally void pursuant to Justice Bradley's dispositive reasoning, then the prevailing candidate would have been the opposite of the one whom the manual recount showed the voters to have actually elected.

[2] 3 U.S.C. § 1.
[3] 3 U.S.C. § 7.

Moreover, the dispute over Washington's 2004 gubernatorial election did not end upon completion of the manual recount on December 30. Instead, a subsequent judicial contest of the election was litigated in a state trial court until the following June 6, 2005, when the trial judge confirmed the winner of the manual recount. The dispute could have lasted even longer, but at that point the losing candidate (Rossi) declined to pursue an appeal of the trial court's decision and conceded the race.

Washington's experience with its 2004 gubernatorial election was not aberrational. Minnesota encountered almost exactly the same situation in its 2008 U.S. Senate election. That year the state's voters cast ballots for Senator at the same time as they voted for President, on Tuesday, November 4. Six weeks (minus one day) later, on Monday, December 15, when presidential electors in the state and around the nation were casting their official Electoral College votes, Minnesota was still conducting its statewide manual recount of the Senate election. Moreover, under Minnesota law, the effect of undertaking the manual recount was to negate the previous certification of vote totals after completion of the canvass. Thus, the official count of the Senate election on Monday, December 15, was zero-zero.[4] If the election at issue had been presidential rather than senatorial, then according to Justice Bradley's analysis, Minnesota would have failed to appoint any presidential electors by the constitutionally mandated date and thus could cast no official Electoral College votes in the presidential election—and, most importantly, could not constitutionally remedy this deficiency by any subsequent proceedings, including completion of its manual recount, after December 15.

Minnesota's disputed 2008 senatorial election, in fact, continued long after December 15. The results of the manual recount were not certified until January 5, 2009. Then, as in Washington, there followed a judicial contest in state court, which was not complete until June. This contest, like that other one, confirmed the result of the manual recount, but in this case the contest encompassed an appeal to the state's supreme court as well as the litigation in the trial court. When the state supreme court affirmed the trial court's dismissal of the contest on June 30, the losing candidate conceded the election.

Thus, in a future disputed presidential election, if a state is to comply with Justice Bradley's edict that it must settle the appointment of its presidential electors by the date on

[4] Technically, the official count stood at zero-zero-zero, since there was a significant third-party candidate who had polled about 16 percent of the vote, as well as the two major-party candidates (Al Franken, the eventual winner and a Democrat, and Norm Coleman, the Republican incumbent).

which they meet to cast their Electoral College votes, the state will need to streamline the kind of recount and contest procedures that Washington and Minnesota employed in 2004 and 2008, respectively. Such streamlining obviously will be a daunting challenge. It will be hard enough for a state to make sure that it completes all of its recount procedures by the first Monday after the second Wednesday in December. But it will be especially difficult for a state to complete any judicial contest of the election that might be filed after certification of the recount's results.

Congressional "Safe Harbor" provision. If this time pressure upon states were not enough, Congress has given states a compelling reason to settle a disputed presidential election even sooner. In a statutory provision dating back to the Electoral Count Act of 1887 (adopted in the aftermath of the disputed 1876 election), and now codified at 3 U.S.C. § 5, Congress has pledged that it will accept as "conclusive"—and thus not overturn—the resolution of a disputed presidential election in a particular state if two conditions are satisfied: first, the state's "final determination" of the dispute must be "made at least six days before the time fixed for the meeting of the electors"; and second, "such determination" must "be made pursuant to" state "laws enacted prior to the day fixed for the appointment of the electors." The incentive that this Safe Harbor provision creates is considerable: the congressional pledge to honor the state's resolution of the dispute as "conclusive" means, at least in principle, that neither the Senate nor the House of Representatives will attempt (based on partisan or other considerations) to undo the state's own determination of its presidential election.[5] But this incentive imposes an even more excruciatingly tight timetable on states. The same arithmetic of the calendar means that the Safe Harbor Deadline—that is, the deadline necessary for a state to obtain the benefit of the congressional pledge—is always the Tuesday in December that is exactly five weeks after the Tuesday in November on which the citizens cast their popular votes in the presidential election.

Obviously, resolving a disputed presidential election in five weeks is even harder than doing so in six. Florida was unable to complete its proceedings within that timeframe in 2000, at least not in a way compliant with the requirements of equal protection as identified by the U.S.

[5] In other words, if a state in compliance with the Safe Harbor provision has determined that Candidate X is entitled to the state's electoral votes, and the state sends Congress a single certificate of this determination, then both houses of Congress—unless they violate the pledge in 3 U.S.C. § 5—will count the state's electoral votes in accordance with this certificate and, accordingly, will refrain from either awarding the state's electoral votes to a different candidate or declaring the state's presidential election null and void and thus refusing to award the state's electoral votes to any candidate.

Supreme Court in Bush v. Gore. Whether Florida could have completed constitutionally acceptable proceedings with the addition of six more days is ultimately unknowable, since the Court in Bush v. Gore also ruled that Florida intended to obtain the benefit of the Safe Harbor Deadline and consequently all of the state's proceedings must cease at the end of the five-week period. (Those six days are 15 percent of the 41 days between Election Day in November and the day of the Electoral College meeting in December.)

The extreme difficulty that any state would have in meeting *either* the purely statutory Safe Harbor Deadline *or* Justice Bradley's constitutionally mandated deadline, which under the current congressional schedule follows six days later, has caused some commentators to argue that Congress should adjust the schedule to give states more time to resolve any disputed presidential election that might arise in the future. One argument is that Congress should shorten or eliminate the six-day period between the Safe Harbor Deadline and the date for the meeting of the presidential electors. Another argument is that Congress should push back the meeting of the presidential electors until late December or early January. Some observers advocate both changes. Opponents of these arguments, conversely, contend that presidential transitions are difficult enough as it is, with the uncertainty of a disputed presidential election causing increasing harm to the country for each additional day that it remains unsettled. On this view, no change in federal law should encourage a disputed presidential election to last longer than five weeks; rather, every effort should be made to shorten that period to the extent possible.

This ALI project takes no position on these arguments and counterarguments concerning the current congressional calendar for presidential elections. Instead, this ALI project accepts those dates as given and endeavors to adopt a framework for the otherwise almost impossible task of resolving a disputed presidential election within the existing calendar. Moreover, this ALI project assumes that a state will wish to obtain the benefit of Safe Harbor status if the state is capable of doing so. While recognizing that this Safe Harbor status is optional, a state will perceive a compelling case for striving to take advantage of it. In the context of a disputed presidential election, there is the obvious temptation for partisanship to dictate the outcome. The Safe Harbor provision is, in effect, a promise that partisanship in Congress will not override whatever the state determines about its own electoral votes. Why would a state not find that promise intensely attractive and thus try to comply with the condition necessary to activate that congressional obligation? Thus, the presumption underlying this project is that a state would

prefer to complete its procedures for resolving a disputed presidential election within five weeks, if it is at all possible for the state to do so, rather than having an extra six days to finish the task but without the benefit of the congressional pledge to be bound to the outcome.

Consequently, the Procedures for the Resolution of a Disputed Presidential Election set forth in this Part of the project endeavor to enable a state to complete all relevant proceedings within the five-week period specified in the congressional Safe Harbor provision. Developing these procedures has required a kind of engineering endeavor: the task has been to determine how to make several interrelated components of an overall dispute-resolution process work together as efficiently and expeditiously as possible, so that collectively they have a reasonable chance of completion without missing the five-week Safe Harbor Deadline. Immediately following this Introductory Note (and thus before § 301) are three charts designed to aid in understanding the engineering choices reflected in these Procedures and the overall design that results from these choices. The first is a detailed calendar of the key deadlines and other events associated with these Procedures, while the other two are more general and less detailed (and thus easier to comprehend on first glance). Anyone wishing to visualize the structural architecture of these Procedures would be well served by consulting these charts at the same time as reading its black-letter text and corresponding Comments and Reporters' Notes.

The engineering challenge of enabling a state to meet the Safe Harbor Deadline. These Procedures have three main components. The first is a *recount*, defined specifically (and more narrowly than in some other uses of the term) to mean solely the reexamination of ballots initially counted on or before Election Day and reported as part of the Election Night preliminary returns. As such, a recount does *not* include determinations concerning the eligibility of ballots not counted as part of the Election Night preliminary returns. These uncounted—but still potentially eligible—ballots include provisional ballots and some absentee ballots, both (a) those arriving too late for inclusion in the Election Night returns but still timely under relevant state law and (b) those previously deemed uncountable but whose eligibility remains subject to review.

The determinations concerning the eligibility of these previously uncounted ballots constitute a large portion of the second main component of these Procedures, the *canvass*. Also encompassed within the canvass are the review and correction of any tabulation errors or discrepancies in the preliminary returns that are not corrected as part of the recount. For

example, in a process often referred to as "reconciliation," the number of ballots cast at a precinct is compared with the number of voters who signed the precinct's poll books (and in many jurisdictions received tickets authorizing them to cast a ballot). When these two numbers are not identical, state law often authorizes local election officials to make a determination as to how the discrepancy should be handled. Sometimes, the discrepancy is resolved in favor of retaining the number of ballots cast, based on a judgment that the error must have been in the failure to record in the poll books the presumably valid voters who cast the extra ballots. In other instances, the discrepancy is resolved by randomly withdrawing from the precinct's pool of countable ballots—the figurative (or literal) ballot box—a number equal to the excess of ballots over voters. Whatever state law provides for this situation, the determinations that local election officials make in this regard are part of the canvass. The sum of all ballot-eligibility, reconciliation, tabulation-correction, and other determinations made during the canvass results in a *certification* of the canvass and its vote totals. The initial certification is made by each Local Election Authority that conducts the canvass, and all of these local certifications are then accumulated in a single statewide certification by the state's Chief Elections Officer.

The third main component of these Procedures is the possibility of a judicial *contest* to the results of the certified canvass. State law provides the grounds available for contesting the certified results in an election, and these grounds can vary somewhat from state to state. But generally these grounds include claims that votes counted on Election Day and included in both the preliminary returns and the certified canvass were fraudulent or ineligible in some way; perhaps, for example, they were ballots cast by ineligible felons (as was the case in Washington's 2004 gubernatorial election), or perhaps they were absentee ballots procured through illegal means (as in Miami's 1997 mayoral election). A judicial contest is also the procedure in which to raise a claim, if such a claim is available in the state at all, that sufficient disenfranchisement of eligible voters or other serious mishap in the conduct of the election requires voiding the certified results in their entirety (or perhaps, alternatively, statistically adjusting those results in some way).

To fit all three of these proceedings—recount, canvass, and contest—within the five-week Safe Harbor period, some significant "engineering" innovations must be pursued. One of the most significant of these is the triggering of an expedited recount, as provided in § 303, upon a finding of certain specified factual conditions to exist 24 hours after the polls have

closed in the November presidential balloting. This expedited recount differs from the typical recount, which customarily follows the certification of the canvass. This custom is based on the understandable premise that there is little reason to undertake the ordeal of a recount unless and until certification of the canvass shows the result of the election to be close enough to justify the undertaking. But in the context of the limited five-week timeframe for a state to achieve Safe Harbor status in a presidential election, waiting until the conclusion of the canvass before beginning the recount is an unaffordable luxury. In fact, the first week after the polls have closed is a period of time in which local election officials can recount ballots initially counted on or before Election Night and, furthermore, it is a period of time in which local officials are often waiting for other events to take place before they can complete the certification of the canvass. For example, local election officials must give provisional voters a period of time after Election Day in which to provide supplementary information that may establish the eligibility of their provisional ballot to be counted. Likewise, absentee voters are often given a window of opportunity to correct clerical errors concerning information that they supply on their absentee-ballot envelopes. While local election officials are waiting for the receipt of such supplementary information from provisional or absentee voters in the first few days after Election Day, they can undertake the task of recounting ballots that already have been counted once—a task that does not require any additional information. In a disputed presidential election, when every day of the short five-week Safe Harbor period is precious, these first few days after Election Day can be used productively by beginning the recount then, rather than waiting for the customary certification of the canvass. (The advantage of reordering these two procedures in this way was brought to the attention of this American Law Institute project by experienced local election officials.)

Another engineering decision was to prioritize ahead of the contest, both temporally and in legal status, the distinct procedure for reviewing determinations made during the canvass. One potential source of delay, which easily could jeopardize a state's capacity to comply with the Safe Harbor Deadline, is the duplication of litigation that can occur when issues are raised, first, in a lawsuit that is denominated a judicial review of the administrative decisions that local election officials make during the canvass and then, second, in a subsequent judicial contest of the certified results of the canvass. Disputed elections often entail both rounds of litigation, especially because one side will perceive an advantage of attempting to prevail during a judicial

review of the canvass, so as to avoid the heavy burden of proof usually associated with attempting to overturn the certified result of the canvass in a judicial contest. Indeed, often a candidate will attempt to have a court undertake a judicial review of the canvass even before its results are certified, thereby delaying the certification until these judicial-review proceedings are complete. These Procedures endeavor to avoid this delay, as well as the inefficient duplication of litigating the same issues twice, by funneling into the judicial review of the canvass those issues suitable for such review. Once so funneled, these issues are precluded from relitigation in a subsequent contest. Moreover, these Procedures incentivize their funneling in this way, by eliminating any burden of proof associated with certification of the canvass *as long as the issues are raised in the special procedure for review of the canvass.* There is no need to delay certification, since appropriate issues can be raised equally by either of the two competing candidates, regardless of which one is ahead in the count at the time of certification.

The Procedures also make a single Presidential Election Court the sole forum for adjudicating issues either in the special procedure for judicial review of the canvass or in the subsequent contest. Thus, there is no incentive to engage in forum-shopping in the hope of finding a more favorable tribunal to litigate particular claims. In this way, once the canvass is complete, the overall process can move immediately to judicial review of the canvass in a streamlined procedure suitable for such issues, leaving to a contest only those issues that did not arise in the canvass itself and thus potentially need some additional factual development before they are ready for judicial adjudication.

Even when the sequencing of these procedures—the recount, the canvass, and the contest—are engineered in this way, these procedures are inevitably truncated compared to how they would occur in a nonpresidential election not subject to the Safe Harbor or other Electoral College deadlines. Truncating these procedures obviously entails a cost in terms of the ability of litigants to pursue factual matters to the extent that they might if they had more time. But there is no way to avoid such truncating and still finish all the procedures within the five-week Safe Harbor period. The only alternative would be to abandon the effort to achieve Safe Harbor status, and even so significant truncating of the recount, canvass, and contest procedures would still be necessary to finish by the date of the Electoral College meeting six days later. Only by extending beyond this constitutionally prescribed date, and running up towards Inauguration Day on January 20, could a state avoid significant truncation of these procedures. But, again, the premise

of this ALI project is that a state would not wish to engage in such constitutionally treacherous conduct, and thus the engineering effort has been to engage in the minimal amount of truncating necessary to enable a state to obtain Safe Harbor status (since a state would want to meet the Electoral College deadline of six days later anyway, and would not wish to lose the benefit of Safe Harbor status just to have an extra six days of vote-counting litigation).

The adoption of these Procedures into state law. These Procedures, as set forth herein as Part III of this project, have been drafted to be consistent with the Principles set forth in Parts I and II. [Indeed, these Procedures reflect—and endeavor to achieve in the specific context of a presidential election—the value of "finality," which will be articulated more generally in the Principles contained in Part II.] But these Procedures also have been drafted so that they may be adopted in law independently, without adoption of either Part I or II. A state thus may choose to adopt these Procedures in order to address the calendaring challenge of completing a presidential recount, along with ancillary litigation, by the Safe Harbor Deadline, and the state's decision to do so may be entirely separate from any consideration the state might wish to give to adoption of the Principles set forth in Part I or II.

For any state that wishes to adopt these Procedures as a means to address the challenge of meeting the Safe Harbor Deadline in a disputed presidential election, it is highly preferable that the method by which the state does so is to have its legislature enact a statute containing these Procedures. The reason for this preference is that the state's legislature is the institution explicitly empowered in Article Two of the federal Constitution to adopt the procedures for the appointment of a state's presidential electors. Moreover, a statute enacted by the state's legislature is the most straightforward method by which a state may enact into law before Election Day a set of procedures capable of earning Safe Harbor status under 3 U.S.C. § 5. Even if a state completes all of its procedures concerning a disputed presidential election by the five-week deadline in 3 U.S.C. § 5, the state risks losing the benefit of the congressional Safe Harbor pledge if the state's procedures were not enacted into state law prior to Election Day. (As addressed in the Comment to § 302, such a post-voting change in the state's ballot-counting law also risks violating the Due Process Clause of the Fourteenth Amendment.) The best and most obvious way for a state to avoid this risk is for its legislature to enact a statute, before Election Day, that puts these Procedures into legal effect for any future presidential election.

If, however, a state's legislature has failed to adopt these Procedures into legislation, it may still be possible for a state to achieve Safe Harbor status if the state's supreme court has been authorized by state law to promulgate procedural rules for the adjudication of disputes that involve the state's judiciary. In this situation, the state's supreme court prior to Election Day in an exercise of its rulemaking authority could promulgate these Procedures, thereby placing them into legal effect in the state before Election Day. If the state's supreme court did so, there would be a strong argument that the status of the Procedures in state law in advance of Election Day would give these Procedures the necessary "safe harbor" status under 3 U.S.C. § 5, such that the congressional pledge would be operative as long as the state complied with these Procedures within the five-week deadline.

Accordingly, these Procedures have been drafted in a form amenable to adoption either as statutory legislation or as a set of procedural rules promulgated by a state supreme court pursuant to its rulemaking authority. But, again, the far preferable method of adoption is a statute enacted by the state's legislature.

Finally, it is unclear whether Virginia permits an appeal to the state's supreme court in a contest under § 805. Virginia expressly precludes any appeal in a recount under § 801.1. See § 802 ("The recount proceeding shall be final and not subject to appeal.") But the relevant statutes appear to contain no comparable provision, one way or the other, regarding the possibility of an appeal in a judicial contest of a presidential election. Given the explicit obligation of the three-judge contest court to complete its adjudication of the contest by the end of the Safe Harbor Deadline, but not sooner, there would be no time for an appeal if the contest court used up all the time available to it under § 805. Yet in a disputed presidential election, if a candidate thought an issue of substance might interest the members of the Virginia Supreme Court, the candidate is likely to knock on that court's door by way of a writ of mandamus or otherwise, unless explicitly prohibited from doing so. Cf. Kirk v. Carter, 202 Va. 335, 117 S.E.2d 135 (1960) (mandamus granted by Virginia Supreme Court of Appeals to require convening of three-judge contest court). Thus, if such a mandamus petition were filed in the Virginia Supreme Court, the state's statutes leave uncertain whether the state could complete its available judicial proceedings in a disputed presidential election by the end of the Safe Harbor Deadline, as evidently desired.

March 13, 2016

Procedures for the Resolution of a Disputed Presidential Election: Calendar of Deadlines

Edward B. Foley, Reporter—ALI Election Law Project

Week	Monday	Tuesday	Wednesday	Thursday	Friday	Sa	Su
0		**Election Day** citizens cast ballots; preliminary count is conducted & reported	**Chief Elections Officer** triggers this calendar if there is close election				
1			**Local Election Authority** complete local recount				
2		**Pres. Recount Panel** complete recount **Local Election Authority** complete local canvass **Secretary of State** certify statewide results	deadline for petitions to review local canvass deadline to contest certified canvass results recount appeal deadline	[Thanksgiving Day in some years]	deadline for motion to dismiss contest deadline for canvass petition briefs/motions **State Supreme Court** recount appeal argument		
3	**State Supreme Court** recount appeal resolved **Pres. Recount Panel** contest motion hearing	**Pres. Recount Panel** canvass review finished	canvass appeal deadline **Pres. Recount Panel** trial of contest begins	[Thanksgiving Day in some years]	**State Supreme Court** canvass appeal argument		
4	**State Supreme Court** canvass appeal resolved **Local Election Authority** recount remand done	**Pres. Recount Panel** contest resolved	contest appeal deadline **Local Election Authority** canvass remand done	**Pres. Recount Panel** recount remand done	**State Supreme Court** contest appeal argument **Pres. Recount Panel** canvass remand done		
5	**State Supreme Court** contest appeal resolved recount remand done canvass remand done	**Safe-Harbor Deadline** **Chief Elections Officer** Final certification based on all judicial orders					
6	**Electors Vote for President**						

Procedures for a Presidential Dispute: Schedule for Official Institutions

WEEK	LOCAL ELECTION AGENCY	STATE TRIAL-LEVEL COURT	STATE SUPREME COURT
1	Recount complete		
2	Canvass complete	Recount review complete	
3	Contest discovery	Canvass review complete Contest motions hearing	Recount appeal complete
4	Recount remand complete	Contest trial, if necessary	Canvass appeal complete
5	Canvass remand complete	Recount remand review Canvass remand review	Recount remand appeal Canvass remand appeal Contest appeal complete

Recount: reexamination of initially counted ballots
Canvass: determination of eligibility of ballots not initially counted (absentee, provisional)
Contest: adjudication of claims that count is tainted by ineligible ballots or other error

Procedures for a Presidential Dispute: Schedule for Campaign Attorneys

WEEK	RECOUNT	CANVASS	CONTEST
1	Observe local recount	Observe local canvass	Investigation of facts
2	Present challenged ballots to state trial-level court	Deadline for petition to review local canvass	Deadline to file contest; continue fact investigation
3	Argue recount appeal in state supreme court	Litigate review of canvass in state trial-level court	Litigate motion to dismiss; conduct discovery; amend contest, as needed
4	Litigate recount remand (if necessary)	Argue canvass appeal in state supreme court	Contest trial (if necessary)
5	Recount remand review & appeal (if necessary) in state trial-level & supreme courts	Canvass remand review & appeal (if necessary) in state trial-level & supreme courts	Argue contest appeal & any necessary remand

Recount: reexamination of initially counted ballots

Canvass: determination of eligibility of ballots not initially counted (absentee, provisional)

Contest: adjudication of claims that count is tainted by ineligible ballots or other error

§ 301. Definitions

(a) "Canvass" means the administrative procedure that encompasses verification of the vote tabulations contained in the preliminary Election Night returns as well as determination of the eligibility of previously uncounted ballots, including provisional ballots and absentee ballots not included in the preliminary returns.

(b) "Certification" means the official declaration of the results from a counting of ballots and occurring, at separate stages, both after the canvass and after completion of all proceedings under these Procedures.

(c) "Chief Elections Officer" means the state's highest authority, often the Secretary of State and in some states a multimember body, responsible for supervising the administration of elections in the state.

(d) "Chief Justice" means the presiding judge of the State Supreme Court.

(e) "Contest" means a judicial procedure that occurs after certification of an election's results, in which a candidate other than the certified recipient of the most votes challenges the certified results and seeks a judicial decree either to declare the contestant the duly elected winner or to void the election.

(f) "Day" means any and all calendar days.

(g) "Election Day" means the traditional day on which citizens go to the polls in their neighborhood polling locations to cast ballots in a presidential election, which Congress has specified to be the first Tuesday after the first Monday in November, as provided in 3 U.S.C. § 1.

(h) "Electoral College" means the totality of all presidential electors in the United States, who pursuant to the U.S. Constitution meet in their respective states on the same congressionally appointed day to cast their votes for the presidency.

(i) "Election Night" means the nighttime hours of Election Day, after the polls have closed in the state, as well as the predawn hours of the following day insofar as the state (and the nation) still awaits preliminary returns of votes counted on or before Election Day and expected to be reported before the night is over as part of the initial count of ballots from all precincts in the state.

(j) "E-mail" means electronic transmission of written documents, using either current Internet-based technology or any future technology that provides a similar electronic capacity to transmit written documents.

(k) "Local Election Authority" means the agency of government, whether a single officer or a multimember body, with authority to canvass local returns, including determining the eligibility of locally cast provisional ballots.

(l) "Preliminary returns" means the report of vote totals of ballots cast and counted on Election Day at each polling location in the state, together with the report of any early and absentee votes counted on (or, if permitted, before) Election Day, all of which are aggregated by the Chief Elections Officer into a single set of statewide preliminary returns.

(m) "Presidential election" means a quadrennial general election at which the eligible electorate of the state chooses a slate of presidential electors, who in turn cast their Electoral College votes for the presidency.

(n) "Recount" means a reexamination and retallying of ballots initially counted and reported as part of preliminary returns.

(o) "Safe Harbor Deadline" means the date, specified in 3 U.S.C. § 5, by which a state must resolve any vote-counting disputes in a presidential election in order for the state to receive the benefit of the congressional pledge to accept whatever resolution the state achieves.

(p) "State" means all 50 states of the United States as well as the District of Columbia (but, specifically for the purposes of these Principles, not U.S. territories, which lack Electoral College votes).

(q) "State Supreme Court" means the state's highest court, even if denominated other than "supreme court" (as is New York's Court of Appeals).

Comment:

a. Certification. As discussed more fully in the Comment to § 316, these Procedures entail two distinct certifications, at separate stages of the overall process. The first certification occurs at the end of the canvass. The second occurs upon completion of all possible proceedings under these Procedures, including judicial review of the canvass and a contest of the results as certified at the end of the canvass. This second certification is the final certification of the

election's outcome and serves as the basis for declaring which slate of presidential electors is entitled to cast the state's Electoral College votes.

b. Chief Elections Officer. In some states, a multimember body rather than a single individual may exercise the statewide responsibility of supervising the administration of elections. In these cases, the term "Chief Elections Officer" as used in these Procedures is intended to encompass these multimember bodies.

c. Day. In counting the number of days for purposes of any deadline, these Procedures include all calendar days and not solely business days. Whenever these Procedures set a deadline as being "within [x number of] days after" an event, this usage means "no later than the x[th] day after" the event. Thus, "within 8 days after" means "no later than the 8th day after." Consequently, in counting the number of days after an event, one day after (that is, the first day after) is the day immediately following the event. The "Procedures for the Resolution of a Disputed Presidential Election: Calendar of Deadlines" on page 83 (immediately after the Introductory Note and before § 301) is provided to illustrate, in calendar format, exactly on which day in relationship to Election Day and the Safe Harbor Deadline each deadline established by these Procedures falls (assuming that compliance with each deadline consumes the maximum available time); in so doing, the calendar format also illustrates the relationship of these various deadlines to each other. In addition to this calendar, two more schematic (and less detailed) charts, on pages 85 and 87, illustrate what happens during each week of this five-week period, from the perspective of both the relevant government bodies and the attorneys that must appear before these bodies on behalf of the competing candidates.

d. Election Day. As elaborated in Part I of this project, the traditional single day on which most voters cast their ballots in an election has recently evolved into a menu of varying practices among the states enabling voters to cast in-person early ballots at some specified locations (usually different from their traditional neighborhood polling locations, where voting occurs on Election Day), or to cast an absentee ballot in advance of Election Day without need to provide any particular excuse or justification for doing so, or some combination of early and open absentee voting. Election Day, however, remains the last day on which voters are permitted to cast a ballot (although in some states absentee ballots cast on Election Day are permitted to arrive by mail at the offices of their relevant Local Election Authority some number of days afterwards and still remain eligible to be counted). For presidential (and congressional) elections,

Congress has fixed the date of Election Day, and accordingly these Procedures define Election Day to be the same as the date designated by Congress.

e. Local Election Authority. The definition here is consistent with, but somewhat narrower than, the use of the same term in Part I. Here it is necessary to define the term to refer specifically to the government body's power regarding the counting of ballots, whereas in Part I it was necessary to define the relevant government body as having administrative powers over the casting as well as counting of ballots. Some states use separate local government bodies to administer the casting and counting of ballots. For example, a state may employ a County Canvassing Board to canvass the election returns and to conduct any recount that might be necessary, while the state simultaneously delegates authority to administer the casting of ballots to a County Clerk (or some other local office). The use of the term here is intended to apply solely to the government body that engages in the functions covered by these Procedures, leaving the state free to employ a different agency of local government for those aspects of election administration not covered by these Procedures.

f. Presidential elections. This definition intentionally excludes presidential primaries, which are not subject to the same Safe Harbor Deadline, and which raise their own distinct issues concerning the timing and methods for resolving ballot-counting disputes. Ultimately, a major party's presidential candidate is chosen at a national nominating convention, and the relationship of that convention to antecedent primaries and caucuses is a complicated one, beyond the scope of these specific Procedures.

g. Recount, canvass, and contest. These three types of proceedings, already discussed preliminarily in the Introductory Note above, are defined specifically for the purpose of the engineering endeavor necessary for a state to meet the Safe Harbor Deadline. Accordingly, the specific definitions of these three terms, as used in these Procedures, may not conform exactly to their uses in other contexts. An understanding of how these three terms are used in these Procedures is best achieved by examining the details of the following Sections insofar as they employ these terms and elaborate on what is to occur in each of the three proceedings.

REPORTERS' NOTE

Presidential elections. The Framers of the federal Constitution intended for the mechanics of presidential elections to function very differently from the way that they quickly came to function. Article II required a state's presidential electors to meet in person to cast their

electoral votes, and this meeting requirement was intended to facilitate the goal—and expectation—of the Framers that the electors would deliberate, and then exercise independent judgment, about who should become president. This meeting requirement was carried forward in the Twelfth Amendment, even after partisanship prevented the original design from working as intended in the election of 1800. For a discussion of the constitutional crisis over the 1800 election, see Edward B. Foley, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 70-71 (2016), and sources cited therein.

Notwithstanding the original design, a deeply rooted expectation has arisen that a state's presidential electors are partisan agents that are supposed to vote for their party's presidential candidate. Indeed, the political parties—sometimes even backed by the force of state law—have required their presidential electors to pledge, under oath, to cast their official Electoral College ballots on behalf of their party's presidential nominee. See Ray v. Blair, 343 U.S. 214 (1952) (permitting state law to impose this pledge as part of the state's law for presidential primaries). A "faithless elector" is one who breaks this pledge and, as this pejorative term implies, it is now considered dishonorable for a presidential elector to exercise the kind of independent judgment that the Framers originally intended. Although there have been isolated instances of faithless electors from time to time, no presidential election has turned on the official Electoral College vote of a faithless elector, and the Supreme Court has never had occasion to rule on whether a faithless elector could be required to recast an official Electoral College vote so that it conformed to an antecedent partisan pledge. (Ray v. Blair did not involve such a scenario, but instead concerned only whether a party's candidate to be a presidential elector could be required to make the partisan pledge in the first instance.)

Part III of this project, and the Procedures it sets forth, do not apply to the potential issue of a faithless elector. Part III does not purport to govern the casting of official Electoral College votes by the state's appointed presidential electors. Nor does it purport to govern the processes that Congress itself uses, pursuant to the Twelfth Amendment and the Electoral Count Act of 1887, to conduct its review and counting of the Electoral College votes as received by the states. Rather, the sole focus of Part III and its Procedures is the method by which a state conclusively determines which party's slate of presidential electors is the authoritatively chosen one, when the method of appointment is a popular vote of the state's eligible citizenry and there is a dispute over the outcome of that popular vote.

Bush v. Gore confirmed that a state need not appoint its presidential electors by means of a popular vote. In the early years of the Republic, some state legislatures chose to retain this authority for themselves, and under the Constitution a state could revert to that method of appointment. For well over a century, however, the universal practice among states has been to employ a popular vote of the eligible citizenry as the method of appointing a state's presidential electors. Part III and its Procedures are predicated on the assumption that states will continue to use this method of appointment. Part III and its Procedures would have no applicability in a state that decided, in advance of the next presidential election, to change its method of appointment so that the state's legislature chose the state's presidential electors directly.

Part III and its Procedures, however, do apply to a state that permits its legislature to appoint the state's presidential electors as a fallback remedy if and when the popular vote in November fails to identify a winning slate of presidential electors.[6] Indeed, Part III and its Procedures are designed to avoid reliance on that kind of fallback remedy to the greatest degree possible by identifying as accurately and expeditiously as feasible which slate of presidential electors is the true winner of the popular vote in November—and to do so in the circumstance in which there is doubt and a potential dispute about this outcome. But simultaneously Part III and its Procedures are designed to determine, also with as much clarity and legitimacy as is feasible in the circumstances, when reliance on that kind of fallback remedy is unavoidable—and thus when the only way for the particular state to participate in the official Electoral College vote for president is for the state legislature to intervene and to appoint the state's presidential electors directly.

For example, suppose on the day of the Safe Harbor Deadline, the State Supreme Court declares that there is a systemic problem that affected the November popular vote, such that it is impossible to identify a winner of the presidential election in the state. At that point, the state faces the choice of *either* not participating in the official Electoral College vote for the presidency six days later *or* having the state's legislature appoint the state's presidential electors directly as a fallback.[7] Part III and its Procedures do not dictate which of these two options a state should choose. But if implemented as designed, these Procedures will enable a state to exercise the latter option if the circumstance arises in which the November popular vote has been rendered inoperable.

It should be noted, moreover, that Part III and its Procedures are usable in a state that chooses not to employ a statewide winner-takes-all popular vote as its method of appointing its presidential electors, but instead opts for some sort of districting or proportional basis for allocating its Electoral College votes. Currently, all states but two (Maine and Nebraska) use a statewide winner-take-all scheme for appointing presidential electors, and these Procedures have been designed with the expectation that this scheme will continue to predominate. Nonetheless, with minor modifications to the mechanism for triggering an Expedited Presidential Recount set forth in § 303, these Procedures would be fully functional in a state, like Maine or Nebraska, that allocates at least some of its Electoral College vote on the basis of the state's congressional districts. If there were a dispute about which presidential candidate won the popular vote in that

[6] For states providing this kind of fallback, see page 203, footnote 24.

[7] In this circumstance, it would be logistically infeasible for the state to hold a new popular election, which itself could be disputed, even if there were adequate time to cast, count, canvass, and potentially recount these new ballots in the six days remaining before the meeting of the presidential electors. (Conceivably, rather than appointing the state's presidential electors itself, the legislature could authorize some other body to quickly exercise this appointment authority. The legislature even could lodge this appointment authority in the Presidential Election Court, although the exercise of this appointment authority would not be a traditionally judicial or adjudicatory function. These Procedures have been drafted to give a state maximum flexibility in its choice of a particular fallback mechanism in the event it is necessary to appoint the state's presidential electors because the November election failed. Consistent with the overall approach of these Procedures, the state legislature should make this choice concerning the fallback mechanism in advance of the November election.)

congressional district, and if determining the result of the presidential election in that district was necessary to identify which presidential candidate won a majority of (pledged) Electoral College votes, then the triggering mechanism of § 303 could apply just as it would if the dispute concerned presidential electors appointed based on the result of a statewide winner-take-all popular vote. The Procedures, with modest revision, could also work if some state in the future chose to allocate its Electoral College votes, not on the basis of congressional districts, but instead on a proportional share of the statewide popular vote (rather than winner-take-all).

These Procedures also are potentially employable if enough states adopt the pending National Popular Vote plan for the plan to take effect. Under that plan, a participating state agrees to award all of its Electoral College votes *not* to the winner of its own statewide popular vote, but instead to the winner of the overall national popular vote. That plan purports to take effect when and if states whose combined allotment of Electoral College votes equals or exceeds the margin of 270 currently necessary for an Electoral College majority under the Twelfth Amendment.[8] Were that to occur, then any state's popular vote could be relevant to determining whether a presidential candidate won a majority of Electoral College votes. If there were doubt about the total popular vote for the competing candidates in a particular state sufficient to cast doubt on which candidate would win an Electoral College majority, then under § 303 these Procedures could be triggered in any state contributing to that doubt. To be sure, potentially that could be a large number of states, and these states need not themselves be the ones that are signatories to the National Popular Vote pact. Still, any state that adopted these Procedures could employ them to resolve uncertainty about the outcome of a presidential election in which the National Popular Vote plan was in effect. (This observation is not intended to express an opinion on the merits of the National Popular Vote plan as a matter of electoral policy; rather, it is simply to note the extent of Part III's potential applicability.)

One final note on terminology relevant to presidential elections: the term "Electoral College" does not appear in the Constitution. But, by longstanding common usage, the term has come to stand for the mechanism that the Constitution, including the Twelfth Amendment, uses for presidential elections. This Part reflects that common usage and, where appropriate, employs it accordingly. Often, the term "Electoral College" is used to refer collectively to all 538 electoral votes, and this Part does the same. But, of course, all 538 presidential electors never meet altogether in one place at the same time. Instead, as discussed above, the presidential electors of each state meet separately in their own respective states—although all these meetings occur on the same day, as required by Article Two of the Constitution. Thus, the term "Electoral College meeting" refers to these state-specific events, although in plural form it can refer collectively to all 51 of these distinct meetings that occur on the same date. For purposes of Part III and its Procedures, it is intended that the particular context in which the term "Electoral College" is used provide additional clarity, as necessary, on its intended meaning.

[8] Currently, 10 states and the District of Columbia, amounting to 165 Electoral College votes, have enacted legislation to adopt the National Popular Vote plan: http://www.nationalpopularvote.com.

§ 302. Applicability and Objective

(a) The provisions of these Procedures shall take effect as the law of the state upon either their explicit enactment by the state legislature or their explicit promulgation by the State Supreme Court pursuant to its rulemaking authority, whichever method of adoption has been employed, and are fully applicable to the next presidential election thereafter.

(b) In any particular presidential election, the specific expedited elements of these Procedures become operational immediately upon the declaration of the Chief Elections Officer, as set forth in § 303.

(c) The overriding purpose of these Procedures is to enable the state to complete a recount, canvass, and any contest of a presidential election, including all related administrative and judicial proceedings concerning the counting of ballots in a presidential election, in compliance with the Safe Harbor provision of 3 U.S.C. § 5.

(d) Whenever an expedited recount has been declared under § 303, it shall be the highest priority of every state official involved with the implementation of these Procedures to comply with the Safe Harbor Deadline of 3 U.S.C. § 5 and with every subsidiary deadline set forth in these Procedures, all of which are aimed at assuring Safe Harbor compliance.

(e) Whenever an expedited recount has been declared under § 303, completion of these Procedures takes precedence over any other recount, canvass, contest, or other proceeding that may be necessary for any other election on the same ballot, and any ballot-eligibility or other determinations made as part of these Procedures that have applicability to another election shall be binding on that other election unless state law elsewhere expressly provides otherwise.

(f) The adoption of these Procedures into state law in advance of the first presidential election to which they shall be applicable, as required in subsection (a), has the objective of maintaining consistency with the principle that the rules for counting ballots remain unchanged after the ballots to be counted have been cast.

Comment:

a. Adoption of these Procedures as the law of the state. As stated in the Introductory Note, it is highly preferable that these Procedures become adopted as the law of the state by means of legislative enactment. Nonetheless, it is also possible that they may become adopted as state law through promulgation by the state's supreme court as an exercise of the court's rulemaking authority, where such authority exists. Regardless of the particular method of their adoption, it is imperative that these Procedures take effect as the law of the state prior to the casting of ballots by voters in the presidential election to which these Procedures shall apply. (If a state ordinarily delays the effective date of an enacted statute for some period of days, that delay is not problematic for the purposes of these Procedures as long as the delay does not extend until Election Day of the next presidential election. Where such a situation would occur, and if the state has the capacity to enact legislation on an expedited or emergency basis, so that the legislation takes effect immediately upon enactment, it is hereby recommended that a state employ this special method of legislation so that these Procedures take effect before Election Day.) Having these Procedures in effect as part of state law prior to Election Day is necessary to assure that utilization of the Procedures will enable the state to take advantage of the Safe Harbor provision of 3 U.S.C. § 5, which requires that a state's "laws" for resolving "any controversy or contest concerning the appointment of all or any of the [state's] electors" be "enacted prior to the day fixed for the appointment of the electors" in order for them to be conclusively binding upon Congress in its counting of Electoral College votes under the Twelfth Amendment.

This Section draws a distinction between, *first*, the Procedures collectively becoming effective prior to Election Day, and thus being consistent with the requirements for Safe Harbor status, and, *second*, particular expedited elements of these Procedures becoming operational only upon a declaration of the state's Chief Elections Officer. There is no reason for a state to undertake the extraordinary and hugely arduous effort of these expedited proceedings unless the state—and the nation as a whole—confronts the situation of an unsettled presidential election 24 hours after Election Day. Otherwise, as almost always is the case, a state can proceed with the canvass in a presidential election according to its normal timetable. If there happens to be the need for a recount in a nonpresidential race on the ballot in a presidential-election year, the state can hold that recount after completion of the canvass (if that is the state's customary practice). The state can also permit a subsequent judicial contest of the nonpresidential race to extend

indefinitely for months—as was the case in Washington for its 2004 gubernatorial election and in Minnesota for its 2008 U.S. Senate election. Part II of this project, among its concerns, addresses the issue of extended litigation of vote totals in nonpresidential elections. But whatever policy choice a state wishes to make concerning the amount of time available for litigating the result of a nonpresidential election—including the specific policy choice of whether or not to adopt Part II of this project—the conventional practices (as reflected by Washington in 2004 and Minnesota in 2008) are simply not feasible in a presidential election.

Thus, there needs to be a mechanism for distinguishing between the ordinary elections, for which the conventional practices can continue to occur (if a state so chooses, even after considering alternatives as discussed in Part II), and the extraordinary situation of an unsettled presidential election, which requires special expedited proceedings.[9] Moreover, by definition, it is impossible to know whether the winner of a presidential election remains undetermined after Election Night (and thus whether there is need for the expedited elements of these Procedures) until after ballots have been cast on Election Day. Accordingly, the triggering of these expedited proceedings (upon declaration of the state's Chief Elections Officer) cannot possibly occur prior to Election Day. Even so, it need not be the case that the triggering of these expedited proceedings inherently deprives a state of any possibility of obtaining Safe Harbor status. On the contrary, as long as the triggering of these expedited proceedings occurs pursuant to state law specified in advance of Election Day—so that the law makes clear when such triggering shall occur—then the triggering itself satisfies the Safe Harbor requirement that it occur pursuant to state law adopted and in effect before Election Day. Moreover, and even more importantly, the specific expedited procedures that are triggered in this way are themselves set forth in advance of Election Day, with all the notice that such advance promulgation provides, and thus are not an instance of law for the adjudication of ballot-counting disputes adopted only after the disputed ballots have been cast. In sum, this Section provides that these Procedures will be in effect as

[9] Even if a state chooses to adopt some form of expedited procedures to resolve a vote-counting dispute in a particular type of nonpresidential election—for example, a gubernatorial election—it is unlikely that the state would wish the timetable to be as accelerated as Congress has required for presidential elections. In other words, suppose a state were to enact expedited procedures that required the resolution of a disputed gubernatorial election to occur conclusively by December 31. Those expedited procedures would achieve resolution over six months sooner than the process that Washington used for its gubernatorial election in 2004. Yet even accelerating the process that much would reach closure *24 days after the Safe Harbor Deadline that year (and thus over three weeks later)*. Thus, even a state that set December 31 as the deadline for resolving a disputed gubernatorial election, and designed special procedures accordingly, would still need to adopt the distinct Procedures set forth here in Part III of this project in order to handle the special exigencies of a disputed presidential election.

state law in advance of Election Day, with the triggering of expedited proceedings to occur after Election Day according to specifically identified conditions set forth in § 303 of these Procedures, which shall have been adopted and in effect prior to Election Day.

b. Compliance with due process. The requirement that these Procedures be adopted in advance of the first presidential election to which they will apply is necessary not only to enable the state to take advantage of Safe Harbor status under 3 U.S.C. § 5, but also to assure compliance with the Due Process Clause of the U.S. Constitution. Federal courts have interpreted the due-process requirement to include a principle that constrains a state from changing the rules for counting ballots after they have been cast. The concern is that such change, in addition to deviating unfairly from the expectations of voters about the rules governing their ballots, may reflect an effort to manipulate the count in favor of a particular party or candidate. These Procedures have been drafted to maintain fidelity to this fundamentally important due-process principle. They embody the goal of detailing as clearly and specifically as possible in advance the procedures that will apply in the event that a ballot-counting dispute arises in the context of a presidential election, so that there are no surprises about the applicable procedures to candidates and voters, and so that these procedures cannot be manipulated to the partisan advantage of one candidate or another. Accordingly, adoption and implementation of these Procedures should minimize the risk that a federal court would find warrant for holding that the state has violated due process in its adjudication of a presidential ballot-counting dispute.

c. The role of the federal judiciary and the importance of non-disruption of these Procedures insofar as they operate as anticipated. The possibility that a federal court might invoke due process as the basis for invalidating a state's procedures for adjudicating a ballot-counting dispute is one element of a broader point concerning the relationship of potential proceedings in both state and federal court regarding the same disputed ballots. Simultaneous, even conflicting, litigation in both state and federal court entails the probability of disruption that will cause a state to miss the Safe Harbor Deadline and even jeopardize the state's ability to hold the meeting of its presidential electors on the constitutionally required day. In light of this concern, these Procedures are intended to provide an orderly mechanism to enable a state to adjudicate a disputed presidential election without need for federal-court intervention.

In this regard, Part III and its Procedures have been crafted with the recognition that, in a genuinely disputable presidential election (where there are credible issues worthy of litigation

that could determine which candidate is the winner of the White House), the competing candidates will consider employing—and likely end up employing—every avenue of judicial process that is potentially available for the adjudication of these issues, with each candidate focusing especially on those forums perceived to be more favorable to the candidate (or the candidate's political party). One of the most important recent developments in American election law, epitomized by Bush v. Gore itself, is the power of the federal judiciary to invoke the Fourteenth Amendment as grounds for supervising the counting of ballots by institutions of state governments, including state courts. These Procedures, insofar as they are adopted as elements of state law, are of course subject to the supremacy of federal law; and the jurisdiction of the state judiciary, including the state supreme court, is ultimately subject to the jurisdiction of the U.S. Supreme Court on any issue of federal law, as Bush v. Gore also illustrates. Thus, these Procedures in no way purport to do what they obviously could not do given federal supremacy: deprive the federal judiciary of the authority that it possesses to require that state vote-counting processes comply with the demands of the Fourteenth Amendment.

Even so, it is important to recognize that federal-court interference with a state's vote-counting procedures may be controversial and perhaps counterproductive in terms of the values of producing a fair and accurate count in a timely manner. Bush v. Gore itself was intensely controversial, and other instances of federal-court intervention in a state's vote-counting procedures have caused considerable delay in the resolution of the affected elections. Delay, of course, is particularly problematic in the context of the limited 35-day period for a state to achieve Safe Harbor status in a disputed presidential election—or the slightly longer 41-day period before the constitutionally required meeting of the presidential electors in all states. To be sure, if a state's procedures for resolving a disputed presidential election fall below the standards of the Fourteenth Amendment, then it may be incumbent upon the federal judiciary to intervene to invalidate and, if possible, rectify the Fourteenth Amendment violation, even recognizing the delay (including potential jeopardy to Safe Harbor status) that the federal-court intervention causes. But an essential component of these Procedures is that they are designed with the aim of satisfying applicable Fourteenth Amendment standards. Thus, if a state employs these Procedures and adheres to them in their implementation, then the state reasonably should be able to expect that the federal judiciary will not interfere with their operation.

To reiterate and underscore this point for emphasis, given its particular importance, a federal court should do nothing to delay any element of these Procedures insofar as they are being followed by the relevant institutions of state government, including the state's Presidential Election Court, according to their provisions. A federal court should not issue a Temporary Restraining Order (or preliminary injunction) that disrupts the anticipated operation of these Procedures, even for a brief period of time. All of the deadlines included in these Procedures have been carefully considered, are intricately connected with each other, and have no margin of adjustability, given all that needs to occur within the limited 35-day period. For a federal court to disrupt the schedule set forth in these Procedures, even if only by 24 hours, is to undo the entire engineering endeavor that these Procedures embody. Thus, there would need to be particularly good reasons for a federal court to engage in such disruption, and such sufficient grounds presumably would exist only if these Procedures were *not* being followed as intended.

In the heat of the battle over the outcome of a presidential election, the federal judiciary undoubtedly can expect one side to seek its assistance in disrupting the operation of these Procedures. One side, after all, will perceive itself to be in the weaker position under the relevant vote-counting provisions of state law. As long as these Procedures are faithfully followed, however, the federal judiciary should refrain from interfering with an effort to obtain Safe Harbor status. Rather, the federal judiciary should let the Procedures play out to the end of their 35-day schedule. If at that point the federal judiciary firmly believes that some fundamental unfairness in violation of the Fourteenth Amendment taints the vote-counting resolution achieved by these Procedures, then the federal judiciary can provide a remedy.

A federal court's alteration of a state's procedures for adjudicating a ballot-counting dispute would deprive the state of Safe Harbor status. This is true even if the federal court were to complete its intervention well in advance of the 35-day Safe Harbor deadline. The reason is that the federal court's alteration of the state's rules would be a change from the state's rules as they existed on Election Day. Accordingly, the state would fail to comply with the independent condition set forth in 3 U.S.C. § 5 necessary for achieving Safe Harbor status: the use of the rules that existed on Election Day. Completion of the adjudication within 35 days would make no difference. (Only if a federal court's intervention into a state's adjudicatory proceeding would *not* cause a deviation from preexisting state law concerning the counting of the presidential ballots would this separate problem under the Safe Harbor provision not arise.) Given this

reality, a federal court should provide a state with every chance of achieving Safe Harbor status and intervene only after the state has deprived itself of this opportunity, by missing the 35-day deadline. At that point, with Safe Harbor status no longer a possibility, the federal court can issue a decree to enforce whatever federal interests are at stake in the adjudication of the dispute over the counting of the state's presidential ballots. (As long as the federal court did not disrupt the state's proceedings, the federal court could hold parallel proceedings for the purpose of apprising the federal court of potential issues and relevant facts, so that the federal court would be in a position to issue a decree shortly after expiration of the Safe Harbor Deadline yet still in advance of the meeting of the state's presidential electors.)

Depending upon the particular federal issue raised, the federal court's remedy, if issued within the six-day period after the Safe Harbor Deadline but before the meeting of the state's presidential electors, could be to declare certain ballots counted, which would make a particular candidate the winner of the presidential election in the state. If so, absent further intervention from the state's legislature, then the federal-court order would have the effect of determining which presidential electors were duly authorized to cast the state's Electoral College votes on the congressionally appointed day. Alternatively, the federal-court decree conceivably might void the result of the state's presidential election, thereby forcing the state legislature to invoke its authority to provide for an alternative means of appointing the state's presidential electors. In any event, the federal judiciary, especially after 2000, should recognize the danger of being drawn into the partisan fight between the two presidential campaigns and thus should find the existence of a Fourteenth Amendment violation only when the federal-court ruling commands sufficient judicial consensus to avoid being itself characterized as tainted by partisanship.

d. Relationship of these Procedures to other recounts or disputed elections occurring at the same time. It is possible that a state may have multiple unresolved elections simultaneously, with the same ballots needing to be recounted for one election also needing to be recounted for a different election (or the question of a ballot's eligibility relevant to both elections). Indeed, when one considers all the different elections that occur in a state on the same Election Day, it is quite probable that if the presidential election remains unresolved, then so too does some other election somewhere in the state. This other unresolved election, after all, need not involve a statewide office (like governor), but instead easily could involve a local office (like mayor or a seat on a city council).

Quite clearly, an unresolved presidential election is more urgent than any other type of unresolved election. This would be true even if the other unresolved election was a gubernatorial or U.S. Senate race, but it is certainly true for local races. Accordingly, these Procedures explicitly establish that they have priority over whatever proceedings might be applicable to other unresolved elections at the same time. Those other proceedings must remain suspended until completion of these Procedures concerning the presidential election. That said, the results of these Procedures can be incorporated into the proceedings concerning nonpresidential elections to avoid duplication of effort. For example, as part of the canvass under § 308, each Local Election Authority will make a determination concerning the eligibility of all provisional ballots within its jurisdiction. Those determinations may also be relevant to another unresolved election, either another statewide race or a local race. If so, then there is no need for a separate proceeding to determine whether these same provisional ballots will be counted in that other election. Rather the determination made under § 308 concerning their eligibility for the presidential election can also govern in the counting of ballots for that other election. This Section provides that such rulings made pursuant to these Procedures will apply in this way to other unresolved races—unless a separate provision of state law expressly declares otherwise.

To be sure, some determinations made concerning the presidential election will not be applicable to other races. For example, in a recount of the presidential election an examination of optical-scan ballots to determine whether ovals contain a mark that constitutes a vote for a presidential candidate will not apply to any other election on the same ballot that also may be unresolved and thus require a recount. For sake of efficiency, a Local Election Authority may wish to conduct the nonpresidential recount at the same time as it conducts the presidential recount under § 305. (Suppose the state needs to conduct both a presidential and gubernatorial recount. Each Local Election Authority might prefer to examine each ballot once, looking at both the presidential and gubernatorial vote on that ballot, rather than conducting two entirely separate recounts of the same set of ballots.) These Procedures permit a Local Election Authority to conduct a presidential and nonpresidential recount simultaneously *only to the extent that the Local Election Authority is able to do so in compliance with all the provisions of these Procedures, including meeting all of the strict deadlines in these Procedures.* If there is any risk that the Local Election Authority would be unable to meet the deadlines in these Procedures if it

conducts both the presidential and nonpresidential recounts simultaneously, then it must defer conducting the nonpresidential recount until after it completes the presidential recount.

In some instances, there may be an inevitable scheduling conflict between these Procedures and proceedings necessary for another unresolved election. The same ballots cannot be in two different courtrooms at the same time. Thus, for example, pursuant to these Procedures, the Presidential Election Court may be conducting a review of disputed ballots under § 306 or § 311. If so, then another court that may have jurisdiction over a ballot-counting dispute in a nonpresidential election will have to wait until the Presidential Election Court has completed its review of the ballots under these Procedures.

REPORTERS' NOTE

The potential role of federal courts in the resolution of a state's vote-counting dispute. No issue looms larger over the ability of a state to complete all of its proceedings for a disputed presidential election by the Safe Harbor Deadline—whether the state uses these Procedures or otherwise—than the possibility that the federal judiciary will intervene in the middle of the state's proceedings. If the federal court does intervene, then a state is no longer in control over whether it will be able to complete its own proceedings before the Safe Harbor clock runs out. The federal judiciary can order the state to redo some of its proceedings, thereby taking extra time that would push the state beyond the Safe Harbor Deadline. (Indeed, that kind of "redo" order is what the four dissenters in Bush v. Gore wanted, instead of the majority's decree to shut the process down in order to finish before Safe Harbor time expired.) Or a lower federal court might enjoin certification of the canvass, notwithstanding a deadline to do so under state law, in order to give the federal court time to rule on constitutional claims raised about the counting of ballots during the canvass. That kind of federal-court injunction is what halted an Ohio election for more than 20 months—obviously long past what would have been the Safe Harbor Deadline if it had been a presidential election.

The competing presidential candidates, of course, will attempt to use the federal judiciary to their advantage if they perceive it in their strategic interest to do so. Consequently, there inevitably is potential tension between the jurisdiction of the federal judiciary and the state's own institutions in resolving a dispute over the counting of ballots in the presidential election—and this tension is susceptible to manipulation and exploitation for partisan purposes. Although the power of the federal judiciary under the federal Constitution cannot be negated simply by the improvement of state procedures under state law, the occasion for the exercise of those federal powers may diminish, as a state amends its law to put its own ballot-counting house in order (so to speak). Insofar as Part III and its Procedures reflect a concerted effort to make the mechanism for a state's counting of presidential ballots as sound as possible, adoption of these Procedures by a state should be a signal to the federal judiciary to think carefully before intervening in a

manner that would disrupt the state's efforts to complete its ballot-counting process in time (and in a manner) to obtain Safe Harbor status.

With this general observation in mind, it is worth reflecting on the historical status of the proposition that the federal judiciary might involve itself in a ballot-counting dispute. Although anticipated by Justice John Marshall Harlan in dissent in 1900, this proposition did not become governing law until the end of the 20th century. Moreover, even as it took root, it was potentially tempered by the availability of the abstention doctrine (and other gate-keeping) devices in order to protect the ability of a state to administer its own ballot-counting process without undue interference.

Prior to the transformation of the political-question doctrine in Baker v. Carr, and with it the flourishing of the one-person-one-vote requirement of the Fourteenth Amendment as interpreted in Reynolds v. Sims, there was no role for the federal judiciary in the litigation of vote-counting controversies. Indeed, the U.S. Supreme Court explicitly repudiated any such role for the federal judiciary in Taylor v. Beckham, which involved a claim that ballot-box stuffing in Kentucky's 1899 gubernatorial election amounted to a Fourteenth Amendment violation. The Court confirmed this jurisdiction-negating interpretation of the Fourteenth Amendment in Snowden v. Hughes, and the unequivocal command of these precedents is what caused Justice Hugo Black to order dismissal of the federal-court suit that sought to overturn the ballot-box stuffing on behalf of Lyndon Johnson in his 1948 bid for the Senate. See Edward B. Foley, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES (2016).

This longstanding jurisprudence, however, did not survive the transformation in election law that Baker v. Carr and Reynolds v. Sims wrought. Although those Warren Court precedents specifically concerned the apportionment of seats in a state's legislature, and not the counting of ballots, the essential principle that all eligible voters equally deserve fair electoral rules—which is what underlies those precedents—eventually was applied in the context of vote-counting controversies, thereby empowering federal courts to supervise a state's vote-counting fairness. See, e.g., Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (state-court invalidation of absentee ballots after they are cast violates the Fourteenth Amendment when state election officials, relying on explicit state statutes, instructed voters that they were entitled to cast those absentee ballots); Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) (to count an absentee ballot that is invalid under explicit state law violates the Fourteenth Amendment). In Bush v. Gore, the U.S. Supreme Court itself would apply those Warren Court precedents in this way for the first time, but the lower federal courts already had done so for over two decades.

Moreover, in adjudicating these Fourteenth Amendment claims concerning a state's vote-counting fairness, the lower federal courts sidestepped various procedural issues raised in an effort to prevent their consideration of the merits of these claims. For example, the so-called "*Rooker–Feldman* doctrine" was raised, arguing that federal-court adjudication of the Fourteenth Amendment claims would amount to an attempt to revise a state-court judgment in an original, rather than appellate, federal-court suit. But the *Rooker–Feldman* argument was defeated simply

by filing the federal-court suit in the name of voters who were not parties to the state-court proceedings. See, e.g., Roe v. Alabama, 43 F.3d at 580.

The argument was also made that a federal court should abstain from adjudicating Fourteenth Amendment claims concerning the counting of ballots while state-court litigation over the counting of those same ballots remains pending. This argument carried some force, but only deferred the federal court's ultimate ruling on the Fourteenth Amendment claims. Moreover, the federal court could retain jurisdiction while the matter remained under consideration in state court, and the federal court could even go so far as to enjoin certification of the election until after the court was finished adjudicating the Fourteenth Amendment issues. See, e.g., Roe v. Alabama, 43 F.3d at 582-583.

In the disputed presidential election of 2000, there was lower federal-court litigation of Fourteenth Amendment claims as well as the U.S. Supreme Court's review of the Florida Supreme Court's rulings in both Bush v. Palm Beach Canvassing Board and Bush v. Gore. In Siegel v. Lepore, 234 F.3d 1163 (11th Cir. 2000) (en banc), the Bush campaign on Fourteenth Amendment grounds sought a federal-court injunction against the manual recounts that the Gore campaign had asked the canvassing boards of four Florida counties to undertake. On December 6, 2000, the Eleventh Circuit (in an 8-4 vote) affirmed the denial of the requested injunction, but it did so not for jurisdictional reasons but rather specifically on the ground that the Bush campaign, at least at that stage of the proceedings, had failed to demonstrate an irreparable injury that would justify enjoining the recounting of ballots. "At the moment, the candidate Plaintiffs (Governor Bush and Secretary Cheney) are suffering no serious harm, let alone irreparable harm, because they have been certified as the winners of Florida's electoral votes notwithstanding the inclusion of manually recounted ballots." Id. at 1177.

In this federal-court lawsuit, the Eleventh Circuit considered—but rejected—jurisdictional arguments raised against its reaching the merits of Bush's claim for injunctive relief. As to the *Rooker–Feldman* doctrine, the Eleventh Circuit ruled it inapplicable because there was no pending state-court judgment that the federal-court plaintiffs were attempting to undo (the U.S. Supreme Court, as of that date, having already vacated the first Florida Supreme Court decision in Bush v. Palm Beach Canvassing Board). See Siegel v. Lepore, 234 F.3d at 1172. The Eleventh Circuit also observed: "The parties to this case are not the same parties that appeared before the Florida Supreme Court." Id. n.5.

The abstention doctrine was also raised in the Eleventh Circuit litigation over the 2000 presidential election, but the Eleventh Circuit found no basis to abstain—and on this point, as concerning the *Rooker–Feldman* doctrine, the Eleventh Circuit was unanimous. The Eleventh Circuit considered both the *Burford* and *Pullman* strands of the abstention doctrine, but found both strands inapplicable. *Burford* abstention concerns the protection of state administrative processes from federal-court interference. The Eleventh Circuit saw no risk of the Bush campaign's lawsuit interfering with Florida's administration of its recount laws, since "the crux of Plaintiffs' complaint is the absence of strict and uniform standards for initiating or conducting such recounts." Siegel v. Lepore, 234 F.3d at 1174. *Pullman* abstention exists to give state courts

the chance to resolve a matter without need for federal-court involvement. The Eleventh Circuit acknowledged that *Pullman* presented "the most persuasive justification for abstention" in the specific context of the case, but ultimately concluded that abstention was "inappropriate" because "Plaintiffs allege a constitutional violation of their voting rights." Id. at 1174. If the Eleventh Circuit is correct on this point, it would mean that *Pullman* abstention is never justified when one side in a campaign claims a Fourteenth Amendment violation in the counting of ballots.

Since 2000, the lower federal courts have been mixed on whether to abstain in vote-counting cases when disputes over the same ballots are pending in state court. The Sixth Circuit, for example, following the Eleventh Circuit's lead, refused to abstain from addressing Fourteenth Amendment claims concerning the rejection of provisional ballots in a 2010 Ohio election. Hunter v. Hamilton County Board of Elections, 635 F.3d 219, 233 (6th Cir. 2011). The Sixth Circuit said that *Pullman* abstention "is appropriate only when state law is unclear" and the state supreme court had already clarified that under state law the disputed provisional ballots should not be counted. Id.

By contrast, in the litigation over the counting of write-in ballots in Alaska's 2010 U.S. Senate election, the federal district court invoked *Pullman* abstention to wait until state tribunals had resolved state-law claims concerning those same ballots. Miller v. Treadwell, 736 F. Supp. 2d 1240, 1242 (D. Alaska 2010). The federal court, however, enjoined certification of the election until after completion of both the state and federal judicial proceedings over the ballots. Once the Alaska Supreme Court conclusively resolved all state-law issues over the write-in ballots, ruling them eligible to be counted even if they contain misspellings of incumbent Senator Murkowski's name, Miller v. Treadwell, 245 P.2d 867 (Alaska 2010), the federal district court went on to consider (and reject) the pending Fourteenth Amendment claims. At that point, the federal court lifted its injunction against certification of the election.

The litigation over Alaska's election ended relatively quickly. The Alaska Supreme Court issued its decision on December 22, with the federal district court's dissolution of its injunction on December 28. Thus, there was no judicial barrier to Senator Murkowski presenting her certificate of election at the beginning of the new Congress on January 3, 2011. But that speed would not have been sufficient for a presidential election. December 22 was 50 days after Election Day that year (November 2)—nine days later than the date for the meeting of the presidential electors if it had been a presidential-election year, and a full 15 days after what would have been the Safe Harbor Deadline (again, always 35 days after Election Day). The federal-court ruling came 21 days, or a full three weeks, after what would have been the Safe Harbor deadline.

The federal-court litigation over provisional ballots in Ohio's 2010 election did not end until July 12, *2012*—more than 20 months after Election Day in 2010! The federal court had enjoined certification of the election throughout that period, thus requiring the elective office to be filled temporarily by appointment. (The office was a seat on a local juvenile court.) During that time, the federal district court conducted a trial on the treatment of provisional ballots,

including testimony from poll workers and local election officials. Obviously, nothing like that could have occurred in a presidential election, at least not without warp-speed expedition that would have rendered the federal-court proceedings altogether different than what in fact occurred. On Monday, December 13, the date Ohio's presidential electors would have been constitutionally required to meet if the litigation over provisional ballots had involved a presidential election, the Ohio Supreme Court had not yet issued its own ruling on the status of the disputed provisional ballots under state law; that ruling would not come until January 7. Thus, when the Sixth Circuit ruled on January 21 that it did not need to abstain because the Ohio Supreme Court had clarified the relevant state-law issues, that non-abstention ruling was entirely inapposite to a presidential election; indeed, had it occurred in a presidential-election year, the inauguration of the new president would have occurred one day earlier, on January 20.

Thus, when considering the possible applicability of the abstention doctrine to future Fourteenth Amendment litigation over the counting of ballots in a presidential election, it is worth distinguishing those circumstances in which a state has adopted procedures designed to achieve Safe Harbor status from those in which a state has made no such effort to do so. Indeed, when a state's own procedures run the risk of missing the constitutionally mandated date for the meeting of the presidential electors (again, six days after the Safe Harbor deadline), federal-court intervention may assist a state in enabling its Electoral College votes to comply with this constitutional deadline. As Siegel v. Lepore in 2000 indicates, not all federal-court lawsuits over the counting of presidential ballots seek to delay certification of the election—and thus not all such lawsuits threaten a delay of certification that would deprive the state of Safe Harbor status. Accordingly, in those circumstances, as in Siegel v. Lepore itself, federal-court abstention may not be warranted.

But when a state has adopted procedures designed to achieve Safe Harbor status—in particular, when a state has adopted these Procedures, which have that achievement as their paramount objective—then a federal court should invoke the abstention doctrine in order to prevent the federal court from causing the state to fail in achieving its Safe Harbor objective. Consider the possibility that a federal district judge enjoins certification of a state's presidential election pending a federal-court hearing on the counting of provisional ballots in that state's election. Consider, too, that this federal-court hearing is not scheduled in a way that permits its completion prior to the Safe Harbor deadline. One might think that sacrificing compliance with Safe Harbor status may be necessary to protect Fourteenth Amendment rights in the context of counting provisional ballots. But the federal district judge's belief that the Fourteenth Amendment claims have potential merit may be erroneous. In recent years, federal district judges have a track record of frequent reversals in high-profile Fourteenth Amendment cases involving the counting of ballots and related voting rules. Imagine the circumstance in which a federal judge has caused a state to lose Safe Harbor status, only to be reversed on appeal—but too late in order to regain the possibility of Safe Harbor compliance. In this circumstance, the federal court has erroneously—and irreparably—interfered with the state's ability to participate in the

presidential election as it was entitled to do under the applicable provisions of the federal Constitution and congressional enactments.

Another point worth emphasizing is that the very intervention of the federal court may deprive the state of Safe Harbor status even if the federal court completes its adjudication well in advance of the 35-day Safe Harbor Deadline. To illustrate this point, consider a state law that requires invalidation of provisional ballots cast in a precinct other than the one in which the provisional voter resides (so-called "out-of-precinct" provisional ballots). Suppose in the circumstances of a presidential election, a federal court holds that compliance with this state law violates the Fourteenth Amendment and accordingly orders that these disputed ballots be counted notwithstanding the state statute that requires their disqualification. Cf. Hunter v. Hamilton County Board of Elections, 850 F. Supp. 2d 795 (S.D. Ohio 2012) (in a nonpresidential election, ordering the counting of out-of-precinct provisional ballots because their disqualification pursuant to state law violates the Fourteenth Amendment). In this situation, the federal-court order would alter the state's law for the adjudication of the ballot-counting dispute from the state's law as it existed at the time the ballots were cast on Election Day. Consequently, the state no longer would be compliant with the separate requirement for attaining Safe Harbor status under 3 U.S.C. § 5 that the laws "for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State" be "laws enacted prior to the day fixed for the appointment of the electors." Even if it were somehow debatable that the state had not changed its own laws for adjudication of a presidential ballot-counting dispute, surely Congress would be entitled to consider that the federal court's alteration of the state's rules for the counting of provisional ballots deprived the state of Safe Harbor status. In this way, Congress would not be bound to accept the result of the federal court's intervention, and the federal court could not insist otherwise.

Moreover, it is worth recognizing that even if the federal district court is correct in identifying a Fourteenth Amendment violation in a state's counting of ballots cast by voters in a presidential election, the federal court cannot force the state to appoint its presidential electors in accordance with the court's interpretation of the Fourteenth Amendment. The state legislature could choose to supersede the federal court's ruling and appoint the state's presidential electors directly under Article II of the federal Constitution—as the Florida legislature was taking steps to do in 2000. While such a move undoubtedly would lack Safe Harbor status (being law adopted after Election Day), and likely would provoke the argument that this new piece of state legislation itself violates the Due Process Clause of the Fourteenth Amendment, Congress would need to be the institution of the federal government to resolve the controversy pursuant to its role in receiving the Electoral College votes from the states under the Twelfth Amendment. Almost certainly, no federal district court would have the power to order Congress to accept one certificate of Electoral College votes from a state (the one that the federal court believed to reflect a constitutionally proper counting of provisional ballots cast in the November election), while simultaneously ordering Congress to reject a different certificate of Electoral College votes from a state (the one stemming from the state legislature's reassertion of Article II power to

appoint the state's presidential electors directly). Even after the alteration of the political-question doctrine in Baker v. Carr, the receipt of a state's Electoral College votes under the Twelfth Amendment—like an impeachment proceeding—surely qualifies as a matter textually committed to Congress and thus beyond the purview of the federal judiciary. See Nixon v. United States, 506 U.S. 224 (1993).

For these reasons, a federal district court should be hesitant to intervene in a state's vote-counting proceedings in a way that potentially interferes with the state's particular Article II power over the appointment of the state's presidential electors. Article II, in this way, presents an additional reason for federal-court caution and even abstention that simply is inapplicable in any nonpresidential election. At the very least, when a state has undertaken a concerted effort to maximize its ability to comply with the Safe Harbor Deadline—an undertaking that is itself an exercise of the state's unique Article II authority—the federal judiciary should do nothing to undermine the state's objective in this regard.

§ 303. Declaration of Expedited Presidential Recount

(a) Within 24 hours after the polls close in the state's presidential election, the Chief Elections Officer shall declare publicly, including by means of notice on an official website as well as e-mail notification to all presidential candidates on the ballot in the state, the need for an Expedited Presidential Recount in the state if either of the following two circumstances exist:

(1) CANDIDATE-SOUGHT: when *both* (A) a presidential candidate, in a statement publicly released on the candidate's official campaign website and transmitted to the Chief Elections Officer between the hours of 12:00 noon and 5:00 p.m. (Eastern time) on the day immediately following Election Day, asserts that uncertainty about the outcome of the presidential election in the state provides grounds (either by itself or together with similar uncertainty in one or more other states) for believing that the national winner of the presidency remains unsettled, *and* (B) preliminary returns show the leading presidential candidate in the state to be ahead of one or more other presidential candidates by a margin of less than one percent of all presidential ballots preliminarily counted in the state; or

(2) NOT-CANDIDATE-SOUGHT: when, notwithstanding no public statement by a candidate of the kind set forth in subsection (1), *both* (A) no presidential candidate can reach a majority of Electoral College votes by relying solely upon states where the candidate's margin of victory according to available preliminary returns is greater than one-half of one percent of all presidential ballots preliminarily counted in those states; *and* (B) preliminary returns show the leading presidential candidate in the state to be ahead of one or more other presidential candidates by a margin of less than one-half of one percent of all presidential ballots preliminarily counted in the state, and the state's Electoral College votes, either alone or in combination with the Electoral College votes of other states where the margin of victory according to preliminary returns is also less than one-half of one percent, would provide a presidential candidate with a majority of

Electoral College votes if added to the Electoral College votes of the states in which that particular candidate leads by more than one-half of one percent.

(b) For purposes of subsection (a)(1)(A), a presidential candidate may make the public assertion of uncertainty about the outcome of the presidential election only if the candidate is in a position to win the presidency if some or all of the asserted uncertainty is resolved in the particular candidate's favor.

(c) In addition to the obligation to declare an Expedited Presidential Recount if either of the two circumstances set forth in subsection (a) apply, the state's Chief Elections Officer may declare an Expedited Presidential Recount in any other situation that the Officer believes warrants it, including when the number of provisional, absentee, or other uncounted ballots might cause the winning presidential candidate in the state to be different from the leading candidate based on preliminary returns and this difference might affect which candidate is the winner of a majority of Electoral College votes.

Comment:

a. When expedition is necessary. As discussed in the Comment to § 302, the need for a mechanism to trigger expedited proceedings arises when a presidential election remains unsettled 24 hours after the polls close on Election Day. The specific conditions for triggering the expedited proceedings, therefore, should be based on factors that make a presidential election still in play 24 hours after the polls have closed. The first key factor is that there is no clear winner of an Electoral College majority, as required by the Twelfth Amendment. Where there is a clear Electoral College majority, it is irrelevant that there may be uncertainty concerning the winner in a state whose Electoral College votes are unnecessary to establish the majority—and thus there is no need for expedited proceedings in this situation. (Of course, a state whose votes are unnecessary to determine the Electoral College winner still would be free to use these expedited proceedings if it wished, in the case where the winner of its own electoral votes remained in doubt even though inconsequential to the overall Electoral College majority.)

Even if there is no clear Electoral College majority, there may be no need for an expedited recount in a particular state; this would be true if the reason for the absence of a majority was three different candidates clearly splitting the Electoral College votes in such a way that none obtains a majority. In this situation, the outcome in every state may be unambiguous on

Election Night—with no need for a recount in any state—and yet no candidate able to accumulate a majority of Electoral College votes. Under the Twelfth Amendment, this presidential election would proceed to the House of Representatives, with the House empowered to elect the President using the special procedure provided therein, whereby each state's delegation in the House has one vote.

Thus, in order to trigger an expedited recount under these Procedures, it is necessary *both* that there be no clear winner of an Electoral College majority *and* that there be uncertainty in the outcome of the presidential election in a particular state that contributes to the absence of a clear Electoral College majority. Another way to put this point is to say that if there is uncertainty about the outcome of the presidential election in one or more states, and if resolution of that uncertainty would cause a particular candidate to reach an Electoral College majority, then the situation exists where expedited proceedings are necessary in each uncertain and potentially outcome-determinative state. In 2000, Florida was the single state presenting this kind of situation. It is important to recognize, however, that in a future unsettled presidential election, there may be multiple states contributing to the condition of uncertainty as to whether or not a candidate is able to obtain an Electoral College majority—as was the case in 1876, when four states (Florida, Louisiana, South Carolina, and Oregon) contributed to this kind of situation. Under these Procedures, an expedited recount would be triggered in each of the states contributing to overall uncertainty concerning whether or not a candidate was capable of winning an Electoral College majority.

Illustrations:

1. On Election Night, Candidate A is the clear winner of 281 Electoral College votes, and Candidate B the indisputable winner of 251, with only Nevada and its six electoral votes "too close to call." Because 270 electoral votes are sufficient for a majority, Candidate B graciously concedes that Candidate A is the winner in a publicly televised address. In this situation, there is no need for Nevada to trigger expedited procedures to determine which candidate won its six electoral votes.

2. On Election Night, Candidate A is the clear winner of 263 Electoral College votes, and Candidate B the indisputable winner of 253. Both New Hampshire with its four electoral votes, and Ohio, with its 18 electoral votes, are "too close to call." Neither candidate makes a concession speech on Election Night; instead, both campaigns vow to

carry on until all the votes, including provisional ballots, have been counted. In this situation, there is a need for Ohio—but not New Hampshire—to trigger expedited procedures to determine the winner of its 18 electoral votes. Whichever candidate wins Ohio will win a majority of electoral votes and thus the presidency: if Candidate A wins Ohio, then A will have 281; if Candidate B wins Ohio, then B will have 271. Either way, New Hampshire is irrelevant to determining which candidate will win an Electoral College majority, and therefore there is no need for New Hampshire to conduct expedited procedures. It is imperative, however, for Ohio to begin immediately to conduct all procedures to determine conclusively which candidate won the state.

3. On Election Night, Candidate A is the clear winner of 263 Electoral College votes, and Candidate B the indisputable winner of 251. Both Nevada, with its six electoral votes, and Ohio, with its 18 electoral votes, are "too close to call." Neither candidate makes a concession speech on Election Night; instead, both campaigns vow to carry on until all votes are counted. In this situation, it is necessary for *both* Ohio *and* Nevada to trigger expedited procedures to determine which candidate won each state's electoral votes. The ultimate winner of the White House may hinge on either state. If Candidate B wins Ohio's 18 electoral votes, that gives B 269, still one short of an Electoral College majority, making Nevada outcome-determinative. Likewise, were it to become apparent that Candidate A wins Nevada, but Ohio still remains in play, then Candidate A would be just shy of an Electoral College majority with 269, and expedited procedures would remain necessary in Ohio. (If Candidate B were the one to quickly win Nevada, with Ohio still unsettled, then the count would stand as A having 263, B with 257, and both needing Ohio to prevail.) It is true that in this scenario, Candidate A needs only one of the two unsettled states, Ohio, to cross the threshold of an Electoral College majority. But because Candidate B needs to prevail in both Ohio and Nevada to reach the magic number of 270, expedited procedures are necessary in both.

b. Criteria for triggering expedition. Even if it is conceptually clear that expedition is necessary when uncertainty in one or more states causes uncertainty over whether a candidate has obtained an Electoral College majority, there need to be specific criteria for determining when the requisite uncertainty exists in a state.

The most important factor, but not the only one, is whether the candidates themselves believe that such uncertainty exists. Especially after 2000, no candidate is likely to concede if he or she believes that there still may be a chance of winning in overtime. Thus, subsection (a) provides two distinct methods for identifying when expedited proceedings must occur, depending on whether or not a candidate still potentially capable of winning the presidency is publicly claiming that the race is not yet over.

Expedition when a viable candidate claims uncertainty. Under subsection (a)(1), if a presidential candidate asserts on the next afternoon following Election Day that the outcome of the election remains unsettled because one or more identified states are "too close to call," the Chief Elections Officer of any one of those states must trigger that same day an Expedited Presidential Recount in the state if, based on preliminary returns available at that time, the margin between the leading candidates in the state is less than one percent of total presidential votes preliminarily counted.

This provision combines both a non-numerical and a numerical component for determining when the Chief Elections Officer of a state must trigger expedited proceedings. The non-numerical component is the assertion of a candidate. The assertion must be public so that there is no doubt that the candidate is claiming that the race is not over. Moreover, to obtain the benefit of the numerical measure for a mandatory expedited recount under subsection (a)(1), which is more lenient than the measure under subsection (a)(2), the candidate's public statement must identify each state that the candidate believes is contributing to the uncertainty over whether any candidate has won enough states to reach a majority of Electoral College votes. For any state so identified in the candidate's public statement, a mandatory Expedited Presidential Recount must commence if the margin in that state meets the numerical threshold of less than one percent—rather than the more difficult numerical threshold contained in subsection (a)(2).

Subsection (a)(1) contains its more lenient numerical threshold, rather than no numerical threshold at all, so that a candidate cannot force a state to conduct an expedited recount simply because the candidate seeks one. A candidate who believes that the race is not over might seek expedited recounts in more states than numerically objective conditions would warrant. Even if the candidate is reasonable in believing that the winner of the presidency remains unsettled, and even if the candidate is reasonable in believing that other states contribute to this uncertainty, the candidate might be unreasonable in seeking expedited recounts in an excessive number of states.

The numerical condition that the margin separating the leading candidates in each identified state must be less than one percent of total presidential votes counted is sufficiently generous to capture all states for which the candidate's power to force the state to undertake a mandatory expedited recount is reasonable.

Note: the candidate who identifies a state as contributing to uncertainty over the winner of the presidency need not be one of the candidates within the one percent margin.

Illustration:

4. Candidate A claims that the race is not over and identifies Iowa as being one of several states contributing to this uncertainty because Candidate B cannot reach 270 Electoral College votes without winning Iowa. Based on preliminary returns, Candidate B is in the lead in Iowa, ahead of Candidate C by a margin of 0.98 percent. Candidate A is running a distant third in Iowa, well over 20 percent behind both Candidates B and C. Nonetheless, in this situation subsection (a)(1) requires Iowa to trigger a mandatory Expedited Presidential Recount. (This situation is one where it is *not* immediately clear that the presidential election will fall to the House of Representatives under the Twelfth Amendment. Rather, it still might be possible for Candidate B to reach 270 Electoral College votes if Candidate B ends up winning Iowa. Or it might be possible that Candidate A reaches 270 if Candidate A wins another state besides Iowa that also remains in play (for example, Ohio). Or, indeed, it might be possible that no candidate reaches 270 if Candidate C wins Iowa, and Candidate A fails to achieve a necessary win elsewhere (again, for example, Ohio). Regardless of the eventual outcome of the presidential election, this situation is one that would require Iowa to conduct an Expedited Presidential Recount.)

The numerical threshold of one percent is not too onerous. This is true in part because the Chief Elections Officer has discretion under subsection (c) to trigger an Expedited Presidential Recount even if it is not required by subsection (a). Thus, if a candidate makes a publicly compelling case for an expedited recount despite the margin in the state being greater than one percent, there will be tremendous public pressure on the Chief Elections Officer in the state to trigger expedited proceedings as sought by the candidate.

Illustration:

5. Preliminary returns in Ohio show Candidate A in the lead, with Candidate B having the next highest vote total. These two candidates are separated by 75,000 votes, which is 1.3 percent of all presidential votes preliminarily counted. (No other candidate is anywhere close to these two.) This margin is too large to trigger a mandatory recount under subsection (a)(1). Nonetheless, preliminary returns also show that Ohioans cast 150,000 provisional ballots in this presidential election, and these provisional ballots have yet to be evaluated and thus are potentially countable. Likewise, Ohio law permits absentee ballots to be counted if postmarked before Election Day as long as they arrive by mail to Local Election Authorities within 10 days after Election Day. Estimates vary on the number of such additional absentee ballots that may end up being counted, but it could be as high as another 100,000 ballots or more. In this circumstance, if the outcome of the presidential election in Ohio could determine which candidate reaches 270 Electoral College votes, the Chief Elections Officer in Ohio should exercise discretion under subsection (c) to trigger an Expedited Presidential Recount because there is a nontrivial possibility that the large volume of uncounted, but potentially countable ballots could alter the outcome of the election in the state, notwithstanding the present lead of more than one percent.

Subsection (b) requires that a candidate asserting that the outcome of the presidential election remains unsettled be in a position to win the presidency if some or all of the uncertainty is resolved in this candidate's favor. This requirement avoids the possibility that the candidate seeking an expedited recount in a state have no chance whatsoever of winning the presidency.

Illustration:

6. Apart from Colorado, Candidate A indisputably has 266 Electoral College votes, and Candidate B has 263. Whichever of the two wins Colorado wins the White House. Preliminary returns show Candidate B trailing Candidate A in the state by 20,000 votes, which amounts to 0.8 percent of the total votes preliminarily counted—less than one percent, *but not less than one-half percent, as required for the separate method of a mandatory trigger of expedited proceedings under subsection (a)(2).* On Election Night, and into the next day, Candidate B ultimately determined that Colorado was unwinnable

because Candidate B was just too far behind. Accordingly, on Wednesday afternoon, Candidate B makes a public concession, recognizing Candidate A as the winner of the presidency. In this situation, Colorado is *not* required to conduct a mandatory Expedited Presidential Recount. This conclusion holds even if a third candidate, Candidate C, publicly asks for one and publicly asserts a belief that Candidate B would prevail in an expedited recount. Candidate C, who unlike Candidate B has no conceivable chance of winning the presidency regardless of what happens in Colorado, should *not* be in a position to obligate Colorado to conduct a mandatory expedited recount. This is so even though Candidate B could have obligated Colorado to conduct a mandatory expedited recount if Candidate B, rather than conceding the election to Candidate A on Wednesday afternoon, instead had publicly declared the race unsettled because of Colorado; in that alternative circumstance, the margin of 0.8 percent would have been close enough to trigger a mandatory expedited recount under subsection (a)(1). Of course, it remains the case that the Chief Elections Officer of the state has the discretion to trigger an expedited recount, even though Candidate B has publicly conceded the election. Thus, if Candidate C offers the Chief Elections Officer a compelling reason why there should be an expedited recount in Colorado, despite Candidate B's public concession of defeat, the Chief Elections Officer can go ahead and trigger one. It is just the case, however, that Candidate C (unlike Candidate B) cannot force the Chief Elections Officer to trigger an expedited recount in this situation.

Expedition even when no viable candidate claims uncertainty. As the preceding Illustrations show, in some circumstances it is necessary to trigger a mandatory expedited recount even when no candidate requests one and, instead, the only candidate in a position to request one has publicly conceded defeat. The presidency is so important, the national scrutiny is appropriately so intense, and the pace of events so rapid, that sometimes it is better to start an expedited recount on the day after Election Day, only later to call it off, rather than delaying its start and losing precious days at the beginning of the 35-day period available. After all, a candidate who publicly concedes defeat on Election Night, or even the next day, might retract that concession several days later. (Although Al Gore did not publicly concede defeat on Election Night in 2000, he did telephone a concession to George W. Bush, only to retract that private concession before making a public statement.)

Accordingly, subsection (a)(2) sets forth a purely numerical basis for triggering a mandatory Expedited Presidential Recount. It does not depend at all on what any candidate, or anyone else, publicly asserts or requests. If preliminary returns in a state show the margin between the two leading candidates to be less than one-half of one percent of total presidential votes preliminarily counted, and if that state is necessary for a candidate to be able to reach 270 Electoral College votes (meaning that no candidate can reach 270 based on preliminary margins greater than one-half of one percent), then the Chief Elections Office of the state must trigger an Expedited Presidential Recount. Nothing more is required for this obligation to take hold.

Illustration:

7. On the day after Election Day, preliminary returns show that Candidate A is ahead by more than one-half of one percent, on a state-by-state basis, in states having a combined total of 266 Electoral College votes. Candidate B is ahead by more than one-half of one percent, on a state-by-state basis, in states having a combined total of 263 Electoral College votes. In Colorado, which has nine Electoral College votes and thus enough to put either Candidate A or B over the top, Candidate A leads Candidate B by 10,000, which is 0.4 percent of the total presidential votes preliminarily counted in the state. Because this margin is less than one-half of one percent, and because no candidate can achieve 270 Electoral College votes without Colorado, subsection (a)(2) requires, without more, that Colorado's Chief Election Officer trigger an Expedited Presidential Recount in the state. This obligation applies even if Candidate B publicly conceded defeat, and acknowledged Candidate A the winner of the presidency, earlier that same day. After the mandatory expedited recount has commenced, if upon reflection Candidate B really wants to call it off, then Candidate B can invoke the specific procedures of § 317 for terminating expedited proceedings that have been triggered under this Section.

One-half of one percent is an appropriate numerical threshold to trigger a mandatory expedited recount when a candidate who otherwise would be in a position to seek such a recount has conceded defeat, or remained silent, or otherwise declined to pursue a recount. A one percent threshold would be unduly permissive in this context. Conversely, a lower threshold (one-quarter of one percent, for example) might prove too stringent, blocking the start of a recount when the public interest indicates that one should get underway. One-half of one percent is neither too

stringent nor too lax. It would only rarely require a state to commence an expedited recount although the relevant candidate is not even seeking one. But a margin of only 10,000 votes in a state with 2.5 million ballots cast, for instance, when that state would determine the winner of the presidency, is close enough to obligate the state to at least begin the process of conducting an expedited recount—if only until all concerned, including the nation's electorate as a whole, recognize that the need to continue an expedited recount no longer exists. In this way, the numerical threshold of subsection (a)(2) strikes an appropriate balance of competing considerations, in the overall public interest.

Moreover, as already indicated, the Chief Elections Officer retains discretion to trigger an expedited recount even in a situation not required by subsection (a)(2). Thus, to take the same Colorado example again, if the margin between Candidate A and Candidate B is 20,000—rather than 10,000—the Chief Elections Officer can trigger an expedited recount even if Candidate B has not called for one. But this margin, while close but now twice as large, is not close enough to force the state to undertake the burden of an expedited recount when *neither* the relevant candidate *nor* the state's Chief Elections Officer believes that one is warranted.

Note: Subsection (a)(2) can require an expedited recount in one state at the same time that subsection (a)(1) requires an expedited recount in a different state.

Illustration:

8. Preliminary returns show Candidate B trailing Candidate A in Florida, Ohio, and Virginia by only 500, 1000, and 2000 votes respectively. If Candidate B ends up prevailing in any of these three battleground states, Candidate B will reach 270 Electoral College votes. Candidate A must remain ahead in all three states in order to achieve 270. Candidate B has publicly declared the presidential election unsettled and identified these three states as the reason. Because Candidate A's lead in each of these three states is well below the numerical threshold of one percent, subsection (a)(1) requires an Expedited Presidential Recount in each of these three states. At the same time, preliminary returns show Candidate A leading Candidate B in Colorado by 10,000 votes, which is 0.4 percent of total presidential votes preliminarily counted in the state. Crucially, Candidate A also must win Colorado to achieve 270. Without winning Colorado, Candidate A ends up with only 266 Electoral College votes even if Candidate A stays ahead in Florida, Ohio, and Virginia. Thus, subsection (a)(2) requires an Expedited Presidential Recount in Colorado

even though Candidate B did not specifically identify Colorado as a state contributing to the uncertainty over the winner of the presidency. The objectively numerical circumstances require an Expedited Presidential Recount in Colorado, along with the three states that Candidate A specifically identified as still being in play. (In this Illustration, subsection (a)(2) would have required expedited recounts in Florida, Ohio, and Virginia, as well as Colorado, even if Candidate B had not identified these three states for purposes of subsection (a)(1). That is because the margins in all three states also fell below the half percent threshold applicable to subsection (a)(2). But this might not always be the case. A candidate might call for a recount in a state where the margin is 0.75 percent, thereby requiring a recount under subsection (a)(1), but a recount would not be required under subsection (a)(2) if it were not a state so identified by the candidate.)

REPORTERS' NOTE

The idea of expedited procedures is hardly foreign to American law. Indeed, its application to elections—and specifically recounts—is not without precedent. Texas, for example, has a provision for an expedited recount in advance of a runoff election. See Texas Election Code Chapter 212, Subchapter D. The special need for expedition in the context of a runoff is apparent: the date for the runoff is fixed shortly after the initial election, and thus if there is doubt about which candidates qualify for the runoff, or whether the runoff is unnecessary because one candidate received a majority of votes in the initial election, this doubt needs to be resolved with special haste. Consequently, Texas law requires that "each recount committee involved in an expedited recount shall continue performing their duties on days that are not regular working days and during hours that are not regular working hours if necessary to complete the recount in time to avoid interfering with the orderly conduct of the scheduled runoff election." Id. § 212.089.

With respect to expediting the contest of a presidential election, Virginia has adopted the most comprehensive scheme of any state to date, and it is discussed in detail immediately following this overview. In addition, several states have statutes that require completion of a presidential contest by the Safe Harbor Deadline, but provide little or no specific instructions on how to structure the contest proceedings to achieve this objective. For example, California law simply provides:

> In a contest of the election of presidential electors the action or appeal shall have priority over all other civil matters. Final determination and judgment shall be rendered at least six days before the first Monday after the second Wednesday in December.

Cal. Election Code § 16003. Iowa law similarly requires that its court for a presidential contest "commence the trial of the case as early as practicable . . . and so arrange for and conduct the

trial that a final determination of the same and judgment shall be rendered at least six days before the first Monday after the second Wednesday in December." Iowa Code § 60.5.

Even the little express statutory language that California and Iowa provide regarding expediting a presidential contest—making it a "priority" or starting it as soon as "practicable"—is more than what Indiana law provides. Indiana's applicable statute states only:

> As required under 3 U.S.C. 5, any recount or contest proceeding concerning the election of presidential electors must be concluded not later than six (6) days before the time fixed by federal law for the meeting of the electors.

Indiana Code § 3-12-11-19.5. This simple decree, however, is no assurance of compliance. In 2000, after all, Florida wanted to complete its judicial contest of the presidential election before the Safe Harbor Deadline (according to the Florida Supreme Court's interpretation of the applicable statutes, thereby making them essentially equivalent on this point to Indiana's minimalist decree). But Florida was unable to complete its contest procedures by that deadline, at least in a way that contained sufficient safeguards of due process and equal protection according to the standards set by the U.S. Supreme Court.

Part III and its Procedures take a dramatically different approach. They do not merely assert an obligation to finish by the Safe Harbor Deadline. Instead, they set forth a mechanism designed to accomplish this directive. The fundamental judgment that underlies Part III is that, based on the experience of not only Florida in 2000 but also recent high-profile disputes in nonpresidential elections, specifying this kind of structural mechanism is necessary and that otherwise it is illusory to expect compliance with a purely minimalist decree of the type that Indiana's statute exemplifies.[10]

Tennessee, by contrast, takes expedition of a presidential election to an extreme. It requires the resolution of a contest to occur "before the last day of November"—well before the expiration of the Safe Harbor Deadline. Tenn. Code § 2-17-103. But the state vests authority over the contest of a presidential election in a nonjudicial body "composed of the governor, secretary of state and attorney general." Id. Given the partisan nature of this "presidential electors tribunal," any questionable decision it might reach concerning the counting of ballots

[10] Connecticut law requires a contest of a presidential election to end "before the first Monday after the second Wednesday in December" but does not endeavor to take advantage of the Safe Harbor provision. Conn. Gen. Stat. Ann. § 9-323. Delaware law likewise empowers the Superior Court of Kent County to constitute "a special board of canvass to hear and determine all contests of elections of electors of President and Vice-President" with the authority to adopt procedures as necessary to comply with "the Act of Congress fixing the day of the meeting of electors." 15 Del. Code § 5927. (Delaware, however, has not updated the specific dates contained in its election code to comport with the congressional calendar for the Electoral College. Thus, when Delaware law says that certification of the results of a contested presidential election must occur "on or before January 1," § 5928, that date is inconsistent with the state's own requirement in § 5927 of the obligation to comply with the applicable Act of Congress.)

cast by citizens would invite litigation in some judicial forum, either state or federal, based on the constitutional principles articulated in Bush v. Gore and related cases.[11]

Georgia requires expedition for judicial contests of elections generally. As the Georgia Supreme Court has observed, "[t]he legislature has demonstrated that election contests are to be heard with the greatest of expedition." Swain v. Thompson, 635 S.E.2d 779, 781 (Ga. 2006). This observation has caused the state supreme court to strictly enforce filing deadlines associated with the litigation of a contest, including requiring dismissal of a contest for failure to comply with tight deadlines.[12] Nevada law expressly provides as a general matter: "Election contests shall take precedence over all regular business of the court in order that results of elections shall be determined as soon as practicable." Nev. Rev. Stat. § 293.413(2).

It is perhaps surprising that more states have not adopted specific procedural mechanisms for the expedited adjudication of disputes over the counting of ballots in a presidential election. See also Joshua Douglas, *Procedural Fairness in Election Contests*, INDIANA L.J. 1, 31 (2013) ("Surprisingly, not every state spells out how to decide election contests for presidential electors."). Even after the experience of Florida in 2000, states generally have not undertaken the effort to promulgate detailed procedures designed to maximize the chances of resolving a disputed presidential election within the five or six weeks necessary in light of the congressional Electoral College calendar. Indeed, Florida itself has adopted no such expedited process for a contested presidential election, despite being the state that ran out of time to conduct its proceedings in 2000, as justices of its own supreme court then lamented. See Gore v. Harris, 770 So. 2d 1243, 1273 (Fla. 2000) (Harding, J., joined by Shaw, J., dissenting) (quoting Vince Lombardi's aphorism: "We didn't lose the game, we just ran out of time."). To be sure, after 2000, Florida eliminated the punch-card machines and their "hanging chads," which caused the particular vote-counting dispute that prevented the state from completing adjudication of the pending judicial contest of the election before the 2000 Safe Harbor Deadline. But Florida, like other states, has not created an expedited judicial process that would enable it to complete a contest of a presidential election that involved other issues, like those concerning provisional or absentee ballots.

Virginia's procedures for a disputed presidential election. One state to have undertaken an effort to coordinate recount and contest procedures in a presidential election so as to enable the state to meet the Safe Harbor Deadline is Virginia. (Ohio, as discussed in the Reporters' Note to § 313, has eliminated the availability of judicial contests for a presidential election, but this elimination is not coordination and, as explained therein, presents additional problems.) Virginia Code § 24.2-801.1 sets forth a special recount procedure for a presidential election, requiring the recount to be "completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days

[11] Texas, even more surprisingly, vests authority to adjudicate a contested presidential election solely in the hands of the state's governor, Tex. Code §§ 221.002(e), 243.012(a), thereby inviting even more than Tennessee a lawsuit on the grounds of arbitrariness under Bush v. Gore.

[12] At least two states, Arizona and Ohio, have specific procedures for expedited appellate- or supreme-court consideration of election-related litigation, although these procedures are designed for emergency matters that need to be settled before the casting of ballots in an election. See AZ ST CIV A P Rule 10; Ohio S. Ct. Prac. R. 12.08.

before the time fixed for the meeting of the electors." Virginia Code § 24.2-805, in turn, sets forth a special contest procedure for a presidential election, also requiring the contest to be "completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the meeting of the electors."

Moreover, these two provisions cross-reference each other in an effort to work together to achieve an expeditious resolution of a disputed presidential election. Both the recount and contest proceedings must commence within two days after certification of the election by the State Board of Elections (and are commenced by a candidate who is not the certified winner filing a petition to initiate a recount or contest[13]). Section 805 explicitly mandates that "the contest shall not wait upon the results of any recount."

In addition, § 801.1 provides that the recount shall be supervised by a specially constituted three-judge court, just as § 805 provides for the adjudication of a contest of a presidential election. This presidential-contest court, under § 805, is "composed of the chief judge of [the Richmond] circuit court and two circuit court judges of circuits not contiguous to the City of Richmond appointed by the Chief Justice of the Supreme Court of Virginia." Similarly, § 801.1 states:

> As soon as a [presidential recount] petition is filed, the chief judge of the [Richmond] Circuit Court shall promptly notify the Chief Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a [presidential-contest] court appointed and sitting under § 24.2-805.

This statutory language does not exactly say that the three judges who supervise the recount will be the same individuals as the three judges who will adjudicate the contest. Under the two provisions, the chief judge of the Richmond circuit court must be one of the three judges, so the recount and contest panels must overlap at least to that extent. But the statutory language does not entirely rule out that the Chief Justice of the Virginia Supreme Court could appoint two circuit judges, A and B, to supervise the recount panel and two different circuit judges, C and D, to adjudicate the contest. That reading of the statute would defeat the efficiency to be gained from having all three judges be identical for both the recount and contest of a presidential election, and thus that interpretation of the statute should be disfavored for that reason alone. In any event, there is nothing in the statute to prevent the Chief Justice from serving the value of efficiency by exercising the appointment authority to make all three judges identical for both functions (even if the statute does not strictly so require).

Virginia is certainly to be commended for undertaking an effort to coordinate its recount and contest procedures for a presidential election in a way to enable the state to meet the Safe Harbor Deadline. And Virginia is a state with particularly noticeable success in resolving high-

[13] To initiate a recount, the margin between the petitioning candidate and the certified winner must be "not more than one percent of the total votes cast for the two such candidates." Va. Code § 24.2-800(B).

profile disputes in statewide elections. From a U.S. Senate election in 1978 to a gubernatorial election in 1989 to two recent Attorney General elections, one in 2005 and another in 2013, Virginia has managed to reach closure of these disputed elections with relative dispatch—by mid-December in all four instances—and without contentious or protracted litigation. See Foley, BALLOT BATTLES at 248, 334-336 & Appendix. With this solid track record, Virginia deserves to have its special procedures for a disputed presidential election evaluated with deference and respect.

Nonetheless, for several reasons the particular provisions that Virginia has adopted, while superior to those in other states, remain less than optimal. First and foremost, contrary to the approach reflected in this Part III and especially in this particular Section of its Procedures, Virginia does not begin to implement its special provisions tailored to the exigent circumstances of a disputed presidential election until two weeks after Election Day. There is no statutory mechanism in Virginia for triggering expedition in a disputed presidential election immediately after Election Day in the circumstance when the nation and world know that the presidential election "is too close to call" and the outcome hangs on Virginia. Even in this situation, Virginia law expends the first two-fifths of the five-week period available under the Safe Harbor Deadline by proceeding as if the situation involved a conventional nonpresidential election. Only during the latter three-fifths of the five-week period do special procedures for a disputed presidential election begin to kick in. Waiting two-fifths of the way through the five-week period available is unwise, given the urgency of an unresolved and potentially litigation-filled presidential election. One cannot predict exactly what issues might arise during the five-week period, and there easily might end up being not enough time available at the back end because of the failure to enter into special expedited mode at the beginning of the process.

Both § 801.1, the presidential-recount provision, and § 805, the presidential-contest provision, explicitly refer to the certification of the election under § 24.2-679 as the predicate for commencing special expedited proceedings in a disputed presidential election. A candidate cannot formally request a recount, and thus start the official recount process, until there has been a certification of the election under § 679 and it is determined that the candidate is within one percent of the certified winner. See § 800. Likewise, a candidate cannot contest a presidential election under § 805 until after it has been certified under § 679.

But § 679 applies to all elections not just presidential ones. And it provides that the State Board of Elections shall meet to certify a November election "on the third Monday in November." This day will always be 13 days after Election Day, which is the first Tuesday after the first Monday. Thus, there will always be a passage of essentially two weeks before the particular presidential provisions of §§ 801.1 and 805 apply. Virginia law sets forth rules for what must occur prior to the State Board's certification under § 679—rules that govern what this Part III terms the conduct of the canvass. But these pre-certification rules apply generally to presidential and nonpresidential elections alike, and there is no provision for special expedition of the canvass solely as it pertains to an unresolved and disputable presidential election. Thus, Virginia law fails to take advantage of the possibility of expediting proceedings in an unresolved

presidential election immediately after Election Day (and certainly before the canvass is certified two weeks later).

Somewhat acknowledging this deficiency, § 801.1—the provision for a presidential recount—contains this hortatory request: "Presidential candidates who anticipate the possibility of asking for a recount are encouraged to so notify the State Board by letter as soon as possible after election day." But this kind of supplicating language—almost beseeching or imploring—is odd for a statute. It certainly is no substitute for the kind of mandatory trigger of an expedited presidential recount that this Part III and its Procedures contain. All of the research and analysis undertaken as preparation for this Part III, including meetings with local and statewide election officials experienced with the conduct of high-profile recounts, has led to the judgment that all states, including Virginia, would benefit from a provision that triggers expedition in an unresolved presidential election immediately after Election Day. This expedition, as provided by this Part III and its Procedures, entails immediate commencement of the recount, rather than treating the canvass as if it were a conventional nonpresidential election and waiting until certification of the canvass before beginning the expedited presidential recount.

A second and somewhat related concern about Virginia's procedures for a disputed presidential election is their omission of any specified process for addressing issues that arise concerning the eligibility of disputed ballots, like those that afflicted Washington's 2004 gubernatorial election or Minnesota's 2008 U.S. Senate election. Section 24.2-802, which governs presidential as well as nonpresidential recounts, expressly states: "a recount shall be based on votes cast in the election and shall not take into account any absentee ballots or provisional ballots sought to be cast but ruled invalid." Presumably, if evidence showed that enough invalidated absentee or provisional ballots had been wrongly invalidated to make a difference in the outcome of the race—the kind of claim at the heart of Minnesota's 2008 election and also prominent in Washington's 2004 dispute—this claim could be litigated in a contest under § 805. But as discussed more fully in the Reporters' Note to § 310 (see also the Comment to § 308), experience shows that in a high-profile disputed election, there will be overwhelming pressure to litigate the eligibility of these ballots prior to certification of the canvass, rather than waiting for a judicial contest. This pressure, already intense in a U.S. Senate or gubernatorial election, would be withering if the presidency is on the line. Thus, during the two weeks prior to certification of the canvass in Virginia, if there were a serious dispute over uncounted but potentially eligible ballots, as in Minnesota or Washington, the candidates would pursue all possible avenues to litigate the eligibility of those ballots immediately, in some sort of pre-certification proceeding. Virginia, however, has no provision to handle this contingency. Accordingly, the inevitable litigation—perhaps seeking a writ of mandamus or invoking some other form of emergency judicial relief—will be more disorderly and chaotic than would be the case if a statute specified a procedure to handle this kind of claim. This disorder and chaos invites the kind of delay that risks the inability to complete proceedings within the Safe Harbor Deadline, thereby defeating Virginia's explicit goal for its special recount and contest procedures for a disputed presidential election. Consequently, like other states, Virginia would be better

served by having a special proceeding for judicial review of ballot-eligibility determinations made during the canvass, like the special proceeding set forth in § 310 of these Procedures.

Finally, it is unclear whether Virginia permits an appeal to the state's supreme court in a contest under § 805. Virginia expressly precludes any appeal in a recount under § 801.1. See § 802 ("The recount proceeding shall be final and not subject to appeal.") But the relevant statutes appear to contain no comparable provision, one way or the other, regarding the possibility of an appeal in a judicial contest of a presidential election. Given the explicit obligation of the three-judge contest court to complete its adjudication of the contest by the end of the Safe Harbor Deadline, but not sooner, there would be no time for an appeal if the contest court used up all the time available to it under § 805. Yet in a disputed presidential election, if a candidate thought an issue of substance might interest the members of the Virginia Supreme Court, the candidate is likely to knock on that court's door by way of a writ of mandamus or otherwise, unless explicitly prohibited from doing so. Cf. Kirk v. Carter, 202 Va. 335, 117 S.E.2d 135 (1960) (mandamus granted by Virginia Supreme Court of Appeals to require convening of three-judge contest court). Thus, if such a mandamus petition were filed in the Virginia Supreme Court, the state's statutes leave uncertain whether the state could complete its available judicial proceedings in a disputed presidential election by the end of the Safe Harbor Deadline, as evidently desired.

§ 304. Presidential Election Court

(a) *Appointment.*

(1) Within 24 hours after the Chief Elections Officer's declaration pursuant to § 303, the Chief Justice publicly shall announce the appointment of three judges to serve as the Presidential Election Court.

(2) The announcement specified in subsection (a)(1) shall *either* (A) confirm the selection of three judges whom the Chief Justice had designated for appointment in advance of Election Day, *or* (B), in the event that no such prior designation had been made, constitute the immediate appointment of the three judges.

(3) Regardless of whether the Chief Justice makes a prior designation under subsection (a)(2)(A), all steps concerning the designation and appointment of individuals to serve as judges on the Presidential Election Court shall occur pursuant to an appointment process publicly promulgated in advance of Election Day.

(4) The appointment process shall be designed to (A) result in a three-member panel structured to be impartial regarding the candidates and political parties competing to win the presidential election, and (B) select individuals to serve as judges on the Presidential Election Court who satisfy the highest standards of integrity, excellence, and evenhandedness applicable to other jurists in the state.

(5) In the event it becomes necessary to replace a judge appointed to the Presidential Election Court (due to death, resignation, removal under subsection (a)(6), or other reason for a vacancy), the Chief Justice shall immediately appoint a replacement subject to the following provisions:

(A) The replacement shall maintain the structural impartiality of the three-member panel as required by subsection (a)(4)(A) and the individual standards specified in subsection (a)(4)(B); and

(B) If a list of alternate judges to serve as potential replacements in the event of a vacancy has been developed in advance

of Election Day, the Chief Justice shall select a replacement from that list.

(6) Once appointed under subsection (a)(1), a judge's term of service on the Presidential Election Court lasts until the inauguration of a new president following the election, and during this term of service the judge may not be removed from the Presidential Election Court except by a unanimous vote of the State Supreme Court and only upon a showing that, after the appointment, demonstrable evidence has surfaced that negates the judge's ability to serve according to the requirement of structural impartiality in subsection (a)(4)(A) or the standards of individual character specified in subsection (a)(4)(B).

(b) *Authority.*

(1) The authority of the Presidential Election Court, as specified in these Procedures, is exclusive, to be exercised without interference from any other body, except insofar as a right of appeal to the State Supreme Court is provided pursuant to these Procedures.

(2) The Presidential Election Court, as a court of law, has the power to enter orders common to any ordinary court of law within the state, including orders to permit parties to its proceedings to conduct discovery to assist any factfinding the Court may undertake, provided that any such orders be consistent with the expedited nature of these Procedures.

(3) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, no court or other tribunal or agency of this state may extend or otherwise delay any deadline set forth in these Procedures.

(4) The Presidential Election Court and the State Supreme Court may set subsidiary deadlines and promulgate other subsidiary rules in order to facilitate implementation of these Procedures, provided that all such subsidiary deadlines and rules are consistent with these Procedures and do not alter any of its deadlines and provisions.

(5) If in contravention of these Procedures, the Presidential Election Court has missed any of its deadlines, the State Supreme Court may issue a remedial order calculated to enable compliance with the remaining deadlines and successful completion of all proceedings necessary to achieve Safe Harbor status under 3 U.S.C. § 5.

(c) ***Electronic Filing and Service.*** **To facilitate compliance with all deadlines provided in these Procedures, both the Presidential Election Court and the State Supreme Court shall establish and maintain a website and e-mail system to enable instantaneous communication as follows:**

(1) All court orders and announcements shall immediately be posted on the court's website and simultaneously transmitted by e-mail to all candidates who are parties to the court's proceeding, as well as to the state's Chief Elections Officer and to any other parties to the court's proceeding.

(2) Whenever a party is subject to a filing deadline caused by the release of a court order or announcement, including the deadline of filing a notice of appeal, the time for calculating the deadline shall begin as soon as the party receives from the court an e-mail notifying the party of the court's order or announcement.

(3) All notices of appeal must be timely filed with both the Presidential Election Court and the State Supreme Court, and the appellant must e-mail the notice of appeal to all other parties to the proceeding that produced the order being appealed.

(4) Whenever a party files a motion, brief, or other document in a pending court proceeding or appeal, the filing shall be by electronic transmission with the document immediately posted on the court's website established under this Section, and the party shall serve by e-mail a copy of the filing to all other parties to the court's proceeding.

(5) Each party to a proceeding or appeal shall designate a single attorney to receive all service of documents pursuant to subsection (c)(4), and this attorney shall specify the single e-mail address to use for this service; and for each proceeding or appeal, a list of all such attorneys and e-mail

addresses shall be publicly posted on the website of the court with jurisdiction over the proceeding or appeal.

(6) Whenever the Presidential Election Court has consolidated several proceedings, or the State Supreme Court has consolidated several appeals, the parties to each case so consolidated shall serve documents under subsection (c)(4) upon the parties to all other cases that are part of the same consolidation.

(7) Both the Presidential Election Court and the State Supreme Court are empowered to adopt additional rules to facilitate the efficient operation of this website and e-mail system and to maximize its effectiveness as a means of instantaneous communication of all relevant legal documents.

(8) *Consequences of noncompliance with electronic filing requirements.*

(A) The failure of a party to file a timely notice of appeal within the specified deadline causes forfeiture of the party's right to that appeal, thereby barring the State Supreme Court's consideration of that appeal.

(B) Pursuant to the authority granted in subsection (c)(7), both the Presidential Election Court and State Supreme Court may impose such sanctions as each deems fit for a party's failure to meet a deadline for filing a document as required in subsection (c)(2), including the sanction of dismissal of the particular proceeding or appeal; provided that in no circumstance may the Presidential Election Court or State Supreme Court waive a party's forfeiture of an appeal for failure to timely file a notice of appeal as required in subsection (c)(8)(A).

(d) *Standard of Review on Appeal.*

(1) In all appeals under §§ 307, 312, and 315, the State Supreme Court shall affirm the Presidential Election Court's decision unless the appellant establishes the decision to be contrary to law or resting upon a clearly erroneous finding of fact.

(2) In reviewing a decision of the Presidential Election Court under the standard set forth in subsection (d)(1), the State Supreme Court shall give due regard to the Presidential Election Court's structural impartiality, as required by subsection (a)(4), and accordingly should affirm the Presidential Election Court's decision whenever reversal would appear to negate or otherwise undermine the impartiality of an adjudication pursuant to these Procedures.

Comment:

a. Timing of appointment. It is highly advisable for the selection of the judges to serve on the Presidential Election Court to occur before the casting of ballots that the Court might be called upon to review. This is true for several reasons. First, in keeping with the basic philosophy of the congressional Safe Harbor provision of 3 U.S.C. § 5, the procedures that will be used to resolve a ballot-counting dispute in a presidential election should be determined in advance of the election itself. This basic idea is also applicable to the identity of the judges who will be called upon to adjudicate the dispute. If both major political parties embrace the appointment of specific individuals to serve on this panel before the ballots are cast, then neither side should be heard to complain about the identity of the panel after the ballots are cast, when the two sides now have very specific strategic interests depending on who is ahead and behind in the count. Although appointing the Presidential Election Court's members after Election Day does not deprive these Procedures of Safe Harbor status under 3 U.S.C. § 5 *as long as the appointment is made pursuant to law in place prior to Election Day*—and thus this Section is written to accommodate either prior or subsequent selection of judges pursuant to previously enacted law—it remains the strong recommendation that the selection occur in advance of the election.

b. The Presidential Election Court as a judicial court of the state. These Procedures are drafted to give states great flexibility in the design of the institution to serve the functions of the Presidential Election Court under these Procedures. The Presidential Election Court is envisioned as a judicial court of law, because some of its key functions are those traditionally associated with courts—most obviously, the judicial contest of an election, but also judicial review (whether by means of a writ of mandamus or otherwise) of the administration of the canvass, as well as judicial review of the recount. Moreover, in a disputed presidential election, it is virtually inevitable that the courts will become involved in litigation over the ballots, whatever particular

form the litigation takes. The Presidential Election Court is designed to be an institution that can handle whatever state-court litigation occurs under state law during the five-week period between Election Day and the Safe Harbor Deadline.

The simplest way for a state to fit this Presidential Election Court within the existing structure of a state's judiciary is to have the Chief Justice select three state judges, all of whom are already members of the state's judiciary, to serve on this special-purpose court. They could be appeals judges or trial judges, or a combination. Special-purpose judicial panels often are assembled for particular cases: complex or multidistrict litigation, for example. Thus, appointing a special panel to adjudicate the distinctively challenging litigation that arises in the context of a disputed presidential election would be well within the judicial tradition of appointing special-purpose panels for a variety of distinctive kinds of cases.

These Procedures, however, would permit a state to experiment with different ways of appointing its Presidential Election Court. If a state wished to confine selection to the pool of retired rather than active judges, for example, nothing in these Procedures would preclude the state from doing so. Indeed, if (insofar as permitted by other provisions of state law) the state wished to look beyond the members of its own judiciary, active or retired, for possible service on its Presidential Election Court—perhaps believing that there are esteemed public figures best suited for the delicate role of adjudicating a disputed presidential election—the Procedures are drafted in a way to accommodate that alternative as well. A state could also experiment with different procedural devices to constrain the appointment of the Presidential Election Court. For example, the state could require the Chief Justice to select three individuals from a list deemed acceptable to the majority and minority caucuses within the state legislature. Although no such requirement is part of these Procedures as drafted, a state that adopted these Procedures would be free to supplement them with additional provisions concerning the appointment of the Presidential Election Court if the state wished. Absent any such additional specifications, however, it should be assumed that the Chief Justice is to select three active state judges for special assignment to the Presidential Election Court.

c. Three members, rather than five or one (or some other number). These Procedures call for a three-member Presidential Election Court. Obviously, with minor adjustment, a state could employ these Procedures with a five-member panel instead. A state even could give the

assignment of all the functions to be performed by the Presidential Election Court to a single judge.

The Procedures, however, use three as the optimal number for several reasons. First, it must be an odd number to avoid the possibility of a tie. Second, one judge alone does not enable the increased confidence in the outcome that potentially comes when several members of a multimember body agree in their rulings. Obviously, dissent within a multimember body creates the converse problem, generating public concern about the basis for the dissent. But on balance the upside of consensus is preferable to the downside of dissent. With a single judge, from the outset the state is deprived of this potential upside. Third, having five judges rather than three significantly increases the risk of dissent, lowering the likelihood of consensus. Five also increases coordination challenges, a concern when the time pressure is acute, as it is during this five-week period. As a related point, it is more difficult to generate collegial working relationships among a five-member, rather than three-member, panel, especially one that is a single-purpose entity that exists only for a short duration. The state's supreme court also has a major role under these Procedures, and it is likely to have more than three members. Thus, there is little to be gained from another larger judicial body involved in the adjudication of disputed presidential ballots. On balance, it is best to have a three-member panel with appeal to the existing state supreme court.

d. The importance of impartiality. In order for the outcome of a disputed presidential election resolved pursuant to these Procedures to have legitimacy, it is imperative that the Presidential Election Court be structured to be as impartial as possible towards the candidates and political parties competing in the election, and for it to be perceived as such. The process for the appointment of its members must guard against bias in the composition of the court. It is also important that each of the three individuals selected to serve as judges of the Presidential Election Court have impeccable reputations and will strive to be fair-minded.

The nation's historical experience shows that, as a practical matter, the greatest risk of public dissatisfaction—and thus public turmoil—following a disputed election occurs if the public perceives that the tribunal responsible for adjudicating the dispute was structurally biased to favor one side. For example, if the tribunal has two members of one major party and only one member of the other major party, it will be perceived as biased against the latter party even though that party has a seat at the table and a voice in the deliberations.

The great challenge is to create a body with an odd number of members so as to avoid the deadlock of a tie vote, yet maintain an even balance between the political parties whose candidates are involved in the dispute. The Presidential Election Court should not follow the model of the Federal Election Commission, which is structured to have three Democrats and three Republicans and which routinely deadlocks in 3-3 partisan splits. When the outcome of a presidential election turns on resolving a vote-counting dispute in one or more states, the nation urgently needs to know which candidate won the state (or states) that will give one of them the requisite majority of Electoral College votes. It would be unacceptable to have the Presidential Election Court stymied by an intractable tie vote.

The goal, then, is to design ahead of an election a tribunal that is likely to maximize the appearance of impartiality. One approach to this end is to have a tribunal with an equal number of partisans on each side, but also with a neutral tiebreaker in the event that the partisans on each side split along party lines. It undeniably is a challenge to find an individual to sit on the court whom both sides to the dispute would accept as genuinely neutral. This is particularly true in a presidential election, when presumably every person who otherwise possesses the qualities appropriate for membership on the body responsible for adjudicating the dispute—intelligence, civic-mindedness, public-spiritedness, and the like—would be knowledgeable about the competing candidates and their campaigns and likely would have formed a personal opinion on which of the two would make a better president. Nonetheless, in a nation of over 300 million citizens, it would be overly cynical to maintain that no one could be found whom both sides would accept as impartially fair-minded as well as competent to the task of adjudicating the vote-counting dispute. Especially if the pool of potential candidates for this position is not confined to currently sitting judges—but instead extends to retired judges or even to highly regarded individuals from various professional backgrounds (university presidents, journalists, doctors, scholars, engineers, and so forth)—one can begin to imagine eminent public figures whom partisans on both sides would trust as being capable of resolving the dispute as fairly and impartially as humanly possible. It would not be necessary for a state to confine its search for such individuals to within its own borders. Instead, precisely because the entire nation elects the president and thus has an intense stake in the outcome, a state facing an outcome-determinative dispute over the winner of its Electoral College votes should be free, if it wishes, to look to other states for candidates suitable for appointment to its Presidential Election Court.

A state might employ a variety of different methods to achieve the goal of structural impartiality for its Presidential Election Court. The following Illustrations provide some suggestions but are not intended to be exclusive.

Illustrations:

1. The state's Chief Justice requires the two candidates to the dispute to agree upon the three members to serve on the court. The Chief Justice of Minnesota used this method for the state's disputed gubernatorial election of 1962. The two candidates selected one judge having an identifiable background associated with one party, a second judge having an identifiable background associated with the opposite party, and a third judge whose background was not identifiably associated with either party and thus who was perceived by both sides as credibly neutral and impartial. (All three were deemed to have the character and temperament to be able to set aside partisan considerations.) This method has the virtue of assuring that the three-member panel is acceptable to both candidates. Its disadvantage is that it is more difficult to employ in advance of the election and the existence of an actual dispute. Requiring the presidential candidates to agree in advance of the election to the members of three-judge courts in all states where there could be an outcome-determinative election dispute would be cumbersome and inefficient, especially if there were more than two credible presidential candidates.

2. Before Election Day, the state's Chief Justice announces the selection of two distinguished jurists to the state's Presidential Election Court, each clearly identified as having different partisan backgrounds—for instance, one Democratic, the other Republican—and calls upon these two jurists to choose a mutually acceptable third member of the panel. This method of appointment is similar to one frequently employed in labor-management or other arbitrations. It has the distinctive advantage that the third member is structurally neutral between the other two members, given their bilateral agreement to select this third member. If the two members selected by the Chief Justice are perceived as equally representative of the two political parties, then the parties are positioned to perceive the third member as credibly neutral towards them.

With this appointment method, the Chief Justice obviously must take great care in selecting the first two members of the panel. If one of the two is perceived as a thoroughly committed partisan, while the other is perceived as only a token or ersatz

member of the other party, the panel will be perceived as lopsided, and the third member will also be perceived as tilted to one side. Consequently, it is essential that the two members appointed by the Chief Justice be perceived by both sides as equally loyal to their respective parties. Yet it is also important to the sound functioning of America's legal system that judges *not* be considered as representatives of political parties, and certainly not in the same way as are members of the state's legislature. Instead, the obligation of a judge in all cases is to adjudicate disputes fairly and impartially, without regard to party affiliation. Accordingly, in appointing these two members of the Presidential Election Court, the Chief Justice should be seeking two individuals, although one a Democrat by background and the other a Republican, who have equivalent reputations for having the character and temperament to be able to set aside partisan considerations. Both of these individuals must endeavor faithfully to adjudicate fairly and impartially according to the applicable law and evidence—and *not* simply seek to protect their respective parties, adjudicating the vote-counting dispute solely based on partisan considerations. If the Chief Justice selects well, these two will pick a third member of the panel who, in addition to being acceptable to the two parties, is also temperamentally predisposed to decide the case as fairly and impartially as possible. This method of selection thus creates the possibility of an adjudication of the dispute that is both genuinely evenhanded towards both sides and, even more importantly, perceived as such by both sides.

While this method of appointment has this prospect for success, it is less well-suited for handling a dispute that involves a third-party or independent candidate. If the Chief Justice has appointed a Democrat and a Republican to the panel, and the two of them pick a nonpartisan neutral, but it turns out that the disputed election is between a Democrat and a third-party candidate, this third-party candidate and other members of that party may perceive the panel as biased in favor of the Democratic candidate and party. The risk of this kind of problem arising, however, diminishes if the Chief Justice exercises care in timing. On or around Labor Day, public opinion polls may give the Chief Justice a sufficient sense of the likelihood that there might be a disputed presidential election involving a candidate other than those of the two major parties. If so, between Labor Day and Election Day, the Chief Justice can select panel members

accordingly. If there are more than two presidential candidates in serious contention, the Chief Justice could make contingent appointments of two members to more than one prospective Presidential Election Court. In each case, the Chief Justice would leave it to the two appointees to select the third member of the panel. These selections also could be made before Election Day, with the particular panel to be officially convened as the operative Presidential Election Court under § 304(a) depending on the dispute that actually arises after Election Day.

3. In a state where a third party has a robust presence, the Chief Justice announces the appointment to the Presidential Election Court of three members, each of whom reflects a different partisan background. Minnesota employed a version of this appointment method for its disputed 2008 U.S. Senate election: one judge had come to the bench from a Democratic background, the second from a Republican background, and the third had been appointed to the bench by Governor Jesse Ventura, an Independent. (Ventura had been the candidate of Minnesota's Independence Party.) The resulting three-member panel was characterized as the "tripartisan" court by journalists in the state. The local press also perceived that this method of appointment caused the court to achieve structural impartiality towards the two disputing candidates, one a Democrat and the other a Republican. There had also been a candidate of the Independence Party, Dean Barkley, in this same U.S. Senate election. Presumably the same tripartisan panel also would have achieved the same structural neutrality if the dispute had been between the Independent and either the Democrat or the Republican—or even an unusually close election that had involved a vote-counting dispute among all three candidates.

4. In a state where it is well known that the state's supreme court is closely and sharply divided along partisan lines (for example, a 4-3 split between Republican and Democratic justices on the court), the Chief Justice announces that the supreme court's members unanimously support the appointment to the state's Presidential Election Court of the three individuals whom the Chief Justice has designated for this service. This unanimity signals to both parties that the three-member panel should be equally acceptable to both sides and has been selected to be structurally impartial towards both sides. Indeed, with this method of appointment it is unnecessary that the resulting panel be seen as having an identifiable Democrat and an identifiable Republican. Instead, if all

three members of the panel are perceived as unaffiliated and neutral between the two parties, the unanimity of the supreme court despite the strong and divided partisanship of its members could provide adequate assurance that the panel is structurally unbiased and impartial, coming to the case collectively open-minded and ready to let the evidence and applicable law dictate their decision.

5. A state adopts a two-step process whereby the Chief Justice first designates a Nominating Committee tasked with selecting the three individuals to serve on the Presidential Election Court and then, upon receipt of these three nominees, officially appoints them as the members of this court. Regardless of the partisan composition of the state supreme court, this type of Nominating Committee can be structured to give equal representation to different political parties. For example, the Chief Justice could appoint two Democrats, two Republicans, and two independents to the Nominating Committee, and could require all six of them to agree unanimously on three nominees to serve as the Presidential Election Court judges. Although there would be a risk that the Nominating Committee would deadlock over selection of the three nominees for the court, on the assumption that the Nominating Committee deliberates in good faith the risk should be relatively small since they would not be deciding the disputed election itself. Moreover, because the Nominating Committee would be doing its work in advance of Election Day (with no actual dispute at hand), the committee would have less incentive to risk the public shame and humiliation of being unable to perform the single task of identifying three individuals to serve on the Presidential Election Court.

As long as the members of the Nominating Committee were well selected by the Chief Justice—with the committee itself publicly perceived as fair and impartial towards the competing political parties—then the three-judge panel unanimously chosen by the committee should also be perceived as fair and impartial to the parties and candidates involved in a dispute after Election Day. Once again, it would not be necessary for any of the three nominees to themselves have identifiably partisan or nonpartisan backgrounds. Instead, the presence of identifiable partisans (or independents) on the Nominating Committee should suffice to provide the Presidential Election Court with the requisite character of structural impartiality and evenhandedness.

These Illustrations are not intended to be exhaustive. States adopting these Procedures are free to experiment with other methods of appointment reasonably designed to achieve § 304(a)(4)(A)'s overarching objective of structural impartiality.

e. Each state's Presidential Election Court as a single body to handle multiple functions. These Procedures channel all litigation that may arise within a state concerning disputed presidential ballots to a single institution for adjudication. In order to engineer an efficient procedure that will enable a state to meet the five-week Safe Harbor Deadline, a single court must be empowered to hear all issues arising over the ballots. There is too great a risk of unnecessary delay if some additional body needs to reconcile potentially conflicting rulings and pronouncements from multiple judicial bodies within the state.

For this essential reason, these Procedures give the Presidential Election Court the authority to adjudicate any judicial contest over the presidential election in the state, and also to conduct any judicial review of administrative decisions that occur during the canvass, as well as to resolve all disputes that occur in the context of the recount itself.

f. A Presidential Election Court in each state. It should be clear from the scope of its powers under these Procedures that the Presidential Election Court is a state court, and not a federal one. It derives its adjudicatory authority from state law, although the state's own power to grant one of its courts this adjudicatory authority ultimately stems from the state's power to appoint presidential electors, vested by Article II of the federal Constitution. A state's Presidential Election Court has jurisdiction solely over disputes arising from the November balloting to appoint that particular state's presidential electors. Its jurisdiction does not extend to similar disputes that may arise over the appointment of a different state's presidential electors.

Thus, it is possible that there may be simultaneously two or more different Presidential Election Courts conducting separate adjudicatory procedures in separate states. Just as the Chief Elections Officer of two or more states may need to trigger an Expedited Presidential Recount in their respective states, as explained in the Comment to § 303, so too may the Chief Justices of these multiple states need to announce the appointment of a Presidential Election Court in each of these states. Thus, for example, if expedited proceedings are occurring simultaneously in both

Ohio and Nevada, it will be necessary to distinguish between the Presidential Election Court of Ohio (PEC-OH) and the Presidential Election Court of Nevada (PEC-NV).[14]

g. The relationship of the Presidential Election Court and the state's supreme court. These Procedures give a crucial role both to the special Presidential Election Court as the single court of original jurisdiction empowered to adjudicate all issues arising over the counting of the state's ballots in the presidential election and to the state's supreme court insofar as it is empowered to exercise appellate jurisdiction over the Presidential Election Court. In this respect, these Procedures repose great trust in both of these state judicial institutions. It is up to those institutions to show themselves worthy of this trust, or else risk the intervention of the federal judiciary notwithstanding the presumption against federal-court interference (described in the Comment to § 302) as long as the state courts comply with these Procedures.

The State Supreme Court is bound by these Procedures and should consider itself so bound even if it was the institution that promulgated them into state law. Safe Harbor status requires following the law as it existed on Election Day, and the State Supreme Court should endeavor faithfully to follow the state law then in effect, including these Procedures. Insofar as a State Supreme Court *sua sponte* deviates from these Procedures, the State Supreme Court risks not only depriving the state of Safe Harbor status but also inviting federal-court involvement since the presumption of regularity no longer applies.

Like the Presidential Election Court, the State Supreme Court is empowered to promulgate supplementary rules consistent with these Procedures, in an effort to enhance their effectiveness. When both courts promulgate supplementary rules in this way, those of the State Supreme Court take precedence, given the court's higher authority within the state's judicial system.

h. Standard of appellate review. Subsection (d)(2) takes cognizance of the Presidential Election Court's structural impartiality in fashioning an important constraint on the ordinary exercise of appellate review when undertaken by the State Supreme Court pursuant to these Procedures. State supreme courts are not structured to be balanced and evenhanded between competing political parties. On the contrary, it is possible—even frequent—that a state's

[14] A state might also choose to give an alternative name to the judicial panel that functions as the Presidential Election Court under these Procedures. For example, a state wishing to be especially precise could denominate this judicial body as the Court for the Adjudication of Disputes over the Appointment of Presidential Electors. But one goal of these Procedures is to be as accessible and understandable to the general public as possible. Given this goal, Presidential Election Court seems a more straightforward name.

supreme court is dominated by one political party or another, and fractured along party lines, or at least the public so perceives. Thus, while subsection (d)(1) confirms that under these Procedures a state's supreme court in exercising appellate jurisdiction over the Presidential Election Court has the ordinary authority to reverse a decision on appeal when the appellant shows the decision to be contrary to law or resting on a clear error of fact, subsection (d)(2) further provides that, in exercising this authority, the state's supreme court must be cognizant of the Presidential Election Court's special feature of structural impartiality, which is a crucial feature of any adjudication pursuant to these Procedures.

Accordingly, a state's supreme court should never reverse a decision of the Presidential Election Court when the reversal would cause the public to lose confidence in the impartiality of an adjudication under these Procedures. Such a situation easily could occur if, for example, the three-member Presidential Election Court rendered a unanimous decision, but the State Supreme Court reverses that decision by a 4-3 split along party lines. In order to avoid this consequence, the State Supreme Court should refrain from issuing a reversal of this nature. If necessary, the State Supreme Court could remand the case to the Presidential Election Court for clarification, with the goal that the Presidential Election Court would be able to render a decision that is both perceived as impartial and ultimately acceptable to the State Supreme Court, whose final decision would also appear nonpartisan.

To be sure, the State Supreme Court is the highest judicial authority in the state and, as such, has the power to reverse a decision of the Presidential Election Court if the majority of the State Supreme Court considers the decision on appeal to be legally incorrect. If the majority of the State Supreme Court truly views the decision under review as unsound, even if that decision was unanimous, the majority will be disinclined to consider the decision to be worthy of respect. Therefore, the majority may be tempted to view reversal as appropriate, even under subsection (d)(2), and even if reversal by the majority would split the State Supreme Court along party lines, thereby provoking an impassioned dissent. As a practical matter, therefore, the overriding objective of subsection (d)(2) is to instill in the State Supreme Court a sense of self-restraint, which would cause the justices of the state's highest court to ask themselves whether they are indeed correct in their initial inclination to view the Presidential Election Court's decision as legally unsound. Ultimately, as already indicated, successful employment of these Procedures depends on the State Supreme Court exercising wise and careful judgment on behalf of the

public as a whole, without itself yielding to potential partisan temptations that may exist among the court's members.

REPORTERS' NOTE

Specialized election courts. The idea of a special court to adjudicate a dispute over the counting of ballots in an election is not novel. Minnesota used special three-judge courts to adjudicate contests of its 1962 gubernatorial election and its 2008 U.S. Senate election, as described in the Illustrations to Comment *d*.

Several states have provisions similar to Minnesota's for the appointment of special courts to adjudicate election contests. Kansas vests the adjudication of a contested presidential election in a three-judge court appointed by the Kansas Supreme Court (not its Chief Justice alone). Kan. Stat. Ann. §§ 25-1437 & 25-1443. For a contested presidential election, as discussed in the Reporters' Note to § 303, Virginia also uses a special three-judge court, two members of which are appointed by the state's Chief Justice and the third is the chief judge of the circuit court in Richmond. Va. Code Ann. § 24.2-805. North Dakota employs a three-judge panel, one of whom is the state's Chief Justice and the other two are district judges designated by the state's governor. N.D. Cent. Code § 16.1-14-07.[15] Maryland will empanel a three-judge court for a contested presidential election upon request of a party or at the discretion of the trial court in which the contest is filed. Md. Code Ann., Elec. Law § 12-203. Iowa uses a special five-judge panel, consisting of the Chief Justice and four district-court judges that the supreme court selects. Iowa Code § 60.1. For a valuable discussion of these provisions, see Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 INDIANA L.J. 1 (2013).[16]

Connecticut assigns the litigation of a disputed presidential election to a special panel of three Supreme Court judges, two of which are chosen by the "Chief Court Administrator" and the other selected by the candidate "who claims . . . that there was a mistake in the count of the votes." C.G.S.A. § 9-323. Two states vest original jurisdiction over a contested presidential election directly in the full State Supreme Court: Colorado and Hawaii.[17] This project considered adopting this approach, thereby dispensing with a separate appeal to the State Supreme Court. Doing so has the obvious benefit of saving time, no small consideration in the context of a disputed presidential election. But even if original jurisdiction over a contested presidential election is vested directly in a State Supreme Court, that court is likely to designate a special master or some similar subsidiary authority to conduct any trial or other factfinding hearing that

[15] "If the chief justice is unable to attend at such trial, the next senior judge on the supreme court shall preside in place of the chief justice." Id.

[16] For contests of certain kinds of nonpresidential elections, West Virginia employs a procedure in which the contestant chooses one judge, the contestee another, and the governor the third. W. Va. Code § 3-7-3. Pennsylvania has a rather odd provision, applicable to a presidential election and some (but not all) other elections in the state, pursuant to which jurisdiction over the contest lies in a court of *two* judges. Pa. Stat. §§ 3291, 3351.

[17] See Joshua Douglas, *Procedural Fairness in Election Contests*, 88 INDIANA L.J. 1 (2013) (appendix), citing Colo. Rev. Stat. § 1-11-204 & Haw. Rev. Stat. §§ 11-171 to -175. Maine similarly vests an appeal of a recount in its state supreme court. Me. Rev. Stat. tit. 21-A, § 737-A(10).

involves the presentation of testimony. Indeed, Missouri expressly authorizes its State Supreme Court to appoint a commissioner to assist its adjudication of a contested election (a provision applicable to other statewide offices but not expressly to presidential elections). Mo. Stat. §§ 155.555, .561.[18] Thus, in the adjudication of any ballot-counting dispute there inevitably are two component parts of the process: the finding of facts based on the receipt of evidence, and the determination of applicable legal rules. Given this reality, there are benefits of employing a Presidential Election Court to conduct the factfinding trial and make a preliminary ruling on the applicable legal issues, before permitting an appeal to the State Supreme Court. For one thing, in recent years a number of state supreme courts have become mired in political controversy. A state can reduce the risk of such controversy engulfing the adjudication of a disputed presidential election by setting up a special Presidential Election Court for this purpose, rather than vesting this adjudication directly in its State Supreme Court. In addition, employment of a Presidential Election Court rather than a single special master or commissioner to engage in the necessary factfinding is likely to inspire greater public confidence (for the same reason that a three-judge panel is preferable to a single judge for this kind of case, as discussed in the Comment above). But if a state wishes to vest original jurisdiction over a disputed presidential election in its Supreme Court, rather than relying on a Presidential Election Court for this purpose, then a state can modify these Procedures to eliminate the appeals provided in §§ 307, 312, and 315.[19]

One important point to note when considering the relative advantages of using a special Presidential Election Court, rather than vesting original jurisdiction in the State Supreme Court, is that Part III of this project recognizes that any election contest is but one particular form of judicial procedure to be invoked in a disputed presidential election. As discussed in the Introductory Note, there are also, potentially, petitions seeking judicial review of the recount or canvass. Without a special Presidential Election Court, either the State Supreme Court will be tied up with original jurisdiction over all these forms of procedure or else various trial courts in the state may have conflicting jurisdiction over different forms of litigation (for example, one trial court hearing claims concerning the recount and another hearing claims concerning the canvass). An advantage of the approach adopted in these Procedures is that it vests all of these potential judicial proceedings in a single Presidential Election Court, achieving the benefits of

[18] Nevada has a similar provision: "The court may refer the contest to a special master in the manner provided by the Nevada Rules of Civil Procedure, and such special master shall have all powers necessary for a proper determination of the contest." Nev. Rev. Stat. § 293.413(3).

[19] It would also be possible for a state to vest original jurisdiction in the Presidential Election Court and then expressly preclude any right of appeal to the State Supreme Court, making the Presidential Election Court's judgments absolutely final and conclusive. This option was also seriously considered for purposes of this project but ultimately, on balance, these Procedures retain appellate jurisdiction for the State Supreme Court. The reason for doing so is the belief that the public more likely will believe the entire process (and thus the result the process reaches) more legitimate if the traditional State Supreme Court is not entirely divested of a role in reviewing the legal issues that arise. If, however, a state wishes to use these Procedures to structure litigation in the Presidential Election Court, but simultaneously preclude any appellate review in the State Supreme Court, a state could simply eliminate the appellate provisions of §§ 307, 312, and 315—just as it could if it vested original jurisdiction in the State Supreme Court. (Doing so would permit some adjustment of the deadlines to give the Presidential Election Court additional time within the five-week Safe Harbor period.)

channeling all this litigation to a single judicial body while simultaneously freeing up the State Supreme Court to consider only appeals of the Presidential Election Court's rulings as necessary (so that the State Supreme Court is not burdened with every detail of all this litigation).

Impartiality. Recognition of the necessity for the tribunals that adjudicate major vote-counting disputes to be structurally impartial and evenhanded toward the two competing political parties and their candidates goes back in American history to 1792. In that year New York had a disputed gubernatorial election between incumbent George Clinton, representing the nascent Jeffersonian party, sometimes called Democratic-Republicans, and John Jay, representing the emerging Federalist party. The outcome of the election turned on disputed ballots from Cooperstown. The tribunal with exclusive and final authority to resolve the dispute was a legislative canvassing committee comprising nine Democratic-Republicans and only three Federalists. The committee split along party lines to disqualify the Cooperstown ballots, which all understood would have elected Jay as governor. The reason given by the committee's partisan majority, that the individual who delivered the ballots under seal to the Secretary of State was no longer the lawful sheriff of the county from which they came because his commission as sheriff had expired, was seen by the Federalists as a pretext for outright partisan theft of the election as well as the disgraceful disenfranchisement of innocent eligible voters. The outrage of the Federalists led to serious civil unrest. In the midst of all the turmoil, a young James Kent—who would later write leading legal commentaries as "America's Blackstone"—made the prescient observation that the membership of the legislative canvassing committee should have been evenly split between the two political parties. Although Kent did not address the need for a neutral tiebreaker, to avoid the potential of a 6-6 deadlock, he did articulate the need that the tribunal for adjudicating this electoral dispute—which functioned as a special-purpose court, as he saw it—be structured to be evenly balanced towards both sides. For details see Foley, BALLOT BATTLES, chapter 2; see also Foley, *The Founders' Bush v. Gore: the 1792 Election and Its Continuing Importance*, 44 INDIANA L. REV. 23 (2010).

American history is replete with episodes of the adjudication of important vote-counting disputes that failed to abide by Kent's call for evenhanded justice. One relatively recent example involved the 1984 election to Indiana's eighth congressional district. The House of Representatives empowered a panel of two Democrats and one Republican to handle the dispute. This panel split 2-1 along party lines to adjust the vote-counting rules to achieve a four-vote victory for the Democratic candidate. The Republicans in the House perceived the change of rules in the midst of the counting process as a partisan theft of the election. See Foley, BALLOT BATTLES, chapter 10.

The country's two disputed presidential elections, in 1876 and 2000, confirmed Kent's wisdom about the importance of the decisionmaking body's composition. Rutherford Hayes was ridiculed by Democrats as "Rutherfraud" or "His Fraudulency" because he was perceived as having been put into office by an 8-7 partisan vote of a structurally flawed Electoral Commission. George W. Bush's title to the presidency was equally questioned by many Democrats who perceived the Supreme Court's ruling in Bush v. Gore as partisan.

Consequently, § 304(a)(4) requires a state to use a method of appointing members of the Presidential Election Court that will result in that body being as structurally impartial as possible in its adjudication of all issues coming before it. Section 304(a)(4) does not require that a state adopt any particular method of appointment of the Presidential Election Court in order to achieve this structural impartiality. Comment *d*, in a series of Illustrations, offers a nonexhaustive set of methods that a state might choose to fulfill this obligation of evenhandedness in the appointment of the Presidential Election Court. For several of these Illustrations, Comment *d* draws upon the particular methods that Minnesota employed for its 1962 gubernatorial election and its 2008 U.S. Senate election.

§ 305. Initial Phase of Presidential Recount by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall immediately begin the process of administering a recount of all ballots in its jurisdiction that were counted as part of the preliminary returns of the presidential election.

(b) Within eight days after Election Day, each Local Election Authority shall complete its recount.

(c) As part of the local recount, any presidential candidate whose preliminary vote totals statewide were within five percent of the leading presidential candidate statewide, along with this leading candidate, may designate representatives to observe the recount conducted by the Local Election Authority.

(1) When a recount involves manual inspection of ballots to determine if a marking on the ballot qualifies as a vote under state law, the observation to which a candidate's representative is entitled must take a form that allows the candidate's representative to examine the markings on the ballot.

(2) When a recount involves only the use of machines to verify the accuracy of the initial count, a candidate's representative shall be entitled to examine the Local Election Authority's inspection of the machines for the purpose of determining that they operate properly.

(3) As part of the right to observe the recount, a candidate's representative may also examine any document relevant to the conduct of the recount, including a ballot, if doing so will not disrupt or delay the recount.

(d) A candidate's designated representative may object to any decision made by the Local Election Authority during the recount if, but only if, reversal of the decision upon review by the Presidential Election Court would alter the number of ballots counted for any candidate.

(e) The Presidential Election Court shall have whatever authority is necessary to assure that each Local Election Authority is able to complete its recount within the eight-day deadline specified in subsection (b).

(1) The Court's authority under this subsection includes the authority to remove a candidate's representative from observation of the recount if the representative has become unduly disruptive.

(2) Whenever the Court removes a candidate's representative pursuant to this authority, the candidate shall have the right to designate a substitute representative to continue observing the recount, but if the substitute also becomes unduly disruptive, the Court in its discretion may declare that the candidate has forfeited the right to designate another substitute.

Comment:

a. The conduct of the recount. What happens in a recount depends on the particular type of voting technology used to cast and count the ballots initially. The Procedures that form Part III of this project do not require a state to adopt any particular type of voting technology; nor do they mandate certain recounting methods insofar as alternative recounting methods might be employed for any single type of voting technology. Thus, whether a manual rather than machine recount is required in a presidential election is a function of voter technology and state law that is beyond the scope of these Procedures. Part II of this Project, however, provides Principles for conducting a recount, which a state may wish to employ for presidential as well as nonpresidential elections.

Notwithstanding the discretion that states have under these Procedures in how to conduct a recount, states still must undertake a recount—rather than merely a retabulation of returns—to comply with these Procedures.[20] To qualify as a recount, rather than a retabulation, some form of reexamination of the ballots themselves must occur. In the case of paper ballots, this reexamination can take the form of running the ballots through a counting machine again, in order to verify the accuracy of the initial count, or it can take the form of manual inspection of each initially counted ballot. In the case of Direct Recording Electronic (DRE) voting machines that do not produce a paper ballot—or paper record of any type, such as a Verified Voter Paper

[20] Insofar as a state does not already provide for a recount rather than just a retabulation, adoption of these Procedures will entail a change of the state's law in this respect. This change would be consistent with 3 U.S.C. § 5 and due process as long as done in advance of the election, for reasons elaborated in the Comment to § 302. Whether in the state this particular change could occur only by means of a statutory enactment by the legislature, or instead by a rule promulgated by the State Supreme Court, is a matter to be resolved by examining the relevant laws of the particular state.

Audit Trail (VVPAT)—a recount can take the form of examining the computer memory of each voting machine and rerunning the computer software to recalculate the vote totals on each machine based on the electronically cast ballots stored in the machine. By contrast, what does *not* suffice as a recount under any circumstances is to take the initially reported vote totals produced from each machine and simply add up all of those machine totals into a single statewide total for each candidate; that kind of re-addition of the initially reported vote totals from each machine is a retabulation of returns, and not a recount of ballots.

b. Full statewide recount. Whatever type of recount is employed (depending on a state's voting technology and applicable laws), in a presidential election it is necessary that the *scope* of recount encompass *all* the ballots cast statewide and initially counted as part of Election Night returns. Each Local Election Authority shall conduct the recount for its share of all these statewide ballots in the presidential election, and no Local Election Authority shall be omitted from this statewide recount. The obligation of each Local Election Authority to perform its portion of the statewide recount is nondiscretionary, once the Chief Elections Officer has made the necessary declaration under § 303.

In some states, for nonpresidential offices, a recount proceeds in multiple stages: first, a random sample of precincts is recounted and, only if there is a sufficient discrepancy between the recount and the initial count, is it necessary to conduct a full recount of all ballots initially counted. That kind of sampling and multiple-stage process is inappropriate for a presidential election for which an expedited recount is necessary after a § 303 declaration. Given the importance of a presidential election to the nation, and in the condition of uncertainty that causes the triggering of expedited procedures under § 303, it is imperative to recount all initially counted presidential ballots in the state—not just a sampling of them—whatever particular method of recounting ballots is employed. Likewise the expedited nature of the recount required under these Procedures precludes a multi-stage recount process. From the outset of the Chief Executive Officer's declaration under § 303, each Local Election Authority must understand that its obligation will be to recount all the initially counted presidential ballots within its jurisdiction and that, given the exigency, it must do so within the specified deadline: one week after the declaration under § 303, which is eight days after Election Day.

As stated in the Introductory Note, however, and as further explained in the Comments to §§ 308 and 310, a full statewide recount under this Section encompasses only the reexamination

of ballots initially counted and reported as part of the preliminary returns on Election Night, which formed the basis of the declaration under § 303. This statewide recount does *not* encompass evaluating the eligibility of any ballots not counted as part of those preliminary returns. Rather, issues concerning the eligibility of those previously uncounted ballots are resolved during the canvass under § 308 and, potentially, through judicial review of the canvass under § 310. (Thus, overseas and military ballots not counted on Election Night, but entitled to be counted later during the canvass, will not be part of the recount under this Section.)

c. Specific focus and goal of a recount in context of these Procedures overall. Accordingly, defined in this precise way, the recount under this Section serves a specific function in the overall operation of these Procedures: to confirm that a ballot included in the preliminary count as containing a vote for a particular candidate does indeed contain a vote cast for that candidate. With certain types of voting technology, this confirmation is a fairly straightforward undertaking. For example, one innovative form of voting technology enables voters to touch the name of their chosen candidates on a computer screen and, then, after they are finished making their choices, the technology prints out a paper version of their ballot with the names of their chosen candidates for the voters to review; the choices as marked on the paper are then tabulated by a separate counting machine. With this technology, there is no ambiguity about the voter's choices as marked on the paper version of the ballots. A recount, thus, can easily confirm the choices as so marked, and can verify the initial count of those ballots by running these paper ballots through the counting machines again.

By contrast, if the voting technology in use involves older optical-scan paper ballots, on which the voters themselves mark their choices by hand with a pen or pencil, then a recount inevitably will involve the issue of how to handle ambiguous marks made by voters. An exclusively machine-based recount of these ballots would require the ballot markings to be readable by machine in order to count, whereas a manual recount of these ballots would permit human evaluation of the markings to resolve the ambiguity. As indicated above, however, it is for a separate provision of state law—based on the state's policy choice—to determine what type of recount it wishes to use to handle the issue of ambiguity on voter-marked optical-scan ballots.

Many issues that might arise in a disputed presidential election would be beyond the scope of the recount, as defined for the purpose of this Section. In addition to issues concerning the eligibility of previously uncounted ballots, which are left to the canvass (as already

mentioned), other issues would need to be left to a judicial contest of the election under § 313. For example, the so-called "butterfly ballot" issue that arose in Florida in 2000—where faulty ballot design induced some voters to cast their ballots erroneously for a candidate who was not their actual choice—would be an issue beyond the scope of a recount, as defined for purposes of this Section, but instead would need to be raised in a contest under § 313. (Whether or not there would be a remedy under § 313 for faulty ballot design is a separate matter, to be determined by a provision of state law that is beyond the scope of these Procedures.) In a recount under this Section, a ballot clearly marked as cast for Candidate A would count for Candidate A, even if an argument might be pursued in § 313 that faulty ballot design caused the voter to cast the ballot for Candidate A when actually Candidate B was the voter's choice.

Illustration:

1. In one particular locality within a state, the printed optical-scan ballots inadvertently omitted the names of Jane Smith and Richard Roe, the Republican Party's nominees for President and Vice President, who by law were entitled to be included among the candidates listed on the ballot. The number of ballots cast in the state that were mistaken in this way is over 10,000, while the complete preliminary returns of initially counted ballots at the end of Election Night showed the Republican presidential nominees trailing the Democratic nominees by less than 1000 votes. The Republicans publicly argue that if their names had not been wrongly omitted from the faulty ballots, enough of these ballots would have been cast for them (rather than for minor-party candidates on the ballot) that they would have prevailed over the Democrats statewide. This argument, even if valid under state law, must be raised in a contest under § 313, and is not cognizable in the recount under this Section. For the purposes of the recount specifically, the faulty ballots must be counted as cast. If there is no ambiguity in how those faulty ballots were marked by voters—for example, clearly marked on behalf of minor-party candidates even though in rates disproportionately high compared to the rest of the state—then the recount will count those ballots as marked, leaving for the contest the issue of how to handle the fact that the Republican candidates were improperly omitted from these ballots, in violation of state law.

d. The right of candidates to observe the recount. The threshold for a candidate to *participate* in a recount should be easier to meet than the threshold for *triggering* the recount in the first place. Nonetheless, and especially in an expedited Presidential Recount, it is undesirable to permit every candidate to participate in the recount, no matter how low the candidate's chances of winning as a result of the recount. Some minor-party or independent candidates might participate in a recount solely to be disruptive, which is especially counterproductive when the need for speed is mission-critical. In this situation, their status should be equivalent to any other member of the public. A threshold of a five percent margin for participation in a recount represents a reasonable balance between including candidates who are close to the leader and not unduly expanding participation.

e. A candidate's examination of ballots during a recount. Subsection (c)(1) gives a candidate's representative the right to examine the markings on a ballot in order to make a judgment about whether those markings constitute a countable vote on behalf of a candidate in the election. The specific form of that examination, including whether it encompasses the right of the candidate's representative to touch the actual ballot and physically handle it, depends on the particular technology and other circumstances involved. For example, the desire to conduct the recount as rapidly as possible may cause a Local Election Authority to project images of each ballot on a screen for the candidate's representatives (and public) to review. These projected images may be entirely sufficient for a candidate's representative to make a judgment on whether the ballot contains a countable vote in the presidential election. If so, then the candidate's representative would have no right to touch the ballot itself; observation of the projected images would constitute examination of the ballot's markings. In other circumstances, however, it may be necessary for a candidate's representative to hold a paper ballot to examine its relevant markings. For example, if there is an issue concerning whether a voter made one written mark on top of, and thus after, a different written mark, it may be necessary to make a close inspection of the ballot while holding it in one's hand. In this instance, observation of a projected image on a screen would not suffice in terms of the right of the candidate's representative to examine the ballot markings.

f. The Presidential Election Court's authority to remove a candidate's representative. The necessity of making sure that each Local Election Authority is capable of completing its recount within the eight-day deadline requires giving the Presidential Election Court the power

to remove a candidate's representative who is unduly disruptive. A candidate must be permitted to substitute a new representative for one who has been so removed. But if the substitute also becomes so disruptive as to require removal, then the Court has the power to declare that the candidate has forfeited the right to have a representative at that particular local recount. Such forfeiture would not apply statewide but solely to the particular locality where the disruption occurred.

§ 306. Presidential Election Court's Review of Local Recount Rulings

(a) Within 24 hours after completion of each recount by a Local Election Authority under § 305, each candidate seeking the Presidential Election Court's review of decisions objected to under § 305(d) must present to the Court an enumeration of the objections for its review.

(b) All objections not timely presented for review, as required by subsection (a), shall be deemed waived and unreviewable.

(c) For each objection, the Court's jurisdiction extends to the Local Election Authority's decision that is the subject of the objection, and the Court is empowered to review and where necessary reverse the decision according to the following principles:

(1) the Local Election Authority's decision is presumptively valid regardless of which candidate it favored and which candidate objects to it;

(2) the candidate objecting to the decision bears the burden of showing it to be either contrary to law or factually incorrect in light of the available evidence, in which case the Court shall set aside the erroneous decision;

(3) upon setting aside an erroneous decision under subsection (c)(2), the Court shall make its own determination of the matter based on the applicable law and available evidence, without remanding the matter to the Local Election Authority for further consideration; provided, however, that the Court may remand a particular factual issue to the Local Election Authority for its determination if (but only if) a remand on the specific issue is absolutely necessary to resolve a dispute concerning a particular ballot under review in the recount.

(d) In the interest of expediting the recount and avoiding a remand whenever possible, the Court is empowered to conduct whatever additional factfinding and evidentiary proceedings it deems necessary, including receiving testimony from the Local Election Authority in order to obtain the benefit of its knowledge and expertise.

(e) Within 14 days after Election Day and prior to the completion and certification of the canvass under §§ 308 and 309, the Court shall complete its review of all objections to recount decisions presented for its consideration and publicly announce its determinations, including any specific issues unavoidably remanded to a Local Election Authority for additional factfinding.

(f) Any candidate who observed the recount under § 305(c) may also participate in the Presidential Election Court's proceedings under this Section, including offering to the Court reasons to sustain a Local Election Authority's decision made during the recount, provided that such participation shall be consistent with the Court's obligation to complete its review as specified in subsection (e), and the Court in its discretion may issue orders detailing the terms of such participation as it deems necessary in order to meet this obligation.

Comment:

a. Plenary authority of Presidential Election Court. The Presidential Election Court has jurisdiction over the decisions made during the recount by a Local Election Authority, if those decisions affected the vote totals for any candidate. But it takes an objection to one of these decisions to invoke the Court's jurisdiction. Once invoked, the Court's jurisdiction is over the decision itself and not merely the objection to the decision, meaning that the Court has the power to substitute its own decision for that of the Local Election Authority rather than remanding the decision for further consideration by the Local Election Authority. This point is important, given the acute time pressure of a presidential recount. Ordinarily, the far better course is for the Court to make the final recount decision with respect to a particular ballot or category of ballots, rather than remanding for further deliberation by the Local Election Authority. The Court therefore has this power and is expected to use it to the full extent feasible. There may, however, be some instances in which a remand to the Local Election Authority is unavoidable. In those instances, every effort should be made to complete the limited remand and the Court's further review of the remand by the date on which the Panel itself is scheduled to render its final judgment under subsection (e). If absolutely necessary, the Court may make a limited remand part of its final judgment, and this limited remand can be pursued after the opportunity for an appeal under § 307. Such a limited remand, like an appeal under § 307, should not delay completion and certification of the canvass under §§ 308 and 309; rather, the completion and certification of the

canvass can continue to proceed as scheduled, with any additional adjustments as necessary reflected in the final certification of the election before the end of the Safe Harbor Deadline, as provided in § 316.

REPORTERS' NOTE

In a statewide election, a fundamental distinction exists between a recount in which a single statewide institution has final authority over the disposition of a disputed ballot and, by contrast, a recount conducted entirely by local election officials without the supervision of a single statewide institution. The role of the Presidential Election Court under this Section puts the recount mandated by these Procedures within the former, rather than the latter, category. The review of all disputed ballots by the Presidential Election Court enables uniform treatment of equivalent ballots, thereby avoiding the problem that arose in Bush v. Gore of locally disparate treatment.

The recount of Minnesota's 2008 U.S. Senate election benefited immensely from this kind of single supervisory statewide institution. There, it was the State Canvassing Board that played this role. Although the Board technically was not a court, it functioned much like one. Four of its five members were state judges, including two justices from the state's supreme court, as required by state law. One of the justices, moreover, was the Chief Justice, who was particularly effective in bringing a precedent-based system of adjudication to the ballot-by-ballot review undertaken by the Board. One method that the Chief Justice employed to assure uniform treatment of equivalent ballots was to keep a set of drawings for each type of ballot marking that the Board encountered during the review. The sheet of paper containing these drawings became a reference point for all members of the Board as they deliberated about specific ballots. Indeed, this sheet of paper was so influential that it was redeployed two years later when Minnesota faced another major statewide recount in its 2010 gubernatorial election. See Foley, BALLOT BATTLES at 321 (photo of Chief Justice's hieroglyphic sheet, reproduced by permission).

There are additional lessons to be learned from Minnesota's 2008 recount, especially in comparison with Florida's in 2000. One major lesson is the paramount importance of public transparency. Minnesota's State Canvassing Board televised over the Internet its deliberation on each ballot subject to its review—and did so in such a way that viewers could see each ballot, make their own judgment on its proper disposition, and compare their judgment with the one reached by the Board itself. This transparency was a major factor in causing public confidence that the Board was deliberating fairly and not attempting to rig the election in favor of one candidate or the other. Contrast the Board's behavior in this regard with that of Miami's canvassing board during the Florida recount in 2000. The Miami recount, while it was underway, occurred behind closed doors, away from public view. As a result, the so-called "Brooks Brothers riot" ensued, causing the Miami board to abandon its recount efforts (which were not resumed). See Foley, BALLOT BATTLES at 240, 320. See also Jay Weiner, THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT (2010). Anyone responsible for conducting a statewide recount in a high-profile election, or responsible for promulgating the

specific rules for the scrutiny of ballots during the recount, would benefit from a study of Minnesota's 2008 recount. While these Procedures provide the basic structure for a presidential recount to replicate the exemplary features of Minnesota's 2008 recount, it will remain necessary to operationalize these Procedures with the kind of guiding spirit that animated the Minnesota Canvassing Board's deliberations in 2008. That spirit is captured not only in Jay Weiner's narrative, supra, but also in Foley, *Lake Wobegon Recount*, 10 ELECTION L.J. 129 (2010); cf. Foley, *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187 (2011).

§ 307. Appeal to State Supreme Court of Recount Review

(a) Within 24 hours after the Presidential Election Court completes its review and makes its public announcement under § 306(e), any candidate seeking an appeal of that review in the State Supreme Court must file a notice of appeal.

(b) No appeal filed under subsection (a) shall delay certification of the canvass pursuant to § 309.

(c) If the State Supreme Court chooses to hold oral argument on a recount appeal filed under subsection (a), the State Supreme Court shall do so within 17 days after Election Day.

(d) Within 20 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(e) If the State Supreme Court's resolution of an appeal requires additional recount proceedings on remand,

(1) each Local Election Authority required to conduct such additional recount proceedings must complete these proceedings within 27 days after Election Day;

(2) the Presidential Election Court must complete any additional recount proceedings of its own, including all review of additional proceedings conducted by each Local Election Authority under subsection (e)(1), within 30 days after Election Day; and

(3) the State Supreme Court must complete any post-remand review of the Court's proceedings under subsection (e)(2) at least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

(f) Any candidate, other than the appellant, who participated in the proceeding under § 306 may participate as an appellee in an appeal filed under this Section, including the submission of an appellate brief, pursuant to whatever briefing schedule the State Supreme Court in its discretion establishes for consideration of the appeal.

Comment:

a. Timetable for appeal process. This Section (like § 312 and § 315) balances the critical need of bringing the entire election dispute to a final conclusion within five weeks of Election

Day with the importance of allowing the state's highest court an opportunity to review the work of the Presidential Election Court. The deadlines of this Section are carefully structured to mesh with the timetable for completing the canvass of the election and the timetable for a judicial contest of the election. Strict adherence to these deadlines is necessary to ensure that an appeal of the Presidential Election Court's decision concerning the recount does not interfere with the timely resolution of a judicial contest of the election under §§ 313-315.

REPORTERS' NOTE

Although one hopes that a recount can be completed without the need for a second round of recount proceedings on remand from a State Supreme Court decision, one lesson from Florida's experience in 2000 is that one cannot guarantee that this hope will be achieved. Even with the best of planning in advance, an unexpected issue might arise that requires further factfinding after appellate consideration. This Section accounts for this possibility and, accordingly, builds in time for a potential remand as part of the overall schedule.

Given the availability of an appeal, moreover, there is no need for the State Supreme Court to resort to any form of extraordinary procedure, like a writ of mandamus, in order to assure that conduct of the recount comports with all applicable requirements of state law.

§ 308. Conduct of Canvass by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall complete its local canvass of the election before 12:00 noon on the 14th day after Election Day.

(b) The local canvass shall include, but is not limited to, these component procedures:

(1) With respect to each provisional ballot, previously uncounted absentee ballot, or any other uncounted ballot cast in the election within the Local Election Authority's jurisdiction, a determination of whether or not the ballot is eligible to be counted;

(2) The correction of any tabulation errors discovered upon review of the preliminary returns or during the recount conducted under § 305;

(3) Any adjustment in the counting of ballots required by the Presidential Election Court's review of the recount under § 306; and

(4) Insofar as required by other provisions of state law, any adjustment in vote totals as part of the reconciliation of discrepancies in the number of ballots cast at a polling location and, according to polling-place records, the number of voters who cast ballots at the polling place.

(c) With respect to any ballot that a Local Election Authority determines eligible to be counted under subsection (b)(1), the Local Election Authority may examine the ballot to ascertain whether it contains a vote in the presidential election and, if so, may add that vote for the purpose of calculating the vote totals for each presidential candidate as part of the certification of the canvass under § 309, PROVIDED THAT the Local Election Authority must not commingle the ballot with other ballots, but instead shall preserve the ballot separately in the event upon review under § 310 the Presidential Election Court reverses the Local Election Authority's determination and the ballot is ruled ineligible to be counted.

(d) For all ballot-eligibility determinations under subsection (b)(1), the Local Election Authority shall make publicly available upon or before completion of the

canvass a written explanation for why it determined the ballot eligible or ineligible, provided that

(1) the Authority may aggregate ballots for which the explanation is the same, and

(2) the Presidential Election Court may specify further the form that these publicly accessible written explanations must take.

Comment:

a. Previously uncounted ballots. Since 2000, there has been a dramatic rise in the number of ballots that are not counted and reported as part of the preliminary returns on Election Night, but instead are considered—and potentially counted—during the canvassing of the returns. These uncounted ballots fall primarily into three categories. First are provisional ballots, now required in all states by the Help America Vote Act of 2002. By their very nature, provisional ballots are not supposed to be counted on Election Day, but instead are set aside for evaluation of their eligibility during the canvass. The percentage of voters who cast provisional rather than regular ballots varies considerably from state to state, and from county to county within states, as does the percentage of provisional ballots that eventually are counted rather than rejected as ineligible. Nonetheless, in many states, including some so-called "battleground states" in recent presidential elections, the volume of provisional ballots that are cast and counted potentially could determine which candidate wins a close presidential election in the state (just as they have determined the winners of some close races for other offices in recent years). Certainly, the inherent disputability of provisional ballots—by their very nature, they are of uncertain status—requires states to have well-structured procedures to evaluate provisional ballots in a presidential election that may turn on them.

A second category of uncounted ballots is absentee ballots that arrive too late to be counted as part of the preliminary returns on Election Night but are still timely under a state's election law (which may permit them to arrive by a certain specified date after Election Day). State laws vary on this point. Some states require absentee ballots to arrive by Election Day, and therefore this category of uncounted ballots for these states is limited solely to those that might arrive on Election Day itself at a time too late to be included in Election Night preliminary returns. Other states, by contrast, may permit absentee ballots to arrive up to a week or 10 days after Election Day, as long as they were postmarked by Election Day or, with respect to military

and overseas ballots, comply with the special rules for returning those subcategories of absentee ballots. Part I of this project more specifically addresses a state's rules for the casting, returning, and counting of absentee ballots. Part III of this project takes as a given whatever these state rules might be, *as long as procedurally they can fit within the schedule and deadlines provided in the Procedures set forth in Part III.* For example, a state that wishes to adopt these Procedures as its method of handling an unresolved presidential election cannot permit absentee ballots to be eligible to be counted if they arrive more than two weeks after Election Day; such a rule would be inconsistent with the obligation set forth in this Section of these Procedures that a state complete its review of all uncounted ballots within 14 days after Election Day. Apart from this outer constraint, however, for the purposes of these Procedures a state can choose how permissive it wishes to be on this point. Consistent with this Section, for example, a state may choose to permit absentee ballots to arrive up to a week (or even 10 days) after Election Day, as long as each Local Election Authority within the state is capable of completing its review of the eligibility of these late-arriving ballots no later than 14 days after Election Day. But consistent with this Section, a state alternatively could choose to permit absentee ballots to arrive no later than three days after Election Day, and a state could also distinguish between domestic absentee ballots, on the one hand, and military and overseas ballots, on the other, for the purpose of the deadline by which they must arrive to be counted. For example, consistent with this Section, a state could set three days after Election Day as the deadline for domestic absentee ballots but set seven days after Election Day as the deadline for military and overseas ballots.

The third category of uncounted ballots is absentee ballots rejected before Election Day but believed by a candidate to have been rejected erroneously and thus potentially countable upon reconsideration during the canvass. This category of ballots figured prominently in both Washington's 2004 gubernatorial election and Minnesota's 2008 senatorial election. Thus, it is easily conceivable that this category of ballots could become an issue in a future presidential election. Indeed, this category of ballots did receive considerable attention during the disputed 2000 presidential election, but ultimately did not become the primary focal point of litigation that year because of strategic choices made by the political campaigns. In the future, however, a state must be prepared for the possibility that an unresolved presidential election may end up focusing on claims that a potentially outcome-determinative number of absentee ballots were rejected incorrectly prior to Election Day and should subsequently be counted during the canvass. In

theory, this category of uncounted ballots could be excluded from the canvass under this Section, and confined instead to the contest under § 313, but it is far more efficient to consider this category of ballots as part of the canvass. The experiences of Washington and Minnesota teach, among other things, that intense pressure can arise to litigate the eligibility of these rejected ballots during the canvass, rather than waiting for a contest after certification of the canvass, and this pressure can produce collateral lawsuits with the capacity of causing significant delays. It is much preferable to have an orderly procedure for the consideration of these ballots during the canvass, at the same time as the consideration of provisional ballots and any other uncounted ballots. Because the canvass inevitably includes determining the eligibility of some uncounted ballots, streamlining the overall process in an effort to meet the Safe Harbor Deadline requires combining all the eligibility determinations regarding uncounted ballots into a single proceeding as part of the canvass.

b. Reconciliation. A standard practice of election administration is to compare, for each polling location, the number of ballots cast and the number of voters recorded as casting those ballots. In principle, these two numbers should be the same. In practice, they often can be off by one or two, usually as a result of a minor administrative error in the operation of the polling process. These errors, tending to be random, also tend to cancel each other out, especially in a statewide election that covers a large number of polling places. Larger discrepancies between these two numbers are more disconcerting, as they potentially signal either more significant administrative problems or even manipulation of the voting process in an effort to alter the result.

As with other aspects of election administration, states differ in their rules governing the practice of comparing these two numbers, often called "reconciliation" among election professionals. An older approach, prevalent in the 19th century, was to require a process of "random withdrawal" as a method of redressing discrepancies found during reconciliation. If a precinct had more ballots cast than recorded voters, then random withdrawal called for removing from the ballot box the same number of ballots as the excess between ballots and voters. Random withdrawal, however, has become more disfavored in recent decades; one argument against it is that, if the excess between ballots and voters is just a recording error (meaning that the number of eligible voters actually was identical to the number of ballots cast, but the administrative error failed to accurately record this equivalence), then removing a ballot from the ballot box detracts

from the accuracy of what is in the box in terms of reflecting the preference of the eligible voters who cast ballots at the precinct.

Part III of this project takes no position on whether or not a state ever should employ random withdrawal and, if so, in what circumstances. Part II of this project addresses this topic. But the Procedures of Part III are designed to work with whatever policy choice a state makes on the matter of reconciliation. States should be able to make different policy choices on this point and still use the Procedures of Part III to handle an unresolved presidential election.

The variability of state law on this topic extends to methods that states use to record the number of voters at each polling location. One common method is simply to count the number of signatures of voters who signed the poll books at that location as a prerequisite to casting a ballot. But another method sometimes employed is to count the number of "authorized to vote" tickets handed to voters after they have checked in and their eligibility has been verified. (Where used, these "authorized to vote" tickets are then handed to poll workers as a prerequisite for using a voting machine to cast a ballot.) These two methods can diverge in their results, as Minnesota recognized during its 2010 gubernatorial recount.

Changes in voting technology likely will cause additional variation in the way states and localities might conduct reconciliation. If in the future voters must scan a pre-marked electronic ballot in order to receive a printed ballot capable of being counted, reconciliation might consist in matching the number of electronic ballots with printed ballots. But whatever reconciliation entails in a particular state, this Section specifies that it be conducted as part of the canvass and thus subject to the schedule and deadlines associated with all parts of the canvass.

c. The need for practical reversibility. The prohibition against commingling ballots ruled eligible for the first time during the canvass is critically important.

Consider the situation in which a Local Election Authority during the canvass rules a ballot eligible to be counted. Perhaps it was a provisional ballot, and there was some significant doubt about its eligibility, but the Local Election Authority ruled in its favor. Suppose the Presidential Election Court then disagrees with the Local Election Authority on the point and determines the ballot ineligible. In this situation, in order to undo the Local Election Authority's contrary ruling, it is imperative that the Presidential Election Court be able to exclude the ballot from the count. If before the Presidential Election Court has a chance to review the Local Election Authority's ruling, the Authority has irretrievably commingled the ruled-upon ballot

with all other counted ballots, then the Authority has irreversibly frustrated the existence and purpose of the Presidential Election Court's review.

To be sure, most ballots in the election will have been counted on or before Election Day in a way that they are irretrievably commingled, and thus if the Local Election Authority made an erroneous eligibility determination that led to their being counted, the Presidential Election Court will be unable to simply order an undoing of those ballots being counted. It would require a major change in the practice of American elections for ballots cast and counted at polling places on Election Day to have serial numbers, whereby each one could be individually retrieved from the count if subsequently determined to have been ineligible. The fear of contravening the voter's right to anonymity in the choices cast on the ballot has historically precluded such a practice.

But ballots not counted until after Election Day present a different dynamic. By definition, their eligibility will be considered only once it is known what the vote margin is in the state between the two leading candidates. If the gap for example is 100 votes, every ballot will be examined with the eye to whether it brings the trailing candidate one ballot closer to closing that 100-vote margin.

Given this dynamic, if the Local Election Authority's decision on the ballot is irreversible as a practical matter, then the litigation pressure to get the matter in the hands of the reviewing court, and then the State Supreme Court, before the Local Election Authority even has a chance to rule on the ballot, will be especially intense. In a disputed presidential election, where the stakes are the highest, this litigation pressure will be intolerable. Motions for emergency Temporary Restraining Orders will fly immediately, once the preliminary returns are known—or perhaps even beforehand if they are anticipated to be close. The race to the courthouse will be chaotic, and any attempt to maintain adjudicatory order will break down, seriously risking noncompliance with the Safe Harbor Deadline.

Consequently, to diffuse this intense pressure, the system must have the built-in feature that no decision of a Local Election Authority that potentially could affect the counting of ballots is irreversible. From the outset, instead, all such decisions will be preserved in a posture that enables the Presidential Election Court to undo those decisions if the Court concludes that those decisions were erroneous. Likewise, the Presidential Election Court's decisions will be preserved in a way that they are reversible if found erroneous by the State Supreme Court. With this

assurance to the candidates and their partisan supporters that nothing is undoable until the entire process is final at the end of the five-week period, the ballot-eligibility determinations during the canvass as well as the subsequent judicial review of them can proceed in a logical and orderly way, without a chaotic and deadline-threatening race to the courthouse.

d. Methods of practical reversibility. As a practical matter, the easiest way to make sure that the ballot-eligibility rulings of a Local Canvassing Authority remain reversible is to keep these ballots sealed and uncounted throughout the time available for seeking judicial review of those rulings. If the ballots stay uncounted in their ballot-secrecy envelopes until after the time is over for any review proceedings before either the Presidential Election Court or the State Supreme Court, then there is no risk of irretrievable commingling. Of course, keeping these eligible ballots separate and uncounted complicates the certification of the canvass and, potentially, the litigation of a judicial contest that challenges the certification. One way to handle this difficulty would be to have the Local Election Authority, at the time of certifying the canvass based on all counted ballots up to that point, make a simultaneous companion certification of the number of eligible-but-as-yet-uncounted ballots that exist alongside the certified count. A judicial contest of that certification could then proceed, recognizing that the additional ballots ruled eligible during the canvass will be added to the count at the end of the contest. It is acceptable under these Procedures for a state to adopt that approach to handling this detail concerning the certification of the canvass.

The Procedures, however, also permit the state to handle the point in a different way, as long as the state can do so in a way that is consistent with its duty not to irretrievably commingle the ballots ruled eligible during the canvass. Suppose, for example, that using innovative technology the state could conditionally count these ballots in a way that would enable them to be uncounted if subsequently ruled ineligible. In these circumstances, the Procedures would permit the state to conditionally count these ballots in this way and to include the conditional count of them in the vote totals reported as part of certifying the canvass.

To be sure, the state presumably would wish to employ this innovative technology only if doing so would be consistent with the value of protecting the voter's anonymity regarding the content of the voted ballot. If counting the ballot conditionally risked violating the voter's anonymity at a subsequent time when it might be necessary to undo its counting, then most states likely would forgo use of the technology—and keep the ballots separate and uncounted until the

time for any litigation over the canvass had expired. Nonetheless, from the perspective of these Procedures, that is a separate policy choice for the states to make. As long as the state complies with the no-commingling requirement, it satisfies the requirement of this Section.

e. Explanation of ballot-eligibility rulings. The Local Election Authority's obligation in subsection (d) to supply a written statement of reasons for its ballot-eligibility determinations is not intended to be onerous, but instead simply to provide a basis upon which the Presidential Election Court can review these determinations. Unless otherwise specifically directed by the Presidential Election Court, these written explanations can take whatever form is most convenient to the Local Election Authority, as long as they are publicly accessible and timely. If it is more convenient to group ballots by category of explanation, rather than listing each ballot seriatim, the Local Election Authority may do that, unless otherwise directed by the Presidential Election Court.

REPORTERS' NOTE

Ballot impact versus anonymity. The imperative not to commingle ballots that remain disputable after certification of the canvass raises a question about whether there is a tradeoff, at least theoretically, between (a) the value of including presumptively eligible ballots in the certified count and (b) the value of preserving voter anonymity. With respect to the first value, a voter suffers when the voter's ballot has been deemed eligible by the relevant Local Election Authority and yet that ballot is set aside and not actually counted until after certification of the canvass and all potential proceedings concerning judicial review of that ballot's eligibility have conclusively expired. Even assuming that this voter's ballot is eventually counted as part of the final certification of the election—and counts equally with all other eligible ballots in this final certification—the ballot (along with its voter) has been deprived of having equal influence over the certification of the canvass itself. Since that certification is consequential, especially for determining which candidate bears the burden in a subsequent contest of overturning that certification, this ballot (along with its voter) suffers a kind of second-class status if it is not counted as part of the certification of the canvass.

It is one thing to exclude from the certification of the canvass a ballot that the relevant Local Election Authority has determined to be *ineligible*. To be sure, that ruling of ineligibility may be subsequently reversed after certification of the canvass but before final certification of the election—in which case this ballot also would have been deprived of having equal influence over certification of the canvass, when given its eventual status as eligible it should have been able to have that equal influence at the earlier stage. Still, at the time of certifying the canvass, this ballot was presumptively ineligible and accordingly should be kept out of the certified count at the close of the canvass. But a ballot that the Local Election Authority has determined to be *eligible* is in exactly the opposite posture. While that ruling of eligibility might be reversed

subsequently, in the meantime the presumptively eligible ballot deserves to be part of the certified count at the close of the canvass. It does an injustice to the ballot, and thus to its voter, to leave this presumptively eligible ballot out of the certified count at this stage of the overall process.

There would be no difficulty associated with counting this presumptively eligible ballot in the certification of the canvass were it not for the paramount obligation under these Procedures to prevent the commingling of this still-disputable ballot. Furthermore, even given this paramount obligation, there would be no difficulty with counting this presumptively eligible ballot were it not for the separate concern about preserving voter anonymity. A Local Election Authority easily could count the ballot and keep it separate and traceable to make sure that it was not commingled with other counted ballots. But this separation and traceability is what raises a concern about a risk to voter anonymity.

Which is more important: protecting voter anonymity, or permitting a presumptively eligible ballot to have equal influence over the certified count at the close of the canvass? Ideally, state law would not be forced to make this choice, if it can find ways to achieve both goals. Whether through new technology or creative and sound administrative practices, a Local Election Authority may be able to count a ballot and make sure that it never becomes public knowledge how a particular voter voted—and to do so without irretrievably commingling the ballot. But it is conceivable that in some circumstances doing all this may not be possible.

Ultimately, these Procedures let a state make its own policy choice regarding the tradeoff between voter anonymity and the equal influence of presumptively eligible ballots. The Procedures are structured to give a state implicit encouragement to explore the development of methods and practices to avoid this tradeoff. But if this tradeoff cannot be avoided, the Procedures allow each state to decide how to handle the issue. What the Procedures do not permit, however, is abandoning the obligation to prevent the commingling of ballots ruled eligible during the canvass. For the reasons elaborated in the Comment, this prohibition against commingling must remain paramount however the state chooses to handle the resulting potential tradeoff between the two other values.

§ 309. Certification of Canvass

(a) Immediately upon completion of the local canvass as required by § 308, each Local Election Authority shall certify the results of its local canvass, including vote totals for each presidential candidate and the explanations for its ballot-eligibility determinations, and shall electronically transmit this certification to the Chief Elections Officer so that the Chief Elections Officer receives this certification at or before noon on the 14th day after Election Day.

(b) At or before 11:59 p.m. on the 14th day after Election Day, after compiling into a single certification of the statewide canvass all certifications of local canvasses received from Local Election Authorities, the Chief Elections Officer shall

(1) display on a publicly available website the statewide certification as well as all the local certifications from which it has been compiled; and

(2) send by e-mail to all presidential candidates on the ballot in the state an electronic copy of this statewide certification and its underlying local certifications.

(c) Once a Local Election Authority has certified its local canvass under subsection (b), the Local Election Authority may not alter the certification, except as ordered by the Presidential Election Court pursuant to a proceeding under § 310.

Comment:

a. Importance of canvass certification. The certification of the canvass is not a final certification of the election, but it is an important point in the process, providing a basis for both judicial review (under § 310) of vote-counting decisions made during the canvass and a contest (under § 313) of the vote totals contained in the certification of the canvass. The certification of the canvass represents a transition from the preliminary returns on Election Night to the final certification of the election upon completion of all possible proceedings under these Procedures. Like the Election Night preliminary returns, certification of the canvass consists of both an initial step at the local level and then an aggregation of all such local results into a single statewide result.

Under these Procedures, it is imperative that the certification of the canvass not be delayed. Even if additional factfinding is required as part of the recount, and even as judicial review of the canvass may identify mistakes made during the canvass that require correction, the

certification of the canvass can and must occur on time, allowing the subsequent error-correction processes to move forward according to the overall structure of these Procedures. If these Procedures operate as designed, nothing that occurs during the canvass is irreversible as a result of certification, and therefore no justification exists for delaying certification in order to avoid a potentially irreversible consequence.

For similar reasons, once certification occurs, there is no need to "reopen" the canvass in order to undo it or to correct an error within it. Section 310 is the procedure for correcting errors that occur in the canvass, and it would simply amount to a duplication of effort to permit a candidate to ask the Local Election Authority to reopen the canvass and then ask the Presidential Election Court to review the canvass. Given the time constraints associated with the Safe Harbor Deadline, there is no room for such duplication of effort. Thus, once the certification of the canvass occurs, the canvass itself is closed, and the process is to move on to the next step, which is judicial review of the canvass under § 310. The Presidential Election Court under that Section can require a Local Election Authority to fix a mistake that occurred in the canvass, but after certification the Local Election Authority cannot fix the mistake on its own initiative.

§ 310. Presidential Election Court's Review of Canvass: Petition and Participants

(a) Within 24 hours after receiving e-mail notification of the statewide and local certifications as specified in § 309(b)(2), a presidential candidate entitled to participate in a presidential recount under § 305 may petition the Presidential Election Court for review of any decision made during the local canvass concerning the eligibility of ballots, or counting of votes, in the presidential election.

(b) A candidate who fails to file a timely petition within the deadline specified in subsection (a) forfeits the right of petition under this Section, thereby barring the Presidential Election Court's consideration of the petition.

(c) Any candidate petitioning under this Section, at the same time as electronically filing the petition with the Presidential Election Court pursuant to the method of electronic transmission established under § 304(h), shall serve electronic notice of the petition upon all other candidates entitled to participate in the presidential recount under § 305, as well as upon any Local Election Authority whose decisions are the subject of the petition.

(d) A petition under this Section shall specifically identify:

(1) each ballot for which the Local Election Authority made an eligibility determination that the candidate requests the Presidential Election Court to review; and

(2) any other decision made by the Local Election Authority that the petition claims is erroneous and, if reversed by the Presidential Election Court, would alter the vote totals certified under § 309.

(e) A petition under this Section may request the Presidential Election Court to classify as eligible to be counted a ballot that the Local Election Authority classified as ineligible to be counted, or may request that the Presidential Election Court classify as ineligible to be counted a ballot that the Local Election Authority classified as eligible to be counted, and a candidate may include both types of requests within the same petition.

(f) The petition shall specify, for each ballot the candidate requests the Presidential Election Court to review, the reasons why the candidate believes the Local Election Authority's eligibility determination to be erroneous.

(g) The Presidential Election Court, in its sole discretion, may join the state's Chief Elections Officer to any proceedings pursuant to this Section.

(h) Apart from subsection (g), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (c).

(i) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

(j) Any party's motions or briefs in support of, or in opposition to, a petition under this Section must be filed with the Presidential Election Court and served upon all other parties within 48 hours after the filing of the petition, and the parties must submit any responsive briefs within the next 24 hours.

Comment:

a. The distinctiveness of this specific proceeding, relative to the recount and potential contest. A key structural element of these Procedures overall is to create a distinct proceeding for judicial review of the canvass, governed by this and the next Section—a proceeding separate from both the judicial review of the recount under § 306 and a judicial contest of the election under § 313. Timing is a major reason for this structural arrangement. Judicial review of the recount can occur in the second week after Election Day, while the canvass remains underway within each Local Election Authority. There is no need for judicial review of the recount to wait until the Local Election Authority completes the canvass.

Conversely, there are some issues suitable for a judicial contest of the election that may take more than two weeks to investigate or, in some instances, even uncover. Suppose, for example, that a presidential election experiences substantial absentee-ballot improprieties, of the kind that tainted Miami's mayoral election of 1997. An adequate understanding of the facts concerning such improprieties might not come to light before certification of the vote totals at the end of the canvass, two weeks after Election Day. It would not have been the purpose of the canvass to investigate those sorts of improprieties, such as monetary payments to absentee voters by so-called ballot brokers. Under § 314, the trial of factual allegations raised in a contest can occur in the fourth week after Election Day, based on evidence gathered after certification of the canvass.

There is no reason, however, to have judicial review of the canvass itself await the trial of the contest. Instead, claims of errors made during the canvass are immediately ripe for judicial review upon certification of the canvass. Given the time pressure of completing all proceedings within the Safe Harbor Deadline, it makes good sense—as an engineering proposition—to start judicial review of the canvass immediately upon these claims becoming ripe. Hence, the decision to separate judicial review of the canvass under this Section from a judicial contest of the election under § 313, which by its nature must proceed at a somewhat later stage of the overall process.

b. The structure of litigation under this Section. Substantively, what distinguishes litigation under this Section from a judicial contest of the election under § 313 is that this Section concerns all challenges to decisions actually made by a Local Election Authority during the canvass under § 308. If a presidential candidate wishes to challenge a decision made during the canvass, then the presidential candidate needs to make that challenge using this Section, and that challenge is governed by the specific deadlines and provisions of this and the following Section. As provided in § 313, if an issue could have been raised under this Section (because it concerns a challenge to a decision made during the canvass), then it is precluded from being raised in a subsequent judicial contest under § 313.

It is advantageous, however, to pursue a claim under this Section, rather than under § 313, because (as provided in § 311 and further explained in the Comment thereto) the burden of proof on claims brought under this Section is specific to each particular ballot or other issue raised. No candidate bears a burden of proof under this Section as a consequence of the certification under § 309. Instead, the burden is simply associated with the effort to undo the particular decision made during the canvass. By contrast, with respect to a petition to contest the certification under § 313, the petitioner bears the burden of overturning the certification based on the grounds asserted.

c. Streamlining the litigation under this Section. It is important to limit participation in the litigation under this Section to only those parties essential to the adjudication of the claims raised. For the same reason, while the Presidential Election Court can permit the filing of briefs by *amici curiae* if the Court so chooses, the Court can also preclude the participation of *amici* if necessary to achieve compliance with the expedited nature of these proceedings.

REPORTERS' NOTE

The issue of ballot eligibility is the one that bedeviled Minnesota's 2008 U.S. Senate election. Specifically, the issue was whether absentee ballots that initially had been rejected by local election officials, and thus not counted as part of Election Night returns, had been rejected erroneously and in fact were eligible to be counted. With only 215 votes separating the incumbent and the challenger, and with the number of wrongly rejected absentee ballots potentially exceeding 1000, it was evident that the election might hinge on these ballots. For an account of this election, see Foley, BALLOT BATTLES, chapter 12, and sources cited therein.

Once this issue emerged, the procedural question became how it would be handled. What would be the forum for adjudicating the question of whether absentee ballots had been rejected erroneously and, if so, how many and what difference would they make to the vote totals for each candidate? One possible forum was the recount proceeding, except that Minnesota law (like the law in some other states) appeared to confine a recount to the review of ballots initially counted on Election Night, excluding consideration of ballots never counted because they had been deemed ineligible. Alternatively, the decision not to count these ballots, if wrongful, could be raised in a subsequent judicial contest of the election, after completion of the recount. But at the time the recount was getting underway, the prospect of a subsequent judicial contest was far down the road, and the issue of wrongfully rejected absentee ballots seemed pressing and urgent—a U.S. Senate seat hinged on their consideration. Moreover, because a contest would occur after certification, the contestant would bear the burden of proof in overturning the certification, and the wrongly excluded absentee ballots would not be part of the certified count. The certification, in other words, might reflect the wrong outcome—imposing this significant burden of proof on the wrong candidate—just because absentee ballots had been wrongly rejected. That consequence of the certification seemed potentially unfair, both on the candidate who should have been certified the winner but wasn't and on the voters who cast the wrongly excluded ballots and who were thus deprived of having their ballots included in the certified totals as they should have been. Thus, there was intense pressure to figure out a way to litigate the issue of wrongful exclusion prior to certification.

As a result, the Minnesota Supreme Court concocted an ad hoc procedure that did not exist within the state's statutory scheme. The procedure was to let previously uncounted absentee ballots become part of the recount if, but only if, both candidates and the relevant Local Election Authority agreed that the ballots had been wrongly rejected. This invented procedure seemed reasonable when the court announced it: what could be objectionable about letting a ballot count if all concerned agreed that it should be counted; why wait for a post-certification contest to include such a consensus-based ballot within the official vote totals of the election? In practice, however, the ad hoc procedure did not operate as intended. By giving each candidate an effective veto over the ballots to be reconsidered, while requiring the candidates to reconsider over 10,000 rejected absentee ballots, the Minnesota Supreme Court inadvertently created a particularly contentious, laborious, and time-consuming process. As two dissenters on the Minnesota Supreme Court argued at the time, it might have been better just to let the Local Election

Authority decide on its own initiative which absentee ballots had been rejected in error—and then, later, let a contestant bear the burden of proving that the Local Election Authority's reconsideration of a ballot was in error (in other words, that its original decision had been correct). Even if the dissenters' position was no more in accord with the statutory scheme than the majority's ad hoc procedure, once the judiciary was going to be in the business of making up new vote-counting procedures for the specific election at hand, then it might as well invent administratively workable ones.

Minnesota's 2008 U.S. Senate election is hardly the first in which a court has faced intense public pressure to develop new procedures to handle a vote-counting problem more fairly than existing statutory procedures would seem to allow. Indeed, the Washington Supreme Court also felt similar pressure in the state's 2004 gubernatorial election over wrongly excluded absentee ballots, and it too found a way to have those ballots reconsidered prior to certification. (Its method was closer to that of the dissenters in the Minnesota case.) Moreover, Minnesota itself faced essentially the same issue in its 1962 gubernatorial election, and there too the Minnesota Supreme Court issued a divided ruling that permitted deviation from the statutory scheme in order to enable Local Election Authorities to correct obvious vote-counting errors before certification of the canvass. A half-century earlier, the Kansas Supreme Court faced the exact same issue in that state's disputed gubernatorial election of 1912. (There, however, the court refused to reopen the canvass to permit correction of a conceded vote-counting error, requiring instead that the error be corrected in a subsequent contest. In this way, the earlier case reflected a stricter attitude about adherence to statutory procedures, even when those procedures appeared to undermine achieving an electoral outcome that accurately reflected the electorate's choice.)[21]

Part III avoids the difficulties that beset these other elections, including Minnesota's in 2008, by creating a distinct process for judicial review of ballot-eligibility determinations, including reconsideration during the canvass of ballots excluded from Election Night returns based on an initial determination of ineligibility. Part III neither forces these ballot-eligibility issues into a recount, which is more appropriately reserved for reviewing initially counted ballots (especially in the expedited context of a presidential recount, which must occur before all ballot-eligibility determinations have been made), nor requires these issues to await a subsequent contest with its attendant burden of proof. Instead, these ballot-eligibility issues get their own distinct process, tailored to its particular purpose. In this way, Part III and its Procedures reflect lessons learned from previous high-stakes disputed elections.

[21] The 2000 election is also one in which the state supreme court deviated from the existing statutory scheme in an attempt to achieve what it perceived as greater electoral accuracy and fairness, although the specific issue there (unlike in Minnesota and Washington) concerned how to treat imperfectly marked ballots, not issues of ballot eligibility.

§ 311. Presidential Election Court's Review of Canvass: Deadline and Proceedings

(a) Within 21 days after Election Day, the Presidential Election Court shall complete its review of any petition filed under § 310.

(b) The Presidential Election Court may consolidate into a single adjudicatory proceeding any or all petitions filed under § 310.

(c) The Presidential Election Court may hold any hearing, with or without oral argument, to facilitate its review of any petition filed under § 310, provided that the hearing does not interfere with the Court's compliance with the deadline in subsection (a).

(d) At any point during a hearing, the Presidential Election Court may issue an interim ruling on legal or factual issues if, in the Court's judgment, doing so will help to expedite its review of a petition.

(e) The Presidential Election Court may receive the testimony of any witness, or receive into evidence any document, that will assist the Court in determining the eligibility of any ballot, or reviewing any ruling during the canvass, that is the subject of a petition.

(f) Any party may propose to the Presidential Election Court the introduction of relevant evidence, but the Court shall determine whether to receive such proposed evidence, balancing the potential value of the evidence against the need to complete its review within the deadline in subsection (a).

(g) In its sole discretion, the Presidential Election Court may adhere to or deviate from generally applicable rules of evidence insofar as the Court determines, in its judgment, that doing so will enable it to make the most factually accurate determinations of ballot eligibility, or vote-counting accuracy, consistent with its overriding obligation to comply with the deadline in subsection (a).

(h) For any ballot subject to a petition filed under § 310, the petitioner shall bear the burden of proving that, more likely than not, the Local Election Authority's determination regarding the ballot's eligibility or ineligibility is erroneous.

(i) For any claim raised in a petition not covered by subsection (h), the petitioner shall bear the burden of proving that the Local Election Authority's

determination caused the vote totals certified under § 309 to be incorrect and, insofar as the petition asks the Court to adjust the certified vote total, shall further bear the burden of proving that the requested adjustment is more likely than not correct.

(j) As part of completing its review of all petitions pursuant to the deadline in subsection (a), the Presidential Election Court shall publicly announce its ruling on each ballot-eligibility determination submitted for its review.

(1) The Court shall declare whether, in its judgment, each ballot is eligible or ineligible and whether this judgment affirms or reverses the Local Election Authority's determination with respect to the ballot;

(2) For each ballot, the Court shall specify the grounds in law or evidence upon which it relies for its determination of whether the ballot is eligible or ineligible to be counted.

(3) The Court's grounds may include the petitioner's failure to meet the burden of proof with respect to the particular ballot.

(4) The Court may report its grounds in whatever format (either briefly or at greater length) that it deems most conducive to the public understanding of its rulings, including grouping together ballots that are subject to the same grounds of decision.

(k) At the same time as the Presidential Election Court publicly announces its final ballot-eligibility rulings on a petition under § 310, the Court shall also publicly announce its final determinations on any other claims in the petition concerning the vote totals certified in the canvass.

Comment:

a. Ballot-specific burden of proof under subsection (h). This Section establishes that the burden of proof in proceedings to review ballot-eligibility determinations in the canvass is ballot-specific, meaning that the petitioning candidate bears the burden of overturning the Local Election Authority's rulings challenged in that petition. If another candidate challenges the same Local Election Authority's rulings on the eligibility of ballots, that other candidate bears the burden of overturning those Local Election Authority's rulings. The burden of proof in proceedings under this Section, in other words, does *not* depend on whether the petitioning

candidate is ahead or behind in the count of ballots as part of the statewide certification of the canvass under § 309. In this respect, the judicial review of the canvass is different from a judicial contest of the election under § 313. In a contest, the contestant bears the burden of proof on all issues necessary to overturn the certification.

The reason for this distinction concerning the burden of proof relates to the point about litigation pressures addressed in the Comment to § 308. If a candidate potentially faces a heavy burden of proof to overturn ballot-eligibility rulings made during the canvass depending on whether or not that candidate is behind in the count in the certification of the canvass, the candidate will be highly tempted to file a preemptive lawsuit of some kind in an effort to control the ballot-eligibility determinations made in the canvass before the certification occurs. These preemptive lawsuits present a major risk of derailing, or at least significantly delaying, the entire process of the canvass; in a presidential election, this risk presents a severe threat of preventing the state from complying with the Safe Harbor Deadline. Consequently, to remove this pressure for preventive litigation, the burden of proof for challenging ballot-eligibility determinations during the canvass should not turn, for the entirety of ballots under review from the canvass, on which candidate is ahead or behind. Instead, the burden of proof should apply ballot-by-ballot for each specific claim that the Local Election Authority made an error in ruling a ballot eligible or ineligible.

In this regard, note also that the burden of proof does not depend on whether the Local Election Authority's ruling being challenged is that the ballot is eligible or, instead, ineligible. In either case, it is the candidate claiming that the ruling is erroneous who bears the ballot-specific burden of overturning that particular ruling. Thus, if the Local Election Authority ruled the ballot eligible, then the petitioning candidate bears the burden of proving that the ballot in question more likely than not was ineligible. Conversely, if the Local Election Authority ruled the ballot ineligible, then the petitioning candidate bears the burden of proving that the ballot in question more likely than not was eligible.

The use of the "more likely than not" standard for this ballot-specific burden of proof, rather than the more demanding "clear and convincing evidence" standard, also contributes to diffusing pressure to sue in court over the conduct of the canvass before the canvass is concluded and certified.

b. Minimizing the necessity for a remand to a Local Election Authority. As in the Comment to § 306 concerning the Presidential Election Authority's reviewing authority over the recount, here too it is important to note that the Court's reviewing authority over the canvass permits the Court to make a final determination on whether or not a ballot is to be counted without need for a remand to the Local Election Authority. Moreover, for the same reason as stated in the Comment to § 306, the need for expeditious proceedings in order to meet the Safe Harbor Deadline creates the expectation that ordinarily the Presidential Election Court will make these final determinations and thereby avoid the risk of delay associated with a remand. Nonetheless, to the extent that a limited remand on certain specific issues is unavoidable, the Court has the authority to order a remand. The goal should be for any such limited remand, and any subsequent proceedings before the Court itself, to be complete by the time the Court must issue its report concerning review of the canvass under subsection (j). But insofar as it is impossible to complete the limited remand by this deadline, then the limited remand ordered by the Court may be concluded during the time available for a post-appeal remand under § 312.

§ 312. Appeal to State Supreme Court of Canvass Review

(a) Within 24 hours after the Presidential Election Court's issuance of its final ruling on a petition under § 311(k), a party to the proceeding may appeal the ruling to the State Supreme Court.

(1) No appeal of any decision made by the Presidential Election Court as part of a proceeding under § 310 can occur until after the Court has issued its final ruling in that proceeding under § 311(k).

(2) The right of appeal under this Section is limited to contending that the Presidential Election Court erred in ruling a ballot eligible or ineligible or otherwise erred in a manner that affects the vote totals certified under § 309.

(3) No appeal can concern any intermediary decision of the Presidential Election Court during the proceeding under § 310 except insofar as the decision affects the eligibility of a ballot or otherwise affects the vote totals certified under § 309.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under subsection (a), that oral argument shall occur within 24 days after Election Day.

(c) Within 27 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(d) If the State Supreme Court's resolution of an appeal under subsection (a) requires additional proceedings on remand concerning the canvass,

(1) each Local Election Authority required to conduct such additional canvass proceedings must complete these proceedings within 29 days after Election Day;

(2) the Presidential Election Court must complete any additional proceedings of its own concerning the canvass, including all review of additional proceedings conducted by each Local Election Authority under subsection (d)(1), within 31 days after Election Day;

(3) the State Supreme Court must complete any post-remand review of the Presidential Election Court's proceedings under subsection (d)(2) at

least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

Comment:

a. No interlocutory appeals permitted. It is imperative that there be no interlocutory appeals to the State Supreme Court concerning judicial review of the canvass. Such interlocutory appeals would jeopardize the state's ability to satisfy the Safe Harbor Deadline. Since the only appealable issues concerning judicial review of the canvass involve the merits of a decision that affects the counting of ballots, any appeal must await the Presidential Election Court's final determination of the merits in question.

The timing of an appeal under this Section is determined by the timing of the Presidential Election Court's final ruling on the merits of a petition pursuant to § 311(k). If a petition has *not* been consolidated with any other similar petitions, then an appeal of the Court's ruling on that petition is ripe once the Court has finally determined all issues concerning that particular petition, and its ripeness in this regard does not depend on the status of any other petition concerning the canvass that may remain pending before the Court. Conversely, however, if the Court has consolidated several petitions concerning the canvass, then the appeal of the Court's decisions concerning any of the consolidated petitions becomes ripe only when the Court has issued its final ruling under § 311(k) on all issues concerning all of the consolidated petitions.

b. Appeals limited to decisions affecting certified vote totals. The only appealable rulings of the Presidential Election Court concerning the conduct of the canvass are those rulings that either sustain or reject a proposed change to the certified vote total for one or more candidates. A ruling concerning the eligibility of a ballot is of this character. If the Presidential Election Court rules a ballot eligible when the Local Election Authority had ruled the ballot ineligible, then the Court's ruling will change the count of ballots. The same is true if the situation is the reverse: the Court rules the ballot ineligible after the Local Election Authority had ruled it eligible. But it is important to state explicitly that the Court's decisions to affirm a ballot-eligibility ruling by a Local Election Authority have the same character: a decision by the Presidential Election Court to confirm that a ballot is eligible, or ineligible, is a decision that affects the certified vote totals precisely because if the decision had gone the other way then the certified vote totals would have changed. Or, to put the same point somewhat differently, if the State Supreme Court reverses the

Presidential Election Court's confirmation of the Local Election Authority on the question of a ballot's eligibility, then the certified vote counts will change accordingly.

Other decisions by the Presidential Election Court concerning the canvass have the same character. Consider, for example, this kind of decision concerning the process of reconciliation: suppose that the Local Election Authority has declined to make any adjustment in the counting of ballots based on the fact that in a particular polling location the number of counted ballots exceeds the recorded number of voters who cast ballots; suppose further that the Presidential Election Court reverses the Local Election Authority's ruling on this point and orders the Local Election Authority to randomly deduct from the number of counted ballots the same number as the excess. The Presidential Election Court's decision on this issue would affect the certified vote totals and thus would be appealable under this Section.

Conversely, however, rulings made by the Presidential Election Court as part of judicial review of the canvass are *not* appealable if they do not have the essential character of confirming or changing the certified vote totals. For example, suppose at issue is the question whether a particular provisional ballot is eligible. As part of the adjudication of this issue, the Court declines to permit a candidate to introduce into evidence the testimony of a particular witness, ruling that the Court has adequate evidence upon which to make its eligibility determination. The Court's decision to reject the proffer of this testimony is not appealable. Only the question of whether the Court made the correct eligibility ruling with respect to the particular provisional ballot at issue is appealable.

§ 313. Judicial Contest of Certified Vote Totals: Petition

(a) Within 24 hours after receiving e-mail notification of the statewide and local certifications as specified in § 309(b)(2), a candidate eligible to participate in a presidential recount under § 305 may file with the Presidential Election Court a petition to contest the validity of the vote totals declared in the statewide certification.

(b) A candidate who fails to file a timely petition within the deadline specified in subsection (a) forfeits the right of petition under this Section, thereby barring the Presidential Election Court's consideration of the petition.

(c) A candidate in the lead based on the statewide certification of the canvass may file with the Presidential Election Court a conditional petition, for the Court to adjudicate if the candidate loses the lead as a result of:

(1) proceedings concerning the recount that occur after certification, or

(2) adjustment in vote totals pursuant to a petition for judicial review of the canvass under § 310, or

(3) the Court finding merit in a petition filed by another candidate under this Section;

provided that the candidate in the lead must file the conditional cross-petition within the same deadline as in subsection (a).

(d) Any candidate petitioning under this Section shall, at the same time as electronically filing the petition with the Presidential Election Court, serve electronic notice of the petition upon all other candidates entitled to participate in a presidential recount under § 305, as well as upon the Chief Elections Officer.

(e) The petition may assert as grounds for contesting the certification any grounds available under state law in a judicial contest of a certified gubernatorial election, except those grounds the petitioning candidate had an opportunity to raise under § 306 or § 310.

(f) A petition under this Section may seek either:

(1) a declaration that, upon the correction of errors affecting the validity of the certification, the petitioner is entitled to be certified the candidate with the highest statewide total of valid votes; or

(2) a declaration that the certification must be declared void, in which case the Legislature of the state may appoint the state's presidential electors directly, or provide an alternative method of appointment of the state's presidential electors, pursuant to its authority under Article II of the U.S. Constitution.

(g) If a petition under this Section claims that the statewide certification is tainted by the presence of more invalid ballots counted in the election than the difference in the vote totals of the leading candidates, the Presidential Election Court shall have such powers, and only such powers, to remedy this taint as would a state court in a contest of a gubernatorial election premised on the same grounds.

(h) The Presidential Election Court, in its sole discretion, may join a Local Election Authority to any proceedings pursuant to this Section.

(i) Apart from subsection (h), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (d).

(j) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

Comment:

a. A contest's relation to the recount and judicial review of the canvass. A petition to contest an election seeks to overturn the certification of the election's results. A contest under this Part of the project, and the Procedures that this Part sets forth, is limited to those issues that could not have been raised under § 306, as part of the Presidential Election Court's review of the recount, or under § 310, as part of the Court's review of the canvass. A presidential candidate who is behind in the count after certification of the candidate thus may contest the certification on grounds that the count is tainted by errors or improprieties that were not capable of being redressed in the recount or canvass. An example would be a claim that absentee ballots cast in

favor of the candidate ahead after certification were invalid because they were cast in exchange for a payment of funds to the voters who cast them—and that there were enough of these improper absentee ballots to put the benefited candidate in the lead.

b. The possibility of a conditional petition. After certification of the canvass under § 309, the lead may change under these Procedures for any of three reasons. First, some residual proceedings concerning the recount may occur after certification of the canvass—for example, when a remand is ordered under § 307—and these residual recount proceedings may alter the vote totals for the candidates, causing the lead to change. Second, judicial review of the canvass under § 310 may result in an adjustment of vote totals that causes the candidate ahead in the certification to now trail another candidate. Third, a candidate behind at the time of the certification may file a meritorious petition under this Section, causing the Presidential Election Court to order an adjustment of the vote totals that puts the petitioning candidate ahead in the count.

Given these possibilities, the candidate in the lead at the time of certification must have an opportunity to challenge the resulting vote totals if and when the lead changes in one or more of these ways. The candidate ahead in the certification has no incentive to make such a challenge unless and until this kind of lead change does occur. In a nonpresidential election, when the need for speed is not so great, the relevant procedures can handle this situation by waiting for the lead to change in actuality before requiring the candidate who was ahead to file such a challenge. But in the accelerated circumstances of a presidential election, it is necessary for the candidate leading at the time of certification to go forward with whatever challenges the candidate potentially would bring if the lead were to change. There is not enough time to wait to see if the lead does in fact change before requiring that candidate to raise these challenges.

Thus, the device of a conditional petition provides the way to handle this situation in the context of a presidential election. The leading candidate's petition must be filed at the same time as a trailing candidate's. But the Court does not need to render a decision on claims made in the leading candidate's conditional petition unless and until the lead actually changes for one or more of the three reasons just identified. In other words, at the time of certification, the leading candidate must identify all claims that this candidate would raise in a contest if this candidate had been behind in the certification; the candidate presents these claims in a petition as if the candidate were behind instead of being ahead; but this particular petition does not become

actively in need of the Court's resolution unless and until this candidate actually falls behind in the course of the proceedings under these Procedures.

In the interests of expedition and efficiency, the Presidential Election Court can undertake steps to litigate the merits of a conditional petition while the petitioning candidate is still ahead in the certified count, before the conditional petition becomes ripe for the Court's ruling on the merits. For example, evidentiary issues relating to a conditional petition may overlap considerably with a regular (non-conditional) petition pending before the Court. Suppose, for instance, that the regular petition contends that a large number of absentee ballots cast on behalf of the leading candidate are tainted because they were procured through payment of funds; but suppose, further, that the leading candidate counters that the petitioning candidate also benefited substantially from the same kind of payments to absentee voters and that, in practice, there was widespread competition among "ballot brokers" in certain neighborhoods in the state. The leading candidate raises this counterclaim in a conditional petition, with the understanding that the Presidential Election Court would not make a final determination of the merits of this counterclaim if either the Court rejects the merits of the claim in the regular petition or the Court finds that the prevalence of absentee-ballot fraud as alleged in the regular petition was in fact insufficient to change which candidate is ahead in the count based solely on valid ballots. Thus, as the litigation of the regular petition remains pending, there is the potential that the Court may never need to make a final determination of the merits of the conditional petition. Even so, if testimony concerning the prevalence of "ballot brokers" and their payments for absentee ballots relates to both the regular petition and the conditional petition, and if it would be more efficient and expeditious for the Court to hear all such relevant testimony at the same time, during the Court's consideration of the regular petition, it is perfectly proper for the Court to do so.

Similarly, the Presidential Election Court can entertain a motion to dismiss a conditional petition at the same time that the Court considers a motion to dismiss a regular petition. For example, one can imagine a regular petition claiming that the leading candidate's vote total is tainted by an outcome-determinative number of invalid ballots cast by ineligible felons. The leading candidate, however, files a motion to dismiss this regular petition on the ground that under the relevant state law a challenge cannot be made to the validity of a ballot on the ground that it was cast by an ineligible felon if the felon was registered to vote in the state and no

challenge had been made to the voter's registration status prior to Election Day on the ground of this ineligibility. Meanwhile, the leading candidate has also filed a conditional petition alleging that a large number of invalid ballots cast by noncitizens taints the opponent's vote totals. The opponent, however, files a motion to dismiss the conditional petition on the ground that under state law it is not cognizable to contest a certified election on the ground that a ballot is invalid for being cast by a noncitizen, because the state's voter-identification law requires proof of citizenship at the time the voter casts the ballot. In this situation, under this and the following Section, the Presidential Election Court may receive briefs and hold an oral argument on both motions to dismiss simultaneously.

c. The baseline of the same substantive law as a gubernatorial contest. This Section establishes that the substantive law to apply in a judicial contest of a presidential election is the same that would apply under state law to a judicial contest of a gubernatorial election, except insofar as the expedited nature of these Procedures for a presidential election necessitates deviation from this gubernatorial baseline. As already noted, claims that otherwise would be cognizable in a contest of a presidential election (because they are cognizable in a gubernatorial contest) may *not* be raised under this Section if they could have been raised in a proceeding to review the recount under § 306 or a proceeding to review the canvass under § 310.

Establishing this gubernatorial baseline has several advantages. First, it recognizes the discretion that states have to adopt their own substantive rules for judicial contests of major statewide elections, including those for the highest executive officer of the state. The substantive law governing judicial contests of a certified election is state, rather than federal, law. States can, and do, differ in the substantive policy choices regarding these rules. For example, a state can choose to make a voter's status as an ineligible felon a non-cognizable issue in a judicial contest or, alternatively, a state can choose to permit a certified election to be contested on the ground that the outcome is tainted by enough ballots cast by ineligible felons to overturn the certified margin of victory. Part III of this project, and the Procedures that Part III sets forth, do not dictate what choice a state should make regarding these policy questions.

Instead, these Procedures establish parity between gubernatorial and presidential elections regarding these policy choices. If ballots may be challenged as ineligible in a judicial contest of a gubernatorial election, then so too may these same ballots be similarly challenged as ineligible in a contest under this Section (unless they were issues susceptible to being raised

under § 306 or § 310, as explained above). Similarly, if a particular claim or issue may not be raised in a gubernatorial contest, then the same claim or issue may not be raised in a contest under this Section. The standards for a gubernatorial contest also govern a presidential contest. A presidential contest should not be disfavored under state law relative to a gubernatorial contest, but a presidential contest also should not be more generous than a gubernatorial contest in terms of the standards for overturning the election's certification.

One issue that can arise in a gubernatorial contest, as it did in Washington's 2004 election, is the remedial authority of a court to order a statistical adjustment in vote totals when the certified margin of victory is exceeded by the number of invalid ballots that should not have been counted but which are impossible to extricate from the count because they have been commingled with all other counted ballots. In the Washington case, the court ruled that state law did not permit a statistical adjustment, at least not in light of the relevant evidence including expert testimony. Subsection (g) makes explicit that the parity of gubernatorial and presidential contests applies to this issue of remedial authority as well. When a court cannot make this kind of statistical adjustment in a gubernatorial contest, it also cannot do so in a presidential contest. But, conversely, were a court empowered to make this kind of statistical adjustment in a gubernatorial contest, then it could do so as well in a presidential contest under this Section.

d. Judicial authority to void a presidential election. As specified in subsection (f)(2), the parity between gubernatorial and presidential contests must be qualified in one particular respect: the circumstance in which the court is authorized to order the certified election null and void. Even in this particular context, the parity between gubernatorial and presidential contests applies up to a point: deviation from parity occurs with respect to what follows from a judicial order to void the election. In other words, if in a judicial contest of a gubernatorial election the court is empowered to declare the election void, then on the same facts the Presidential Election Court under this Section is also empowered to declare the presidential election void. But whereas in the gubernatorial contest the court might also be empowered to order a new election after voiding the initial one, not so the Presidential Election Court under this Section. Instead, under subsection (f)(2), immediately upon the Presidential Election Court's order to void the certified vote totals in the presidential election, the authority reverts to the state's legislature under Article II of the federal Constitution to provide for an alternative method for appointment of the state's presidential electors prior to the uniform date for the presidential electors to cast their votes. This

alternative method of appointment could be for the legislature itself to appoint the electors, or to authorize another body to appoint the electors. In principle, the legislature could authorize the Presidential Election Court to appoint the electors as equitably as the circumstances permit, although the legislature may be reluctant to give a court this inherently political function, and the court might be just as reluctant to undertake it. (Presumably, there would be insufficient time for the legislature to order a new election as the alternative method of appointing the state's presidential electors, but in theory the legislature would have power under the U.S. Constitution to attempt a second election—although if that election also ended up disputed, there almost certainly would be insufficient time to resolve the dispute before the date on which the presidential electors were constitutionally required to meet.)

Illustration:

1. Susan Smith and John Jones are presidential candidates in 2020. Smith leads Jones by only 100 votes in the certification of New Mexico's canvass under § 309, and whichever candidate wins New Mexico will have an Electoral College majority. Jones has filed a petition under this Section claiming that severe overcrowding at the polls in Albuquerque, caused by a systemic technological failure with the rollout of the city's new electronic poll books, prevented thousands of eligible voters from casting ballots that would have made a difference in the outcome of the presidential election in the state. Suppose that this claim is cognizable under state law: if the same circumstances had occurred in a gubernatorial election, the state's judiciary would have found the claim valid and voided the election, ordering a new one. Under this Section, the Presidential Election Court of New Mexico has the same authority to void the certified result of the presidential election in the state, based on the same facts; however, if the Presidential Election Court so voids the election, the Court does *not* have the authority on its own initiative to order a new presidential election in the state, but instead the state's legislature has the authority to appoint the state's presidential electors in a manner the legislature chooses.

REPORTERS' NOTE

The relevance of Washington's 2004 gubernatorial contest. For anyone concerned about what a judicial contest of a presidential election might look like today (in the aftermath of 2000), there is no better precedent to examine than Washington's 2004 gubernatorial election. There, the state court faced the daunting challenge of dealing with the fact that the certified margin of victory was only 129 votes, yet the evidence established that 1678 unlawful ballots were included in the count that produced this certified result. In other words, the number of invalid ballots wrongfully included in the count dwarfed the certified margin of victory by more than tenfold. (Most of these invalid ballots had been cast by ineligible felons.) These invalid ballots clearly might have affected the outcome of the election, but there was no way to tell for sure because they had been commingled with all other counted ballots and could no longer be isolated from the undifferentiated pool. For a discussion of this election, see Foley, BALLOT BATTLES, chapter 12.

Given this difficult situation, the state court had to consider the possibility under state law of three less-than-ideal options: first, voiding the election on the ground that it had been irretrievably tainted by the large number of invalid ballots in relationship to the certified margin of victory; second, using a statistical procedure (often called "proportionate deduction") to reduce from each candidate's counted votes in each precinct a number of invalid ballots cast in that precinct equal to the candidate's share of overall votes in that precinct; or third, letting the count stand unless the contestant demonstrated through witness testimony which candidate received the vote of an invalid ballot. Based on its analysis of applicable state law, the trial judge in the Washington case chose the third option. But other states faced with the same situation would confront applicable precedents that would dictate choosing either of the other options. For a comprehensive analysis of the relevant precedents nationwide, see Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEG. 265 (2007).

Ohio's elimination of a judicial contest in a presidential election. In the aftermath of the 2004 election, when all eyes nationwide had been on Ohio as the pivotal state, the Ohio legislature undertook a reform of election procedures that included the explicit elimination of the availability of a judicial contest in a presidential election. See Ohio Rev. Code § 3515.08(A) ("The nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, shall not be subject to a contest of election conducted under this chapter.") Ohio evidently was concerned about its ability to complete a contest, as well as recount and related proceedings, in a disputed presidential election in time to satisfy the Safe Harbor Deadline. A separate provision of the same post-2004 electoral reform contained an express requirement that a presidential recount be complete by this deadline: "As required by 3 U.S.C. 5, any recount of votes conducted under this chapter for the election of presidential electors shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors." Ohio Rev. Code § 3515.041. If under state law a recount is not finished until the date of the Safe Harbor Deadline, then there is no time afterwards for a judicial contest of the election as certified upon conclusion of the

recount. Eliminating the availability of a post-recount contest thus, at least in theory, prevents the risk that a contest could deprive Ohio of the benefit of Safe Harbor status.

In practice, however, elimination of the contest option may not achieve this desired result. Issues that previously would have been raised in a judicial contest, and which in other states would still be raised in a contest, do not simply disappear. Candidates instead will search for other judicial avenues in which to raise the same claims. Moreover, if the claims are perceived to have at least potential merit, there will be intense public pressure for judges to acknowledge the availability of some other type of judicial process in which to litigate the claims. For example, suppose that there is credible evidence that the outcome of a presidential election in Ohio is tainted by substantial absentee-ballot fraud (of the kind that tainted Miami's 1997 mayoral election). If a judicial contest of the election is unavailable as a vehicle for rescuing the presidential election from the apparent perpetration of this nefarious fraud, then inevitably there will be a concerted effort to use the state's recount procedures to undo this attempt to steal the presidency. Or there will be an effort to reopen the canvass in order to cleanse the certification of the canvass from the taint of this absentee-ballot fraud. These efforts will occur even if the recount, or reopening of the canvass, is not a well-designed vehicle for adjudicating the claim of fraud. The imperative will be to find some way, even if less than ideal, rather than none, to remedy the problem. One can foresee, for example, the use of a writ of mandamus, or a writ of prohibition, filed as an original action in the Ohio Supreme Court, seeking a decree to order the Secretary of State to amend the certification to free it from the taint of fraudulent absentee votes. Cf. State ex rel. Painter v. Brunner, 128 Ohio St. 3d 17 (2010) (original writ of mandamus granted to prevent counting of provisional ballots in violation of state law); State ex rel. Skaggs v. Brunner, 120 Ohio St. 3d 506 (2008) (same). And if relief from the absentee-ballot fraud is not forthcoming in state court, there will be lawsuits filed in federal court, based on the authority of Roe v. Alabama (discussed above) and related cases, as an alternative way to save the presidential election from outright theft. Indeed, given Ohio's recent experience with nonpresidential election litigation, it is likely that the federal-court lawsuits would be filed without waiting to see if a state-court alternative would be successful.

The resulting flurry of simultaneous lawsuits would likely be chaotic and destabilizing. Contrary to the intended goal of the relevant Ohio statutes, there would be a markedly increased risk that the conflicting lawsuits, in state and federal court, would jeopardize the state's ability to appoint a slate of presidential electors by the date they are required to meet—at least a slate that represents the will of the state's electorate in November, cleansed of the fraud. And even if state or federal courts undertook the challenge of retooling various forms of judicial procedure, like a writ of mandamus, to hold a trial on the allegations and evidence of absentee-ballot fraud, the courts on the fly would have to develop new schedules and practices for handling this ad hoc process.

A much better process would be to have the claims of absentee-ballot fraud litigated in a contest action specifically designed for the purpose and thus thought out in advance. For this reason, these Procedures include the possibility of a contest action in a presidential election and

engineer it so that it can occur after the recount and canvass—and still permit the state to satisfy the Safe Harbor Deadline.

§ 314. Contest of Certified Vote Totals: Deadline and Proceedings

(a) Within 28 days after Election Day, the Presidential Election Court shall conclusively resolve any contest filed under § 313 and shall announce its resolution electronically pursuant to § 304(h).

(b) To facilitate compliance with the deadline in subsection (a), the Presidential Election Court shall adhere to an expedited schedule for adjudication of the contest, including issuing such orders for expedited discovery as necessary to enable a trial of the contest to commence within seven days after the filing of the contest.

(c) A motion to dismiss a contest petition filed under § 313, including a motion to dismiss a conditional petition filed under § 313(c), must be filed with the Presidential Election Court and served upon the petitioner within 48 hours after the filing of the contest.

(d) The Presidential Election Court may choose to hold an oral argument on a motion to dismiss the contest, provided that the argument shall occur within 72 hours after the filing of the motion.

(e) Unless the Presidential Election Court has previously granted a motion to dismiss, the trial of the contest will commence within seven days after the filing of the contest.

(f) While a contest petition or conditional petition is pending, the Presidential Election Court may permit the petitioner for good cause shown to amend the petition to add or supplement claims with facts that could not have been available to the petitioner at the time the petition initially was filed, provided that in no event shall the Court permit the amendment of a petition more than 21 days after Election Day; nor under any circumstances may the Court waive forfeiture for failure to timely file the original contest petition or conditional petition as required under § 313(a)-(c).

(g) Whenever a contest petition or conditional petition is pending at the same time as another contest petition, the Presidential Election Court may consolidate proceedings, including oral argument on motions to dismiss or trial of evidentiary

issues, in the interest of completing adjudication of all pending petitions within the deadline in subsection (a).

(h) When considering whether to grant any motion to dismiss a contest petition or conditional petition, the Presidential Election Court in its discretion may defer ruling on the motion until after a trial on factual issues relating to the petition that is the subject of the motion to dismiss, and one factor that may weigh in favor of exercising this discretion is whether there would be sufficient time to hold a trial if a dismissal of the petition were reversed on appeal by the State Supreme Court.

(i) With respect to the trial of any contest petition or conditional petition, the petitioner bears the burden of proving by a preponderance of the evidence any issue of fact necessary to sustain a legal claim made in the petition; provided that with respect to any such issue of fact the burden of proof may be elevated to the standard of clear and convincing evidence if but only if the same elevated standard would apply to the same factual issue in a contest of a gubernatorial election.

Comment:

a. Additional time for discovery of contest-related evidence. Like all other proceedings concerning the resolution of a disputed presidential election, a judicial contest of the certified results of the election must be complete by the Safe Harbor deadline if the state is to attain the benefit of Safe Harbor status and, in any event, must be complete six days later when the state's presidential electors meet to cast their official Electoral College votes. While these deadlines are challenging to all aspects of these Procedures, including the recount and canvass, they are especially challenging to the litigation of a contest. In a nonpresidential election, even an expedited judicial contest would extend over many weeks or even months. The experience of both Washington in 2004 and Minnesota in 2008 underscores this point.

These Procedures recognize this reality and address it by making the contest the last of the proceedings to occur under the overall coordinated schedule that these Procedures collectively establish. The Procedures build in the maximum allowable time for the development and presentation of claims cognizable in a contest (claims that could not be pursued in the recount or judicial review of the canvass) consistent with the objective of completing all proceedings by the Safe Harbor deadline. The Procedures achieve this piece of engineering by

permitting contest petitions (and any conditional petition) to be amended for up to a week after filing of the initial petition.

As provided in § 313, a contest petition or conditional petition must be filed initially within 24 hours after certification of the canvass under § 309. Thus, this initial deadline is immediate, and the reason that it is not postponed until later is to put candidates, election officials, and the public on notice that the certification will be contested. Litigation of claims capable of being raised at this time, at least in a preliminary fashion, can begin—even if additional evidence is being gathered that may determine the ultimate adjudication of the contest. Given the exigencies of the schedule, there is no reason to delay for even a week any contest-related proceedings that can occur immediately after certification. For example, motions to dismiss claims raised in a contest petition or conditional petition need not await the gathering of additional evidence relevant to the claims. The legal sufficiency of these claims can be litigated immediately upon certification of the canvass. Factual allegations will be assumed true for purposes of the motions to dismiss and thus are not dependent on the gathering and presentation of evidence. Thus, these claims can be pled in petitions filed within 24 hours after certification, and the legal sufficiency of these claims tested forthwith in motions to dismiss, while expedited discovery of relevant evidence gets underway.

As expedited discovery occurs, evidence accumulated may have either of two characteristics. First, the evidence may straightforwardly support a claim already raised in a contest petition. For example, if the contest petition claims absentee voters received illegal payments in exchange for casting their absentee ballots, discovery proceedings may uncover evidence establishing the time, method, and amount of these payments, thereby directly substantiating the petition's claim. In this circumstance, the petition would not need to be amended in light of the evidence obtained during discovery. Second, by contrast, evidence obtained during discovery might raise issues not pled in the initial petition. To build upon the previous example, suppose now that discovery reveals not only illegal payments made for absentee votes but also a practice of fraudulently casting absentee ballots on behalf of registered voters who chose not to cast a ballot in the particular election. This newly discovered evidence would go beyond the scope of what was initially pled in the petition. Subsection (f) would permit amendment of the petition to add a new claim of absentee-ballot fraud based on this subsequently discovered evidence. Subsection (f), however, imposes two important constraints

on the amendment of a petition based on new evidence as described in the previous paragraph. First, the newly discovered evidence must not have been available to the petitioner at the time the petition was initially filed. It must be genuinely new. The reason for this constraint is to incentivize the pleading and litigation of claims as soon as feasible, in keeping with the need to expedite proceedings as much as possible. The decision to permit or deny amendment of a petition in light of new evidence is vested in the sound discretion of the Presidential Election Court. In exercising this discretion, the Court should avoid engaging in a mini-trial over whether the evidence is genuinely new or not. Rather when presented with an application to amend a pending petition, the Court should quickly decide whether to grant or deny the request based on information provided in the application, and then move on to the litigation of the contest itself (whatever its resulting scope).

The second constraint is that the outer limit for an application to amend a petition based on newly discovered evidence is 21 days after Election Day (which will be equivalent to one week after the deadline for certification of the canvass). It is not much additional time. But it is all that is available, given the exigencies of the overall objective of meeting the Safe Harbor Deadline. Moreover, as the 2000 presidential election in Florida demonstrated, one additional week in the context of the overall five-week schedule can make a huge difference. Thus, the ability to amend a petition under subsection (f) is an important structural feature of these Procedures.

b. Motions to dismiss and the timing of contest trials. In ordinary litigation, it may be efficient for a trial court to grant a motion to dismiss, recognizing the possibility that the dismissal may be reversed on appeal and the case remanded for a trial on the reinstated claims. But in the specific context of these expedited Procedures, as explained more fully in the Comment to the next Section, there may be insufficient time to hold a trial on reinstated claims on remand after a successful appeal of a decision by the Presidential Election Court to grant a motion to dismiss. Thus, subsection (h) requires the Presidential Election Court to take account of this reality when ruling on any motion to dismiss.

This reality does not mean that it is never appropriate for the Presidential Election Court to grant a motion to dismiss a contest petition. On the contrary, if the Presidential Election Court quickly determines that a contest petition lacks legal merit even if all its allegations of fact are true, and if no trial is necessary on any other contest-related matters, then a quick dismissal of

the contest petition may be immediately appealed; and if the State Supreme Court disagrees with that dismissal and does so expeditiously—so that the appeal is over by the end of the third week after Election Day—then there still will be time to hold a trial on the contest petition during the fourth week after Election Day, and the trial will have the benefit of the State Supreme Court's guidance from the appeal. But to be balanced against this possibility is the concern that, if the appeal extends into the fourth week, time for holding the trial may evaporate. Likewise, dismissal of some claims in a contest petition may still leave the necessity of holding a trial on other claims, and thus little efficiency is to be gained from granting only a partial motion to dismiss.

Thus, subsection (h) leaves it to the sound judgment of the Presidential Election Court to decide whether or not to grant a motion to dismiss, recognizing the time constraints involved. Even if the Presidential Election Court might be inclined to grant a motion to dismiss, based on its analysis of the legal issues involved, the better decision may well be to hold a trial of the facts relevant to the dismissible claims anyway—because the trial can be conducted more efficiently in advance of an appeal, rather than afterwards. In this respect, litigation of a contest under these Procedures may differ from the ordinary expectation of how to handle a motion to dismiss. Moreover, holding a trial on dismissible claims will especially make sense if the Presidential Election Court knows that it must hold a trial on other claims raised in a contest petition, and these other claims overlap factually with the dismissible claims, and thus the Court might as well hold a trial on all contest-related claims simultaneously. The overarching goal remains to complete all proceedings that may be required, including those that might be mandated by the State Supreme Court as the result of an appeal, before expiration of the Safe Harbor deadline.

c. Burden of proof in a contest. A key distinguishing feature between judicial review of the canvass under §§ 310-311 and a judicial contest under this and the previous Section is the nature of the burden of proof that applies in each of the two proceedings. Even though judicial review of the canvass under §§ 310-311 occurs after certification of the canvass, there is no burden of proof imposed on any candidate as a consequence of the certification. Instead, the burden of proof under § 311 is specific to each decision made by a Local Election Authority during the canvass, with the candidate challenging the specific decision bearing the burden of proving that particular decision incorrect. In this way, the burden of proof under § 311 shifts from ballot to ballot, or issue to issue, as the candidates present their challenges to decisions

made during the canvass. As the burden of proof shifts in this way, it does not matter which candidate is ahead or behind after certification of the canvass; the certification is not consequential to who bears the burden.

The burden of proof in a contest is different. The certification matters greatly here. The nature of a contest is that the contestant is challenging the certified result, presenting claims that the certification resulted from errors—and that if those errors are corrected, a different candidate would emerge on top. Given all this, the contestant bears the burden of proving all elements necessary to establish the merits of a claim raised in a contest. Moreover, historically, this burden is understood to be a heavy one; a certified election is not lightly overturned. Thus, a candidate who is behind in the count at the time of certification faces a high hurdle, and the candidate who is ahead has the benefit associated with this presumption of victory.

Exactly how high this hurdle should be is, of course, a policy matter for state law to determine. A state could choose to require a contestant to prove all facts necessary for a claim "by clear and convincing evidence"—a standard significantly more onerous than the conventional "preponderance of the evidence" standard. This Section leaves this policy choice for state law to make, as long as the state maintains parity between gubernatorial and presidential elections (in keeping with the overall principle of parity in this respect under this and the previous Section). Thus, subsection (i) sets the traditional "preponderance of the evidence" standard as the default, but if state law has elevated the burden to the "clear and convincing" standard in a gubernatorial contest, then that elevated burden applies here as well.

It is important to note that the same burden of proof applies to a claim whether made in a regular or conditional petition. For example, suppose a candidate alleges that an opposing candidate has benefited from absentee votes procured through the improper payment of funds. It does not matter whether that allegation is raised by a candidate trailing after certification in a regular petition to contest the certified result, or instead is made by the leading candidate in a conditional petition. If the burden of proof in the former is "clear and convincing evidence" (because that is the same burden that would apply in a gubernatorial contest), then so too must the conditional petitioner meet the same evidentiary standard if making these factual allegations.

As explained in the Comment to the previous Section, the conditional petition is treated as if the petitioner were behind rather than ahead at the time of the certification. Indeed, this treatment is the very essence of its conditional nature. It does not become actively ripe for the

Presidential Election Court's adjudication unless and until the conditional petitioner does fall behind as a result of other pending proceedings (as described above). At the point that the candidate who filed the conditional petition does fall behind, it becomes entirely appropriate to treat this candidate as bearing the same onerous burden of proof as a candidate behind at the time of certification. At this point, in effect, as a result of the proceedings, the certified result has been altered, and the candidate who was ahead in the initial certification is now behind in the altered certification. To be sure, the altered certification is temporary and may shift back, especially if the conditional petition is meritorious. But at the moment the conditional petition becomes actively ripe for adjudication, it should be subject to exactly the same burden of proof as if it were a regular petition to contest the initial certification. Consequently, at a point in the litigation of evidentiary issues under this Section, if the Presidential Election Court considers a question concerning a conditional petition prior to the time it becomes actively ripe for adjudication (in the interest of efficiency, as previously discussed), the Court must apply the same burden of proof that would apply if the same claim were raised in a regular rather than conditional petition.

§ 315. Appeal to State Supreme Court of Contest Determinations

(a) Within 24 hours after receiving by e-mail the announcement of the Presidential Election Court's resolution of a contest under § 314, a party to the contest may appeal to the State Supreme Court.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under this Section, the argument shall occur within 48 hours after the filing of the appeal.

(c) The State Supreme Court shall resolve any appeal filed under this Section, including the issuance of any orders necessary to adjust vote totals in the statewide certification, no later than 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

(d) If in an appeal under this Section the State Supreme Court identifies any issue requiring a remand for additional factfinding proceedings, the State Supreme Court shall order such factfinding to be complete whenever feasible in such time as to permit final resolution of the appeal in accordance with subsection (c).

Comment:

a. Remand on appeal of judicial contest. Given the overall structure of these Procedures, the greatest risk of a development that prevents completion of all proceedings by the Safe Harbor deadline is presented by an appeal of a contest. Under § 314, the trial of a contest is not required to be complete until 28 days after Election Day, leaving only one week for the appeal of the contest, including any additional proceedings that might be necessary on remand from the appeal.

Thus, when faced with an appeal of a contest, the State Supreme Court needs to consider whether any sort of remand is truly necessary under applicable state and federal law (including federal constitutional standards of equal protection and due process). If a remand is unavoidable given the requirements of applicable law, then the State Supreme Court must calculate whether there is any way to conduct the remand in time to meet the Safe Harbor Deadline. If so, then the State Supreme Court should fashion the remand order accordingly; but if not, then the State Supreme Court should assure that the state at least will complete the remand and all other proceedings by the date on which the presidential electors are scheduled to meet.

Unfortunately, these Procedures cannot provide an absolute guarantee that the state will always be able to meet the Safe Harbor Deadline. They can only maximize the likelihood that a state will be able to do so. An issue may arise in an appeal of a contest that requires an unavoidable remand, and this remand is of such scope and character that there is no way to complete it in time to achieve Safe Harbor status. In that case, like a runner who must finish a race knowing that second place is the best that can be achieved—but for whom second place is no sure thing unless the runner still sprints to the end—the state still must expedite the remand proceedings in order not to risk failing to complete a resolution of the contest by the date on which the presidential electors must meet.

Thus, if there is a way for the State Supreme Court to resolve the appeal of the contest without ordering a remand, the court should opt for that no-remand resolution. Obviously, the court cannot avoid a remand when one is compelled by a proper understanding of applicable state and federal law. But often the question of whether to hold a remand is a matter committed to the sound discretion of the appellate court. In some instances, the record on appeal permits the appellate court to make the relevant finding of fact after the appellate court reverses the trial court's legal error. In this situation, the State Supreme Court should go ahead and make the relevant finding of fact itself, so as to enable resolution of the appeal by the Safe Harbor Deadline, thereby avoiding the delay of an unnecessary remand.

REPORTERS' NOTE

Balancing accuracy and finality in a presidential election with a "statistical tie." Depending on the particular claims involved in a disputed presidential election, a State Supreme Court may conclude that the presidential election lies irreducibly within what social scientists would view as a statistical "margin of error," which might persist even if the court were to order additional proceedings in an effort to improve the accuracy of the outcome. (The term "statistical tie" has the same meaning as this statistical "margin of error"—that, beyond a certain level of precision, all outcomes within a range are statistically equivalent in terms of their accuracy. Thus, in an election with a million votes, and a margin of error of 0.01%, or +/- 100 votes, the outcome that Candidate A won by 49 and the outcome that Candidate B won by 49 are equally accurate from a social-science perspective. Hence the assertion that an election of this nature amounts to a "statistical tie" and the implication that it is artificial to think that legal machinery can determine with greater accuracy whether Candidate A or B in some sense "really" received

more valid votes.[22]) When faced with this situation, as the Safe Harbor Deadline looms closer and closer the court would need to weigh the value of ordering additional adjudicatory proceedings against the risk that pursuing them would jeopardize meeting not only the Safe Harbor Deadline but also the constitutionally required meeting of the Electoral College six days later.

The tension between accuracy and finality is addressed more fully in Part II of this Project, as the tension affects nonpresidential elections as well. But the balance of competing considerations weighs differently in presidential elections. For one thing, the impossibility of holding a revote in a presidential election need not apply to other elective offices. Also, the practical political consequence of a "statistical tie" in a presidential election is different than a similar circumstance affecting a lesser office. The governance of a state can suffer tolerably well the unfortunate situation in which an officeholder serves a term as a consequence of adjudicatory proceedings that, because of their irreducible level of imprecision, amount to the equivalent of a coin flip from a statistical perspective. But it is exponentially more problematic for the occupant of the Oval Office to be determined in this essentially random way. Indeed, one of the most memorable lines to emerge from the disputed presidential election of 1876 was Samuel Tilden's statement that he would refuse to let that election be decided "by lot," as some in Congress were considering. Paul Leland Haworth, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876, at 198-199. "I may lose the Presidency, but I will not raffle for it," the candidate purportedly exclaimed. Id. at 200. Given the much more awesome powers of the presidency now, including the nuclear arsenal that the Commander-in-Chief wields, it would be even more disconcerting today to settle a presidential election by a coin toss.[23]

---

[22] For more background on this point, see Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL. REV. 350 (2007). See also Michael Pitts, *Heads or Tails?: A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739 (2006).

[23] To be clear, the issue of how best to handle a "statistical tie" in a state's presidential election (when that state's Electoral Votes are pivotal to determining whether a candidate has attained a majority of pledged Electoral College votes) is analytically distinct from what happens if a state's presidential election were to result in an exact mathematical tie. It is at least theoretically possible that a state's presidential election could end up truly dead even. For example, if New Hampshire's 1974 U.S. Senate election could end up with just a two-vote margin, 110,926 to 110,924—as in fact occurred—it is not inconceivable that New Hampshire (currently considered a presidential swing state) could have a presidential election that yields an exact tie, with something like 110,925 votes each for both the Democratic and Republican candidates. Were this situation to arise, the question would be whether state law requires the tie to be broken by lot. New Hampshire uses a lottery to break exact ties in some types of elections, including presidential *primaries*. N.H. Rev. Code § 660.23. Virginia has a statute that specifies using a lottery to break an exact tie in a November general election vote for presidential electors. Va. Code § 24.2-674. If hypothetically there was no dispute about the fact that a state's presidential election ended in an exact tie, and if it was clear (as in Virginia) that the applicable state statutes required breaking that tie with a coin flip, then as a formal proposition of law the use of that state statutory procedure would be entitled to Safe Harbor status (assuming of course that the required coin toss occurred within five weeks of Election Day).

Practically speaking, however, a situation in which a state's presidential election might actually end in an exact tie would be one in which observers likely would also consider it to be within a margin of error that amounted to it being a statistical tie—meaning that it was just as likely that Candidate A actually won more votes, or that Candidate B won more votes, as that the "true" result was an exact numerical tie. If so, the sense of the election being a statistical tie might predominate—to the point of calling for a political resolution of the statistical tie, by means of invoking the fallback of legislative appointment of the state's presidential electors, rather than proceeding

For better or worse, the Constitution contains a mechanism for handling the situation when the result of the popular vote in a particular state is essentially indeterminate, despite the best efforts of the state's adjudicatory processes to determine the outcome. That mechanism is the constitutional authority of the state's legislature to invoke a fallback method of appointing the state's presidential electors, including by means of the state's legislature simply undertaking this appointment itself. Thus, if in the context of a particular presidential election, a State Supreme Court, with the date for the meeting of the presidential electors coming ever closer, finds the outcome of the popular vote essentially indeterminate, the court must entertain the possibility that the better course is simply to declare the November popular vote null and void and let the appointment of the state's presidential electors revert to the legislature's constitutional authority.[24]

To be sure, these Procedures in their entirety are designed to avoid the State Supreme Court finding itself in that unpalatable situation. Their overarching aim is to enable the state to determine accurately the presidential choice that the eligible electorate made when casting ballots in November. But in a rare situation it may be necessary to recognize that this aim is not

---

to an actual coin toss as the statutorily prescribed method of breaking an exact numerical tie. The larger point, not to be lost in considering the distinction between a statistical tie and an exact tie, is the dynamic quality of a state's effort to improve its vote-counting accuracy as the calendar moves ever closer towards both the Safe Harbor Deadline and the meeting of the presidential electors. Given this dynamic quality, at some point a State Supreme Court may be called upon to make a judgment concerning the balance between the effort to achieve greater vote-counting accuracy and the state's expressed desire to appoint its presidential electors in accordance with the congressionally prescribed timetable.

[24] Delaware is one state with a statute that explicitly authorizes—and requires—its legislature to appoint the state's presidential electors if the popular vote ends up inconclusive: "Whenever there shall be a failure to choose I or more of the electors of President or Vice-President at any general election, the General Assembly shall convene and choose such elector or electors and certify the appointment of the elector or electors so chosen." 29 Del. Code § 704; accord 15 Del. Code § 7731. North Carolina has an even more elaborate statute on this point:

> (a) Appointment by General Assembly if No Proclamation by Six Days Before Electors' Meeting Day. - As permitted by 3 U.S.C. § 2, whenever the appointment of any Presidential Elector has not been proclaimed under G.S. 163-210 before noon on the date for settling controversies specified by 3 U.S.C. § 5, and upon the call of an extra session pursuant to the North Carolina Constitution for the purposes of this section, the General Assembly may fill the position of any Presidential Electors whose election is not yet proclaimed.
>
> (b) Appointment by Governor if No Appointment by the Day Before Electors' Meeting Day. - If the appointment of any Presidential Elector has not been proclaimed under G.S. 163-210 before noon on the date for settling controversies specified by 3 U.S.C. § 5, nor appointed by the General Assembly by noon on the day before the day set for the meeting of Presidential Electors by 3 U.S.C. § 7, then the Governor shall appoint that Elector.
>
> (c) Standard for Decision by General Assembly and Governor. - In exercising their authority under subsections (a) and (b) of this section, the General Assembly and the Governor shall designate Electors in accord with their best judgment of the will of the electorate. The decisions of the General Assembly or Governor under subsections (a) and (b) of this section are not subject to judicial review, except to ensure that applicable statutory and constitutional procedures were followed. The judgment itself of what was the will of the electorate is not subject to judicial review.
>
> (d) Proclamation Before Electors' Meeting Day Controls. - If the proclamation of any Presidential Elector under G.S. 163-210 is made any time before noon on the day set for the meeting of Presidential Electors by 3 U.S.C. § 7, then that proclamation shall control over an appointment made by the General Assembly or the Governor. This section does not preclude litigation otherwise provided by law to challenge the validity of the proclamation or the procedures that resulted in that proclamation.

N.C. Gen. Stat. § 163-213.

achievable, in which case it is better to invite the state legislature to exercise its constitutional authority rather than for the judiciary to conduct additional adjudicatory procedures that would risk the state having no presidential electors on the date when they must cast their Electoral College votes.

§ 316. Final Certification of Presidential Election

(a) Before noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5, the Chief Elections Officer shall publicly issue a final certification of the presidential election, based on a compilation of final orders in all proceedings concerning the presidential recount, any review of the canvass, and any contest, including:

(1) any final post-remand orders concerning the recount under § 307;

(2) any final post-remand orders concerning the canvass under § 312; and

(3) any final orders resolving an appeal of a contest under § 315.

(b) If at noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5 the Chief Elections Officer has failed to publicly issue a final certification of the presidential election as required in subsection (a), the State Supreme Court shall have the authority to issue any orders necessary to assure compliance with the Safe Harbor Deadline, including directly and immediately issuing the final certification of the election on its own authority.

(c) If notwithstanding its authority under subsection (b), the State Supreme Court determines at or before 11:59 p.m. on the date of the Safe Harbor Deadline that the state is unable to declare a final certification of the presidential election pursuant to these Procedures, then the State Supreme Court immediately shall issue a public declaration that the state is exercising its option to waive the Safe Harbor status available under 3 U.S.C. § 5.

(d) Whenever the State Supreme Court pursuant to subsection (c) has issued a public declaration that the state cannot meet the deadline necessary for Safe Harbor status, the State Supreme Court shall have the authority to issue emergency orders as necessary to enable final certification of the presidential election on or before the date specified in 3 U.S.C. § 7 for the state's presidential electors to cast their Electoral College votes.

Comment:

a. Weaving three threads together. This Section is the wrap-up provision of these Procedures and, accordingly, has a claim for being the most important. This Section enables the state's Chief Elections Officer—and, if necessary, the State Supreme Court—to weave together into a single final result three distinct threads, each of which potentially may reach its own culmination on the day before the Safe Harbor Deadline.

Illustration:

1. Imagine this scenario: the 2020 presidential election has been the subject of multiple disputes in a single pivotal state. First, during the recount, a question arose concerning whether to count ballots that are doubly marked for the same candidate, with the oval filled in next to the candidate's name and the same name added on the line for a write-in candidate. The machines recorded these ballots as containing an uncountable "overvote" in the presidential election, and during the manual recount the Presidential Election Court, along with many Local Election Authorities, have interpreted the relevant provision of state law as requiring the ballots to be interpreted to contain an uncountable overvote in the presidential election. The State Supreme Court, however, has reversed that legal ruling and ordered a remand, requiring the counting of ballots in this category. The Local Election Authorities have completed their necessary review of the ballots on remand, the Presidential Election Court has affirmed this review, and on the Monday before the Safe Harbor Deadline, the State Supreme Court has dismissed any further appeals related to the recount. The vote totals as certified at the end of the canvass now stand ready to be adjusted in light of these additionally counted votes as part of the remanded component of the recount.

Second, during the canvass, a question arose whether late-arriving domestic absentee ballots lacking a postmark could be counted if it could be shown that post-office error caused the absence of the postmark. The Presidential Election Court, along with many Local Election Authorities, answered this question in the negative, holding that domestic absentee ballots arriving after Election Day cannot count without a postmark showing them cast on or before Election Day regardless of the reason for the missing postmark. The State Supreme Court, however, reversed this holding and, on remand, the Local Election Authorities have counted all such absentee ballots where evidence

established that the missing postmark was caused by post-office error. The Presidential Election Court has affirmed these post-remand determinations, and the State Supreme Court has dismissed all further appeals relating to the canvass. The previously certified vote totals now stand ready to be adjusted to include these additionally counted absentee ballots.

Third, a contest to the vote totals certified at the end of the canvass was filed on the ground that the candidate ahead in the certified totals benefited from improper assistance provided to voters residing in nursing homes. After holding a trial to consider the evidence of the alleged improper assistance, the Presidential Election Court ruled that, although the conduct was inappropriate, it did not subvert the voluntary choices of the nursing-home voters and therefore no adjustment in the certified count was required. On appeal, however, the State Supreme Court has reversed this ruling, holding instead that the conduct of the candidate's campaign workers at the nursing home, as demonstrated by the evidence in the record, went far beyond permissible assistance and negated the view that these ballots represented an exercise of the voters' autonomous choice. The State Supreme Court determined that the record showed that 138 ballots were tainted by this kind of impropriety, and thus the State Supreme Court ordered that 138 votes be deducted from the leading candidate's initially certified vote total.

Thus, as of the day before the Safe Harbor Deadline, in this situation there are three separate adjustments that must be made to the vote totals as certified at the end of the canvass: first, the adjustment made as a result of the remanded component of the recount, concerning the doubly marked ballots; second, the adjustment made on remand in the judicial review of the canvass, concerning the absentee ballots lacking a postmark; and third, the adjustment required as a result of the contest, concerning the nursing-home ballots tainted by improper assistance. This Section empowers the Chief Elections Officer to make all three adjustments simultaneously (along with any other similarly necessary adjustments as a result of any of the proceedings undertaken pursuant to these Procedures), and to unify all these adjustments into a single, final certification of the presidential election—and to announce this final certification in time to satisfy the Safe Harbor Deadline.

b. Final certification of the election. While it may seem obvious, it is worth underscoring the distinction between the certification of the canvass under § 309, which is preliminary, and certification of the election under this Section, which is final. What gets certified under § 309, moreover, is not the election, but rather simply the vote totals as reflected in the canvass. Those vote totals may change in any of three ways, as described above. Thus, it would be wrong to say that the certification under § 309 identifies a winner of the election as determined in the canvass; rather, the § 309 certification identifies a candidate who is officially ahead in the count upon completion of the canvass. That distinction is an important one. For nonpresidential elections, it often may be appropriate to say that the certification of the canvass identifies an official *winner*; but not so in a presidential election governed by these Procedures. Even though the certification of the canvass is an important moment in the overall process structured by these Procedures, and even though one of its important features is that it imposes a significant burden of proof on any candidate petitioning to contest the certification under § 313 (as described above), it goes too far to claim that certification of the canvass under § 309 identifies (even if only preliminarily) the *winner* of the presidential election in the state. The candidate ahead in the vote totals as certified under § 309 is emphatically not officially the *winner*, even in a preliminary sense. Instead, the official winner is identified solely by the final certification that occurs under this Section.

To be sure, if after certification of the canvass under § 309, no candidate files a petition for judicial review of the canvass under § 310 and no candidate files a petition to contest the certification under § 313—and if there are no further recount proceedings under § 307—then certification of the canvass under § 309 can become converted, without any changes to the vote totals, into a certification of the election under this Section. But in order for that conversion to occur prior to the relevant deadlines in §§ 309, 310, and 313, the candidates would need to enter the stipulation specified in § 317. In this sense, the conversion does not occur automatically. Once these expedited Procedures have been invoked in a presidential election under § 303, then for the election to become final—and thus for there to be an official winner of the election—the Chief Elections Officer must make the public declaration of the certification required by this Section. That public declaration constitutes notice that the state's proceedings are complete, including for the purpose of satisfying the Safe Harbor Deadline.

c. Between noon and midnight on the date of the Safe Harbor Deadline. If the Chief Elections Officer has not issued the certification called for in subsection (a), then the state's supreme court has until midnight to remedy this omission before the state loses its opportunity to achieve Safe Harbor compliance. The time specified in subsection (c) is 11:59 p.m., one minute before midnight, because that time is immediately before the expiration of the Safe Harbor Deadline. The goal is to permit a state's supreme court to be able to make the certification necessary to obtain Safe Harbor status up until the very last minute, if using every last bit of available time makes doing so possible. But if and when the state's supreme court realizes that it will be incapable of meeting the Safe Harbor Deadline, then it must issue a public declaration to this effect immediately upon that realization.

§ 317. Cessation of Expedited Procedures If No Longer Necessary

(a) At any time after the Chief Elections Officer has issued a declaration under § 303 on the necessity of an Expedited Presidential Recount, and prior to final certification of the election under § 316, these Procedures will no longer be applicable if and only if:

(1) all candidates entitled to participate in a recount under § 305(c) jointly sign and submit to the Presidential Election Court a statement stipulating that:

(A) there is no further need to complete any recount or other proceedings, including the canvass, on an expedited basis pursuant to these proceedings,

(B) all the candidates signing the statement waive all rights that they otherwise would have under these Procedures; and

(C) the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316;

(2) the Chief Elections Officer signs and submits a separate statement to the Presidential Election Court confirming all the stipulations set forth in the joint statement of the candidates under paragraph (1); and

(3) the Presidential Election Court upon receipt of the statements required in paragraphs (1) and (2), issues a pronouncement confirming that the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316.

(b) Immediately upon issuance of a pronouncement of the Presidential Election Court under subsection (a)(3), the Chief Elections Officer shall proceed forthwith to issue the final certification of the election under § 316.

(c) Whether or not a stipulation has been reached pursuant to subsection (a), any candidate who files a judicial petition or appeal under any provision of these Procedures may voluntarily dismiss the petition or appeal at a subsequent time by applying to the court in which the petition or appeal is under consideration and, upon approval of the court to which this application for voluntary dismissal is made, the petition or appeal shall be dismissed by court order.

Comment:

This Section permits the expedited Procedures to terminate, even after they have been triggered under § 303 but before they otherwise would be complete, if the circumstances develop such that the presidential-election outcome in the particular state is no longer unsettled. There is obviously no point in undertaking the arduous effort required by these expedited Procedures if, as a practical matter, they have become moot. Still, this Section requires all relevant participants to make a formal declaration that the expedited Procedures, having once been invoked, are no longer necessary. These formal declarations are essential so that there is no doubt about the official status of the presidential election in the state.

The candidates may invoke this Section on a state-by-state basis. In other words, even if the winner of the presidency remains underdetermined because other states remain in dispute, the candidates can choose to agree that the outcome of a particular state is no longer disputed. The Chief Elections Officer, however, must agree that an expedited recount and canvass no longer are necessary in the state. An expedited recount and canvass are triggered under § 303 by order of the Chief Elections Officer, not by the request of a candidate, and the Chief Elections Officer must be satisfied that the conditions no longer warrant these expedited proceedings. By contrast, the three different types of judicial-review proceedings available under these Procedures, as well as appeals of these judicial-review proceedings, are instigated at the behest of a particular candidate, and thus each of these judicial forms of relief may be withdrawn voluntarily by the candidate who initially sought the particular form of judicial relief.

APPENDIX

BLACK LETTER OF TENTATIVE DRAFT NO. 1

§ 101. Definitions

(a) "Absentee voting" means voting that occurs on or before Election Day by allowing a voter to obtain a paper or electronic ballot for all offices and matters for which the voter would be eligible to vote on Election Day, and then allowing the voter to mark the ballot outside the presence of election officials and return it by an approved method to the voter's Local Election Authority for verification and counting.

(b) "Chief Elections Officer" means the state's highest authority, often the Secretary of State and in some states a multimember body, responsible for supervising the administration of elections in the state.

(c) "Early in-person voting" means voting that occurs before Election Day by allowing a voter to appear in person, at a location designated by the voter's Local Election Authority as an early-voting location, and there to obtain and cast in the presence of election officials a secret ballot for all offices and matters for which the voter would be eligible to vote on Election Day.

(d) "Election Day" means the single day established by law for voters to cast their ballots in a particular election by presenting themselves in person at a voting precinct. In jurisdictions permitting early in-person voting, Election Day is the last day on which voters may cast a ballot in that particular election. For federal elections, Congress has established Election Day as the first Tuesday after the first Monday in November in each even calendar year.

(e) "Local Election Authority" means a local agency of government responsible for administering, through a clerk's office, board of elections, or comparable administrative body, the voting processes established by law for the election of public officials and determination of ballot issues.

(f) "Local election jurisdiction" means the geographic area served by a Local Election Authority.

(g) "Open absentee voting" means absentee voting available to any voter, without a showing that the voter faces an impediment to voting in person at the voter's assigned precinct on Election Day.

(h) "UOCAVA voter" means a voter eligible to take advantage of the voting processes available to military and overseas citizens under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 42 U.S.C. § 1973ff et seq., and associated state legislation.

(i) "Voter" means an individual who satisfies the eligibility standards and the voter-registration requirements necessary to vote in a given election in the individual's local election jurisdiction.

§ 102. Obligation to Avoid Partisanship and Undue Burden in the Voting Process

(a) Decisions about how to structure early in-person voting and open absentee voting should be made without partisanship.

(b) States and local election jurisdictions should avoid imposing undue burdens on voters seeking to participate in the voting process, and states should ensure that local election jurisdictions have sufficient resources to enable each voter who desires to vote in person the opportunity to do so without an undue burden. Ordinarily, a wait of greater than 30 minutes at the polls constitutes an undue burden.

§ 103. Decision to Adopt Early In-Person Voting or Open Absentee Voting

States and Local Election Authorities should make voting convenient and accessible while protecting its security and integrity, including by providing voters well-structured alternatives to Election Day voting whenever appropriate. Whether to adopt early in-person voting or open absentee voting (or both) is a policy judgment left to the discretion of each state, subject to the principles described in § 102, any applicable federal laws or requirements, and the state's ability to manage either (or both) of these alternative voting processes effectively, securely, and with integrity.

§ 104. Days and Hours of Early In-Person Voting

(a) For a regular federal, statewide, or local election, and for a run-off or special election for either a federal office or a statewide office, a uniform statewide period of early in-person voting should begin by the 10th calendar day before Election Day, and should continue daily through the second calendar day before Election Day.

(b) For a run-off or special election not covered in subsection (a), as soon as is practicable after the offices to be decided are fixed, the state's Chief Elections Officer, in consultation with Local Election Authorities, should establish the days of a uniform period of early in-person voting, to include the final weekend before Election Day.

(c) For each day of a uniform period of early in-person voting established under subsection (a) or (b), the state's Chief Elections Officer, in consultation with Local Election Authorities, should establish and publicize in advance the hours during which voters in each local election jurisdiction may participate in early voting. These hours may vary from local election jurisdiction to local election jurisdiction, according to the following principles consistently applied throughout the state:

(1) The specific hours of early voting for a given local election jurisdiction should reasonably accommodate the daily schedules of the voters in that jurisdiction, including where appropriate by providing weekday early-voting opportunities outside of regular business hours, as well as weekend early-voting hours, for voters for whom early voting during regular business hours is difficult.

(2) In local election jurisdictions serving urbanized areas (as classified by the U.S. Census Bureau), the specific hours of early voting should include a substantial amount of weekday early-voting hours outside of regular business hours, and a meaningful amount of weekend early-voting hours on each weekend day.

(3) The total number of hours of early in-person voting, and the distribution of those hours, should be designed to ensure compliance with the principles of § 102.

(4) Local election jurisdictions should avoid unnecessary variation in their early-voting hours from day to day during the early-voting period.

(5) In any statewide election, variations among local election jurisdictions in the number of hours available for early in-person voting should be designed to provide all voters in the state, regardless of locality, substantively equivalent opportunities to cast a ballot through early in-person voting, with the recognition that this equivalence is not necessarily achieved through an equal number of hours.

(d) On all days of early in-person voting, a voter who is waiting in line to vote at an early in-person voting location at the time designated as the end of that day's period of voting hours should be allowed to vote that day.

§ 105. Locations of Early In-Person Voting

Local Election Authorities should establish and publicize in advance the voting location(s) where voters in each local election jurisdiction may participate in early in-person voting, according to the following principles:

(a) Voting locations should have sufficient equipment and staff to avoid waiting times of greater than 30 minutes, consistent with the principle of § 102(b).

(b) When appropriate, whether for administrative efficiency, voter convenience, or to advance the principles of § 102, a Local Election Authority should establish multiple voting locations.

(c) When establishing voting locations other than its regular business office(s), a Local Election Authority should select locations that are easy for voters to reach by their ordinary means of transportation without long travel times.

(d) Voting locations should be accessible and in compliance with the Americans with Disabilities Act and other governing law.

§ 106. Processes of Early In-Person Voting

(a) Wherever possible, Local Election Authorities should use the same voting equipment, ballots, forms, and other materials for early in-person voting that they use for Election Day voting.

(b) Early in-person voters should be subject to the same voter identification requirements applicable to Election Day voting, and also should be subject to the same punishments for voter impersonation or voting fraud applicable to Election Day voting.

(c) Local Election Authorities should update their poll books or voter files daily during the period of early voting.

(d) Any individual who seeks to vote at an early-voting location but is not allowed to cast a regular ballot should be permitted to cast a provisional ballot, to be evaluated according to the same eligibility rules as provisional ballots cast on Election Day, subject to the qualification that no provisional ballot cast at an early-voting location should be rejected solely because of the location at which it was cast.

(e) Local Election Authorities should provide opportunities for outside observers to monitor early in-person voting that are substantially equivalent to the opportunities provided for monitoring Election Day voting.

(f) Local Election Authorities must structure early-voting operations to afford voters privacy when voting and instill confidence that voting will be secure and fair.

(g) Local Election Authorities must not tally votes cast through early in-person voting until the close of polls on Election Day.

(h) The state's Chief Elections Officer must establish procedures to ensure that Local Election Authorities will secure all voting equipment, ballots, and other materials used for early in-person voting against tampering, loss, and damage throughout the period of early in-person voting.

§ 107. Period of Open Absentee Voting

(a) For a regular federal, state, or local election, absentee ballots for voters who wish to participate in open absentee voting should be transmitted to voters no later than four weeks (28 days) before Election Day, or in the case of a voter who applies for an absentee ballot after that date, within 24 hours of receiving the absentee-ballot application.

(b) For a run-off or special election for a federal, state, or local office, absentee ballots for voters who wish to participate in open absentee voting should be transmitted to voters by the later of either four weeks (28 days) before Election Day or as soon as is practicable after the offices to be decided are fixed, or in the case of a voter who applies for an absentee ballot after that date, within 24 hours of receiving the absentee-ballot application.

§ 108. Applications for Open Absentee-Voting Ballots

(a) The state's Chief Elections Officer should develop an official absentee-ballot application for use throughout the state for all federal, state, and local elections that is simple and clear. The application should not require an applicant to provide any more information than is necessary to determine the applicant's voting eligibility and the subsequent validity of a voted absentee ballot. A downloadable version of the application should be publicly available on the Internet.

(b) A state with both open absentee voting and early in-person voting should not automatically send an absentee-ballot application to all voters, but instead should send an application only to a voter who requests one. A state with open absentee voting but without early in-person voting may send an absentee-ballot application to all voters in the state.

(c) A voter should be allowed to return a completed absentee-ballot application to the voter's Local Election Authority starting at least 30 days before Election Day, and continuing through no later than three days before Election Day (except in the case of a voter with a permanent disability or other condition that makes it difficult or impossible to vote in person, or a voter covered by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq.,

for whom states may develop separate procedures to allow the later return of a completed absentee-ballot application).

(d) A voter should be allowed to return a completed absentee-ballot application to the voter's Local Election Authority only by mail delivery, a commercial courier service, or personally by hand, except in a jurisdiction that has chosen to allow the electronic return of completed absentee-ballot applications. The voter's agent also may hand deliver the completed application, but no agent should be permitted to deliver more than two completed applications on the same day. A completed application returned by mail or courier may not be accompanied in the same envelope by another voter's completed absentee-ballot application.

(e) Each state must ensure that its criminal law retains specific prohibitions against any person submitting an absentee-ballot application in the name of any other person, and against submitting an absentee-ballot application with knowledge of its falsity, including knowledge that the applicant is not a qualified voter.

(f) Unless the applicant expresses a contrary preference on the application, an application for an absentee ballot for a primary election should also constitute an application for an absentee ballot for the ensuing general election, and an application for an absentee ballot for any general, primary, or special election should also constitute an application for any run-off election necessary to conclude the election. Absentee-ballot applications should include a clear notice to the applicant of this effect.

(g) Only a voter with a permanent disability or other condition that makes it difficult or impossible to vote in person, as well as a voter covered by the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq., should be able to request status as a "permanent" absentee voter for all future elections conducted by the voter's jurisdiction, and thereby receive an absentee ballot for each future election without needing to reapply for an absentee ballot.

(h) A voter other than one described in subsection (g) should be able to request status as a "standing" absentee voter for all future elections conducted by the voter's jurisdiction, for the limited purpose of automatically receiving an *application* for an absentee ballot for each future election. In order to receive the

absentee ballot itself, the voter should be required to complete a new absentee-ballot application for each election in which the voter desires to cast an absentee ballot, except as provided in subsection (f).

§ 109. Voting and Returning Open Absentee Ballots

(a) The state's Chief Elections Officer should assist Local Election Authorities to develop absentee ballots and absentee-ballot-transmission envelopes that are simple and clear, in conjunction with the development of simple and clear absentee-ballot applications under § 108. To the extent feasible, the information required on ballot-transmission envelopes should correspond to the information required on the absentee-ballot applications.

(b) Identification and authentication requirements for a voted absentee ballot should not impose unnecessary burdens on the voter or require the voter to provide any more information than is necessary to determine the validity of a voted absentee ballot (including information to permit efficient communication with the voter).

(c) Authentication requirements for a voted absentee ballot should include the voter's oath or affirmation that the voter cast the ballot without any coercion or other undue influence that affected the voter's choices.

(d) Any requirement that, in addition to the voter's oath or affirmation described in subsection (c), a witness also attest to the authenticity of a voted absentee ballot should not require that the witness be a notary public or a registered voter, and should otherwise be structured to minimize the burden on the voter.

(e) A voter should be allowed to return a voted absentee ballot to the voter's Local Election Authority only by mail delivery, a commercial courier service, or personally by hand, except in a jurisdiction that has chosen to allow the electronic return of voted absentee ballots. The voter's agent also may hand deliver the voted absentee ballot, but no agent should be permitted to deliver more than two voted absentee ballots on the same day. A voted absentee ballot returned by mail or courier may not be accompanied in the same transmission envelope or mailing envelope by another voted absentee ballot.

(f) Each state must ensure that its criminal law retains specific prohibitions against any person voting an absentee ballot in the name of any other person, or submitting an absentee ballot with knowledge of its invalidity.

(g) To be valid, a voted absentee ballot either must be received by an appropriate election official by the close of the polls on Election Day, or be postmarked before Election Day and received by the appropriate election official by the close of business on the day before the deadline for completion of the local canvass. Absentee ballots received after Election Day without a postmark (other than those ballots cast by military or overseas voters covered by their own special absentee-voting rules) must not be counted.

(h) The state's Chief Elections Officer, in cooperation with Local Election Authorities, should develop a tracking system that will allow any voter who has applied for an absentee ballot to determine the status of the ballot. The system should permit voters to determine, either online or by telephone: (i) whether the application has been received; (ii) whether the application is valid; (iii) whether and when an absentee ballot has been sent to the voter; (iv) whether the voter's completed absentee-ballot-transmission envelope and accompanying voted ballot have been received; (v) whether the transmitted ballot is valid and will be counted; (vi) for an invalid ballot, what remedial steps, if any, are available for the voter to correct any deficiencies; and (vii) whether the ballot has been counted. Within 48 hours of any official determination or action described in items (i) through (vii) above, Local Election Authorities should update the tracking information to reflect that determination or action.

§ 110. Processing and Counting Voted Absentee Ballots

(a) Voted absentee ballots should be collected, processed, and counted at one central location in each local election jurisdiction.

(b) Each Local Election Authority should establish an absentee-ballot-counting board, evenly balanced in its representation of the relevant political parties, to conduct the processing and counting of voted absentee ballots. Members

of the absentee-ballot-counting board should be specially trained in their duties before the period of absentee voting begins.

(c) Before the period of open absentee voting begins, the state's Chief Elections Officer should determine whether gaps exist in the statutorily prescribed procedure for absentee-ballot-counting boards to follow in determining whether a voted absentee ballot is valid and eligible for counting, and should fill any gaps by prescribing clear rules designed to further the following purposes:

(1) ensure confidence that each counted ballot was properly cast by an eligible voter;

(2) ensure that no tampering has occurred to any ballot;

(3) prevent the invalidation of any ballot for noncompliance with procedures that do not directly bear on purpose (1) or (2); and

(4) identify precisely those categories of errors or deficiencies affecting the validity of a voted absentee ballot that voters may correct, and how they may be corrected.

(d) Although the absentee-ballot-counting board must not count voted absentee ballots before Election Day, it should begin verifying the validity of as many voted absentee ballots as possible and processing those ballots on a rolling basis before Election Day. By the end of Election Day, the counting board should have verified the validity of all absentee ballots received before Election Day.

(e) If it is timely, a voted absentee ballot should be classified as valid unless:

(1) the voter is not registered to vote or not qualified to vote, except if a preponderance of the evidence establishes that a qualified voter submitted a valid registration application that, because of an error committed by a government official, did not result in the voter appearing in the state's voter-registration database;

(2) no name or other identifier appears on the absentee-ballot-transmission envelope, making it impossible to verify its validity;

(3) the absentee-ballot-transmission envelope lacks the voter's signature or authentication (including the oath or affirmation specified in § 109(c));

(4) the voter has failed to provide an acceptable form of voter identification, if any is required;

(5) the absentee-ballot-transmission envelope lacks the signature of a witness, if a witness is required;

(6) the absentee ballot is one of multiple ballots cast by the same voter in the same election;

(7) the voter returned the absentee ballot using an intermediary other than as allowed in § 109(e);

(8) the absentee ballot is accompanied by another voted absentee ballot inside the same absentee-ballot-transmission envelope or mailing envelope, as prohibited in § 109(e), except that two voted absentee ballots authenticated as having been submitted by two voters in the same household are not invalid under this rule unless the preponderance of evidence suggests that the ballots were cast under circumstances inconsistent with the ballots containing the voluntary choices of the eligible voters who cast the ballots;

(9) the absentee-ballot-transmission envelope arrived unsealed and the preponderance of evidence suggests that the ballot was cast under circumstances inconsistent with the ballot containing the voluntary choices of the eligible voter who cast the ballot; or

(10) clear and convincing evidence otherwise establishes that the absentee ballot was cast under circumstances inconsistent with the ballot containing the voluntary choices of the eligible voter who cast the ballot, including duress, coercion, or bribery.

(f) When an absentee-ballot-counting board determines that a voted absentee ballot is invalid, within 24 hours the Local Election Authority should inform the voter of this determination, using the contact information that the voter has specified on the ballot-transmission envelope.

(g) If the invalidity is a result of the voter's clerical error or other correctable error or deficiency on the transmission envelope, including the lack of the voter's signature or authentication on the envelope, the voter's failure to provide an acceptable form of voter identification, or the lack of a witness signature (if

required), the Local Election Authority must allow the voter an opportunity to correct the problem before the earlier of the 10th day after Election Day or the completion of the local canvass of the election, and must inform the voter of this opportunity, using the contact information that the voter has specified on the ballot-transmission envelope. If a voter sufficiently corrects an error or deficiency, the ballot must then be validated, counted, and included in the local canvass.

(h) A voter who does not take advantage of the error-correction opportunity provided in subsection (g) may not subsequently seek to correct an invalid ballot during any other post-election dispute-resolution processes, and an uncorrected ballot should not be counted.

(i) Members of the public, representatives of candidates and political parties, journalists, and other interested observers should have a reasonable opportunity to observe and participate in the process by which the absentee-ballot-counting board determines the validity of voted absentee ballots, as well as in the process by which the board counts absentee ballots, provided that these observers do not harass or interfere with members of the absentee-ballot-counting board or other public employees assisting in these processes.

(j) The state's Chief Elections Officer should establish clear rules for Local Election Authorities to follow to ensure that voted absentee ballots are protected against loss, damage, or manipulation, including clear chain-of-custody procedures for all voted absentee ballots and ballot-transmission envelopes.

§ 111. State and Local Data-Collection Responsibilities

(a) Local Election Authorities should maintain detailed records concerning open absentee voting and early in-person voting, including:

(1) The number of early in-person voters at each early in-person voting location on each day of the early in-person voting period, and the hours that the location was open each day;

(2) The waiting times that voters experienced at specified regular times throughout each day of the early in-person voting period;

(3) The number of provisional ballots cast at early-voting locations, the reason(s) for their use, and their resolution;

(4) The number of valid votes cast for each candidate and for or against each ballot issue through early in-person voting;

(5) The number of absentee-ballot applications the local election jurisdiction received, the date when the jurisdiction received each application, and the jurisdiction's disposition of each application;

(6) The number of voted absentee ballots returned, and the date when the local election jurisdiction received each voted absentee ballot;

(7) The number of voted absentee ballots initially deemed ineligible for counting;

(8) The number of those ballots included in paragraph (7) because of errors that the election authority permits voters to correct;

(9) The number of those ballots identified in paragraph (8) that were corrected and counted;

(10) The number of valid votes cast for each candidate and for or against each ballot issue through the absentee ballots; and

(11) The estimated costs and cost savings associated with any alternatives to Election Day voting in use in the local election jurisdiction.

(b) To permit more extensive analysis of the extent of early in-person voting and open absentee voting, whenever appropriate the data maintained under subsection (a) should be reported at the precinct level, rather than at the aggregated level of the local election jurisdiction.

(c) As soon as reasonably possible, and no later than 180 days after an election, state election officials should collect and organize the data gathered in subsection (a) and make the data publicly available for study and analysis, including in electronic form for data that is maintained electronically.

(d) For purposes of comparison, Local Election Authorities also should maintain and make publicly available for study and analysis detailed records concerning Election Day voting, including:

(1) The number of voters voting at each precinct on Election Day;

(2) Waiting times that voters experienced at each precinct at specified regular times throughout Election Day; and

(3) The number of provisional ballots cast at each precinct on Election Day, the reason(s) for their use, and their resolution.

(e) State and local election officials should study and analyze the data collected in subsection (a), and should review independent studies and analyses of this data, in order to adjust early in-person voting procedures and open absentee voting procedures for future elections, as appropriate to help avoid delays in voting and otherwise to further the purposes of this Part.

§ 301. Definitions

(a) "Canvass" means the administrative procedure that encompasses verification of the vote tabulations contained in the preliminary Election Night returns as well as determination of the eligibility of previously uncounted ballots, including provisional ballots and absentee ballots not included in the preliminary returns.

(b) "Certification" means the official declaration of the results from a counting of ballots and occurring, at separate stages, both after the canvass and after completion of all proceedings under these Procedures.

(c) "Chief Elections Officer" means the state's highest authority, often the Secretary of State and in some states a multimember body, responsible for supervising the administration of elections in the state.

(d) "Chief Justice" means the presiding judge of the State Supreme Court.

(e) "Contest" means a judicial procedure that occurs after certification of an election's results, in which a candidate other than the certified recipient of the most votes challenges the certified results and seeks a judicial decree either to declare the contestant the duly elected winner or to void the election.

(f) "Day" means any and all calendar days.

(g) "Election Day" means the traditional day on which citizens go to the polls in their neighborhood polling locations to cast ballots in a presidential election,

which Congress has specified to be the first Tuesday after the first Monday in November, as provided in 3 U.S.C. § 1.

(h) "Electoral College" means the totality of all presidential electors in the United States, who pursuant to the U.S. Constitution meet in their respective states on the same congressionally appointed day to cast their votes for the presidency.

(i) "Election Night" means the nighttime hours of Election Day, after the polls have closed in the state, as well as the predawn hours of the following day insofar as the state (and the nation) still awaits preliminary returns of votes counted on or before Election Day and expected to be reported before the night is over as part of the initial count of ballots from all precincts in the state.

(j) "E-mail" means electronic transmission of written documents, using either current Internet-based technology or any future technology that provides a similar electronic capacity to transmit written documents.

(k) "Local Election Authority" means the agency of government, whether a single officer or a multimember body, with authority to canvass local returns, including determining the eligibility of locally cast provisional ballots.

(l) "Preliminary returns" means the report of vote totals of ballots cast and counted on Election Day at each polling location in the state, together with the report of any early and absentee votes counted on (or, if permitted, before) Election Day, all of which are aggregated by the Chief Elections Officer into a single set of statewide preliminary returns.

(m) "Presidential election" means a quadrennial general election at which the eligible electorate of the state chooses a slate of presidential electors, who in turn cast their Electoral College votes for the presidency.

(n) "Recount" means a reexamination and retallying of ballots initially counted and reported as part of preliminary returns.

(o) "Safe Harbor Deadline" means the date, specified in 3 U.S.C. § 5, by which a state must resolve any vote-counting disputes in a presidential election in order for the state to receive the benefit of the congressional pledge to accept whatever resolution the state achieves.

(p) "State" means all 50 states of the United States as well as the District of Columbia (but, specifically for the purposes of these Principles, not U.S. territories, which lack Electoral College votes).

(q) "State Supreme Court" means the state's highest court, even if denominated other than "supreme court" (as is New York's Court of Appeals).

§ 302. Applicability and Objective

(a) The provisions of these Procedures shall take effect as the law of the state upon either their explicit enactment by the state legislature or their explicit promulgation by the State Supreme Court pursuant to its rulemaking authority, whichever method of adoption has been employed, and are fully applicable to the next presidential election thereafter.

(b) In any particular presidential election, the specific expedited elements of these Procedures become operational immediately upon the declaration of the Chief Elections Officer, as set forth in § 303.

(c) The overriding purpose of these Procedures is to enable the state to complete a recount, canvass, and any contest of a presidential election, including all related administrative and judicial proceedings concerning the counting of ballots in a presidential election, in compliance with the Safe Harbor provision of 3 U.S.C. § 5.

(d) Whenever an expedited recount has been declared under § 303, it shall be the highest priority of every state official involved with the implementation of these Procedures to comply with the Safe Harbor Deadline of 3 U.S.C. § 5 and with every subsidiary deadline set forth in these Procedures, all of which are aimed at assuring Safe Harbor compliance.

(e) Whenever an expedited recount has been declared under § 303, completion of these Procedures takes precedence over any other recount, canvass, contest, or other proceeding that may be necessary for any other election on the same ballot, and any ballot-eligibility or other determinations made as part of these Procedures that have applicability to another election shall be binding on that other election unless state law elsewhere expressly provides otherwise.

(f) The adoption of these Procedures into state law in advance of the first presidential election to which they shall be applicable, as required in subsection (a), has the objective of maintaining consistency with the principle that the rules for counting ballots remain unchanged after the ballots to be counted have been cast.

§ 303. Declaration of Expedited Presidential Recount

(a) Within 24 hours after the polls close in the state's presidential election, the Chief Elections Officer shall declare publicly, including by means of notice on an official website as well as e-mail notification to all presidential candidates on the ballot in the state, the need for an Expedited Presidential Recount in the state if either of the following two circumstances exist:

(1) CANDIDATE-SOUGHT: when *both* (A) a presidential candidate, in a statement publicly released on the candidate's official campaign website and transmitted to the Chief Elections Officer between the hours of 12:00 noon and 5:00 p.m. (Eastern time) on the day immediately following Election Day, asserts that uncertainty about the outcome of the presidential election in the state provides grounds (either by itself or together with similar uncertainty in one or more other states) for believing that the national winner of the presidency remains unsettled, *and* (B) preliminary returns show the leading presidential candidate in the state to be ahead of one or more other presidential candidates by a margin of less than one percent of all presidential ballots preliminarily counted in the state; or

(2) NOT-CANDIDATE-SOUGHT: when, notwithstanding no public statement by a candidate of the kind set forth in subsection (1), *both* (A) no presidential candidate can reach a majority of Electoral College votes by relying solely upon states where the candidate's margin of victory according to available preliminary returns is greater than one-half of one percent of all presidential ballots preliminarily counted in those states; *and* (B) preliminary returns show the leading presidential candidate in the state to be ahead of one or more other presidential candidates by a margin of less than one-half of one percent of all presidential ballots preliminarily counted

in the state, and the state's Electoral College votes, either alone or in combination with the Electoral College votes of other states where the margin of victory according to preliminary returns is also less than one-half of one percent, would provide a presidential candidate with a majority of Electoral College votes if added to the Electoral College votes of the states in which that particular candidate leads by more than one-half of one percent.

(b) For purposes of subsection (a)(1)(A), a presidential candidate may make the public assertion of uncertainty about the outcome of the presidential election only if the candidate is in a position to win the presidency if some or all of the asserted uncertainty is resolved in the particular candidate's favor.

(c) In addition to the obligation to declare an Expedited Presidential Recount if either of the two circumstances set forth in subsection (a) apply, the state's Chief Elections Officer may declare an Expedited Presidential Recount in any other situation that the Officer believes warrants it, including when the number of provisional, absentee, or other uncounted ballots might cause the winning presidential candidate in the state to be different from the leading candidate based on preliminary returns and this difference might affect which candidate is the winner of a majority of Electoral College votes.

§ 304. Presidential Election Court

(a) *Appointment.*

(1) Within 24 hours after the Chief Elections Officer's declaration pursuant to § 303, the Chief Justice publicly shall announce the appointment of three judges to serve as the Presidential Election Court.

(2) The announcement specified in subsection (a)(1) shall *either* (A) confirm the selection of three judges whom the Chief Justice had designated for appointment in advance of Election Day, *or* (B), in the event that no such prior designation had been made, constitute the immediate appointment of the three judges.

(3) Regardless of whether the Chief Justice makes a prior designation under subsection (a)(2)(A), all steps concerning the designation and

appointment of individuals to serve as judges on the Presidential Election Court shall occur pursuant to an appointment process publicly promulgated in advance of Election Day.

(4) The appointment process shall be designed to (A) result in a three-member panel structured to be impartial regarding the candidates and political parties competing to win the presidential election, and (B) select individuals to serve as judges on the Presidential Election Court who satisfy the highest standards of integrity, excellence, and evenhandedness applicable to other jurists in the state.

(5) In the event it becomes necessary to replace a judge appointed to the Presidential Election Court (due to death, resignation, removal under subsection (a)(6), or other reason for a vacancy), the Chief Justice shall immediately appoint a replacement subject to the following provisions:

(A) The replacement shall maintain the structural impartiality of the three-member panel as required by subsection (a)(4)(A) and the individual standards specified in subsection (a)(4)(B); and

(B) If a list of alternate judges to serve as potential replacements in the event of a vacancy has been developed in advance of Election Day, the Chief Justice shall select a replacement from that list.

(6) Once appointed under subsection (a)(1), a judge's term of service on the Presidential Election Court lasts until the inauguration of a new president following the election, and during this term of service the judge may not be removed from the Presidential Election Court except by a unanimous vote of the State Supreme Court and only upon a showing that, after the appointment, demonstrable evidence has surfaced that negates the judge's ability to serve according to the requirement of structural impartiality in subsection (a)(4)(A) or the standards of individual character specified in subsection (a)(4)(B).

(b) *Authority.*

(1) The authority of the Presidential Election Court, as specified in these Procedures, is exclusive, to be exercised without interference from any other body, except insofar as a right of appeal to the State Supreme Court is provided pursuant to these Procedures.

(2) The Presidential Election Court, as a court of law, has the power to enter orders common to any ordinary court of law within the state, including orders to permit parties to its proceedings to conduct discovery to assist any factfinding the Court may undertake, provided that any such orders be consistent with the expedited nature of these Procedures.

(3) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, no court or other tribunal or agency of this state may extend or otherwise delay any deadline set forth in these Procedures.

(4) The Presidential Election Court and the State Supreme Court may set subsidiary deadlines and promulgate other subsidiary rules in order to facilitate implementation of these Procedures, provided that all such subsidiary deadlines and rules are consistent with these Procedures and do not alter any of its deadlines and provisions.

(5) If in contravention of these Procedures, the Presidential Election Court has missed any of its deadlines, the State Supreme Court may issue a remedial order calculated to enable compliance with the remaining deadlines and successful completion of all proceedings necessary to achieve Safe Harbor status under 3 U.S.C. § 5.

(c) *Electronic Filing and Service.* **To facilitate compliance with all deadlines provided in these Procedures, both the Presidential Election Court and the State Supreme Court shall establish and maintain a website and e-mail system to enable instantaneous communication as follows:**

(1) All court orders and announcements shall immediately be posted on the court's website and simultaneously transmitted by e-mail to all

candidates who are parties to the court's proceeding, as well as to the state's Chief Elections Officer and to any other parties to the court's proceeding.

(2) Whenever a party is subject to a filing deadline caused by the release of a court order or announcement, including the deadline of filing a notice of appeal, the time for calculating the deadline shall begin as soon as the party receives from the court an e-mail notifying the party of the court's order or announcement.

(3) All notices of appeal must be timely filed with both the Presidential Election Court and the State Supreme Court, and the appellant must e-mail the notice of appeal to all other parties to the proceeding that produced the order being appealed.

(4) Whenever a party files a motion, brief, or other document in a pending court proceeding or appeal, the filing shall be by electronic transmission with the document immediately posted on the court's website established under this Section, and the party shall serve by e-mail a copy of the filing to all other parties to the court's proceeding.

(5) Each party to a proceeding or appeal shall designate a single attorney to receive all service of documents pursuant to subsection (c)(4), and this attorney shall specify the single e-mail address to use for this service; and for each proceeding or appeal, a list of all such attorneys and e-mail addresses shall be publicly posted on the website of the court with jurisdiction over the proceeding or appeal.

(6) Whenever the Presidential Election Court has consolidated several proceedings, or the State Supreme Court has consolidated several appeals, the parties to each case so consolidated shall serve documents under subsection (c)(4) upon the parties to all other cases that are part of the same consolidation.

(7) Both the Presidential Election Court and the State Supreme Court are empowered to adopt additional rules to facilitate the efficient operation of this website and e-mail system and to maximize its effectiveness as a means of instantaneous communication of all relevant legal documents.

(8) *Consequences of noncompliance with electronic filing requirements.*

(A) The failure of a party to file a timely notice of appeal within the specified deadline causes forfeiture of the party's right to that appeal, thereby barring the State Supreme Court's consideration of that appeal.

(B) Pursuant to the authority granted in subsection (c)(7), both the Presidential Election Court and State Supreme Court may impose such sanctions as each deems fit for a party's failure to meet a deadline for filing a document as required in subsection (c)(2), including the sanction of dismissal of the particular proceeding or appeal; provided that in no circumstance may the Presidential Election Court or State Supreme Court waive a party's forfeiture of an appeal for failure to timely file a notice of appeal as required in subsection (c)(8)(A).

(d) *Standard of Review on Appeal.*

(1) In all appeals under §§ 307, 312, and 315, the State Supreme Court shall affirm the Presidential Election Court's decision unless the appellant establishes the decision to be contrary to law or resting upon a clearly erroneous finding of fact.

(2) In reviewing a decision of the Presidential Election Court under the standard set forth in subsection (d)(1), the State Supreme Court shall give due regard to the Presidential Election Court's structural impartiality, as required by subsection (a)(4), and accordingly should affirm the Presidential Election Court's decision whenever reversal would appear to negate or otherwise undermine the impartiality of an adjudication pursuant to these Procedures.

§ 305. Initial Phase of Presidential Recount by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall immediately begin the process of administering a recount of all ballots in its jurisdiction that were counted as part of the preliminary returns of the presidential election.

(b) Within eight days after Election Day, each Local Election Authority shall complete its recount.

(c) As part of the local recount, any presidential candidate whose preliminary vote totals statewide were within five percent of the leading presidential candidate statewide, along with this leading candidate, may designate representatives to observe the recount conducted by the Local Election Authority.

(1) When a recount involves manual inspection of ballots to determine if a marking on the ballot qualifies as a vote under state law, the observation to which a candidate's representative is entitled must take a form that allows the candidate's representative to examine the markings on the ballot.

(2) When a recount involves only the use of machines to verify the accuracy of the initial count, a candidate's representative shall be entitled to examine the Local Election Authority's inspection of the machines for the purpose of determining that they operate properly.

(3) As part of the right to observe the recount, a candidate's representative may also examine any document relevant to the conduct of the recount, including a ballot, if doing so will not disrupt or delay the recount.

(d) A candidate's designated representative may object to any decision made by the Local Election Authority during the recount if, but only if, reversal of the decision upon review by the Presidential Election Court would alter the number of ballots counted for any candidate.

(e) The Presidential Election Court shall have whatever authority is necessary to assure that each Local Election Authority is able to complete its recount within the eight-day deadline specified in subsection (b).

(1) The Court's authority under this subsection includes the authority to remove a candidate's representative from observation of the recount if the representative has become unduly disruptive.

(2) Whenever the Court removes a candidate's representative pursuant to this authority, the candidate shall have the right to designate a substitute representative to continue observing the recount, but if the substitute also becomes unduly disruptive, the Court in its discretion may declare that the candidate has forfeited the right to designate another substitute.

§ 306. Presidential Election Court's Review of Local Recount Rulings

(a) Within 24 hours after completion of each recount by a Local Election Authority under § 305, each candidate seeking the Presidential Election Court's review of decisions objected to under § 305(d) must present to the Court an enumeration of the objections for its review.

(b) All objections not timely presented for review, as required by subsection (a), shall be deemed waived and unreviewable.

(c) For each objection, the Court's jurisdiction extends to the Local Election Authority's decision that is the subject of the objection, and the Court is empowered to review and where necessary reverse the decision according to the following principles:

(1) the Local Election Authority's decision is presumptively valid regardless of which candidate it favored and which candidate objects to it;

(2) the candidate objecting to the decision bears the burden of showing it to be either contrary to law or factually incorrect in light of the available evidence, in which case the Court shall set aside the erroneous decision;

(3) upon setting aside an erroneous decision under subsection (c)(2), the Court shall make its own determination of the matter based on the applicable law and available evidence, without remanding the matter to the Local Election Authority for further consideration; provided, however, that

the Court may remand a particular factual issue to the Local Election Authority for its determination if (but only if) a remand on the specific issue is absolutely necessary to resolve a dispute concerning a particular ballot under review in the recount.

(d) In the interest of expediting the recount and avoiding a remand whenever possible, the Court is empowered to conduct whatever additional factfinding and evidentiary proceedings it deems necessary, including receiving testimony from the Local Election Authority in order to obtain the benefit of its knowledge and expertise.

(e) Within 14 days after Election Day and prior to the completion and certification of the canvass under §§ 308 and 309, the Court shall complete its review of all objections to recount decisions presented for its consideration and publicly announce its determinations, including any specific issues unavoidably remanded to a Local Election Authority for additional factfinding.

(f) Any candidate who observed the recount under § 305(c) may also participate in the Presidential Election Court's proceedings under this Section, including offering to the Court reasons to sustain a Local Election Authority's decision made during the recount, provided that such participation shall be consistent with the Court's obligation to complete its review as specified in subsection (e), and the Court in its discretion may issue orders detailing the terms of such participation as it deems necessary in order to meet this obligation.

§ 307. Appeal to State Supreme Court of Recount Review

(a) Within 24 hours after the Presidential Election Court completes its review and makes its public announcement under § 306(e), any candidate seeking an appeal of that review in the State Supreme Court must file a notice of appeal.

(b) No appeal filed under subsection (a) shall delay certification of the canvass pursuant to § 309.

(c) If the State Supreme Court chooses to hold oral argument on a recount appeal filed under subsection (a), the State Supreme Court shall do so within 17 days after Election Day.

(d) Within 20 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(e) If the State Supreme Court's resolution of an appeal requires additional recount proceedings on remand,

(1) each Local Election Authority required to conduct such additional recount proceedings must complete these proceedings within 27 days after Election Day;

(2) the Presidential Election Court must complete any additional recount proceedings of its own, including all review of additional proceedings conducted by each Local Election Authority under subsection (e)(1), within 30 days after Election Day; and

(3) the State Supreme Court must complete any post-remand review of the Court's proceedings under subsection (e)(2) at least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

(f) Any candidate, other than the appellant, who participated in the proceeding under § 306 may participate as an appellee in an appeal filed under this Section, including the submission of an appellate brief, pursuant to whatever briefing schedule the State Supreme Court in its discretion establishes for consideration of the appeal.

§ 308. Conduct of Canvass by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall complete its local canvass of the election before 12:00 noon on the 14th day after Election Day.

(b) The local canvass shall include, but is not limited to, these component procedures:

(1) With respect to each provisional ballot, previously uncounted absentee ballot, or any other uncounted ballot cast in the election within the Local Election Authority's jurisdiction, a determination of whether or not the ballot is eligible to be counted;

(2) The correction of any tabulation errors discovered upon review of the preliminary returns or during the recount conducted under § 305;

(3) Any adjustment in the counting of ballots required by the Presidential Election Court's review of the recount under § 306; and

(4) Insofar as required by other provisions of state law, any adjustment in vote totals as part of the reconciliation of discrepancies in the number of ballots cast at a polling location and, according to polling-place records, the number of voters who cast ballots at the polling place.

(c) With respect to any ballot that a Local Election Authority determines eligible to be counted under subsection (b)(1), the Local Election Authority may examine the ballot to ascertain whether it contains a vote in the presidential election and, if so, may add that vote for the purpose of calculating the vote totals for each presidential candidate as part of the certification of the canvass under § 309, PROVIDED THAT the Local Election Authority must not commingle the ballot with other ballots, but instead shall preserve the ballot separately in the event upon review under § 310 the Presidential Election Court reverses the Local Election Authority's determination and the ballot is ruled ineligible to be counted.

(d) For all ballot-eligibility determinations under subsection (b)(1), the Local Election Authority shall make publicly available upon or before completion of the canvass a written explanation for why it determined the ballot eligible or ineligible, provided that

(1) the Authority may aggregate ballots for which the explanation is the same, and

(2) the Presidential Election Court may specify further the form that these publicly accessible written explanations must take.

§ 309. Certification of Canvass

(a) Immediately upon completion of the local canvass as required by § 308, each Local Election Authority shall certify the results of its local canvass, including vote totals for each presidential candidate and the explanations for its ballot-eligibility determinations, and shall electronically transmit this certification to the

Chief Elections Officer so that the Chief Elections Officer receives this certification at or before noon on the 14th day after Election Day.

(b) At or before 11:59 p.m. on the 14th day after Election Day, after compiling into a single certification of the statewide canvass all certifications of local canvasses received from Local Election Authorities, the Chief Elections Officer shall

(1) display on a publicly available website the statewide certification as well as all the local certifications from which it has been compiled; and

(2) send by e-mail to all presidential candidates on the ballot in the state an electronic copy of this statewide certification and its underlying local certifications.

(c) Once a Local Election Authority has certified its local canvass under subsection (b), the Local Election Authority may not alter the certification, except as ordered by the Presidential Election Court pursuant to a proceeding under § 310.

§ 310. Presidential Election Court's Review of Canvass: Petition and Participants

(a) Within 24 hours after receiving e-mail notification of the statewide and local certifications as specified in § 309(b)(2), a presidential candidate entitled to participate in a presidential recount under § 305 may petition the Presidential Election Court for review of any decision made during the local canvass concerning the eligibility of ballots, or counting of votes, in the presidential election.

(b) A candidate who fails to file a timely petition within the deadline specified in subsection (a) forfeits the right of petition under this Section, thereby barring the Presidential Election Court's consideration of the petition.

(c) Any candidate petitioning under this Section, at the same time as electronically filing the petition with the Presidential Election Court pursuant to the method of electronic transmission established under § 304(h), shall serve electronic notice of the petition upon all other candidates entitled to participate in the presidential recount under § 305, as well as upon any Local Election Authority whose decisions are the subject of the petition.

(d) A petition under this Section shall specifically identify:

(1) each ballot for which the Local Election Authority made an eligibility determination that the candidate requests the Presidential Election Court to review; and

(2) any other decision made by the Local Election Authority that the petition claims is erroneous and, if reversed by the Presidential Election Court, would alter the vote totals certified under § 309.

(e) A petition under this Section may request the Presidential Election Court to classify as eligible to be counted a ballot that the Local Election Authority classified as ineligible to be counted, or may request that the Presidential Election Court classify as ineligible to be counted a ballot that the Local Election Authority classified as eligible to be counted, and a candidate may include both types of requests within the same petition.

(f) The petition shall specify, for each ballot the candidate requests the Presidential Election Court to review, the reasons why the candidate believes the Local Election Authority's eligibility determination to be erroneous.

(g) The Presidential Election Court, in its sole discretion, may join the state's Chief Elections Officer to any proceedings pursuant to this Section.

(h) Apart from subsection (g), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (c).

(i) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

(j) Any party's motions or briefs in support of, or in opposition to, a petition under this Section must be filed with the Presidential Election Court and served upon all other parties within 48 hours after the filing of the petition, and the parties must submit any responsive briefs within the next 24 hours.

§ 311. Presidential Election Court's Review of Canvass: Deadline and Proceedings

(a) Within 21 days after Election Day, the Presidential Election Court shall complete its review of any petition filed under § 310.

(b) The Presidential Election Court may consolidate into a single adjudicatory proceeding any or all petitions filed under § 310.

(c) The Presidential Election Court may hold any hearing, with or without oral argument, to facilitate its review of any petition filed under § 310, provided that the hearing does not interfere with the Court's compliance with the deadline in subsection (a).

(d) At any point during a hearing, the Presidential Election Court may issue an interim ruling on legal or factual issues if, in the Court's judgment, doing so will help to expedite its review of a petition.

(e) The Presidential Election Court may receive the testimony of any witness, or receive into evidence any document, that will assist the Court in determining the eligibility of any ballot, or reviewing any ruling during the canvass, that is the subject of a petition.

(f) Any party may propose to the Presidential Election Court the introduction of relevant evidence, but the Court shall determine whether to receive such proposed evidence, balancing the potential value of the evidence against the need to complete its review within the deadline in subsection (a).

(g) In its sole discretion, the Presidential Election Court may adhere to or deviate from generally applicable rules of evidence insofar as the Court determines, in its judgment, that doing so will enable it to make the most factually accurate determinations of ballot eligibility, or vote-counting accuracy, consistent with its overriding obligation to comply with the deadline in subsection (a).

(h) For any ballot subject to a petition filed under § 310, the petitioner shall bear the burden of proving that, more likely than not, the Local Election Authority's determination regarding the ballot's eligibility or ineligibility is erroneous.

(i) For any claim raised in a petition not covered by subsection (h), the petitioner shall bear the burden of proving that the Local Election Authority's

determination caused the vote totals certified under § 309 to be incorrect and, insofar as the petition asks the Court to adjust the certified vote total, shall further bear the burden of proving that the requested adjustment is more likely than not correct.

(j) As part of completing its review of all petitions pursuant to the deadline in subsection (a), the Presidential Election Court shall publicly announce its ruling on each ballot-eligibility determination submitted for its review.

(1) The Court shall declare whether, in its judgment, each ballot is eligible or ineligible and whether this judgment affirms or reverses the Local Election Authority's determination with respect to the ballot;

(2) For each ballot, the Court shall specify the grounds in law or evidence upon which it relies for its determination of whether the ballot is eligible or ineligible to be counted.

(3) The Court's grounds may include the petitioner's failure to meet the burden of proof with respect to the particular ballot.

(4) The Court may report its grounds in whatever format (either briefly or at greater length) that it deems most conducive to the public understanding of its rulings, including grouping together ballots that are subject to the same grounds of decision.

(k) At the same time as the Presidential Election Court publicly announces its final ballot-eligibility rulings on a petition under § 310, the Court shall also publicly announce its final determinations on any other claims in the petition concerning the vote totals certified in the canvass.

§ 312. Appeal to State Supreme Court of Canvass Review

(a) Within 24 hours after the Presidential Election Court's issuance of its final ruling on a petition under § 311(k), a party to the proceeding may appeal the ruling to the State Supreme Court.

(1) No appeal of any decision made by the Presidential Election Court as part of a proceeding under § 310 can occur until after the Court has issued its final ruling in that proceeding under § 311(k).

(2) The right of appeal under this Section is limited to contending that the Presidential Election Court erred in ruling a ballot eligible or ineligible or otherwise erred in a manner that affects the vote totals certified under § 309.

(3) No appeal can concern any intermediary decision of the Presidential Election Court during the proceeding under § 310 except insofar as the decision affects the eligibility of a ballot or otherwise affects the vote totals certified under § 309.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under subsection (a), that oral argument shall occur within 24 days after Election Day.

(c) Within 27 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(d) If the State Supreme Court's resolution of an appeal under subsection (a) requires additional proceedings on remand concerning the canvass,

(1) each Local Election Authority required to conduct such additional canvass proceedings must complete these proceedings within 29 days after Election Day;

(2) the Presidential Election Court must complete any additional proceedings of its own concerning the canvass, including all review of additional proceedings conducted by each Local Election Authority under subsection (d)(1), within 31 days after Election Day;

(3) the State Supreme Court must complete any post-remand review of the Presidential Election Court's proceedings under subsection (d)(2) at least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

§ 313. Judicial Contest of Certified Vote Totals: Petition

(a) Within 24 hours after receiving e-mail notification of the statewide and local certifications as specified in § 309(b)(2), a candidate eligible to participate in a presidential recount under § 305 may file with the Presidential Election Court a

petition to contest the validity of the vote totals declared in the statewide certification.

(b) A candidate who fails to file a timely petition within the deadline specified in subsection (a) forfeits the right of petition under this Section, thereby barring the Presidential Election Court's consideration of the petition.

(c) A candidate in the lead based on the statewide certification of the canvass may file with the Presidential Election Court a conditional petition, for the Court to adjudicate if the candidate loses the lead as a result of:

(1) proceedings concerning the recount that occur after certification, or

(2) adjustment in vote totals pursuant to a petition for judicial review of the canvass under § 310, or

(3) the Court finding merit in a petition filed by another candidate under this Section;

provided that the candidate in the lead must file the conditional cross-petition within the same deadline as in subsection (a).

(d) Any candidate petitioning under this Section shall, at the same time as electronically filing the petition with the Presidential Election Court, serve electronic notice of the petition upon all other candidates entitled to participate in a presidential recount under § 305, as well as upon the Chief Elections Officer.

(e) The petition may assert as grounds for contesting the certification any grounds available under state law in a judicial contest of a certified gubernatorial election, except those grounds the petitioning candidate had an opportunity to raise under § 306 or § 310.

(f) A petition under this Section may seek either:

(1) a declaration that, upon the correction of errors affecting the validity of the certification, the petitioner is entitled to be certified the candidate with the highest statewide total of valid votes; or

(2) a declaration that the certification must be declared void, in which case the Legislature of the state may appoint the state's presidential electors directly, or provide an alternative method of appointment of the state's

presidential electors, pursuant to its authority under Article II of the U.S. Constitution.

(g) If a petition under this Section claims that the statewide certification is tainted by the presence of more invalid ballots counted in the election than the difference in the vote totals of the leading candidates, the Presidential Election Court shall have such powers, and only such powers, to remedy this taint as would a state court in a contest of a gubernatorial election premised on the same grounds.

(h) The Presidential Election Court, in its sole discretion, may join a Local Election Authority to any proceedings pursuant to this Section.

(i) Apart from subsection (h), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (d).

(j) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

§ 314. Contest of Certified Vote Totals: Deadline and Proceedings

(a) Within 28 days after Election Day, the Presidential Election Court shall conclusively resolve any contest filed under § 313 and shall announce its resolution electronically pursuant to § 304(h).

(b) To facilitate compliance with the deadline in subsection (a), the Presidential Election Court shall adhere to an expedited schedule for adjudication of the contest, including issuing such orders for expedited discovery as necessary to enable a trial of the contest to commence within seven days after the filing of the contest.

(c) A motion to dismiss a contest petition filed under § 313, including a motion to dismiss a conditional petition filed under § 313(c), must be filed with the Presidential Election Court and served upon the petitioner within 48 hours after the filing of the contest.

(d) The Presidential Election Court may choose to hold an oral argument on a motion to dismiss the contest, provided that the argument shall occur within 72 hours after the filing of the motion.

(e) Unless the Presidential Election Court has previously granted a motion to dismiss, the trial of the contest will commence within seven days after the filing of the contest.

(f) While a contest petition or conditional petition is pending, the Presidential Election Court may permit the petitioner for good cause shown to amend the petition to add or supplement claims with facts that could not have been available to the petitioner at the time the petition initially was filed, provided that in no event shall the Court permit the amendment of a petition more than 21 days after Election Day; nor under any circumstances may the Court waive forfeiture for failure to timely file the original contest petition or conditional petition as required under § 313(a)-(c).

(g) Whenever a contest petition or conditional petition is pending at the same time as another contest petition, the Presidential Election Court may consolidate proceedings, including oral argument on motions to dismiss or trial of evidentiary issues, in the interest of completing adjudication of all pending petitions within the deadline in subsection (a).

(h) When considering whether to grant any motion to dismiss a contest petition or conditional petition, the Presidential Election Court in its discretion may defer ruling on the motion until after a trial on factual issues relating to the petition that is the subject of the motion to dismiss, and one factor that may weigh in favor of exercising this discretion is whether there would be sufficient time to hold a trial if a dismissal of the petition were reversed on appeal by the State Supreme Court.

(i) With respect to the trial of any contest petition or conditional petition, the petitioner bears the burden of proving by a preponderance of the evidence any issue of fact necessary to sustain a legal claim made in the petition; provided that with respect to any such issue of fact the burden of proof may be elevated to the standard of clear and convincing evidence if but only if the same elevated standard would apply to the same factual issue in a contest of a gubernatorial election.

§ 315. Appeal to State Supreme Court of Contest Determinations

(a) Within 24 hours after receiving by e-mail the announcement of the Presidential Election Court's resolution of a contest under § 314, a party to the contest may appeal to the State Supreme Court.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under this Section, the argument shall occur within 48 hours after the filing of the appeal.

(c) The State Supreme Court shall resolve any appeal filed under this Section, including the issuance of any orders necessary to adjust vote totals in the statewide certification, no later than 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

(d) If in an appeal under this Section the State Supreme Court identifies any issue requiring a remand for additional factfinding proceedings, the State Supreme Court shall order such factfinding to be complete whenever feasible in such time as to permit final resolution of the appeal in accordance with subsection (c).

§ 316. Final Certification of Presidential Election

(a) Before noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5, the Chief Elections Officer shall publicly issue a final certification of the presidential election, based on a compilation of final orders in all proceedings concerning the presidential recount, any review of the canvass, and any contest, including:

(1) any final post-remand orders concerning the recount under § 307;

(2) any final post-remand orders concerning the canvass under § 312; and

(3) any final orders resolving an appeal of a contest under § 315.

(b) If at noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5 the Chief Elections Officer has failed to publicly issue a final certification of the presidential election as required in subsection (a), the State Supreme Court shall have the authority to issue any orders necessary to assure compliance with the Safe

Harbor Deadline, including directly and immediately issuing the final certification of the election on its own authority.

(c) If notwithstanding its authority under subsection (b), the State Supreme Court determines at or before 11:59 p.m. on the date of the Safe Harbor Deadline that the state is unable to declare a final certification of the presidential election pursuant to these Procedures, then the State Supreme Court immediately shall issue a public declaration that the state is exercising its option to waive the Safe Harbor status available under 3 U.S.C. § 5.

(d) Whenever the State Supreme Court pursuant to subsection (c) has issued a public declaration that the state cannot meet the deadline necessary for Safe Harbor status, the State Supreme Court shall have the authority to issue emergency orders as necessary to enable final certification of the presidential election on or before the date specified in 3 U.S.C. § 7 for the state's presidential electors to cast their Electoral College votes.

§ 317. Cessation of Expedited Procedures If No Longer Necessary

(a) At any time after the Chief Elections Officer has issued a declaration under § 303 on the necessity of an Expedited Presidential Recount, and prior to final certification of the election under § 316, these Procedures will no longer be applicable if and only if:

(1) all candidates entitled to participate in a recount under § 305(c) jointly sign and submit to the Presidential Election Court a statement stipulating that:

(A) there is no further need to complete any recount or other proceedings, including the canvass, on an expedited basis pursuant to these proceedings,

(B) all the candidates signing the statement waive all rights that they otherwise would have under these Procedures; and

(C) the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316;

(2) the Chief Elections Officer signs and submits a separate statement to the Presidential Election Court confirming all the stipulations set forth in the joint statement of the candidates under paragraph (1); and

(3) the Presidential Election Court upon receipt of the statements required in paragraphs (1) and (2), issues a pronouncement confirming that the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316.

(b) Immediately upon issuance of a pronouncement of the Presidential Election Court under subsection (a)(3), the Chief Elections Officer shall proceed forthwith to issue the final certification of the election under § 316.

(c) Whether or not a stipulation has been reached pursuant to subsection (a), any candidate who files a judicial petition or appeal under any provision of these Procedures may voluntarily dismiss the petition or appeal at a subsequent time by applying to the court in which the petition or appeal is under consideration and, upon approval of the court to which this application for voluntary dismissal is made, the petition or appeal shall be dismissed by court order.

If, however, a state's legislature has failed to adopt these Procedures into legislation, it may still be possible for a state to achieve Safe Harbor status if the state's supreme court has been authorized by state law to promulgate procedural rules for the adjudication of disputes that involve the state's judiciary. In this situation, the state's supreme court prior to Election Day in an exercise of its rulemaking authority could promulgate these Procedures, thereby placing them into legal effect in the state before Election Day. If the state's supreme court did so, there would be a strong argument that the status of the Procedures in state law in advance of Election Day would give these Procedures the necessary "safe harbor" status under 3 U.S.C. § 5, such that the congressional pledge would be operative as long as the state complied with these Procedures within the five-week deadline.

Accordingly, these Procedures have been drafted in a form amenable to adoption either as statutory legislation or as a set of procedural rules promulgated by a state supreme court pursuant to its rulemaking authority. But, again, the far preferable method of adoption is a statute enacted by the state's legislature.

~~Finally, it is unclear whether Virginia permits an appeal to the state's supreme court in a contest under § 805. Virginia expressly precludes any appeal in a recount under § 801.1. See § 802 ("The recount proceeding shall be final and not subject to appeal.") But the relevant statutes appear to contain no comparable provision, one way or the other, regarding the possibility of an appeal in a judicial contest of a presidential election. Given the explicit obligation of the three judge contest court to complete its adjudication of the contest by the end of the Safe Harbor Deadline, but not sooner, there would be no time for an appeal if the contest court used up all the time available to it under § 805. Yet in a disputed presidential election, if a candidate thought an issue of substance might interest the members of the Virginia Supreme Court, the candidate is likely to knock on that court's door by way of a writ of mandamus or otherwise, unless explicitly prohibited from doing so. Cf. Kirk v. Carter, 202 Va. 335, 117 S.E.2d 135 (1960) (mandamus granted by Virginia Supreme Court of Appeals to require convening of three-judge contest court). Thus, if such a mandamus petition were filed in the Virginia Supreme Court, the state's statutes leave uncertain whether the state could complete its available judicial proceedings in a disputed presidential election by the end of the Safe Harbor Deadline, as evidently desired.~~

DRAFT Minutes of the Spring 2016 Meeting of the
Advisory Committee on Appellate Rules

April 5, 2016
Denver, Colorado

Attendance and Introductions

The Chair, Judge Steven M. Colloton, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, at 9:00 a.m., at the Colorado Supreme Court in Denver, Colorado.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Kevin C. Newsom, Esq. Gregory Garre, Esq. participated by telephone. Solicitor General Donald Verrilli was represented by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division.

Reporter Gregory E. Maggs was present and kept these minutes. Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Marie Leary, Esq., Research Associate, Appellate Rules Committee, Federal Judicial Center; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office. Mr. Derek Webb, law clerk to Judge Sutton, participated by telephone.

Judge Colloton began the meeting by introducing Chief Justice Nancy E. Rice of the Colorado Supreme Court. Chief Justice Rice welcomed the Committee to the courthouse and spoke of the history of the building. Judge Colloton also welcomed Judge Kavanaugh to his first meeting.

Approval of the Minutes of the October 2015 Meeting

A spelling error on page 11 of the draft minutes of the October 2015 Meeting was identified and corrected. The draft minutes were then approved.

Report on the January 2016 Meeting of the Standing Committee

Judge Colloton reported that the Standing Committee had approved two proposals from the Appellate Rules Committee for publication and public comment. One was Item 13-AP-H, which concerned proposed amendments to Rule 41(b) and (d) regarding the stays of a mandate. The other was Item 15-AP-C, which concerned proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) to lengthen the time for filing a reply brief from 14 days to 21 days.

Judge Colloton said that a third proposal, Item No. 14-AP-D, which concerns amicus briefs filed by party consent under Appellate Rule 29(a), prompted suggestions from the Style Consultants and substantive comments from the Committee Members. Judge Colloton therefore decided to bring the item back for further discussion at today's Committee meeting.

Item No. 12-AP-D (Civil Rule 62: Bonds)

Mr. Newsom led the discussion of this item. He began by reporting the status of proposed revisions to Civil Rule 62 and addressed the discussion draft of this rule on page 70 of the Agenda Book. He explained that the revision to Rule 62 aims to accomplish three things: (1) to extend the automatic stay to 30 days; (2) to allow a party to provide security other than a bond; and (3) to require only one security for all stayed periods. He also explained that the Advisory Committee Note was edited to make it more concise.

Mr. Newsom then turned to the proposed conforming amendments to Appellate Rules 8, 11, and 39, addressing the discussion drafts of these rules on pages 61-64 of the Agenda Book. The Committee agreed with the general approach of the drafts and the policy decision to make Rule 8(b) apply to providers of security other than sureties. The Committee decided to amend the discussion draft in the following three ways:

(1) Rule 8(a)(1)(B) [lines 6-7]: The bracketed phrase "[provided to obtain the stay of a judgment or order of a district court pending appeal]" should be included but edited to say "provided to obtain the stay."

(2) Rule 8(a)(2)(E) [line 15]: The word "appropriate" should be deleted.

(3) Rule 8(b) [lines 16-20]: The wording of this section should be rephrased to say: "If a party gives security in any form, including a bond, other security, stipulation, or other undertaking, with one or more sureties or other security providers, each security provider submits . . . ." The subsequent references to "surety" in the provision should then be replaced with "security provider."

The Committee addressed the discussion draft of Rule 11(g) at length. It considered various possible amendments but ultimately did not alter the discussion draft. The Committee did not make any amendments to the discussion draft of Rule 39(e).

Mr. Newsom moved to approve the discussion draft as amended and to send it to the Standing Committee for publication. The motion was seconded and approved.

Item No.12-AP-F (Civil Rule 23: Class Action Settlement Objectors)

Judge Colloton introduced this item, which concerns class action settlement objections. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward. Judge Colloton explained that the Civil Rules Committee decided to address this matter through what it calls "the simple approach." Under this approach, Civil Rule 23(e)(5)(B) would be amended to provide that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval. The simple approach would not require amending the Appellate Rules.

Judge Colloton asked the Committee to consider whether the proposed "simple approach" was a good solution to the problem of class action objections. He also asked the Committee to consider whether requiring a district court to approve consideration paid to an objector impermissibly interferes with an appellate court's jurisdiction.

Mr. Derek Webb spoke regarding his memorandum included in the Agenda Book at page 109. He informed the Committee that the Civil and Appellate rules allow a district court to continue to act in a variety of situations even though a notice of appeal has been filed.

Two judge members expressed agreement with the "simple approach" of the Civil Rules Committee. An attorney member expressed some concern about the policy behind the approach. He was not sure that the district court would always know the case better than the court of appeals. He offered the example of a case in which there was a proposed payment to withdraw an objection after oral argument in the court of appeals. He asked, "Should the district court really decide whether the payment should be made?" The attorney member, however, thought that such situations might be rare.

Judge Sutton saw some potential for conflict between the district court and court of appeals. He noted that nothing in the proposed revision of Civil Rule 23 would require or prevent the dismissal of an objection by a court of appeals. He suggested that another, possibly better, approach might have been to require a court of appeals to ask the district court for an indicative ruling under Appellate Rule 12.1 before deciding whether to dismiss an objection. He said that this option

remains open to the courts of appeals and suggested that the Advisory Committee Note could address this point.

Following further discussion, Judge Colloton summarized the apparent views of the Committee as follows: The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee.

Item No. 16-AP-A (Appellate Rule 4(b)(1) and Criminal Case Notice of Appeals)

The Reporter introduced this item, which concerns a proposal to amend Appellate Rule 4(b)(1)(A) to increase the period for filing a notice of appeal in a criminal case from 14 days to 30 days. The reporter explained that the Committee previously had considered and rejected essentially the same proposal when it addressed Item 11-AP-E. The Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

A judge member said that limiting the period for filing a notice of appeal to 14 days was necessary for having prompt appeals. He also noted that the interests of lawyers may differ from clients; lawyers may want more time but clients may want speedier action. Expressing the view of the Department of Justice, Mr. Byron said no real need has been shown for the amendment. Other speakers emphasized that the Committee had previously considered and decided the matter.

Judge Colloton asked whether there should be further study. No member believed that further study was required. A motion to remove the item from the Committee's agenda was seconded and approved.

Item No. 14-AP-D (Appellate Rule 29(a) on Amicus Briefs Filed with Party Consent)

Judge Colloton introduced this item, which concerns amicus briefs filed by party consent. He reminded the Committee that it had proposed a modification of Appellate Rule 29(a) at its October 2016 meeting. He then explained that the Standing Committee was generally favorable to the proposal but identified issues that may require further consideration.

Judge Colloton began by discussing the policy issue of whether a court should be able to reject not only amicus briefs filed by party consent but also amicus briefs filed by the government. An attorney member said that the rules should continue to provide the government a right to file an amicus brief. Mr. Byron said that the Department of Justice's position was that the government should have a right to file an amicus brief.

Judge Colloton then addressed the discussion draft line-by-line. The sense of the Committee was to make the following revisions:

(1) line 3: strike the hyphen in "amicus-curiae"

(2) line 5: adopt the "except" clause rather than the separate "but" sentence proposed by the Style Consultants

(3) line 6: strike "by local rule"

(4) line 6: replace "prohibit" with "prohibit or strike"

At the suggestion of a judge member, the Committee also decided to replace the Advisory Committee Note for the proposed amendment to Appellate Rule 29(a) on page 140 of the Agenda Book with the following: "The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification."

The Committee approved a motion to submit the revised version of the Rule to the Standing Committee.

Item No. 08-AP-R (Appellate Rules 26.1 and 29(c) on Disclosures)

Judge Colloton introduced this item, which concerns Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements is to assist judges in deciding whether they need to recuse themselves. Judge Colloton explained that some local rules go further. He explained that, in the memorandum included at page 159 of the Agenda Book, Professor Daniel Capra had tried to pull together suggestions for additional disclosure requirements without necessarily advocating for them. Judge Colloton said that the initial decisions for the Committee were (1) whether to include some or all of the proposed disclosures; (2) whether to conduct more study; or (3) whether to drop the matter.

A judge member asked the attorney members how burdensome they considered such disclosure requirements. An attorney members said that some disclosure requirements are very burdensome. The committee discussed the requirement of disclosing witnesses. Several members suggested that the cost was not worth the benefit. An attorney member also said that disclosing affiliates of corporations would be burdensome. He said that such disclosures are sometimes required in state courts.

Judge Sutton asked whether the list of required disclosures would carry with it a presumption that recusal was necessary when the listed information was disclosed. An attorney member asked whether the Advisory Committee Note could address this potential concern by saying that the additional disclosure requirements do not change the recusal standards.

Another attorney member asked how strong the need was for changing the current rules. Mr. Byron, speaking for the Justice Department, agreed that additional disclosure requirements would be burdensome and that it was not clear how beneficial they would be.

Judge Sutton said that the current rule requires disclosure of things that by statute automatically require disclosure. The proposed rule would go further. He also said that the proposal should not go to the Standing Committee for publication at this time because the Bankruptcy Rules Committee was still working on its own disclosure requirements.

Judge Colloton questioned the need for requiring parties to disclose the identity of judges, asking whether there were many judges who have to recuse themselves because of the identity of a judge during earlier proceedings in a case.

Several committee members expressed concern that disclosing the identity of all lawyers who had worked on a matter could be very burdensome, especially if there had been an administrative proceeding below. But a countervailing consideration was that judges still may have to recuse themselves based on the participation of a lawyer.

The Committee discussed the question whether clauses (a)(2), (a)(3), and (a)(4) should use the term "proceeding" or "case" or some other term. A judge member pointed out that some appeals come directly from agencies. Another judge member suggested that the word "matter" might be better. Another judge member suggested that perhaps local rules should address matters coming directly to the court of appeals from administrative proceedings.

Judge Colloton asked whether the draft of Rule 26.1(e) corresponded to any similar provision in the draft revision to the Bankruptcy Rules. The Committee decided that the reporter should coordinate with the Criminal Rules and Bankruptcy Rules Committees.

It was the sense of the committee that the following action should be taken with respect to the discussion drafts of Rule 26.1 and Rule 29(c) beginning on page 150 of the Agenda Book.

(1) The "except clause" in line 3 should be deleted so that Rule 26.1 applies to all parties.

(2) The term "affiliated" in line 5 should be deleted. A Fourth Circuit local rule requires disclosure of affiliates. But the term is complicated to define.

(3) The term “matter” rather than “case” or “proceeding” should be in lines 10, 12, and 14

(4) The “good cause”exception in lines 17 and 18 should be included. The formulation differs from the formulation in the criminal law rules. The exception has to be included at the end of the sentence because of everything else at the start of the sentence. The substance is the same.

(5) There was no objection to the proposed language in lines 31-32 regarding persons who want to intervene.

(6) The Advisory Committee note should make clear that the Committee is not trying to change the recusal requirements.

(7) The Committee had no objection to the proposed change to Rule 29(c)(5)(D).

The Committee determined that no amendment should be proposed at this time, and that the matter should be carried over for further consideration. The Chair may receive input from the Standing Committee at its June 2016 meeting.

Item 12-AP-B (Appellate Rules Form 4 and Institutional Account Statement)

This Item concerns a proposal to add the parenthetical phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to one of the questions in Appellate Form 4. The reporter introduced the time and summarized the arguments in Reporter Struve's memorandum for and against the adding the parenthetical phrase.

After a brief discussion, the Committee decided to take no action for two reasons. First, the language of the Form already tracks the applicable statute. Second, although the parenthetical phrase might prevent the filing of institutional account statements unnecessarily, the consequence was not very burdensome to either confinement institutions or prisoners. A motion to remove this item from the agenda was made, seconded, and approved.

Item No. 15-AP-E (Appellate Rules Form 4 and Social Security Numbers)

The reporter introduced this item, which included five proposals. The first proposal was to amend Appellate Form 4 to remove the question asking litigants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The reporter presented this item. As discussed in the memorandum on page 215 of the Agenda Book, the clerks of the courts of appeals report that this information is no longer needed for any purpose. The Committee

discussed the matter briefly and decided that the question should be deleted. The Committee will send a proposal for publication to the Standing Committee.

The second proposal was to amend Appellate Rule 25(a)(5) to prohibit filings from containing any part of a social security number. The Committee decided to take no action on this matter because Appellate Rule 25(a)(5) incorporates the privacy standards from the Civil Rules. Any change should come from the Civil Rules.

The third proposal was to amend Appellate Rule 24(a)(1) to add a presumption that an affidavit filed in support of a motion for leave to proceed in forma pauperis would be sealed. The Committee previously had discussed this matter at its October 2015 meeting. Following a brief discussion, the sense of the Committee was that the proposal should be rejected.

The fourth proposal was that Appellate Rule 32.1(b) should be amended to require litigants to provide pro se applicants with unpublished opinions that are not available without cost from a publicly accessible database. An attorney member suggested that this proposal raised a substantive policy question about how much financial assistance should be given to pro se litigants and that this question was better addressed by Congress than by a Rules Committee. Another attorney member pointed out that the proposal concerned all pro se litigants, not just those seeking leave to proceed in forma pauperis. Some pro se litigants might be able to afford access to commercial databases. Another member of the Committee asked whether a court might order a party to provide unpublished opinions on an individual basis. The sense of the Committee was that the proposal should be rejected.

The fifth proposal was to amend Appellate Rule 25(d)(2)(D) to allow pro se litigants to file or serve documents electronically. A member suggested that the Committee should consider this proposal as part of its general consideration of electronic filing issues.

A motion was made to present the first matter (concerning social security numbers) to the Standing Committee for publication, to remove the second, third, and fourth matters from the agenda, and to fold the fifth matter into the rest of the other agenda items concerning electronic filing. The motion was seconded and approved.

Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees)

The reporter introduced this item, which the Committee discussed for the first time at the October 2015 Meeting. The item concerns the procedure by which an appellant who prevails on appeal may recover the $5 fee for filing a notice of appeal and the $500 fee for docketing an appeal. Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court.

In most circuits, the $500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Committee considered the question whether Rule 39 should be amended. The clerk representative said that the clerks in most circuits want to tax the whole thing in the court of appeals. Mr. Byron suggested the possibility of deleting (e)(4). A judge member said that he thought that the rule was correct as written.

Following further discussion the sense of the Committee was that the Chair should communicate with the chief judges of the various circuits about the problem, with the goal of finding a resolution without amending the rules. The motion to remove the item from the agenda was made, seconded, and approved.

Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H (Electronic Filing and Service)

These items concern electronic filing, signature, service, and proof of service. The reporter described the progress that the Civil Rules Committee had made on revising the Civil Rules to address these subjects. Several members of the Committee expressed agreement with the four major characteristics of the reform: First, parties represented by counsel must file electronically absent an exception, such as an exception for good cause. Second, use of the court's electronic filing system constitutes a signature. Third, parties will serve papers through the court's electronic filing system. Fourth, no proof of service is required for papers served through the electronic filing system.

The Committee concluded that the reporter should prepare a discussion draft of Appellate Rule 25 that would follow the most recent draft of Civil Rule 5. The reporter would then circulate the draft to the committee members by email. The goal is to present a proposed revision of Appellate Rule 25 to the Standing Committee in June.

The Committee also directed the reporter to determine whether other Appellate Rules would also require amendment to address electronic filing.

Memo on Circuit Splits

The Committee also considered a memorandum prepared by Mr. Webb. The memorandum listed a number of circuit splits on issues under the Appellate Rules. The Committee decided to study three of these issues for possible inclusion on its agenda in the future: (1) whether delay by prison authorities in delivering the order from which the prisoner wishes to appeal can be used in computing time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the

appellate court or the district court. The Committee also agreed to study the other issues in the memorandum further.

Adjournment

Judge Colloton thanked Justice Eid for her 6 years of service on the Committee and for providing her input from the perspective of a state court. Judge Colloton also thanked Prof. Barrett for her service on the Committee and for hosting the meeting in Chicago. Judge Colloton noted that this was the last meeting for Judge Sutton at the Appellate Rules Committee. He also noted that this was the last meeting for Mr. Gans and himself. He noted that Mr. Gans has served for in clerk's office of the Eighth Circuit for 33 years. Judge Colloton thanked him for his insight and polling of his colleagues.

Judge Sutton announced that Judge Neil Gorsuch will be the new chair of this committee. Judge Sutton thanked Judge Colloton for his four years of service, care, and fair-mindedness. Judge Sutton also read comments from former reporter Cathie Struve who complimented and thanked Judge Colloton for his service as chair of the Committee.

The meeting adjourned.

ALI

THE AMERICAN LAW INSTITUTE

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

Council Draft No. 2

(December 16, 2015)

SUBJECTS COVERED

Procedures for a Presidential Dispute: Schedules for Official Institutions and Campaign Attorneys

PART III Procedures for the Resolution of a Disputed Presidential Election

APPENDIX Black Letter of Council Draft No. 2

The Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1626 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

This document is submitted to the meeting of the Council of The American Law Institute on January 21-22, 2016, at the ALI 4th floor Conference Center, 4025 Chestnut Street, Philadelphia, Pennsylvania. As of the date this draft was printed, it had not been considered by the Council or membership of The American Law Institute, and therefore does not represent the position of the Institute on any of the issues with which it deals.

The American Law Institute

COUNCIL EMERITI

**Director Emeritus*
***President Emeritus and Chair of the Council Emeritus*

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes
Council Draft No. 2

Comments and Suggestions Invited

We welcome written comments on this draft. They may be submitted via the website project page or sent via email to PLELcomments@ali.org. Comments will be forwarded directly to the Reporters, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

Unless expressed otherwise in the submission, individuals who submit comments authorize The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author. Comments will be accessible on the website's project page as soon as they are posted by ALI staff. You must be signed in to submit or view comments.

Reporter
Professor Edward B. Foley
Ohio State University,
Michael E. Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Email: foley.33@osu.edu

Director
Professor Richard L. Revesz
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: director@ALI.org

Associate Reporter
Professor Steven F. Huefner
Ohio State University,
Michael E. Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Email: huefner.4@osu.edu

Deputy Director
Ms. Stephanie A. Middleton
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: smiddleton@ALI.org

Reporters' Conflicts of Interest

The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

FRANK SULLIVAN, JR., Indiana University, Robert H. McKinney School of Law, Indianapolis, IN
JOHN J. SULLIVAN, Service Employees International Union, Washington, DC
JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
PATRICIA M. WALD, Washington, DC

LIAISONS

For the National Center for State Courts
REBECCA GREEN, William & Mary Marshall-Wythe School of Law, Williamsburg, VA
For the National Conference of State Legislatures
WENDY UNDERHILL, Denver, CO

MEMBERS CONSULTATIVE GROUP

Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes
(as of November 30, 2015)

MARC T. AMY, Louisiana Court of Appeal, Third Circuit, Abbeville, LA
JOHN FOX ARNOLD, St. Louis, MO
WILLIAM G. ARNOT, Houston, TX
WILLIAM T. BARKER, Chicago, IL
MARIALYN BARNARD, Texas Fourth Court of Appeals, San Antonio, TX
SIMON K. BARSKY, Valley Village, CA
DEBRA LYN BASSETT, Los Angeles, CA
WARREN BELMAR, Palm Beach, FL
MARK I. BERNSTEIN, Court of Common Pleas, First Judicial District, Philadelphia, PA
ASHUTOSH A. BHAGWAT, Davis, CA
SANFORD L. BOHRER, Miami, FL
EMMET J. BONDURANT II, Atlanta, GA
DAVID M. BRODSKY, Johns Island, SC
DAVID JOHN BURMAN, Seattle, WA
TOM CAMPBELL, Orange, CA
ELENA A. CAPPELLA, Philadelphia, PA
PETER H. CARSON, San Francisco, CA
NICOLE B. CASAREZ, Houston, TX
HENRY L. CHAMBERS, JR., Richmond, VA
ERIC A. CHIAPPINELLI, Lubbock, TX
NEIL HOWARD COGAN, Costa Mesa, CA
ANNE E. COHEN, New York, NY
DAVID K. COHEN, Chevy Chase, MD
NEIL B. COHEN, Brooklyn, NY
DENNIS R. CONNOLLY, Princeton, NJ
MICHAEL A. COOPER, New York, NY
RICHARD D. CRAIG, Oklahoma City, OK
MICHAEL CROMMELIN, Melbourne, Australia
JOSIAH M. DANIEL III, Dallas, TX
JACK DAVIES, Minneapolis, MN
KIMBERLY A. DEMARCHI, Phoenix, AZ
SUZANNE M. DUGAN, Washington, DC
LINDA S. EADS, Dallas, TX
GEORGE E. EDWARDS, Indianapolis, IN
JOSEPH P. ESPOSITO, Washington, DC
IRA M. FEINBERG, New York, NY
JOSEPH Z. FLEMING, Miami, FL
C. ALLEN FOSTER, Washington, DC
STEVEN I. FRIEDLAND, Greensboro, NC
FAITH E. GAY, New York, NY
E. DUNCAN GETCHELL, JR., Richmond, VA
JOSEPH GOLDBERG, Albuquerque, NM
PHILIP S. GOLDBERG, Washington, DC
NICOLE A. GORDON, New York, NY
DAVID M. GOSSETT, Washington, DC
MICHAEL GREENWALD, Philadelphia, PA
CHARLES E. GRIFFIN, Ridgeland, MS
SETH GROSSMAN, San Francisco, CA
KEVIN J. HAMILTON, Seattle, WA
TERESA WILTON HARMON, Chicago, IL
ALLISON HAYWARD, Cambria, CA
OTTO J. HETZEL, Washington, DC
W. WILLIAM HODES, Lady Lake, FL
KATHLEEN J. HOPKINS, Seattle, WA
EDWIN E. HUDDLESON, Washington, DC
RICHARD H. HUNTER, St. Croix, U.S. VI
VINCENT R. JOHNSON, San Antonio, TX
ANTHONY JOHNSTONE, Missoula, MT
JOSEPH A. KANEFIELD, Phoenix, AZ
ROBERT M. KAUFMAN, New York, NY
EVELYN V. KEYES, Texas First Court of Appeals, Houston, TX
MARK R. KILLENBECK, Fayetteville, AR
DANIEL J. KRISCH, Hartford, CT
RONALD J. KROTOSZYNSKI, Tuscaloosa, AL
PETER B KUTNER, Norman, OK
EDWARD LABATON, New York, NY
OTHNI J. LATHRAM, Tuscaloosa, AL
JOHN P. LAVELLE, JR., Philadelphia, PA
JOHN K. LAWRENCE, Ann Arbor, MI
BILL LANN LEE, Berkeley, CA
MATTHEW HOWARD LEMBKE, Birmingham, AL
SETH R. LESSER, Rye Brook, NY
DAVID L. LEWIS, New York, NY
PETER LINZER, Houston, TX
ANN M. LOUSIN, Chicago, IL
HOUSTON PUTNAM LOWRY, Hartford, CT
MYLES V. LYNK, Tempe, AZ
C. SCOTT MARAVILLA, Washington, DC
RAYMOND B. MARCIN, Washington, DC
MARY MASSARON, Bloomfield Hills, MI
LORELIE S. MASTERS, Washington, DC
LLOYD H. MAYER, Notre Dame, IN
THOMAS WM. MAYO, Dallas, TX
ROBERT LEE MCCURLEY, Tuscaloosa, AL
BEVERLY MCQUEARY SMITH, Jersey City, NJ

LAWRENCE F. MEEHAN, Philadelphia, PA
MICHAEL J. MEEHAN, Tucson, AZ
BRUCE P. MERENSTEIN, Philadelphia, PA
THOMAS BUTLER MERRITT, Littleton, NH
LUTHER T. MUNFORD, Ridgeland, MS
CYNTHIA E. NANCE, Fayetteville, AR
RICHARD L. NEUMEIER, Boston, MA
ROBERT G. NEWMAN, San Antonio, TX
JAMES M. O'FALLON, Eugene, OR
KATHLEEN M. O'SULLIVAN, Seattle, WA
ELIZABETH PENDO, St. Louis, MO
W. MICHEL PIERSON, Circuit Court for Baltimore City, Eighth Judicial Circuit, Baltimore, MD
MICHAEL J. PITTS, Indianapolis, IN
ROGER V. PUGH, New York, NY
MARGARET JANE RADIN, Ann Arbor, MI
BERNARD D. REAMS, JR., San Antonio, TX
JOE R. REEDER, Washington, DC
RICHARD C. REUBEN, Columbia, MO
AUGUSTIN RIVERA, JR., Corpus Christi, TX
JAMES L. ROBERTSON, Jackson, MS
JONATHAN C. ROSE, Washington, DC
ROBIN S. ROSENBAUM, U.S. District Court, Southern District of Florida, Fort Lauderdale, FL
RONALD D. ROTUNDA, Orange, CA
MARGARET M. RUSSELL, Santa Clara, CA
KAREN J. SARJEANT, Silver Spring, MD
RONNA G. SCHNEIDER, Cincinnati, OH
ANDREW G. SCHULTZ, Albuquerque, NM
HERMAN SCHWARTZ, Washington, DC
LESLIE SCOTT, Jackson, MS
JOHN A. SEBERT, Evanston, IL
PAUL M. SECUNDA, Milwaukee, WI
GARY E. SHERMAN, Wisconsin Court of Appeals, District IV, Madison, WI
RICHARD G. SINGER, Camden, NJ
ARTHUR B. SPITZER, Washington, DC
H. MARK STICHEL, Baltimore, MD
ELIZABETH S. STONG, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY
GUY MILLER STRUVE, New York, NY
DANIEL M. TRAYNOR, Devils Lake, ND
WILLIS B. TRIBLER, Chicago, IL
H. WOODRUFF TURNER, Pittsburgh, PA
MARK V. TUSHNET, Cambridge, MA
TIMOTHY M. TYMKOVICH, U.S. Court of Appeals, Tenth Circuit, Denver, CO
R. PATRICK VANCE, New Orleans, LA
BILL WAGNER, Tampa, FL
WENONA YVONNE WHITFIELD, Carbondale, IL
L. KINVIN WROTH, South Royalton, VT
DAVID P. YAFFE, Los Angeles, CA
JOHN HARDIN YOUNG, Rehoboth Beach, DE
ERIC H. ZAGRANS, Cleveland, OH

The bylaws of The American Law Institute provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council." Each portion of an Institute project is submitted initially for review to the project's Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute's Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission. The status of this Draft is indicated on the front cover and title page.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

The Council approved the initiation of this project in October 2010. Reporter Edward B. Foley presented a preview of this project at the 2011 Annual Meeting. The Reporters gave a report on this project, centered on the Model Calendar for the Resolution of Disputed Presidential Elections and Expedited Procedures for an Unresolved Presidential Election, at the 2012 Annual Meeting.

An earlier version of some of the material contained in Part III can be found in Preliminary Draft No. 3 (2015).

Principles (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute's Principles projects. The Institute's Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called "Principles of Corporate Governance and Structure: Restatement and Recommendations," but in the course of development the title was changed to "Principles of Corporate Governance: Analysis and Recommendations" and "Restatement" was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable "Principles" project.

The "Principles" approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute's first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of "rules of statewide application," as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family Dissolution: Analysis and Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family Dissolution: Analysis and Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

"Principles" may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute's Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

REPORTERS' MEMORANDUM

COUNCIL DRAFT NO. 2

PRINCIPLES OF THE LAW
ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES
Part III: Procedures for the Resolution of a Disputed Presidential Election

This draft is scheduled for presentation at Council's meeting on January 21, 2016. It will be the first occasion for Council to consider a draft of black-letter material and commentary on the topic of resolving disputed elections. At its meeting on October 15, 2015, Council considered and approved (pursuant to a conventional Boskey motion) Council Draft No. 1 (October 2, 2015), which contained only Part I of this project, concerning the topic of non-precinct voting.

From the inception of this Election Law project, the project has encompassed both the topic of non-precinct voting and the topic of disputed elections. Since a joint meeting of the Advisers and the Members Consultative Group on December 4, 2014, it has been the collective judgment of the Reporters and others involved with the project that the topic of disputed elections should be bifurcated into two distinct components. One of these components, now denominated Part II: Principles for the Resolution of Ballot-Counting Disputes, addresses principles applicable to elections generally and thus to various types of nonpresidential offices—senator, governor, mayor, and so forth—as well as to the presidency. The second component concerning the topic of disputed elections, now denominated Part III: Procedures for the Resolution of a Disputed Presidential Election, addresses presidential elections solely and specifically.

This bifurcation resulted from the view, strongly and widely expressed at the December 2014 meeting, that two different types of black-letter text were required for (a) elections generally and (b) presidential elections specifically. The judgment was that elections generally called for a set of Principles, while presidential elections required—in addition to those generally applicable principles—a set of specific procedural rules designed to enable a state to complete the adjudication of a dispute over the counting of presidential ballots within the extraordinarily tight schedule set by the Constitution and Congress. This judgment was reached based on a draft, presented at the December 2014 meeting, that contained a unified and comprehensive code for the resolution of all types of disputed elections. Having had the benefit of reviewing that draft, the consensus was to split the topic of disputed elections into a less code-like set of Principles for elections generally, while retaining the more rule-like form for the specific procedures necessary to address the unique scheduling challenge of resolving a disputed presidential election.

At the joint meeting of the Advisers and the Members Consultative Group on September 11, 2015, the Reporters presented a draft that implemented this bifurcation judgment. The discussion of this draft first confirmed that this bifurcation was

appropriate—that Part II should contain Principles applicable to ballot-counting disputes arising in all different types of elections, while Part III should contain specific Procedures to address the unique scheduling difficulties of resolving a disputed presidential election. With that confirmation in mind, the September 15 meeting then considered the status of these two distinct Parts and the timing of their further development.

With respect to Part II, there was a general sense that while the Principles in Part II were on the right track, they needed considerably more work before presentation to Council. Furthermore, there was also general agreement that there was relatively less urgency to the completion of Part II, compared to Part III. Conversely, the general sense was that the black-letter text of Part III, as presented in the September 2015 draft, was substantively solid and, with only modest revisions, would be in a position for Council to consider at its January 2016 meeting.

In addition, there was a strong and widespread sense among the Advisers and MCG at the September 2015 meeting that the subject matter of Part III was particularly urgent. Given the upcoming presidential election of 2016, the view was that it would be highly desirable to prepare Part III for presentation to Council at its January 2016 meeting, and then to the members at the Annual Meeting in May. If approved at both of these meetings, Part III would then serve as an ALI pronouncement on how states might prepare themselves for the risk of a disputed presidential election in November. (Beyond enabling states to consider the promulgation of procedures for this purpose during the summer and early fall of 2016, Part III might also serve to assist state and federal judges—as well as state and local officials responsible for election administration—on how to handle various matters, including scheduling difficulties, in the event that a disputed presidential election occurs in November.)

Given these different assessments concerning Parts II and III, they have now been bifurcated temporally as well as substantively. As recommended at the September 2015 Advisers meeting, Part II is now moving on a slower track, with the plan of presenting another draft of Part II at a joint meeting of the Advisers and MCG in June 2016. Thus, Part II will not be presented to Council at its January 2016 meeting.

Consequently, what is now being presented for Council's consideration is Part III. Since September, the substance of its black-letter provisions has been revised somewhat to reflect Adviser and MCG input, as well as further analysis of the Reporters. Nonetheless, the substance of these black-letter provisions is largely the same as what the Advisers and MCG reviewed in September 2015. The form, however, of these black-letter provisions is significantly different. Based on feedback from the September meeting, the black-letter provisions have been clustered together into fewer Sections (each with more subsections). This formatting change has two main goals: first, to make the provisions themselves more accessible and comprehensible (in this particular project, it may be easier now to see the trees of the forest, perhaps, rather than a mass of branches and leaves); and second, to conform stylistically to the format of the provisions in Part I, which Council has already seen and approved.

In addition to this restructuring of Part III's black-letter provisions, since September the Reporters have devoted substantial work to adding and improving the content of the Comments and Reporters' Notes. (These had been relatively lean in the draft presented at the September 2015 meeting, as the focus of that meeting had been to review a draft of black-letter provisions for both Parts II and III to see whether bifurcation was indeed the correct approach.) As currently drafted, the Comments and Reporters' Notes for Part III are intended to support Part III's black-letter provisions independently, without reference to Part II. Nonetheless, these Comments and Reporters' Notes have been drafted with the expectation that eventually they will sit beside, and indeed follow, a set of Comments and Reporters' Notes for the Principles contained in Part II. And because Part II will be the more comprehensive document—applicable to elections generally, and encompassing substantive principles for the counting of ballots as well as procedural principles concerning the adjudication of ballot-counting disputes—the current draft of Part III reflects a judgment that considerable background information will be more suitably presented in Reporters' Notes to Part II, rather than to Part III.

One additional point of feedback from the September 2015 Advisers and MCG meeting is pertinent here. It was strongly suggested, and generally agreed, that Part III—given its particular design to address the unique timetable of a disputed presidential election—contain a thorough introductory explanation of the background circumstances, including the applicable constitutional and congressional requirements, that give rise to its necessity in the event of a presidential-election dispute. The accompanying draft of Part III therefore contains a lengthy Introductory Note in response to that feedback.

This memorandum will not endeavor to repeat that Introductory Note, except to summarize its overarching point: the extraordinary challenge of completing the resolution of a disputed presidential election within the five-week window that Congress has provided (or to stretch it out one more week, to meet the constitutional requirement that all states cast their Electoral College votes on the same date) requires a detailed scheme to coordinate all the essential pieces needed for this situation—including a recount, the canvassing of returns, and a potential judicial contest of the result. It does not suffice for a state statute to decree simply, as some do, that the adjudication of a vote-counting dispute in a presidential election must conclude by the congressionally (or constitutionally) specified date. A simple decree of this nature does not provide the mechanism for making compliance feasible. Instead, all the intricate moving pieces (each complicated enough by itself) must be constructed in advance and designed so as to work together and reach fruition in a short amount of time.

As described in the Introductory Note, as well as throughout the Comments and Reporters' Notes, this undertaking is in the nature of an engineering project—and a daunting one at that. Thus, if the Procedures that are set forth in this Part III seem complex, there is at least some assurance in knowing that complexity, while inevitable, has been managed in a particular way by design and thus serves a purpose. It is much better than the false hope of decreeing that the entire dispute-resolution process must end five weeks after Election Day, but then providing no mechanism to enable that command to be carried out. (To aid in understanding the basic structure of the mechanisms

generated by this engineering project, accompanying this Reporters' Memorandum is a set of two schematic PowerPoint slides presented at the September 2015 meeting.)

With these preliminary observations, the Reporters' hope is that this draft provides the foundation for Council to decide whether to move forward with the goal of presenting Part III to the full membership at the May 2016 Annual Meeting.

Procedures for a Presidential Dispute: Schedule for Official Institutions

WEEK	LOCAL ELECTION AGENCY	STATE TRIAL-LEVEL COURT	STATE SUPREME COURT
1	Recount complete		
2	Canvass complete	Recount review complete	
3	Contest discovery	Canvass review complete Contest motions hearing	Recount appeal complete
4	Recount remand complete	Contest trial, if necessary	Canvass appeal complete
5	Canvass remand complete	Recount remand review Canvass remand review	Recount remand appeal Canvass remand appeal Contest appeal complete

Recount: reexamination of initially counted ballots
Canvass: determination of eligibility of ballots not initially counted (absentee, provisional)
Contest: adjudication of claims that count is tainted by ineligible ballots or other error

Procedures for a Presidential Dispute: Schedule for Campaign Attorneys

WEEK	RECOUNT	CANVASS	CONTEST
1	Observe local recount	Observe local canvass	Investigation of facts
2	Present challenged ballots to state trial-level court	Deadline for petition to review local canvass	Deadline to file contest; continue fact investigation
3	Argue recount appeal in state supreme court	Litigate review of canvass in state trial-level court	Litigate motion to dismiss; conduct discovery; amend contest, as needed
4	Litigate recount remand (if necessary)	Argue canvass appeal in state supreme court	Contest trial (if necessary)
5	Recount remand review & appeal (if necessary) in state trial-level & supreme courts	Canvass remand review & appeal (if necessary) in state trial-level & supreme courts	Argue contest appeal & any necessary remand

Recount: reexamination of initially counted ballots

Canvass: determination of eligibility of ballots not initially counted (absentee, provisional)

Contest: adjudication of claims that count is tainted by ineligible ballots or other error

TABLE OF CONTENTS

Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

Part III: Procedures for the Resolution of a Disputed Presidential Election

Introductory Note: These Procedures address the unique challenges that exist when a presidential election remains unsettled more than 24 hours after the polls have closed and, despite the reporting of preliminary returns on Election Night and into the next day, neither of the two leading candidates has made a statement of concession. This situation raises the possibility that the unsettled election will turn into a disputed election, as occurred in 2000, with the candidates and their campaigns using available procedures, including judicial litigation, in an effort to secure a victory. Although the phenomenon of candidates and their partisan supporters fighting over the counting of ballots is hardly unique to presidential elections, the imperative of resolving this kind of dispute in a presidential election within the limited time constraints imposed by the federal Constitution and related statutory provisions of federal law presents a scheduling difficulty inapplicable to any other elective office. These procedures address that difficulty.

Constitutional background. The relevant parts of the U.S. Constitution are sparse. Article II says that "[e]ach State shall appoint" its presidential electors "in such Manner as the Legislature thereof may direct," but goes on to provide that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." The Twelfth Amendment, adopted after the crisis over the election of 1800, states:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, . . . and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House

> of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

The Twentieth Amendment, adopted during the Great Depression to shorten the gap between the November date on which voters cast their ballots and the inauguration of the new President, specifies that "[t]he terms of the President and the Vice President shall end at noon on the 20th day of January." Although the Twentieth Amendment goes on to provide for the contingency of an Acting President "[i]f a President shall not have been chosen before the time fixed for the beginning of his term," the Constitution clearly creates the expectation that any dispute over a presidential election be conclusively resolved before the new President is to take office at noon on January 20.[1] Moreover, in the modern era, the political urgency of resolving a disputed presidential election before Inauguration Day would make untenable the contemplation of any procedures thereafter to change the result of that particular presidential election.

Even apart from the outer limit of Inauguration Day, the weight of history suggests that compliance with the federal Constitution requires a state to resolve any dispute over the choice of its presidential electors, including any controversy over counting of ballots cast by citizens for a presidential candidate's slate of electors, before the nationally uniform day on which the presidential electors in all states must meet to cast their official Electoral College votes. This point turned out to be the decisive one in the resolution of the disputed 1876 presidential election. To facilitate the resolution of that dispute, Congress adopted a special Electoral Commission comprised of five Senators, five Representatives, and five Justices. The composition of the Commission was evenly balanced between five Republicans and five Democrats from Congress, two Justices perceived as Republican and two perceived as Democrats, with the fifth Justice to be an independent. When the Justice expected to fill the

[1] The text of the Twentieth Amendment contains a regrettably ambiguous distinction between the possibility that by noon on January 20 "a President shall not have been *chosen*" and the possibility that "a President elect shall fail to have *qualified*" (emphasis added in both instances). Having made this distinction, the Amendment goes on to state that "the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have *qualified*, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have *qualified*." But the Amendment does not go on to state what happens if neither a President nor Vice President shall have been *chosen*. Presumably, the same power of Congress to provide by law "who shall then act as President" would apply in this circumstance.

independent slot declined to serve, Justice Joseph Bradley was called upon to play this role. With the other members splitting seven-seven along partisan lines as anticipated, Justice Bradley's determination became dispositive. Justice Bradley's pivotal reasoning rested on the proposition that any proceedings that occur in a state after the constitutionally uniform date for the casting of votes by the presidential electors are null and void. "To allow a State legislature in any way to change the appointment of electors after they have been elected and given their votes, would," Justice Bradley explained, "subvert the design of the Constitution in requiring all the electoral votes to be given on the same day." Justice Bradley also made clear that his reasoning applied to judicial proceedings, as well as legislative enactments, within a state: "No tampering of the result can be admitted after the day fixed by Congress for casting the electoral votes."

Justice Bradley's opinion is not binding on Congress in future elections in any formal sense. Indeed, in 1960, Hawaii engaged in recount proceedings after the nationally uniform date for the meeting of presidential electors that year. Whereas the state's official votes as of that date were cast for Nixon, the subsequent recount proceedings purported to change the state's electoral votes to Kennedy. But Hawaii's electoral votes did not matter one way or the other to the outcome of the 1960 presidential election; Kennedy had a majority even if Hawaii was awarded to Nixon. When it came time for Congress to count the electoral votes from the states on January 6, 1961, Nixon himself as the sitting Vice President—and thus President of the Senate—announced that he was accepting the electoral votes from Hawaii in favor of Kennedy. In this respect, Nixon acted directly contrary to the precedent set by Justice Bradley; the Hawaii votes for Kennedy were entirely null and void under Bradley's dispositive reasoning. But Nixon also publicly announced that his acceptance of the Hawaii votes for Kennedy was "without the intent of establishing a precedent." Thus, what happened regarding Hawaii—inconsequential as it was to the outcome of the 1960 election—cannot be seen as undermining Justice Bradley's constitutional reasoning that determined the result of the 1876 election. At this point in U.S. history, then, the best constitutional analysis is that (as Justice Bradley explained) a state is obligated to resolve all disputes regarding the appointment of its presidential electors before the nationally uniform date on which they must cast their official Electoral College votes.

Congressionally specified dates for presidential elections. Exercising the authority granted it in Article II, Congress has set as the date for the appointment of the presidential

electors "the Tuesday next after the first Monday in November"[2]—what is commonly known as Election Day, since it is the same day on which voters cast their ballots in congressional elections, and because all states have chosen to appoint their presidential electors by a popular vote of the same electorate that casts congressional ballots. Also pursuant to its Article II authority, Congress has made "the first Monday after the second Wednesday in December" the nationally uniform day on which "[t]he electors of President and Vice President of each State shall meet and give their votes."[3] The arithmetic of the calendar means that there is always an interval of six weeks minus one day between the Tuesday in November on which citizens cast their popular votes for presidential candidates—technically, votes for presidential electors who have pledged to support their party's presidential candidate—and the Monday in December on which the duly appointed presidential electors, pursuant to that popular vote in November, cast their official Electoral College votes for president.

Six weeks (minus one day) is not a lot of time for resolving a dispute over the counting of ballots in a major statewide election. Recent history confirms this commonsense point. In 2004, Washington State had a disputed gubernatorial election. The state's voters cast their ballots for governor at the same time as they voted for president that year, on Tuesday, November 2. Six weeks (minus one day) later, on Monday, December 13, when the presidential electors in the state and all across the country met to cast their Electoral College votes, Washington's gubernatorial election remained unresolved. It was still in the midst of a statewide manual recount. That recount would not end until over two weeks later, on Thursday, December 30, and the candidate who prevailed in that manual recount (Christine Gregoire, the Democrat) was *not* the candidate who had prevailed in the previous machine recount (Dino Rossi, the Republican). Thus, if the dispute had involved a presidential rather than a gubernatorial election, and if all proceedings after December 13 had been constitutionally void pursuant to Justice Bradley's dispositive reasoning, then the prevailing candidate would have been the opposite of the one whom the manual recount showed the voters to have actually elected.

Moreover, the dispute over Washington's 2004 gubernatorial election did not end upon completion of the manual recount on December 30. Instead, a subsequent judicial contest of the election was litigated in a state trial court until the following June 6, 2005, when the trial judge

[2] 3 U.S.C. § 1.
[3] 3 U.S.C. § 7.

confirmed the winner of the manual recount. The dispute could have lasted even longer, but at that point the losing candidate (Rossi) declined to pursue an appeal of the trial court's decision and conceded the race.

Washington's experience with its 2004 gubernatorial election was not aberrational. Minnesota encountered almost exactly the same situation in its 2008 U.S. Senate election. That year the state's voters cast ballots for Senator at the same time as they voted for President, on Tuesday, November 4. Six weeks (minus one day) later, on Monday, December 15, when presidential electors in the state and around the nation were casting their official Electoral College votes, Minnesota was still conducting its statewide manual recount of the Senate election. Moreover, under Minnesota law, the effect of undertaking the manual recount was to negate the previous certification of vote totals after completion of the canvass. Thus, the official count of the Senate election on Monday, December 15 was zero-zero.[4] If the election at issue had been presidential rather than senatorial, then according to Justice Bradley's analysis, Minnesota would have failed to appoint any presidential electors by the constitutionally mandated date and thus could cast no official Electoral College votes in the presidential election—and, most importantly, could not constitutionally remedy this deficiency by any subsequent proceedings, including completion of its manual recount, after December 15.

Minnesota's disputed 2008 senatorial election, in fact, continued long after December 15. The results of the manual recount were not certified until January 5, 2009. Then, as in Washington, there followed a judicial contest in state court, which was not complete until June. This contest, like that other one, confirmed the result of the manual recount, but in this case the contest encompassed an appeal to the state's supreme court as well as the litigation in the trial court. When the state supreme court affirmed the trial court's dismissal of the contest on June 30, the losing candidate conceded the election.

Thus, in a future disputed presidential election, if a state is to comply with Justice Bradley's edict that it must settle the appointment of its presidential electors by the date on which they meet to cast their Electoral College votes, the state will need to streamline the kind of recount and contest procedures that Washington and Minnesota employed in 2004 and 2008, respectively. Such streamlining obviously will be a daunting challenge. It will be hard enough

[4] Technically, the official count stood at zero-zero-zero, since there was a significant third-party candidate who had polled about 16 percent of the vote, as well as the two major-party candidates (Al Franken, the eventual winner and a Democrat, and Norm Coleman, the Republican incumbent).

for a state to make sure that it completes all of its recount procedures by the first Monday after the second Wednesday in December. But it will be especially difficult for a state to complete any judicial contest of the election that might be filed after certification of the recount's results.

Congressional "Safe Harbor" provision. If this time pressure upon states were not enough, Congress has given states a compelling reason to settle a disputed presidential election even sooner. In a statutory provision dating back to the Electoral Count Act of 1887 (adopted in the aftermath of the disputed 1876 election), and now codified at 3 U.S.C. § 5, Congress has pledged that it will accept as "conclusive"—and thus not overturn—the resolution of a disputed presidential election in a particular state if two conditions are satisfied: first, the state's "final determination" of the dispute must be "made at least six days before the time fixed for the meeting of the electors"; and second, "such determination" must "be made pursuant to" state "laws enacted prior to the day fixed for the appointment of the electors." The incentive that this Safe Harbor provision creates is considerable: the congressional pledge to honor the state's resolution of the dispute as "conclusive" means, at least in principle, that neither the Senate nor the House of Representatives will attempt (based on partisan or other considerations) to undo the state's own determination of its presidential election.[5] But this incentive imposes an even more excruciatingly tight timetable on states. The same arithmetic of the calendar means that the Safe Harbor Deadline—that is, the deadline necessary for a state to obtain the benefit of the congressional pledge—is always the Tuesday in December that is exactly five weeks after the Tuesday in November on which the citizens cast their popular votes in the presidential election.

Obviously, resolving a disputed presidential election in five weeks is even harder than doing so in six. Florida was unable to complete its proceedings within that timeframe in 2000, at least not in a way compliant with the requirements of equal protection as identified by the U.S. Supreme Court in Bush v. Gore. Whether Florida could have completed constitutionally acceptable proceedings with the addition of six more days is ultimately unknowable, since the Court in Bush v. Gore also ruled that Florida intended to obtain the benefit of the Safe Harbor

[5] In other words, if a state in compliance with the Safe Harbor provision has determined that Candidate X is entitled to the state's electoral votes, and the state sends Congress a single certificate of this determination, then both houses of Congress—unless they violate the pledge in 3 U.S.C. § 5—will count the state's electoral votes in accordance with this certificate and, accordingly, will refrain from either awarding the state's electoral votes to a different candidate or declaring the state's presidential election null and void and thus refusing to award the state's electoral votes to any candidate.

Deadline and consequently all of the state's proceedings must cease at the end of the five-week period. Those six days are 15 percent of the 41 days between Election Day in November and the day of the Electoral College meeting in December.

The extreme difficulty that any state would have in meeting *either* the purely statutory Safe Harbor Deadline *or* Justice Bradley's constitutionally mandated deadline, which under the current congressional schedule follows six days later, has caused some commentators to argue that Congress should adjust the schedule to give states more time to resolve any disputed presidential election that might arise in the future. One argument is that Congress should shorten or eliminate the six-day period between the Safe Harbor Deadline and the date for the meeting of the presidential electors. Another argument is that Congress should push back the meeting of the presidential electors until late December or early January. Some observers advocate both changes. Opponents of these arguments, conversely, contend that presidential transitions are difficult enough as it is, with the uncertainty of a disputed presidential election causing increasing harm to the country for each additional day that it remains unsettled. On this view, no change in federal law should encourage a disputed presidential election to last longer than five weeks; rather, every effort should be made to shorten that period to the extent possible.

This ALI project takes no position on these arguments and counterarguments concerning the current congressional calendar for presidential elections. Instead, this ALI project accepts those dates as given and endeavors to adopt a framework for the otherwise almost impossible task of resolving a disputed presidential election within the existing calendar. Moreover, this ALI project assumes that a state will wish to obtain the benefit of Safe Harbor status if the state is capable of doing so. While recognizing that this Safe Harbor status is optional, a state will perceive a compelling case for striving to take advantage of it. In the context of a disputed presidential election, there is the obvious temptation for partisanship to dictate the outcome. The Safe Harbor provision is, in effect, a promise that partisanship in Congress will not override whatever the state determines about its own electoral votes. Why would a state not find that promise intensely attractive and thus try to comply with the condition necessary to activate that congressional obligation? Thus, the presumption underlying this project is that a state would prefer to complete its procedures for resolving a disputed presidential election within five weeks, if it is at all possible for the state to do so, rather than having an extra six days to finish the task but without the benefit of the congressional pledge to be bound to the outcome.

Consequently, the Procedures for the Resolution of a Disputed Presidential Election set forth in this Part of the project endeavor to enable a state to complete all relevant proceedings within the five-week period specified in the congressional Safe Harbor provision. Developing these procedures has required a kind of engineering endeavor: the task has been to determine how to make several interrelated components of an overall dispute-resolution process work together as efficiently and expeditiously as possible, so that collectively they have a reasonable chance of completion without transgressing the five-week Safe Harbor Deadline.

The engineering challenge of enabling a state to meet the Safe Harbor Deadline. These Procedures have three main components. The first is a *recount*, defined specifically (and more narrowly than in some other uses of the term) to mean solely the reexamination of ballots initially counted on or before Election Day and reported as part of the Election Night preliminary returns. As such, a recount does *not* include determinations concerning the eligibility of ballots not counted as part of the Election Night preliminary returns. These uncounted—but still potentially eligible—ballots include provisional ballots and some absentee ballots, both (a) those arriving too late for inclusion in the Election Night returns but still timely under relevant state law and (b) those previously deemed uncountable but whose eligibility remains subject to review.

The determinations concerning the eligibility of these previously uncounted ballots constitute a large portion of the second main component of these Procedures, the *canvass*. Also encompassed within the canvass are the review and correction of any tabulation errors or discrepancies in the preliminary returns that are not corrected as part of the recount. For example, in a process often referred to as "reconciliation" the number of ballots cast at a precinct is compared with the number of voters who signed the precinct's poll books (and in many jurisdictions received tickets authorizing them to cast a ballot). When these two numbers are not identical, state law often authorizes local election officials to make a determination as to how the discrepancy should be handled. Sometimes, the discrepancy is resolved in favor of retaining the number of ballots cast, based on a judgment that the error must have been in the failure to record in the poll books the presumably valid voters who cast the extra ballots. In other instances, the discrepancy is resolved by randomly withdrawing from the precinct's pool of countable ballots—the figurative (or literal) ballot box—a number equal to the excess of ballots over voters. Whatever state law provides for this situation, the determinations that local election officials

make in this regard are part of the canvass. The sum of all ballot-eligibility, reconciliation, tabulation-correction, and other determinations made during the canvass results in a *certification* of the canvass and its vote totals. The initial certification is made by each Local Election Authority that conducts the canvass, and all of these local certifications are then accumulated in a single statewide certification by the state's Chief Elections Officer.

The third main component of these Procedures is the possibility of a judicial *contest* to the results of the certified canvass. State law provides the grounds available for contesting the certified results in an election, and these grounds can vary somewhat from state to state. But generally these grounds include claims that votes counted on Election Day and included in both the preliminary returns and the certified canvass were fraudulent or ineligible in some way; perhaps, for example, they were ballots cast by ineligible felons (as was the case in Washington's 2004 gubernatorial election), or perhaps they were absentee ballots procured through illegal means (as in Miami's 1997 mayoral election). A judicial contest is also the procedure in which to raise a claim, if such a claim is available in the state at all, that sufficient disenfranchisement of eligible voters or other serious mishap in the conduct of the election requires voiding the certified results in their entirety (or perhaps, alternatively, statistically adjusting those results in some way).

To fit all three of these proceedings—recount, canvass, and contest—within the five-week Safe Harbor period, some significant "engineering" innovations must be pursued. One of the most significant of these is the triggering of an expedited recount, as provided in § 303, upon a finding of certain specified factual conditions to exist 24 hours after the polls have closed in the November presidential balloting. This expedited recount differs from the typical recount, which customarily follows the certification of the canvass. This custom is based on the understandable premise that there is little reason to undertake the ordeal of a recount unless and until certification of the canvass shows the result of the election to be close enough to justify the undertaking. But in the context of the limited five-week timeframe for a state to achieve Safe Harbor status in a presidential election, waiting until the conclusion of the canvass before beginning the recount is an unaffordable luxury. In fact, the first week after the polls have closed is a period of time in which local election officials can recount ballots initially counted on or before Election Night and, furthermore, it is a period of time in which local officials are often waiting for other events to take place before they can complete the certification of the canvass.

For example, local election officials must give provisional voters a period of time after Election Day in which to provide supplementary information that may establish the eligibility of their provisional ballot to be counted. Likewise, absentee voters are often given a window of opportunity to correct clerical errors concerning information that they supply on their absentee ballot envelopes. While local election officials are waiting for the receipt of such supplementary information from provisional or absentee voters in the first few days after Election Day, they can undertake the task of recounting ballots that already have been counted once—a task that does not require any additional information. In a disputed presidential election, when every day of the short five-week Safe Harbor period is precious, these first few days after Election Day can be used productively by beginning the recount then, rather than waiting for the customary certification of the canvass. (The advantage of reordering these two procedures in this way was brought to the attention of this American Law Institute project by experienced local election officials.)

Another engineering decision was to prioritize ahead of the contest, both temporally and in legal status, the distinct procedure for reviewing determinations made during the canvass. One potential source of delay, which easily could jeopardize a state's capacity to comply with the Safe Harbor Deadline, is the duplication of litigation that can occur when issues are raised, first, in a lawsuit that is denominated a judicial review of the administrative decisions that local election officials make during the canvass and then, second, in a subsequent judicial contest of the certified results of the canvass. Disputed elections often entail both rounds of litigation, especially because one side will perceive an advantage of attempting to prevail during a judicial review of the canvass, so as to avoid the heavy burden of proof usually associated with attempting to overturn the certified result of the canvass in a judicial contest. Indeed, often a candidate will attempt to have a court undertake a judicial review of the canvass even before its results are certified, thereby delaying the certification until these judicial-review proceedings are complete. These Procedures endeavor to avoid this delay, as well as the inefficient duplication of litigating the same issues twice, by funneling into the judicial review of the canvass those issues suitable for such review. Once so funneled, these issues are precluded from relitigation in a subsequent contest. Moreover, these Procedures incentivize their funneling in this way, by eliminating any burden of proof associated with certification of the canvass *as long as the issues are raised in the special procedure for review of the canvass*. There is no need to delay

certification, since appropriate issues can be raised equally by either of the two competing candidates, regardless of which one is ahead in the count at the time of certification.

The Procedures also make a single Presidential Election Court the sole forum for adjudicating issues either in the special procedure for judicial review of the canvass or in the subsequent contest. Thus, there is no incentive to engage in forum-shopping in the hope of finding a more favorable tribunal to litigate particular claims. In this way, once the canvass is complete, the overall process can move immediately to judicial review of the canvass in a streamlined procedure suitable for such issues, leaving to a contest only those issues that did not arise in the canvass itself and thus potentially need some additional factual development before they are ready for judicial adjudication.

Even when the sequencing of these procedures—the recount, the canvass, and the contest—are engineered in this way, these procedures are inevitably truncated compared to how they would occur in a nonpresidential election not subject to the Safe Harbor or other Electoral College deadlines. Truncating these procedures obviously entails a cost in terms of the ability of litigants to pursue factual matters to the extent that they might if they had more time. But there is no way to avoid such truncating and still finish all the procedures within the five-week Safe Harbor period. The only alternative would be to abandon the effort to achieve Safe Harbor status, and even so significant truncating of the recount, canvass, and contest procedures would still be necessary to finish by the date of the Electoral College meeting six days later. Only by extending beyond this constitutionally prescribed date, and running up towards Inauguration Day on January 20, could a state avoid significant truncation of these procedures. But, again, the premise of this A.L.I. project is that a state would not wish to engage in such constitutionally treacherous conduct, and thus the engineering effort has been to engage in the minimal amount of truncating necessary to enable a state to obtain Safe Harbor status (since a state would want to meet the Electoral College deadline of six days later anyway, and would not wish to lose the benefit of Safe Harbor status just to have an extra six days of vote-counting litigation).

The adoption of these Procedures into state law. These Procedures, as set forth herein as Part III of this project, have been drafted to be consistent with the Principles set forth in Parts I and II. [Indeed, these Procedures reflect—and endeavor to achieve in the specific context of a presidential election—the value of "finality" articulated more generally in the Principles contained in Part II.] But these Procedures also have been drafted so that they may be adopted in

law independently, without adoption of either Part I or II. A state thus may choose to adopt these Procedures in order to address the calendaring challenge of completing a presidential recount, along with ancillary litigation, by the Safe Harbor Deadline, and the state's decision to do so may be entirely separate from any consideration the state might wish to give to adoption of the Principles set forth in Part I or II.

For any state that wishes to adopt these Procedures as a means to address the challenge of meeting the Safe Harbor Deadline in a disputed presidential election, it is highly preferable that the method by which the state does so is to have its legislature enact a statute containing these Procedures. The reason for this preference is that the state's legislature is the institution explicitly empowered in Article Two of the federal Constitution to adopt the procedures for the appointment of a state's presidential electors. Moreover, a statute enacted by the state's legislature is the most straightforward method by which a state may enact into law before Election Day a set of procedures capable of earning Safe Harbor status under 3 U.S.C. § 5. Even if a state completes all of its procedures concerning a disputed presidential election by the five-week deadline in 3 U.S.C. § 5, the state risks losing the benefit of the congressional Safe Harbor pledge if the state's procedure were not enacted into state law prior to Election Day. The best and most obvious way for a state to avoid this risk is for its legislature to enact a statute, before Election Day, that puts these Procedures into legal effect for any future presidential election.

If, however, a state's legislature has failed to adopt these Procedures into legislation, it may still be possible for a state to achieve Safe Harbor status if the state's supreme court has been authorized by state law to promulgate procedural rules for the adjudication of disputes that involve the state's judiciary. In this situation, the state's supreme court prior to Election Day in an exercise of its rulemaking authority could promulgate these Procedures, thereby placing them into legal effect in the state before Election Day. If the state's supreme court did so, there would be a strong argument that the status of the Procedures in state law in advance of Election Day would give these Procedures the necessary "safe harbor" status under 3 U.S.C. § 5, such that the congressional pledge would be operative as long as the state complied with these Procedures within the five-week deadline.

Accordingly, these Procedures have been drafted in a form amenable to adoption either as statutory legislation or as a set of procedural rules promulgated by a state supreme court pursuant

to its rulemaking authority. But, again, the far preferable method of adoption is a statute enacted by the state's legislature.

§ 301. Definitions

(a) "Canvass" means the administrative procedure that encompasses verification of the vote tabulations contained in the preliminary Election Night returns as well as determination of the eligibility of previously uncounted ballots, including provisional ballots and absentee ballots not included in the preliminary returns;

(b) "Certification" means the official declaration of the results from a counting of ballots and occurring, at separate stages, both after the canvass and after completion of all proceedings under these Procedures;

(c) "Chief Elections Officer" means the state's highest official, often the Secretary of State, responsible for supervising the administration of elections in the state;

(d) "Chief Justice" means the presiding judge of the state's highest court;

(e) "Contest" means a judicial procedure that occurs after certification of an election's results, in which a candidate other than the certified recipient of the most votes challenges the certified results and seeks a judicial decree either to declare the contestant the duly elected winner or to void the election;

(f) "Day" means any and all calendar days;

(g) "Election Day" means the traditional day on which citizens go to the polls in their neighborhood polling locations to cast ballots in a presidential election, which Congress has specified to be the first Tuesday after the first Monday in November, as provided in 3 U.S.C. § 1;

(h) "Election Night" means the nighttime hours of Election Day, after the polls have closed in the state, as well as the predawn hours of the following day insofar as the state (and the nation) still awaits preliminary returns of votes counted on or before Election Day and expected to be reported before the night is over as part of the initial count of ballots from all precincts in the state;

(i) "Local Election Authority" means the agency of government, whether a single officer or a multimember body, with authority to canvass local returns, including determining the eligibility of locally cast provisional ballots;

(j) "Preliminary returns" means the report of vote totals of ballots cast and counted on Election Day at each polling location in the state, together with the report of any early and absentee votes counted on (or, if permitted, before) Election Day, all of which are aggregated by the Chief Elections Officer into a single set of statewide preliminary returns;

(k) "Presidential election" means a quadrennial November general election at which the eligible electorate of the state chooses a slate of presidential electors, who will cast their Electoral College votes six weeks later and who are expected to cast those Electoral College votes on behalf of the presidential candidate named on the ballot and on whose behalf they are slated as presidential electors;

(l) "Recount" means a reexamination of ballots initially counted on or before Election Day and reported as part of preliminary returns;

(m) "Safe Harbor Deadline" means the date, specified in 3 U.S.C. § 5, by which a state must resolve any vote-counting disputes in a presidential election in order for the state to receive the benefit of the congressional pledge to accept whatever resolution the state achieves;

(n) "State Supreme Court" means the state's highest court, even if denominated other than "supreme court" (as is New York's Court of Appeals).

Comment:

a. Certification. As discussed more fully in the Comment to § 316, these Procedures entail two distinct certifications, at separate stages of the overall process. The first certification occurs at the end of the canvass. The second occurs upon completion of all possible proceedings under these Procedures, including judicial review of the canvass and a contest of the results as certified at the end of the canvass. This second certification is the final certification of the election's outcome and serves as the basis for declaring which slate of presidential electors is entitled to cast the state's Electoral College votes.

b. Chief Elections Officer. In some states, a multimember body rather than a single individual may exercise the responsibility of supervising statewide the administration of

elections. In these cases, the term "Chief Elections Officer" as used in these Procedures is intended to encompass these multimember bodies.

c. Day. In counting the number of days for purposes of any deadline, these Procedures include all calendar days and not solely business days.

d. Election Day. As elaborated in Part I of this project, the traditional single day on which most voters cast their ballots in an election has recently evolved into a menu of varying practices among the states enabling voters to cast in-person early ballots at some specified locations (usually different from their traditional neighborhood polling locations, where voting occurs on Election Day), or to cast an absentee ballot in advance of Election Day without need to provide any particular excuse or justification for doing so, or some combination of early and open absentee voting. Election Day, however, remains the last day on which voters are permitted to cast a ballot (although in some states absentee ballots cast on Election Day are permitted to arrive by mail at the offices of their relevant Local Election Authority some number of days afterwards and still remain eligible to be counted). For presidential (and congressional) elections, Congress has fixed the date of Election Day, and accordingly these Procedures define Election Day to be the same as the date designated by Congress.

e. Local Election Authority. The definition here is consistent with, but somewhat narrower, than the use of the same term in Part I. Here it is necessary to define the term to refer specifically to the government body's power regarding the counting of ballots, whereas in Part I it was necessary to define the relevant government body as having administrative powers over the casting as well as counting of ballots. Some states use separate local government bodies to administer the casting and counting of ballots. For example, a state may employ a County Canvassing Board to canvass the election returns and to conduct any recount that might be necessary, while the state simultaneously delegates authority to administer the casting of ballots to a County Clerk (or some other local office). The use of the term here is intended to apply solely to the government body that engages in the functions covered by these Procedures, leaving the state free to employ a different agency of local government for those aspects of election administration not covered by these Procedures.

f. Presidential elections. This definition intentionally excludes presidential primaries, which are not subject to the same Safe Harbor Deadline, and which raise their own distinct issues concerning the timing and methods for resolving ballot-counting disputes. Ultimately, a major

party's presidential candidate is chosen at a national nominating convention, and the relationship of that convention to antecedent primaries and caucuses is a complicated one, beyond the scope of these specific Procedures.

g. Recount, canvass, and contest. These three types of proceedings, already discussed preliminarily in the Introductory Note above, are defined specifically for the purpose of the engineering endeavor necessary for a state to meet the Safe Harbor Deadline. Accordingly, the specific definitions of these three terms, as used in these Procedures, may not conform exactly to their uses in other contexts. An understanding of how these three terms are used in these Procedures is best achieved by examining the details of the following Sections insofar as they employ these terms and elaborate on what is to occur in each of the three proceedings.

REPORTERS' NOTE

Presidential elections. The Framers of the federal Constitution intended for the mechanics of presidential elections to function very differently from the way that they quickly came to function. Article II required a state's presidential electors to meet in person to cast their electoral votes, and this meeting requirement was intended to facilitate the goal—and expectation—of the Framers that the electors would deliberate, and then exercise independent judgment, about who should become president. This meeting requirement was carried forward in the Twelfth Amendment, even after partisanship prevented the original design from working as intended in the election of 1800. For a discussion of the constitutional crisis over the 1800 election, see Edward B. Foley, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 70-71 (2016), and sources cited therein.

Notwithstanding the original design, a deeply rooted expectation has arisen that a state's presidential electors are partisan agents that are supposed to vote for their party's presidential candidate. Indeed, the political parties—sometimes even backed by the force of state law—have required their presidential electors to pledge, under oath, to cast their official Electoral College ballots on behalf of their party's presidential nominee. See Ray v. Blair, 343 U.S. 214 (1952) (permitting state law to impose this pledge as part of the state's law for presidential primaries). A "faithless elector" is one who breaks this pledge and, as this pejorative term implies, it is now considered dishonorable for a presidential elector to exercise the kind of independent judgment that the Framers originally intended. Although there have been isolated instances of faithless electors from time to time, no presidential election has turned on the official Electoral College vote of a faithless elector, and the Supreme Court has never had occasion to rule on whether a faithless elector could be required to recast an official Electoral College vote so that it conformed to an antecedent partisan pledge. (Ray v. Blair did not involve such a scenario, but instead concerned only whether a party's candidate to be a presidential elector could be required to make the partisan pledge in the first instance.)

Part III of this project, and the Procedures it sets forth, do not apply to the potential issue of a faithless elector. Part III does not purport to govern the casting of official Electoral College votes by the state's appointed presidential electors. Nor does it purport to govern the processes

that Congress itself uses, pursuant to the Twelfth Amendment and the Electoral Count Act of 1887, to conduct its review and counting of the Electoral College votes as received by the states. Rather, the sole focus of Part III and its Procedures is the method by which a state conclusively determines which party's slate of presidential electors is the authoritatively chosen one, when the method of appointment is a popular vote of the state's eligible citizenry and there is a dispute over the outcome of that popular vote.

Bush v. Gore confirmed that a state need not appoint its presidential electors by means of a popular vote. In the early years of the Republic, some state legislatures chose to retain this authority for themselves, and under the Constitution a state could revert to that method of appointment. For well over a century, however, the universal practice among states has been to employ a popular vote of the eligible citizenry as the method of appointing a state's presidential electors. Part III and its Procedures are predicated on the assumption that states will continue to use this method of appointment. Part III and its Procedures would have no applicability in a state that decided, in advance of the next presidential election, to change its method of appointment so that the state's legislature chose the state's presidential electors directly.

Part III and its Procedures, however, do apply to a state that permits its legislature to appoint the state's presidential electors as a fallback remedy if and when the popular vote in November fails to identify a winning slate of presidential electors. Indeed, Part III and its Procedures are designed to avoid reliance on that kind of fallback remedy to the greatest degree possible by identifying as accurately and expeditiously as feasible which slate of presidential electors is the true winner of the popular vote in November—and to do so in the circumstance in which there is doubt and a potential dispute about this outcome. But simultaneously Part III and its Procedures are designed to determine, also with as much clarity and legitimacy as is feasible in the circumstances, when reliance on that kind of fallback remedy is unavoidable—and thus when the only way for the particular state to participate in the official Electoral College vote for president is for the state legislature to intervene and to appoint the state's presidential electors directly.

For example, suppose on the day of the Safe Harbor Deadline, the State Supreme Court declares that there is a systemic problem that affected the November popular vote, such that it is impossible to identify a winner of the presidential election in the state. At that point, the state faces the choice of *either* not participating in the official Electoral College vote for the presidency six days later *or* having the state's legislature appoint the state's presidential electors directly as a fallback.[6] Part III and its Procedures do not dictate which of these two options a state should choose. But if implemented as designed, these Procedures will enable a state to exercise the latter option if the circumstance arises in which the November popular vote has been rendered inoperable.

It should be noted, moreover, that Part III and its Procedures are usable in a state that chooses not to employ a statewide winner-takes-all popular vote as its method of appointing its presidential electors, but instead opts for some sort of districting or proportional basis for allocating its Electoral College votes. Currently, all states but two (Maine and Nebraska) use a statewide winner-take-all scheme for appointing presidential electors, and these Procedures have

[6] In this circumstance, it would be logistically infeasible for the state to hold a new popular election, which itself conceivably could be disputed, even if there were adequate time to cast, count, canvass, and potentially recount these new ballots in the six days remaining before the meeting of the presidential electors.

been designed with the expectation that this scheme will continue to predominate. Nonetheless, these Procedures are fully functional in a state, like Maine or Nebraska, that allocates at least some of its Electoral College vote on the basis of the state's congressional districts. If there were a dispute about which presidential candidate won the popular vote in that congressional district, and if determining the result of the presidential election in that district was necessary to identify which presidential candidate won a majority of (pledged) Electoral College votes, then the triggering mechanism of § 303 would apply just as it would if the dispute concerned presidential electors appointed based on the result of a statewide winner-take-all popular vote. The Procedures equally would work if some state in the future chose to allocate its Electoral College votes, not on the basis of congressional districts, but instead on a proportional share of the statewide popular vote (rather than winner-take-all).

These Procedures would also work if enough states adopt the pending National Popular Vote plan for the plan to take effect. Under that plan, a participating state agrees to award all of its Electoral College votes *not* to the winner of its own statewide popular vote, but instead to the winner of the overall national popular vote. That plan purports to take effect when and if states whose combined allotment of Electoral College votes equals or exceeds the margin of 270 currently necessary for an Electoral College majority under the Twelfth Amendment.[7] Were that to occur, then any state's popular vote could be relevant to determining whether a presidential candidate won a majority of Electoral College votes. If there were doubt about the total popular vote for the competing candidates in a particular state sufficient to cast doubt on which candidate would win an Electoral College majority, then under § 303 these Procedures could be triggered in any state contributing to that doubt. To be sure, potentially that could be a large number of states, and these states need not themselves be the ones that are signatories to the National Popular Vote pact. Still, any state that adopted these Procedures could employ them to resolve uncertainty about the outcome of a presidential election in which the National Popular Vote plan was in effect. (This observation is not intended to express an opinion on the merits of the National Popular Vote plan as a matter of electoral policy; rather, it is simply to note the extent of Part III's potential applicability.)

One final note on terminology relevant to presidential elections: the term "Electoral College" does not appear in the Constitution. But, by longstanding common usage, the term has come to stand for the mechanism that the Constitution, including the Twelfth Amendment, uses for presidential elections. This Part reflects that common usage and, where appropriate, employs it accordingly. Often, the term "Electoral College" is used to refer collectively to all 538 electoral votes, and this Part occasionally does the same. But, of course, all 538 presidential electors never meet altogether in one place at the same time. Instead, as discussed above, the presidential electors of each state meet separately in their own respective states—although all these meetings occur on the same day, as required by Article Two of the Constitution. Thus, the term "Electoral College meeting" refers to these state-specific events, although in plural form it can refer collectively to all 51 of these distinct meetings that occur on the same date. For purposes of Part III and its Procedures, it is intended that the particular context in which the term "Electoral College" is used provide additional clarity, as necessary, on its intended meaning.

[7] Currently, 10 states and the District of Columbia, amounting to 165 Electoral College votes, have enacted legislation to adopt the National Popular Vote plan: http://www.nationalpopularvote.com.

§ 302. Applicability and Objective

(a) The provisions of these Procedures shall take effect as the law of the state upon either their explicit enactment by the state legislature or their explicit promulgation by the State Supreme Court pursuant to its rulemaking authority, whichever method of adoption has been employed, and are fully applicable to the next presidential election thereafter.

(b) In any particular presidential election, the specific expedited elements of these Procedures become operational immediately upon the declaration of the Chief Elections Officer, as set forth in § 303.

(c) The overriding purpose of these Procedures is to enable the state to complete a recount, canvass, and any contest of a presidential election, including all related administrative and judicial proceedings concerning the counting of ballots in a presidential election, in compliance with the Safe Harbor Deadline of 3 U.S.C. § 5.

(d) Whenever an expedited recount has been declared under § 303, it shall be the highest priority of every state official involved with the implementation of these Procedures to comply with the Safe Harbor Deadline of 3 U.S.C. § 5 and with every subsidiary deadline set forth in these Procedures, all of which are aimed at assuring Safe Harbor compliance.

(e) Whenever an expedited recount has been declared under § 303, completion of these Procedures takes precedence over any other recount, canvass, contest, or other proceeding that may be necessary for any other election on the same ballot, and any ballot-eligibility or other determinations made as part of these Procedures that have applicability to another election shall be binding on that other election unless state law elsewhere expressly provides otherwise.

Comment:

a. As stated in the Introductory Note, it is highly preferable that these Procedures become adopted as the law of the state by means of legislative enactment. Nonetheless, it is also possible that they may become adopted as state law through promulgation by the state's supreme court as an exercise of the court's rulemaking authority, where such authority exists. Regardless of the particular method of their adoption, it is important that these Procedures take effect as the law of the state prior to the casting of ballots by voters in the presidential election to which these

Procedures shall apply. (If a state ordinarily delays the effective date of an enacted statute for some period of days, that delay is not problematic for the purposes of these Procedures as long as the delay does not extend until Election Day of the next presidential election. Where such a situation would occur, and if the state has the capacity to enact legislation on an expedited or emergency basis, so that the legislation takes effect immediately upon enactment, it is hereby recommended that a state employ this special method of legislation so that these Procedures take effect before Election Day.) Having these Procedures in effect as part of state law prior to Election Day is necessary for utilization of the Procedures to comply with the Safe Harbor provision of 3 U.S.C. § 5, which requires that a state's "laws" for resolving "any controversy or contest concerning the appointment of all or any of the [state's] electors" be "enacted prior to the day fixed for the appointment of the electors" in order for them to be conclusively binding upon Congress in its counting of Electoral College votes under the Twelfth Amendment.

This Section draws a distinction between, *first*, the Procedures collectively becoming effective prior to Election Day, and thus being consistent with the requirements for Safe Harbor status, and, *second*, particular expedited elements of these Procedures becoming operational only upon a declaration of the state's Chief Elections Officer. There is no reason for a state to undertake the extraordinary and hugely arduous effort of these expedited proceedings unless the state—and the nation as a whole—confronts the situation of an unsettled presidential election 24 hours after Election Day. Otherwise, as almost always is the case, a state can proceed with the canvass in a presidential election according to its normal timetable. If there happens to be the need for a recount in a nonpresidential race on the ballot in a presidential-election year, the state can hold that recount after completion of the canvass (if that is the state's customary practice). The state can also permit a subsequent judicial contest of the nonpresidential race to extend indefinitely for months—as was the case in Washington for its 2004 gubernatorial election and in Minnesota for its 2008 U.S. Senate election. Part II of this project, among its concerns, addresses the issue of extended litigation of vote totals in nonpresidential elections. But whatever policy choice a state wishes to make concerning the amount of time available for litigating the result of a nonpresidential election—including the specific policy choice of whether or not to adopt Part II of this project—the conventional practices (as reflected by Washington in 2004 and Minnesota in 2008) are simply not feasible in a presidential election.

Thus, there needs to be a mechanism for distinguishing between the ordinary elections, for which the conventional practices can continue to occur (if a state so chooses, even after considering alternatives as discussed in Part II), and the extraordinary situation of an unsettled presidential election, which requires special expedited proceedings.[8] Moreover, by definition, it is impossible to know whether a presidential election remains unsettled after Election Night (and thus whether there is need for the expedited elements of these Procedures) until after ballots have been cast on Election Day. Thus, the triggering of these expedited proceedings (upon declaration of the state's Chief Elections Officer) cannot possibly occur prior to Election Day. Even so, it need not be the case that the triggering of these expedited proceedings inherently deprives a state of any possibility of obtaining Safe Harbor status. On the contrary, as long as the triggering of these expedited proceedings occurs pursuant to state law specified in advance of Election Day—so that the law makes unambiguously clear when, and only when, such triggering shall occur—then the triggering itself satisfies the Safe Harbor requirement that it be conducted pursuant to state law adopted and in effect before Election Day. In sum, this Section provides that these Procedures will be in effect as state law in advance of Election Day, with the triggering of expedited proceedings to occur after Election Day according to specifically identified conditions set forth in § 303 of these Procedures, which shall have been adopted and in effect prior to Election Day.

b. Relationship of these Procedures to other recounts or disputed elections occurring at the same time. It is possible that a state may have multiple unresolved elections simultaneously, with the same ballots needing to be recounted for one election also needing to be recounted for a different election (or the question of a ballot's eligibility relevant to both elections). Indeed, when one considers all the different elections that occur in a state on the same Election Day, it is quite probable that if the presidential election remains unresolved, then so too does some other election somewhere in the state. This other unresolved election, after all, need not involve a

[8] Even if a state chooses to adopt some form of expedited procedures to resolve a vote-counting dispute in a particular type of nonpresidential election—for example, a gubernatorial election—it is unlikely that the state would wish the timetable to be as accelerated as Congress has required for presidential elections. In other words, suppose a state were to enact expedited procedures that required the resolution of a disputed gubernatorial election to occur conclusively by December 31. Those expedited procedures would achieve resolution over six months sooner than the process that Washington used for its gubernatorial election in 2004. Yet even accelerating the process that much would reach closure *24 days after the Safe Harbor Deadline that year (and thus over three weeks later).* Thus, even a state that set December 31 as the deadline for resolving a disputed gubernatorial election, and designed special procedures accordingly, would still need to adopt the distinct Procedures set forth here in Part III of this project in order to handle the special exigencies of a disputed presidential election.

statewide office (like governor), but instead easily could involve a local office (like mayor or a seat on a city council).

Quite clearly, an unresolved presidential election is more urgent than any other type of unresolved election. This would be true even if the other unresolved election was a gubernatorial or U.S. Senate race, but it is certainly true for local races. Accordingly, these Procedures explicitly establish that they have priority over whatever proceedings might be applicable to other unresolved elections at the same time. Those other proceedings must remain suspended until completion of these Procedures concerning the presidential election. That said, the results of these Procedures can be incorporated into the proceedings concerning nonpresidential elections to avoid duplication of effort. For example, as part of the canvass under § 308, each Local Election Authority will make a determination concerning the eligibility of all provisional ballots within its jurisdiction. Those determinations may also be relevant to another unresolved election, either another statewide race or a local race. If so, then there is no need for a separate proceeding to determine whether these same provisional ballots will be counted in that other election. Rather the determination made under § 308 concerning their eligibility for the presidential election can also govern in the counting of ballots for that other election. This Section provides that such rulings made pursuant to these Procedures will apply in this way to other unresolved races—unless a separate provision of state law expressly declares otherwise.

To be sure, some determinations made concerning the presidential election will not be applicable to other races. For example, in a recount of the presidential election an examination of optical-scan ballots to determine whether ovals contain a mark that constitutes a vote for a presidential candidate will not apply to any other election on the same ballot that also may be unresolved and thus require a recount. For sake of efficiency, a Local Election Authority may wish to conduct the nonpresidential recount at the same time as it conducts the presidential recount under § 305. (Suppose the state needs to conduct both a presidential and gubernatorial recount. Each Local Election Authority might prefer to examine each ballot once, looking at both the presidential and gubernatorial vote on that ballot, rather than conducting two entirely separate recounts of the same set of ballots.) These Procedures permit a Local Election Authority to conduct a presidential and nonpresidential recount simultaneously *only to the extent that the Local Election Authority is able to do so in compliance with all the provisions of these Procedures, including meeting all of the strict deadlines in these Procedures.* If there is any risk

ALI

THE AMERICAN LAW INSTITUTE

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

Council Draft No. 2

(December 16, 2015)

SUBJECTS COVERED

Procedures for a Presidential Dispute: Schedules for Official Institutions and Campaign Attorneys

PART III Procedures for the Resolution of a Disputed Presidential Election

APPENDIX Black Letter of Council Draft No. 2

The Executive Office
The American Law Institute
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1626 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: http://www.ali.org

This document is submitted to the meeting of the Council of The American Law Institute on January 21-22, 2016, at the ALI 4th floor Conference Center, 4025 Chestnut Street, Philadelphia, Pennsylvania. As of the date this draft was printed, it had not been considered by the Council or membership of The American Law Institute, and therefore does not represent the position of the Institute on any of the issues with which it deals.

The American Law Institute

COUNCIL EMERITI

**Director Emeritus*
***President Emeritus and Chair of the Council Emeritus*

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes
Council Draft No. 2

Comments and Suggestions Invited

We welcome written comments on this draft. They may be submitted via the website project page or sent via email to PLELcomments@ali.org. Comments will be forwarded directly to the Reporters, the Director, and the Deputy Director. You may also send comments via standard mail; contact information appears below.

Unless expressed otherwise in the submission, individuals who submit comments authorize The American Law Institute to retain the submitted material in its files and archives, and to copy, distribute, publish, and otherwise make it available to others, with appropriate credit to the author. Comments will be accessible on the website's project page as soon as they are posted by ALI staff. You must be signed in to submit or view comments.

Reporter
Professor Edward B. Foley
Ohio State University,
Michael E. Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Email: foley.33@osu.edu

Director
Professor Richard L. Revesz
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: director@ALI.org

Associate Reporter
Professor Steven F. Huefner
Ohio State University,
Michael E. Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Email: huefner.4@osu.edu

Deputy Director
Ms. Stephanie A. Middleton
The Executive Office
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Email: smiddleton@ALI.org

Reporters' Conflicts of Interest

The project's Reporters may have been involved in other engagements on issues within the scope of the project; all Reporters are asked to disclose any conflicts of interest, or their appearance, in accord with the Policy Statement and Procedures on Conflicts of Interest with Respect to Institute Projects.

Principles of the Law
Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

REPORTER

EDWARD B. FOLEY, Ohio State University, Michael E. Moritz College of Law, Columbus, OH

ASSOCIATE REPORTER

STEVEN F. HUEFNER, Ohio State University, Michael E. Moritz College of Law, Columbus, OH

FRANK SULLIVAN, JR., Indiana University, Robert H. McKinney School of Law, Indianapolis, IN
JOHN J. SULLIVAN, Service Employees International Union, Washington, DC
JEFFREY S. SUTTON, U.S. Court of Appeals, Sixth Circuit, Columbus, OH
PATRICIA M. WALD, Washington, DC

LIAISONS

For the National Center for State Courts
REBECCA GREEN, William & Mary Marshall-Wythe School of Law, Williamsburg, VA
For the National Conference of State Legislatures
WENDY UNDERHILL, Denver, CO

MEMBERS CONSULTATIVE GROUP

Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes
(as of November 30, 2015)

MARC T. AMY, Louisiana Court of Appeal, Third Circuit, Abbeville, LA
JOHN FOX ARNOLD, St. Louis, MO
WILLIAM G. ARNOT, Houston, TX
WILLIAM T. BARKER, Chicago, IL
MARIALYN BARNARD, Texas Fourth Court of Appeals, San Antonio, TX
SIMON K. BARSKY, Valley Village, CA
DEBRA LYN BASSETT, Los Angeles, CA
WARREN BELMAR, Palm Beach, FL
MARK I. BERNSTEIN, Court of Common Pleas, First Judicial District, Philadelphia, PA
ASHUTOSH A. BHAGWAT, Davis, CA
SANFORD L. BOHRER, Miami, FL
EMMET J. BONDURANT II, Atlanta, GA
DAVID M. BRODSKY, Johns Island, SC
DAVID JOHN BURMAN, Seattle, WA
TOM CAMPBELL, Orange, CA
ELENA A. CAPPELLA, Philadelphia, PA
PETER H. CARSON, San Francisco, CA
NICOLE B. CASAREZ, Houston, TX
HENRY L. CHAMBERS, JR., Richmond, VA
ERIC A. CHIAPPINELLI, Lubbock, TX
NEIL HOWARD COGAN, Costa Mesa, CA
ANNE E. COHEN, New York, NY
DAVID K. COHEN, Chevy Chase, MD
NEIL B. COHEN, Brooklyn, NY
DENNIS R. CONNOLLY, Princeton, NJ
MICHAEL A. COOPER, New York, NY
RICHARD D. CRAIG, Oklahoma City, OK
MICHAEL CROMMELIN, Melbourne, Australia
JOSIAH M. DANIEL III, Dallas, TX
JACK DAVIES, Minneapolis, MN
KIMBERLY A. DEMARCHI, Phoenix, AZ
SUZANNE M. DUGAN, Washington, DC
LINDA S. EADS, Dallas, TX
GEORGE E. EDWARDS, Indianapolis, IN
JOSEPH P. ESPOSITO, Washington, DC
IRA M. FEINBERG, New York, NY
JOSEPH Z. FLEMING, Miami, FL
C. ALLEN FOSTER, Washington, DC
STEVEN I. FRIEDLAND, Greensboro, NC
FAITH E. GAY, New York, NY
E. DUNCAN GETCHELL, JR., Richmond, VA
JOSEPH GOLDBERG, Albuquerque, NM
PHILIP S. GOLDBERG, Washington, DC
NICOLE A. GORDON, New York, NY
DAVID M. GOSSETT, Washington, DC
MICHAEL GREENWALD, Philadelphia, PA
CHARLES E. GRIFFIN, Ridgeland, MS
SETH GROSSMAN, San Francisco, CA
KEVIN J. HAMILTON, Seattle, WA
TERESA WILTON HARMON, Chicago, IL
ALLISON HAYWARD, Cambria, CA
OTTO J. HETZEL, Washington, DC
W. WILLIAM HODES, Lady Lake, FL
KATHLEEN J. HOPKINS, Seattle, WA
EDWIN E. HUDDLESON, Washington, DC
RICHARD H. HUNTER, St. Croix, U.S. VI
VINCENT R. JOHNSON, San Antonio, TX
ANTHONY JOHNSTONE, Missoula, MT
JOSEPH A. KANEFIELD, Phoenix, AZ
ROBERT M. KAUFMAN, New York, NY
EVELYN V. KEYES, Texas First Court of Appeals, Houston, TX
MARK R. KILLENBECK, Fayetteville, AR
DANIEL J. KRISCH, Hartford, CT
RONALD J. KROTOSZYNSKI, Tuscaloosa, AL
PETER B KUTNER, Norman, OK
EDWARD LABATON, New York, NY
OTHNI J. LATHRAM, Tuscaloosa, AL
JOHN P. LAVELLE, JR., Philadelphia, PA
JOHN K. LAWRENCE, Ann Arbor, MI
BILL LANN LEE, Berkeley, CA
MATTHEW HOWARD LEMBKE, Birmingham, AL
SETH R. LESSER, Rye Brook, NY
DAVID L. LEWIS, New York, NY
PETER LINZER, Houston, TX
ANN M. LOUSIN, Chicago, IL
HOUSTON PUTNAM LOWRY, Hartford, CT
MYLES V. LYNK, Tempe, AZ
C. SCOTT MARAVILLA, Washington, DC
RAYMOND B. MARCIN, Washington, DC
MARY MASSARON, Bloomfield Hills, MI
LORELIE S. MASTERS, Washington, DC
LLOYD H. MAYER, Notre Dame, IN
THOMAS WM. MAYO, Dallas, TX
ROBERT LEE MCCURLEY, Tuscaloosa, AL
BEVERLY MCQUEARY SMITH, Jersey City, NJ

LAWRENCE F. MEEHAN, Philadelphia, PA
MICHAEL J. MEEHAN, Tucson, AZ
BRUCE P. MERENSTEIN, Philadelphia, PA
THOMAS BUTLER MERRITT, Littleton, NH
LUTHER T. MUNFORD, Ridgeland, MS
CYNTHIA E. NANCE, Fayetteville, AR
RICHARD L. NEUMEIER, Boston, MA
ROBERT G. NEWMAN, San Antonio, TX
JAMES M. O'FALLON, Eugene, OR
KATHLEEN M. O'SULLIVAN, Seattle, WA
ELIZABETH PENDO, St. Louis, MO
W. MICHEL PIERSON, Circuit Court for Baltimore City, Eighth Judicial Circuit, Baltimore, MD
MICHAEL J. PITTS, Indianapolis, IN
ROGER V. PUGH, New York, NY
MARGARET JANE RADIN, Ann Arbor, MI
BERNARD D. REAMS, JR., San Antonio, TX
JOE R. REEDER, Washington, DC
RICHARD C. REUBEN, Columbia, MO
AUGUSTIN RIVERA, JR., Corpus Christi, TX
JAMES L. ROBERTSON, Jackson, MS
JONATHAN C. ROSE, Washington, DC
ROBIN S. ROSENBAUM, U.S. District Court, Southern District of Florida, Fort Lauderdale, FL
RONALD D. ROTUNDA, Orange, CA
MARGARET M. RUSSELL, Santa Clara, CA
KAREN J. SARJEANT, Silver Spring, MD
RONNA G. SCHNEIDER, Cincinnati, OH
ANDREW G. SCHULTZ, Albuquerque, NM
HERMAN SCHWARTZ, Washington, DC
LESLIE SCOTT, Jackson, MS
JOHN A. SEBERT, Evanston, IL
PAUL M. SECUNDA, Milwaukee, WI
GARY E. SHERMAN, Wisconsin Court of Appeals, District IV, Madison, WI
RICHARD G. SINGER, Camden, NJ
ARTHUR B. SPITZER, Washington, DC
H. MARK STICHEL, Baltimore, MD
ELIZABETH S. STONG, U.S. Bankruptcy Court, Eastern District of New York, Brooklyn, NY
GUY MILLER STRUVE, New York, NY
DANIEL M. TRAYNOR, Devils Lake, ND
WILLIS R. TRIBLER, Chicago, IL
H. WOODRUFF TURNER, Pittsburgh, PA
MARK V. TUSHNET, Cambridge, MA
TIMOTHY M. TYMKOVICH, U.S. Court of Appeals, Tenth Circuit, Denver, CO
R. PATRICK VANCE, New Orleans, LA
BILL WAGNER, Tampa, FL
WENONA YVONNE WHITFIELD, Carbondale, IL
L. KINVIN WROTH, South Royalton, VT
DAVID P. YAFFE, Los Angeles, CA
JOHN HARDIN YOUNG, Rehoboth Beach, DE
ERIC H. ZAGRANS, Cleveland, OH

The bylaws of The American Law Institute provide that "Publication of any work as representing the Institute's position requires approval by both the membership and the Council." Each portion of an Institute project is submitted initially for review to the project's Consultants or Advisers as a Memorandum, Preliminary Draft, or Advisory Group Draft. As revised, it is then submitted to the Council of the Institute in the form of a Council Draft. After review by the Council, it is submitted as a Tentative Draft, Discussion Draft, or Proposed Final Draft for consideration by the membership at the Institute's Annual Meeting. At each stage of the reviewing process, a Draft may be referred back for revision and resubmission. The status of this Draft is indicated on the front cover and title page.

The typical ALI Section is divided into three parts: black letter, Comment, and Reporter's Notes. In some instances there may also be a separate Statutory Note. Although each of these components is subject to review by the project's Advisers and Members Consultative Group and by the Council and Annual Meeting of the Institute, only the black letter and Comment are regarded as the work of the Institute. The Reporter's and Statutory Notes remain the work of the Reporter.

The Council approved the initiation of this project in October 2010. Reporter Edward B. Foley presented a preview of this project at the 2011 Annual Meeting. The Reporters gave a report on this project, centered on the Model Calendar for the Resolution of Disputed Presidential Elections and Expedited Procedures for an Unresolved Presidential Election, at the 2012 Annual Meeting.

An earlier version of some of the material contained in Part III can be found in Preliminary Draft No. 3 (2015).

Principles (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)

Principles are primarily addressed to legislatures, administrative agencies, or private actors. They can, however, be addressed to courts when an area is so new that there is little established law. Principles may suggest best practices for these institutions.

a. The nature of the Institute's Principles projects. The Institute's Corporate Governance Project was conceived as a hybrid, combining traditional Restatement in areas governed primarily by the common law, such as duty of care and duty of fair dealing, with statutory recommendations in areas primarily governed by statute. The project was initially called "Principles of Corporate Governance and Structure: Restatement and Recommendations," but in the course of development the title was changed to "Principles of Corporate Governance: Analysis and Recommendations" and "Restatement" was dropped. Despite this change of title, the Corporate Governance Project combined Restatement with Recommendations and sought to unify a legal field without regard to whether the formulations conformed precisely to present law or whether they could readily be implemented by a court. In such a project, it is essential that the commentary make clear the extent to which the black-letter principles correspond to actual law and, if not, how they might most effectively be implemented as such. These matters were therefore carefully addressed at the beginning of each Comment, as they should be in any comparable "Principles" project.

The "Principles" approach was also followed in Principles of the Law of Family Dissolution: Analysis and Recommendations, the Institute's first project in the field of family law. Rules and practice in this field vary widely from state to state and frequently confer broad discretion on the courts. The project therefore sought to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent, while leaving many details to the local establishment of "rules of statewide application," as explained in the following provision:

§ 1.01 Rules of Statewide Application

(1) A rule of statewide application is a rule that implements a Principle set forth herein and that governs in all cases presented for decision in the jurisdiction that has adopted it, with such exceptions as the rule itself may provide.

(2) A rule of statewide application may be established by legislative, judicial, or administrative action, in accord with the constitutional provisions and legal traditions that apply to the subject of the rule in the adopting jurisdiction.

Principles of the Law of Family Dissolution: Analysis and Recommendations

Thus, a black-letter principle provided that, in marriages of a certain duration, property originally held separately by the respective spouses should upon dissolution of the marriage be recharacterized as marital, but it left to each State the formula for determining the required duration and extent of the recharacterization:

§ 4.12 Recharacterization of Separate Property as Marital Property at the Dissolution of Long-Term Marriage

(1) In marriages that exceed a minimum duration specified in a rule of statewide application, a portion of the separate property that each spouse held at the time of their marriage should be recharacterized at dissolution as marital property.

(a) The percentage of separate property that is recharacterized as marital property under Paragraph (1) should be determined by the duration of the marriage, according to a formula specified in a rule of statewide application.

(b) The formula should specify a marital duration at which the full value of the separate property held by the spouses at the time of their marriage is recharacterized at dissolution as marital property.

Principles of the Law of Family Dissolution: Analysis and Recommendations

The Comments and Illustrations examined and analyzed the consequences of selecting various possible alternatives.

"Principles" may afford fuller opportunity to promote uniformity across state lines than the Restatement or statutory approaches taken alone. For example, the Institute's Complex Litigation: Statutory Recommendations and Analysis combines broad black-letter principles with the text of a proposed federal statute that would implement those principles.

REPORTERS' MEMORANDUM

COUNCIL DRAFT NO. 2

PRINCIPLES OF THE LAW
ELECTION ADMINISTRATION: NON-PRECINCT VOTING AND RESOLUTION OF BALLOT-COUNTING DISPUTES
Part III: Procedures for the Resolution of a Disputed Presidential Election

This draft is scheduled for presentation at Council's meeting on January 21, 2016. It will be the first occasion for Council to consider a draft of black-letter material and commentary on the topic of resolving disputed elections. At its meeting on October 15, 2015, Council considered and approved (pursuant to a conventional Boskey motion) Council Draft No. 1 (October 2, 2015), which contained only Part I of this project, concerning the topic of non-precinct voting.

From the inception of this Election Law project, the project has encompassed both the topic of non-precinct voting and the topic of disputed elections. Since a joint meeting of the Advisers and the Members Consultative Group on December 4, 2014, it has been the collective judgment of the Reporters and others involved with the project that the topic of disputed elections should be bifurcated into two distinct components. One of these components, now denominated Part II: Principles for the Resolution of Ballot-Counting Disputes, addresses principles applicable to elections generally and thus to various types of nonpresidential offices—senator, governor, mayor, and so forth—as well as to the presidency. The second component concerning the topic of disputed elections, now denominated Part III: Procedures for the Resolution of a Disputed Presidential Election, addresses presidential elections solely and specifically.

This bifurcation resulted from the view, strongly and widely expressed at the December 2014 meeting, that two different types of black-letter text were required for (a) elections generally and (b) presidential elections specifically. The judgment was that elections generally called for a set of Principles, while presidential elections required—in addition to those generally applicable principles—a set of specific procedural rules designed to enable a state to complete the adjudication of a dispute over the counting of presidential ballots within the extraordinarily tight schedule set by the Constitution and Congress. This judgment was reached based on a draft, presented at the December 2014 meeting, that contained a unified and comprehensive code for the resolution of all types of disputed elections. Having had the benefit of reviewing that draft, the consensus was to split the topic of disputed elections into a less code-like set of Principles for elections generally, while retaining the more rule-like form for the specific procedures necessary to address the unique scheduling challenge of resolving a disputed presidential election.

At the joint meeting of the Advisers and the Members Consultative Group on September 11, 2015, the Reporters presented a draft that implemented this bifurcation judgment. The discussion of this draft first confirmed that this bifurcation was

appropriate—that Part II should contain Principles applicable to ballot-counting disputes arising in all different types of elections, while Part III should contain specific Procedures to address the unique scheduling difficulties of resolving a disputed presidential election. With that confirmation in mind, the September 15 meeting then considered the status of these two distinct Parts and the timing of their further development.

With respect to Part II, there was a general sense that while the Principles in Part II were on the right track, they needed considerably more work before presentation to Council. Furthermore, there was also general agreement that there was relatively less urgency to the completion of Part II, compared to Part III. Conversely, the general sense was that the black-letter text of Part III, as presented in the September 2015 draft, was substantively solid and, with only modest revisions, would be in a position for Council to consider at its January 2016 meeting.

In addition, there was a strong and widespread sense among the Advisers and MCG at the September 2015 meeting that the subject matter of Part III was particularly urgent. Given the upcoming presidential election of 2016, the view was that it would be highly desirable to prepare Part III for presentation to Council at its January 2016 meeting, and then to the members at the Annual Meeting in May. If approved at both of these meetings, Part III would then serve as an ALI pronouncement on how states might prepare themselves for the risk of a disputed presidential election in November. (Beyond enabling states to consider the promulgation of procedures for this purpose during the summer and early fall of 2016, Part III might also serve to assist state and federal judges—as well as state and local officials responsible for election administration—on how to handle various matters, including scheduling difficulties, in the event that a disputed presidential election occurs in November.)

Given these different assessments concerning Parts II and III, they have now been bifurcated temporally as well as substantively. As recommended at the September 2015 Advisers meeting, Part II is now moving on a slower track, with the plan of presenting another draft of Part II at a joint meeting of the Advisers and MCG in June 2016. Thus, Part II will not be presented to Council at its January 2016 meeting.

Consequently, what is now being presented for Council's consideration is Part III. Since September, the substance of its black-letter provisions has been revised somewhat to reflect Adviser and MCG input, as well as further analysis of the Reporters. Nonetheless, the substance of these black-letter provisions is largely the same as what the Advisers and MCG reviewed in September 2015. The form, however, of these black-letter provisions is significantly different. Based on feedback from the September meeting, the black-letter provisions have been clustered together into fewer Sections (each with more subsections). This formatting change has two main goals: first, to make the provisions themselves more accessible and comprehensible (in this particular project, it may be easier now to see the trees of the forest, perhaps, rather than a mass of branches and leaves); and second, to conform stylistically to the format of the provisions in Part I, which Council has already seen and approved.

In addition to this restructuring of Part III's black-letter provisions, since September the Reporters have devoted substantial work to adding and improving the content of the Comments and Reporters' Notes. (These had been relatively lean in the draft presented at the September 2015 meeting, as the focus of that meeting had been to review a draft of black-letter provisions for both Parts II and III to see whether bifurcation was indeed the correct approach.) As currently drafted, the Comments and Reporters' Notes for Part III are intended to support Part III's black-letter provisions independently, without reference to Part II. Nonetheless, these Comments and Reporters' Notes have been drafted with the expectation that eventually they will sit beside, and indeed follow, a set of Comments and Reporters' Notes for the Principles contained in Part II. And because Part II will be the more comprehensive document—applicable to elections generally, and encompassing substantive principles for the counting of ballots as well as procedural principles concerning the adjudication of ballot-counting disputes—the current draft of Part III reflects a judgment that considerable background information will be more suitably presented in Reporters' Notes to Part II, rather than to Part III.

One additional point of feedback from the September 2015 Advisers and MCG meeting is pertinent here. It was strongly suggested, and generally agreed, that Part III—given its particular design to address the unique timetable of a disputed presidential election—contain a thorough introductory explanation of the background circumstances, including the applicable constitutional and congressional requirements, that give rise to its necessity in the event of a presidential-election dispute. The accompanying draft of Part III therefore contains a lengthy Introductory Note in response to that feedback.

This memorandum will not endeavor to repeat that Introductory Note, except to summarize its overarching point: the extraordinary challenge of completing the resolution of a disputed presidential election within the five-week window that Congress has provided (or to stretch it out one more week, to meet the constitutional requirement that all states cast their Electoral College votes on the same date) requires a detailed scheme to coordinate all the essential pieces needed for this situation—including a recount, the canvassing of returns, and a potential judicial contest of the result. It does not suffice for a state statute to decree simply, as some do, that the adjudication of a vote-counting dispute in a presidential election must conclude by the congressionally (or constitutionally) specified date. A simple decree of this nature does not provide the mechanism for making compliance feasible. Instead, all the intricate moving pieces (each complicated enough by itself) must be constructed in advance and designed so as to work together and reach fruition in a short amount of time.

As described in the Introductory Note, as well as throughout the Comments and Reporters' Notes, this undertaking is in the nature of an engineering project—and a daunting one at that. Thus, if the Procedures that are set forth in this Part III seem complex, there is at least some assurance in knowing that complexity, while inevitable, has been managed in a particular way by design and thus serves a purpose. It is much better than the false hope of decreeing that the entire dispute-resolution process must end five weeks after Election Day, but then providing no mechanism to enable that command to be carried out. (To aid in understanding the basic structure of the mechanisms

generated by this engineering project, accompanying this Reporters' Memorandum is a set of two schematic PowerPoint slides presented at the September 2015 meeting.)

With these preliminary observations, the Reporters' hope is that this draft provides the foundation for Council to decide whether to move forward with the goal of presenting Part III to the full membership at the May 2016 Annual Meeting.

Procedures for a Presidential Dispute: Schedule for Official Institutions

WEEK	LOCAL ELECTION AGENCY	STATE TRIAL-LEVEL COURT	STATE SUPREME COURT
1	Recount complete		
2	Canvass complete	Recount review complete	
3	Contest discovery	Canvass review complete Contest motions hearing	Recount appeal complete
4	Recount remand complete	Contest trial, if necessary	Canvass appeal complete
5	Canvass remand complete	Recount remand review Canvass remand review	Recount remand appeal Canvass remand appeal Contest appeal complete

Recount: reexamination of initially counted ballots
Canvass: determination of eligibility of ballots not initially counted (absentee, provisional)
Contest: adjudication of claims that count is tainted by ineligible ballots or other error

Procedures for a Presidential Dispute: Schedule for Campaign Attorneys

WEEK	RECOUNT	CANVASS	CONTEST
1	Observe local recount	Observe local canvass	Investigation of facts
2	Present challenged ballots to state trial-level court	Deadline for petition to review local canvass	Deadline to file contest; continue fact investigation
3	Argue recount appeal in state supreme court	Litigate review of canvass in state trial-level court	Litigate motion to dismiss; conduct discovery; amend contest, as needed
4	Litigate recount remand (if necessary)	Argue canvass appeal in state supreme court	Contest trial (if necessary)
5	Recount remand review & appeal (if necessary) in state trial-level & supreme courts	Canvass remand review & appeal (if necessary) in state trial-level & supreme courts	Argue contest appeal & any necessary remand

Recount: reexamination of initially counted ballots

Canvass: determination of eligibility of ballots not initially counted (absentee, provisional)

Contest: adjudication of claims that count is tainted by ineligible ballots or other error

TABLE OF CONTENTS

Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes

Part III: Procedures for the Resolution of a Disputed Presidential Election

Introductory Note: These Procedures address the unique challenges that exist when a presidential election remains unsettled more than 24 hours after the polls have closed and, despite the reporting of preliminary returns on Election Night and into the next day, neither of the two leading candidates has made a statement of concession. This situation raises the possibility that the unsettled election will turn into a disputed election, as occurred in 2000, with the candidates and their campaigns using available procedures, including judicial litigation, in an effort to secure a victory. Although the phenomenon of candidates and their partisan supporters fighting over the counting of ballots is hardly unique to presidential elections, the imperative of resolving this kind of dispute in a presidential election within the limited time constraints imposed by the federal Constitution and related statutory provisions of federal law presents a scheduling difficulty inapplicable to any other elective office. These procedures address that difficulty.

Constitutional background. The relevant parts of the U.S. Constitution are sparse. Article II says that "[e]ach State shall appoint" its presidential electors "in such Manner as the Legislature thereof may direct," but goes on to provide that "Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." The Twelfth Amendment, adopted after the crisis over the election of 1800, states:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President . . . and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; -- the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; -- The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House

> of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

The Twentieth Amendment, adopted during the Great Depression to shorten the gap between the November date on which voters cast their ballots and the inauguration of the new President, specifies that "[t]he terms of the President and the Vice President shall end at noon on the 20th day of January." Although the Twentieth Amendment goes on to provide for the contingency of an Acting President "[i]f a President shall not have been chosen before the time fixed for the beginning of his term," the Constitution clearly creates the expectation that any dispute over a presidential election be conclusively resolved before the new President is to take office at noon on January 20.[1] Moreover, in the modern era, the political urgency of resolving a disputed presidential election before Inauguration Day would make untenable the contemplation of any procedures thereafter to change the result of that particular presidential election.

Even apart from the outer limit of Inauguration Day, the weight of history suggests that compliance with the federal Constitution requires a state to resolve any dispute over the choice of its presidential electors, including any controversy over counting of ballots cast by citizens for a presidential candidate's slate of electors, before the nationally uniform day on which the presidential electors in all states must meet to cast their official Electoral College votes. This point turned out to be the decisive one in the resolution of the disputed 1876 presidential election. To facilitate the resolution of that dispute, Congress adopted a special Electoral Commission comprised of five Senators, five Representatives, and five Justices. The composition of the Commission was evenly balanced between five Republicans and five Democrats from Congress, two Justices perceived as Republican and two perceived as Democrats, with the fifth Justice to be an independent. When the Justice expected to fill the

[1] The text of the Twentieth Amendment contains a regrettably ambiguous distinction between the possibility that by noon on January 20 "a President shall not have been *chosen*" and the possibility that "a President elect shall fail to have *qualified*" (emphasis added in both instances). Having made this distinction, the Amendment goes on to state that "the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have *qualified*, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have *qualified*." But the Amendment does not go on to state what happens if neither a President nor Vice President shall have been *chosen*. Presumably, the same power of Congress to provide by law "who shall then act as President" would apply in this circumstance.

independent slot declined to serve, Justice Joseph Bradley was called upon to play this role. With the other members splitting seven-seven along partisan lines as anticipated, Justice Bradley's determination became dispositive. Justice Bradley's pivotal reasoning rested on the proposition that any proceedings that occur in a state after the constitutionally uniform date for the casting of votes by the presidential electors are null and void. "To allow a State legislature in any way to change the appointment of electors after they have been elected and given their votes, would," Justice Bradley explained, "subvert the design of the Constitution in requiring all the electoral votes to be given on the same day." Justice Bradley also made clear that his reasoning applied to judicial proceedings, as well as legislative enactments, within a state: "No tampering of the result can be admitted after the day fixed by Congress for casting the electoral votes."

Justice Bradley's opinion is not binding on Congress in future elections in any formal sense. Indeed, in 1960, Hawaii engaged in recount proceedings after the nationally uniform date for the meeting of presidential electors that year. Whereas the state's official votes as of that date were cast for Nixon, the subsequent recount proceedings purported to change the state's electoral votes to Kennedy. But Hawaii's electoral votes did not matter one way or the other to the outcome of the 1960 presidential election; Kennedy had a majority even if Hawaii was awarded to Nixon. When it came time for Congress to count the electoral votes from the states on January 6, 1961, Nixon himself, as the sitting Vice President—and thus President of the Senate—announced that he was accepting the electoral votes from Hawaii in favor of Kennedy. In this respect, Nixon acted directly contrary to the precedent set by Justice Bradley; the Hawaii votes for Kennedy were entirely null and void under Bradley's dispositive reasoning. But Nixon also publicly announced that his acceptance of the Hawaii votes for Kennedy was "without the intent of establishing a precedent." Thus, what happened regarding Hawaii—inconsequential as it was to the outcome of the 1960 election—cannot be seen as undermining Justice Bradley's constitutional reasoning that determined the result of the 1876 election. At this point in U.S. history, then, the best constitutional analysis is that (as Justice Bradley explained) a state is obligated to resolve all disputes regarding the appointment of its presidential electors before the nationally uniform date on which they must cast their official Electoral College votes.

Congressionally specified dates for presidential elections. Exercising the authority granted it in Article II, Congress has set as the date for the appointment of the presidential

electors "the Tuesday next after the first Monday in November"[2]—what is commonly known as Election Day, since it is the same day on which voters cast their ballots in congressional elections, and because all states have chosen to appoint their presidential electors by a popular vote of the same electorate that casts congressional ballots. Also pursuant to its Article II authority, Congress has made "the first Monday after the second Wednesday in December" the nationally uniform day on which "[t]he electors of President and Vice President of each State shall meet and give their votes."[3] The arithmetic of the calendar means that there is always an interval of six weeks minus one day between the Tuesday in November on which citizens cast their popular votes for presidential candidates—technically, votes for presidential electors who have pledged to support their party's presidential candidate—and the Monday in December on which the duly appointed presidential electors, pursuant to that popular vote in November, cast their official Electoral College votes for president.

Six weeks (minus one day) is not a lot of time for resolving a dispute over the counting of ballots in a major statewide election. Recent history confirms this commonsense point. In 2004, Washington State had a disputed gubernatorial election. The state's voters cast their ballots for governor at the same time as they voted for president that year, on Tuesday, November 2. Six weeks (minus one day) later, on Monday, December 13, when the presidential electors in the state and all across the country met to cast their Electoral College votes, Washington's gubernatorial election remained unresolved. It was still in the midst of a statewide manual recount. That recount would not end until over two weeks later, on Thursday, December 30, and the candidate who prevailed in that manual recount (Christine Gregoire, the Democrat) was *not* the candidate who had prevailed in the previous machine recount (Dino Rossi, the Republican). Thus, if the dispute had involved a presidential rather than a gubernatorial election, and if all proceedings after December 13 had been constitutionally void pursuant to Justice Bradley's dispositive reasoning, then the prevailing candidate would have been the opposite of the one whom the manual recount showed the voters to have actually elected.

Moreover, the dispute over Washington's 2004 gubernatorial election did not end upon completion of the manual recount on December 30. Instead, a subsequent judicial contest of the election was litigated in a state trial court until the following June 6, 2005, when the trial judge

[2] 3 U.S.C. § 1.
[3] 3 U.S.C. § 7.

confirmed the winner of the manual recount. The dispute could have lasted even longer, but at that point the losing candidate (Rossi) declined to pursue an appeal of the trial court's decision and conceded the race.

Washington's experience with its 2004 gubernatorial election was not aberrational. Minnesota encountered almost exactly the same situation in its 2008 U.S. Senate election. That year the state's voters cast ballots for Senator at the same time as they voted for President, on Tuesday, November 4. Six weeks (minus one day) later, on Monday, December 15, when presidential electors in the state and around the nation were casting their official Electoral College votes, Minnesota was still conducting its statewide manual recount of the Senate election. Moreover, under Minnesota law, the effect of undertaking the manual recount was to negate the previous certification of vote totals after completion of the canvass. Thus, the official count of the Senate election on Monday, December 15 was zero-zero.[4] If the election at issue had been presidential rather than senatorial, then according to Justice Bradley's analysis, Minnesota would have failed to appoint any presidential electors by the constitutionally mandated date and thus could cast no official Electoral College votes in the presidential election—and, most importantly, could not constitutionally remedy this deficiency by any subsequent proceedings, including completion of its manual recount, after December 15.

Minnesota's disputed 2008 senatorial election, in fact, continued long after December 15. The results of the manual recount were not certified until January 5, 2009. Then, as in Washington, there followed a judicial contest in state court, which was not complete until June. This contest, like that other one, confirmed the result of the manual recount, but in this case the contest encompassed an appeal to the state's supreme court as well as the litigation in the trial court. When the state supreme court affirmed the trial court's dismissal of the contest on June 30, the losing candidate conceded the election.

Thus, in a future disputed presidential election, if a state is to comply with Justice Bradley's edict that it must settle the appointment of its presidential electors by the date on which they meet to cast their Electoral College votes, the state will need to streamline the kind of recount and contest procedures that Washington and Minnesota employed in 2004 and 2008, respectively. Such streamlining obviously will be a daunting challenge. It will be hard enough

[4] Technically, the official count stood at zero-zero-zero, since there was a significant third-party candidate who had polled about 16 percent of the vote, as well as the two major-party candidates (Al Franken, the eventual winner and a Democrat, and Norm Coleman, the Republican incumbent).

for a state to make sure that it completes all of its recount procedures by the first Monday after the second Wednesday in December. But it will be especially difficult for a state to complete any judicial contest of the election that might be filed after certification of the recount's results.

Congressional "Safe Harbor" provision. If this time pressure upon states were not enough, Congress has given states a compelling reason to settle a disputed presidential election even sooner. In a statutory provision dating back to the Electoral Count Act of 1887 (adopted in the aftermath of the disputed 1876 election), and now codified at 3 U.S.C. § 5, Congress has pledged that it will accept as "conclusive"—and thus not overturn—the resolution of a disputed presidential election in a particular state if two conditions are satisfied: first, the state's "final determination" of the dispute must be "made at least six days before the time fixed for the meeting of the electors"; and second, "such determination" must "be made pursuant to" state "laws enacted prior to the day fixed for the appointment of the electors." The incentive that this Safe Harbor provision creates is considerable: the congressional pledge to honor the state's resolution of the dispute as "conclusive" means, at least in principle, that neither the Senate nor the House of Representatives will attempt (based on partisan or other considerations) to undo the state's own determination of its presidential election.[5] But this incentive imposes an even more excruciatingly tight timetable on states. The same arithmetic of the calendar means that the Safe Harbor Deadline—that is, the deadline necessary for a state to obtain the benefit of the congressional pledge—is always the Tuesday in December that is exactly five weeks after the Tuesday in November on which the citizens cast their popular votes in the presidential election.

Obviously, resolving a disputed presidential election in five weeks is even harder than doing so in six. Florida was unable to complete its proceedings within that timeframe in 2000, at least not in a way compliant with the requirements of equal protection as identified by the U.S. Supreme Court in Bush v. Gore. Whether Florida could have completed constitutionally acceptable proceedings with the addition of six more days is ultimately unknowable, since the Court in Bush v. Gore also ruled that Florida intended to obtain the benefit of the Safe Harbor

[5] In other words, if a state in compliance with the Safe Harbor provision has determined that Candidate X is entitled to the state's electoral votes, and the state sends Congress a single certificate of this determination, then both houses of Congress—unless they violate the pledge in 3 U.S.C. § 5—will count the state's electoral votes in accordance with this certificate and, accordingly, will refrain from either awarding the state's electoral votes to a different candidate or declaring the state's presidential election null and void and thus refusing to award the state's electoral votes to any candidate.

Deadline and consequently all of the state's proceedings must cease at the end of the five-week period. Those six days are 15 percent of the 41 days between Election Day in November and the day of the Electoral College meeting in December.

The extreme difficulty that any state would have in meeting *either* the purely statutory Safe Harbor Deadline *or* Justice Bradley's constitutionally mandated deadline, which under the current congressional schedule follows six days later, has caused some commentators to argue that Congress should adjust the schedule to give states more time to resolve any disputed presidential election that might arise in the future. One argument is that Congress should shorten or eliminate the six-day period between the Safe Harbor Deadline and the date for the meeting of the presidential electors. Another argument is that Congress should push back the meeting of the presidential electors until late December or early January. Some observers advocate both changes. Opponents of these arguments, conversely, contend that presidential transitions are difficult enough as it is, with the uncertainty of a disputed presidential election causing increasing harm to the country for each additional day that it remains unsettled. On this view, no change in federal law should encourage a disputed presidential election to last longer than five weeks; rather, every effort should be made to shorten that period to the extent possible.

This ALI project takes no position on these arguments and counterarguments concerning the current congressional calendar for presidential elections. Instead, this ALI project accepts those dates as given and endeavors to adopt a framework for the otherwise almost impossible task of resolving a disputed presidential election within the existing calendar. Moreover, this ALI project assumes that a state will wish to obtain the benefit of Safe Harbor status if the state is capable of doing so. While recognizing that this Safe Harbor status is optional, a state will perceive a compelling case for striving to take advantage of it. In the context of a disputed presidential election, there is the obvious temptation for partisanship to dictate the outcome. The Safe Harbor provision is, in effect, a promise that partisanship in Congress will not override whatever the state determines about its own electoral votes. Why would a state not find that promise intensely attractive and thus try to comply with the condition necessary to activate that congressional obligation? Thus, the presumption underlying this project is that a state would prefer to complete its procedures for resolving a disputed presidential election within five weeks, if it is at all possible for the state to do so, rather than having an extra six days to finish the task but without the benefit of the congressional pledge to be bound to the outcome.

Consequently, the Procedures for the Resolution of a Disputed Presidential Election set forth in this Part of the project endeavor to enable a state to complete all relevant proceedings within the five-week period specified in the congressional Safe Harbor provision. Developing these procedures has required a kind of engineering endeavor: the task has been to determine how to make several interrelated components of an overall dispute-resolution process work together as efficiently and expeditiously as possible, so that collectively they have a reasonable chance of completion without transgressing the five-week Safe Harbor Deadline.

The engineering challenge of enabling a state to meet the Safe Harbor Deadline. These Procedures have three main components. The first is a *recount*, defined specifically (and more narrowly than in some other uses of the term) to mean solely the reexamination of ballots initially counted on or before Election Day and reported as part of the Election Night preliminary returns. As such, a recount does *not* include determinations concerning the eligibility of ballots not counted as part of the Election Night preliminary returns. These uncounted—but still potentially eligible—ballots include provisional ballots and some absentee ballots, both (a) those arriving too late for inclusion in the Election Night returns but still timely under relevant state law and (b) those previously deemed uncountable but whose eligibility remains subject to review.

The determinations concerning the eligibility of these previously uncounted ballots constitute a large portion of the second main component of these Procedures, the *canvass*. Also encompassed within the canvass are the review and correction of any tabulation errors or discrepancies in the preliminary returns that are not corrected as part of the recount. For example, in a process often referred to as "reconciliation" the number of ballots cast at a precinct is compared with the number of voters who signed the precinct's poll books (and in many jurisdictions received tickets authorizing them to cast a ballot). When these two numbers are not identical, state law often authorizes local election officials to make a determination as to how the discrepancy should be handled. Sometimes, the discrepancy is resolved in favor of retaining the number of ballots cast, based on a judgment that the error must have been in the failure to record in the poll books the presumably valid voters who cast the extra ballots. In other instances, the discrepancy is resolved by randomly withdrawing from the precinct's pool of countable ballots—the figurative (or literal) ballot box—a number equal to the excess of ballots over voters. Whatever state law provides for this situation, the determinations that local election officials

make in this regard are part of the canvass. The sum of all ballot-eligibility, reconciliation, tabulation-correction, and other determinations made during the canvass results in a *certification* of the canvass and its vote totals. The initial certification is made by each Local Election Authority that conducts the canvass, and all of these local certifications are then accumulated in a single statewide certification by the state's Chief Elections Officer.

The third main component of these Procedures is the possibility of a judicial *contest* to the results of the certified canvass. State law provides the grounds available for contesting the certified results in an election, and these grounds can vary somewhat from state to state. But generally these grounds include claims that votes counted on Election Day and included in both the preliminary returns and the certified canvass were fraudulent or ineligible in some way; perhaps, for example, they were ballots cast by ineligible felons (as was the case in Washington's 2004 gubernatorial election), or perhaps they were absentee ballots procured through illegal means (as in Miami's 1997 mayoral election). A judicial contest is also the procedure in which to raise a claim, if such a claim is available in the state at all, that sufficient disenfranchisement of eligible voters or other serious mishap in the conduct of the election requires voiding the certified results in their entirety (or perhaps, alternatively, statistically adjusting those results in some way).

To fit all three of these proceedings—recount, canvass, and contest—within the five-week Safe Harbor period, some significant "engineering" innovations must be pursued. One of the most significant of these is the triggering of an expedited recount, as provided in § 303, upon a finding of certain specified factual conditions to exist 24 hours after the polls have closed in the November presidential balloting. This expedited recount differs from the typical recount, which customarily follows the certification of the canvass. This custom is based on the understandable premise that there is little reason to undertake the ordeal of a recount unless and until certification of the canvass shows the result of the election to be close enough to justify the undertaking. But in the context of the limited five-week timeframe for a state to achieve Safe Harbor status in a presidential election, waiting until the conclusion of the canvass before beginning the recount is an unaffordable luxury. In fact, the first week after the polls have closed is a period of time in which local election officials can recount ballots initially counted on or before Election Night and, furthermore, it is a period of time in which local officials are often waiting for other events to take place before they can complete the certification of the canvass.

For example, local election officials must give provisional voters a period of time after Election Day in which to provide supplementary information that may establish the eligibility of their provisional ballot to be counted. Likewise, absentee voters are often given a window of opportunity to correct clerical errors concerning information that they supply on their absentee ballot envelopes. While local election officials are waiting for the receipt of such supplementary information from provisional or absentee voters in the first few days after Election Day, they can undertake the task of recounting ballots that already have been counted once—a task that does not require any additional information. In a disputed presidential election, when every day of the short five-week Safe Harbor period is precious, these first few days after Election Day can be used productively by beginning the recount then, rather than waiting for the customary certification of the canvass. (The advantage of reordering these two procedures in this way was brought to the attention of this American Law Institute project by experienced local election officials.)

Another engineering decision was to prioritize ahead of the contest, both temporally and in legal status, the distinct procedure for reviewing determinations made during the canvass. One potential source of delay, which easily could jeopardize a state's capacity to comply with the Safe Harbor Deadline, is the duplication of litigation that can occur when issues are raised, first, in a lawsuit that is denominated a judicial review of the administrative decisions that local election officials make during the canvass and then, second, in a subsequent judicial contest of the certified results of the canvass. Disputed elections often entail both rounds of litigation, especially because one side will perceive an advantage of attempting to prevail during a judicial review of the canvass, so as to avoid the heavy burden of proof usually associated with attempting to overturn the certified result of the canvass in a judicial contest. Indeed, often a candidate will attempt to have a court undertake a judicial review of the canvass even before its results are certified, thereby delaying the certification until these judicial-review proceedings are complete. These Procedures endeavor to avoid this delay, as well as the inefficient duplication of litigating the same issues twice, by funneling into the judicial review of the canvass those issues suitable for such review. Once so funneled, these issues are precluded from relitigation in a subsequent contest. Moreover, these Procedures incentivize their funneling in this way, by eliminating any burden of proof associated with certification of the canvass *as long as the issues are raised in the special procedure for review of the canvass*. There is no need to delay

certification, since appropriate issues can be raised equally by either of the two competing candidates, regardless of which one is ahead in the count at the time of certification.

The Procedures also make a single Presidential Election Court the sole forum for adjudicating issues either in the special procedure for judicial review of the canvass or in the subsequent contest. Thus, there is no incentive to engage in forum-shopping in the hope of finding a more favorable tribunal to litigate particular claims. In this way, once the canvass is complete, the overall process can move immediately to judicial review of the canvass in a streamlined procedure suitable for such issues, leaving to a contest only those issues that did not arise in the canvass itself and thus potentially need some additional factual development before they are ready for judicial adjudication.

Even when the sequencing of these procedures—the recount, the canvass, and the contest—are engineered in this way, these procedures are inevitably truncated compared to how they would occur in a nonpresidential election not subject to the Safe Harbor or other Electoral College deadlines. Truncating these procedures obviously entails a cost in terms of the ability of litigants to pursue factual matters to the extent that they might if they had more time. But there is no way to avoid such truncating and still finish all the procedures within the five-week Safe Harbor period. The only alternative would be to abandon the effort to achieve Safe Harbor status, and even so significant truncating of the recount, canvass, and contest procedures would still be necessary to finish by the date of the Electoral College meeting six days later. Only by extending beyond this constitutionally prescribed date, and running up towards Inauguration Day on January 20, could a state avoid significant truncation of these procedures. But, again, the premise of this ALI project is that a state would not wish to engage in such constitutionally treacherous conduct, and thus the engineering effort has been to engage in the minimal amount of truncating necessary to enable a state to obtain Safe Harbor status (since a state would want to meet the Electoral College deadline of six days later anyway, and would not wish to lose the benefit of Safe Harbor status just to have an extra six days of vote-counting litigation).

The adoption of these Procedures into state law. These Procedures, as set forth herein as Part III of this project, have been drafted to be consistent with the Principles set forth in Parts I and II. [Indeed, these Procedures reflect—and endeavor to achieve in the specific context of a presidential election—the value of "finality" articulated more generally in the Principles contained in Part II.] But these Procedures also have been drafted so that they may be adopted in

law independently, without adoption of either Part I or II. A state thus may choose to adopt these Procedures in order to address the calendaring challenge of completing a presidential recount, along with ancillary litigation, by the Safe Harbor Deadline, and the state's decision to do so may be entirely separate from any consideration the state might wish to give to adoption of the Principles set forth in Part I or II.

For any state that wishes to adopt these Procedures as a means to address the challenge of meeting the Safe Harbor Deadline in a disputed presidential election, it is highly preferable that the method by which the state does so is to have its legislature enact a statute containing these Procedures. The reason for this preference is that the state's legislature is the institution explicitly empowered in Article Two of the federal Constitution to adopt the procedures for the appointment of a state's presidential electors. Moreover, a statute enacted by the state's legislature is the most straightforward method by which a state may enact into law before Election Day a set of procedures capable of earning Safe Harbor status under 3 U.S.C. § 5. Even if a state completes all of its procedures concerning a disputed presidential election by the five-week deadline in 3 U.S.C. § 5, the state risks losing the benefit of the congressional Safe Harbor pledge if the state's procedure were not enacted into state law prior to Election Day. The best and most obvious way for a state to avoid this risk is for its legislature to enact a statute, before Election Day, that puts these Procedures into legal effect for any future presidential election.

If, however, a state's legislature has failed to adopt these Procedures into legislation, it may still be possible for a state to achieve Safe Harbor status if the state's supreme court has been authorized by state law to promulgate procedural rules for the adjudication of disputes that involve the state's judiciary. In this situation, the state's supreme court prior to Election Day in an exercise of its rulemaking authority could promulgate these Procedures, thereby placing them into legal effect in the state before Election Day. If the state's supreme court did so, there would be a strong argument that the status of the Procedures in state law in advance of Election Day would give these Procedures the necessary "safe harbor" status under 3 U.S.C. § 5, such that the congressional pledge would be operative as long as the state complied with these Procedures within the five-week deadline.

Accordingly, these Procedures have been drafted in a form amenable to adoption either as statutory legislation or as a set of procedural rules promulgated by a state supreme court pursuant

to its rulemaking authority. But, again, the far preferable method of adoption is a statute enacted by the state's legislature.

§ 301. Definitions

(a) "Canvass" means the administrative procedure that encompasses verification of the vote tabulations contained in the preliminary Election Night returns as well as determination of the eligibility of previously uncounted ballots, including provisional ballots and absentee ballots not included in the preliminary returns;

(b) "Certification" means the official declaration of the results from a counting of ballots and occurring, at separate stages, both after the canvass and after completion of all proceedings under these Procedures;

(c) "Chief Elections Officer" means the state's highest official, often the Secretary of State, responsible for supervising the administration of elections in the state;

(d) "Chief Justice" means the presiding judge of the state's highest court;

(e) "Contest" means a judicial procedure that occurs after certification of an election's results, in which a candidate other than the certified recipient of the most votes challenges the certified results and seeks a judicial decree either to declare the contestant the duly elected winner or to void the election;

(f) "Day" means any and all calendar days;

(g) "Election Day" means the traditional day on which citizens go to the polls in their neighborhood polling locations to cast ballots in a presidential election, which Congress has specified to be the first Tuesday after the first Monday in November, as provided in 3 U.S.C. § 1;

(h) "Election Night" means the nighttime hours of Election Day, after the polls have closed in the state, as well as the predawn hours of the following day insofar as the state (and the nation) still awaits preliminary returns of votes counted on or before Election Day and expected to be reported before the night is over as part of the initial count of ballots from all precincts in the state;

(i) "Local Election Authority" means the agency of government, whether a single officer or a multimember body, with authority to canvass local returns, including determining the eligibility of locally cast provisional ballots;

(j) "Preliminary returns" means the report of vote totals of ballots cast and counted on Election Day at each polling location in the state, together with the report of any early and absentee votes counted on (or, if permitted, before) Election Day, all of which are aggregated by the Chief Elections Officer into a single set of statewide preliminary returns;

(k) "Presidential election" means a quadrennial November general election at which the eligible electorate of the state chooses a slate of presidential electors, who will cast their Electoral College votes six weeks later and who are expected to cast those Electoral College votes on behalf of the presidential candidate named on the ballot and on whose behalf they are slated as presidential electors;

(l) "Recount" means a reexamination of ballots initially counted on or before Election Day and reported as part of preliminary returns;

(m) "Safe Harbor Deadline" means the date, specified in 3 U.S.C. § 5, by which a state must resolve any vote-counting disputes in a presidential election in order for the state to receive the benefit of the congressional pledge to accept whatever resolution the state achieves;

(n) "State Supreme Court" means the state's highest court, even if denominated other than "supreme court" (as is New York's Court of Appeals).

Comment:

a. Certification. As discussed more fully in the Comment to § 316, these Procedures entail two distinct certifications, at separate stages of the overall process. The first certification occurs at the end of the canvass. The second occurs upon completion of all possible proceedings under these Procedures, including judicial review of the canvass and a contest of the results as certified at the end of the canvass. This second certification is the final certification of the election's outcome and serves as the basis for declaring which slate of presidential electors is entitled to cast the state's Electoral College votes.

b. Chief Elections Officer. In some states, a multimember body rather than a single individual may exercise the responsibility of supervising statewide the administration of

elections. In these cases, the term "Chief Elections Officer" as used in these Procedures is intended to encompass these multimember bodies.

c. Day. In counting the number of days for purposes of any deadline, these Procedures include all calendar days and not solely business days.

d. Election Day. As elaborated in Part I of this project, the traditional single day on which most voters cast their ballots in an election has recently evolved into a menu of varying practices among the states enabling voters to cast in-person early ballots at some specified locations (usually different from their traditional neighborhood polling locations where voting occurs on Election Day), or to cast an absentee ballot in advance of Election Day without need to provide any particular excuse or justification for doing so, or some combination of early and open absentee voting. Election Day, however, remains the last day on which voters are permitted to cast a ballot (although in some states absentee ballots cast on Election Day are permitted to arrive by mail at the offices of their relevant Local Election Authority some number of days afterwards and still remain eligible to be counted). For presidential (and congressional) elections, Congress has fixed the date of Election Day, and accordingly these Procedures define Election Day to be the same as the date designated by Congress.

e. Local Election Authority. The definition here is consistent with, but somewhat narrower, than the use of the same term in Part I. Here it is necessary to define the term to refer specifically to the government body's power regarding the counting of ballots, whereas in Part I it was necessary to define the relevant government body as having administrative powers over the casting as well as counting of ballots. Some states use separate local government bodies to administer the casting and counting of ballots. For example, a state may employ a County Canvassing Board to canvass the election returns and to conduct any recount that might be necessary, while the state simultaneously delegates authority to administer the casting of ballots to a County Clerk (or some other local office). The use of the term here is intended to apply solely to the government body that engages in the functions covered by these Procedures, leaving the state free to employ a different agency of local government for those aspects of election administration not covered by these Procedures.

f. Presidential elections. This definition intentionally excludes presidential primaries, which are not subject to the same Safe Harbor Deadline, and which raise their own distinct issues concerning the timing and methods for resolving ballot-counting disputes. Ultimately, a major

party's presidential candidate is chosen at a national nominating convention, and the relationship of that convention to antecedent primaries and caucuses is a complicated one, beyond the scope of these specific Procedures.

g. Recount, canvass, and contest. These three types of proceedings, already discussed preliminarily in the Introductory Note above, are defined specifically for the purpose of the engineering endeavor necessary for a state to meet the Safe Harbor Deadline. Accordingly, the specific definitions of these three terms, as used in these Procedures, may not conform exactly to their uses in other contexts. An understanding of how these three terms are used in these Procedures is best achieved by examining the details of the following Sections insofar as they employ these terms and elaborate on what is to occur in each of the three proceedings.

REPORTERS' NOTE

Presidential elections. The Framers of the federal Constitution intended for the mechanics of presidential elections to function very differently from the way that they quickly came to function. Article II required a state's presidential electors to meet in person to cast their electoral votes, and this meeting requirement was intended to facilitate the goal—and expectation—of the Framers that the electors would deliberate, and then exercise independent judgment, about who should become president. This meeting requirement was carried forward in the Twelfth Amendment, even after partisanship prevented the original design from working as intended in the election of 1800. For a discussion of the constitutional crisis over the 1800 election, see Edward B. Foley, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES 70-71 (2016), and sources cited therein.

Notwithstanding the original design, a deeply rooted expectation has arisen that a state's presidential electors are partisan agents that are supposed to vote for their party's presidential candidate. Indeed, the political parties—sometimes even backed by the force of state law—have required their presidential electors to pledge, under oath, to cast their official Electoral College ballots on behalf of their party's presidential nominee. See Ray v. Blair, 343 U.S. 214 (1952) (permitting state law to impose this pledge as part of the state's law for presidential primaries). A "faithless elector" is one who breaks this pledge and, as this pejorative term implies, it is now considered dishonorable for a presidential elector to exercise the kind of independent judgment that the Framers originally intended. Although there have been isolated instances of faithless electors from time to time, no presidential election has turned on the official Electoral College vote of a faithless elector, and the Supreme Court has never had occasion to rule on whether a faithless elector could be required to recast an official Electoral College vote so that it conformed to an antecedent partisan pledge. (Ray v. Blair did not involve such a scenario, but instead concerned only whether a party's candidate to be a presidential elector could be required to make the partisan pledge in the first instance.)

Part III of this project, and the Procedures it sets forth, do not apply to the potential issue of a faithless elector. Part III does not purport to govern the casting of official Electoral College votes by the state's appointed presidential electors. Nor does it purport to govern the processes

that Congress itself uses, pursuant to the Twelfth Amendment and the Electoral Count Act of 1887, to conduct its review and counting of the Electoral College votes as received by the states. Rather, the sole focus of Part III and its Procedures is the method by which a state conclusively determines which party's slate of presidential electors is the authoritatively chosen one, when the method of appointment is a popular vote of the state's eligible citizenry and there is a dispute over the outcome of that popular vote.

Bush v. Gore confirmed that a state need not appoint its presidential electors by means of a popular vote. In the early years of the Republic, some state legislatures chose to retain this authority for themselves, and under the Constitution a state could revert to that method of appointment. For well over a century, however, the universal practice among states has been to employ a popular vote of the eligible citizenry as the method of appointing a state's presidential electors. Part III and its Procedures are predicated on the assumption that states will continue to use this method of appointment. Part III and its Procedures would have no applicability in a state that decided, in advance of the next presidential election, to change its method of appointment so that the state's legislature chose the state's presidential electors directly.

Part III and its Procedures, however, do apply to a state that permits its legislature to appoint the state's presidential electors as a fallback remedy if and when the popular vote in November fails to identify a winning slate of presidential electors. Indeed, Part III and its Procedures are designed to avoid reliance on that kind of fallback remedy to the greatest degree possible by identifying as accurately and expeditiously as feasible which slate of presidential electors is the true winner of the popular vote in November—and to do so in the circumstance in which there is doubt and a potential dispute about this outcome. But simultaneously Part III and its Procedures are designed to determine, also with as much clarity and legitimacy as is feasible in the circumstances, when reliance on that kind of fallback remedy is unavoidable—and thus when the only way for the particular state to participate in the official Electoral College vote for president is for the state legislature to intervene and to appoint the state's presidential electors directly.

For example, suppose on the day of the Safe Harbor Deadline, the State Supreme Court declares that there is a systemic problem that affected the November popular vote, such that it is impossible to identify a winner of the presidential election in the state. At that point, the state faces the choice of *either* not participating in the official Electoral College vote for the presidency six days later *or* having the state's legislature appoint the state's presidential electors directly as a fallback.[6] Part III and its Procedures do not dictate which of these two options a state should choose. But if implemented as designed, these Procedures will enable a state to exercise the latter option if the circumstance arises in which the November popular vote has been rendered inoperable.

It should be noted, moreover, that Part III and its Procedures are usable in a state that chooses not to employ a statewide winner-takes-all popular vote as its method of appointing its presidential electors, but instead opts for some sort of districting or proportional basis for allocating its Electoral College votes. Currently, all states but two (Maine and Nebraska) use a statewide winner-take-all scheme for appointing presidential electors, and these Procedures have

[6] In this circumstance, it would be logistically infeasible for the state to hold a new popular election, which itself conceivably could be disputed, even if there were adequate time to cast, count, canvass, and potentially recount these new ballots in the six days remaining before the meeting of the presidential electors.

been designed with the expectation that this scheme will continue to predominate. Nonetheless, these Procedures are fully functional in a state, like Maine or Nebraska, that allocates at least some of its Electoral College vote on the basis of the state's congressional districts. If there were a dispute about which presidential candidate won the popular vote in that congressional district, and if determining the result of the presidential election in that district was necessary to identify which presidential candidate won a majority of (pledged) Electoral College votes, then the triggering mechanism of § 303 would apply just as it would if the dispute concerned presidential electors appointed based on the result of a statewide winner-take-all popular vote. The Procedures equally would work if some state in the future chose to allocate its Electoral College votes, not on the basis of congressional districts, but instead on a proportional share of the statewide popular vote (rather than winner-take-all).

These Procedures would also work if enough states adopt the pending National Popular Vote plan for the plan to take effect. Under that plan, a participating state agrees to award all of its Electoral College votes *not* to the winner of its own statewide popular vote, but instead to the winner of the overall national popular vote. That plan purports to take effect when and if states whose combined allotment of Electoral College votes equals or exceeds the margin of 270 currently necessary for an Electoral College majority under the Twelfth Amendment.[7] Were that to occur, then any state's popular vote could be relevant to determining whether a presidential candidate won a majority of Electoral College votes. If there were doubt about the total popular vote for the competing candidates in a particular state sufficient to cast doubt on which candidate would win an Electoral College majority, then under § 303 these Procedures could be triggered in any state contributing to that doubt. To be sure, potentially that could be a large number of states, and these states need not themselves be the ones that are signatories to the National Popular Vote pact. Still, any state that adopted these Procedures could employ them to resolve uncertainty about the outcome of a presidential election in which the National Popular Vote plan was in effect. (This observation is not intended to express an opinion on the merits of the National Popular Vote plan as a matter of electoral policy; rather, it is simply to note the extent of Part III's potential applicability.)

One final note on terminology relevant to presidential elections: the term "Electoral College" does not appear in the Constitution. But, by longstanding common usage, the term has come to stand for the mechanism that the Constitution, including the Twelfth Amendment, uses for presidential elections. This Part reflects that common usage and, where appropriate, employs it accordingly. Often the term "Electoral College" is used to refer collectively to all 538 electoral votes, and this Part occasionally does the same. But, of course, all 538 presidential electors never meet altogether in one place at the same time. Instead, as discussed above, the presidential electors of each state meet separately in their own respective states—although all these meetings occur on the same day, as required by Article Two of the Constitution. Thus, the term "Electoral College meeting" refers to these state-specific events, although in plural form it can refer collectively to all 51 of these distinct meetings that occur on the same date. For purposes of Part III and its Procedures, it is intended that the particular context in which the term "Electoral College" is used provide additional clarity, as necessary, on its intended meaning.

[7] Currently, 10 states and the District of Columbia, amounting to 165 Electoral College votes, have enacted legislation to adopt the National Popular Vote plan: http://www.nationalpopularvote.com.

§ 302. Applicability and Objective

(a) The provisions of these Procedures shall take effect as the law of the state upon either their explicit enactment by the state legislature or their explicit promulgation by the State Supreme Court pursuant to its rulemaking authority, whichever method of adoption has been employed, and are fully applicable to the next presidential election thereafter.

(b) In any particular presidential election, the specific expedited elements of these Procedures become operational immediately upon the declaration of the Chief Elections Officer, as set forth in § 303.

(c) The overriding purpose of these Procedures is to enable the state to complete a recount, canvass, and any contest of a presidential election, including all related administrative and judicial proceedings concerning the counting of ballots in a presidential election, in compliance with the Safe Harbor Deadline of 3 U.S.C. § 5.

(d) Whenever an expedited recount has been declared under § 303, it shall be the highest priority of every state official involved with the implementation of these Procedures to comply with the Safe Harbor Deadline of 3 U.S.C. § 5 and with every subsidiary deadline set forth in these Procedures, all of which are aimed at assuring Safe Harbor compliance.

(e) Whenever an expedited recount has been declared under § 303, completion of these Procedures takes precedence over any other recount, canvass, contest, or other proceeding that may be necessary for any other election on the same ballot, and any ballot-eligibility or other determinations made as part of these Procedures that have applicability to another election shall be binding on that other election unless state law elsewhere expressly provides otherwise.

Comment:

a. As stated in the Introductory Note, it is highly preferable that these Procedures become adopted as the law of the state by means of legislative enactment. Nonetheless, it is also possible that they may become adopted as state law through promulgation by the state's supreme court as an exercise of the court's rulemaking authority, where such authority exists. Regardless of the particular method of their adoption, it is important that these Procedures take effect as the law of the state prior to the casting of ballots by voters in the presidential election to which these

Procedures shall apply. (If a state ordinarily delays the effective date of an enacted statute for some period of days, that delay is not problematic for the purposes of these Procedures as long as the delay does not extend until Election Day of the next presidential election. Where such a situation would occur, and if the state has the capacity to enact legislation on an expedited or emergency basis, so that the legislation takes effect immediately upon enactment, it is hereby recommended that a state employ this special method of legislation so that these Procedures take effect before Election Day.) Having these Procedures in effect as part of state law prior to Election Day is necessary for utilization of the Procedures to comply with the Safe Harbor provision of 3 U.S.C. § 5, which requires that a state's "laws" for resolving "any controversy or contest concerning the appointment of all or any of the [state's] electors" be "enacted prior to the day fixed for the appointment of the electors" in order for them to be conclusively binding upon Congress in its counting of Electoral College votes under the Twelfth Amendment.

This Section draws a distinction between, *first*, the Procedures collectively becoming effective prior to Election Day, and thus being consistent with the requirements for Safe Harbor status, and, *second*, particular expedited elements of these Procedures becoming operational only upon a declaration of the state's Chief Elections Officer. There is no reason for a state to undertake the extraordinary and largely arduous effort of these expedited proceedings unless the state—and the nation as a whole—confronts the situation of an unsettled presidential election 24 hours after Election Day. Otherwise, as almost always is the case, a state can proceed with the canvass in a presidential election according to its normal timetable. If there happens to be the need for a recount in a nonpresidential race on the ballot in a presidential-election year, the state can hold that recount after completion of the canvass (if that is the state's customary practice). The state can also permit a subsequent judicial contest of the nonpresidential race to extend indefinitely for months—as was the case in Washington for its 2004 gubernatorial election and in Minnesota for its 2008 U.S. Senate election. Part II of this project, among its concerns, addresses the issue of extended litigation of vote totals in nonpresidential elections. But whatever policy choice a state wishes to make concerning the amount of time available for litigating the result of a nonpresidential election—including the specific policy choice of whether or not to adopt Part II of this project—the conventional practices (as reflected by Washington in 2004 and Minnesota in 2008) are simply not feasible in a presidential election.

Thus, there needs to be a mechanism for distinguishing between the ordinary elections, for which the conventional practices can continue to occur (if a state so chooses, even after considering alternatives as discussed in Part II), and the extraordinary situation of an unsettled presidential election, which requires special expedited proceedings.[8] Moreover, by definition, it is impossible to know whether a presidential election remains unsettled after Election Night (and thus whether there is need for the expedited elements of these Procedures) until after ballots have been cast on Election Day. Thus, the triggering of these expedited proceedings (upon declaration of the state's Chief Elections Officer) cannot possibly occur prior to Election Day. Even so, it need not be the case that the triggering of these expedited proceedings inherently deprives a state of any possibility of obtaining Safe Harbor status. On the contrary, as long as the triggering of these expedited proceedings occurs pursuant to state law specified in advance of Election Day—so that the law makes unambiguously clear when, and only when, such triggering shall occur—then the triggering itself satisfies the Safe Harbor requirement that it be conducted pursuant to state law adopted and in effect before Election Day. In sum, this Section provides that these Procedures will be in effect as state law in advance of Election Day, with the triggering of expedited proceedings to occur after Election Day according to specifically identified conditions set forth in § 303 of these Procedures, which shall have been adopted and in effect prior to Election Day.

b. Relationship of these Procedures to other recounts or disputed elections occurring at the same time. It is possible that a state may have multiple unresolved elections simultaneously, with the same ballots needing to be recounted for one election also needing to be recounted for a different election (or the question of a ballot's eligibility relevant to both elections). Indeed, when one considers all the different elections that occur in a state on the same Election Day, it is quite probable that if the presidential election remains unresolved, then so too does some other election somewhere in the state. This other unresolved election, after all, need not involve a

[8] Even if a state chooses to adopt some form of expedited procedures to resolve a vote-counting dispute in a particular type of nonpresidential election—for example, a gubernatorial election—it is unlikely that the state would wish the timetable to be as accelerated as Congress has required for presidential elections. In other words, suppose a state were to enact expedited procedures that required the resolution of a disputed gubernatorial election to occur conclusively by December 31. Those expedited procedures would achieve resolution over six months sooner than the process that Washington used for its gubernatorial election in 2004. Yet even accelerating the process that much would reach closure *24 days after the Safe Harbor Deadline that year (and thus over three weeks later).* Thus, even a state that set December 31 as the deadline for resolving a disputed gubernatorial election, and designed special procedures accordingly, would still need to adopt the distinct Procedures set forth here in Part III of this project in order to handle the special exigencies of a disputed presidential election.

statewide office (like governor), but instead easily could involve a local office (like mayor or a seat on a city council).

Quite clearly, an unresolved presidential election is more urgent than any other type of unresolved election. This would be true even if the other unresolved election was a gubernatorial or U.S. Senate race, but it is certainly true for local races. Accordingly, these Procedures explicitly establish that they have priority over whatever proceedings might be applicable to other unresolved elections at the same time. Those other proceedings must remain suspended until completion of these Procedures concerning the presidential election. That said, the results of these Procedures can be incorporated into the proceedings concerning nonpresidential elections to avoid duplication of effort. For example, as part of the canvass under § 308, each Local Election Authority will make a determination concerning the eligibility of all provisional ballots within its jurisdiction. Those determinations may also be relevant to another unresolved election, either another statewide race or a local race. If so, then there is no need for a separate proceeding to determine whether these same provisional ballots will be counted in that other election. Rather the determinations made under § 308 concerning their eligibility for the presidential election can also govern in the counting of ballots for that other election. This Section provides that such rulings made pursuant to these Procedures will apply in this way to other unresolved races—unless a separate provision of state law expressly declares otherwise.

To be sure, some determinations made concerning the presidential election will not be applicable to other races. For example, in a recount of the presidential election an examination of optical-scan ballots to determine whether ovals contain a mark that constitutes a vote for a presidential candidate will not apply to any other election on the same ballot that also may be unresolved and thus require a recount. For sake of efficiency, a Local Election Authority may wish to conduct the nonpresidential recount at the same time as it conducts the presidential recount under § 305. (Suppose the state needs to conduct both a presidential and gubernatorial recount. Each Local Election Authority might prefer to examine each ballot once, looking at both the presidential and gubernatorial vote on that ballot, rather than conducting two entirely separate recounts of the same set of ballots.) These Procedures permit a Local Election Authority to conduct a presidential and nonpresidential recount simultaneously *only to the extent that the Local Election Authority is able to do so in compliance with all the provisions of these Procedures, including meeting all of the strict deadlines in these Procedures.* If there is any risk

that the Local Election Authority would be unable to meet the deadlines in these Procedures if it conducts both the presidential and nonpresidential recounts simultaneously, then it must defer conducting the nonpresidential recount until after it completes the presidential recount.

In some instances, there may be an inevitable scheduling conflict between these Procedures and proceedings necessary for another unresolved election. The same ballots cannot be in two different courtrooms at the same time. Thus, for example, pursuant to these Procedures, the Presidential Election Court may be conducting a review of disputed ballots under § 306 or § 311. If so, then another court that may have jurisdiction over a ballot-counting dispute in a nonpresidential election will have to wait until the Presidential Election Court has completed its review of the ballots under these Procedures.

§ 303. Declaration of Expedited Presidential Recount

(a) The Chief Elections Officer shall declare publicly, no later than 24 hours after the polls close in a presidential election, the need for an Expedited Presidential Recount if all of the following conditions apply:

(1) there is uncertainty about whether any presidential candidate has secured a majority of Electoral College votes; and

(2) there is uncertainty about the result of the presidential election in the state; and

(3) the state-specific uncertainty of subsection (2) is a contributing factor to the nationwide uncertainty of subsection (1).

(b) For purposes of § 303(a), uncertainty about the result of the presidential election in the state exists if any of the following conditions apply:

(1) There have been no public declarations of victory and defeat by the two presidential candidates with the highest number of votes based on preliminary returns available to the Chief Elections Officer;

(2) Preliminary returns available to the Chief Elections Officer show the leading presidential candidate in the state ahead of one or more rivals by a margin of less than one-quarter of one percent of all presidential ballots preliminarily counted in the state; or

(3) Based on information available to the Chief Elections Officer concerning the number of provisional, absentee, and other uncounted ballots that potentially could be added to the count during the canvassing of returns, the winning presidential candidate in the state might be different from the leading presidential candidate based on preliminary returns.

Comment:

a. When expedition is necessary. As discussed in the Comment to § 302, the need for a mechanism to trigger expedited proceedings arises when a presidential election remains unsettled 24 hours after the polls close on Election Day. The specific conditions for triggering the expedited proceedings, therefore, should be based on factors that make a presidential election still in play 24 hours after the polls have closed. The first key factor is that there is no clear winner of an Electoral College majority, as required by the Twelfth Amendment. Where there is a clear Electoral College majority, it is irrelevant that there may be uncertainty concerning the winner in a state whose Electoral College votes are unnecessary to establish the majority—and thus there is no need for expedited proceedings in this situation.

Even if there is no clear Electoral College majority, there may be no need for an expedited recount in a particular state; this would be true if the reason for the absence of a majority was three different candidates clearly splitting the Electoral College votes in such a way that none obtain a majority. In this situation, the outcome in every state may be unambiguous on Election Night, with no need for a recount in any state—and yet no candidate able to accumulate a majority of Electoral College votes. Under the Twelfth Amendment, this presidential election would proceed to the House of Representatives, with the House empowered to elect the President using the special procedure provided therein, whereby each state's delegation in the House has one vote.

Thus, in order to trigger an expedited recount under these Procedures, it is necessary *both* that there be no clear winner of an Electoral College majority *and* that there be uncertainty in the outcome of the presidential election in a particular state that contributes to the absence of a clear Electoral College majority. Another way to put this point is to say that if there is uncertainty about the outcome of the presidential election in one or more states, and if resolution of that uncertainty would cause a particular candidate to reach an Electoral College majority, then the situation exists where expedited proceedings are necessary in each uncertain and potentially

outcome-determinative state. In 2000, Florida was the single state presenting this kind of situation. It is important to recognize, however, that in a future unsettled presidential election, there may be multiple states contributing to the condition of uncertainty as to whether or not a candidate is able to obtain an Electoral College majority—as was the case in 1876, when four states (Florida, Louisiana, South Carolina, and Oregon) contributed to this kind of situation. Under these Procedures, an expedited recount would be triggered in each of the states contributing to overall uncertainty concerning whether or not a candidate was capable of winning an Electoral College majority.

Illustrations:

1. On Election Night, Candidate A is the clear winner of 281 Electoral College votes, and Candidate B the indisputable winner of 251, with only Nevada and its six electoral votes "too close to call." Because 270 electoral votes are sufficient for a majority, Candidate B graciously concedes that Candidate A is the winner in a publicly televised address. In this situation, there is no need for Nevada to trigger expedited procedures to determine which candidate won its six electoral votes.

2. On Election Night, Candidate A is the clear winner of 263 Electoral College votes, and Candidate B the indisputable winner of 253. Both New Hampshire with its four electoral votes, and Ohio, with its 18 electoral votes, are "too close to call." Neither candidate makes a concession speech on Election Night; instead, both campaigns vow to carry on until all the votes, including provisional ballots, have been counted. In this situation, there is a need for Ohio—but not New Hampshire—to trigger expedited procedures to determine the winner of its 18 electoral votes. Whichever candidate wins Ohio will win a majority of electoral votes and thus the presidency: if Candidate A wins Ohio, then A will have 281; if Candidate B wins Ohio, then B will have 271. Either way, New Hampshire is irrelevant to determining which candidate will win an Electoral College majority, and therefore there is no need for New Hampshire to conduct expedited procedures. It is imperative, however, for Ohio to begin immediately to conduct all procedures to determine conclusively which candidate won the state.

3. On Election Night, Candidate A is the clear winner of 263 Electoral College votes, and Candidate B the indisputable winner of 251. Both Nevada, with its six electoral votes, and Ohio, with its 18 electoral votes, are "too close to call." Neither

candidate makes a concession speech on Election Night; instead, both campaigns vow to carry on until all votes are counted. In this situation, it is necessary for *both* Ohio *and* Nevada to trigger expedited procedures to determine which candidate won each state's electoral votes. The ultimate winner of the White House may hinge on either state. If Candidate B wins Ohio's 18 electoral votes, that gives B 269, still one short of an Electoral College majority, making Nevada outcome-determinative. Likewise, were it to become apparent that Candidate A wins Nevada, but Ohio still remains in play, then Candidate A would be just shy of an Electoral College majority with 269, and expedited procedures would remain necessary in Ohio. (If Candidate B were the one to quickly win Nevada, with Ohio still unsettled, then the count would stand as A having 263, B with 257, and both needing Ohio to prevail.) It is true that in this scenario Candidate A needs only one of the two unsettled states, Ohio, to cross the threshold of an Electoral College majority. But because Candidate B needs to prevail in both Ohio and Nevada to reach the magic number of 270, expedited procedures are necessary in both.

b. Criteria for triggering expedition. Even if it is conceptually clear that expedition is necessary when uncertainty in one or more states causes uncertainty over whether a candidate has obtained an Electoral College majority, there need to be specific criteria for determining when the requisite uncertainty exists in a state.

The most important factor, but not the only one, is whether the candidates themselves believe that such uncertainty exists. Especially after 2000, no candidate is likely to concede if he or she believes that there still may be a chance of winning in overtime. Thus, if Election Night comes and goes without such a concession, and it is premised on public perception that one or more states remain "too close to call"—then the Chief Elections Officers in the relevant states know that they need to trigger expedited procedures, so that the outcomes in these unsettled states can be determined as quickly as possible.

At this initial stage of an unresolved presidential election, it is not important whether or not the candidate is correct in believing an outcome-determinative state to be "too close to call." Rather, the candidate's perception that it is so is enough to necessitate expedition in that state—at least for as long as the candidate believes the uncertainty to persist. Thus, for example, if on the morning after Election Day, a candidate's campaign announces (in effect), "We believe the election to still be undecided because Colorado is too close to call, and whoever wins Colorado

wins the White House," then Colorado needs to undertake expedited procedures until the candidates become convinced that Colorado is indeed settled.

But the assessments of the candidates themselves are not the only sufficient basis for triggering expedition. As 2000 itself showed, candidates sometimes mistakenly concede defeat, only to subsequently retract their concession. Thus, a state's Chief Elections Officer should be entitled—and required—to trigger expedited procedures if objective criteria establish a sufficient basis for reasonably believing that the state may still be in play (as long as the state is critical to determining the Electoral College majority winner). When the margin between the two leading candidates is less than one-quarter of a percent—and a candidate needs that state to reach 270 electoral votes—that fact alone should be enough to set in motion an expedited recount. As provided in § 317, the competing candidates can call off an expedited recount if, after sober reflection, they agree that one is not necessary. But it is far preferable to get an expedited recount underway and then subsequently call it off, rather than to realize too late that one is indeed necessary and then to have to play catch-up with less than 35 days available.

Subsection (b)(3) is included because an objective calculation of whether a state is in play depends not only on the margin between the two leading candidates but also on the number of uncounted ballots that potentially might be added to the count.

REPORTERS' NOTE

The idea of expedited procedures is hardly foreign to American law. Indeed, its application to elections—and specifically recounts—is not without precedent. Texas, for example, has a provision for an expedited recount in advance of a runoff election. See Texas Election Code Chapter 212, Subchapter D. The special need for expedition in the context of a runoff is apparent: the date for the runoff is fixed shortly after the initial election, and thus if there is doubt about which candidates qualify for the runoff, or whether the runoff is unnecessary because one candidate received a majority of votes in the initial election, this doubt needs to be resolved with special haste. Consequently, Texas law requires that "each recount committee involved in an expedited recount shall continue performing their duties on days that are not regular working days and during hours that are not regular working hours if necessary to complete the recount in time to avoid interfering with the orderly conduct of the scheduled runoff election." Id. § 212.089.

With respect to expediting the contest of a presidential election, Virginia has adopted the most comprehensive scheme of any state to date, and it is discussed in detail immediately following this overview. In addition, several states have statutes that require completion of a presidential contest by the Safe Harbor Deadline, but provide little or no specific instructions on how to structure the contest proceedings to achieve this objective. For example, California law simply provides:

> In a contest of the election of presidential electors the action or appeal shall have priority over all other civil matters. Final determination and judgment shall be rendered at least six days before the first Monday after the second Wednesday in December.

Cal. Election Code § 16003. Iowa law similarly requires that its court for a presidential contest "commence the trial of the case as early as practicable . . . and so arrange for and conduct the trial that a final determination of the same and judgment shall be rendered at least six days before the first Monday after the second Wednesday in December." Iowa Code § 60.5.

Even the little express statutory language that California and Iowa provide regarding expediting a presidential contest—making it a "priority" or starting it as soon as "practicable"—is more than what Indiana law provides. Indiana's applicable statute states only:

> As required under 3 U.S.C. 5, any recount or contest proceeding concerning the election of presidential electors must be concluded not later than six (6) days before the time fixed by federal law for the meeting of the electors.

Indiana Code § 3-12-11-19.5. This simple decree, however, is no assurance of compliance. In 2000, after all, Florida wanted to complete its judicial contest of the presidential election before the Safe Harbor Deadline (according to the Florida Supreme Court's interpretation of the applicable statutes, thereby making them essentially equivalent on this point to Indiana's minimalist decree). But Florida was unable to complete its contest procedures by that deadline, at least in a way that contained sufficient safeguards of due process and equal protection according to the standards set by the U.S. Supreme Court.

Part III and its Procedures take a dramatically different approach. They do not merely assert an obligation to finish by the Safe Harbor Deadline. Instead, they set forth a mechanism designed to accomplish this directive. The fundamental judgment that underlies Part III is that, based on the experience of not only Florida in 2000 but also recent high-profile disputes in nonpresidential elections, specifying this kind of structural mechanism is necessary and that otherwise it is illusory to expect compliance with a purely minimalist decree of the type that Indiana's statute exemplifies.[9]

Tennessee, by contrast, takes expedition of a presidential election to an extreme. It requires the resolution of a contest to occur "before the last day of November"—well before the expiration of the Safe Harbor Deadline. Tenn. Code § 2-17-103. But the state vests authority over the contest of a presidential election in a nonjudicial body "composed of the governor, secretary of state and attorney general." Id. Given the partisan nature of this "presidential electors tribunal," any questionable decision it might reach concerning the counting of ballots

[9] Connecticut law requires a contest of a presidential election to end "before the first Monday after the second Wednesday in December" but does not endeavor to take advantage of the Safe Harbor provision. Conn. Gen. Stat. Ann. § 9-323. Delaware law likewise empowers the Superior Court of Kent County to constitute "a special board of canvass to hear and determine all contests of elections of electors of President and Vice-President" with the authority to adopt procedures as necessary to comply with "the Act of Congress fixing the day of the meeting of electors." 15 Del. Code § 5927. (Delaware, however, has not updated the specific dates contained in its election code to comport with the congressional calendar for the Electoral College. Thus, when Delaware law says that certification of the results of a contested presidential election must occur "on or before January 1," § 5928, that date is inconsistent with the state's own requirement in § 5927 of the obligation to comply with the applicable Act of Congress.)

cast by citizens would invite litigation in some judicial forum, either state or federal, based on the constitutional principles articulated in Bush v. Gore and related cases.[10]

Georgia requires expedition for judicial contests of elections generally. As the Georgia Supreme Court has observed, "[t]he legislature has demonstrated that election contests are to be heard with the greatest of expedition." Swain v. Thompson, 635 S.E.2d 779, 781 (Ga. 2006). This observation has caused the state supreme court to strictly enforce filing deadlines associated with the litigation of a contest, including requiring dismissal of a contest for failure to comply with tight deadlines.[11] Nevada law expressly provides as a general matter: "Election contests shall take precedence over all regular business of the court in order that results of elections shall be determined as soon as practicable." Nev. Rev. Stat. § 293.413(2).

It is perhaps surprising that more states have not adopted specific procedural mechanisms for the expedited adjudication of disputes over the counting of ballots in a presidential election. See also Joshua Douglas, *Procedural Fairness in Election Contests*, INDIANA L.J. 1, 31 (2013) ("Surprisingly, not every state spells out how to decide election contests for presidential electors."). Even after the experience of Florida in 2000, states generally have not undertaken the effort to promulgate detailed procedures designed to maximize the chances of resolving a disputed presidential election within the five or six weeks necessary in light of the congressional Electoral College calendar. Indeed, Florida itself has adopted no such expedited process for a contested presidential election, despite being the state that ran out of time to conduct its proceedings in 2000, as justices of its own supreme court then lamented. See Gore v. Harris, 770 So. 2d 1243, 1273 (Fla. 2000) (Harding, J., joined by Shaw, J., dissenting) (quoting Vince Lombardi's aphorism: "We didn't lose the game; we just ran out of time."). Given Florida's status as a perennial presidential battleground, it would particularly do well to consider remedying this deficiency. To be sure, after 2000, Florida eliminated the punch-card machines and their "hanging chads," which caused the particular vote-counting dispute that prevented the state from completing adjudication of the pending judicial contest of election before the 2000 Safe Harbor Deadline. But Florida, like other states, has not created an expedited judicial process that would enable it to complete a contest of a presidential election that involved other issues, like those concerning provisional or absentee ballots.

Virginia's procedures for a disputed presidential election. One state to have undertaken an effort to coordinate recount and contest procedures in a presidential election so as to enable the state to meet the Safe Harbor Deadline is Virginia. (Ohio, as discussed in the Reporters' Note to § 313, has eliminated the availability of judicial contests for a presidential election, but this elimination is not coordination and, as explained therein, presents additional problems.) Virginia Code § 24.2-801.1 sets forth a special recount procedure for a presidential election, requiring the recount to be "completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the meeting of the electors." Virginia Code § 24.2-805, in turn, sets forth a special contest procedure for a presidential election, also requiring the contest to be

[10] Texas, even more surprisingly, vests authority to adjudicate a contested presidential election solely in the hands of the state's governor, Tex. Code §§ 221.002(e), 243.012(a), thereby inviting even more than Tennessee a lawsuit on the grounds of arbitrariness under Bush v. Gore.

[11] At least two states, Arizona and Ohio, have specific procedures for expedited appellate- or supreme-court consideration of election-related litigation, although these procedures are designed for emergency matters that need to be settled before the casting of ballots in an election. See AZ ST CIV A P Rule 10; Ohio S. Ct. Prac. R. 12.08.

"completed, in accordance with the provisions of 3 U.S.C. § 5, at least six days before the time fixed for the meeting of the electors."

Moreover, these two provisions cross-reference each other in an effort to work together to achieve an expeditious resolution of a disputed presidential election. Both the recount and contest proceedings must commence within two days after certification of the election by the State Board of Elections (and are commenced by a candidate who is not the certified winner filing a petition to initiate a recount or contest[12]). Section 805 explicitly mandates that "the contest shall not wait upon the results of any recount."

In addition, § 801.1 provides that the recount shall be supervised by a specially constituted three-judge court, just as § 805 provides for the adjudication of a contest of a presidential election. This presidential-contest court, under § 805, is "composed of the chief judge of [the Richmond] circuit court and two circuit court judges of circuits not contiguous to the City of Richmond appointed by the Chief Justice of the Supreme Court of Virginia." Similarly, § 801.1 states:

> As soon as a [presidential recount] petition is filed, the chief judge of the [Richmond] Circuit Court shall promptly notify the Chief Justice of the Supreme Court of Virginia, who shall designate two other judges to sit with the chief judge, and the court shall be constituted and sit in all respects as a [presidential-contest] court appointed and sitting under § 24.2-805.

This statutory language does not exactly say that the three judges who supervise the recount will be the same individuals as the three judges who will adjudicate the contest. Under the two provisions, the chief judge of the Richmond circuit court must be one of the three judges, so the recount and contest panels must overlap at least to that extent. But the statutory language does not entirely rule out that the Chief Justice of the Virginia Supreme Court could appoint two circuit judges, A and B, to supervise the recount panel and two different circuit judges, C and D, to adjudicate the contest. That reading of the statute would defeat the efficiency to be gained from having all three judges be identical for both the recount and contest of a presidential election, and thus that interpretation of the statute should be disfavored for that reason alone. In any event, there is nothing in the statute to prevent the Chief Justice from serving the value of efficiency by exercising the appointment authority to make all three judges identical for both functions (even if the statute does not strictly so require).

Virginia is certainly to be commended for undertaking an effort to coordinate its recount and contest procedures for a presidential election in a way to enable the state to meet the Safe Harbor Deadline. And Virginia is a state with particularly noticeable success in resolving high-profile disputes in statewide elections. From a U.S. Senate election in 1978 to a gubernatorial election in 1989 to two recent Attorney General elections, one in 2005 and another in 2013, Virginia has managed to reach closure of these disputed elections with relative dispatch—by mid-December in all four instances—and without contentious or protracted litigation. See Foley, BALLOT BATTLES at 248, 334-336 & Appendix. With this solid track record, Virginia deserves to have its special procedures for a disputed presidential election evaluated with deference and respect.

[12] To initiate a recount, the margin between the petitioning candidate and the certified winner must be "not more than one percent of the total votes cast for the two such candidates." Va. Code § 24.2-800(B).

Nonetheless, for several reasons the particular provisions that Virginia has adopted, while superior to those in other states, remain less than optimal. First and foremost, contrary to the approach reflected in this Part III and especially in this particular section of its Procedures, Virginia does not begin to implement its special provisions tailored to the exigent circumstances of a disputed presidential election until two weeks after Election Day. There is no statutory mechanism in Virginia for triggering expedition in a disputed presidential election immediately after Election Day in the circumstance when the nation and world know that the presidential election "is too close to call" and the outcome hangs on Virginia. Even in this situation, Virginia law expends the first two-fifths of the five-week period available under the Safe Harbor Deadline by proceeding as if the situation involved a conventional nonpresidential election. Only during the latter three-fifths of the five-week period do special procedures for a disputed presidential election begin to kick in. Waiting two-fifths of the way through the five-week period available is unwise, given the urgency of an unresolved and potentially litigation-filled presidential election. One cannot predict exactly what issues might arise during the five-week period, and there easily might end up being not enough time available at the back end because of the failure to enter into special expedited mode at the beginning of the process.

Both § 801.1, the presidential-recount provision, and § 805, the presidential- contest provision, explicitly refer to the certification of the election under § 24.2-679 as the predicate for commencing special expedited proceedings in a disputed presidential election. A candidate cannot formally request a recount, and thus start the official recount process, until there has been a certification of the election under § 679 and it is determined that the candidate is within one percent of the certified winner. See § 800. Likewise, a candidate cannot contest a presidential election under § 805 until after it has been certified under § 679.

But § 679 applies to all elections not just presidential ones. And it provides that the State Board of Elections shall meet to certify a November election "on the third Monday in November." This day will always be 13 days after Election Day, which is the first Tuesday after the first Monday. Thus, there will always be a passage of essentially two weeks before the particular presidential provisions of §§ 801.1 and 805 apply. Virginia law sets forth rules for what must occur prior to the State Board's certification under § 679—rules that govern what this Part III terms the conduct of the canvass. But these pre-certification rules apply generally to presidential and nonpresidential alike, and there is no provision for special expedition of the canvass solely as it pertains to an unresolved and disputable presidential election. Thus, Virginia law fails to take advantage of the possibility of expediting proceedings in an unresolved presidential election immediately after Election Day (and certainly before the canvass is certified two weeks later).

Somewhat acknowledging this deficiency, § 801.1—the provision for a presidential recount—contains this hortatory request: "Presidential candidates who anticipate the possibility of asking for a recount are encouraged to so notify the State Board by letter as soon as possible after election day." But this kind of supplicating language—almost beseeching or imploring—is odd for a statute. It certainly is no substitute for the kind of mandatory trigger of an expedited presidential recount that this Part III and its Procedures contain. All of the research and analysis undertaken as preparation for this Part III, including meetings with local and statewide election officials experienced with the conduct of high-profile recounts, has led to the judgment that all states, including Virginia, would benefit from a provision that triggers expedition in an unresolved presidential election immediately after Election Day. This expedition, as provided by

this Part III and its Procedures, entails immediate commencement of the recount, rather than treating the canvass as if it were a conventional nonpresidential election and waiting until certification of the canvass before beginning the expedited presidential recount.

A second and somewhat related concern about Virginia's procedures for a disputed presidential election is their omission of any specified process for addressing issues that arise concerning the eligibility of disputed ballots, like those that afflicted Washington's 2004 gubernatorial election or Minnesota's 2008 U.S. Senate election. Section 24.2-802, which governs presidential as well as nonpresidential recounts, expressly states: "a recount shall be based on votes cast in the election and shall not take into account any absentee ballots or provisional ballots sought to be cast but ruled invalid." Presumably, if evidence showed that enough invalidated absentee or provisional ballots had been wrongly invalidated to make a difference in the outcome of the race—the kind of claim at the heart of Minnesota's 2008 election and also prominent in Washington's 2004 dispute—this claim could be litigated in a contest under § 805. But as discussed more fully in the Reporters' Note to § 310 (see also the Comment to § 308), experience shows that in a high-profile disputed election, there will be overwhelming pressure to litigate the eligibility of these ballots prior to certification of the canvass, rather than waiting for a judicial contest. This pressure, already intense in a U.S. Senate or gubernatorial election, would be withering if the presidency is on the line. Thus, during the two weeks prior to certification of the canvass in Virginia, if there were a serious dispute over uncounted but potentially eligible ballots, as in Minnesota or Washington, the candidates would pursue all possible avenues to litigate the eligibility of those ballots immediately, in some sort of pre-certification proceeding. Virginia, however, has no provision to handle this contingency. Accordingly, the inevitable litigation—perhaps seeking a writ of mandamus or invoking some other form of emergency judicial relief—will be more disorderly and chaotic than would be the case if a statute specified a procedure to handle this kind of claim. This disorder and chaos invites the kind of delay that risks the inability to complete proceedings within the Safe Harbor Deadline, thereby defeating Virginia's explicit goal for its special recount and contest procedures for a disputed presidential election. Consequently, like other states, Virginia would be better served by having a special proceeding for judicial review of ballot-eligibility determinations made during the canvass, like the special proceeding set forth in § 310 of these Procedures.

Finally, it is unclear whether Virginia permits an appeal to the state's supreme court in a contest under § 805. Virginia expressly precludes any appeal in a recount under § 801.1. See § 802 ("The recount proceeding shall be final and not subject to appeal.") But the relevant statutes appear to contain no comparable provision, one way or the other, regarding the possibility of an appeal in a presidential contest. Given the explicit obligation of the three-judge contest court to complete its adjudication of the contest by the end of the Safe Harbor Deadline, but no sooner, there would be no time for an appeal if the contest court used up all the time available to it under § 805. Yet in a disputed presidential election, if a candidate thought an issue of substance might interest the members of the Virginia Supreme Court, the candidate is likely to knock on that court's door by way of a writ of mandamus or otherwise, unless explicitly prohibited from doing so. Cf. Kirk v. Carter, 202 Va. 335, 117 S.E.2d 135 (1960) (mandamus granted by Virginia Supreme Court of Appeals to require convening of three-judge contest court). Thus, if such a mandamus petition were filed in the Virginia Supreme Court, the state's statutes leave uncertain whether the state could complete its available judicial proceedings in a disputed presidential election by the end of the Safe Harbor Deadline, as evidently desired.

For all of these reasons, Virginia would do well to reevaluate its set of special procedures for a disputed presidential election. While the state is to be lauded for being at the forefront of the effort to develop an orderly system for this kind of dispute, this Part III and its underlying reasoning provide a preferable approach to the state's objective to achieving Safe Harbor status.

§ 304. Appointment and Authority of Presidential Election Court

(a) Within 24 hours of the Chief Elections Officer's declaration pursuant to § 303, the Chief Justice publicly shall either (1) announce the appointment of three judges to serve as the Presidential Election Court; or (2) if before the election three judges were contingently appointed to serve in this capacity, confirm this prior appointment.

(b) The authority of the Presidential Election Court, as set forth in these Procedures, is exclusive, to be exercised without interference from any other body, except insofar as a right of appeal to the State Supreme Court is provided pursuant to these Procedures;

(c) The Presidential Election Court, as a court of law, has the power to enter such orders common to any ordinary court of law within the state, including orders to permit parties to its proceedings to conduct such discovery that may assist any factfinding the Court may undertake; provided that any such orders be consistent with the expedited nature of these Procedures.

(d) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, no court or other tribunal or agency of this state may extend or otherwise delay any deadline set forth in these Procedures.

(e) The Presidential Election Court and the State Supreme Court may set subsidiary deadlines and promulgate other subsidiary rules in order to facilitate implementation of these Procedures, provided that all such subsidiary deadlines and rules are consistent with these Procedures and do not alter any of its deadlines and provisions.

(f) These Procedures are designed so that compliance with them is consistent with federal law, including the federal Constitution, and therefore should not require any adjustment by the federal judiciary.

Comment:

a. Timing of appointment. It is highly advisable for the appointment of the Presidential Election Court to occur before the casting of ballots that the Court might be called upon to review. This is true for several reasons. First, in keeping with the basic philosophy of the congressional Safe Harbor provision of 3 U.S.C. § 5, it is better for the procedures that will be used to resolve a ballot-counting dispute in a presidential election to be determined in advance of the election itself. This basic idea includes the identity of the judges who will be called upon to adjudicate a dispute in the event that one arises. If both major political parties embrace the appointment of specific individuals to serve on this panel before the ballots are cast, then neither side should be heard to complain about the identity of the panel after the ballots are cast, when the two sides now have very specific strategic interests depending on who is ahead and behind in the count. Although appointing the Presidential Election Court's members after Election Day should not deprive these Procedures of Safe Harbor status under 3 U.S.C. § 5 as long as the appointment is made pursuant to law in place prior to Election Day—and thus this Section is written to accommodate either prior or subsequent appointment pursuant to previously enacted law—it remains the strong recommendation that the appointment occur in advance of the election.

b. The Presidential Election Court as a judicial court of the state. These Procedures are drafted to give states maximum flexibility in the choice of the institution to serve the functions of the Presidential Election Court under these Procedures. The Presidential Election Court is envisioned as a judicial court of law, because some of its key functions are those traditionally associated with courts—most obviously, the judicial contest of an election, but also judicial review (whether by means of a writ of mandamus or otherwise) of the administration of the canvass, as well as judicial review of the recount. Moreover, in a disputed presidential election, it is virtually inevitable that the courts will become involved in litigation over the ballots, whatever particular form the litigation takes. The Presidential Election Court is designed to be an institution that can handle whatever state-court litigation occurs under state law during the five-week period between Election Day and the Safe Harbor Deadline.

The simplest way for a state to fit this Presidential Election Court within the existing structure of a state's judiciary is to have the Chief Justice select three state judges, all of whom are already members of the state's judiciary, to serve on this special-purpose court. They could

be appeals judges or trial judges, or a combination. Special-purpose judicial panels often are assembled for particular cases: complex or multidistrict litigation, for example. Thus, appointing a special panel to adjudicate the distinctively challenging litigation that arises in the context of a disputed presidential election would be well within the judicial tradition of appointing special-purpose panels for a variety of distinctive kinds of cases.

The Procedures, however, would permit a state to experiment with different ways of appointing its Presidential Election Court. If a state wished to confine selection to the pool of retired rather than active judges, for example, there is nothing in these Procedures that would preclude the state from doing so. Indeed, if (insofar as permitted by other provisions of state law) the state wished to look beyond the members of its own judiciary, active or retired, for possible service on its Presidential Election Court—perhaps believing that there are esteemed public figures in the state best suited for the delicate role of adjudicating a disputed presidential election—the Procedures are drafted in a way to accommodate that alternative as well. A state could also experiment with different procedural devices to constrain the appointment of the Presidential Election Court. For example, the state could require the Chief Justice to select three individuals from a list deemed acceptable to the majority and minority caucuses within the state legislature. Although no such requirement is part of these Procedures as drafted, a state that adopted these Procedures would be free to supplement them with additional provisions concerning the appointment of the Presidential Election Court if the state wished. Absent any such additional specifications, however, it should be assumed that the Chief Justice is to select three active state judges for special assignment to the Presidential Election Court.

c. Each state's Presidential Election Court as a single body to handle multiple functions. The one constraint that these Procedures do impose is to channel all litigation that may arise within a state concerning disputed presidential ballots to a single institution for adjudication. In order to engineer the procedural efficiency to enable a state to meet the five-week Safe Harbor Deadline, a single court must be empowered to hear all issues arising over the ballots. There is too great a risk of unnecessary delay if some additional body needs to reconcile potentially conflicting rulings and pronouncements from multiple judicial bodies within the state.

For this essential reason, these Procedures give the Presidential Election Court the authority to adjudicate any judicial contest over the presidential election in the state, and also to

conduct any judicial review of administrative decisions that occur during the canvass, as well as to resolve all disputes that occur in the context of the recount itself.

d. A Presidential Election Court in each state. It should be clear from the scope of its powers under these Procedures that the Presidential Election Court is a state court, and not a federal one. It derives its adjudicatory authority from state law, although the state's own power to grant one of its courts this adjudicatory authority ultimately stems from the state's power to appoint presidential electors, vested by Article II of the federal Constitution. A state's Presidential Election Court has jurisdiction solely over disputes arising from the November balloting to appoint that particular state's presidential electors. Its jurisdiction does not extend to similar disputes that may arise over the appointment of a different state's presidential electors.

Thus, it is possible that there may be simultaneously two or more different Presidential Election Courts conducting separate adjudicatory procedures in separate states. Just as the Chief Elections Officer of two or more states may need to trigger an Expedited Presidential Recount in their respective states, as explained in the Comment to § 303, so too may the Chief Justices of these multiple states need to announce the appointment of a Presidential Election Court in each of these states. Thus, for example, if expedited proceedings are occurring simultaneously in both Ohio and Nevada (as in Illustration 3 above), it will be necessary to distinguish between the Presidential Election Court of Ohio (PEC-OH) and the Presidential Election Court of Nevada (PEC-NV).[13]

e. Three members, rather than five or one (or some other number). These Procedures call for a three-member Presidential Election Court. Obviously, with minor adjustment, a state could employ these Procedures with a five-member panel instead. A state even could give the assignment of all the functions to be performed by the Presidential Election Court to a single judge.

The Procedures, however, use three as the optimal number for several reasons. First, it must be an odd number to avoid the possibility of a tie. Second, one judge alone does not enable the increased confidence in the outcome that potentially comes when several members of a multimember body agree in their rulings. Obviously, dissent within a multimember body creates

[13] A state might also choose to give an alternative name to the judicial panel that functions as the Presidential Election Court under these Procedures. For example, a state wishing to be especially precise could denominate this judicial body as the Court for the Adjudication of Disputes over the Appointment of Presidential Electors. But one goal of these Procedures is to be as accessible and understandable to the general public as possible. Given this goal, Presidential Election Court seems a more straightforward name.

the converse problem, generating public concern about the basis for the dissent. But on balance the upside of consensus is preferable to the downside of dissent. With a single judge, from the outset the state is deprived of this potential upside. Third, five judges rather than three significantly increases the risk of dissent, lowering the likelihood of consensus. Five also increases coordination challenges, a concern when the time pressure is acute, as it is during this five-week period. As a related point, it is more difficult to generate collegial working relationships among a five-member, rather than three-member, panel, especially one that is a single-purpose entity that exists only for a short duration. The state's supreme court also has a major role under these Procedures, and it is likely to have more than three members. Thus, there is little to be gained from another larger judicial body involved in the adjudication of disputed presidential ballots. On balance, it is best to have a three-member panel with appeal to the existing state supreme court.

f. The role of the federal judiciary and the importance of non-disruption of these Procedures insofar as they operate as anticipated. Part III and its Procedures have been crafted with the recognition that, in a genuinely disputable presidential election (where there are creditable issues worthy of litigation that could determine which candidate is the winner of the White House), the competing candidates will consider employing—and likely end up employing—every avenue of judicial process that is potentially available for the adjudication of these issues, with each candidate focusing especially on those forums perceived to be more favorable to the political party to which the candidate belongs. In this light, one of the most important recent developments in American election law, epitomized by Bush v. Gore itself, is the power of the federal judiciary to invoke the Fourteenth Amendment as grounds for supervising the counting of ballots by institutions of state governments, including state courts. These Procedures, insofar as they are adopted as elements of state law, are of course subject to the supremacy of federal law; and the jurisdiction of the state judiciary, including the state supreme court, is ultimately subject to the jurisdiction of the U.S. Supreme Court on any issue of federal law, as Bush v. Gore also illustrates. Thus, these Procedures in no way purport to do what they obviously could not do given federal supremacy: they cannot, and thus do not, deprive the federal judiciary of the authority that it possesses to require that state vote-counting processes comply with the demands of the Fourteenth Amendment.

Even so, it is also important to recognize that federal-court interference with a state's vote-counting procedures may be controversial and perhaps counterproductive in terms of the values of producing a fair and accurate count in a timely manner. Bush v. Gore itself was intensely controversial, and other instances of federal-court intervention in a state's vote-counting procedures have caused considerable delay in the resolution of the affected elections. Delay, of course, is particularly problematic in the context of the limited 35-day period for a state to achieve Safe Harbor status in a disputed presidential election—or the slightly longer 41-day period before the constitutionally required meeting of the presidential electors in all states. To be sure, if a state's procedures for resolving a disputed presidential election fall below the standards of the Fourteenth Amendment, then it may be incumbent upon the federal judiciary to intervene to invalidate and, if possible, rectify the Fourteenth Amendment violation, even recognizing the delay (including potential jeopardy to Safe Harbor status) that the federal-court intervention causes. But an essential component of these Procedures is that they are designed with the aim of satisfying applicable Fourteenth Amendment standards. Thus, if a state employs these Procedures and adheres to them in their implementation, then the state reasonably should be able to expect that the federal judiciary will not interfere with their operation.

To reiterate and underscore this point for emphasis, given its particular importance, a federal court should do nothing to delay any element of these Procedures insofar as they are being followed by the relevant institutions of state government, including the state's Presidential Election Court, according to their provisions. A federal court should not issue a Temporary Restraining Order (or preliminary injunction) that disrupts the anticipated operation of these Procedures, even for a brief period of time. All of the deadlines included in these Procedures have been carefully considered, are intricately connected with each other, and have no margin of adjustability, given all that needs to occur within the limited 35-day period. For a federal court to disrupt the schedule set forth in these Procedures, even if only by 24 hours, is to undo the entire engineering endeavor that these Procedures embody. Thus, there would need to be particularly good reasons for a federal court to engage in such disruption, and such sufficient grounds would exist only if these Procedures were *not* being followed as intended.

In the heat of the battle over the outcome of a presidential election, the federal judiciary undoubtedly can expect one side to seek its assistance in disrupting the operation of these Procedures. One side, after all, will perceive itself to be in the weaker position under the relevant

vote-counting provisions of state law. As long as these Procedures are faithfully followed, however, the federal judiciary should refrain from interfering with an effort to obtain Safe Harbor status. Rather, the federal judiciary should let the Procedures play out to the end of their 35-day schedule. If at that point the federal judiciary firmly believes that some fundamental unfairness in violation of the Fourteenth Amendment taints the vote-counting resolution achieved by these Procedures, then the federal judiciary can void the result, thereby forcing the state legislature to invoke its authority to provide for an alternative means of appointing the state's presidential electors. But the federal judiciary, especially after 2000, should recognize the danger of being drawn into the partisan fight between the two presidential campaigns and thus should find the existence of a Fourteenth Amendment violation only when the federal-court ruling commands sufficient judicial consensus to avoid being itself characterized as an exercise of partisanship.

g. The relationship of the Presidential Election Court and the state's supreme court. These Procedures give a crucial role both to the special Presidential Election Court as the single court of original jurisdiction empowered to adjudicate all issues arising over the counting of the state's ballots in the presidential election and to the state's supreme court insofar as it is empowered to exercise appellate jurisdiction over the Presidential Election Court. In this respect, these Procedures repose great trust in both of these state judicial institutions. It is up to those institutions to show themselves worthy of this trust, or else risk the intervention of the federal judiciary notwithstanding the presumption against federal-court interference (described above) as long as the state courts comply with these Procedures.

The State Supreme Court should consider itself bound by these Procedures, even if the state's supreme court is the institution that promulgated them into state law. Safe Harbor status requires following the law as it existed on Election Day, and the State Supreme Court should endeavor faithfully to follow the state law then in effect, including these Procedures. Insofar as a State Supreme Court *sua sponte* deviates from these Procedures, not only does the State Supreme Court risk depriving the state of Safe Harbor status but also inviting federal-court involvement since the presumption of regularity no longer applies.

Subsection (e) makes clear that the State Supreme Court is bound by these Procedures and should view itself as so bound. Nonetheless, like the Presidential Election Court, the State Supreme Court is empowered to promulgate supplementary rules consistent with these

Procedures, in an effort to enhance their effectiveness. When both courts promulgate supplementary rules in this way, those of the State Supreme Court take precedence, given the court's higher authority within the state's judicial system.

REPORTERS' NOTE

a. Specialized election courts. The idea of a special court to adjudicate a dispute over the counting of ballots in an election is not novel. Minnesota used special three-judge courts to adjudicate contests of its 1962 gubernatorial election and its 2008 U.S. Senate election. See Foley, BALLOT BATTLES, chapters 9 & 12. In both instances, the Chief Justice of the state was authorized to designate three members of the state's judiciary to form the special panel. Both times, this power was used to create a panel with the appearance of impartiality. For the 1962 gubernatorial, the Chief Justice required the two candidates to pick the three judges, thereby assuring a measure of bipartisanship in the panel's composition. (The two candidates picked one judge appointed by a Republican governor, a second judge appointed by a Democratic governor, and the third judge had been appointed to one judicial position by the governor of one party and a second judicial position by a governor of the other party.) For the 2008 U.S. Senate election, informal consultation with other members of the Minnesota Supreme Court led to the selection of one judge appointed by a Democrat, another appointed by a Republican, and the third appointed by Governor Jesse Ventura of the state's Independence Party. The resulting panel was nicknamed the "tripartisan" court by journalists covering the dispute.

While Minnesota deserves praise for the particular ways in which it has composed its special three-member courts for adjudication of high-stakes election contests—and these Procedures permit a state to use these or similar methods of selecting judges in order to achieve an appearance of impartiality for the adjudication of a contested presidential election—these Procedures do not impose any particular method of selecting the members of a state's Presidential Election Court. Part II of this project encompasses an overarching principle of impartiality that should govern the resolution of disputed elections, and it would violate that principle for the Chief Justice of the state to select three judges from the same partisan background to serve on the Presidential Election Court. Regardless of whether a state formally adopts Part II of this project as part of its law, it would be hoped that the Chief Justice of a state would not undertake the task of appointing judges to the Presidential Election Court in that kind of blatantly partisan manner. Rather, one would hope that the basic idea of "fair play" imbedded in American culture would cause the Chief Justice to exercise this appointment authority in a more evenhanded manner. Minnesota, after all, did not need any formal rules to yield the balanced panels utilized for its 1962 and 2008 disputed elections. In both cases, the relevant statute left appointment of the three-judge panels to the Chief Justice's unfettered discretion. Similarly, these Procedures do not themselves impose any explicit constraints on the exercise of the Chief Justice's authority to appoint the members of the Presidential Election Court. In this way, a state can use these Procedures to replicate the Minnesota situation. But these Procedures are also consistent with a state adopting supplemental rules to require a Chief Justice to use a specific method of appointing the Presidential Election Court in order to maximize the objective of impartiality. Thus, these Procedures leave states with wide discretion concerning the policy choice of how best to appoint the members of the special Presidential Election Court for the adjudication of a disputed presidential election.

Several states have provisions similar to Minnesota's for the appointment of special courts to adjudicate election contests. Kansas vests the adjudication of a contested presidential election in a three-judge court appointed by the Kansas Supreme Court (not its Chief Justice alone). Kan. Stat. Ann. §§ 25-1437 & 25-1443. For a contested presidential election, as discussed in the Reporters' Note to § 303, Virginia also uses a special three-judge court, two members of which are appointed by the state's Chief Justice and the third is the chief judge of the circuit court in Richmond. Va. Code Ann. § 24.2-805. North Dakota employs a three-judge panel, one of whom is the state's Chief Justice and the other two are district judges designated by the state's governor. N.D. Cent. Code § 16.1-14-07.[14] Maryland will empanel a three-judge court for a contested presidential election upon request of a party or at the discretion of the trial court in which the contest is filed. Md. Code Ann., Elec. Law § 12-203. Iowa uses a special five-judge panel, consisting of the Chief Justice and four district-court judges that the supreme court selects. Iowa Code § 60.1. For a valuable discussion of these provisions, see Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 INDIANA L.J. 1 (2013).[15]

Connecticut assigns the litigation of a disputed presidential election to a special panel of three Supreme Court judges, two of which are chosen by the "Chief Court Administrator" and the other selected by the candidate "who claims . . . that there was a mistake in the count of the votes." C.G.S.A. § 9-323. Two states vest original jurisdiction over a contested presidential election directly in the full State Supreme Court: Colorado and Hawaii.[16] This project considered adopting this approach, thereby dispensing with a separate appeal to the State Supreme Court. Doing so has the obvious benefit of saving time, no small consideration in the context of a disputed presidential election. But even if original jurisdiction over a contested presidential election is vested directly in a State Supreme Court, that court is likely to designate a special master or some similar subsidiary authority to conduct any trial or other factfinding hearing that involves the presentation of testimony. Indeed, Missouri expressly authorizes its State Supreme Court to appoint a commissioner to assist its adjudication of a contested election (a provision applicable to other statewide offices but not expressly to presidential elections). Mo. Stat. §§ 155.555, .561.[17] Thus, in the adjudication of any ballot-counting dispute there inevitably is two component parts of the process: the finding of facts based on the receipt of evidence, and the determination of applicable legal rules. Given this reality, there are benefits of employing a Presidential Election Court to conduct the factfinding trial and make a preliminary ruling on the applicable legal issues, before permitting an appeal to the State Supreme Court. For one thing, in recent years a number of state supreme courts have become mired in political controversy. A state can reduce the risk of such controversy engulfing the adjudication of a disputed presidential

[14] "I the chief justice is unable to attend at such trial, the next senior judge on the supreme court shall preside in place of the chief justice." Id.

[15] For contests of certain kinds of nonpresidential elections, West Virginia employs a procedure in which the contestant chooses one judge, the contestee another, and the governor the third. W. Va. Code § 3-7-3. Pennsylvania has a rather odd provision, applicable to a presidential election and some (but not all) other elections in the state, pursuant to which jurisdiction over the contest lies in a court of *two* judges. Pa. Stat. §§ 3291, 3351.

[16] See Joshua Douglas, *Procedural Fairness in Election Contests*, 88 INDIANA L.J. 1 (2013) (appendix), citing Colo. Rev. Stat. § 1-11-204 & Haw. Rev. Stat. §§ 11-171 to -175. Maine similarly vests an appeal of a recount in its state supreme court. Me. Rev. Stat. tit. 21-A, § 737-A(10).

[17] Nevada has a similar provision: "The court may refer the contest to a special master in the manner provided by the Nevada Rules of Civil Procedure, and such special master shall have all powers necessary for a proper determination of the contest." Nev. Rev. Stat. § 293.413(3).

election by setting up a special Presidential Election Court for this purpose, rather than vesting this adjudication directly in its State Supreme Court. In addition, employment of a Presidential Election Court rather than a single special master or commissioner to engage in the necessary factfinding is likely to inspire greater public confidence (for the same reason that a three-judge panel is preferable to a single judge for this kind of case, as discussed in the Comment above). But if a state wishes to vest original jurisdiction over a disputed presidential election in its Supreme Court, rather than relying on a Presidential Election Court for this purpose, then a state can modify these Procedures to eliminate the appeals provided in §§ 307, 312, and 315.[18]

One important point to note when considering the relative advantages of using a special Presidential Election Court, rather than vesting original jurisdiction in the State Supreme Court, is that Part III of this project recognizes that any election contest is but one particular form of judicial procedure to be invoked in a disputed presidential election. As discussed in the Introductory Note, there are also, potentially, petitions seeking judicial review of the recount or canvass. Without a special Presidential Election Court, either the State Supreme Court will be tied up with original jurisdiction over all these forms of procedure or else various trial courts in the state may have conflicting jurisdiction over different forms of litigation (for example, one trial court hearing claims concerning the recount and another hearing claims concerning the canvass). An advantage of the approach adopted in these Procedures is that it vests all of these potential judicial proceedings in a single Presidential Election Court, achieving the benefits of channeling all this litigation to a single judicial body while simultaneously freeing up the State Supreme Court to consider only appeals of the Presidential Election Court's rulings as necessary (so that the State Supreme Court is not burdened with every detail of all this litigation).

b. The potential role of federal courts in the resolution of a state's vote-counting dispute. No issue looms larger over the ability of a state to complete all of its proceedings for a disputed presidential election by the Safe Harbor Deadline—whether the state uses these Procedures or otherwise—than the possibility that the federal judiciary will intervene in the middle of the state's proceedings. If the federal court does intervene, then a state is no longer in control over whether it will be able to complete its own proceedings before the Safe Harbor clock runs out. The federal judiciary can order the state to redo some of its proceedings, thereby taking extra time that would push the state beyond the Safe Harbor Deadline. (Indeed, that kind of "redo" order is what the four dissenters in Bush v. Gore wanted, instead of the majority's decree to shut the process down in order to finish before Safe Harbor time expired.) Or a lower federal court might enjoin certification of the canvass, notwithstanding a deadline to do so under state law, in order to give the federal court time to rule on constitutional claims raised about the counting of ballots during the canvass. That kind of federal court injunction is what halted an Ohio election

[18] It would also be possible for a state to vest original jurisdiction in the Presidential Election Court and then expressly preclude any right of appeal to the State Supreme Court, making the Presidential Election Court's judgments absolutely final and conclusive. This option was also seriously considered for purposes of this project but ultimately, on balance, these Procedures retain appellate jurisdiction for the State Supreme Court. The reason for doing so is the belief that the public more likely will believe the entire process (and thus the result the process reaches) more legitimate if the traditional State Supreme Court is not entirely divested of a role in reviewing the legal issues that arise. If, however, a state wishes to use these Procedures for the way they structure litigation in the Presidential Election Court, but simultaneously preclude any appellate review in the State Supreme Court, a state could simply eliminate the appellate provisions of §§ 307, 312, and 315—just as it could if it vested original jurisdiction in the State Supreme Court.

for more than 20 months—obviously long past what would have been the Safe Harbor Deadline if it had been a presidential election.

The competing presidential candidates, of course, will attempt to use the federal judiciary to their advantage if they perceive it in their strategic interest to do so. Consequently, there inevitably is potential tension between the jurisdiction of the federal judiciary and the state's own institutions in resolving a dispute over the counting of ballots in the presidential election—and this tension is susceptible to manipulation and exploitation for partisan purposes. Although the power of the federal judiciary under the federal Constitution cannot be negated simply by the improvement of state procedures under state law, the occasion for the exercise of those federal powers may diminish, as a state amends its law to put its own ballot-counting house in order (so to speak). Insofar as Part III and its Procedures reflect a concerted effort to make the mechanism for a state's counting of presidential ballots as sound as possible, adoption of these Procedures by a state should be a signal to the federal judiciary to think carefully before intervening in a manner that would disrupt the state's efforts to complete its ballot-counting process in time to obtain Safe Harbor status.

With this general observation in mind, it is worth reflecting on the historical status of the proposition that the federal judiciary might involve itself in a ballot-counting dispute. Although anticipated by Justice John Marshall Harlan in dissent in 1900, this proposition did not become governing law until the end of the 20th century. Moreover, even as it took root, it was potentially tempered by the availability of the abstention doctrine (and other gate-keeping) devices in order to protect the ability of a state to administer its own ballot-counting process without undue interference.

Prior to the transformation of the political-question doctrine in Baker v. Carr, and with it the flourishing of the one-person-one-vote requirement of the Fourteenth Amendment as interpreted in Reynolds v. Sims, there was no role for the federal judiciary in the litigation of vote-counting controversies. Indeed, the U.S. Supreme Court explicitly repudiated any such role for the federal judiciary in Taylor v. Beckham, which involved a claim that ballot-box stuffing in Kentucky's 1899 gubernatorial election amounted to a Fourteenth Amendment violation. The Court confirmed this jurisdiction-negating interpretation of the Fourteenth Amendment in Snowden v. Hughes, and the unequivocal command of these precedents is what caused Justice Hugo Black to order dismissal of the federal-court suit that sought to overturn the ballot-box stuffing on behalf of Lyndon Johnson in his 1948 bid for the Senate. See Edward B. Foley, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES (2016).

This longstanding jurisprudence, however, did not survive the transformation in election law that Baker v. Carr and Reynolds v. Sims wrought. Although those Warren Court precedents specifically concerned the apportionment of seats in a state's legislature, and not the counting of ballots, the essential principle that all eligible voters equally deserve fair electoral rules—which is what underlies those precedents—eventually was applied in the context of vote-counting controversies, thereby empowering federal courts to supervise a state's vote-counting fairness. See, e.g., Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (state-court invalidation of absentee ballots after they are cast violates the Fourteenth Amendment when state election officials, relying on explicit state statutes, instructed voters that they were entitled to cast those absentee ballots); Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) (to count an absentee ballot that is invalid under explicit state law violates the Fourteenth Amendment). In Bush v. Gore, the U.S. Supreme

Court itself would apply those Warren Court precedents in this way for the first time, but the lower federal courts already had done so for over two decades.

Moreover, in adjudicating these Fourteenth Amendment claims concerning a state's vote-counting fairness, the lower federal courts sidestepped various procedural issues raised in an effort to prevent their consideration of the merits of these claims. For example, the so-called "*Rooker–Feldman* doctrine" was raised, arguing that federal-court adjudication of the Fourteenth Amendment claims would amount to an attempt to revise a state-court judgment in an original, rather than appellate, federal-court suit. But the *Rooker–Feldman* argument was defeated simply by filing the federal-court suit in the name of voters who were not parties to the state-court proceedings. See, e.g., Roe v. Alabama, 43 F.3d at 580.

The argument was also made that a federal court should abstain from adjudicating Fourteenth Amendment claims concerning the counting of ballots while state-court litigation over the counting of those same ballots remains pending. This argument carried some force, but only deferred the federal court's ultimate ruling on the Fourteenth Amendment claims. Moreover, the federal court could retain jurisdiction while the matter remained under consideration in state court, and the federal court could even go so far as to enjoin certification of the election until after the court was finished adjudicating the Fourteenth Amendment issues. See, e.g., Roe v. Alabama, 43 F.3d at 582-583.

In the disputed presidential election of 2000, there was lower federal-court litigation of Fourteenth Amendment claims as well as the U.S. Supreme Court's review of the Florida Supreme Court's rulings in both Bush v. Palm Beach Canvassing Board and Bush v. Gore. In Siegel v. Lepore, 234 F.3d 1163 (11th Cir. 2000) (en banc), the Bush campaign on Fourteenth Amendment grounds sought a federal-court injunction against the manual recounts that the Gore campaign had asked the canvassing boards of four Florida counties to undertake. On December 6, 2000, the Eleventh Circuit (in an 8-4 vote) affirmed the denial of the requested injunction, but it did so not for jurisdictional reasons, but rather specifically on the ground that the Bush campaign, at least at that stage of the proceedings, had failed to demonstrate an irreparable injury that would justify enjoining the recounting of ballots. "At the moment, the candidate Plaintiffs (Governor Bush and Secretary Cheney) are suffering no serious harm, let alone irreparable harm, because they have been certified as the winners of Florida's electoral votes notwithstanding the inclusion of manually recounted ballots." Id. at 1177.

In this federal-court lawsuit, the Eleventh Circuit considered—but rejected—jurisdictional arguments raised against its reaching the merits of Bush's claim for injunctive relief. As to the *Rooker–Feldman* doctrine, the Eleventh Circuit ruled it inapplicable because there was no pending state-court judgment that the federal-court plaintiffs were attempting to undo (the U.S. Supreme Court, as of that date, having already vacated the first Florida Supreme Court decision in Bush v. Palm Beach Canvassing Board). See Siegel v. Lepore, 234 F.3d at 1172. The Eleventh Circuit also observed: "The parties to this case are not the same parties that appeared before the Florida Supreme Court." Id. n.5.

The abstention doctrine was also raised in the Eleventh Circuit litigation over the 2000 presidential election, but the Eleventh Circuit found no basis to abstain—and on this point, as concerning the *Rooker–Feldman* doctrine, the Eleventh Circuit was unanimous. The Eleventh Circuit considered both the *Burford* and *Pullman* strands of the abstention doctrine, but found both strands inapplicable. *Burford* abstention concerns the protection of state administrative

processes from federal-court interference. The Eleventh Circuit saw no risk of the Bush campaign's lawsuit interfering with Florida's administration of its recount laws, since "the crux of Plaintiffs' complaint is the absence of strict and uniform standards for initiating or conducting such recounts." Siegel v. Lepore, 234 F.3d at 1174. *Pullman* abstention exists to give state courts the chance to resolve a matter without need for federal-court involvement. The Eleventh Circuit acknowledged that *Pullman* presented "the most persuasive justification for abstention" in the specific context of the case, but ultimately concluded that abstention was "inappropriate" because "Plaintiffs allege a constitutional violation of their voting rights." Id. at 1174. If the Eleventh Circuit is correct on this point, it would mean that *Pullman* abstention is never justified when one side in a campaign claims a Fourteenth Amendment violation in the counting of ballots.

Since 2000, the lower federal courts have been mixed on whether to abstain in vote-counting cases when disputes over the same ballots are pending in state court. The Sixth Circuit, for example, following the Eleventh Circuit's lead, refused to abstain from addressing Fourteenth Amendment claims concerning the rejection of provisional ballots in a 2010 Ohio election. Hunter v. Hamilton County Board of Elections, 635 F.3d 219, 233 (6th Cir. 2011). The Sixth Circuit said that *Pullman* abstention "is appropriate only when state law is unclear" and the state supreme court had already clarified that under state law the disputed provisional ballots should not be counted. Id.

By contrast, in the litigation over the counting of write-in ballots in Alaska's 2010 U.S. Senate election, the federal district court invoked *Pullman* abstention to wait until state tribunals had resolved state-law claims concerning those same ballots. Miller v. Treadwell, 736 F. Supp. 2d 1240, 1242 (D. Alaska 2010). The federal court, however, enjoined certification of the election until after completion of both the state and federal judicial proceedings over the ballots. Once the Alaska Supreme Court conclusively resolved all state-law issues over the write-in ballots, ruling them eligible to be counted even if they contain misspellings of incumbent Senator Murkowski's name, Miller v. Treadwell, 245 P.2d 867 (Alaska 2010), the federal district court went on to consider (and reject) the pending Fourteenth Amendment claims. At that point, the federal court lifted its injunction against certification of the election.

The litigation over Alaska's election ended relatively quickly. The Alaska Supreme Court issued its decision on December 22, with the federal district court's dissolution of its injunction on December 28. Thus, there was no judicial barrier to Senator Murkowski presenting her certificate of election at the beginning of the new Congress on January 3, 2011. But that speed would not have been sufficient for a presidential election. December 22 was 50 days after Election Day that year (November 2)—nine days later than the date for the meeting of the presidential electors if it had been a presidential-election year, and a full 15 days after what would have been the Safe Harbor Deadline (again, always 35 days after Election Day). The federal-court ruling came 21 days, or a full three weeks, after what would have been the Safe Harbor deadline.

The federal-court litigation over provisional ballots in Ohio's 2010 election did not end until July 12, *2012*—more than 20 months after Election Day in 2010! The federal court had enjoined certification of the election throughout that period, thus requiring the elective office to be filled temporarily by appointment. (The office was a seat of a local juvenile court.) During that time, the federal district court conducted a trial on the treatment of provisional ballots, including testimony from poll workers and local election officials. Obviously, nothing like that

could have occurred in a presidential election, at least not without warp-speed expedition that would have rendered the federal-court proceedings altogether different than what in fact occurred. On Monday, December 13, the date Ohio's presidential electors would have been constitutionally required to meet if the litigation over provisional ballots had involved a presidential election, the Ohio Supreme Court had not yet issued its own ruling on the status of the disputed provisional ballots under state law; that ruling would not come until January 7. Thus, when the Sixth Circuit ruled on January 21 that it did not need to abstain because the Ohio Supreme Court had clarified the relevant state-law issues, that non-abstention ruling was entirely inapposite to a presidential election; indeed, had it occurred in a presidential-election year, the inauguration of the new president would have occurred one day earlier, on January 20.

Thus, when considering the possible applicability of the abstention doctrine to future Fourteenth Amendment litigation over the counting of ballots in a presidential election, it is worth distinguishing those circumstances in which a state has adopted procedures designed to achieve Safe Harbor status from those in which a state has made no such effort to do so. Indeed, when a state's own procedures run the risk of missing the constitutionally mandated date for the meeting of the presidential electors (again, six days after the Safe Harbor deadline), federal-court intervention may assist a state in enabling its Electoral College votes to comply with this constitutional deadline. As Siegel v. Lepore in 2000 indicates, not all federal-court lawsuits over the counting of presidential ballots seek to delay certification of the election—and thus not all such lawsuits threaten a delay of certification that would deprive the state of Safe Harbor status. Accordingly, in those circumstances, as in Siegel v. Lepore itself, federal-court abstention may not be warranted.

But when a state has adopted procedures designed to achieve Safe Harbor status—in particular, when a state has adopted these procedures, which have that achievement as their paramount objective—then a federal court should invoke the abstention doctrine in order to prevent the federal court from causing the state to fail in achieving its Safe Harbor objective. Consider the possibility that a federal district judge enjoins certification of a state's presidential election pending a federal-court hearing on the counting of provisional ballots in that state's election. Consider, too, that this federal-court hearing is not scheduled in a way that permits its completion prior to the Safe Harbor deadline. One might think that sacrificing compliance with Safe Harbor status may be necessary to protect Fourteenth Amendment rights in the context of counting provisional ballots. But the federal district judge's belief that the Fourteenth Amendment claims have potential merit may be erroneous. In recent years, federal district judges have a track record of frequent reversals in high-profile Fourteenth Amendment cases involving the counting of ballots and related voting rules. Imagine the circumstance in which a federal judge has caused a state to lose Safe Harbor status, only to be reversed on appeal—but too late in order to regain the possibility of Safe Harbor compliance. In this circumstance, the federal court has erroneously—and irreparably—intervened with the state's ability to participate in the presidential election as it was entitled to do under the applicable provisions of the federal Constitution and congressional enactments.

Moreover, it is worth recognizing that even if the federal district court is correct in identifying a Fourteenth Amendment violation in a state's counting of ballots cast by voters in a presidential election, the federal court cannot insist that the state appoint its presidential electors in accordance with the court's interpretation of the Fourteenth Amendment. The state legislature could choose to supersede the federal court's ruling and appoint the state's presidential electors

directly under Article II of the federal Constitution—as the Florida legislature was taking steps to do in 2000. While such a move undoubtedly would lack Safe Harbor status (being law adopted after Election Day), and likely would provoke the argument that this new piece of state legislation itself violates the Due Process Clause of the Fourteenth Amendment, Congress would need to be the institution of the federal government to resolve the controversy pursuant to its role in receiving the Electoral College votes from the states under the Twelfth Amendment. Almost certainly, no federal district court would have the power to order Congress to accept one certificate of Electoral College votes from a state (the one that the federal court believed to reflect a constitutionally proper counting of provisional ballots cast in the November election), while simultaneously ordering Congress to reject a different certificate of Electoral College votes from a state (the one stemming from the state legislature's reassertion of Article II power to appoint the state's presidential electors directly). Even after the alteration of the political-question doctrine in Baker v. Carr, the receipt of a state's Electoral College votes under the Twelfth Amendment—like an impeachment proceeding—surely qualifies as a matter textually committed to Congress and thus beyond the purview of the federal judiciary. See *Nixon*, 506 U.S. 224 (1993).

For these reasons, a federal district court should be hesitant to intervene in a state's vote-counting proceedings in a way that potentially interferes with the state's particular Article II power over the appointment of the state's presidential electors. Article II, in this way, presents an additional reason for federal-court abstention, or at least caution, that simply is inapplicable in any nonpresidential election. At the very least, when a state has undertaken a concerted effort to maximize the chances of being able to comply with the Safe Harbor Deadline—an undertaking that is itself an exercise of the state's unique Article II authority—the federal judiciary should do nothing to undermine the state's objective in this regard.

§ 305. Initial Phase of Presidential Recount by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall immediately begin the process of administering a recount of all ballots in its jurisdiction that were counted as part of the preliminary returns of the presidential election.

(b) Within eight days after Election Day, each Local Election Authority shall complete its recount of ballots.

(c) As part of the local recount, any presidential candidate whose preliminary vote totals statewide were within one percent of the leading presidential candidate statewide may designate representatives to observe the recount conducted by the Local Election Authority.

(1) When a recount involves manual inspection of ballots to determine if a marking on the ballot qualifies as a vote under state law, the observation to which a candidate's representative is entitled must take a form that allows the candidate's representative to examine the markings on the ballot.

(2) When a recount involves only the use of machines to verify the accuracy of the initial count, a candidate's representative shall be entitled to examine the Local Election Authority's inspection of the machines for the purpose of determining that they operate properly.

(3) As part of the right to observe the recount, a candidate's representative may also examine any document relevant to the conduct of the recount, including a ballot, if doing so will not disrupt or delay the recount.

(d) A candidate's designated representative may object to any decision made by the Local Election Authority during the recount if, but only if, reversal of the decision upon review by the Presidential Election Court would alter the number of ballots counted for any candidate.

(e) The Presidential Election Court shall have whatever authority is necessary to assure that each Local Election Authority is able to complete its recount within the eight-day deadline specified in subsection (b).

(1) The Court's authority under this subsection includes the authority to remove a candidate's representative from observation of the recount if the representative has become unduly disruptive.

(2) Whenever the Court removes a candidate's representative pursuant to this authority, the candidate shall have the right to designate a substitute representative to continue observing the recount, but if the substitute also becomes unduly disruptive, the Court in its discretion may declare that the candidate has forfeited the right to designate another substitute.

Comment:

a. The conduct of the recount. What happens in a recount depends on the particular type of voting technology used to cast and count the ballots initially. The Procedures that form Part III of this project do not require a state to adopt any particular type of voting technology; nor do

they mandate certain recounting methods insofar as alternative recounting methods might be employed for any single type of voting technology. Thus, whether a manual rather than machine recount is required in a presidential election is a function of voter technology and state law that is beyond the scope of these Procedures. Part II of this Project, however, provides Principles for conducting a recount, which a state may wish to employ for presidential as well as nonpresidential elections.

Notwithstanding the discretion that states have under these Procedures in how to conduct a recount, states still must undertake a recount—rather than merely a retabulation of returns—to comply with these Procedures. To qualify as a recount, rather than a retabulation, some form of reexamination of the ballots themselves must occur. In the case of paper ballots, this reexamination can take the form of running the ballots through a counting machine again, in order to verify the accuracy of the initial count, or it can take the form of manual inspection of each initially counted ballot. In the case of Direct Recording Electronic (DRE) voting machines that do not produce a paper ballot—or paper record of any type, such as a Verified Voter Paper Audit Trail (VVPAT)—a recount can take the form of examining the computer memory of each voting machine and rerunning the computer software to recalculate the vote totals on each machine based on the electronically cast ballots stored in the machine. By contrast, what does *not* suffice as a recount under any circumstances is to take the initially reported vote totals produced from each machine and simply add up all of those machine totals into a single statewide total for each candidate; that kind of re-addition of the initially reported vote totals from each machine is a retabulation of returns, and not a recount of ballots.

b. Full statewide recount. Whatever type of recount is employed (depending on a state's voting technology and applicable laws) in a presidential election it is necessary that the *scope* of recount encompass *all* the ballots cast statewide and initially counted as part of Election Night returns. Each Local Election Authority shall conduct the recount for its share of all these statewide ballots in the presidential election, and no Local Election Authority shall be omitted from this statewide recount. The obligation of each Local Election Authority to perform its portion of the statewide recount is nondiscretionary, once the Chief Elections Officer has made the necessary declaration under § 303.

In some states, for nonpresidential offices, a recount proceeds in multiple stages: first, a random sample of precincts is recounted and, only if there is a sufficient discrepancy between the

recount and the initial count, is it necessary to conduct a full recount of all ballots initially counted. That kind of sampling and multiple-stage process is inappropriate for a presidential election for which an expedited recount is necessary after a § 303 declaration. Given the importance of a presidential election to the nation, and in the condition of uncertainty that causes the triggering of expedited procedures under § 303, it is imperative to recount all initially counted presidential ballots in the state—not just a sampling of them—whatever particular method of recounting ballots is employed. Likewise the expedited nature of the recount required under these Procedures precludes a multi-stage recount process. From the outset of the Chief Executive Officer's declaration under § 303, each Local Election Authority must understand that its obligation will be to recount all the initially counted presidential ballots within its jurisdiction and that, given the exigency, it must do so within the specified deadline: one week after the declaration under § 303, which is eight days after Election Day.

As stated in the Introductory Note, however, and as further explained in the Comments to §§ 308 and 310, a full statewide recount under this Section encompasses only the reexamination of ballots initially counted and reported as part of the preliminary returns on Election Night, which formed the basis of the declaration under § 303. This statewide recount does *not* encompass evaluating the eligibility of any ballots not counted as part of those preliminary returns. Rather, issues concerning the eligibility of those previously uncounted ballots are resolved during the canvass under § 308 and, potentially, through judicial review of the canvass under § 310. (Thus, overseas and military ballots not counted on Election Night, but entitled to be counted later during the canvass, will not be part of the recount under this Section.)

c. Specific focus and goal of a recount in context of these Procedures overall. Accordingly, defined in this precise way, the recount under this Section serves a specific function in the overall operation of these Procedures: to confirm that a ballot included in the preliminary count as containing a vote for a particular candidate does indeed contain a vote cast for that candidate. With certain types of voting technology, this confirmation is a fairly straightforward undertaking. For example, one innovative form of voting technology enables voters to touch the name of their chosen candidates on a computer screen and, then, after they are finished making their choices, the technology prints out a paper version of their ballot with the names of their chosen candidates for the voters to review; the choices as marked on the paper are then tabulated by a separate counting machine. With this technology, there is no ambiguity about

the voter's choices as marked on the paper version of the ballots. A recount, thus, can easily confirm the choices as so marked, and can verify the initial count of those ballots by running these paper ballots through the counting machines again.

By contrast, if the voting technology in use involves older optical-scan paper ballots, on which the voters themselves mark their choices by hand with a pen or pencil, then a recount inevitably will involve the issue of how to handle ambiguous marks made by voters. An exclusively machine-based recount of these ballots would require the ballot markings to be readable by machine in order to count, whereas a manual recount of these ballots would permit human evaluation of the markings to resolve the ambiguity. As indicated above, however, it is for a separate provision of state law—based on the state's policy choice—to determine what type of recount it wishes to use to handle the issue of ambiguity on voter-marked optical-scan ballots.

Many issues that might arise in a disputed presidential election would be beyond the scope of the recount, as defined for the purpose of this Section. In addition to issues concerning the eligibility of previously uncounted ballots, which are left to the canvass (as already mentioned), other issues would need to be left to a judicial contest of the election under § 313. For example, the so-called "butterfly ballot" issue that arose in Florida in 2000—where faulty ballot design induced some voters to cast their ballots erroneously for a candidate who was not their actual choice—would be an issue beyond the scope of a recount, as defined for purposes of this section, but instead would need to be raised in a contest under § 313. (Whether or not there would be a remedy under § 313 for faulty ballot design is a separate matter, to be determined by a provision of state law that is beyond the scope of these Procedures.) In a recount under this Section, a ballot clearly marked as cast for Candidate A would count for Candidate A, even if an argument might be pursued in § 313 that faulty ballot design caused the voter to cast the ballot for Candidate A when actually Candidate B was the voter's choice.

Illustration:

1. In one particular locality within a state, the printed optical-scan ballots inadvertently omitted the name of Jane Smith and Richard Roe, the Republican Party's nominees for President and Vice-President, who by law were entitled to be included among the candidates listed on the ballot. The number of ballots cast in the state that were mistaken in this way is over 10,000, while the complete preliminary returns of initially counted ballots at the end of Election Night showed the Republican presidential

nominees trailing the Democratic nominees by less than 1000 votes. The Republicans publicly argue that if their names had not been wrongly omitted from the faulty ballots, enough of these ballots would have been cast for them (rather than for minor-party candidates on the ballot) that they would have prevailed over the Democrats statewide. This argument, even if valid under state law, must be raised in a contest under § 313, and is not cognizable in the recount under this Section. For the purposes of the recount specifically, the faulty ballots must be counted as cast. If there is no ambiguity in how those faulty ballots were marked by voters—for example, clearly marked on behalf of minor-party candidates even though in rates disproportionately high compared to the rest of the state—then the recount will count those ballots as marked, leaving for the contest the issue of how to handle the fact that the Republican candidates were improperly omitted from these ballots, in violation of state law.

d. The right of candidates to observe the recount. The threshold for a candidate to *participate* in a recount should be easier to meet than the threshold for *triggering* the recount in the first place. Nonetheless, and especially in an expedited Presidential Recount, it is undesirable to permit every candidate to participate in the recount, no matter how low the candidate's chances of winning as a result of the recount. Some minor-party or independent candidates might participate in a recount solely to be disruptive, which is especially counterproductive when the need for speed is mission-critical. In this situation, their status should be equivalent to any other member of the public. A threshold of a one-percent margin for participation in a recount represents a reasonable balance between including candidates who are close to the leader and not unduly expanding participation.

e. A candidate's examination of ballots during a recount. Subsection (c)(1) gives a candidate's representative the right to examine the markings on a ballot in order to make a judgment about whether those markings constitute a countable vote on behalf of a candidate in the election. The specific form of that examination, including whether it encompasses the right of the candidate's representative to touch the actual ballot and physically handle it, depends on the particular technology and other circumstances involved. For example, the desire to conduct the recount as rapidly as possible may cause a Local Election Authority to project images of each ballot on a screen for the candidate's representatives (and public) to review. These projected images may be entirely sufficient for a candidate's representative to make a judgment on whether

the ballot contains a countable vote in the presidential election. If so, then the candidate's representative would have no right to touch the ballot itself; observation of the projected images would constitute examination of the ballot's markings. In other circumstances, however, it may be necessary for a candidate's representative to hold a paper ballot to examine its relevant markings. For example, if there is an issue concerning whether a voter made one written mark on top of, and thus after, a different written mark, it may be necessary to make a close inspection of the ballot while holding it in one's hand. In this instance, observation of a projected image on a screen would not suffice in terms of the right of the candidate's representative to examine the ballot markings.

f. The Presidential Election Court's authority to remove a candidate's representative. The necessity of making sure that each Local Election Authority is capable of completing its recount within the eight-day deadline requires giving the Presidential Election Court the power to remove a candidate's representative who is unduly disruptive. A candidate must be permitted to substitute a new representative for one who has been so removed. But if the substitute also becomes so disruptive as to require removal, then the Court has the power to declare that the candidate has forfeited the right to have a representative at that particular local recount. Such forfeiture would not apply statewide but solely to the particular locality where the disruption occurred.

§ 306. Presidential Election Court's Review of Local Recount Rulings

(a) Within 24 hours after completion of each recount by a Local Election Authority under § 305, each candidate seeking the Presidential Election Court's review of decisions objected to under § 305(d) must present to the Court an enumeration of the objections for its review.

(b) All objections not timely presented for review, as required by subsection (a), shall be deemed waived and unreviewable.

(c) For each objection, the Court's jurisdiction extends to the Local Election Authority's decision that is the subject of the objection, and the Court is empowered not only to nullify the Local Election Authority's decision but also to substitute the Court's own judgment on the matter.

(d) In the interest of expediting the recount, the Court should exercise its authority under subsection (c) to the full extent possible, remanding a decision to the Local Election Authority only when

(1) additional factfinding is necessary, and

(2) the required factfinding will be conducted more efficiently by the Local Election Authority than by the Court itself.

(e) Within 14 days after Election Day and prior to the completion and certification of the canvass under §§ 308 and 309, the Court shall complete its review of all objections to recount decisions presented for its consideration and publicly announce its determinations, including any specific matters remanded to a Local Election Authority for additional factfinding.

Comment:

a. The Presidential Election Court has jurisdiction over the decisions made during the recount by a Local Election Authority, if those decisions affected the vote totals for any candidate. But it takes an objection to one of these decisions to invoke the Court's jurisdiction. Once invoked, the Court's jurisdiction is over the decision itself and not merely the objection to the decision, meaning that the Court has the power to substitute its own decision for that of the Local Election Authority rather than remanding the decision for further consideration by the Local Election Authority. This point is important, given the acute time pressure of a presidential recount. Ordinarily, the far better course is for the Court to make the final recount decision with respect to a particular ballot or category of ballots, rather than remanding for further deliberation by the Local Election Authority. The Court therefore has this power and is expected to use it to the full extent feasible. There may, however, be some instances in which a remand to the Local Election Authority is unavoidable. In those instances, every effort should be made for the limited remand and review of the remand to be complete by the date on which the Panel itself is scheduled to render its final judgment under subsection (e). If absolutely necessary, the Court may make a limited remand part of its final judgment, and this limited remand can be pursued after the opportunity for an appeal under § 307. Such a limited remand, like an appeal under § 307, should not delay completion and certification of the canvass under §§ 308 and 309; rather, the completion and certification of the canvass can continue to proceed as scheduled, with any

additional adjustments as necessary reflected in the final certification of the election before the end of the Safe Harbor Deadline, as provided in § 316.

REPORTERS' NOTE

In a statewide election, a fundamental distinction exists between a recount in which a single statewide institution has final authority over the disposition of a disputed ballot and, by contrast, a recount conducted entirely by local election officials without the supervision of a single statewide institution. The role of the Presidential Election Court under this Section puts the recount mandated by these Procedures within the former, rather than the latter, category. The review of all disputed ballots by the Presidential Election Court enables uniform treatment of equivalent ballots, thereby avoiding the problem that arose in Bush v. Gore of locally disparate treatment.

The recount of Minnesota's 2008 U.S. Senate election benefited immensely from this kind of single supervisory statewide institution. There, it was the State Canvassing Board that played this role. Although the Board technically was not a court, it functioned much like one. Four of its five members were state judges, including two justices from the state's supreme court, as required by state law. One of the justices, moreover, was the Chief Justice, who was particularly effective in bringing a precedent-based system of adjudication to the ballot-by-ballot review undertaken by the Board. One method that the Chief Justice employed to assure uniform treatment of equivalent ballots was to keep a set of drawings for each type of ballot marking that the Board encountered during the review. The sheet of paper containing these drawings became a reference point for all members of the Board as they deliberated about specific ballots. Indeed, this sheet of paper was so influential that it was redeployed two years later when Minnesota faced another major statewide recount in its 2010 gubernatorial election. See Foley, BALLOT BATTLES at 321 (photo of Chief Justice's hieroglyphic sheet, reproduced by permission).

There are additional lessons to be learned from Minnesota's 2008 recount, especially in comparison with Florida's in 2000. One major lesson is the paramount importance of public transparency. Minnesota's State Canvassing Board televised over the Internet its deliberation on each ballot subject to its review—and did so in such a way that viewers could see each ballot, make their own judgment on its proper disposition, and compare their judgment with the one reached by the Board itself. This transparency was a major factor in causing public confidence that the Board was deliberating fairly and not attempting to rig the election in favor of one candidate or the other. Contrast the Board's behavior in this regard with that of Miami's canvassing board during the Florida recount in 2000. The Miami recount, while it was underway, occurred behind closed doors, away from public view. As a result, the so-called "Brooks Brothers riot" ensued, causing the Miami board to abandon its recount efforts (which were not resumed). See BALLOT BATTLES at 240, 320. See also Jay Weiner, THIS IS NOT FLORIDA: HOW AL FRANKEN WON THE MINNESOTA SENATE RECOUNT (2010). Anyone responsible for conducting a statewide recount in a high-profile election, or responsible for promulgating the specific rules for the scrutiny of ballots during the recount, would benefit from a study of Minnesota's 2008 recount. While these Procedures provide the basic structure for a presidential recount to replicate the exemplary features of Minnesota's 2008 recount, it will remain necessary to operationalize these Procedures with the kind of guiding spirit that animated the Minnesota Canvassing Board's deliberations in 2008. That spirit is captured not only in Jay Weiner's

narrative, supra, but also in Foley, *Lake Wobegon Recount*, 10 ELECTION L.J. 129 (2010); cf. Foley, *How Fair Can Be Faster: The Lessons of Coleman v. Franken*, 10 ELECTION L.J. 187 (2011).

§ 307. Appeal to State Supreme Court of Recount Review

(a) Within 24 hours after the Presidential Election Court completes its review and makes its public announcement under § 306(e), any candidate seeking an appeal of that review in the State Supreme Court must file a notice of appeal.

(b) No appeal filed under subsection (a) shall delay certification of the canvass pursuant to § 309.

(c) If the State Supreme Court chooses to hold oral argument on a recount appeal filed under subsection (a), the State Supreme Court shall do so within 17 days after Election Day.

(d) Within 20 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(e) If the State Supreme Court's resolution of an appeal requires additional recount proceedings on remand,

(1) each Local Election Authority required to conduct such additional recount proceedings must complete these proceedings within 27 days after Election Day;

(2) the Presidential Election Court must complete any additional recount proceedings of its own, including all review of additional proceedings conducted by each Local Election Authority under subsection (e)(1), within 30 days after Election Day; and

(3) the State Supreme Court must complete any post-remand review of the Court's proceedings under subsection (e)(2) at least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

REPORTERS' NOTE

Although one hopes that a recount can be completed without the need for a second round of recount proceedings on remand from a State Supreme Court decision, one lesson from Florida's experience in 2000 is that one cannot guarantee that this hope will be achieved. Even with the best of planning in advance, an unexpected issue might arise that requires further

factfinding after appellate consideration. This Section accounts for this possibility and, accordingly, builds in time for a potential remand as part of the overall schedule.

Given the availability of an appeal, moreover, there is no need for the State Supreme Court to resort to any form of extraordinary procedure, like a writ of mandamus, in order to assure that conduct of the recount comports with all applicable requirements of state law.

§ 308. Conduct of Canvass by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall complete its local canvass of the election within 14 days after Election Day.

(b) The local canvass shall include, but is not limited to, these component procedures:

(1) With respect to each provisional ballot, previously uncounted absentee ballot, or any other uncounted ballot cast in the election within the Local Election Authority's jurisdiction, a determination of whether or not the ballot is eligible to be counted;

(2) The correction of any tabulation errors discovered upon review of the preliminary returns or during the recount conducted under § 305;

(3) Any adjustment in the counting of ballots required by the Presidential Election Court's review of the recount under § 306; and

(4) Insofar as required by other provisions of state law, any adjustment in vote totals as part of the reconciliation of discrepancies in the number of ballots cast at a polling location and, according to polling-place records, the number of voters who cast ballots at the polling place.

(c) With respect to any ballot that a Local Election Authority determines eligible to be counted under subsection (b)(1), the Local Election Authority may examine the ballot to ascertain whether it contains a vote in the presidential election and, if so, may add that vote for the purpose of calculating the vote totals for each presidential candidate as part of the certification of the canvass under § 309, PROVIDED THAT the Local Election Authority must not commingle the ballot with other ballots, but instead shall preserve the ballot separately in the event upon

review under § 310 the Presidential Election Court reverses the Local Election Authority's determination and the ballot is ruled ineligible to be counted.

(d) For all ballot-eligibility determinations under subsection (b)(1), the Local Election Authority shall make publicly available upon or before completion of the canvass a written explanation for why it determined the ballot eligible or ineligible, provided that

(1) the Authority may aggregate ballots for which the explanation is the same, and

(2) the Presidential Election Court may specify further the form that these publicly accessible written explanations must take.

Comment:

a. Previously uncounted ballots. Since 2000, there has been a dramatic rise in the number of ballots that are not counted and reported as part of the preliminary returns on Election Night, but instead are considered—and potentially counted—during the canvassing of the returns. These uncounted ballots fall primarily into three categories. First are provisional ballots, now required in all states by the Help America Vote Act of 2002. By their very nature, provisional ballots are not supposed to be counted on Election Day, but instead are set aside for evaluation of their eligibility during the canvass. The percentage of voters who cast provisional rather than regular ballots varies considerably from state to state, and from county to county within states, as does the percentage of provisional ballots that eventually are counted rather than rejected as ineligible. Nonetheless, in many states, including some so-called "battleground states" in recent presidential elections, the volume of provisional ballots that are cast and counted potentially could determine which candidate wins a close presidential election in the state (just as they have determined the winners of some close races for other offices in recent years). Certainly, the inherent disputability of provisional ballots—by their very nature, they are of uncertain status—requires states to have well-structured procedures to evaluate provisional ballots in a presidential election that may turn on them.

A second category of uncounted ballots is absentee ballots that arrive too late to be counted as part of the preliminary returns on Election Night but are still timely under a state's election law (which may permit them to arrive by a certain specified date after Election Day). States vary their laws on this point. Some states require absentee ballots to arrive by Election

Day, and therefore this category of uncounted ballots for these states is limited solely to those that might arrive on Election Day itself at a time too late to be included in Election Night preliminary returns. Other states, by contrast, may permit absentee ballots to arrive up to a week or 10 days after Election Day, as long as they were postmarked by Election Day or, with respect to military and overseas ballots, comply with the special rules for returning those subcategories of absentee ballots. Part I of this project more specifically addresses a state's rules for the casting, returning, and counting of absentee ballots. Part III of this project takes as a given whatever these state rules might be, *as long as procedurally they can fit within the schedule and deadlines provided in the Procedures set forth in Part III.* For example, a state that wishes to adopt these Procedures as its method of handling an unresolved presidential election cannot permit absentee ballots to be eligible to be counted if they arrive more than two weeks after Election Day; such a rule would be inconsistent with the obligation set forth in this Section of these Procedures that a state complete its review of all uncounted ballots within 14 days after Election Day. Apart from this outer constraint, however, for the purposes of these Procedures a state can choose how permissive it wishes to be on this point. Consistent with this Section, for example, a state may choose to permit absentee ballots to arrive up to a week (or even 10 days) after Election Day, as long as each Local Election Authority within the state is capable of completing its review of the eligibility of these late-arriving ballots no later than 14 days after Election Day. But consistent with this Section, a state alternatively could choose to permit absentee ballots to arrive no later than three days after Election Day, and a state could also distinguish between domestic absentee ballots, on the one hand, and military and overseas ballots, on the other, for the purpose of the deadline by which they must arrive to be counted. For example, consistent with this Section, a state could set three days after Election Day as the deadline for domestic absentee ballots but set seven days after Election Day as the deadline for military and overseas ballots.

The third category of uncounted ballots is absentee ballots rejected before Election Day but believed by a candidate to have been rejected erroneously and thus potentially countable upon reconsideration during the canvass. This category of ballots figured prominently in both Washington's 2004 gubernatorial election and Minnesota's 2008 senatorial election. Thus, it is easily conceivable that this category of ballots could become an issue in a future presidential election. Indeed, this category of ballots did receive considerable attention during the disputed

2000 presidential election, but ultimately did not become the primary focal point of litigation that year because of strategic choices made by the political campaigns. In the future, however, a state must be prepared for the possibility that an unresolved presidential election may end upon focusing on claims that a potentially outcome-determinative number of absentee ballots were rejected incorrectly prior to Election Day and should subsequently be counted during the canvass. In theory, this category of uncounted ballots could be excluded from the canvass under this Section, and confined instead to the contest under § 313, but it is far more efficient to consider this category of ballots as part of the canvass. The experiences of Washington and Minnesota teach, among other things, that intense pressure can arise to litigate the eligibility of these rejected ballots during the canvass, rather than waiting for a contest after certification of the canvass, and this pressure can produce collateral lawsuits with the capacity of causing significant delays. It is much preferable to have an orderly procedure for the consideration of these ballots during the canvass, at the same time as the consideration of provisional ballots and any other uncounted ballots. Because the canvass inevitably includes determining the eligibility of some uncounted ballots, streamlining the overall process in an effort to meet the Safe Harbor Deadline requires combining all the eligibility determinations regarding uncounted ballots into a single proceeding as part of the canvass.

b. Reconciliation. A standard practice of election administration is to compare, for each polling location, the number of ballots cast and the number of voters recorded as casting those ballots. In principle, these two numbers should be the same. In practice, they often can be off by one or two, usually as a result of a minor administrative error in the operation of the polling process. These errors, tending to be random, also tend to cancel each other out, especially in a statewide election that covers a large number of polling places. Larger discrepancies between these two numbers are more disconcerting, as they potentially signal either more significant administrative problems or even manipulation of the voting process in an effort to alter the result.

As with other aspects of election administration, states differ in their rules governing the practice of comparing these two numbers, often called "reconciliation" among election professionals. An older approach, prevalent in the 19th century, was to require a process of "random withdrawal" as a method of redressing discrepancies found during reconciliation. If a precinct had more ballots cast than recorded voters, then random withdrawal called for removing from the ballot box the same number of ballots as the excess between ballots and voters.

Random withdrawal, however, has become more disfavored in recent decades; one argument against it is that, if the excess between ballots and voters is just a recording error (meaning that the number of eligible voters actually was identical to the number of ballots cast, but the administrative error failed to accurately record this equivalence), then removing a ballot from the ballot box detracts from the accuracy of what is in the box in terms of reflecting the preference of the eligible voters who cast ballots at the precinct.

Part III of this project takes no position on whether or not a state ever should employ random withdrawal and, if so, in what circumstances. Part II of this project addresses this topic. But the Procedures of Part III are designed to work with whatever policy choice a state makes on the matter of reconciliation. States should be able to make different policy choices on this point and still use the Procedures of Part III to handle an unresolved presidential election.

The variability of state law on this topic extends to methods that states use to record the number of voters at each polling location. One common method is simply to count the number of signatures of voters who signed the poll books at that location as a prerequisite to casting a ballot. But another method sometimes employed is to count the number of "authorized to vote" tickets handed to voters after they have checked in and their eligibility has been verified. (Where used, these "authorized to vote" tickets are then handed to poll workers as a prerequisite for using a voting machine to cast a ballot.) These two methods can diverge in their results, as Minnesota recognized during its 2010 gubernatorial recount.

Changes in voting technology likely will cause additional variation in the way states and localities might conduct reconciliation. If in the future voters must scan a pre-marked electronic ballot in order to receive a printed ballot capable of being counted, reconciliation might consist in matching the number of electronic ballots with printed ballots. But whatever reconciliation entails in a particular state, this Section specifies that it be conducted as part of the canvass and thus subject to the schedule and deadlines associated with all parts of the canvass.

c. The need for practical reversibility. The prohibition against commingling ballots ruled eligible for the first time during the canvass is critically important.

Consider the situation in which a Local Election Authority during the canvass rules a ballot eligible to be counted. Perhaps it was a provisional ballot, and there was some significant doubt about its eligibility, but the Local Election Authority ruled in its favor. Suppose the Presidential Election Court then disagrees with the Local Election Authority on the point and

determines the ballot ineligible. In this situation, in order to undo the Local Election Authority's contrary ruling, it is imperative that the Presidential Election Court be able to exclude the ballot from the count. If before the Presidential Election Court has a chance to review the Local Election Authority's ruling, the Authority has irretrievably commingled the ruled-upon ballot with all other counted ballots, then the Authority has irreversibly frustrated the existence and purpose of the Presidential Election Court's review.

To be sure, most ballots in the election will have been counted on or before Election Day in a way that they are irretrievably commingled, and thus if the Local Election Authority made an erroneous eligibility determination that led to their being counted, the Presidential Election Court will be unable to simply order an undoing of those ballots being counted. It would require a major change in the practice of American elections for ballots cast and counted at polling places on Election Day to have serial numbers, whereby each one could be individually retrieved from the count if subsequently determined to have been ineligible. The fear of contravening the voter's right to anonymity in the choices cast on the ballot has historically precluded such a practice.

But ballots not counted until after Election Day present a different dynamic. By definition, their eligibility will be considered only once it is known what the vote margin is in the state between the two leading candidates. If the gap for example is 100 votes, every ballot will be examined with the eye to whether it brings the trailing candidate one ballot closer to closing that 100-vote margin.

Given this dynamic, if the Local Election Authority's decision on the ballot is irreversible as a practical matter, then the litigation pressure to get the matter in the hands of the reviewing court, and then the State Supreme Court, before the Local Election Authority even has a chance to rule on the ballot, will be especially intense. In a disputed presidential election, where the stakes are the highest, this litigation pressure will be intolerable. Motions for emergency Temporary Restraining Orders will fly immediately, once the preliminary returns are known—or perhaps even beforehand if they are anticipated to be close. The race to the courthouse will be chaotic, and any attempt to maintain adjudicatory order will break down, seriously risking noncompliance with the Safe Harbor Deadline.

Consequently, to diffuse this intense pressure, the system must have the built-in feature that no decision of a Local Election Authority that potentially could affect the counting of ballots

is irreversible. From the outset, instead, all such decisions will be preserved in a posture that enables the Presidential Election Court to undo those decisions if the Court concludes that those decisions were erroneous. Likewise, the Presidential Election Court's decisions will be preserved in a way that they are reversible if found erroneous by the State Supreme Court. With this assurance to the candidates and their partisan supporters that nothing is undoable until the entire process is final at the end of the five-week period, the ballot-eligibility determinations during the canvass as well as the subsequent judicial review of them can proceed in a logical and orderly way, without a chaotic and deadline-threatening race to the courthouse.

d. Methods of practical reversibility. As a practical matter, the easiest way to make sure that the ballot-eligibility rulings of a Local Canvassing Authority remain reversible is to keep these ballots sealed and uncounted throughout the time available for seeking judicial review of those rulings. If the ballots stay uncounted in their ballot-secrecy envelopes until after the time is over for any review proceedings before either the Presidential Election Court or the State Supreme Court, then there is no risk of irretrievable commingling. Of course, keeping these eligible ballots separate and uncounted complicates the certification of the canvass and, potentially, the litigation of a judicial contest that challenges the certification. One way to handle this difficulty would be to have the Local Election Authority, at the time of certifying the canvass based on all counted ballots up to that point, make a simultaneous companion certification of the number of eligible-but-as-yet-uncounted ballots that exist alongside the certified count. A judicial contest of that certification could then proceed, recognizing that the additional ballots ruled eligible during the canvass will be added to the count at the end of the contest. It is acceptable under these Procedures for a state to adopt that approach to handling this detail concerning the certification of the canvass.

The Procedures, however, also permit the state to handle the point in a different way, as long as the state can do so in a way that is consistent with its duty not to irretrievably commingle the ballots ruled eligible during the canvass. Suppose, for example, that using innovative technology the state could conditionally count these ballots in a way that would enable them to be uncounted if subsequently ruled ineligible. In these circumstances, the Procedures would permit the state to conditionally count these ballots in this way and to include the conditional count of them in the vote totals reported as part of certifying the canvass.

To be sure, the state presumably would wish to employ this innovative technology only if doing so would be consistent with the value of protecting the voter's anonymity regarding the content of the voted ballot. If counting the ballot conditionally risked violating the voter's anonymity at a subsequent time when it might be necessary to undo its counting, then most states likely would forgo use of the technology—and keep the ballots separate and uncounted until the time for any litigation over the canvass had expired. Nonetheless, from the perspective of these Procedures, that is a separate policy choice for the states to make. As long as the state complies with the no-commingling requirement, it satisfies the requirement of this Section.

e. Explanation of ballot-eligibility rulings. The Local Election Authority's obligation in subsection (d) to supply a written statement of reasons for its ballot-eligibility determinations is not intended to be onerous, but instead simply to provide a basis upon which the Presidential Election Court can review these determinations. Unless otherwise specifically directed by the Presidential Election Court, these written explanations can take whatever form is most convenient to the Local Election Authority, as long as they are publicly accessible and timely. If it is more convenient to group ballots by category of explanation, rather than listing each ballot seriatim, the Local Election Authority may do that, unless otherwise directed by the Presidential Election Court.

REPORTERS' NOTE

Ballot impact versus anonymity. The imperative not to commingle ballots that remain disputable after certification of the canvass raises a question about whether there is a tradeoff, at least theoretically, between (a) the value of including presumptively eligible ballots in the certified count and (b) the value of preserving voter anonymity. With respect to the first value, a voter suffers when the voter's ballot has been deemed eligible by the relevant Local Election Authority and yet that ballot is set aside and not actually counted until after certification of the canvass and all potential proceedings concerning judicial review of that ballot's eligibility have conclusively expired. Even assuming that this voter's ballot is eventually counted as part of the final certification of the election—and counts equally with all other eligible ballots in this final certification—the ballot (along with its voter) has been deprived of having equal influence over the certification of the canvass itself. Since that certification is consequential, especially for determining which candidate bears the burden in a subsequent contest of overturning that certification, this ballot (along with its voter) suffers a kind of second-class status if it is not counted as part of the certification of the canvass.

It is one thing to exclude from the certification of the canvass a ballot that the relevant Local Election Authority has determined to be *ineligible*. To be sure, that ruling of ineligibility may be subsequently reversed after certification of the canvass but before final certification of the election—in which case this ballot also would have been deprived of having equal influence

over certification of the canvass, when given its eventual status as eligible it should have been able to have that equal influence at the earlier stage. Still, at the time of certifying the canvass, this ballot was presumptively ineligible and accordingly should be kept out of the certified count at the close of the canvass. But a ballot that the Local Election Authority has determined to be *eligible* is in exactly the opposite posture. While that ruling of eligibility might be reversed subsequently, in the meantime the presumptively eligible ballot deserves to be part of the certified count at the close of the canvass. It does an injustice to the ballot, and thus to its voter, to leave this presumptively eligible ballot out of the certified count at this stage of the overall process.

There would be no difficulty associated with counting this presumptively eligible ballot in the certification of the canvass were it not for the paramount obligation under these Procedures to prevent the commingling of this still-disputable ballot. Furthermore, even given this paramount obligation, there would be no difficulty with counting this presumptively eligible ballot were it not for the separate concern about preserving voter anonymity. A Local Election Authority easily could count the ballot and keep it separate and traceable to make sure that it was not commingled with other counted ballots. But this separation and traceability is what raises a concern about a risk to voter anonymity.

Which is more important: protecting voter anonymity or permitting a presumptively eligible ballot to have equal influence over the certified count at the close of the canvass? Ideally, state law would not be forced to make this choice, if it can find ways to achieve both goals. Whether through new technology or creative and sound administrative practices, a Local Election Authority may be able to count a ballot and make sure that it never becomes public knowledge how a particular voter voted—and to do so without irretrievably commingling the ballot. But it is conceivable that in some circumstances doing all this may not be possible.

Ultimately, these Procedures let a state make its own policy choice regarding the tradeoff between voter anonymity and the equal influence of presumptively eligible ballots. The Procedures are structured to give a state implicit encouragement to explore the development of methods and practices to avoid this tradeoff. But if this tradeoff cannot be avoided, the Procedures allow each state to decide how to handle the issue. What the Procedures do not permit, however, is abandoning the obligation to prevent the commingling of ballots ruled eligible during the canvass. For the reasons elaborated in the Comment, this prohibition against commingling must remain paramount however the state chooses to handle the resulting potential tradeoff between the two other values.

§ 309. Certification of Canvass

(a) Immediately upon completion of the local canvass as required by § 308, each Local Election Authority shall certify the results of its local canvass, including vote totals for each presidential candidate and the explanations for its ballot-eligibility determinations.

(b) By the end of the fourteenth day after Election Day, the Chief Elections Officer shall compile into a single certification of the statewide canvass all certifications of local canvasses received from Local Election Authorities.

(c) Once a Local Election Authority has certified its local canvass under subsection (b), the Local Election Authority may not alter the certification, except as ordered by the Presidential Election Court pursuant to a proceeding under § 310.

Comment:

a. The certification of the canvass is not a final certification of the election, but it is an important point in the process, providing a basis for both judicial review (under § 310) of vote-counting decisions made during the canvass and a contest (under § 313) of the vote totals contained in the certification of the canvass. The certification of the canvass represents a transition from the preliminary returns on Election Night to the final certification of the election upon completion of all possible proceedings under these Procedures. Like the Election Night preliminary returns, certification of the canvass consists of both an initial step at the local level and then an aggregation of all such local results into a single statewide result.

Under these Procedures, it is imperative that the certification of the canvass not be delayed. Even if additional factfinding is required as part of the recount, and even as judicial review of the canvass may identify mistakes made during the canvass that require correction, the certification of the canvass can and must occur on time, allowing the subsequent error-correction processes to move forward according to the overall structure of these Procedures. If these Procedures operate as designed, nothing that occurs during the canvass is irreversible as a result of certification, and therefore no justification exists for delaying certification in order to avoid a potentially irreversible consequence.

For similar reasons, once certification occurs, there is no need to "reopen" the canvass in order to undo it or to correct an error within it. Section 310 is the procedure for correcting errors that occur in the canvass, and it would simply amount to a duplication of effort to permit a candidate to ask the Local Election Authority to reopen the canvass and then ask the Presidential Election Court to review the canvass. Given the time constraints associated with the Safe Harbor Deadline, there is no room for such duplication of effort. Thus, once the certification of the canvass occurs, the canvass itself is closed, and the process is to move on to the next step, which is judicial review of the canvass under § 310. The Presidential Election Court under that Section

can require a Local Election Authority to fix a mistake that occurred in the canvass, but after certification the Local Election Authority cannot fix the mistake on its own initiative.

§ 310. Presidential Election Court's Review of Canvass: Petition and Participants

(a) Within 24 hours after a Local Election Authority has certified its local canvass under § 308, a presidential candidate entitled to participate in a presidential recount under § 305 may petition the Presidential Election Court for review of any decision made during the local canvass concerning the eligibility of ballots, or counting of votes, in the presidential election.

(b) Any candidate petitioning under this Section shall, at the same time as electronically filing the petition with the Presidential Election Court, serve electronic notice of the petition upon all other candidates entitled to participate in the presidential recount under § 305, as well as upon any Local Election Authority whose decisions are the subject of the petition.

(c) A petition under this Section shall specifically identify

(1) each ballot for which the Local Election Authority made an eligibility determination that the candidate wishes the Presidential Election Court to review; and

(2) any other decision made by the Local Election Authority that the petition claims is erroneous and, if reversed by the Presidential Election Court, would alter the vote totals certified under § 309.

(d) A petition under this Section may request the Presidential Election Court to classify as eligible to be counted a ballot that the Local Election Authority classified as ineligible to be counted, or may request that the Presidential Election Court classify as ineligible to be counted a ballot that the Local Election Authority classified as eligible to be counted, and a candidate may include both types of requests within the same petition.

(e) The petition shall specify, for each ballot the candidate wishes the Presidential Election Court to review, the reasons why the candidate believes the Local Election Authority's eligibility determination to be erroneous.

(f) The Presidential Election Court, in its sole discretion, may join the state's Chief Elections Officer to any proceedings pursuant to this Section.

(g) Apart from subsection (f), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (b).

(h) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

(i) Any party's motions or briefs in support of, or in opposition to, a petition under this Section must be filed with the Presidential Election Court and served upon all other parties within 48 hours after the filing of the petition, and the parties must submit any responsive briefs within the next 24 hours thereafter.

Comment:

a. The distinctiveness of this specific proceeding, relative to the recount and potential contest. A key structural element of these Procedures overall is to create a distinct proceeding for judicial review of the canvass, governed by this and the next Section—a proceeding separate from both the judicial review of the recount under § 306 and a judicial contest of the election under § 313. Timing is a major reason for this structural arrangement. Judicial review of the recount can occur in the second week after Election Day, while the canvass remains underway within each Local Election Authority. There is no need for judicial review of the recount to wait until the Local Election Authority completes the canvass.

Conversely, there are some issues suitable for a judicial contest of the election that may take more than two weeks to investigate or, in some instances, even uncover. Suppose, for example, that a presidential election experiences substantial absentee ballot improprieties, of the kind that tainted Miami's mayoral election of 1997. An adequate understanding of the facts concerning such improprieties might not come to light before certification of the vote totals at the end of the canvass, two weeks after Election Day. It would not have been the purpose of the canvass to investigate those sorts of improprieties, such as monetary payments to absentee voters by so-called ballot brokers. Under § 314, the trial of factual allegations raised in a contest can occur in the fourth week after Election Day, based on evidence gathered after certification of the canvass.

There is no reason, however, to have judicial review of the canvass itself await the trial of the contest. Instead, claims of errors made during the canvass are immediately ripe for judicial review upon certification of the canvass. Given the time pressure of completing all proceedings within the Safe Harbor Deadline, it makes good sense—as an engineering proposition—to start judicial review of the canvass immediately upon these claims becoming ripe. Hence, the decision to separate judicial review of the canvass under this Section from a judicial contest of the election under § 313, which by its nature must proceed at a somewhat later stage of the overall process.

b. The structure of litigation under this Section. Substantively, what distinguishes litigation under this Section from a judicial contest of the election under § 313 is that this Section concerns all challenges to decisions actually made by a Local Election Authority during the canvass under § 308. If a presidential candidate wishes to challenge a decision made during the canvass, then the presidential candidate needs to make that challenge using this Section, and that challenge is governed by the specific deadlines and provisions of this and the following Section. As provided in § 313, if an issue could have been raised under this Section (because it concerns a challenge to a decision made during the canvass), then it is precluded from being raised in a subsequent judicial contest under § 313.

It is advantageous, however, to pursue a claim under this Section, rather than under § 313, because (as provided in § 314 and further explained in the Comment thereto) the burden of proof on claims brought under this Section is specific to each particular ballot or other issue raised. No candidate bears a burden of proof under this Section as a consequence of the certification under § 309. Instead, the burden is simply associated with the effort to undo the particular decision made during the canvass. By contrast, with respect to a petition to contest the certification under § 313, the petitioner bears the burden of overturning the certification based on the grounds asserted.

c. Streamlining the litigation under this Section. It is important to limit participation in the litigation under this Section to only those parties essential to the adjudication of the claims raised. For the same reason, while the Presidential Election Court can permit the filing of briefs by *amici curiae* if the Court so chooses, the Court can also preclude the participation of *amici* if necessary to achieve compliance with the expedited nature of these proceedings.

REPORTERS' NOTE

The issue of ballot eligibility is the one that bedeviled Minnesota's 2008 U.S. Senate election. Specifically, the issue was whether absentee ballots that initially had been rejected by local election officials, and thus not counted as part of Election Night returns, had been rejected erroneously and in fact were eligible to be counted. With only 215 votes separating the incumbent and the challenger, and with the number of wrongly rejected absentee ballots potentially exceeding 1000, it was evident that the election might hinge on these ballots. For an account of this election, see Foley, BALLOT BATTLES, chapter 12, and sources cited therein.

Once this issue emerged, the procedural question became how it would be handled. What would be the forum for adjudicating the question of whether absentee ballots had been rejected erroneously and, if so, how many and what difference would they make to the vote totals for each candidate? One possible forum was the recount proceeding, except that Minnesota law (like the law in some other states) appeared to confine a recount to the review of ballots initially counted on Election Night, excluding consideration of ballots never counted because they had been deemed ineligible. Alternatively, the decision not to count these ballots, if wrongful, could be raised in a subsequent judicial contest of the election, after completion of the recount. But at the time the recount was getting underway, the prospect of a subsequent judicial contest was far down the road, and the issue of wrongfully rejected absentee ballots seemed pressing and urgent—a U.S. Senate seat hinged on their consideration. Moreover, because a contest would occur after certification, the contestant would bear the burden of proof in overturning the certification, and the wrongly excluded absentee ballots would not be part of the certified count. The certification, in other words, might reflect the wrong outcome—imposing this significant burden of proof on the wrong candidate—just because absentee ballots had been wrongly rejected. That consequence of the certification seemed potentially unfair, both on the candidate who should have been certified the winner but wasn't and on the voters who cast the wrongly excluded ballots and who were thus deprived of having their ballots included in the certified totals as they should have been. Thus, there was intense pressure to figure out a way to litigate the issue of wrongful exclusion prior to certification.

As a result, the Minnesota Supreme Court concocted an ad hoc procedure that did not exist within the state's statutory scheme. The procedure was to let previously uncounted absentee ballots become part of the recount if, but only if, both candidates and the relevant Local Election Authority agreed that the ballots had been wrongly rejected. This invented procedure seemed reasonable when the court announced it: what could be objectionable about letting a ballot count if all concerned agreed that it should be counted; why wait for a post-certification contest to include such a consensus-based ballot within the official vote totals of the election? In practice, however, the ad hoc procedure did not operate as intended. By giving each candidate an effective veto over the ballots to be reconsidered, while requiring the candidates to reconsider over 10,000 rejected absentee ballots, the Minnesota Supreme Court inadvertently created a particularly contentious, laborious, and time-consuming process. As two dissenters on the Minnesota Supreme Court argued at the time, it might have been better just to let the Local Election Authority decide on its own initiative which absentee ballots had been rejected in error—and then, later, let a contestant bear the burden of proving that the Local Election Authority's reconsideration of a ballot was in error (in other words, that its original decision had been correct). Even if the dissenters' position was no more in accord with the statutory scheme than the majority's ad hoc procedure, once the judiciary was going to be in the business of making up

new vote-counting procedures for the specific election at hand, then it might as well invent administratively workable ones.

Minnesota's 2008 U.S. Senate election is hardly the first in which a court has faced intense public pressure to develop new procedures to handle a vote-counting problem more fairly than existing statutory procedures would seem to allow. Indeed, the Washington Supreme Court also felt similar pressure in the state's 2004 gubernatorial election over wrongly excluded absentee ballots, and it too found a way to have those ballots reconsidered prior to certification. (Its method was closer to that of the dissenters in the Minnesota case.) Moreover, Minnesota itself faced essentially the same issue in its 1962 gubernatorial election, and there too the Minnesota Supreme Court issued a divided ruling that permitted deviation from the statutory scheme in order to enable Local Election Authorities to correct obvious vote-counting errors before certification of the canvass. A half-century earlier, the Kansas Supreme Court faced the exact same issue in that state's disputed gubernatorial election of 1912. (There, however, the court refused to reopen the canvass to permit correction of a conceded vote-counting error, requiring instead that the error be corrected in a subsequent contest. In this way, the earlier case reflected a stricter attitude about adherence to statutory procedures, even when those procedures appeared to undermine achieving an electoral outcome that accurately reflected the electorate's choice.)[19]

Part III avoids the difficulties that beset these other elections, including Minnesota's in 2008, by creating a distinct process for judicial review of ballot-eligibility determinations, including reconsideration during the canvass of ballots excluded from Election Night returns based on an initial determination of ineligibility. Part III neither forces these ballot-eligibility issues into a recount, which is more appropriately reserved for reviewing initially counted ballots (especially in the expedited context of a presidential recount, which must occur before all ballot-eligibility determinations have been made), nor requires these issues to await a subsequent contest with its attendant burden of proof. Instead, these ballot-eligibility issues get their own distinct process, tailored to its particular purpose. In this way, Part III and its Procedures reflect lessons learned from previous high-stakes disputed elections.

§ 311. Presidential Election Court's Review of Canvass: Deadline and Proceedings

(a) Within 21 days after Election Day, the Presidential Election Court shall complete its review of any petition filed under § 310.

(b) The Presidential Election Court may consolidate into a single adjudicatory proceeding any or all petitions filed under § 310.

(c) The Presidential Election Court may hold any hearing, with or without oral argument, to facilitate its review of any petition filed under § 310, provided that

[19] The 2000 election is also one in which the state supreme court deviated from the existing statutory scheme in an attempt to achieve what it perceived as greater electoral accuracy and fairness, although the specific issue there (unlike in Minnesota and Washington) concerned how to treat imperfectly marked ballots, not issues of ballot eligibility.

the hearing does not interfere with the Court's compliance with the deadline in subsection (a).

(d) At any point during a hearing, the Presidential Election Court may issue an interim ruling on legal or factual issues if, in the Court's judgment, doing so will help to expedite its review of a petition.

(e) The Presidential Election Court may receive the testimony of any witness, or receive into evidence any document, that will assist the Court in determining the eligibility of any ballot, or reviewing any ruling during the canvass, that is the subject of a petition.

(f) Any party may propose to the Presidential Election Court the introduction of relevant evidence, but the Court shall determine whether to receive such proposed evidence, balancing the potential value of the evidence against the need to complete its review within the deadline in subsection (a).

(g) In its sole discretion, the Presidential Election Court may adhere to or deviate from generally applicable rules of evidence insofar as the Court determines, in its judgment, that doing so will enable it to make the most factually accurate determinations of ballot eligibility, or vote-counting accuracy, consistent with its overriding obligation to comply with the deadline in subsection (a).

(h) For any ballot subject to a petition filed under § 310, the petitioner shall bear the burden of proving that, more likely than not, the Local Election Authority's determination regarding the ballot's eligibility or ineligibility is erroneous.

(i) For any claim raised in a petition not covered by subsection (h), the petitioner shall bear the burden of proving that the Local Election Authority's determination caused the vote totals certified under § 309 to be incorrect and, insofar as the petition asks the Court to adjust the certified vote total, shall further bear the burden of proving that the requested adjustment is more likely than not correct.

(j) As part of completing its review of all petitions pursuant to the deadline in subsection (a), the Presidential Election Court shall publicly report its ruling on each ballot-eligibility determination submitted for its review.

(1) The Court shall declare whether, in its judgment, each ballot is eligible or ineligible and whether this judgment affirms or reverses the Local Election Authority's determination with respect to the ballot;

(2) For each ballot, the Court shall specify the grounds in law or evidence upon which it relies for its determination of whether the ballot is eligible or ineligible to be counted.

(3) The Court's grounds may include the petitioner's failure to meet the burden of proof with respect to the particular ballot.

(4) The Court may report its grounds in whatever format (either briefly or at greater length) that it deems most conducive to the public understanding of its rulings, including grouping together ballots that are subject to the same grounds of decision.

(k) At the same time as the Presidential Election Court publicly announces its final ballot-eligibility rulings on a petition under § 310, the Court shall also publicly announce its final determinations on any other claims in the petition concerning the vote totals certified in the canvass.

Comment:

a. Ballot-specific burden of proof under subsection (h). This Section establishes that the burden of proof in proceedings to review ballot-eligibility determinations in the canvass is ballot-specific, meaning that the petitioning candidate bears the burden of overturning the Local Election Authority's rulings challenged in that petition. If another candidate challenges the same Local Election Authority's rulings on the eligibility of ballots, that other candidate bears the burden of overturning those Local Election Authority's rulings. The burden of proof in proceedings under this Section, in other words, does *not* depend on whether the petitioning candidate is ahead or behind in the count of ballots as part of the statewide certification of the canvass under § 309. In this respect, the judicial review of the canvass is different from a judicial contest of the election under § 313. In a contest, the contestant bears the burden of proof on all issues necessary to overturn the certification.

The reason for this distinction concerning the burden of proof relates to the point about litigation pressures addressed in the Comment to § 308. If a candidate potentially faces a heavy burden of proof to overturn ballot-eligibility rulings made during the canvass depending on

whether or not that candidate is behind in the count in the certification of the canvass, the candidate will be highly tempted to file a preemptive lawsuit of some kind in an effort to control the ballot-eligibility determinations made in the canvass before the certification occurs. These preemptive lawsuits present a major risk of derailing, or at least significantly delaying, the entire process of the canvass; in a presidential election, this risk presents a severe threat of preventing the state from complying with the Safe-Harbor Deadline. Consequently, to remove this pressure for preventive litigation, the burden of proof for challenging ballot-eligibility determinations during the canvass should not turn, for the entirety of ballots under review from the canvass, on which candidate is ahead or behind. Instead, the burden of proof should apply ballot-by-ballot for each specific claim that the Local Election Authority made an error in ruling a ballot eligible or ineligible.

In this regard, note also that the burden of proof does not depend on whether the Local Election Authority's ruling being challenged is that the ballot is eligible or, instead, ineligible. In either case, it is the candidate claiming that the ruling is erroneous who bears the ballot-specific burden of overturning that particular ruling. Thus, if the Local Election Authority ruled the ballot eligible, then the petitioning candidate bears the burden of proving that the ballot in question more likely than not was ineligible. Conversely, if the Local Election Authority ruled the ballot ineligible, then the petitioning candidate bears the burden of proving that the ballot in question more likely than not was eligible.

The use of the "more likely than not" standard for this ballot-specific burden of proof, rather than the more demanding "clear and convincing evidence" standard, also contributes to diffusing pressure to sue in court over the conduct of the canvass before the canvass is concluded and certified.

b. Minimizing the necessity for a remand to a Local Election Authority. As in the Comment to § 306 concerning the Presidential Election Authority's reviewing authority over the recount, here too it is important to note that the Court's reviewing authority over the canvass permits the Court to make a final determination on whether or not a ballot is to be counted without need for a remand to the Local Election Authority. Moreover, for the same reason as stated in the Comment to § 306, the need for expeditious proceedings in order to meet the Safe Harbor Deadline creates the expectation that ordinarily the Presidential Election Court will make these final determinations and thereby avoid the risk of delay associated with a remand.

Nonetheless, to the extent that a limited remand on certain specific issues is unavoidable, the Court has the authority to order a remand. The goal should be for any such limited remand, and any subsequent proceedings before the Court itself, to be complete by the time the Court must issue its report concerning review of the canvass under subsection (j). But insofar as it is impossible to complete the limited remand by this deadline, then the limited remand ordered by the Court may be concluded during the time available for a post-appeal remand under § 312.

§ 312. Appeal to State Supreme Court of Canvass Review

(a) Within 24 hours after the Presidential Election Court's issuance of its final ruling on a petition under § 311(k), a party to the proceeding may appeal the ruling to the State Supreme Court.

(1) No appeal of any decision made by the Presidential Election Court as part of a proceeding under § 310 can occur until after the Court has issued its final ruling in that proceeding under § 311(k).

(2) The right of appeal under this Section is limited to contending that the Presidential Election Court erred in ruling a ballot eligible or ineligible or otherwise erred concerning the vote totals certified under § 309.

(3) No appeal can concern any intermediary decision of the Presidential Election Court during the proceeding under § 310 except insofar as the decision affects the eligibility of a ballot or otherwise affects the vote totals certified under § 309.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under subsection (a), that oral argument shall occur within 24 days after Election Day.

(c) Within 27 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(d) If the State Supreme Court's resolution of an appeal under subsection (a) requires additional proceedings on remand concerning the canvass,

(1) each Local Election Authority required to conduct such additional canvass proceedings must complete these proceedings within 29 days after Election Day;

(2) the Presidential Election Court must complete any additional proceedings of its own concerning the canvass, including all review of additional proceedings conducted by each Local Election Authority under subsection (d)(1), within 31 days after Election Day;

(3) the State Supreme Court must complete any post-remand review of the Presidential Election Court's proceedings under subsection (d)(2) at least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

Comment:

a. No interlocutory appeals permitted. It is imperative that there be no interlocutory appeals to the State Supreme Court concerning judicial review of the canvass. Such interlocutory appeals would jeopardize the state's ability to satisfy the Safe Harbor Deadline. Since the only appealable issues concerning judicial review of the canvass involve the merits of a decision that affects the counting of ballots, any appeal must await the Presidential Election Court's final determination of the merits in question.

The timing of an appeal under this Section is determined by the timing of the Presidential Election Court's final ruling on the merits of a petition pursuant to § 311(k). If a petition has *not* been consolidated with any other similar petitions, then an appeal of the Court's ruling on that petition is ripe once the Court has finally determined all issues concerning that particular petition, and its ripeness in this regard does not depend on the status of any other petition concerning the canvass that may remain pending before the Court. Conversely, however, if the Court has consolidated several petitions concerning the canvass, then the appeal of the Court's decisions concerning any of the consolidated petitions becomes ripe only when the Court has issued its final ruling under § 311(k) on all issues concerning all of the consolidated petitions.

b. Appeals limited to decisions affecting certified vote totals. The only appealable rulings of the Presidential Election Court concerning the conduct of the canvass are those rulings that either sustain or reject a proposed change to the certified vote total for one or more candidates. A ruling concerning the eligibility of a ballot is of this character. If the Presidential Election Court

rules a ballot eligible when the Local Election Authority had ruled the ballot ineligible, then the Court's ruling will change the count of ballots. The same is true if the situation is the reverse: the Court rules the ballot ineligible after the Local Election Authority had ruled it eligible. But it is important to state explicitly that the Court's decisions to affirm a ballot-eligibility ruling by a Local Election Authority have the same character: a decision by the Presidential Election Court to confirm that a ballot is eligible, or ineligible, is a decision that affects the certified vote totals precisely because if the decision had gone the other way then the certified vote totals would have changed. Or, to put the same point somewhat differently, if the State Supreme Court reverses the Presidential Election Court's confirmation of the Local Election Authority on the question of a ballot's eligibility, then the certified vote counts will change accordingly.

Other decisions by the Presidential Election Court concerning the canvass have the same character. Consider, for example, this kind of decision concerning the process of reconciliation: suppose that the Local Election Authority has declined to make any adjustment in the counting of ballots based on the fact that in a particular polling location the number of counted ballots exceeds the recorded number of voters who cast ballots; suppose further that the Presidential Election Court reverses the Local Election Authority's ruling on this point and orders the Local Election Authority to randomly deduct from the number of counted ballots the same number as the excess. The Presidential Election Court's decision on this issue would affect the certified vote totals and thus would be appealable under this Section.

Conversely, however, rulings made by the Presidential Election Court as part of judicial review of the canvass are *not* appealable if they do not have the essential character of confirming or changing the certified vote totals. For example, suppose at issue is the question whether a particular provisional ballot is eligible. As part of the adjudication of this issue, the Court declines to permit a candidate to introduce into evidence the testimony of a particular witness, ruling that the Court has adequate evidence upon which to make its eligibility determination. The Court's decision to reject the proffer of this testimony is not appealable. Only the question of whether the Court made the correct eligibility ruling with respect to the particular provisional ballot at issue is appealable.

§ 313. Judicial Contest of Certified Vote Totals: Petition

(a) No later than 24 hours after the Chief Elections Officer declares the statewide certification of the canvass pursuant to § 309, a candidate eligible to participate in a presidential recount under § 305 may file with the Presidential Election Court a petition to contest the validity of the vote totals declared in the statewide certification.

(b) A candidate in the lead based on the statewide certification of the canvass may file with the Presidential Election Court a conditional petition, for the Court to adjudicate if the candidate loses the lead as a result of

(1) proceedings concerning the recount that occur after certification, or

(2) adjustment in vote totals pursuant to a petition for judicial review of the canvass under § 310, or

(3) the Court finding merit in a petition filed by another candidate under this Section;

provided that the candidate in the lead must file the conditional cross-petition within the same deadline as in subsection (a).

(c) Any candidate petitioning under this Section shall, at the same time as electronically filing the petition with the Presidential Election Court, serve electronic notice of the petition upon all other candidates entitled to participate in a presidential recount under § 305, as well as upon the Chief Elections Officer.

(d) The petition may assert as grounds for contesting the certification any grounds available under state law in a judicial contest of a certified gubernatorial election, except those grounds the petitioning candidate had an opportunity to raise under § 306 or § 310.

(e) A petition under this Section may seek either:

(1) a declaration that, upon the correction of errors affecting the validity of the certification, the petitioner is entitled to be certified the candidate with the highest statewide total of valid votes; or

(2) a declaration that the certification must be declared void, in which case the Legislature of the state may provide an alternative method of

appointment of the state's presidential electors pursuant to its authority under Article II of the U.S. Constitution.

(f) If a petition under this Section claims that the statewide certification is tainted by the presence of more invalid ballots counted in the election than the difference in the vote totals of the two leading candidates, the Presidential Election Court shall have such powers, and only such powers, to remedy this taint as would a state court in a contest of a gubernatorial election premised on the same grounds.

(g) The Presidential Election Court, in its sole discretion, may join a Local Election Authority to any proceedings pursuant to this Section.

(h) Apart from subsection (g), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (c).

(i) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

Comment:

a. A contest's relation to the recount and judicial review of the canvass. A petition to contest an election seeks to overturn the certification of the election's results. A contest under this Part of the project, and the Procedures that this Part sets forth, is limited to those issues that could not have been raised under § 306, as part of the Presidential Election Court's review of the recount, or under § 310, as part of the Court's review of the canvass. A presidential candidate who is behind in the count after certification of the candidate thus may contest the certification on grounds that the count is tainted by errors or improprieties that were not capable of being redressed in the recount or canvass. An example would be a claim that absentee ballots cast in favor of the candidate ahead after certification were invalid because they were cast in exchange for a payment of funds to the voters who cast them—and that there were enough of these improper absentee ballots to put the benefited candidate in the lead.

b. The possibility of a conditional petition. After certification of the canvass under § 309, the lead may change under these Procedures for any of three reasons. First, some residual proceedings concerning the recount may occur after certification of the canvass—for example, when a remand is ordered under § 307—and these residual recount proceedings may alter the

vote totals for the candidates, causing the lead to change. Second, judicial review of the canvass under § 310 may result in an adjustment of vote totals that causes the candidate ahead in the certification to now trail another candidate. Third, a candidate behind at the time of the certification may file a meritorious petition under this Section, causing the Presidential Election Court to order an adjustment of the vote totals that puts the petitioning candidate ahead in the count.

Given these possibilities, the candidate in the lead at the time of certification must have an opportunity to challenge the resulting vote totals if and when the lead changes in one or more of these ways. The candidate ahead in the certification has no incentive to make such a challenge unless and until this kind of lead change does occur. In a nonpresidential election, when the need for speed is not so great, the relevant procedures can handle this situation by waiting for the lead to change in actuality before requiring the candidate who was ahead to file such a change. But in the accelerated circumstances of a presidential election, it is necessary for the candidate leading at the time of certification to go forward with whatever challenges the candidate potentially would bring if the lead were to change. There is not enough time to wait to see if the lead does in fact change before requiring that candidate to raise these challenges.

Thus, the device of a conditional petition provides the way to handle this situation in the context of a presidential election. The leading candidate's petition must be filed at the same time as a trailing candidate's. But the Court does not need to render a decision on claims made in the leading candidate's conditional petition unless and until the lead actually changes for one or more of the three reasons just identified. In other words, at the time of certification, the leading candidate must identify all claims that this candidate would raise in a contest if this candidate had been behind in the certification; the candidate presents these claims in a petition as if the candidate were behind instead of being ahead; but this particular petition does not become actively in need of the Court's resolution unless and until this candidate actually falls behind in the course of the proceedings under these Procedures.

In the interests of expedition and efficiency, the Presidential Election Court can undertake steps to litigate the merits of a conditional petition while the petitioning candidate is still ahead in the certified count, before the conditional petition becomes ripe for the Court's ruling on the merits. For example, evidentiary issues relating to a conditional petition may overlap considerably with a regular (non-conditional) petition pending before the Court.

Suppose, for instance, that the regular petition contends that a large number of absentee ballots cast on behalf of the leading candidate are tainted because they were procured through payment of funds; but suppose, further, that the leading candidate counters that the petitioning candidate also benefited substantially from the same kind of payments to absentee voters and that, in practice, there was widespread competition among "ballot brokers" in certain neighborhoods in the state. The leading candidate raises this counterclaim in a conditional petition, with the understanding that the Presidential Election Court would not make a final determination of the merits of this counterclaim if either the Court rejects the merits of the claim in the regular petition or the Court finds that the prevalence of absentee-ballot fraud as alleged in the regular petition was in fact insufficient to change which candidate is ahead in the count based solely on valid ballots. Thus, as the litigation of the regular petition remains pending, there is the potential that the Court may never need to make a final determination of the merits of the conditional petition. Even so, if testimony concerning the prevalence of "ballot brokers" and their payments for absentee ballots relates to both the regular petition and the conditional petition, and if it would be more efficient and expeditious for the Court to hear all such relevant testimony at the same time, during the Court's consideration of the regular petition, it is perfectly proper for the Court to do so.

Similarly, the Presidential Election Court can entertain a motion to dismiss a conditional petition at the same time that the Court considers a motion to dismiss a regular petition. For example, one can imagine a regular petition claiming that the leading candidate's vote total is tainted by an outcome-determinative number of invalid ballots cast by ineligible felons. The leading candidate, however, files a motion to dismiss this regular petition on the ground that under the relevant state law a challenge cannot be made to the validity of a ballot on the ground that it was cast by an ineligible felon if the felon was registered to vote in the state and no challenge had been made to the voter's registration status prior to Election Day on the ground of this ineligibility. Meanwhile, the leading candidate has also filed a conditional petition alleging a large number of invalid ballots cast by noncitizens taints the opponent's vote totals. The opponent, however, files a motion to dismiss the conditional petition on the ground that under state law it is not cognizable to contest a certified election on the ground that a ballot is invalid for being cast by a noncitizen, because the state's voter-identification law requires proof of citizenship at the time the voter casts the ballot. In this situation, under this and the following

Section, the Presidential Election Court may receive briefs and hold an oral argument on both motions to dismiss simultaneously.

c. The baseline of the same substantive law as a gubernatorial contest. This Section establishes that the substantive law to apply in a judicial contest of a presidential election is the same that would apply under state law to a judicial contest of a gubernatorial election, except insofar as the expedited nature of these Procedures for a presidential election necessitate deviation from this gubernatorial baseline. As already noted, claims that otherwise would be cognizable in a contest of a presidential election (because they are cognizable in a gubernatorial contest) may *not* be raised under this Section if they could have been raised in a proceeding to review the recount under § 306 or a proceeding to review the canvass under § 310.

Establishing this gubernatorial baseline has several advantages. First, it recognizes the discretion that states have to adopt their own substantive rules for judicial contests of major statewide elections, including those for the highest executive officer of the state. The substantive law governing judicial contests of a certified election is state, rather than federal, law. States can, and do, differ in the substantive policy choices regarding these rules. For example, a state can choose to make a voter's status as an ineligible felon a non-cognizable issue in a judicial contest or, alternatively, a state can choose to permit a certified election to be contested on the ground that the outcome is tainted by enough ballots cast by ineligible felons to overturn the certified margin of victory. Part III of this project, and the Procedures that Part III sets forth, do not dictate what choice a state should make regarding these policy questions.

Instead, these Procedures establish parity between gubernatorial and presidential elections regarding these policy choices. If ballots may be challenged as ineligible in a judicial contest of a gubernatorial election, then so too may these same ballots be similarly challenged as ineligible in a contest under this Section (unless they were issues susceptible to being raised under § 306 or § 310, as explained above). Similarly, if a particular claim or issue may not be raised in a gubernatorial contest, then the same claim or issue may not be raised in a contest under this Section. The standards for a gubernatorial contest also govern a presidential contest. A presidential contest should not be disfavored under state law relative to a gubernatorial contest, but a presidential contest also need not be more generous than a gubernatorial contest in terms of the standards for overturning the election's certification.

One issue that can arise in a gubernatorial contest, as it did in Washington's 2004 election, is the remedial authority of a court to order a statistical adjustment in vote totals when the certified margin of victory is exceeded by the number of invalid ballots that should not have been counted but which are impossible to extricate from the count because they have been commingled with all other counted ballots. In the Washington case, the court ruled that state law did not permit a statistical adjustment, at least not in light of the relevant evidence including expert testimony. Subsection (f) makes explicit that the parity of gubernatorial and presidential contests applies to this issue of remedial authority as well. Where a court cannot make this kind of statistical adjustment in a gubernatorial contest, it also cannot do so in a presidential contest. But, conversely, were a court empowered to make this kind of statistical adjustment in a gubernatorial contest, then it could do so as well in a presidential contest under this Section.

d. Judicial authority to void a presidential election. As specified in subsection (e)(2), the parity between gubernatorial and presidential contests must be qualified in one particular respect: the circumstance in which the court is authorized to order the certified election null and void. Even in this particular context, the parity between gubernatorial and presidential contests applies up to a point: deviation from parity occurs with respect to what follows from a judicial order to void the election. In other words, if in a judicial contest of a gubernatorial election the court is empowered to declare the election void, then on the same facts the Presidential Election Court under this Section is also empowered to declare the presidential election void. But whereas in the gubernatorial contest the court might also be empowered to order a new election after voiding the initial one, not so the Presidential Election Court under this Section. Instead, under subsection (e)(2), immediately upon the Presidential Election Court's order to void the certified vote totals in the presidential election, the authority reverts to the state's legislature under Article II of the federal Constitution to provide for an alternative method for appointment of the state's presidential electors prior to the uniform date for the presidential electors to cast their votes.

Illustration:

1. Susan Smith and John Jones are presidential candidates in 2020. Smith leads Jones by only 100 votes in the certification of New Mexico's canvass under § 309, and whichever candidate wins New Mexico will have an Electoral College majority. Jones has filed a petition under this Section claiming that severe overcrowding at the polls in Albuquerque, caused by a systemic technological failure with the rollout of the city's new

electronic poll books, prevented thousands of eligible voters from casting ballots that would have made a difference in the outcome of the presidential election in the state. Suppose that this claim is cognizable under state law: if the same circumstances had occurred in a gubernatorial election, the state's judiciary would have found the claim valid and voided the election, ordering a new one. Under this Section, the Presidential Election Court of New Mexico has the same authority to void the certified result of the presidential election in the state, based on the same facts; however, if the Presidential Election Court so voids the election, the Court does *not* have the authority on its own initiative to order a new presidential election in the state, but instead the state's legislature has the authority to appoint the state's presidential electors in a manner the legislature chooses.

REPORTERS' NOTE

The relevance of Washington's 2004 gubernatorial contest. For anyone concerned about what a judicial contest of a presidential election might look like today (in the aftermath of 2000), there is no better precedent to examine than Washington's 2004 gubernatorial election. There, the state court faced the daunting challenge of dealing with the fact that the certified margin of victory was only 129 votes, yet the evidence established that 1678 unlawful ballots were included in the count that produced this certified result. In other words, the number of invalid ballots wrongfully included in the count dwarfed the certified margin of victory by more than tenfold. (Most of these invalid ballots had been cast by ineligible felons.) These invalid ballots clearly might have affected the outcome of the election, but there was no way to tell for sure because they had been commingled with all other counted ballots and could no longer be isolated from the undifferentiated pool. For a discussion of this election, see Foley, BALLOT BATTLES, chapter 12.

Given this difficult situation, the state court had to consider the possibility under state law of three less-than-ideal options: first, voiding the election on the ground that it had been irretrievably tainted by the large number of invalid ballots in relationship to the certified margin of victory; second, using a statistical procedure (often called "proportionate deduction") to reduce from each candidate's counted votes in each precinct a number of invalid ballots cast in that precinct equal to the candidate's share of overall votes in that precinct; or third, letting the count stand unless the contestant demonstrated through witness testimony which candidate received the vote of an invalid ballot. Based on its analysis of applicable state law, the trial judge in the Washington case chose the third option. But other states faced with the same situation would confront applicable precedents that would dictate choosing either of the other options. For a comprehensive analysis of the relevant precedents nationwide, see Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEG. 265 (2007).

Ohio's elimination of a judicial contest in a presidential election. In the aftermath of the 2004 election, when all eyes nationwide had been on Ohio as the pivotal state, the Ohio

legislature undertook a reform of election procedures that included the explicit elimination of the availability of a judicial contest in a presidential election. See Ohio Rev. Code § 3515.08(A) ("The nomination or election of any person to any federal office, including the office of elector for president and vice president and the office of member of congress, shall not be subject to a contest of election conducted under this chapter.") Ohio evidently was concerned about its ability to complete a contest, as well as recount and related proceedings, in a disputed presidential election in time to satisfy the Safe Harbor Deadline. A separate provision of the same post-2004 electoral reform contained an express requirement that a presidential recount be complete by this deadline: "As required by 3 U.S.C. 5, any recount of votes conducted under this chapter for the election of presidential electors shall be completed not later than six days before the time fixed under federal law for the meeting of those presidential electors." Ohio Rev. Code § 3515.041. If under state law a recount is not finished until the date of the Safe Harbor Deadline, then there is no time afterwards for a judicial contest of the election as certified upon conclusion of the recount. Eliminating the availability of a post-recount contest thus, at least in theory, prevents the risk that a contest could deprive Ohio of the benefit of Safe Harbor status.

In practice, however, elimination of the contest option may not achieve this desired result. Issues that previously would have been raised in a judicial contest, and which in other states would still be raised in a contest, do not simply disappear. Candidates instead will search for other judicial avenues in which to raise the same claims. Moreover, if the claims are perceived to have at least potential merit, there will be intense public pressure for judges to acknowledge the availability of some other type of judicial process in which to litigate the claims. For example, suppose that there is credible evidence that the outcome of a presidential election in Ohio is tainted by substantial absentee-ballot fraud (of the kind that tainted Miami's 1997 mayoral election). If a judicial contest of the election is unavailable as a vehicle for rescuing the presidential election from the apparent perpetration of this nefarious fraud, then inevitably there will be a concerted effort to use the state's recount procedures to undo this attempt to steal the presidency. Or there will be an effort to reopen the canvass in order to cleanse the certification of the canvass from the taint of this absentee-ballot fraud. These efforts will occur even if the recount, or reopening of the canvass, is not a well-designed vehicle for adjudicating the claim of fraud. The imperative will be to find some way, even if less than ideal, rather than none, to remedy the problem. One can foresee, for example, the use of a writ of mandamus, or a writ of prohibition, filed as an original action in the Ohio Supreme Court, seeking a decree to order the Secretary of State to amend the certification to free it from the taint of fraudulent absentee votes. Cf. State ex rel. Painter v. Brunner, 128 Ohio St. 3d 17 (2010) (original writ of mandamus granted to prevent counting of provisional ballots in violation of state law); State ex rel. Skaggs v. Brunner, 120 Ohio St. 3d 506 (same). And if relief from the absentee-ballot fraud is not forthcoming in state court, there will be lawsuits filed in federal court, based on the authority of Roe v. Alabama (discussed above) and related cases, as an alternative way to save the presidential election from outright theft. Indeed, given Ohio's recent experience with nonpresidential election litigation, it is likely that the federal-court lawsuits would be filed without waiting to see if a state-court alternative would be successful.

The resulting flurry of simultaneous lawsuits would likely be chaotic and destabilizing. Contrary to the intended goal of the relevant Ohio statutes, there would be a markedly increased risk that the conflicting lawsuits, in state and federal court, would jeopardize the state's ability to appoint a slate of presidential electors by the date they are required to meet—at least a slate that represents the will of the state's electorate in November, cleansed of the fraud. And even if state

or federal courts undertook the challenge of retooling various forms of judicial procedure, like a writ of mandamus, to hold a trial on the allegations and evidence of absentee-ballot fraud, the courts on the fly would have to develop new schedules and practices for handling this ad hoc process.

A much better process would be to have the claims of absentee-ballot fraud litigated in a contest action specifically designed for the purpose and thus thought out in advance. For this reason, these Procedures include the possibility of a contest action in a presidential election and engineer it so that it can occur after the recount and canvass—and still permit the state to satisfy the Safe Harbor Deadline. Thus, as a perennial "swing state" most likely to face a disputed presidential election if one occurs, Ohio would do well to reconsider the approach to this issue that it took after 2004 and, instead, embrace the approach reflected in these Procedures. Indeed, all of the state- and federal-court litigation that Ohio experienced over the counting of provisional ballots in disputed elections occurred in 2008 and 2010—after Ohio's initial round of post-2004 reforms (see *Painter* and *Skaggs*, above)—and thus this additional experience bolsters the case for revisiting the procedures that Ohio will employ in the event that it suffers from a disputed presidential election.

§ 314. Contest of Certified Vote Totals: Deadline and Proceedings

(a) Within 28 days of Election Day, the Presidential Election Court shall conclusively resolve any contest filed under § 313.

(b) To facilitate compliance with the deadline in subsection (a), the Presidential Election Court shall adhere to an expedited schedule for adjudication of the contest, including issuing such orders for expedited discovery as necessary to enable a trial of the contest to commence within seven days after the filing of the contest.

(c) A motion to dismiss a contest petition filed under § 313, including a motion to dismiss a conditional petition under § 313(b), must be filed with the Presidential Election Court and served upon the petitioner within 48 hours after the filing of the contest.

(d) The Presidential Election Court may choose to hold an oral argument on a motion to dismiss the contest, provided that the argument shall occur within 72 hours of the filing of the motion.

(e) Unless the Presidential Election Court has previously granted a motion to dismiss, the trial of the contest will commence within seven days after the filing of the contest.

(f) While a contest petition or conditional petition is pending, the Presidential Election Court may permit the petitioner for good cause shown to amend the petition to add or supplement claims with facts that could not have been known to the petitioner at the time the petition initially was filed, provided that in no event shall the Court permit the amendment of a petition more than 21 days after Election Day.

(g) Whenever a contest petition or conditional petition is pending at the same time as another contest petition, the Presidential Election Court may consolidate proceedings, including oral argument on motions to dismiss or trial of evidentiary issues, in the interest of completing adjudication of all pending petitions within the deadline in subsection (a).

(h) When considering whether to grant any motion to dismiss a contest petition or conditional petition, in order to avoid the necessity of a trial on factual issues relating to the petition that is the subject of the motion to dismiss, the Presidential Election Court shall take account that, if the Court grants the motion to dismiss but that dismissal is reversed on appeal by the State Supreme Court, there may be insufficient time after the reversal to hold a factfinding trial that might have been held prior to the appeal.

(i) With respect to the trial of any contest petition or conditional petition, the petitioner bears the burden of proving by a preponderance of the evidence any issue of fact necessary to sustain a legal claim made in the petition; provided that with respect to any such issue of fact the burden of proof may be elevated to the standard of clear and convincing evidence if but only if the same elevated standard would apply to the same factual issue in a contest of a gubernatorial election.

Comment:

a. Additional time for discovery of contest-related evidence. Like all other proceedings concerning the resolution of a disputed presidential election, a judicial contest of the certified results of the election must be complete by the Safe Harbor deadline if the state is to attain the benefit of Safe Harbor status and, in any event, must be complete six days later when the state's presidential electors meet to cast their official Electoral College votes. While these deadlines are challenging to all aspects of these Procedures, including the recount and canvass, they are

especially challenging to the litigation of a contest. In a nonpresidential election, even an expedited judicial contest would extend over many weeks or even months. The experience of both Washington in 2004 and Minnesota in 2008 underscore this point.

These Procedures recognize this reality and address it by making the contest the last of the proceedings to occur under the overall coordinated schedule that these Procedures collectively establish. The Procedures build in the maximum allowable time for the development and presentation of claims cognizable in a contest (claims that could not be pursued in the recount or judicial review of the canvass) consistent with the objective of completing all proceedings by the Safe Harbor deadline. The Procedures achieve this piece of engineering by permitting contest petitions (and any conditional petition) to be amended for up to a week after filing of the initial petition.

As provided in § 313, a contest petition or conditional petition must be filed initially within 24 hours after certification of the canvass under § 309. Thus, this initial deadline is immediate, and the reason that it is not postponed until later is to put candidates, election officials, and the public on notice that the certification will be contested. Litigation of claims capable of being raised at this time, at least in a preliminary fashion, can begin—even if additional evidence is being gathered that may determine the ultimate adjudication of the contest. Given the exigencies of the schedule, there is no reason to delay for even a week any contest-related proceedings that can occur immediately after certification. For example, motions to dismiss claims raised in a contest petition or conditional petition need not await the gathering of additional evidence relevant to the claims. The legal sufficiency of these claims can be litigated immediately upon certification of the canvass. Factual allegations will be assumed true for purposes of the motions to dismiss and thus are not dependent on the gathering and presentation of evidence. Thus, these claims can be pled in petitions filed within 24 hours after certification, and the legal sufficiency of these claims tested forthwith in motions to dismiss, while expedited discovery of relevant evidence gets underway.

As expedited discovery occurs, evidence accumulated may have either of two characteristics. First, the evidence may straightforwardly support a claim already raised in a contest petition. For example, if the contest petition claims absentee voters received illegal payments in exchange for casting their absentee ballots, discovery proceedings may uncover evidence establishing the time, method, and amount of these payments, thereby directly

substantiating the petition's claim. In this circumstance, the petition would not need to be amended in light of the evidence obtained during discovery. Second, by contrast, evidence obtained during discovery might raise issues not pled in the initial petition. To build upon the previous example, suppose now that discovery reveals not only illegal payments made for absentee votes but also a practice of fraudulently casting absentee ballots on behalf of registered voters who chose not to cast a ballot in the particular election. This newly discovered evidence would go beyond the scope of what was initially pled in the petition. Subsection (f) would permit amendment of the petition to add a new claim of absentee ballot fraud based on this subsequently discovered evidence.

Subsection (f), however, imposes two important constraints on the amendment of a petition based on new evidence as described in the previous paragraph. First, the newly discovered evidence must not have been available to the petitioner at the time the petition was initially filed. It must be genuinely new. The reason for this constraint is to incentivize the pleading and litigation of claims as soon as feasible, in keeping with the need to expedite proceedings as much as possible. The decision to permit or deny amendment of a petition in light of new evidence is vested in the sound discretion of the Presidential Election Court. In exercising this discretion, the Court should avoid engaging in a mini-trial over whether the evidence is genuinely new or not. Rather, when presented with an application to amend a pending petition, the Court should quickly decide whether to grant or deny the request based on information provided in the application, and then move on to the litigation of the contest itself (whatever its resulting scope).

The second constraint is that the outer limit for an application to amend a petition based on newly discovered evidence is 21 days after Election Day (which will be equivalent to one week after the deadline for certification of the canvass). It is not much additional time. But it is all that is available, given the exigencies of the overall objective of meeting the Safe Harbor Deadline. Moreover, as the 2000 presidential election in Florida demonstrated, one additional week in the context of the overall five-week schedule can make a huge difference. Thus, the ability to amend a petition under subsection (f) is an important structural feature of these Procedures.

b. Motions to dismiss and the timing of contest trials. In ordinary litigation, it may be efficient for a trial court to grant a motion to dismiss, recognizing the possibility that the

dismissal may be reversed on appeal and the case remanded for a trial on the reinstated claims. But in the specific context of these expedited Procedures, as explained more fully in the Comment to the next Section, there may be insufficient time to hold a trial on reinstated claims on remand after a successful appeal of a decision by the Presidential Election Court to grant a motion to dismiss. Thus, subsection (h) requires the Presidential Election Court to take account of this reality when ruling on any motion to dismiss.

This reality does not mean that it is never appropriate for the Presidential Election Court to grant a motion to dismiss a contest petition. On the contrary, if the Presidential Election Court quickly determines that a contest petition lacks legal merit even if all its allegations of fact are true, and if no trial is necessary on any other contest-related matters, then a quick dismissal of the contest petition may be immediately appealed; and if the State Supreme Court disagrees with that dismissal and does so expeditiously—so that the appeal is over by the end of the third week after Election Day—then there still will be time to hold a trial on the contest petition during the fourth week after Election Day, and the trial will have the benefit of the State Supreme Court's guidance from the appeal. But to be balanced against this possibility is the concern that, if the appeal extends into the fourth week, time for holding the trial may evaporate. Likewise, dismissal of some claims in a contest petition may still leave the necessity of holding a trial on other claims, and thus little efficiency is to be gained from granting only a partial motion to dismiss.

Thus, subsection (h) leaves it to the sound judgment of the Presidential Election Court to decide whether or not to grant a motion to dismiss, recognizing the time constraints involved. Even if the Presidential Election Court might be inclined to grant a motion to dismiss, based on its analysis of the legal issues involved, the better decision may well be to hold a trial of the facts relevant to the dismissible claims anyway—because the trial can be conducted more efficiently in advance of an appeal, rather than afterwards. In this respect, litigation of a contest under these Procedures may differ from the ordinary expectation of how to handle a motion to dismiss. Moreover, holding a trial on dismissible claims will especially make sense if the Presidential Election Court knows that it must hold a trial on other claims raised in a contest petition, and these other claims overlap factually with the dismissible claims, and thus the Court might as well hold a trial on all contest-related claims simultaneously. The overarching goal remains to

complete all proceedings that may be required, including those that might be mandated by the State Supreme Court as the result of an appeal, before expiration of the Safe Harbor deadline.

c. Burden of proof in a contest. A key distinguishing feature between judicial review of the canvass under §§ 310-311 and a judicial contest under this and the previous Section is the nature of the burden of proof that applies in each of the two proceedings. Even though judicial review of the canvass under §§ 310-311 occurs after certification of the canvass, there is no burden of proof imposed on any candidate as a consequence of the certification. Instead, the burden of proof under § 311 is specific to each decision made by a Local Election Authority during the canvass, with the candidate challenging the specific decision bearing the burden of proving that particular decision incorrect. In this way, the burden of proof under § 311 shifts from ballot to ballot, or issue to issue, as the candidates present their challenges to decisions made during the canvass. As the burden of proof shifts in this way, it does not matter which candidate is ahead or behind after certification of the canvass; the certification is not consequential to who bears the burden.

The burden of proof in a contest is different. The certification matters greatly here. The nature of a contest is that the contestant is challenging the certified result, presenting claims that the certification resulted from errors—and that if those errors are corrected, a different candidate would emerge on top. Given all this, the contestant bears the burden of proving all elements necessary to establish the merits of a claim raised in a contest. Moreover, historically, this burden is understood to be a heavy one; a certified election is not lightly overturned. Thus, a candidate who is behind in the count at the time of certification faces a high hurdle, and the candidate who is ahead has the benefit associated with this presumption of victory.

Exactly how high this hurdle should be is, of course, a policy matter for state law to determine. A state could choose to require a contestant to prove all facts necessary for a claim "by clear and convincing evidence"—a standard significantly more onerous than the conventional "preponderance of the evidence" standard. This Section leaves this policy choice for state law to make, as long as the state maintains parity between gubernatorial and presidential elections (in keeping with the overall principle of parity in this respect under this and the previous Section). Thus, subsection (i) sets the traditional "preponderance of the evidence" standard as the default, but if state law has elevated the burden to the "clear and convincing" standard in a gubernatorial contest, then that elevated burden applies here as well.

It is important to note that the same burden of proof applies to a claim whether made in a regular or conditional petition. For example, suppose a candidate alleges that an opposing candidate has benefited from absentee votes procured through the improper payment of funds. It does not matter whether that allegation is raised by a candidate trailing after certification in a regular petition to contest the certified result, or instead is made by the leading candidate in a conditional petition. If the burden of proof in the former is "clear and convincing evidence" (because that is the same burden that would apply in a gubernatorial contest), then so too must the conditional petitioner meet the same evidentiary standard if making these factual allegations.

As explained in the Comment to the previous Section, the conditional petition is treated as if the petitioner were behind rather than ahead at the time of the certification. Indeed, this treatment is the very essence of its conditional nature. It does not become actively ripe for the Presidential Election Court's adjudication unless and until the conditional petitioner does fall behind as a result of other pending proceedings (as described above). At the point that the candidate who filed the conditional petition does fall behind, it becomes entirely appropriate to treat this candidate as bearing the same onerous burden of proof as a candidate behind at the time of certification. At this point, in effect, as a result of the proceedings, the certified result has been altered, and the candidate who was ahead in the initial certification is now behind in the altered certification. To be sure, the altered certification is temporary and may shift back, especially if the conditional petition is meritorious. But at the moment the conditional petition becomes actively ripe for adjudication, it should be subject to exactly the same burden of proof as if it were a regular petition to contest the initial certification. Consequently, at a point in the litigation of evidentiary issues under this Section, if the Presidential Election Court considers a question concerning a conditional petition prior to the time it becomes actively ripe for adjudication (in the interest of efficiency, as previously discussed), the Court must apply the same burden of proof that would apply if the same claim were raised in a regular rather than conditional petition.

§ 315. Appeal to State Supreme Court of Contest Determinations

(a) Within 24 hours after the Presidential Election Court's resolution of a contest under § 314, a party to the contest may appeal to the State Supreme Court.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under this Section, the argument shall occur within 48 hours after the filing of the appeal.

(c) The State Supreme Court shall resolve any appeal filed under this Section, including the issuance of any orders necessary to adjust vote totals in the statewide certification, no later than 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

(d) If in an appeal under this Section the State Supreme Court identifies any issue requiring a remand for additional factfinding proceedings, the State Supreme Court shall order such factfinding to be complete wherever feasible in such time as to permit final resolution of the appeal in accordance with subsection (c).

Comment:

a. Given the overall structure of these Procedures, the greatest risk of a development that prevents completion of all proceedings by the Safe Harbor deadline is presented by an appeal of a contest. Under § 314, the trial of a contest is not required to be complete until 28 days after Election Day, leaving only one week for the appeal of the contest, including any additional proceedings that might be necessary on remand from the appeal.

Thus, when faced with an appeal of a contest, the State Supreme Court needs to consider whether any sort of remand is truly necessary under applicable state and federal law (including federal constitutional standards of equal protection and due process). If a remand is unavoidable given the requirements of applicable law, then the State Supreme Court must calculate whether there is any way to conduct the remand in time to meet the Safe Harbor Deadline. If so, then the State Supreme Court should fashion the remand order accordingly; but if not, then the State Supreme Court should assure that the state at least will complete the remand and all other proceedings by the date on which the presidential electors are scheduled to meet.

Unfortunately, these Procedures cannot provide an absolute guarantee that the state will always be able to meet the Safe Harbor Deadline. They can only maximize the likelihood that a state will be able to do so. An issue may arise in an appeal of a contest that requires an unavoidable remand, and this remand is of such scope and character that there is no way to complete it in time to achieve Safe Harbor status. In that case, like a runner who must finish a race knowing that second place is best that can be achieved—but for whom second place is no

sure thing unless the runner still sprints to the end—the state still must expedite the remand proceedings in order not to risk failing to complete a resolution of the contest by the date on which the presidential electors must meet.

Thus, if there is a way for the State Supreme Court to resolve the appeal of the contest without ordering a remand, the court should opt for that no-remand resolution. Obviously, the court cannot avoid a remand when one is compelled by a proper understanding of applicable state and federal law. But often the question of whether to hold a remand is a matter committed to the sound discretion of the appellate court. In some instances, the record on appeal permits the appellate court to make the relevant finding of fact after the appellate court reverses the trial court's legal error. In this situation, the State Supreme Court should go ahead and make the relevant finding of fact itself, so as to enable resolution of the appeal by the Safe Harbor Deadline, thereby avoiding the delay of an unnecessary remand.

REPORTERS' NOTE

Balancing accuracy and finality in a presidential election with a "statistical tie." Depending on the particular claims involved in a disputed presidential election, a State Supreme Court may conclude that the presidential election lies irreducibly within what social scientists would view as a statistical "margin of error," which might persist even if the court were to order additional proceedings in an effort to improve the accuracy of the outcome. (The term "statistical tie" has the same meaning as this statistical "margin of error"—that, beyond a certain level of precision, all outcomes within a range are statistically equivalent in terms of their accuracy. Thus, in an election with a million votes, and a margin of error of 0.01%, or +/- 100 votes, the outcome that Candidate A won by 49 and the outcome that Candidate B won by 49 are equally accurate from a social-science perspective. Hence the assertion that an election of this nature amounts to a "statistical tie" and the implication that it is artificial to think that legal machinery can determine with greater accuracy whether Candidate A or B in some sense "really" received more valid votes.[20]) When faced with this situation, as the Safe Harbor Deadline looms closer and closer the court would need to weigh the value of ordering additional adjudicatory proceedings against the risk that pursuing them would jeopardize meeting not only the Safe Harbor Deadline but also the constitutionally required meeting of the Electoral College six days later.

The tension between accuracy and finality is addressed more fully in Part II of this Project, as the tension affects nonpresidential elections as well. But the balance of competing considerations weighs differently in presidential elections. For one thing, the impossibility of holding a revote in a presidential election need not apply to other elective offices. Also, the practical political consequence of a "statistical tie" in a presidential election is different than a

[20] For more background on this point, see Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL. REV. 350 (2007). See also Michael Pitts, *Heads or Tails?: A Modest Proposal for Deciding Close Elections*, 39 CONN. L. REV. 739 (2006).

similar circumstance affecting a lesser office. The governance of a state can suffer tolerably well the unfortunate situation in which an officeholder serves a term as a consequence of adjudicatory proceedings that, because of their irreducible level of imprecision, amount to the equivalent of a coin flip from a statistical perspective. But it is exponentially more problematic for the occupant of the Oval Office to be determined in this essentially random way. Indeed, one of the most memorable lines to emerge from the disputed presidential election of 1876 was Samuel Tilden's statement that he would refuse to let that election be decided "by lot," as some in Congress were considering. Paul Leland Haworth, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876, at 198-199. "I may lose the Presidency, but I will not raffle for it," the candidate purportedly exclaimed. Id. at 200. Given the much more awesome powers of the presidency now, including the nuclear arsenal that the Commander-in-Chief wields, it would be even more disconcerting today to settle a presidential election by a coin toss.[21]

For better or worse, the Constitution contains a mechanism for handling the situation when the result of the popular vote in a particular state is essentially indeterminate, despite the best efforts of the state's adjudicatory processes to determine the outcome. That mechanism is the constitutional authority of the state's legislature to invoke a fallback method of appointing the state's presidential electors, including by means of the state's legislature simply undertaking this appointment itself. Thus, if in the context of a particular presidential election, a State Supreme Court, with the date for the meeting of the presidential electors coming ever closer, finds the outcome of the popular vote essentially indeterminate, the court must entertain the possibility that the better course is simply to declare the November popular vote null and void

[21] To be clear, the issue of how best to handle a "statistical tie" in a state's presidential election (when that state's Electoral Votes are pivotal to determining whether a candidate has attained a majority of pledged Electoral College votes) is analytically distinct from what happens if a state's presidential election were to result in an exact mathematical tie. It is at least theoretically possible that a state's presidential election could end up truly dead even. For example, if New Hampshire's 1974 U.S. Senate election could end up with just a two-vote margin, 110,926 to 110,924—as in fact occurred—it is not inconceivable that New Hampshire (currently considered a presidential swing state) could have a presidential election that yields an exact tie, with something like 110,925 votes each for both the Democratic and Republican candidates. Were this situation to arise, the question would be whether state law requires the tie to be broken by lot. New Hampshire uses a lottery to break exact ties in some types of elections, including presidential *primaries*. N.H. Rev. Code § 660.23. Virginia has a statute that specifies using a lottery to break an exact tie in a November general election vote for presidential electors. Va. Code § 24.2-674. If hypothetically there was no dispute about the fact that a state's presidential election ended in an exact tie, and if it was clear (as in Virginia) that the applicable state statutes required breaking that tie with a coin flip, then as a formal proposition of law the use of that state statutory procedure would be entitled to Safe Harbor status (assuming of course that the required coin toss occurred within five weeks of Election Day).

Practically speaking, however, a situation in a which a state's presidential election might actually end in an exact tie would be one in which observers likely would also consider it to be within a margin of error that amounted to it being a statistical tie—meaning that it was just as likely that Candidate A actually won more votes, or that Candidate B won more votes, than that the "true" result was an exact numerical tie. If so, the sense of the election being a statistical tie might predominate—to the point of calling for a political resolution of the statistical tie, by means of invoking the fallback of legislative appointment of the state's presidential electors, rather than proceeding to an actual coin toss as the statutorily prescribed method of breaking an exact numerical tie. The larger point, not to be lost in considering the distinction between a st2atistical tie and an exact tie, is the dynamic quality of a state's effort to improve its vote-counting accuracy as the calendar moves ever closer towards both the Safe Harbor Deadline and the meeting of the presidential electors. Given this dynamic quality, at some point a State Supreme Court may be called upon to make a judgment concerning the balance between the effort to achieve greater vote-counting accuracy and the state's expressed desire to appoint its presidential electors in accordance with the congressionally prescribed timetable.

and let the appointment of the state's presidential electors revert to the legislature's constitutional authority.[22]

To be sure, these Procedures in their entirety are designed to avoid the State Supreme Court finding itself in that unpalatable situation. Their overarching aim is to enable the state to determine accurately the presidential choice that the eligible electorate made when casting ballots in November. But in a rare situation it may be necessary to recognize that this aim is not achievable, in which case it is better to invite the state legislature to exercise its constitutional authority rather than for the judiciary to conduct additional adjudicatory procedures that would risk the state having no presidential electors on the date when they must cast their Electoral College votes.

[22] Delaware is one state with a statute that explicitly authorizes—and requires—its legislature to appoint the state's presidential electors if the popular vote ends up inconclusive: "Whenever there shall be a failure to choose 1 or more of the electors of President or Vice President at any general election, the General Assembly shall convene and choose such elector or electors and certify the appointment of the elector or electors so chosen." 29 Del. Code § 704; accord 15 Del. Code § 7731. North Carolina has an even more elaborate statute on this point:

> (a) Appointment by General Assembly if No Proclamation by Six Days Before Electors' Meeting Day. - As permitted by 3 U.S.C. § 2, whenever the appointment of any Presidential Elector has not been proclaimed under G.S. 163-210 before noon on the date for settling controversies specified by 3 U.S.C. § 5, and upon the call of an extra session pursuant to the North Carolina Constitution for the purposes of this section, the General Assembly may fill the position of any Presidential Electors whose election is not yet proclaimed.
>
> (b) Appointment by Governor if No Appointment by the Day Before Electors' Meeting Day. - If the appointment of any Presidential Elector has not been proclaimed under G.S. 163-210 before noon on the date for settling controversies specified by 3 U.S.C. § 5, nor appointed by the General Assembly by noon on the day before the day set for the meeting of Presidential Electors by 3 U.S.C. § 7, then the Governor shall appoint that Elector.
>
> (c) Standard for Decision by General Assembly and Governor. - In exercising their authority under subsections (a) and (b) of this section, the General Assembly and the Governor shall designate Electors in accord with their best judgment of the will of the electorate. The decisions of the General Assembly or Governor under subsections (a) and (b) of this section are not subject to judicial review, except to ensure that applicable statutory and constitutional procedures were followed. The judgment itself of what was the will of the electorate is not subject to judicial review.
>
> (d) Proclamation Before Electors' Meeting Day Controls. - If the proclamation of any Presidential Elector under G.S. 163-210 is made any time before noon on the day set for the meeting of Presidential Electors by 3 U.S.C. § 7, then that proclamation shall control over an appointment made by the General Assembly or the Governor. This section does not preclude litigation otherwise provided by law to challenge the validity of the proclamation or the procedures that resulted in that proclamation.

N.C. Gen. Stat. § 163-213.

§ 316. Final Certification of Presidential Election

(a) Before noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5, the Chief Elections Officer shall publicly issue a final certification of the presidential election, based on a compilation of final orders in all proceedings concerning the presidential recount, any review of the canvass, and any contest, including:

(1) any final post-remand orders concerning the recount under § 307;

(2) any final post-remand orders concerning the canvass under § 312; and

(3) any final orders resolving an appeal of a contest under § 315.

(b) If at noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5 the Chief Elections Officer has failed to publicly issue a final certification of the presidential election as required in subsection (a), the State Supreme Court shall have the authority to issue any orders necessary to assure compliance with the Safe Harbor Deadline, including directly and immediately issuing the final certification of the election on its own authority.

(c) If notwithstanding its authority under subsection (b), the State Supreme Court determines at or before 11:59 p.m. on the date of the Safe Harbor Deadline that the state is unable to declare a final certification of the presidential election pursuant to these Procedures, then the State Supreme Court immediately shall issue a public declaration that the state is exercising its option to waive the Safe Harbor status available under 3 U.S.C. § 5.

(d) Whenever the State Supreme Court pursuant to subsection (c) has issued a public declaration that the state cannot meet the deadline necessary for Safe Harbor status, the State Supreme Court shall have the authority to issue emergency orders as necessary to enable final certification of the presidential election on or before the date specified in 3 U.S.C. § 7 for the state's presidential electors to cast their Electoral College votes.

Comment:

a. Weaving three threads together. This Section is the wrap-up provision of these Procedures and, accordingly, has a claim for being the most important. This Section enables the

state's Chief Elections Officer—and, if necessary, the State Supreme Court—to weave together into a single final result three distinct threads, each of which potentially may reach its own culmination on the day before the Safe Harbor Deadline.

Illustration:

1. Imagine this scenario: the 2020 presidential election has been the subject of multiple disputes in a single pivotal state. First, during the recount, a question arose concerning whether to count ballots that are doubly marked for the same candidate, with the oval filled in next to the candidate's name and the same name added on the line for a write-in candidate. The machines recorded these ballots as containing an uncountable "overvote" in the presidential election, and during the manual recount the Presidential Election Court, along with many Local Election Authorities, have interpreted the relevant provision of state law as requiring the ballots to be interpreted to contain an uncountable overvote in the presidential election. The State Supreme Court, however, has reversed that legal ruling and ordered a remand requiring the counting of ballots in this category. The Local Election Authorities have completed their necessary review of the ballots on remand, the Presidential Election Court has affirmed this review, and on the Monday before the Safe Harbor Deadline, the State Supreme Court has dismissed any further appeals related to the recount. The vote totals as certified at the end of the canvass now stand ready to be adjusted in light of these additionally counted votes as part of the remanded component of the recount.

Second, during the canvass, a question arose whether late-arriving domestic absentee ballots lacking a postmark could be counted if it could be shown that post-office error caused the absence of the postmark. The Presidential Election Court, along with many Local Election Authorities, answered this question in the negative, holding that domestic absentee ballots arriving after Election Day cannot count without a postmark showing them cast on or before Election Day regardless of the reason for the missing postmark. The State Supreme Court, however, reversed this holding and, on remand, the Local Election Authorities have counted all such absentee ballots where evidence established that the missing postmark was caused by post-office error. The Presidential Election Court has affirmed these post-remand determinations, and the State Supreme Court has dismissed all further appeals relating to the canvass. The previously certified

vote totals now stand ready to be adjusted to include these additionally counted absentee ballots.

Third, a contest to the vote totals certified at the end of the canvass was filed on the ground that the candidate ahead in the certified totals benefited from improper assistance provided to voters residing in nursing homes. After holding a trial to consider the evidence of the alleged improper assistance, the Presidential Election Court ruled that, although the conduct was inappropriate, it did not subvert the voluntary choices of the nursing-home voters and therefore no adjustment in the certified count was required. On appeal, however, the State Supreme Court has reversed this ruling, holding instead that the conduct of the candidate's campaign workers at the nursing home, as demonstrated by the evidence in the record, went far beyond permissible assistance and negated the view that these ballots represented an exercise of the voters' autonomous choice. The State Supreme Court determined that the record showed that 138 ballots were tainted by this kind of impropriety, and thus the State Supreme Court ordered that 138 votes be deducted from the leading candidate's initially certified vote total.

Thus, as of the day before the Safe Harbor Deadline, in this situation there are three separate adjustments that must be made to the vote totals as certified at the end of the canvass: first, the adjustment made as a result of the remanded component of the recount, concerning the doubly marked ballots; second, the adjustment made on remand in the judicial review of the canvass, concerning the absentee ballots lacking a postmark; and third, the adjustment required as a result of the contest, concerning the nursing-home ballots tainted by improper assistance. This Section empowers the Chief Elections Officer to make all three adjustments simultaneously (along with any other similarly necessary adjustments, as a result of any of the proceedings undertaken pursuant to these Procedures), and to unify all these adjustments into a single, final certification of the presidential election—and to announce this final certification in time to satisfy the Safe Harbor Deadline.

b. Final certification of the election. While it may seem obvious, it is worth underscoring the distinction between the certification of the canvass under § 309, which is preliminary, and certification of the election under this Section, which is final. What gets certified under § 309, moreover, is not the election, but rather simply the vote totals as reflected in the canvass.

Those vote totals may change in any of three ways, as described above. Thus, it would be wrong to say that the certification under § 309 identifies a winner of the election as determined in the canvass; rather, the § 309 certification identifies a candidate who is officially ahead in the count upon completion of the canvass. That distinction is an important one. For nonpresidential elections, it often may be appropriate to say that the certification of the canvass identifies an official *winner*; but not so in a presidential election governed by these Procedures. Even though the certification of the canvass is an important moment in the overall process structured by these Procedures, and even though one of its important features is that it imposes a significant burden of proof on any candidate petitioning to contest the certification under § 313 (as described above), it goes too far to claim that certification of the canvass under § 309 identifies (even if only preliminarily) the *winner* of the presidential election in the state. The candidate ahead in the vote totals as certified under § 309 is emphatically not officially the *winner*, even in a preliminary sense. Instead, the official winner is identified solely by the final certification that occurs under this Section.

To be sure, if after certification of the canvass under § 309, no candidate files a petition for judicial review of the canvass under § 310 and no candidate files a petition to contest the certification under § 313—and if there are no further recount proceedings under § 307—then certification of the canvass under § 309 can become converted, without any changes to the vote totals, into a certification of the election under this Section. But in order for that conversion to occur prior to the relevant deadlines in §§ 309, 310, and 313, the candidates would need to enter the stipulation specified in § 317. In this sense, the conversion does not occur automatically. Once these expedited Procedures have been invoked in a presidential election under § 303, then for the election to become final—and thus for there to be an official winner of the election—the Chief Elections Officer must make the public declaration of the certification required by this Section. That public declaration constitutes notice that the state's proceedings are complete, including for the purpose of satisfying the Safe Harbor Deadline.

c. Between noon and midnight on the date of the Safe Harbor Deadline. If the Chief Elections Officer has not issued the certification called for in subsection (a), then the state's supreme court has until midnight to remedy this omission before the state loses its opportunity to achieve Safe Harbor compliance. The time specified in subsection (c) is 11:59 p.m., one minute before midnight, because that time is immediately before the expiration of the Safe Harbor

Deadline. The goal is to permit a state's supreme court to be able to make the certification necessary to obtain Safe Harbor status up until the very last minute, if using every last bit of available time makes doing so possible. But if and when the state's supreme court realizes that it will be incapable of meeting the Safe Harbor Deadline, then it must issue a public declaration to this effect immediately upon that realization.

§ 317. Cessation of Expedited Procedures If No Longer Necessary

(a) At any time after the Chief Elections Officer has issued a declaration under § 303 on the necessity of an Expedited Presidential Recount, and prior to final certification of the election under § 316, these Procedures will no longer be applicable if and only if:

(1) all candidates entitled to participate in a recount under § 305(c) jointly sign and submit to the Presidential Election Court a statement stipulating that

(A) there is a nationally recognized winner of the presidential election,

(B) all other candidates signing the joint statement have publicly conceded the election to the winning candidate,

(C) there is no further need to complete any recount or other proceedings on an expedited basis pursuant to these proceedings,

(D) all the candidates signing the statement waive all rights that they otherwise would have under these Procedures; and

(E) the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316;

(2) the Chief Elections Officer signs and submits a separate statement to the Presidential Election Court confirming all the stipulations set forth in the joint statement of the candidates under paragraph (1); and

(3) the Presidential Election Court upon receipt of the statements required in paragraphs (1) and (2), issues a pronouncement confirming that the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316.

(b) Immediately upon issuance of a pronouncement of the Presidential Election Court under subsection (a)(3), the Chief Elections Officer shall proceed forthwith to issue the final certification of the election under § 316.

Comment:

This Section permits the expedited Procedures to terminate, even after they have been triggered under § 303 but before they otherwise would be complete, if the circumstances develop such that the presidential-election outcome is no longer unsettled. There is obviously no point in undertaking the arduous effort required by these expedited Procedures if, as a practical matter, they have become moot. Still, this Section requires all relevant participants to make a formal declaration that the expedited Procedures, having once been invoked, are no longer necessary. These formal declarations are essential so that there is no doubt about the official status of the presidential election in the state.

APPENDIX

BLACK LETTER OF COUNCIL DRAFT NO. 2

§ 301. Definitions

(a) "Canvass" means the administrative procedure that encompasses verification of the vote tabulations contained in the preliminary Election Night returns as well as determination of the eligibility of previously uncounted ballots, including provisional ballots and absentee ballots not included in the preliminary returns;

(b) "Certification" means the official declaration of the results from a counting of ballots and occurring, at separate stages, both after the canvass and after completion of all proceedings under these Procedures;

(c) "Chief Elections Officer" means the state's highest official, often the Secretary of State, responsible for supervising the administration of elections in the state;

(d) "Chief Justice" means the presiding judge of the state's highest court;

(e) "Contest" means a judicial procedure that occurs after certification of an election's results, in which a candidate other than the certified recipient of the most votes challenges the certified results and seeks a judicial decree either to declare the contestant the duly elected winner or to void the election;

(f) "Day" means any and all calendar days;

(g) "Election Day" means the traditional day on which citizens go to the polls in their neighborhood polling locations to cast ballots in a presidential election, which Congress has specified to be the first Tuesday after the first Monday in November, as provided in 3 U.S.C. § 1;

(h) "Election Night" means the nighttime hours of Election Day, after the polls have closed in the state, as well as the predawn hours of the following day insofar as the state (and the nation) still awaits preliminary returns of votes counted on or before Election Day and expected to be reported before the night is over as part of the initial count of ballots from all precincts in the state;

(i) "Local Election Authority" means the agency of government, whether a single officer or a multimember body, with authority to canvass local returns, including determining the eligibility of locally cast provisional ballots;

(j) "Preliminary returns" means the report of vote totals of ballots cast and counted on Election Day at each polling location in the state, together with the report of any early and absentee votes counted on (or, if permitted, before) Election Day, all of which are aggregated by the Chief Elections Officer into a single set of statewide preliminary returns;

(k) "Presidential election" means a quadrennial November general election at which the eligible electorate of the state chooses a slate of presidential electors, who will cast their Electoral College votes six weeks later and who are expected to cast those Electoral College votes on behalf of the presidential candidate named on the ballot and on whose behalf they are slated as presidential electors;

(l) "Recount" means a reexamination of ballots initially counted on or before Election Day and reported as part of preliminary returns;

(m) "Safe Harbor Deadline" means the date, specified in 3 U.S.C. § 5, by which a state must resolve any vote-counting disputes in a presidential election in order for the state to receive the benefit of the congressional pledge to accept whatever resolution the state achieves;

(n) "State Supreme Court" means the state's highest court, even if denominated other than "supreme court" (as is New York's Court of Appeals).

§ 302. Applicability and Objective

(a) The provisions of these Procedures shall take effect as the law of the state upon either their explicit enactment by the state legislature or their explicit promulgation by the State Supreme Court pursuant to its rulemaking authority, whichever method of adoption has been employed, and are fully applicable to the next presidential election thereafter.

(b) In any particular presidential election, the specific expedited elements of these Procedures become operational immediately upon the declaration of the Chief Elections Officer, as set forth in § 303.

(c) The overriding purpose of these Procedures is to enable the state to complete a recount, canvass, and any contest of a presidential election, including all related administrative and judicial proceedings concerning the counting of ballots in a presidential election, in compliance with the Safe Harbor Deadline of 3 U.S.C. § 5.

(d) Whenever an expedited recount has been declared under § 303, it shall be the highest priority of every state official involved with the implementation of these Procedures to comply with the Safe Harbor Deadline of 3 U.S.C. § 5 and with every subsidiary deadline set forth in these Procedures, all of which are aimed at assuring Safe Harbor compliance.

(e) Whenever an expedited recount has been declared under § 303, completion of these Procedures takes precedence over any other recount, canvass, contest, or other proceeding that may be necessary for any other election on the same ballot, and any ballot-eligibility or other determinations made as part of these Procedures that have applicability to another election shall be binding on that other election unless state law elsewhere expressly provides otherwise.

§ 303. Declaration of Expedited Presidential Recount

(a) The Chief Elections Officer shall declare publicly, no later than 24 hours after the polls close in a presidential election, the need for an Expedited Presidential Recount if all of the following conditions apply:

(1) there is uncertainty about whether any presidential candidate has secured a majority of Electoral College votes; and

(2) there is uncertainty about the result of the presidential election in the state; and

(3) the state-specific uncertainty of subsection (2) is a contributing factor to the nationwide uncertainty of subsection (1).

(b) For purposes of § 303(a), uncertainty about the result of the presidential election in the state exists if any of the following conditions apply:

(1) There have been no public declarations of victory and defeat by the two presidential candidates with the highest number of votes based on preliminary returns available to the Chief Elections Officer;

(2) Preliminary returns available to the Chief Elections Officer show the leading presidential candidate in the state ahead of one or more rivals by a margin of less than one-quarter of one percent of all presidential ballots preliminarily counted in the state; or

(3) Based on information available to the Chief Elections Officer concerning the number of provisional, absentee, and other uncounted ballots that potentially could be added to the count during the canvassing of returns, the winning presidential candidate in the state might be different from the leading presidential candidate based on preliminary returns.

§ 304. Appointment and Authority of Presidential Election Court

(a) Within 24 hours of the Chief Elections Officer's declaration pursuant to § 303, the Chief Justice publicly shall either (1) announce the appointment of three judges to serve as the Presidential Election Court; or (2) if before the election three judges were contingently appointed to serve in this capacity, confirm this prior appointment.

(b) The authority of the Presidential Election Court, as set forth in these Procedures, is exclusive, to be exercised without interference from any other body, except insofar as a right of appeal to the State Supreme Court is provided pursuant to these Procedures;

(c) The Presidential Election Court, as a court of law, has the power to enter such orders common to any ordinary court of law within the state, including orders to permit parties to its proceedings to conduct such discovery that may assist any factfinding the Court may undertake; provided that any such orders be consistent with the expedited nature of these Procedures.

(d) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, no court or other tribunal or agency of this state may extend or otherwise delay any deadline set forth in these Procedures.

(e) The Presidential Election Court and the State Supreme Court may set subsidiary deadlines and promulgate other subsidiary rules in order to facilitate implementation of these Procedures, provided that all such subsidiary deadlines and

rules are consistent with these Procedures and do not alter any of its deadlines and provisions.

(f) These Procedures are designed so that compliance with them is consistent with federal law, including the federal Constitution, and therefore should not require any adjustment by the federal judiciary.

§ 305. Initial Phase of Presidential Recount by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall immediately begin the process of administering a recount of all ballots in its jurisdiction that were counted as part of the preliminary returns of the presidential election.

(b) Within eight days after Election Day, each Local Election Authority shall complete its recount of ballots.

(c) As part of the local recount, any presidential candidate whose preliminary vote totals statewide were within one percent of the leading presidential candidate statewide may designate representatives to observe the recount conducted by the Local Election Authority.

(1) When a recount involves manual inspection of ballots to determine if a marking on the ballot qualifies as a vote under state law, the observation to which a candidate's representative is entitled must take a form that allows the candidate's representative to examine the markings on the ballot.

(2) When a recount involves only the use of machines to verify the accuracy of the initial count, a candidate's representative shall be entitled to examine the Local Election Authority's inspection of the machines for the purpose of determining that they operate properly.

(3) As part of the right to observe the recount, a candidate's representative may also examine any document relevant to the conduct of the recount, including a ballot, if doing so will not disrupt or delay the recount.

(d) A candidate's designated representative may object to any decision made by the Local Election Authority during the recount if, but only if, reversal of the decision upon review by the Presidential Election Court would alter the number of ballots counted for any candidate.

(e) The Presidential Election Court shall have whatever authority is necessary to assure that each Local Election Authority is able to complete its recount within the eight-day deadline specified in subsection (b).

(1) The Court's authority under this subsection includes the authority to remove a candidate's representative from observation of the recount if the representative has become unduly disruptive.

(2) Whenever the Court removes a candidate's representative pursuant to this authority, the candidate shall have the right to designate a substitute representative to continue observing the recount, but if the substitute also becomes unduly disruptive, the Court in its discretion may declare that the candidate has forfeited the right to designate another substitute.

§ 306. Presidential Election Court's Review of Local Recount Rulings

(a) Within 24 hours after completion of each recount by a Local Election Authority under § 305, each candidate seeking the Presidential Election Court's review of decisions objected to under § 305(d) must present to the Court an enumeration of the objections for its review.

(b) All objections not timely presented for review, as required by subsection (a), shall be deemed waived and unreviewable.

(c) For each objection, the Court's jurisdiction extends to the Local Election Authority's decision that is the subject of the objection, and the Court is empowered not only to nullify the Local Election Authority's decision but also to substitute the Court's own judgment on the matter.

(d) In the interest of expediting the recount, the Court should exercise its authority under subsection (c) to the full extent possible, remanding a decision to the Local Election Authority only when

(1) additional factfinding is necessary, and

(2) the required factfinding will be conducted more efficiently by the Local Election Authority than by the Court itself.

(e) Within 14 days after Election Day and prior to the completion and certification of the canvass under §§ 308 and 309, the Court shall complete its review of all objections to recount decisions presented for its consideration and publicly announce its determinations, including any specific matters remanded to a Local Election Authority for additional factfinding.

§ 307. Appeal to State Supreme Court of Recount Review

(a) Within 24 hours after the Presidential Election Court completes its review and makes its public announcement under § 306(e), any candidate seeking an appeal of that review in the State Supreme Court must file a notice of appeal.

(b) No appeal filed under subsection (a) shall delay certification of the canvass pursuant to § 309.

(c) If the State Supreme Court chooses to hold oral argument on a recount appeal filed under subsection (a), the State Supreme Court shall do so within 17 days after Election Day.

(d) Within 20 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(e) If the State Supreme Court's resolution of an appeal requires additional recount proceedings on remand,

(1) each Local Election Authority required to conduct such additional recount proceedings must complete these proceedings within 27 days after Election Day;

(2) the Presidential Election Court must complete any additional recount proceedings of its own, including all review of additional proceedings conducted by each Local Election Authority under subsection (e)(1), within 30 days after Election Day; and

(3) the State Supreme Court must complete any post-remand review of the Court's proceedings under subsection (e)(2) at least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

§ 308. Conduct of Canvass by Local Authorities

(a) Whenever the Chief Elections Officer pursuant to § 303 has declared the need for an Expedited Presidential Recount, each Local Election Authority shall complete its local canvass of the election within 14 days after Election Day.

(b) The local canvass shall include, but is not limited to, these component procedures:

(1) With respect to each provisional ballot, previously uncounted absentee ballot, or any other uncounted ballot cast in the election within the Local Election Authority's jurisdiction, a determination of whether or not the ballot is eligible to be counted;

(2) The correction of any tabulation errors discovered upon review of the preliminary returns or during the recount conducted under § 305;

(3) Any adjustment in the counting of ballots required by the Presidential Election Court's review of the recount under § 306; and

(4) Insofar as required by other provisions of state law, any adjustment in vote totals as part of the reconciliation of discrepancies in the number of ballots cast at a polling location and, according to polling-place records, the number of voters who cast ballots at the polling place.

(c) With respect to any ballot that a Local Election Authority determines eligible to be counted under subsection (b)(1), the Local Election Authority may examine the ballot to ascertain whether it contains a vote in the presidential election and, if so, may add that vote for the purpose of calculating the vote totals for each presidential candidate as part of the certification of the canvass under § 309, PROVIDED THAT the Local Election Authority must not commingle the ballot with other ballots, but instead shall preserve the ballot separately in the event upon review under § 310 the Presidential Election Court reverses the Local Election Authority's determination and the ballot is ruled ineligible to be counted.

(d) For all ballot-eligibility determinations under subsection (b)(1), the Local Election Authority shall make publicly available upon or before completion of the canvass a written explanation for why it determined the ballot eligible or ineligible, provided that

(1) the Authority may aggregate ballots for which the explanation is the same, and

(2) the Presidential Election Court may specify further the form that these publicly accessible written explanations must take.

§ 309. Certification of Canvass

(a) Immediately upon completion of the local canvass as required by § 308, each Local Election Authority shall certify the results of its local canvass, including vote totals for each presidential candidate and the explanations for its ballot-eligibility determinations.

(b) By the end of the fourteenth day after Election Day, the Chief Elections Officer shall compile into a single certification of the statewide canvass all certifications of local canvasses received from Local Election Authorities.

(c) Once a Local Election Authority has certified its local canvass under subsection (b), the Local Election Authority may not alter the certification, except as ordered by the Presidential Election Court pursuant to a proceeding under § 310.

§ 310. Presidential Election Court's Review of Canvass: Petition and Participants

(a) Within 24 hours after a Local Election Authority has certified its local canvass under § 308, a presidential candidate entitled to participate in a presidential recount under § 305 may petition the Presidential Election Court for review of any decision made during the local canvass concerning the eligibility of ballots, or counting of votes, in the presidential election.

(b) Any candidate petitioning under this Section shall, at the same time as electronically filing the petition with the Presidential Election Court, serve electronic notice of the petition upon all other candidates entitled to participate in

the presidential recount under § 305, as well as upon any Local Election Authority whose decisions are the subject of the petition.

(c) A petition under this Section shall specifically identify

(1) each ballot for which the Local Election Authority made an eligibility determination that the candidate wishes the Presidential Election Court to review; and

(2) any other decision made by the Local Election Authority that the petition claims is erroneous and, if reversed by the Presidential Election Court, would alter the vote totals certified under § 309.

(d) A petition under this Section may request the Presidential Election Court to classify as eligible to be counted a ballot that the Local Election Authority classified as ineligible to be counted, or may request that the Presidential Election Court classify as ineligible to be counted a ballot that the Local Election Authority classified as eligible to be counted, and a candidate may include both types of requests within the same petition.

(e) The petition shall specify, for each ballot the candidate wishes the Presidential Election Court to review, the reasons why the candidate believes the Local Election Authority's eligibility determination to be erroneous.

(f) The Presidential Election Court, in its sole discretion, may join the state's Chief Elections Officer to any proceedings pursuant to this Section.

(g) Apart from subsection (f), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (b).

(h) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

(i) Any party's motions or briefs in support of, or in opposition to, a petition under this Section must be filed with the Presidential Election Court and served upon all other parties within 48 hours after the filing of the petition, and the parties must submit any responsive briefs within the next 24 hours thereafter.

§ 311. Presidential Election Court's Review of Canvass: Deadline and Proceedings

(a) Within 21 days after Election Day, the Presidential Election Court shall complete its review of any petition filed under § 310.

(b) The Presidential Election Court may consolidate into a single adjudicatory proceeding any or all petitions filed under § 310.

(c) The Presidential Election Court may hold any hearing, with or without oral argument, to facilitate its review of any petition filed under § 310, provided that the hearing does not interfere with the Court's compliance with the deadline in subsection (a).

(d) At any point during a hearing, the Presidential Election Court may issue an interim ruling on legal or factual issues if, in the Court's judgment, doing so will help to expedite its review of a petition.

(e) The Presidential Election Court may receive the testimony of any witness, or receive into evidence any document, that will assist the Court in determining the eligibility of any ballot, or reviewing any ruling during the canvass, that is the subject of a petition.

(f) Any party may propose to the Presidential Election Court the introduction of relevant evidence, but the Court shall determine whether to receive such proposed evidence, balancing the potential value of the evidence against the need to complete its review within the deadline in subsection (a).

(g) In its sole discretion, the Presidential Election Court may adhere to or deviate from generally applicable rules of evidence insofar as the Court determines, in its judgment, that doing so will enable it to make the most factually accurate determinations of ballot eligibility, or vote-counting accuracy, consistent with its overriding obligation to comply with the deadline in subsection (a).

(h) For any ballot subject to a petition filed under § 310, the petitioner shall bear the burden of proving that, more likely than not, the Local Election Authority's determination regarding the ballot's eligibility or ineligibility is erroneous.

(i) For any claim raised in a petition not covered by subsection (h), the petitioner shall bear the burden of proving that the Local Election Authority's

determination caused the vote totals certified under § 309 to be incorrect and, insofar as the petition asks the Court to adjust the certified vote total, shall further bear the burden of proving that the requested adjustment is more likely than not correct.

(j) As part of completing its review of all petitions pursuant to the deadline in subsection (a), the Presidential Election Court shall publicly report its ruling on each ballot-eligibility determination submitted for its review.

(1) The Court shall declare whether, in its judgment, each ballot is eligible or ineligible and whether this judgment affirms or reverses the Local Election Authority's determination with respect to the ballot;

(2) For each ballot, the Court shall specify the grounds in law or evidence upon which it relies for its determination of whether the ballot is eligible or ineligible to be counted.

(3) The Court's grounds may include the petitioner's failure to meet the burden of proof with respect to the particular ballot.

(4) The Court may report its grounds in whatever format (either briefly or at greater length) that it deems most conducive to the public understanding of its rulings, including grouping together ballots that are subject to the same grounds of decision.

(k) At the same time as the Presidential Election Court publicly announces its final ballot-eligibility rulings on a petition under § 310, the Court shall also publicly announce its final determinations on any other claims in the petition concerning the vote totals certified in the canvass.

§ 312. Appeal to State Supreme Court of Canvass Review

(a) Within 24 hours after the Presidential Election Court's issuance of its final ruling on a petition under § 311(k), a party to the proceeding may appeal the ruling to the State Supreme Court.

(1) No appeal of any decision made by the Presidential Election Court as part of a proceeding under § 310 can occur until after the Court has issued its final ruling in that proceeding under § 311(k).

(2) The right of appeal under this Section is limited to contending that the Presidential Election Court erred in ruling a ballot eligible or ineligible or otherwise erred concerning the vote totals certified under § 309.

(3) No appeal can concern any intermediary decision of the Presidential Election Court during the proceeding under § 310 except insofar as the decision affects the eligibility of a ballot or otherwise affects the vote totals certified under § 309.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under subsection (a), that oral argument shall occur within 24 days after Election Day.

(c) Within 27 days after Election Day, the State Supreme Court shall resolve any appeal filed under subsection (a).

(d) If the State Supreme Court's resolution of an appeal under subsection (a) requires additional proceedings on remand concerning the canvass,

(1) each Local Election Authority required to conduct such additional canvass proceedings must complete these proceedings within 29 days after Election Day;

(2) the Presidential Election Court must complete any additional proceedings of its own concerning the canvass, including all review of additional proceedings conducted by each Local Election Authority under subsection (d)(1), within 31 days after Election Day;

(3) the State Supreme Court must complete any post-remand review of the Presidential Election Court's proceedings under subsection (d)(2) at least 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

§ 313. Judicial Contest of Certified Vote Totals: Petition

(a) No later than 24 hours after the Chief Elections Officer declares the statewide certification of the canvass pursuant to § 309, a candidate eligible to participate in a presidential recount under § 305 may file with the Presidential

Election Court a petition to contest the validity of the vote totals declared in the statewide certification.

(b) A candidate in the lead based on the statewide certification of the canvass may file with the Presidential Election Court a conditional petition, for the Court to adjudicate if the candidate loses the lead as a result of

(1) proceedings concerning the recount that occur after certification, or

(2) adjustment in vote totals pursuant to a petition for judicial review of the canvass under § 310, or

(3) the Court finding merit in a petition filed by another candidate under this Section;

provided that the candidate in the lead must file the conditional cross-petition within the same deadline as in subsection (a).

(c) Any candidate petitioning under this Section shall, at the same time as electronically filing the petition with the Presidential Election Court, serve electronic notice of the petition upon all other candidates entitled to participate in a presidential recount under § 305, as well as upon the Chief Elections Officer.

(d) The petition may assert as grounds for contesting the certification any grounds available under state law in a judicial contest of a certified gubernatorial election, except those grounds the petitioning candidate had an opportunity to raise under § 306 or § 310.

(e) A petition under this Section may seek either:

(1) a declaration that, upon the correction of errors affecting the validity of the certification, the petitioner is entitled to be certified the candidate with the highest statewide total of valid votes; or

(2) a declaration that the certification must be declared void, in which case the Legislature of the state may provide an alternative method of appointment of the state's presidential electors pursuant to its authority under Article II of the U.S. Constitution.

(f) If a petition under this Section claims that the statewide certification is tainted by the presence of more invalid ballots counted in the election than the

difference in the vote totals of the two leading candidates, the Presidential Election Court shall have such powers, and only such powers, to remedy this taint as would a state court in a contest of a gubernatorial election premised on the same grounds.

(g) The Presidential Election Court, in its sole discretion, may join a Local Election Authority to any proceedings pursuant to this Section.

(h) Apart from subsection (g), there shall be no other parties to a proceeding under this Section other than the petitioning candidate and those parties entitled to be served notice under subsection (c).

(i) The Presidential Election Court, in its sole discretion, shall decide whether to permit or prohibit the filing of briefs *amicus curiae* in any proceeding under this Section.

§ 314. Contest of Certified Vote Totals: Deadline and Proceedings

(a) Within 28 days of Election Day, the Presidential Election Court shall conclusively resolve any contest filed under § 313.

(b) To facilitate compliance with the deadline in subsection (a), the Presidential Election Court shall adhere to an expedited schedule for adjudication of the contest, including issuing such orders for expedited discovery as necessary to enable a trial of the contest to commence within seven days after the filing of the contest.

(c) A motion to dismiss a contest petition filed under § 313, including a motion to dismiss a conditional petition under § 313(b), must be filed with the Presidential Election Court and served upon the petitioner within 48 hours after the filing of the contest.

(d) The Presidential Election Court may choose to hold an oral argument on a motion to dismiss the contest, provided that the argument shall occur within 72 hours of the filing of the motion.

(e) Unless the Presidential Election Court has previously granted a motion to dismiss, the trial of the contest will commence within seven days after the filing of the contest.

(f) While a contest petition or conditional petition is pending, the Presidential Election Court may permit the petitioner for good cause shown to amend the petition to add or supplement claims with facts that could not have been known to the petitioner at the time the petition initially was filed, provided that in no event shall the Court permit the amendment of a petition more than 21 days after Election Day.

(g) Whenever a contest petition or conditional petition is pending at the same time as another contest petition, the Presidential Election Court may consolidate proceedings, including oral argument on motions to dismiss or trial of evidentiary issues, in the interest of completing adjudication of all pending petitions within the deadline in subsection (a).

(h) When considering whether to grant any motion to dismiss a contest petition or conditional petition, in order to avoid the necessity of a trial on factual issues relating to the petition that is the subject of the motion to dismiss, the Presidential Election Court shall take account that, if the Court grants the motion to dismiss but that dismissal is reversed on appeal by the State Supreme Court, there may be insufficient time after the reversal to hold a factfinding trial that might have been held prior to the appeal.

(i) With respect to the trial of any contest petition or conditional petition, the petitioner bears the burden of proving by a preponderance of the evidence any issue of fact necessary to sustain a legal claim made in the petition; provided that with respect to any such issue of fact the burden of proof may be elevated to the standard of clear and convincing evidence if but only if the same elevated standard would apply to the same factual issue in a contest of a gubernatorial election.

§ 315. Appeal to State Supreme Court of Contest Determinations

(a) Within 24 hours after the Presidential Election Court's resolution of a contest under § 314, a party to the contest may appeal to the State Supreme Court.

(b) If the State Supreme Court chooses to hold oral argument on an appeal filed under this Section, the argument shall occur within 48 hours after the filing of the appeal.

(c) The State Supreme Court shall resolve any appeal filed under this Section, including the issuance of any orders necessary to adjust vote totals in the statewide certification, no later than 24 hours prior to the expiration of the Safe Harbor Deadline under 3 U.S.C. § 5.

(d) If in an appeal under this Section the State Supreme Court identifies any issue requiring a remand for additional factfinding proceedings, the State Supreme Court shall order such factfinding to be complete wherever feasible in such time as to permit final resolution of the appeal in accordance with subsection (c).

§ 316. Final Certification of Presidential Election

(a) Before noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5, the Chief Elections Officer shall publicly issue a final certification of the presidential election, based on a compilation of final orders in all proceedings concerning the presidential recount, any review of the canvass, and any contest, including:

(1) any final post-remand orders concerning the recount under § 307;

(2) any final post-remand orders concerning the canvass under § 312; and

(3) any final orders resolving an appeal of a contest under § 315.

(b) If at noon on the date of the Safe Harbor Deadline under 3 U.S.C § 5 the Chief Elections Officer has failed to publicly issue a final certification of the presidential election as required in subsection (a), the State Supreme Court shall have the authority to issue any orders necessary to assure compliance with the Safe Harbor Deadline, including directly and immediately issuing the final certification of the election on its own authority.

(c) If notwithstanding its authority under subsection (b), the State Supreme Court determines at or before 11:59 p.m. on the date of the Safe Harbor Deadline that the state is unable to declare a final certification of the presidential election pursuant to these Procedures, then the State Supreme Court immediately shall issue a public declaration that the state is exercising its option to waive the Safe Harbor status available under 3 U.S.C. § 5.

(d) Whenever the State Supreme Court pursuant to subsection (c) has issued a public declaration that the state cannot meet the deadline necessary for Safe Harbor status, the State Supreme Court shall have the authority to issue emergency orders as necessary to enable final certification of the presidential election on or before the date specified in 3 U.S.C. § 7 for the state's presidential electors to cast their Electoral College votes.

§ 317. Cessation of Expedited Procedures If No Longer Necessary

(a) At any time after the Chief Elections Officer has issued a declaration under § 303 on the necessity of an Expedited Presidential Recount, and prior to final certification of the election under § 316, these Procedures will no longer be applicable if and only if:

(1) all candidates entitled to participate in a recount under § 305(c) jointly sign and submit to the Presidential Election Court a statement stipulating that

(A) there is a nationally recognized winner of the presidential election,

(B) all other candidates signing the joint statement have publicly conceded the election to the winning candidate,

(C) there is no further need to complete any recount or other proceedings on an expedited basis pursuant to these proceedings,

(D) all the candidates signing the statement waive all rights that they otherwise would have under these Procedures; and

(E) the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316;

(2) the Chief Elections Officer signs and submits a separate statement to the Presidential Election Court confirming all the stipulations set forth in the joint statement of the candidates under paragraph (1); and

(3) the Presidential Election Court upon receipt of the statements required in paragraphs (1) and (2), issues a pronouncement confirming that

the Chief Elections Officer may proceed forthwith to the final certification of the election under § 316.

(b) Immediately upon issuance of a pronouncement of the Presidential Election Court under subsection (a)(3), the Chief Elections Officer shall proceed forthwith to issue the final certification of the election under § 316.

MEMORANDUM

TO: **Hon. Jeffrey S. Sutton, Chair**
Committee on Rules of Practice and Procedure

FROM: **Hon. Steven M. Colloton, Chair**
Advisory Committee on Appellate Rules

RE: **Report of Advisory Committee on Appellate Rules**

DATE: **December 14, 2015**

I. Introduction

The Advisory Committee on Appellate Rules met on October 29, 2015 in Chicago, Illinois. The Committee approved for publication three sets of proposed amendments. These amendments relate to (1) stays of the issuance of the mandate under Rule 41; (2) the authorization of local rules that would prevent the filing of an amicus brief based on party consent under Rule 29(a) when filing the brief would cause the disqualification of a judge; and (3) the extension of filing and serving a reply brief in appeals and cross appeals from 14 days to 21 days under Rules 31(a)(1) and 28.1(f)(4). The Committee also considered nine additional items and decided to remove three of them from its agenda. Since the October meeting, the Committee has received one additional new item to consider.

Part II of this report discusses the proposals for which the Committee seeks approval for publication. Part III covers the other matters under consideration.

The Committee has scheduled its next meeting for April 5-6, 2015. Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items – for Publication

The Committee seeks approval for publication of three sets of proposed amendments as set forth in the following subsections.

A. Stays of the Issuance of the Mandate: Rule 41

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

In light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), the Committee has studied whether Rule 41 should be amended (1) to clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) to address the standard for stays of the mandate; and (3) to restructure the Rule to eliminate redundancy. The Committee now seeks approval to publish proposed amendments to accomplish these changes. The proposed amendments are set out in an enclosure to this report.

Before 1998, Rule 41 referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. The proposed amendments to Rule 41(b) would specify that the mandate is stayed only "by order." Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and facilitate review of the stay.

The amendments to Rule 41(d) simplify and clarify the current rules pertaining to issuance of a stay pending a petition for a writ of certiorari to the Supreme Court. The deletion of subdivision (d)(1) is intended to streamline the Rule by removing redundant language; no substantive change is intended. Subdivision (d)(4) – i.e., former subdivision (d)(2)(D) – is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. In *Schad* and *Bell*, without deciding whether the current version of Rule 41 provides authority for a further stay of the mandate after denial of

certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Schad,* 133 S. Ct. at 2551. Because a court of appeals has inherent authority to *recall* a mandate in extraordinary circumstances, *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), the Committee thought there was little point in considering whether to forbid extensions of time altogether. The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances.

Some have suggested that under the current rule, a court may extend the time after a denial of certiorari *without* extraordinary circumstances under Rule 41(b). The proposed amendment to Rule 41(b) would establish that a court may extend the time only "in extraordinary circumstances" or pending a petition for certiorari under the conditions set forth in Rule 41(d). The "extraordinary circumstances" requirement is based on the strong interest of litigants and the judicial system in achieving finality. The proposed amendment would apply the "extraordinary circumstances" requirement both after a denial of certiorari and when no party petitions for a writ of certiorari, because the strong interests in finality counsel against extensions unless a heightened standard is met.

B. Authorizing Local Rules on the Filing of Amicus Briefs: Rule 29(a)

Federal Rule of Appellate Procedure 29(a) specifies that an amicus curiae may file a brief with leave of the court or without leave of the court "if the brief states that all parties have consented to its filing." A potential concern is that the parties might consent to the filing of a brief by an amicus curiae, and that filing may cause the recusal of one or more judges either on the panel hearing the case or voting on whether to rehear the case en banc. Several Circuits have adopted local rules to address this concern. For example, D.C. Circuit Rule 29(b) states: "Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case or a member of the en banc court when participation is sought with respect to a petition for rehearing en banc." The Second, Fifth, and Ninth Circuits have similar local rules.

These local rules appear to be inconsistent with Rule 29(a) because they do not allow the filing of amicus briefs based solely on consent of the parties in all instances. The Committee seeks approval to publish an amendment to authorize local rules limiting the filing of amicus briefs in situations when they would disqualify a judge. The proposed amendment is set out in an enclosure to this report. The Committee believed that the local rules should be authorized because they reasonably conclude that the court's interest in avoiding disqualification of one or more judges on a hearing panel or in a rehearing vote outweighs the interest of a putative *amicus curiae* in filing a brief.

C. Extension of Time for Filing Reply Briefs: Rules 31(a)(1) and 28.1(f)(4)

Federal Rule of Appellate Procedure Rules 31(a)(1) and 28.1(f)(4) give parties 14 days after service of the appellee's brief to file a reply brief in appeals and cross-appeals. In addition, Rule 26(c) provides that "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire." Accordingly, parties effectively have 17 days to file a reply brief. Pending amendments, however, soon will eliminate the "three-day rule" in Rule 26(c), thus reducing the effective time for filing a reply brief from 17 days to 14 days.

The Committee considered whether Rules 31(a)(1) and 28.1(f)(4) should be amended to extend the period for filing reply briefs in light of the elimination of the three-day rule. The Committee concluded that effectively shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the Committee concluded the period should be extended to 21 days. The Committee now seeks approval to publish amendments to Rules 31(a)(1) and 28.1(f)(4) that would accomplish this result.

The Committee did not believe that extending the period for filing a reply brief would delay the completion of appellate litigation. For the 12-month period ending September 30, 2014, the median time from the filing of the appellee's "last brief" to oral argument or submission on the briefs was 3.6 months nationally. The Administrative Office does not specifically measure the time from filing of the "reply brief" to oral argument, perhaps because the reply brief is optional. Given this 3.6-month median time period, however, a four-day increase over the 17 days allowed under the current rules is not likely to have a discernible impact on the scheduling or submission of cases. *See* Administrative Office of the U.S. Courts, Table B-4A ("U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2014"). The Committee's clerk representative reported his understanding that the circuits typically set cases for oral argument after receipt of the appellee's brief, and that a modest change in the deadline for a reply brief should not affect this scheduling.

III. Information Items

The Committee is studying a proposal to expand the disclosure requirements in Rules 26.1 and 29(c) so judges can evaluate whether recusal is warranted. Local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. At its October 2015 meeting, the Committee discussed six possible amendments to these Rules. The Committee plans to study the matter further, in coordination with other advisory committees and the Committee on Codes of Conduct as warranted.

The Committee is considering a proposal to address a potential problem involving class action settlement objectors. A member of a class may object to a settlement, file an appeal, and then offer to drop the appeal in exchange for consideration from counsel representing the class. A concern is that such class members might not make their objections in good faith based on genuine objections, but instead might simply be attempting to leverage their ability to delay the settlement in order to extract payment. Because the solution to this problem may involve changes to both the Civil and Appellate Rules, the Committee is coordinating with the Civil Rules Committee on this matter, and the Civil Rules Committee likely will report on this matter as well.

The Committee is studying possible amendments to Federal Rule Civil Procedure 62(a), which concerns bonds that an appellant must post to stay the execution of a judgment during the pendency of an appeal. Although the possible amendments would address a Civil Rule, the matter is of interest to the Appellate Rules Committee because appeal bonds are an appellate issue. The Appellate Rules Committee has conveyed its views to those working on the matter in the Civil Rules Committee, and the Civil Rules Committee likely will report on this matter.

The Committee is considering a recent suggestion that would address several aspects of appeals by litigants proceeding *in forma pauperis*. The issues raised include whether to exclude any part of a social security number in court filings, whether to seal motions to proceed in forma pauperis, and whether to require opposing counsel to make certain types of authorities available to pro se litigants. The Committee is studying the desirability and feasibility of the suggested reforms.

The Committee is considering whether to amend the Appellate Rules to address whether the $500 fee for docketing a case under 28 U.S.C. § 1913 is recoverable as costs in the district court or in the court of appeals. The Committee has been advised that there is a lack of uniformity in practice among the circuits and is seeking additional information from clerks of court about current practices. The Committee will continue to study the matter.

THIS PAGE INTENTIONALLY BLANK

APPENDIX

THIS PAGE INTENTIONALLY BLANK

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

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When Issued. The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only in extraordinary circumstances or under Rule 41(d).

(c) Effective Date. The mandate is effective when issued.

(d) Staying the Mandate Pending a Petition for Certiorari.

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

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately ~~when~~ on receiving a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

Committee Note

Subdivision (b). Subdivision (b) is revised to clarify that an order is required for a stay of the mandate and to specify the standard for such stays.

Before 1998, the Rule referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling of the Rule. Though the change appears to have been intended as merely stylistic, it has caused uncertainty concerning whether a court of appeals can stay its mandate through mere inaction or whether such a stay requires an order. There are good reasons to require an affirmative act by the court. Litigants—particularly those not well versed in appellate procedure—may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell v. Thompson*, 545 U.S. 794, 804 (2005), the lack of notice of a stay was one of the factors that contributed to the Court's holding that staying the mandate was an abuse of discretion. Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and can also facilitate review of the stay.

A new sentence is added to the end of subdivision (b) to specify that the court may extend the time for the mandate's issuance only in extraordinary circumstances or

pursuant to Rule 41(d) (concerning stays pending petitions for certiorari). The extraordinary-circumstances requirement reflects the strong systemic and litigant interests in finality. Rule 41(b)'s presumptive date for issuance of the mandate builds in an opportunity for a losing litigant to seek rehearing, and Rule 41(d) authorizes a litigant to seek a stay pending a petition for certiorari. Delays of the mandate's issuance for other reasons should be ordered only in extraordinary circumstances.

Subdivision (d). Two changes are made in subdivision (d).

Subdivision (d)(1)—which formerly addressed stays of the mandate upon the timely filing of a motion to stay the mandate or a petition for panel or en banc rehearing—has been deleted and the rest of subdivision (d) has been renumbered accordingly. In instances where such a petition or motion is timely filed, subdivision (b) sets the presumptive date for issuance of the mandate at 7 days after entry of an order denying the petition or motion. Thus, it seems redundant to state (as subdivision (d)(1) did) that timely filing of such a petition or motion stays the mandate until disposition of the petition or motion. The deletion of subdivision (d)(1) is intended to streamline the Rule; no substantive change is intended.

Subdivision (d)(4)—i.e., former subdivision (d)(2)(D)—is amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. Without deciding whether the prior version of Rule 41 provided authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Ryan v. Schad*, 133 S. Ct. 2548, 2551 (2013) (per curiam). The amendment to subdivision (d)(4) makes explicit that the court may stay the mandate after the denial of certiorari, and also makes explicit that such a stay is permissible only in extraordinary circumstances. Such a stay cannot occur through mere inaction but rather requires an order.

The reference in prior subdivision (d)(2)(D) to the *filing* of a copy of the Supreme Court's order is replaced by a reference to the court of appeals' *receipt* of a copy of the Supreme Court's order. The filing of the copy and its receipt by the court of appeals amount to the same thing (*cf.* Rule 25(a)(2), setting a general rule that "filing is not timely unless the clerk receives the papers within the time fixed for filing"), but "upon receiving a copy" is more specific and, hence, clearer.

THIS PAGE INTENTIONALLY BLANK

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, except that a court of appeals may by local rule prohibit the filing of an amicus brief that would result in the disqualification of a judge.

* * * * *

Committee Note

Under current Rule 29(a), by the parties' consent alone, an amicus curiae might file a brief that results in the disqualification of a judge who is assigned to the case or participating in a vote on a petition for rehearing. The amendment authorizes local rules, such as those previously adopted in some circuits, that prohibit the filing of such a brief.

THIS PAGE INTENTIONALLY BLANK

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within ~~14~~ 21 days after service of the appellee's brief but a reply brief must be filed at least 7 days before argument, unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (a)(1) is revised to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

THIS PAGE INTENTIONALLY BLANK

Rule 28.1. Cross-Appeals

* * * * *

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within ~~14~~ 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

* * * * *

Committee Note

Subdivision (f)(4) is amended to extend the period for filing a reply brief from 14 days to 21 days. Before the elimination of the "three-day rule" in Rule 26(c), attorneys were accustomed to a period of 17 days within which to file a reply brief, and the committee concluded that shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs. Because time periods are best measured in increments of 7 days, the period is extended to 21 days.

THIS PAGE INTENTIONALLY BLANK

TAB 5B

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules
Table of Agenda Items —December 2015

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08 Discussed and retained on agenda 10/15
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15

FRAP Item	Proposal	Source	Current Status
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 10/15
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12 Discussed and retained on agenda 10/15
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/15 Discussed and retained on agenda 10/15

FRAP Item	Proposal	Source	Current Status
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/15
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14 Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14 Discussed and retained on agenda 10/14 Discussed and retained on agenda 04/15 Draft approved 10/15 for submission to Standing Committee
14-AP-D	Consider possible changes to Rule 29's authorization of amicus filings based on party consent	Standing Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee
15-AP-A	Consider adopting rule presumptively permitting pro se litigants to use CM/ECF	Robert M. Miller, Ph.D.	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-B	Technical amendment – update cross-reference to Rule 13 in Rule 26(a)(4)(C)	Reporter	Draft approved 04/15 for submission to Standing Committee Approved by Standing Committee 06/15
15-AP-C	Consider amendment to Rule 31(a)(1)’s deadline for reply briefs	Appellate Rules Committee	Awaiting initial discussion Draft approved 10/15 for submission to Standing Committee
15-AP-D	Amend FRAP 3(a)(1) (copies of notice of appeal) and 3(d)(1) (service of notice of appeal)	Paul Ramshaw, Esq.	Awaiting initial discussion Discussed and retained on agenda 10/15

FRAP Item	Proposal	Source	Current Status
15-AP-E	Amend the FRAP (and other sets of rules) to address concerns relating to social security numbers; sealing of affidavits on motions under 28 U.S.C. § 1915 or 18 U.S.C. § 3006A; provision of authorities to pro se litigants; and electronic filing by pro se litigants	Sai	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-F	Recovery of appellate fees	Prof. Gregory Sisk	Awaiting initial discussion Discussed and retained on agenda 10/15
15-AP-H	Electronic filing by pro se litigants	Robert M. Miller, Ph.D.	Awaiting initial discussion

TAB 5C

THIS PAGE INTENTIONALLY BLANK

DRAFT

Minutes of the Fall 2015 Meeting of the
Advisory Committee on Appellate Rules
October 29-30, 2015

Chicago, Illinois

I. Attendance and Introductions

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 29, 2015, at 9:00 a.m., at the Notre Dame Law Suite in Chicago, Illinois.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Mr. Gregory G. Katsas, Mr. Neal K. Katyal, Judge Stephen Joseph Murphy III, and Mr. Kevin C. Newsom. Solicitor General Donald Verrilli was represented by Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice, and by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division, both of whom were present. Judge Brett M. Kavanaugh was absent.

Reporter Gregory E. Maggs was present and kept these minutes. Associate Reporter Catherine Struve participated by telephone for all but brief portions of the meeting.

Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office.

Judge Robert Michael Dow Jr., a member of the Advisory Committee on Civil Rules arrived at 11:30 a.m. and left at 12:30 p.m. Mr. Alex Dahl of Lawyers for Civil Justice also attended portions of the meeting as an observer.

Judge Colloton called the meeting to order. He thanked Professor Barrett for her efforts in making the Notre Dame Law Suite available to the Committee for this meeting. Judge Colloton mentioned that Judge Peter T. Fay and Judge Richard G. Taranto had completed their service on the Committee. Judge Colloton welcomed Judge Murphy as a new member. Judge Colloton also explained that Judge Kavanaugh is a new member but was unable to attend. Judge Colloton thanked Professor Struve for her long and diligent service as the reporter and her great assistance during the transition, and the Committee applauded. Judge Colloton introduced Professor Maggs as the new

reporter for the committee. Judge Colloton also announced that Ms. Marie Leary, Research Associate for the Appellate Rules Committee was unable to attend.

II. Approval of the Minutes of the April 2015 Meeting

Judge Colloton directed the Committee's attention to the approval of the minutes from the April 2015 meeting. An attorney member asked about the Committee's policy regarding the identification of speakers in its meetings. He observed that the minutes mostly did not identify speakers by name but sometimes included identifying information. Professor Coquillette said that the tradition was not to identify members of the Committee when they speak because of concerns about outside lobbying and about the ability of speakers to speak freely.

Two attorney members favored having the minutes identify speakers. Another attorney member spoke in favor of identifying speakers, noting that it was a public meeting. A judge member said that the practice of not identifying members had been in place for many years. He believed that the practice should be the same across committees. But he further said that he did not think that identifying members in the minutes would affect lobbying. Mr. Letter said that representatives of the Department of Justice should be identified as such, which has been the practice. The Committee did not vote on whether to change the traditional practice, leaving the matter open for further consideration.

An attorney member called the Committee's attention to page 19 of the minutes [Agenda Book at 39], and asked Judge Colloton whether a representative of the Committee had spoken to the Fifth Circuit about its local rules on the length of briefs. Judge Colloton said that no conversation had yet occurred with the Fifth Circuit because it seemed premature. The proposed amendment to the federal rules is still pending, and if it is adopted, then the Fifth Circuit might opt out of the new length limits or modify its local rule.

The minutes of the Spring 2015 meeting were approved by voice vote.

Judge Colloton mentioned that the minutes of the Standing Committee's May 2015 meeting were not available in time for inclusion in the Agenda Book for this meeting. He summarized the meeting, noting that the Standing Committee had approved all of the amendments proposed by the Appellate Committee. The judicial Conference also has approved the proposed amendments, and they have gone to the Supreme Court. Judge Sutton said that the Standing Committee was grateful to the Appellate Rules Committee for preparing the proposed amendments.

III. Action and Discussion Items

A. Item No. 13-AP-H (FRAP 41)

Judge Colloton introduced Item No. 13-AP-H, reminding the Committee that the item concerns possible amendments to Rule 41 that would (1) clarify that a court of appeals must enter an

order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

Judge Colloton recounted that at its April 2014 meeting, the consensus of the Committee was that the words "by order" should be restored to Rule 41(b). Thus, a court would have to enter an order if it wished to stay the issuance of the mandate.

On the issue of the standard for ordering a stay, the Committee discussed whether to add an "extraordinary circumstances" test to Rules 41(b) and 41(d)(4). A judge member said that the standard under Rule 41(d)(4) was in fact already extraordinary circumstances and that the proposed amendment would be merely a codification of existing practice. The judge member said that it is not clear what the current standard is under Rule 41(b).

An attorney member asked whether judges should have to state their reasoning for an extension. Several members were opposed to adding such a requirement.

The consensus of the Committee was to add the "extraordinary circumstances" test to both Rules 41(b) and 41(d)(4). The Committee then discussed how to phrase the wording. An academic member suggested that Rule 41(b) and (d)(4) should be phrased consistently. An attorney member suggested that the phrase "unless extraordinary circumstances exist" for Rule 41(d). The Committee also agreed to this proposal by consensus.

The Committee then considered Professor Kimble's style suggestions as shown in the Agenda Book. The Committee approved the suggested changes, including his proposal to delete the word "certiorari" in Rule 41(d)(1) and (d)(4).

The Committee then set this item aside so that the Reporter could prepare a document showing all of the changes proposed at the meeting. The Committee resumed discussion of this item at the end of the meeting. The Reporter circulated electronically a document showing the changes.[1]

---

[1] The circulated electronic document contained the following text, which the Committee approved:

> **Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**
>
> (a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.
>
> (b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only in extraordinary circumstances or under Rule 41(d).
>
> (c) **Effective Date.** The mandate is effective when issued.
>
> (d) **Staying the Mandate Pending a Petition for Certiorari.**
>
> ~~(1) **On Petition for Rehearing or Motion.** The timely filing of a~~

An attorney member of the Committee asserted that Rule 41(b) is warranted by the interest in finality which warrants a high bar. The member also asserted that Rule 41(d)(4) codifies the Supreme Court's decisions.

After reviewing the changes, Committee approved the revised version of the rule by consensus. A judge member moved to send the draft, as approved, to the standing committee. An academic member seconded the motion. The Committee approved the motion by voice vote.

B. Item No. 08-AP-H (Manufactured Finality)

Judge Colloton introduced Item No. 08-AP-H and recounted its history. He explained that this item concerns efforts of a would-be appellant to "manufacture" appellate jurisdiction after the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Committee first discussed this matter in November 2008 and then revisited it at seven subsequent meetings. At the April 2015 meeting, by consensus, the Committee decided to take no action on the topic of manufactured finality. A judge member moved to remove the item from the agenda, and another judge member seconded the motion. Without further discussion, the Committee approved the motion by voice vote.

C. Item No. 08-AP-R (FRAP 26.1 & 29(c) disclosure requirements)

Judge Colloton introduced Item No. 08-AP-R. He reminded the Committee that local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. Judge Colloton said that the issue is whether additional disclosures should be required and, if so, which additional disclosures.

~~petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) **Pending Petition for Certiorari.**~~

~~(A)~~ (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the ~~certiorari~~ petition would present a substantial question and that there is good cause for a stay.

~~(B)~~ (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

~~(C)~~ (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

~~(D)~~ (4) The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.

The Committee turned its attention to the discussion drafts of Rules 26.1 and 29 [Agenda Book 117-119].

A judge member said that, as a general matter, judges would prefer more disclosure up front so that they do not spend time on a case before a conflict is discovered. An attorney member said that an opposing consideration was that requiring more disclosure could be onerous to attorneys.

The committee then turned its attention to specific issues in the discussion draft. The summary of the Committee discussion in these minutes has been re-ordered to follow the structure of the rules.

Rule 26.1(a)(1): Members of the Committee discussed the draft proposal to add the words "or affiliated." Given the indefiniteness of this phrase, the Committee considered whether the words should be omitted.

Rule 26.1(a)(2): Members of the Committee were concerned that merely requiring a party to list the "trial" judges in prior proceedings might be insufficient. In a habeas case, for example, both trial and appellate judges may have taken part in prior proceedings. A judge member proposed that the word "trial" should be removed.

Rule 26.1 (a)(3): An attorney member said the term "partners and associates" should be changed to "attorneys" or "lawyers." He also asked whether the term "law firms" was appropriate, given that entities other than law firms, such as public interest organizations, might represent parties in a lawsuit. He suggested replacing "law firms" with "legal organizations."

Rule 26.1(d): Mr. Letter observed that in antitrust cases, requiring the disclosure of an organizational victim could be problematic because there could be thousands of victims.

Rule 26.1(f): The Committee considered whether the word "intervenor" should be replaced with the term "putative intervenor." The Committee also considered whether subsection (f) should be deleted as unnecessary because, following intervention, intervenors would be parties and would be covered by the rule.

Rule 29(c)(5)(D): The discussion of this provision focused on two questions. One question was whether (D) should be deleted. Two attorney members said that attorneys often do not list everyone who worked on a brief. One of the attorney members asked this hypothetical: "If a lawyer read a brief and gave a few comments, would that have to be disclosed?" A judge member asked this hypothetical: "If a judge's son or daughter wrote a brief, should that have to be disclosed or not?" An academic member asked whether there were actual examples of past problems. A judge member thought that the rule was unrealistically strict. The second question discussed was, if (D) is not deleted, whether the phrase "contributed to" was too broad. A judge member suggested using the word "authored" because it would not include those who merely reviewed a brief and made

comments. Mr. Letter asked whether the Supreme Court has experience with what the word "authored" meant.

Following all of the discussion, the sense of the Committee appeared to be that the draft should be revised, to delete "trial" in Rule 26.1(a)(2); to replace "partners and associates" with "lawyers" and to replace "law firms" with "legal organizations" in Rule 26.1(a)(3); and either to strike Rule 29(c)(5)(D) or to replace the phrase "contributed to the preparation" with "authored in whole or part." The Committee did not make definite conclusions with respect to the other issues. Judge Colloton said that he did not think the item was ready to send to the Standing Committee.

D. Item No. 12-AP-F (FRAP 42 Class Action Appeals)

Judge Colloton introduced Item No. 12-AP-F, which concerns possible problems when objectors to class action settlements ask for consideration to drop their appeals. Judge Colloton then turned the discussion over to Judge Dow, who discussed the work of the Civil Committee. Judge Dow began by saying that Prof. Catherine Struve's memorandum [Agenda Book at 145-171] was directly on point.

Judge Dow explained that while it would be an error to say that all class action settlement objectors are bad, some objectors may be causing delays with extortionate appeals. He explained that a class member may lay low while a class action settlement is negotiated, file a pro forma objection to the settlement in the district court, and then surface by filing an appeal. After filing the appeal, the objector then may call counsel and ask for money to make the appeal go away.

Judge Dow said that the proposed changes have two parts. First, objectors must state their grounds for objection to a class action settlement under the proposed Federal Rule of Civil Procedure 23(e)(5)(A) [Agenda Book, at 203-204]. Second, a district court would have to approve any withdrawal of an objection under the proposed Rule 23(e)(5)(C) [Agenda Book at 204]. This requirement of approval would not only allow district judges to prohibit "a payoff" but also likely would discourage extortionate objections. Judge Dow said that the appellate and civil committees need to work together to determine the implementation.

A judge member asked whether the proposed Rule 23(e)(5)(C) was a permissible Civil Rule given that it effectively would limit what happens in the appellate courts. The judge member also asked how a payment would come to the attention of the court of appeals absent a rule that the objector or class counsel must disclose the payment. Another judge said that courts would not usually become involved in the withdrawal of an appeal. Judge Dow agreed that the Federal Rules of Appellate Procedure also should address the issue. Mr. Byron asked whether the sketch of Appellate Rule 42(c) [Agenda Book at 141] would suffice. Mr. Letter asked whether a payoff to a class action objector would be less of a concern if the money was coming out of the class counsel's fees. Judge Sutton asked whether an "indicative rule" under proposed Rule 42(c) would work. An attorney member said that proposed Rule 42(c) was inconsistent with general practice because it would require the court of appeals to refer a matter to the district court. Mr. Byron did not think it was inconsistent,

and Judge Sutton suggested that the procedure contemplated would be like sending a case back for a determination of whether there is jurisdiction. Mr. Letter also thought that if there was nothing in the Appellate Rules about withdrawing appeals, litigants might not know to look at Civil Rule 23. The clerk representative asked what the district court would do with the case when it was sent back. Judge Dow suggested that perhaps Rule 42 should require disclosure and approval of a fee. Judge Sutton suggested that an alternative would be for class counsel to seek an expedited appeal to reduce the pressure for class objectors. Mr. Letter said that the procedure might be burdensome because parties settle with appellants all the time. Prof. Coquillette suggested that it is an attorney conduct problem.

Judge Dow said that he would take this matter to back to Civil Rules Committee to discuss the issues. He emphasized that the sketch of proposed Rule 42(c) is a work in progress.

Mr. Dahl asked about the "indicative ruling" under Rule 23(e)(5): If the district court does approve the payment, could the objector appeal the indicative ruling? Judge Colloton suggested that it would remain in the Court of Appeals.

The Committee was in recess for lunch.

D. Item No. 15-AP-C (Deadline for Reply Briefs)

Judge Colloton introduced Item No. 15-AP-C. He summarized past discussions, which had recognized that most appellants now have effectively a total of 17 days to serve and file reply briefs because of the 14 days provided by Rule 31(a)(1) and the 3 additional days provided by Rule 26(c). The proposed revision of Rule 26(c) to eliminate the 3 additional days when appellants serve and file documents electronically will effectively reduce the time for serving and filing a reply brief to 14 days. Judge Colloton said that the questions for the Committee are whether to modify Rule 31(a) to extend the period from 14 days and, if so, whether the extended period should be 17 days or 21 days.

Judge Colloton noted that one question previously raised had been whether extending the time for filing and serving a reply brief would reduce the time before oral argument. On this point, he noted that statistics suggest that the extension from 14 days to 21 days would be unlikely to have a material effect because in federal courts of appeal the mean period from the filing of the last appellate brief to oral argument is currently 3.6 months [see Agenda Book at 265]. In addition, the clerk representative recalled that a study had shown that no courts had waited until a reply brief is filed before scheduling oral argument.

An attorney member said that 14 days was too short for preparing and filing a reply brief. He further said that he would prefer 21 days to 17 days, explaining that the time for filing and serving a reply brief was already shorter than the time for filing other briefs. He believed that the benefit to attorneys and clients would come at very little cost to the system. Another attorney member said that attorneys in practice had internalized the 17-day period. He noted also that the period for filing a reply brief starts when the response is actually filed, not when it is due, and the uncertainty of when

the response will be filed also may make filing a reply in 14 days difficult. He supported 21 days. Professor Coquillette supported 21 days because 21 days is a multiple of 7 days, which helps keep the reply brief due on a weekday. The appellate clerk liaison agreed that multiples of 7 days are slightly easier for the clerks office to work with. An attorney member believed that additional time will help lawyers produce better briefs. An appellate judge member said that the Supreme Court of Colorado has the same schedule as the current federal rule. Another appellate judge emphasized that there should be a replacement for the lost three days and that 21 days made more sense than 17 days.

The sense of the Committee was to modify the Rules to extend the period for filing and serving reply briefs from 14 days to 21 days. Judge Colloton suggested that the Committee's reporter prepare a marked-up draft showing the exact changes to Rules 31(a)(1) and 28.1(f)(4). The Committee would then have an opportunity to vote on the proposed changes by email.

E. Item No. 14-AP-D (amicus briefs filed by consent of the parties)

Judge Colloton introduced Item No. 14-AP-D, which came to the advisory committee's attention through discussion at the June meeting of the Standing Committee. He explained that some circuits have created local rules that appear to conflict with Rule 29(a). Although Rule 29(a) says that an amicus may file a brief if all parties have consented to its filing, some local rules bar filing of amicus briefs that would result in the recusal of a judge. Judge Colloton said that questions for the Committee are whether Rule 29(a) is optimal as written or whether Rule 29(a) should be revised to permit what the local rules provide.

An appellate judge member explained how allowing the filing of an amicus brief in some cases might require a judge to recuse himself or herself. Although this possibility might not happen often in panel cases, he explained that it could happen when a court hears a case en banc.

An attorney member supported the position of the local rules. He proposed adding this sentence to the end of Rule 29(a): "The court may reject an amicus curiae brief, including one submitted with all parties' consent, where it would result in the recusal of any member of the court." An appellate judge member asked whether there was a way to reword the proposal because it seemed odd to reject a brief after it had been filed.

Mr. Byron suggested that Rule 29(a) could be amended to allow circuits to adopt local rules. An attorney member responded that a broad authorization might be problematic because a circuit might bar all amicus briefs.

After further discussion, it was the sense of the Committee that the local rules were reasonable and that Rule 29(a) should be amended to allow the kinds of local rules that have been adopted by the D.C., Second, Fifth, and Ninth Circuits. Judge Colloton asked the Committee's reporter to draft and circulate proposed language for revising Rule 29(a) to achieve the Committee's objective. He suggested that the Committee could vote on a proposed amendment by email.

F. Item No. 12-AP-D (Civil Rule 62/Appeal Bonds)

Judge Colloton briefly recounted the history of this agenda item and thanked all those who had worked on it. Judge Colloton then invited Mr. Newsom to discuss the matter. Mr. Newsom began by asking the Committee to compare the current version of Federal Rule of Civil Procedure 62 to the proposed "September 2015 Draft" revision of Rule 62 [Agenda Book at 294]. Mr. Newsom then identified four principal points for consideration: (1) Under the current rule, there is a gap between the automatic 14-day stay of a judgment and the deadline for filing anything attacking the judgment. (2) Most appellants currently obtain a single bond (or other form of security) to cover both the post-judgment period and the appeal period, but the current rule seems to anticipate two different bonds. (3) Although the current rule contemplates that appellants will give a bond as security, sometimes appellants provide a letter of credit or other form of security. (4) The current rule does not specify an amount for the bond.

Mr. Newsom explained that the proposed Rule 62(a)(1) would extend the automatic stay from 14 to 30 days, unless the court orders otherwise. This extension would address the current gap between the 14-day stay of judgment and the deadline for filing an appeal or other attack on the judgment. Mr. Newsom explained that a court might "order otherwise" if the court is concerned about the possibility that the losing party might try to hide assets during the period of the stay. The proposed revision of Rule 62(a)(2) authorizes a stay to be secured by a bond or by other form of security, such as a letter of credit or an escrow account. Mr. Newsom noted that the proposed rule does not contemplate that the appellant would have to post more than one form of security. The proposed rule, like the current rule, does not specify an amount of the bond or other security. Proposed Rule 62(a)(3) authorizes a court to grant a stay in its discretion.

An attorney member was concerned about what might happen if a judge did not grant a stay to the appellant and the appellee lost on appeal. Mr. Newsom explained that the proposed revision of Rule 62(c) would allow a district court to impose terms if the district court denied a stay.

An attorney member was concerned that the proposed revision of Rule 62(b) would allow a court to refuse a stay for good cause even though an appellant had provided security. The attorney member thought that this proposed rule was contrary to current practice. The attorney member asserted that practitioners currently assume that if a client who has lost at trial posts a sufficient bond, the client is entitled to a stay. An appellate judge member asked whether the proposed Rule 62(b) should be rewritten to make clear that ordinarily a stay would be granted. Another appellate judge member asked whether this portion of the proposed Rule 62(b) should be eliminated.

Mr. Byron suggested that the appellee might have other options besides needing the denial of a stay.

Mr. Letter reminded the Committee that in a case in which the government is involved there is an automatic 60-day period in which to file an appeal. *See* Fed. R. App. P. 4(a)(1)(B). As a result, even extending the automatic stay from 14 to 30 days will still lead to a gap.

Judge Sutton said that the current version of Rule 62 is somewhat ambiguous. He wondered whether that ambiguity might not be beneficial because it affords discretion.

Judge Colloton reminded the Committee that the proposal concerned a Federal Rule of Civil Procedure, rather than a Federal Rule of Appellate Procedure. But he emphasized that the Committee may want to provide feedback to the Civil Rules Committee because the issue affects appellate lawyers. He suggested communicating to the Civil Rules Committee that concerns were raised among appellate lawyers that the current rule, in practice, has meant that there is a right to a stay if the appellant posts a bond, and that the proposed Rule 62(b) appears to represent a shift in policy, such that a stay upon posting security is not assured.

Summing up the discussion, Mr. Newsom asked whether the Committee thought it was acceptable for proposed Rule 62(a)(2) to require only a single bond and to allow for alternative forms of security other than bonds, and for proposed Rule 62(a)(1) to extend the period of the automatic stay from 14 days to 30 days. This was the sense of the Committee.

G. Item No. 12-AP-D (FRAP Form 4 and institutional-account statements)

The reporter introduced Item No. 12-AP-D, which concerns Federal Rules of Appellate Procedure Form 4. Question 4 requires a prisoner "seeking to appeal a judgment in a civil action or proceeding" to attach an institutional account statement. The proposal is to add the phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to Question 4 so that prisoners would not have to attach such statements in habeas cases. The reporter noted that Form 4 was amended in 2013 but the word processing templates for Form 4 which are available at the U.S. Courts website have not yet been updated and still contain the pre-2013 language.

The clerk representative said that institutional account statements are currently filed in many cases in which they are not needed. He further said that filed forms are not made public.

Mr. Letter said that he would ask the Bureau of Prisons to determine whether preparing the account statements is burdensome. The clerk representative said that he would inquire about whether the form is burdensome for clerks of courts.

The reporter said that he would notify those responsible of the need to update the word processing forms available on the U.S. Courts website.

The sense of the Committee was to leave the matter on the agenda until more information is obtained and the word processing templates are corrected.

H. Item No. 14-AP-C (Issues relating to *Morris v. Atichity*)

The reporter introduced Item No. 14-AP-C, which is a proposed rule that would require

courts to resolve issues raised by litigants. The reporter reminded the Committee that the item was included on the agenda for the April 2015 meeting, but the Committee did not have time to address it.

Following a brief discussion of the points raised in Professor Daniel Capra's memorandum [Agenda Book at 369-370], an attorney member moved that Committee take no action and remove the item from the agenda. Another attorney member seconded the motion. The Committee approved the motion by voice vote.

I. Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, and 15-AP-D (Possible amendments relating to electronic filing)

Judge Chagares introduced these items. The Committee's discussion focused on three issues. The first issue was whether pro se litigants should be permitted to file electronically. Judge Chagares said that a consensus appears to be emerging among the Advisory Committees that pro se litigants should be barred from using electronic filing unless local rules allow. Professor Coquillette cautioned that it may be undesirable to allow the circuits to adopt their own approaches because of the benefits of uniformity.

The clerk representative said that the Eighth Circuit allows pro se prisoners to file electronically and the clerk's office then uses the filing to serve the parties electronically. He said that this approach has not been problematic to date, but he cautioned that a handful of pro se litigants conceivably might abuse the system.

Judge Chagares said that the Advisory Committees have been discussing how to handle signatures on electronically filed and served documents. He suggested that the rules should specify that logging in and sending constitutes signature.

Finally, Judge Chagares addressed the current rules requiringg a filing to contain a proof of service. He suggested that proof of service should not be required when there is electronic filing.

Judge Colloton explained that the Committee at this time did not need to reach any final conclusion, but instead only to develop a sense of the issues. He suggested that the Committee should wait until the Advisory Committees on the Civil and Criminal Rules have considered the matters, and that the advisory committees should coordinate their approaches. This was the sense of the Committee.

J. Item No. 15-AP-E (FRAP amendments relating to social security numbers etc.)

The reporter introduced Item No. 15-AP-E, which concerns four proposals, namely: (1) that filings do not include any part of a social security number; (2) that courts seal financial affidavits filed in connection with motions to proceed in forma pauperis; (3) that opposing parties provide certain types of cited authorities to pro se litigants; and (4) that courts do not prevent pro se litigants from

filing or serving documents electronically. The reporter noted that the Committee had just discussed the fourth issue in connection with the previous item.

The social security number issue concerns Federal Rule of Civil Procedure 5.2(a)(1), which allows filed documents to contain only the last four digits of a person's social security number. Although this is a rule of civil procedure, the matter concerns this Committee because Federal Rule of Appellate Procedure 25(a)(5) makes Rule 5.2 applicable to appeals. In addition, Form 4 specifically asks movants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The clerk representative believed that these last four digits are no longer used for any purpose. He noted that similar forms (i.e., AO 239/240, "Application to Proceed in District Court Without Prepaying Fees or Costs") are used in the district courts.

After a brief discussion, based on the information available at the meeting, it was the sense of the Committee that Form 4 should not ask movants for the last four digits of their social security number. It was also the sense of the Committee that motions for leave to proceed in forma pauperis should not be sealed. A judge member expressed the view that these petitions are court documents and that the other party in a lawsuit should not be prevented from seeing them. No votes, however, were taken on either issue.

The proposal to require litigants to provide cited authorities to pro se litigants concerns local district court rules, but Federal Rule of Appellate Procedure 32.1(b) already partly addresses the concerns raised in the proposal. An attorney member asked whether Rule 32.1(b) refers only to free publicly accessible databases or would include databases like Westlaw and Lexis for which payment is required. Another Committee member responded that the Advisory Committee Note to Rule 32.1 says that publicly accessible databases could include "a commercial database maintained by a legal research service or a database maintained by a court."

Judge Colloton suggested that the item be retained on the agenda for the spring meeting. The Appellate Committee will see what the Civil Committee recommends before taking action.

K. Item No. 15-AP-F (Recovery of Appellate Docketing Fee after Reversal)

The reporter introduced this new item, which concerns the procedure by which an appellant who prevails on appeal may recover the $500 docketing fee. The majority of circuits allow recovery of this fee as costs in the circuit court but a few courts require litigants to recover this fee in the district court. The proposal was to amend Rule 39 to require courts to follow what is now the majority approach.

A judge member question whether an amended rule was necessary. It may be that the circuits that do not allow for the recovery of costs in the circuit courts are not following the current rule. The clerk representative said that the Eighth Circuit has not always been consistent in its approach. He further said that he would raise the issue with other clerks of court to determine their practice.

The Committee took no action on the matter and left it on the agenda.

L. Item No. 15-AP-G (discretionary appeals of interlocutory orders)

The reporter introduced Item No. 15-AP-G, explaining that its proponent requested a "general rule authorizing discretionary appeals of interlocutory orders, leaving it to the court of appeals to sort through those requests on a case by case basis." The reporter briefly summarized the proponent's argument as outlined in the memorandum on the item [Agenda Book at 491-494].

A judge member said that in Colorado all orders are appealable with leave of the Supreme Court. In her experience, the process often took a lot of time. She said that the trial courts typically will stay the litigation while the interlocutory appeal is pending.

A judge member and an attorney member spoke against the proposal, questioning both its benefits and the authority to pass such a rule.

Following brief discussion, an attorney member moved that the Committee take no action on Item No. 15-AP-G and remove the item from the agenda. The motion was seconded. After brief discussion, the Committee voted by voice to remove the item.

IV. Concluding matters

Judge Colloton explained that the reporter would circulate for vote by email the final proposed language for two items. For Item No. 14-AP-D, the reporter will circulate a revised version of Rule 29(a), as amended to authorize local rules that would prevent the filing of an amicus brief based on party consent when filing the brief might cause the disqualification of a judge. For Item 15-AP-C, the reporter will circulate revised versions of Rules 31(a)(1) and 28.1(f)(4), amended to extend the deadline for filing and serving a reply brief from 14 days to 21 days.

Judge Colloton said that proposed revisions of Rules 26.1 and 29(c) concerning disclosure requirements were not ready for circulation. The consensus among the Committee was that Item No. 08-AP-R should be held over until the spring.

The Committee adjourned at 5:00 pm.