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April 1, 2023
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23-AP-D
23-BK-E
23-CV-K
23-CR-C
23-EV-A

Dear Secretary Byron,

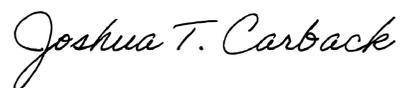
I write to you to formally submit my proposal for reforming judicial rules governing contempt proceedings. The inherent power of the judiciary to initiate contempt proceedings is well established. The culmination of decades of rulemaking under the interbranch framework instituted by the Rules Enabling Act of 1934, unfortunately, transformed what was once a relatively simple exercise of discretion into a more onerous and complicated task than it needs to be. Federal contempt law, by my count, now consists of at least 178 opinions issued by the United States Supreme Court, 182 statutes in the United States Code, 95 regulations in the Code of Federal Regulations, 37 nationwide rules of federal practice and procedure, 10 circuit wide rules governing policy and procedure, and 151 local rules governing practice and procedure.

I attach to this letter a published law review article expressing my proposal for reforming federal contempt law, including my proposed revisions to federal statutes, rules, and regulations. I also attach a supplement containing proposed revisions that I updated since that article was published. My proposal is comprehensive and systematic. My proposed rule revisions, in particular, affect appellate procedure, bankruptcy procedure, civil procedure, criminal procedure, and evidence. I therefore request that you transmit my proposal to the Standing Committee on Rules of Practice and Procedure and its five advisory committees for their mutual consideration. My proposal recommends, among other things, the creation of a civil analogue to Criminal Rule 42; the revision of Criminal Rule 42; the revision of 18 U.S.C. §§ 401, 3484, and 3499; and the repeal of 18 U.S.C. §§ 1703, 1503, 1509, 1512–13, 1621–23, 3146–49. This proposal will thereby fulfill the following objectives:

1. Define and distinguish criminal contempt and civil contempt;
2. Explain the scope of criminal contempt and civil contempt;
3. Create a formal process for parties to petition for contempt proceedings;
4. Clarify the range of penalties and purge conditions for contempt proceedings;
5. Shift discretion for contempt prosecutions from the executive to the judiciary; and
6. Authorize bankruptcy courts to wield contempt power.

I believe that the adoption of my proposal will promote the clarity, simplicity, efficiency, and fairness of contempt proceedings.

Respectfully,



Joshua T. Carback, Esq.

SUPPLEMENTAL PROPOSED REVISIONS TO CONTEMPT AUTHORITIES

New Fed. R. Civ. P. 42: Civil Contempt

(a) Definition.

- (1) Civil contempt is disobedience out of the court's presence, such as
 - (i) A violation of a court order or decree;
 - (ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and
 - (iii) A violation of a statute constituting contempt per se.
- (2) Civil contempt is coercive, not punitive.
- (3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to compel compliance with an order or decree.

(b) Authority.

- (1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.
- (2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].
- (3) Other persons or tribunals who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

- (1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or a tribunal that lacks authority to conduct the proceeding.
- (2) The court may initiate a civil contempt proceeding sua sponte.
- (3) A party to an action can request a civil contempt proceeding by filing a petition with the court against the alleged contemnor.
- (4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must

- (i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);
 - (ii) schedule deadline for the filing of an answer by the alleged contemnor;
 - (iii) state the time and place of any prehearing conference or hearing; and
 - (iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fine and any period of incarceration.
- (5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:
- (i) A valid order or decree of the court was in effect;
 - (ii) The alleged contemnor knew of that order or decree; and
 - (iii) The alleged contemnor breached that order or decree.
- (6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that
- (i) provides a short and concise explanation of its disposition;
 - (ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and
 - (iii) states the precise manner in which the purge conditions must be satisfied.
- (7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.
- (d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. Purge conditions may be imposed individually or in combination. Purge conditions may be imposed immediately upon a finding of civil contempt or contingently in the event that a contemnor does not comply with an order or decree of court by a specified deadline. The following is an inexhaustive list of purge conditions:
- (1) Reprimand;
 - (2) Report to any state bar or equivalent professional body; and
 - (3) Fine;

- (i) A fine may be payable to the court, a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.
 - (ii) A fine must be calculated according to the character and magnitude of the harm or prejudice threatened by continued breach of the court's order or decree.
- (e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or contingently if another purge condition is not timely satisfied.
- (f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

Revised Fed. R. Crim. P. 42: Criminal Contempt

- (a) Definition.
 - (1) Any disrespect or violation of the court's dignity may be liable for criminal contempt.
 - (2) Criminal contempt is punitive, not coercive.
 - (3) Direct criminal contempt is misbehavior in the court's presence or so near to it as to obstruct the administration of justice.
 - (4) Constructive criminal contempt is disobedience to the court outside of the court's presence, and can involve the following:
 - (i) violation of a court order or decree;
 - (ii) interference with or obstruction of the administration of justice, including improper threats, tampering, or other undue influences directed toward grand jurors, petit jurors, witnesses, officers of the court, and other persons operating under court order or decree;
 - (iii) violation of bail or parole conditions;
 - (iv) material misrepresentation to the court, including perjury;
 - (v) violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and
 - (vi) violation of a statute constituting contempt per se.
- (b) Authority.

- (1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.
- (2) Masters can recommend criminal contempt sanctions and certify them for disposition by a court with proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].
- (3) Other persons or tribunals that do not possess authority to adjudicate civil contempt proceedings but are authorized to recommend them may certify those recommendations for disposition under this rule.

(c) Direct Criminal Contempt Procedure

- (1) Misbehavior committed in the court's presence can be adjudicated through summary proceedings if the presiding judge certifies that he saw or heard the misbehavior.
- (2) Direct criminal contempts are sui generis and therefore have no elements, mens rea, or standard of proof.
- (3) Following a summary proceeding, the presiding judge must promptly issue a signed order filed with the clerk providing a short and concise statement of facts and an explanation for his disposition.
- (4) The court cannot enter a summary contempt judgment relating to misbehavior in its presence nunc pro tunc.
- (5) A presiding judge who can lawfully preside over a summary proceeding for direct criminal contempt can nevertheless refer the matter for a constructive criminal contempt proceeding under section (d) of this rule if doing so is in the interest of justice.

(d) Constructive Criminal Contempt Procedure

- (1) Constructive criminal contempts must be adjudicated through a separate proceeding with a separate caption from the action in which the contempt arose.
- (2) The court may initiate a constructive criminal contempt proceeding sua sponte or by petition.
- (3) The court must give the alleged contemnor notice in open court and issue a show cause order or an arrest order. The alleged contemnor must be released or detained as Federal Rule of Criminal Procedure 47 [former Rule 46] provides. The alleged contemnor is entitled to a trial by jury. The show cause order or arrest order must
 - (i) Recite a short and plain basis for the criminal contempt proceeding, including the essential facts constituting the criminal contempt charged;
 - (ii) Schedule the time and place of a trial;

- (iii) Allow the alleged contemnor a reasonable time to prepare a defense; and
 - (iv) Expressly state any penalties requested under (d)(2) if offered.
 - (4) The court may request that the alleged criminal contempt be prosecuted by the government or, if interest of justice so requires, another attorney. If the government declines to prosecute, the court must appoint another attorney to prosecute.
 - (5) The prosecuting attorney must prove the following elements beyond a reasonable doubt:
 - (i) There was a lawful and reasonably specific order, decree, or proceeding;
 - (ii) The alleged contemnor violated that order or decree, or misbehaved in the court's presence; and
 - (iii) The alleged contemnor's conduct was willful.
 - (6) If the alleged criminal contempt involved disrespect or criticism towards a judge, that judge is disqualified from presiding over the trial or hearing unless the alleged contemnor consents.
 - (7) Upon a finding or verdict of guilty, the court may impose punishment.
- (e) Punishment. Punishment for criminal contempt must involve the least possible power adequate to the end proposed. Penalties for direct and constructive criminal contempt can be imposed individually or in combination. The following is an inexhaustive list of potential penalties:
- (1) Reprimand
 - (2) Fine
 - (i) The fine can be imposed on a per diem basis or consist of a single sum.
 - (ii) The fine may be payable to the court, to a party prejudiced by the contempt as compensation, or some other recipient for the purpose of atoning for any disrespect or indignity.
 - (iii) The fine must be calculated according to the character and magnitude of any disrespect or indignity.
 - (3) Incarceration
 - (i) Direct Criminal Contempt. If the alleged contemnor is found guilty of direct criminal contempt, he can be sentenced to a period of incarceration not exceeding six months for a single contemptuous act. He may, however, be sentenced to a period of incarceration exceeding six months for more than one

contemptuous act, provided that the increment of incarceration attributed to each act does not exceed six months.

- (ii) Constructive Criminal Contempt. If the alleged contemnor is found guilty of constructive criminal contempt, he can be sentenced to a period of incarceration exceeding six months.
- (f) Civil Contempt. Nothing in this rule can be construed to detract from the court's authority to correct defiance of its orders or decrees through civil contempt proceedings under Federal Rule of Civil Procedure 42 and any other relevant authorities.

Criminal Amendments and Federal Judgeship Act of [Year]

An Act

To amend Title 18 of the United States Code regarding the authority of federal courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Criminal Amendments and Federal Judgeship Act of [Year].

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

Sec. 401 of Title 18, United States Code, is amended to read as follows:

“§ 401. Power of Court

“(a) A court of the United States has power to punish and correct contempt of its authority and none other, sua sponte or by petition, including—

- (1) Misbehavior or disobedience in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior or disobedience of any judicial officer in their official transactions; and
- (3) Disobedience or resistance to their lawful writs, processes, orders, rules, decrees, or commands out of their presence.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

- (1) Reprimand;
- (2) Fine;
- (3) Imprisonment.

Sec. 3484 of Title 18, United States Code, is amended to read as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).

Service in United States, Rule 17(d), (e,1)1.

Service in foreign country, Rule 17(d), (e,2)1.

Indigent defendants, Rule 17(b).

On taking depositions, Rule 17(f).

Papers and documents, Rule 17(c).

Disobedience of subpoena as contempt of court, Rule 42.

Sec. 3499 of Title 18, United States Code, is amended to read as follows:

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disobedience of subpoena without excuse as contempt, Rule 42

Sec. 1073 of Title 18, United States Code is deleted.

Sec. 1503 of Title 18, United States Code is deleted.

Sec. 1509 of Title 18, United States Code is deleted.

Sec. 1512 of Title 18, United States Code is deleted.

Sec. 1513 of Title 18, United States Code is deleted.

Sec. 1621 of Title 18, United States Code is deleted.

Sec. 1622 of Title 18, United States Code is deleted.

Sec. 1623 of Title 18, United States Code is deleted.

Sec. 3146 of Title 18, United States Code is deleted.

Sec. 3147 of Title 18, United States Code is deleted.

Sec. 3148 of Title 18, United States Code is deleted.

Sec. 3149 of Title 18, United States Code is deleted.

18 U.S.C. § 401 – Power of Court

(a) A court of the United States ~~shall have~~ has power to punish ~~by fine or imprisonment, or both, and correct contempt of its authority and none other, sua sponte or by petition,~~ as including—

- (1) Misbehavior or disobedience of any person in its presence or so near ~~thereto~~ as to obstruct the administration of justice;
- (2) Misbehavior or disobedience of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

- (1) Reprimand;
- (2) Report to any state bar or comparable ethics institution;
- (3) Fine; and
- (4) Imprisonment.

18 U.S.C. § 3484 Subpoenas—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Form, contents and issuance of subpoena, Rule 17(a).

Service in United States, Rule 17(d), (e,1)1.

Service in foreign country, Rule 17(d), (e,2)1.

Indigent defendants, Rule 17(b).

On taking depositions, Rule 17(f).

Papers and documents, Rule 17(c).

Disobedience of subpoena as contempt of court, ~~Rule 17(g)~~ Rule 42.

18 U.S.C. § 3499 Contempt of court by witness—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Disobedience of subpoena without excuse as contempt, ~~Rule 17(g)~~ Rule 42.

Bankruptcy Amendments and Federal Judgeship Act of [Year]

An Act

To amend Title 11 of the United States Code regarding the authority of bankruptcy courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Bankruptcy Amendments and Federal Judgeship Act of [Year].

TITLE I—BANKRUPTCY JURISDICTION AND PROCEDURE

Sec. 105(a) of Title 11, United States Code, is amended to read as follows:

“§ 105. Power of Court

“(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed

to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105 – Power of Court

- (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

2023

Contempt Power and the United States Courts

Joshua Carback

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CONTEMPT POWER AND THE UNITED STATES COURTS

*Joshua T. Carback**

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*Joshua T. Carback[®] is an independent author and a civil litigator. He thanks the editors of the *Mitchell Hamline Law Journal of Public Policy and Practice* for their work on this manuscript. The opinions expressed in this article are strictly those of the author and should not be construed to reflect the views of any other person or institution.

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I. INTRODUCTION

Federal law governing the contempt power of the United States Courts is disorganized, cluttered, and poorly drafted. The lack of consolidation within and between various sources of federal legal authority is a critical problem. Contempt provisions lie scattered in piecemeal form across the entire breadth of the United States Code. Contempt provisions comprising federal common law likewise lie scattered across five separate sets of judicial rules of practice and procedure, covering five separate subject areas, using five separate numerologies: these rules govern bankruptcy procedure, appellate procedure, civil procedure, criminal procedure, and evidence. The high volume and lack of coordination between these interrelated authorities needlessly complicate contempt litigation. The objectives of this article are therefore to comprehensively survey the authorities governing contempt power and rectify their defects.

A. *Overview of Contempt Law*

The power to punish disrespect and disobedience through contempt proceedings is inherent to the judicial power and implied under Article III of the United States Constitution. There are two important distinctions mediating this power. The first distinction is between criminal contempt and civil contempt. Criminal contempt is contempt of a court's dignity. Civil contempt is disobedience of a court's order, rule, or judgment. Criminal contempt and civil contempt are not mutually exclusive categories; they often overlap. An act of disobedience can insult a court's dignity; an insult against a court's dignity can arise from an act of disobedience.¹

The second distinction is between direct contempt and constructive contempt. Direct contempt occurs within a court's presence, that is, within the proximity of the presiding tribunal. Constructive contempt occurs beyond the proximity of the

¹ See generally U.S. Const. art. III; see also SIR JOHN C. FOX, THE HISTORY OF CONTEMPT OF COURT: THE FORM OF TRIAL AND THE MODE OF PUNISHMENT 1 (1927).

courthouse. All direct contempt is criminal. Constructive contempt can be criminal, civil, or both.²

B. *Defects in Contempt Law*

The Strategic Plan for the Federal Judiciary declares seven core values: rule of law, equal justice, judicial independence, diversity and respect, accountability, excellence, and service.³ Federal contempt law does not reflect these values. The scope of the contempt power of the United States Courts is not clearly expressed in federal contempt authorities for four reasons. First, there is no statute that comprehensively governs civil contempt.

Second, the principal statute governing criminal contempt, 18 U.S.C. § 401, is defective. It does not adequately declare, for example, the distinction between civil and criminal contempt procedures or what penalties are liable upon conviction for criminal contempt.

Third, there is a lack of clarity about whether bankruptcy judges possess contempt power.

Fourth, judicial rules governing contempt procedures are poorly organized. There are multiple sets of contempt rules governing different courts with different jurisdictions. There is a lack of coordination between contempt provisions *within* these sets of rules. There is also a lack of coordination *between* these different sets of rules. These defects undermine the uniformity, simplicity, and efficiency of federal practice and procedure as a whole.⁴

C. *Reforming Contempt Law*

I propose to systematically improve federal contempt law in three ways. First, I propose to improve the statutory regime for contempt procedures by eliminating redundancy between criminal contempt statutes and passing legislation that explicitly gives bankruptcy courts contempt power.

² Fox, *supra* note 1, at 1.

³ U.S. JUD. CONF., STRATEGIC PLAN FOR THE FED. JUDICIARY 2 (2020).

⁴ Cf. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1687–88 (1995).

Second, I propose new rules and rule amendments to streamline contempt procedures for the United States Supreme Court, United States Courts of Appeals, United States District Courts, specialty courts, territorial courts, and administrative courts.

Third, I propose to nationalize local contempt rules derived from specific courts with local contempt provisions that deserve to be replicated. Simplification of contempt provisions at one level of authority generates a cascade of improvements by eliminating the need for similar provisions at others. An improved nationwide rule can eliminate the need for needlessly complicating local derivations. If a nationwide rule says more, moreover, a statute should say less. Improvements to nationwide rules of practice and procedure, in other words, eliminate superfluous and needlessly complicating local derivations and statutory counterparts.

D. *Roadmap for this Article*

Part II of this article explains the interbranch process for generating federal judicial rules of practice and procedure. It recounts how the federal government created contempt provisions at the inception of the interbranch rulemaking process in order to provide historical perspective. It also explains in more detail how the four defects I identified in contemporary federal contempt law undermine the efficacy of contempt procedures in federal courts.⁵ Part III of this article provides precise instructions for implementing my three overarching proposals for reforming federal contempt law.⁶ Part IV concludes.⁷ Parts V – IX are appendices containing strikethrough copies of authorities currently comprising federal contempt law along with my proposed reforms and revisions. Parts IX – XV are appendices containing clean copies of authorities comprising federal contempt law in its current form. The appendices in Parts V – XV serve both as specific references for my proposals in this article as well as general references for practitioners and judges engaged in contempt proceedings. I encourage the reader to turn back and forth

⁵ See *infra*-Part II.

⁶ Compare *supra*-Part I.C, with *infra*-Part III.

⁷ See *infra*-Part IV.

between each proposal and the appendix containing its respective authority revised according to my proposed specifications. The footnotes in each section of each part of this article cross-reference the particular appendices relevant to each proposal.⁸

II. BACKGROUND

The Rules Enabling Act of 1934 created the modern interbranch framework for making rules of practice and procedure for the federal judiciary, including rules governing contempt proceedings. It was a landmark achievement in the annals of American institutional reform. But successive generations of incremental tinkering slowly spun a doctrinal web so intricate and dense that the authorities governing federal contempt law practically shun attorneys from seriously considering contempt power as an effective recourse for problems that arise in litigation. The needless complexity of the federal contempt law chills judges from understanding and applying contempt power on behalf of the courts as well.⁹

A. *Judicial Rulemaking Generally*

The Rules Enabling Act of 1934, now codified in Title 28, Chapter 31 of the United States Code, balances the competing interests and equities of each branch of the federal government in judicial rules of procedure by requiring cooperation, collaboration, and contribution from each branch in the judicial rulemaking process. Section 2071 specifically provides that rules promulgated by the Supreme Court “shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.”¹⁰ The ball for judicial rulemaking therefore starts in the judiciary’s court, pun intended.¹¹ The Supreme Court, however, no longer bears the weight of that responsibility alone—the Supreme

⁸ See *infra*—Part V—IV.

⁹ U.S. CONST. ARTS. I–III; 28 U.S.C. §§ 2071 et seq.

¹⁰ 28 U.S.C. § 2071.

¹¹ See 28 U.S.C. § 2072.

Court delegates its rulemaking responsibility through several layers of the federal judiciary’s administrative hierarchy.

The United States Judicial Conference administers the federal judiciary at the national level by supervising the Administrative Office of the United States Courts, facilitating internal disciplinary actions, developing national policies, proposing federal legislation, and improving federal practice and procedure.¹² The Judicial Conference delegates its rulemaking responsibility to its Standing Committee on Rules of Practice and Procedure.¹³

The Standing Committee reviews and coordinates the rulemaking recommendations of five advisory committees, each dedicated to a different subject area: appellate procedure, bankruptcy procedure, civil procedure, criminal procedure, and evidence. The meetings of the advisory committees are open and recorded. Each advisory committee has sub-committees dedicated to different projects within their respective domains. The roster of each committee consists of a chair, several members, a reporter, a secretary, and independent “contributors”—subject matter experts such as practicing attorneys, law professors, and representatives from the United States Department of Justice.¹⁴

Proposals to reform federal rules of practice and procedure must survive a daunting seven-stage gauntlet of interbranch scrutiny. First, the advisory committees to the Standing Committee make recommended rule amendments predicated on study, discussions, and consultations with their respective subcommittees.

Second, upon the approval of the Standing Committee, the advisory committees publish proposed rule amendments and solicit public comment.

Third, at the conclusion of the public comment period, the advisory committees review public feedback and, if worthy, submit proposed rule amendments incorporating public comment to the Standing Committee.

¹² 28 U.S.C. § 331; 28 U.S.C. § 604; 28 U.S.C. §§ 2071 et al.

¹³ 28 U.S.C. § 2073(b).

¹⁴ McCabe, *supra* note 4, at 1664–66; U.S. Cts., Rules Committees – Chairs and Reporters (July 28, 2020).

Fourth, the Standing Committee reviews proposed rule amendments by the advisory committees, typically at its June meeting, and, if deemed worthy, submits those proposed rule amendments to the Judicial Conference.

Fifth, the Judicial Conference reviews proposed rule amendments, typically at its September meeting, and, if worthy, submits those proposed rule amendments to the Supreme Court.¹⁵

Sixth, the Supreme Court reviews proposed rule amendments and, if worthy, transmits them to the United States Congress for review on May 1.¹⁶

Seventh, there is a congressional review period of seven months. During that period Congress may act on proposed rule amendments and reject, modify, or defer them. Unless Congress acts, proposed rule amendments become legally effective by on December 1.¹⁷

B. *Judicial Rulemaking and Contempt Rules*

Congress intended for judicial rules to govern contempt proceedings from the beginning.¹⁸ The Standing Committee and its constituent advisory committees therefore spent a significant amount of time deliberating how to make contempt rules efficient and clear. The advisory committees identified several common issues in the course of their deliberations: the extent to which the civil contempt and criminal contempt provisions should mirror each other; the distinction between constructive contempt and direct contempt; the distinction between civil contempt and criminal contempt; the scope of what constitutes “the court’s presence” for the purposes of

¹⁵ 28 U.S.C. § 2073.

¹⁶ 28 U.S.C. § 2074.

¹⁷ 28 U.S.C. §§ 2074–2075; Fed. Judicial Ctr., *How Rules of Procedure are Developed and Revised in the U.S. Courts* (2020); McCabe, *supra* note 4, at 1656–57, 72–75; U.S. Courts, *Governance & The Judicial Conference*, <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference> (last visited Aug. 3, 2020; 3:45 p.m.).

¹⁸ *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 12 (Sept. 8, 1941) (statement of James J. Robinson, Dir., Inst. of Crim. L. & Criminology).

delimiting the boundaries of direct criminal contempt; whether conduct can be subject to both criminal contempt and civil contempt simultaneously; and whether corporations can be held in contempt.¹⁹

The advisory committees resolved these issues over time as follows. Contumacious conduct can be subject to both civil and criminal contempt proceedings simultaneously. Artificial persons, corporations, are liable for contempt like natural persons. The scope of conduct constituting direct criminal contempt subject to summary judgment includes conduct not only occurring in the courtroom during a proceeding, but also conduct in the judge's chambers, the clerk's office, other areas of a courthouse, and the courthouse's immediate surround. A court's "presence," for the purpose of contempt law, is not limited to the actual room where a presiding judge sits.²⁰

Congress continued to tinker with contempt procedures but lacks a sufficiently comprehensive vision necessary to achieve true

¹⁹ *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 697–703 (Jan. 14, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att’y. Gen.; George Z. Medalie, U.S. Att’y., S.D.N.Y.; G. Aaron Youngquist, Assistant Att’y. Gen. U.S. Dep’t of Just.; George F. Longsdorf, Att’y.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 457–58, 535–36 (May 19, 1942) (statements of George F. Longsdorf, Att’y.; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att’y. Gen.; Aaron Youngquist, Assistant Att’y. Gen. U.S. Dep’t of Just.; James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Herbert Wechsler, Assist. Att’y. Gen., U.S. Dep’t of Just.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 87–90, 390, 569, 571, 573–74 (Feb. 19, 1943) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att’y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Atty; George H. Dession, Prof., Yale L. Sch.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 895–98 (Feb. 23, 1943).

²⁰ *See U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 8 (Aug. 2–3, 1973); *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Oct. 7–8, 1999); Dave Schlueter, Memorandum to Criminal Rules Advisory Committee re: Restyling Project – Rules 10 to 22 (Second Draft of Rules and First Draft of Notes 234 (Sept. 9, 1999), *reprinted in U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Oct. 7–8, 1999); *see also* 18 U.S.C. § 402 (noting that corporations and associations are liable for contempt).

progress.²¹ The federal judiciary's advisory committees likewise strived to make contempt rules compatible with contempt statutes for years. But the fit was never flush. Although the legislature and judiciary worked to establish the groundwork for the federal contempt law, they failed to operationalize general principles through a system of interlocking statutes and rules that is sufficiently concise, compact, and clear.

The history of how the federal judiciary's advisory committees grappled with drafting contempt rules revealed two maladies afflicting the current regime governing contempt law: *first*, the selective articulation of contempt liability in the federal rules of practice, and procedure; and *second*, the dizzying array of external and internal cross-references between different contempt authorities.

1. Articulation of Contempt Liability.

A difficult question presented from the very beginning was how often to punctuate the conclusion of a rule with the fact that non-compliance is liable for contempt. Should every rule have a contempt clause? In discussing Criminal Rule 4 (summons) in 1941, for example, the criminal rules advisory committee pondered whether it should state that noncompliance may result in contempt proceedings. On one hand, they could insert a contempt clause for every rule to ensure clarity. On the other hand, they could leave a contempt clause out of every rule on the theory that contempt is an implicit sanction for all disobedience or disrespect; therefore, mentioning it in provision after provision would be overly redundant and needlessly take up space.

An excerpt from the committee's discussion in 1941 illustrates how the rule makers serving in the Judicial Conference in different capacities pondered this conundrum:

²¹ Act of June 25, 1948, ch. 645, 62 Stat. 701 (codified as amended at 18 U.S.C. § 3285, §§ 3691–3692); Act of May 24, 1949, ch. 139, § 8(c), 63 Stat. 89, 90; Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended at 28 U.S.C. § 2077); Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642 (codified as amended at 28 U.S.C. § 2072).

Murray Seasongood: Will people say, “Well, after all, the only penalty is for contempt, and I won’t pay any attention to it.”

Alexander Holtzoff: Then he will issue a warrant if the defendant does not appear.

Murray Seasongood: Could anybody say that is a limitation, that the only penalty is the penalty for contempt of court for not obeying a summons?

James J. Robinson: I tried to save space, possibly at some cost.

Murray Seasongood: If he does not appear in response to the summons, then a warrant shall be issued. Perhaps that should be in.

George H. Dession: That could be done in any case. That does not have to go in.

Frederick E. Crane: I do not know, but any court process, if it is disobeyed, is subject to contempt. Do you have to add that to every order or process of the court? I did not think that you needed to emphasize it. I may be wrong, but I took for granted that any order or process, whether a summons or warrant or any order, civil or criminal, is subject to contempt.

Chairman Arthur T. Vanderbilt: That is true. This is the language so that the man who receives it will be apprised of that fact.

Frederick E. Crane: That may be the answer, then.²²

²² *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. (Sept. 8, 1941) (statements of Chairman Arthur T. Vanderbilt, Chief Justice, Sup. Ct. of N.J.; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att’y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Hon. Frederick E. Crane, N.Y. Ct. of App.) (discussing

The less rigid approach prevailed over time. As criminal rules advisory committee member George Medalie noted in 1943, “There are some things we had better leave to the courts, to their experience and practical judgment. You cannot cover everything.”²³

The advisory committees did not incorporate contempt power into federal rules in a coordinated, systematic matter. Instead, they opted to gradually reform rules implicating contempt power on a case-by-case basis. They employed four different approaches to amendments to contempt rules over time.

First, there were cases when the advisory committees intentionally added contempt provisions to rules because they were certain that contempt power was available, and that availability was worthy of emphasis.²⁴

a former version of FED. R. CRIM. P. 4); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 63–64 (Sept. 8, 1941) (statements of James J. Robinson, Dir., Inst. of Crim. L. & Criminology; Assoc. J., N.Y. Ct. of App.) (discussing a former version of FED. R. CRIM. P. 4); *see also U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 345 (Sept. 9, 1941) (statement of Murray Seasongood, Partner, Warrington & Paxton) (discussing a draft of former Fed. R. Crim. P. 9).

²³ *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 87–90 (Feb. 19, 1943) (statement of George Z. Medalie, U.S. Att’y., S.D.N.Y.).

²⁴ FED. R. BANKR. P. 9014; FED. R. BANKR. P. 9020; FED. R. CIV. P. 4 & 1963 Amend. Comm. note on subdivision (f); FED. R. CIV. P. 4.1(b) & 1993 Amend. Comm. note on subdivision (b); FED. R. CIV. P. 11 & 1983 Amendment Comm. note; FED. R. CIV. P. 37(b) & 1937 Comm. note; FED. R. CIV. P. 45(g) & 1937 Comm. note subdivision (e), 1991 Amend. Comm. note subdivisions (a) and (f), 2013 Amend. Comm. note subdivisions (c), (f), & (g); FED. R. CIV. P. 53(c)(2); FED. R. CIV. P. 56(h); FED. R. CIV. P. 73 & 1983 Comm. note subdivision (a); FED. R. CRIM. P. 6(e)(5),(7) & Comm. note 1977 Proposed Amends., 1983 Amend. Comm. note, 2002 Amend. Comm. note; FED. R. CRIM. P. 7(a)(1) & 2002 Amend. Comm. note; FED. R. CRIM. P. 17(g) & 2002 Amend. note; FED. R. CRIM. P. 42; Notes of Conference Call with the Discovery Subcomm. of the Advisory Comm. on Civ. Rules 2–4 (July 23, 2012), *reprinted in U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Book*, U.S. S. Ct. 183 (Nov. 1–2, 2012) (removing a bracketed limitation excluding contempt from the list of available sanctions listed in FED. R. CIV. P. 37(b)(2)(A)); *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. (Apr. 4–5, 2011) (“The Committee unanimously approved the suggested addition to Rule 45(g), described above, adding at line 272,

Second, there were cases when the advisory committees were certain that contempt should not be available as an enforcement mechanism. They effectuated this intent in one of two ways: by deliberately omitting reference to the contempt power, such as in Civil Rule 35 (medical examination) and Bankruptcy Rule 2005

page 102, these words: ‘may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order relating to the subpoena.’”); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. (Jan. 14, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att’y. Gen.; George F. Longsdorf, Att’y) (discussing drafts of former Fed. R. Crim. P. 45 and 107); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 326–330 (May 19, 1942) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Atty. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Att’y; George H. Dession, Prof., Yale L. Sch.; Hugh D. McLellan, J., U.S. Dist. Ct. D. Mass.) (discussing whether an explicit contempt clause in a rule governing summons was necessary); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct., 457–58 (May 19, 1942) (statements of George F. Longsdorf, Att’y; Alexander Holtzoff, Special Assistant, Off. of the U.S. Att’y. Gen.; Aaron Youngquist, Assistant U.S. Att’y. Gen.; James J. Robinson, Dir., Inst. of Crim. L. & Criminology); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 87–90, 390, 569, 571 (Feb. 19, 1943) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Atty. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George F. Longsdorf, Att’y; George H. Dession, Prof., Yale L. Sch.); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Draft Minutes*, U.S. S. Ct. 4, 223–24 (June 21–22, 1999) (statements of J. Smith, Kate Stith, Prof., Yale L. Sch.; Fern M. Smith, U.S. Dist. J. for N.D.C.A.), reprinted in *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Oct. 7–8, 1999); see also *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 12–13 (Apr. 20–21, 2009) (editing the text in Fed. R. CIV. P. 45(h) regarding the availability of sanctions in such a manner as not to detract from the availability of contempt as an enforcement mechanism).

(apprehension);²⁵ or by affirmatively disclaiming that contempt was unavailable, such as in Criminal Rule 4 (summons).²⁶

Third, there were cases when advisory committees were divided or agnostic on the availability of contempt as an enforcement mechanism for a particular rule. The criminal advisory committee, for example, deliberated the scope of contempt liability for unauthorized release of grand jury materials under Criminal Rule 6(e) in 1999. It ultimately decided to defer the resolution of that issue to judicial interpretation (case law) or congressional action. This anecdote illustrates the troublesome fact that while the Standing Committee was generally zealous to conserve its rulemaking prerogatives, its constituent organs, like any bureaucratic entity, tended to “punt the football” on difficult questions.²⁷ This anecdote also reveals the tradeoff for delegating rulemaking responsibility across multiple levels of review involving a larger group of people. When power is diffuse, the reins are loose.

Fourth, there were cases when the advisory committees were certain that contempt power was available as an enforcement mechanism but decided not to insert an explicit textual affirmation of

²⁵ FED. R. CIV. P. 35; FED. BANKR. R. 2005; *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 1568–69, 1572 (Nov. 18, 1935) (statements of Chairman William DeWitt Mitchell, Att’y.; Edson R. Sunderland, Prof., U. Mich. L. Sch.) (discussing the availability of contempt in former Rule 65 governing medical examinations); *U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Meeting Minutes*, U.S. S. Ct. 16–17 (Feb. 15, 18, 1967) (statements of Edward T. Gignoux, U.S. Dist. Ct. D. Me.; Frank R. Kennedy, Prof., U. Mich. L. Sch.) (noting that J. Edward Gignoux withdrew his suggestion that Bankruptcy Rule 2005—then Bankruptcy Rule 2.21—cross-reference Criminal Rule 42—then Criminal Rule 40—because there was unanimity that the criminal contempt rule had content that ought not be in the bankruptcy rule).

²⁶ FED. R. CRIM. P. 4 & 1944 Comm. note (a)(4); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 63–64 (Sept. 8, 1941) (statements of Alexander Holtzoff, Special Assistant, Off. of the U.S. Att’y. Gen.; Murray Seasongood, Partner, Warrington & Paxton; George H. Dession, Prof., Yale L. Sch.; Hon. Frederick E. Crane, N.Y. Ct. of App.).

²⁷ FED. R. CRIM. P. 6(e)(5),(7); U.S. Jud. Conf., Advisory Comm. on Rules of Crim. Proc., Rule 1–31 Preliminary Draft of the Proposed Revision of the Federal Rules of Criminal Procedure Using Guidelines for Drafting and Editing Court Rules 30, 63 (2000), reprinted in *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Jan. 10–11, 2000).

that fact. Given that contempt power is inherent to the judicial power, the advisory committees often wanted to avoid emphasizing the availability of contempt as an enforcement mechanism when they believed it was clearly implied. They left out any explicit reference to contempt power in some rules, in other words, not because they were agnostic or even had negative views about the availability of contempt proceedings, but rather because they thought it was more economical to keep silent or because the availability of contempt power was deemed unworthy of emphasis. The banality of contempt liability for disrespect or disobedience therefore bears some blame for why federal rules of practice and procedure are so inconsistent in explaining if and to what extent contempt power applies to any given situation.²⁸

The history of advisory committee deliberations about how to incorporate contempt power into the federal rules of practice and procedure reveals an institutional tendency to prefer flexibility over systemization. It is a general principle of law that anyone who disobeys the authority or denies the dignity of an Article III court is liable for contempt whether or not a particular rule explicitly says so. The particular rules where the Standing Committee intentionally omitted any reference to contempt power or affirmatively prohibited the applicability of contempt power consequently were quite few. When the Standing Committee explicitly disclaimed contempt liability in particular rules, it was for emphasis, not as a matter of course. The fact that the Standing Committee did treat silence as a prohibition on a few occasions, however, created some uncertainty in the rules: silence did not always mean the same thing. The negative

²⁸ Memorandum to the Chairman and Members of the Committee on the Administration of the Bankruptcy System: Proposals to Reduce Certain Costs of the Bankruptcy Process 4–5 (Jan. 7–8, 1993), *reprinted in U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Agenda Book*, U.S. S. Ct. (Feb. 18–19, 1993) (weighing the merits of adding a contempt provision to Bankruptcy Rule 4004(g)); *cf. U.S. Jud. Conf. Advisory Comm. on Rules Crim. Proc., Meeting Minutes*, U.S. S. Ct. 63–64 (Sept. 8, 1941) (James J. Robinson, Dir., Inst. of Crim. L. & Criminology) (stating that he left certain language out of Criminal Rule 4 to save space).

implication canon does not apply consistently across the board. Sometimes silence meant “Yes.” Sometimes silence meant “No.”²⁹

The history of contempt power yields an interesting paradox: the advisory committees were intentional in creating, yet they were not always clear about what their intentions created. They recognized from the beginning that there was a cost to taking a flexible approach by sprinkling textual references to contempt power here and there, rather than systematically confirming in every rule whether contempt power was available or not. In the end, that decision cost them in terms of clarity and consistency.

The use of four different approaches rather than one created confusion. The tradeoff of having three levels of rules committees—the Standing Committee, advisory committees, and advisory subcommittees—was injecting more expertise *into* the rules at the cost of creating more “noise” *between* the rules. There are therefore now too many cooks in the kitchen. For the justice system to become more efficient, systematization, not flexibility, must be the prime

²⁹ See, e.g., Notes of Conference Call with Discovery Subcomm. of the Advisory Comm. on Civil Rules (July 5, 2012), reprinted in *U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Book*, U.S. S. Ct. (Nov. 1–2, 2012) (“The focus is on whether the failure to preserve [under FED. CIV. R. 37(g)(2)] has had a severe impact on the truth-seeking process. This discussion prompted a question: What happens if there was unquestioned bad faith, but no prejudice? For example, the most outrageous effort to destroy the evidence might be bungled. Is there nothing the judge can do in the face of such conduct? One reaction was that the court surely has abundant inherent authority to respond to such behavior. Another was that there are cases that say prejudice can be presumed if there has been bad faith activity. A third was that the courts surely have inherent authority to punish outrageous conduct. This discussion prompted reference to the inherent authority question that hovers in the background of the discussions.”); Mark D. Shapiro, Memorandum to Advisory Comm. on Civ. R., Fed. R. of Att’y. Conduct (FRAC) (March 28, 2000), reprinted in *U.S. Jud. Conf. Advisory Comm. on Civ. Rules, Agenda Books*, U.S. S. Ct. 6 (Apr. 10–11, 2000) (“A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civ. R. 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power.”); *U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 1544 (Nov. 18, 1935) (statement of Hon. George Donworth, U.S. Dist. Ct. W.D. Wash.) (in discussing former FED. R. CIV. P. 57 concerning interrogatories involving documents and tangible things, stating, “Does not the general law of contempt cover all these things about refusing to obey the order of the court?”).

directive. Federal rulemaking requires a new paradigm: fewer hands, and more delicate fingers.

2. External & Internal Cross-References.

The Rules Enabling Act did not fully dredge the swamp of disparate authorities that stymied litigators during the nineteenth century. It simply provided enough drainage to allow for a more level playing field. But cross-references between judicial rules and statutes operationalizing federal procedures still needlessly complicated the game. Not every judicial rule has a statutory cross-reference, of course, but many do. Advisory committees recognized early on that zigzagging between disparate authorities to figure out how a particular contempt procedure works is not ideal.³⁰

There are two types of cross-references in contempt law. The first type of cross-references are external cross-references: procedural rules that cross-reference procedural statutes. The Standing Committee took the view that it should keep authority for enforcement procedures, like contempt power, exclusively within the rules whenever possible. In 1953, the civil rules advisory committee noted that its draftsmanship of Civil Rule 45(e) was so good, it rendered its coordinate statute unnecessary, therefore, Congress abolished that statute outright.³¹ In 1973, the criminal rules advisory committee voted to keep the punishment for unauthorized release of grand jury testimony set forth in Criminal Rule 6 (grand jury) strictly within the scope of the Federal Rules of Criminal Procedure, rather

³⁰ 28 U.S.C. § 1652; *cf. U.S. Jud. Conf. Advisory Comm. on Rules of Civ. Proc., Meeting Minutes*, U.S. S. Ct. 27 (Apr. 20–21, 2009) (“It is clear that Rule 45 is a long and complicated rule. ‘You have to work hard to find what it means.’ Many judges say that it is a perfectly fine rule, that the problem is that lawyers do not understand it. A fine rule that lawyers cannot understand may deserve some clarification.”).

³¹ *U.S. Jud. Conf. Advisory Comm. on Rules Civ. Proc., Meeting Minutes*, U.S. S. Ct. 442–43 (May 19, 1953) (statement of Hon. Charles Edward Clark, U.S. Ct. App. 2d Cir.) (“I just comment in passing that is one of the difficulties that occurred as to the poor admiralty people. [FED. R. CIV. P.] 45(e) is a very good rule of subpoena. It was so good that the revisers of Title 28 U.S. Code said it was lovely, and since it was so good[,] they didn’t need any statute. They abolished the statute, and then we had the question what to do in admiralty.”).

than requesting that Congress enact coordinate statutes in the United States Code to serve that purpose.³²

We find a less stark example in 2000 when the criminal rules advisory committee considered inserting an external cross-reference to 28 U.S.C. § 1784. Section 1784 governs contempt proceedings against foreign residents who fail to respond to subpoenas. The committee minutes reveal that there was no consensus about whether the general rule governing criminal contempt—Criminal Rule 42 (then Criminal Rule 43)—even applied to Section 1784. The committee opted to omit a cross-reference. It was satisfied with only having a cross-reference to Section 1784 in Criminal Rule 1, which outlined the scope of the Federal Rules of Criminal Procedure as a whole.³³ In 2001, the criminal rules advisory committee accepted a subcommittee recommendation to amend Criminal Rule 42 (criminal contempt) to reflect the new authority of magistrate judges to preside over contempt proceedings. This amendment simply inserted a cross-reference to the relevant statute granting magistrate judges the contempt power.³⁴

The second type of cross-references are cross-references *between* rules. One might wonder if it was ever possible to make each rule hermetically sealed and self-sufficient. The principle of autarky in, though academically interesting, never caught on. Not only did the advisory committees frequently draft rules *within* a given subject area that cross-referenced other subject areas—they occasionally even

³² *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 8 (August 2–3, 1973) (“A discussion of unauthorized release of grand jury testimony followed. Judge Gesell urged that this should be a statutory offense, noting that at present the only apparent means of enforcement is through the contempt power. Justice Cutter urged that solutions be kept within the framework of the Criminal Rules rather than statutes, if possible. It was VOTED to recommend no changes in the subpoena practice.”).

³³ *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. (Oct. 19–20, 2000).

³⁴ *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. (Apr. 25–26, 2001).

drafted internal cross-references *between* subject areas. Bankruptcy Rule 9.11, for example, was drafted in the likeness of Civil Rule 11.³⁵

Over time, advisory committees made case-by-case decisions as to whether cross-references in the body of a rule or its comments were appropriate. Some rules ended up being more self-sufficient than others. The criminal rules advisory committee opted in 2000 to not include an internal cross-reference in Criminal Rule 42 (criminal contempt) to Criminal Rule 32 (sentencing) for the purpose of clarifying whether a criminal contempt sentencing would require the production of a presentence report (it did not).³⁶

The criminal rules advisory committee agreed with a subcommittee proposal in 2001 to insert an internal cross-reference in Criminal Rule 7 (indictment and information) clarifying that contempt charges under Criminal Rule 42 (criminal contempt) need not be initiated by indictment.³⁷ Suffice it to say that both internal and external cross-references made contempt law more convoluted than necessary. Anyone who needs to prepare for a contempt proceeding practically needs to wear a neck brace to mitigate the amount of

³⁵ *U.S. Jud. Conf. Advisory Comm. on Bankr. Rules, Meeting Minutes*, U.S. S. Ct. 3 (Oct. 31 & Nov. 2, 1966) (statements of Frank R. Kenny, Prof., U. Mich. L. Sch.; Hon. Elmore Whitehurst, Assist. Dir., Admin. Off. U.S. Cts.) (“Judge Whitehurst referred to the last sentences of Rule 9.11(a) and said he wondered just what he should do, if, as a referee, he [was] [sic] confronted with a violation of the rule. Professor Kennedy stated that the sentences came right out of Rule 11 of the Federal Rules of Civil Procedure. He said that perhaps any sanction other than citation for contempt might be imposed by the referee. He suggested that unless Judge Whitehurst wished the Committee and reporter to pursue this matter further, the draft of Rule 9.11 should follow the corresponding Federal Civil Rule.”).

³⁶ *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 2 (Jan. 10–11, 2000).

³⁷ *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Meeting Minutes*, U.S. S. Ct. 5 (Apr. 25–26, 2001); *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Draft Minutes*, U.S. S. Ct. 14 (Apr. 25–26, 2001), reprinted in *U.S. Jud. Conf. Advisory Comm. on Rules of Crim. Proc., Agenda Book*, U.S. S. Ct. (Apr. 25–26, 2002); Hon. Anthony J. Scirica, U.S. Jud. Conf., Comm. on R. Prac. & P., Memorandum to the Chief Justice of the United States [&] Associate Justices of the United States re: Summary of the Proposed Amendments to the Federal Rules 4 (Nov. 13, 2001), reprinted in *U.S. Jud. Conf., Advisory Comm. on Rules of Crim. Proc.*, U.S. S. Ct. (Apr. 25–26, 2002).

whiplash they will suffer from jerking back and forth between so many different interconnected contempt authorities.

III. ANALYSIS

The three branches of the federal government must work together to reform statutes, sentencing guidelines, and judicial rules governing the contempt power of the United States Courts. I provide specific recommendations for contempt reforms in the context of criminal, civil, bankruptcy, and administrative procedure below.

A. *Criminal Contempt Legislation*

I propose that the federal government amend 18 U.S.C. § 401 and Criminal Rule 42 to be more comprehensive in three ways. First, Congress should modify 18 U.S.C. § 401 to provide explicit notice of the three penalties or purge conditions that a court may prescribe for contempt: reprimand, fines, and imprisonment. The language for this amendment should be broad and permissive, not exhaustive. Courts should be allowed ample room for discretion and creativity in handling contempt matters.³⁸

Second, Criminal Rule 42 should be amended to allow parties to file petitions out of court or move in court for civil and/or criminal contempt proceedings.³⁹

Third, Criminal Rule 42 and 18 U.S.C. § 401 should also expressly declare the right of the court to initiate contempt proceedings *sua sponte*. These amendments will render criminal contempt statutes, especially statutes in the genre of obstruction of justice (perjury, witness tampering, violation of bail and probation orders, etc.) superfluous and justify their repeal.

One might argue that such a widespread effort to repeal criminal contempt statutes is unjustified. Criminal contempt statutes are normally merely declaratory of a court's right to punish an offense through its inherent power. But the purpose of the criminal contempt statutes at issue is not simply to express what the law is. By rendering

³⁸ See *infra*—Part V.A–B.

³⁹ See *infra*—Part V.K.

an offense that is sui generis by default into a crime as such, the discretion for prosecution and punishment shifts from the judiciary to the executive. That is the real purpose behind the criminal contempt statutes that saturate the federal criminal code. The criminalization of contempt forms a chokehold on judicial discretion. It represents a fear that judges will not adequately punish contempt if left to their own devices.

I maintain that if there is anywhere where judicial discretion in punishment should have priority, it is in the zone of the judiciary's inherent power to punish contempt. When the judicial power guaranteed under Article III is the greatest "victim" of an offense, the judicial power should have the greatest prerogative in vindicating that offense. I believe that the judiciary is capable of using its broad sentencing discretion to adequately punish conduct contemplated by criminal contempt statutes. For hundreds of years, common law courts punished indignities against them under their inherent power, not as crimes as such, without any problems. I do not see any justification for departing from this tradition.⁴⁰ Criminal contempt statutes are, in my view, unnecessary.

In light of my proposed amendments to 18 U.S.C. § 401 and Criminal Rule 42, I propose that Congress repeal the following criminal statutes: 18 U.S.C. §§ 1073, 1503, 1509, 1512, 1523, 1621–1623, 3484, 3498–3499, and 3146–3149.⁴¹ These repeals will require amendments to the current model federal jury instruction for contempt under Section 401 as well. The federal criminal code is obese. This is a good place to trim fat. One cannot complain that this pattern of repeal will amplify the threat of impunity. Those liabilities once contemplated by criminal contempt statutes will simply collapse into 18 U.S.C. § 401 and Criminal Rule 42.⁴²

⁴⁰ *E.g.*, *King v. Bellingham* (1649) 82 K.B. 582, Style 126 (Eng.) (punishing perjury with a fine of ten pounds); *Wingfield's Case* (1633) 79 K.B. 819, Cro. Car. 251 (Eng.) (punishing men who assaulted a sheriff of Middlesex with fines ranging between 500 marks and 500 pounds); *Royson's Case* (1629) 79 K.B. 729, Cro. Car. 146 (Eng.) (punishing breach of bail with imprisonment and standing in the pillory with a paper proclaiming the contemnor's offense).

⁴¹ *See infra*-Part V.A.

⁴² *Compare* Leonard B. Sand et al., 1 Model Fed. Jury Instr.-Crim. P. 20.01–02 (Lexis Nexis Nov. 2022), *with infra*-Part VIII.A.

The reversion of criminal contempt of court from a class of statutory crime as such back into a sui generis offense will resolve separation of powers concerns triggered under the Appointments Clause when the judiciary appoints independent prosecutors under Rule 42. The proper way to achieve both a balance and separation of power between the coordinate branches of the federal government is to reduce the burden of each branches' involvement in vindicating each other's prerogatives to the greatest extent possible. The means and ends of criminal contempt proceedings, for example, is to vindicate judicial power that is both inherent and implied under Article III. The executive power under Article II therefore ought to be involved to the minimum extent possible in enforcing and upholding the dignity of the judicial power under Article III through contempt proceedings. To that end, it is perhaps appropriate that the default prosecutor for criminal contempt charges should be an independent prosecutor rather than a public prosecutor.⁴³

B. *Bankruptcy Contempt Legislation*

I propose new legislation to settle the question of whether bankruptcy judges possess contempt power. The passage of the Bankruptcy Amendments and Federal Judgeship Act in 1984 did not clarify whether bankruptcy judges and magistrate judges had contempt power. The Federal Courts Improvement Act of 2000 clarified that magistrate judges do indeed possess contempt power, but the status of bankruptcy judges was left unresolved. I am not convinced that bankruptcy courts currently have contempt power. Such power cannot, in my mind, be granted to an Article I court sub silentio.⁴⁴ Since Congress gave contempt power to magistrate judges, I see no reason why bankruptcy judges should not possess it as well. But Congress must grant such power expressly, not by implication.⁴⁵

⁴³ Cf. *Donziger v. United States*, 38 F.4th 290 (2d Cir. 2022), *petition for cert. filed* (Sept. 20, 2022) (No. 22-___).

⁴⁴ Laura B. Bartell, *Contempt of the Bankruptcy Court – A New Look*, 1996 U. ILL. L. REV. 1, 56 (1996).

⁴⁵ See *infra*—Part V.C–D.

C. *Administrative State Legislation*

I propose two sets of statutory reforms affecting administrative entities within the executive branch. First, I propose that Congress harmonize laws regulating referrals of contempt matters by administrative courts, boards, agency panels, etc., to federal district courts. The specific administrative entities implicated by this proposal include United States Departments of Agriculture, Commerce, Health and Human Services, Interior, Labor, Justice, Defense, Homeland Security, Treasury, Transportation, as well as some independent agencies. The particular administrative law courts implicated by this proposal include agency tribunals such as the National Labor Relations Board, the Harbor Workers' Compensation Benefits Review Board, immigration courts, the Trademark Trial and Appeal Board, and the Patent Trial and Appeal Board. I drafted a model statute to fulfill this proposed administrative reform for all of these administrative entities. The draft language states that the certification of contempt matters arising before administrative law courts, bodies, boards, agency panels, etc., should be adjudicated by a federal court that can exercise jurisdiction over the underlying subject matter or the alleged contemnor. The proceedings should be governed by federal rules of practice and procedure (i.e., Criminal Rule 42) as if the contempt arose in proceedings before the federal court receiving the certification itself.⁴⁶

Second, I propose that Congress harmonize one hundred and fifty or so statutes and regulations governing subpoena enforcement for the departments and independent agencies within the executive branch referred to above. I crafted model language to facilitate this objective. Congress can incorporate this language into a statute or regulation. This language states that the certification of a matter involving the enforcement of a subpoena issued by an administrative entity should be adjudicated under the relevant federal rules of practice and procedure governing the federal court that can exercise jurisdiction over the administrative process or the person accused of contempt of the subpoena. The federal court that has jurisdiction over the administrative proceeding requiring the enforcement of a

⁴⁶ See *infra*—Part V.E.

subpoena should then adjudicate a contempt of the relevant administrative entity as if it arose in proceedings before that court itself.⁴⁷

D. Criminal Contempt Sentencing Guidelines

I am content with the current sentencing regime for criminal contempt statutes established by United States Guidelines 2J1.1 and 2X5.1. The United States Sentencing Commission should, however, amend these guidelines to reflect my proposed amendments to Title 18, Section 401 of the United States Code. Because the proposed amendments render most, if not all, criminal contempt statutes superfluous, the guidelines must reflect the repeal of those statutes. The Sentencing Commission should also modify the guidelines to reference statutes that sound in criminal contempt but are not eliminated by my proposed reforms.⁴⁸

E. Contempt Rules of Civil Procedure

The Standing Committee should modify the Federal Rules of Civil Procedure by adopting a new rule comprehensively governing (constructive) civil contempt. The new rule should be an analogue to Criminal Rule 42 and styled as “Civil Rule 42.” The numerology of the Civil Rules following New Civil Rule 42 should “bump down” to create as much symmetry as possible between the Civil Rules and Criminal Rules.

My inspiration for a comprehensive federal civil contempt rule arises in part from civil contempt provisions found in the local rules of the United States District Courts for the Northern, Southern, Eastern, and Western Districts of New York; the Eastern District of North Carolina; the Southern District of West Virginia; the rules of specialty courts like the United States Court of Claims, the United States Court of International Trade, the United States Foreign Intelligence Surveillance Court; and the rules of state courts with civil

⁴⁷ See *infra*—Part V.F.

⁴⁸ See *infra*—Part XV.

contempt rules like the State of Maryland.⁴⁹ A comprehensive civil contempt rule is practical because it improves the harmony between the various rules of practice and procedure. A comprehensive civil contempt rule is also justified for pedagogical reasons: it instructs the bench and bar how civil contempt processes work, what purge conditions are available, etc.

New Civil Rule 42 should be framed to achieve the following objectives:

- (1) Define civil contempt and distinguish it from criminal contempt;
- (2) Explain that the scope of the rule encompasses civil contempt under the Civil Rules, local rules, and statutes sounding in civil contempt;
- (3) Articulate discrepancies in contempt authority between Article III judges and judicial officers, such as masters, magistrates, bankruptcy judges, etc.;
- (4) Explain that an institution that cannot exercise inherent or statutory contempt power can certify a contempt in proceedings before them to an institution that can under this particular rule;
- (5) Clarify the authority of the court to initiate civil (constructive) contempt proceedings sua sponte;
- (6) Clarify that parties in interest to a case can petition for civil (constructive) contempt;
- (7) List the requirements for a party-initiated petition for civil (constructive) contempt;

⁴⁹ See N.D.N.Y. L.R. 83.5; S.D.N.Y. L.R. Civ. 83.6; E.D.N.Y. L.R. Civ. 83.6; W.D.N.Y. L.R. Civ. 83.4; E.D.N.C. L.R. Civ. 100.3; S.D. W.Va. L.R. P. 4.1.1–3; Ct. Int'l Trade L.R. 37(b); Ct. Int'l Trade L.R. 45(f); Ct. Int'l Trade L.R. 53(c)(2); Ct. Int'l Trade L.R. 56(h); Ct. Int'l Trade L.R. 86.2; Ct. Fed. Claims R. 4.1; F.I.S.C. L.R. 19; Md. Rule 15-206; Md. Rule 15-207.

- (8) List the requirements for a show cause order to be entered by the court upon granting a petition;
- (9) List the requirements for service of process;
- (10) Cross-reference other rules as necessary when special exemptions or applications are in order; Clarify the wide range of purge conditions that a court can impose; and
- (11) Clarify that civil contempt proceedings do not foreclose concurrent or consecutive criminal contempt proceedings.

The committee note to New Civil Rule 42 should reference published federal appellate precedents exemplifying the variety of purge conditions available. These precedents should include cases when courts held parties in constructive civil and constructive criminal contempt simultaneously, provide guidance on how to proceed when such a finding is appropriate, and explain how such cases are treated on appeal.⁵⁰

Contempt provisions in Old Civil Rules 4.1, 37(b), 53, 56, and 70 must be amended in light of the implementation of New Civil Rule 42. New Civil Rule 42 will supersede Old Civil Rule 4.1(b); therefore, the latter should be deleted. Civil Rule 4.1 should also be restyled to remove subsection (a) from the header because there is only one provision in the new version of the rule, not two. Old Civil Rule 37 should be amended. Section (b) of Old Civil Rule 37 should focus on non-contempt sanctions. This way there is no danger of surplusage in New Civil Rule 42. Subsections (b)(1) and (b)(2)(vii) of Old Civil Rule 37 should be simplified by incorporating an internal cross-reference to New Civil Rule 42 and revised Criminal Rule 42. Old Civil Rule 45 should be renumbered as New Civil Rule 46.⁵¹

The amendments to Civil Rule 42 will render Subsection (g) of Old Civil Rule 42 superfluous, therefore, Subsection (g) of Old Civil Rule 42 should be deleted. Old Civil Rule 53 should be renumbered as New Civil Rule 54. New Civil Rule 42 will render

⁵⁰ See *infra*-Part VI.C.

⁵¹ See *infra*-Part VI.A–B, D–G.

Subsection (c)(2) of Old Civil Rule 42 superfluous, and therefore, Subsection (c)(2) of Old Civil Rule 42 should be deleted. Old Civil Rule 56 should be renumbered as New Civil Rule 57. The amendments to New Civil Rule 42 will render the contempt language in Section (h) of Old Civil Rule 42 superfluous, therefore, Section (h) of Old Civil Rule 42 should be deleted. New Civil Rule 42 should internally cross-reference New Civil Rule 42 and revised Criminal Rule 42 in lieu of Section (h) of Old Civil Rule 42. Old Civil Rule 70 should be renumbered as New Civil Rule 71. The amendments to New Civil Rule 42 will render Section (e) of Old Civil Rule 42 superfluous, therefore, Section (e) of Old Civil Rule 42 should be deleted.⁵²

F. *Contempt Rules of Criminal Procedure*

The Standing Committee should revise Criminal Rule 42 to eliminate unnecessary criminal contempt statutes and trim unnecessary contempt provisions in other criminal rules. There is no need to “bump down” the numerology of subsequent rules in the Federal Rules of Criminal Procedure. The Standing Committee should amend other criminal rules with contempt provisions, however, in light of my proposed amendments revising Criminal Rule 42.

Revised Criminal Rule 42 does the following:

- (1) Defines criminal contempt and distinguishes it from civil contempt;
- (2) Explains that the scope of the rule encompasses criminal contempt under the Criminal Rules, local rules, and statutes sounding in criminal contempt;
- (3) Articulates discrepancies between contempt power of Article III judges and judicial officers, such as masters, magistrates, bankruptcy judges, etc.;

⁵² *Id.*

- (4) Explains that authorities who cannot exercise inherent or statutory contempt power can certify contempt to federal courts that can specifically under this rule;
- (5) Clarifies the authority of the court to initiate criminal (direct and constructive) contempt proceedings *sua sponte*;
- (6) Clarifies that parties in interest to a case can petition for criminal (constructive) contempt;
- (7) Lists the requirements for a party-initiated petition for criminal (constructive) contempt;
- (8) Lists the requirements for a show cause order to be entered by the court upon granting a petition;
- (9) Lists the requirements for service of process;
- (10) Cross-references other rules as necessary when special exemptions or applications apply;
- (11) Clarifies the wide range of penalties that can be imposed; and
- (12) Clarifies that criminal contempt proceedings do not foreclose consecutive or concurrent civil contempt proceedings.

The committee note to revised Criminal Rule 42 should reference published federal appellate precedents exemplifying the variety of penalties and the relevant guidelines in the United States Sentencing Guidelines for executing them. These precedents should include cases when a party was held in constructive civil and constructive criminal contempt simultaneously and provide guidance on how to proceed when such a finding is appropriate.⁵³

One might contend that prosecutors should have absolute discretion and the final word in criminal contempt matters, therefore, there should be no appointment of independent prosecutors if the

⁵³ See *infra*-Part VI.K.

executive does not wish to prosecute.⁵⁴ I disagree. The doctrine of separation of powers must not be left in a vacuum. The inherent authority of the federal judiciary, in my view, encompasses the ability to appoint independent counsel to represent and effectuate its institutional prerogatives, especially in proceedings initiated to vindicate those prerogatives.

The ultimate tool of the executive for balancing the power distributed between it and the judiciary in criminal contempt proceedings is not prosecutorial discretion by a “semi-autonomous” Department of Justice; it is the power of the President of the United States to grant pardons. The Standing Committee should therefore modify Old Criminal Rule 6(e) to internally cross-reference New Civil Rule 42 and revised Criminal Rule 42. Old Criminal Rule 7(a) should be modified to internally cross-reference revised Criminal Rule 42. Old Criminal Rule 17(g) is rendered superfluous by revised Criminal Rule 42(g); therefore, Old Criminal Rule 17(g) should be eliminated.⁵⁵

G. *Contempt Rules of Bankruptcy Procedure*

I propose that the Federal Rules of Bankruptcy Procedure be modified in light of my proposed statutory reform officially conferring bankruptcy courts with contempt power. If and when bankruptcy courts are statutorily given contempt power, Bankruptcy Rule 9020 should be amended to simply state that New Civil Rule 42 and revised Criminal Rule 42 govern contempt matters in proceedings before bankruptcy courts. Bankruptcy Rule 9020’s current internal cross-reference to Bankruptcy Rule 9014 should be eliminated.⁵⁶

H. *Contempt Rules of Appellate Procedure*

I propose that the Standing Committee modify the Federal Rules of Appellate Procedure by adopting a new rule governing

⁵⁴ See Neal Devins & Steven J. Mulroy, *Judicial Vigilantism: Inherent Judicial Authority to Appoint Contempt Prosecutors in Young v. United States ex rel Vuitton et fils S.A.*, 76 KY. L.J. 861 (1988).

⁵⁵ See *infra*-Part VI.H–K.

⁵⁶ See *infra*-Part VI.L.

contempt in appellate proceedings that is designated as Federal Rule of Appellate Procedure 42. All rules subsequent to New Appellate Rule 42 should “bump down.” New Appellate Rule 42 should simply state that New Civil Rule 42 and revised Criminal Rule 42 govern contempt matters in proceedings before federal appellate courts. Again, this will improve the harmony, efficiency, and clarity of the federal rules of practice and procedure as a whole.⁵⁷

I. *Contempt Rules of Evidentiary Procedure*

The Standing Committee should modify Evidence Rule 1101 to internally cross-reference revised Criminal Rule 42(c).⁵⁸

J. *Contempt Rules of Specialty Courts*

I propose that Article III specialty courts uniformly adopt a model contempt rule into their local rules. This model contempt rule will render all other contempt provisions unnecessary. This model contempt rule will simply state that contempt will be adjudicated under New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model rule is uniformly styled as “Rule 42” to maintain the symmetry of contempt provisions between national and local rules of practice and procedure.⁵⁹

I propose that Article I specialty courts uniformly adopt a model contempt rule. This model contempt rule will render all other local contempt provisions currently in force for such courts unnecessary. This model rule must have two different versions because not all Article I specialty courts are statutorily delegated the contempt power, and even if so, not necessarily to the same degree as Article III courts. My preference is that both versions of this model rule—whichever is applicable—be uniformly adopted and styled by the Article I specialty court in question as “Rule 42” to maintain the symmetry in contempt provisions between national rules of practice and procedure and local or jurisdictionally specific ones.⁶⁰

⁵⁷ See *infra*-Part VI.M.

⁵⁸ See *infra*-Part VI.N.

⁵⁹ See *infra*-Part VII.B–C.

⁶⁰ See *infra*-Part VII.F–G.

The first version of this rule, applicable to Article I specialty courts that are statutorily delegated contempt power by Congress, should dictate that the rules of those courts are enforceable through civil and criminal contempt proceedings in the same manner as articulated in New Civil Rule 42 and revised Criminal Rule 42. This model rule applies to the United States Court of Federal Claims and the United States Tax Court.⁶¹

The second version of this rule, applicable to Article I specialty courts that are not statutorily delegated contempt power by Congress, should dictate that their rules are enforceable through certification of contempt matters to a federal district court that can exercise jurisdiction over the subject matter or over the alleged contemnor in the underlying proceeding. This model rule applies to the United States Trademark Trial and Appeal Board, the United States Patent Trial and Appeal Board, the Armed Services Board of Contract Appeals, the Civilian Board of Contract Appeals, the Postal Service Board of Contract Appeals, the United States Merit Systems Protection Board, and the United States International Trade Commission.⁶²

K. *Contempt Rules and Secondary Sources*

The Federal Judicial Center should collaborate with the Standing Committee towards creating a manual on contempt power. This manual should include a concise history of the contempt power; a glossary referencing every contempt provision in federal rules, regulations, statutes; and a bibliography of helpful scholarly treatises, law review articles, and other secondary authorities explicating federal contempt law. The manual should gloss leading case law from every circuit on every facet of contempt law. The bench book for federal district judges and the manual on recurring problems in criminal trials contain some good material to start with. But the

⁶¹ See *infra*-Part VII.F.

⁶² See *infra*-Part VII.G.

manual I envision will be grander in scope so that it is helpful to every judge in every court.⁶³

L. *Contempt Rules of Circuit Procedure*

I propose reforms for rules that govern at the regional level of the federal judiciary, that is, rules governing the United States Circuits Courts of Appeals and Judicial Councils. These reforms should go hand-in-hand with proposed statutory reforms. The Standing Committee should modify Judicial Conduct and Judicial Disability Rule 13(d) to explicitly state that contempt proceedings will be conducted in a manner that substantially conforms to New Civil Rule 42 and revised Criminal Rule 42. The current rule does not articulate how the contempt power of a special investigative committee interfaces, if at all, with contempt procedures outlined in the federal rules of practice and procedure. The processes I propose in New Civil Rule 42 and revised Criminal Rule 42 are sufficient to guide special investigative committees in enforcing the Judicial Conduct and Disability Act through contempt proceedings.⁶⁴

I also propose that a model local rule be uniformly adopted and incorporated into regional rules affecting United States Circuits Courts of Appeals and other specialty appellate courts, such as the United States Court of Appeals for Veterans Claims. This model rule should dictate that the rules of the circuit or specialty appellate court in question are controlled by New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model local rule be incorporated and styled as “Local Rule 42” to maintain the symmetry of all contempt provisions between the local rules of all circuit courts of appeals, the local rules of specialty appellate courts, and the federal rules of practice and procedure.⁶⁵

⁶³ See *infra*-Parts IX–XV; *cf.* FED. JUD. CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES §§ 7.01–.02 (6th ed. 2013); FED. JUD. CTR., MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS pt. 4 (6th ed. 2010).

⁶⁴ See *infra*-Part VI.O.

⁶⁵ See *infra*-Part VII.B.

M. *Contempt Rules of Local Procedure*

I propose revisions to the Rules for the Supreme Court of the United States and the local rules of United States District Courts, Bankruptcy Courts, and Territorial Courts. Though Supreme Court Rules are not “local rules” for the purposes of Civil Rule 83, I nevertheless address them here because they are effectively local rules specific to the Supreme Court as the court of last resort. To that end, I propose that the Supreme Court adopt a single rule governing its exercise of contempt power. Because the Supreme Court’s rules are *sui generis*, however, I do not recommend that they merely replicate the contents of New Civil Rule 42 and revised Criminal Rule New 42 as I recommended for the local rules of the lower courts.

Less is more when it comes to the highest court in the land—the fountainhead for the judiciary’s inherent power. I fear that words do more to constrict than to empower here. I therefore think it is sufficient for the Supreme Court to merely institute a rule declaring that the Court has both inherent and implied constitutional authority to correct disobedience and punish indignities against its prerogatives, including through civil and criminal contempt proceedings. No further details are required.⁶⁶

Thanks to the language in New Civil Rule 42(a)(1)(ii) and revised Criminal Rule 42(a)(5)(iv), most if not all contempt provisions in local rules promulgated under Civil Rule 83 are rendered superfluous and should be eliminated.⁶⁷ Pending the implementation of my proposed modifications to the Civil Rules and Criminal Rules, however, I offer model local rules to be uniformly adopted by Article III district courts and Article IV territorial courts as well as Article I specialty courts.

These model local rules should simply state that the “local rules” in question are enforceable through civil and criminal contempt proceedings as articulated in New Civil Rule 42 and revised Criminal Rule 42. My preference is that this model local rule be incorporated

⁶⁶ See *infra*-Part VII.A.

⁶⁷ Cf. FED. JUD. CTR., UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY COURT RULES 1 (2012) (“Likewise, many national rules address matters about which there is no apparent need for local rules.”).

and styled as “Local Rule 42” to maintain the symmetry in contempt provisions across all national and local rules of practice and procedure. Individual chambers should feel free to refer to these rules in their chambers-specific orders and guidelines.⁶⁸

IV. CONCLUSION

The basic principles of contempt power under English common law are manifest in federal common law. The interbranch framework for judicial rulemaking instituted by the Rules Enabling Act generated the authorities governing contempt procedures today. But those procedures are deficient in multiple respects. The strategic plan of the federal judiciary emphasizes the importance of enhancing access to justice and the judicial process by ensuring that court rules, processes, and procedures meet the needs of lawyers. This article proposes three overarching reforms for fulfilling the objectives established by the federal judiciary’s strategic plan in the context of federal contempt law.⁶⁹

First, I propose making 18 U.S.C. § 401 and Criminal Rule 42 more comprehensive. This reform will lay the groundwork for eliminating most if not all criminal contempt statutes. It will therefore reduce unnecessary bulk in the federal code. It will also shift the burden of discretion for punishing contemptuous behavior from prosecutors back to the judiciary, a shift I think is both legally sound and normatively justified.

Second, I propose amendments streamlining contempt procedures for every federal adjudicative body, including Article I courts, Article III courts, and Article IV courts. I recommend, for example, that the Standing Committee draft a civil analogue to Rule 42 of the Federal Rules of Criminal Procedure. By implementing a comprehensive civil contempt rule, the Standing Committee will eliminate disparate contempt provisions found in other areas of the rules of practice and procedure, the rules of specialty courts, and local rules. All of these improvements will make federal procedural common law more concise, clear, and compact.

⁶⁸ See *infra*-Part VII.C–G.

⁶⁹ See *supra* note 3, at 21.

Third, I propose model local contempt rules that nationalize best practices from district courts whose rules are exceptionally helpful. The standardization of rules at the local level across the country relieves the need for rules at the national level to be unnecessarily granular. Improvements at each level of the procedural hierarchy have a positive cascading effect in reinforcing the clarity and coherence of the whole system.

My hope is that all of these proposals will enhance the dignity and efficacy of the judicial system and therefore benefit the bench and bar alike.

V. APPENDIX A: PROPOSED STATUTORY REFORMS⁷⁰

Below are proposed statutory amendments to Title 18 of the United States Code and two model statutes bearing on contempt power in administrative courts and regulating subpoena enforcement respectively.

A. *Criminal Amendments and Federal Judgeship Act of [Year]*

An Act

To amend Title 18 of the United States Code regarding the authority of federal courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Criminal Amendments and Federal Judgeship Act of [Year].

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

⁷⁰ I provide the boilerplate language for these reforms below. I offer proposed language for statutory reforms through draft revisions to both the relevant statute at large and its replicated form in the United States Code. Strikethrough text is language currently in force that recommend Congress eliminate. Underlined language is language not currently in force that I propose Congress add.

Sec. 401 of Title 18, United States Code, is amended to read as follows:

“§ 401. Power of Court

“(a) A court of the United States has power to punish and correct contempt of its authority and none other, sua sponte or by petition, including—

- (1) Misbehavior or disobedience in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior or disobedience of any judicial officer in their official transactions; and
- (3) Disobedience or resistance to their lawful writs, processes, orders, rules, decrees, or commands out of their presence.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

- (1) Reprimand;
- (2) Fine;
- (3) Imprisonment.

Sec. 1073 of Title 18, United States Code is deleted.

Sec. 1503 of Title 18, United States Code is deleted.

Sec. 1509 of Title 18, United States Code is deleted.

Sec. 1512 of Title 18, United States Code is deleted.

Sec. 1513 of Title 18, United States Code is deleted.

Sec. 1346 of Title 18, United States Code is deleted.

Sec. 1347 of Title 18, United States Code is deleted.

Sec. 1348 of Title 18, United States Code is deleted.

Sec. 1349 of Title 18, United States Code is deleted.

Sec. 1523 of Title 18, United States Code is deleted.

Sec. 1621 of Title 18, United States Code is deleted.

Sec. 1622 of Title 18, United States Code is deleted.

Sec. 1623 of Title 18, United States Code is deleted.

Sec. 3484 of Title 18, United States Code is deleted.

Sec. 3498 of Title 18, United States Code is deleted.

Sec. 3499 of Title 18, United States Code is deleted.

B. *18 U.S.C. § 401 – Power of Court*

(a) A court of the United States ~~shall have~~ has power to punish ~~by fine or imprisonment, or both, and correct contempt of its authority and none other, sua sponte or by petition, as including—~~

(1) Misbehavior or disobedience of any person in its presence or so near ~~thereto~~ as to obstruct the administration of justice;

(2) Misbehavior or disobedience of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(b) Penalties and purge conditions for contempt may include, either individually or in combination, the following:

(1) Reprimand;

(2) Report to any state bar or comparable ethics institution;

(3) Fine; and

(4) Imprisonment.

C. *Bankruptcy Amendments and Federal Judgeship Act of [Year]*

An Act

To amend Title 11 of the United States Code regarding the authority of bankruptcy courts to initiate contempt proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the Bankruptcy Amendments and Federal Judgeship Act of [Year].

TITLE I—BANKRUPTCY JURISDICTION AND PROCEDURE

Sec. 105(a) of Title 11, United States Code, is amended to read as follows:

“§ 105. Power of Court

“(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

D. *11 U.S.C. § 105 – Power of Court*

- (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title, including orders for civil and criminal contempt. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

E. *Model Contempt Statute for Administrative Law Courts*

Enforcement. If a person is allegedly contemptuous of a [administrative law authority], that [administrative law authority] can, at its discretion, certify the facts underlying that allegation to any federal district court that can exercise jurisdiction over the matter or where the alleged contemnor resides or carries on business. The district court must adjudicate the certified contempt allegation under the federal rules of practice and procedure as if those facts arose in a proceeding before that same district court.

F. *Model Contempt Statute for Enforcing Agency Subpoenas*

The [department, agency, board, authority, etc.] can make such investigations as the [department, agency, board, authority, etc.] deems necessary for the effective administration of this chapter or to determine whether any person subject to this [title, chapter, subtitle, etc.] engaged or is about to engage in any act that constitutes or will constitute a violation of this [title, chapter, subtitle, etc.], an order issued to facilitate the execution of this [title, chapter, subtitle, etc.], or any rule or regulation issued under this [title, chapter, subtitle, etc.].

For the purpose of such investigation, the [department, agency, board, authority, etc.] can administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any records that are relevant to the inquiry. The [department, agency, board, authority, etc.] can require attendance of witnesses and the production of records from any place in the United States or abroad. In case of refusal to obey a subpoena, the [department, agency, board, authority, etc.] can certify the matter to any district court that can exercise jurisdiction over the investigation or where the alleged violator resides or carries on business. The federal district court can require the attendance and testimony of the alleged violator and the production of records. The federal district court may issue an order requiring the alleged violator to appear before the [department, agency, board, authority, etc.] to

produce records or to give testimony regarding the matter under investigation.

The district court can punish and correct any failure to obey its orders through any means permitted under the federal rules of practice and procedure, including through contempt proceedings governed by those rules. Service of process in these cases must occur in the judicial district where the person is an inhabitant or wherever the person can be found.

VI. APPENDIX B: PROPOSED AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

Below are proposed revisions to the Federal Rules of Civil Procedure, Criminal Procedure, Bankruptcy Procedure, Evidence, and Judicial Conduct and Disability.

A. *FED. R. CIV. P. 4.1: Serving Other Process*

~~(a) In General. Process—Other than a summons under Rule 4 or a subpoena under Rule 45—must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).~~

~~(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.~~

B. *FED. R. CIV. P. 37: Failure to Disclose or to Cooperate in Discovery; Sanctions*

(b) Failure to Comply with a Court Order.

(1) Sanctions Sought in the District Where the Deposition Is Taken. If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be ~~treated as contempt of court~~ sanctioned. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be ~~treated as contempt of~~ sanctioned by either the court where the discovery is taken or the court where the action is pending.

(2) Sanctions Sought in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent--or a witness designated under Federal Rules of Civil Procedure 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;

- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party;
- (vii) initiating sanction proceedings under Federal Rule of Civil Procedure 11; or
- (viii) ~~treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination~~ initiating contempt proceedings under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

C. *[New] Fed. R. Civ. P. 42: Civil Contempt*

(a) Definition.

(1) Civil contempt is disobedience out the court out of the court's presence, such as

- (i) A violation of a court order or decree;
- (ii) A violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and
- (iii) A violation of a statute constituting contempt per se.

(2) Civil contempt is coercive, not punitive.

- (3) A purge condition is a condition that must be satisfied in order to avoid or lift a coercive measure imposed by the court to coerce compliance with an order or decree.

(b) Authority.

- (1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.
- (2) Masters can recommend civil contempt sanctions and certify them for disposition by a court with the proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].
- (3) Other persons or courts who do not possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings, but are authorized to recommend them, may certify those recommendations for disposition under this rule.

(c) Procedure

- (1) Civil contempt proceedings must be included in the same action where the alleged contempt occurred unless the matter is certified from a person or courts lacks authority to conduct the proceeding.
- (2) The court may initiate a civil contempt proceeding sua sponte.
- (3) A party to an action can initiate a civil contempt proceeding by filing a petition with the court against the alleged contemnor.

- (4) An order issued sua sponte under (c)(2) or in response to a petition under (c)(3) must schedule a prehearing conference, a hearing, or both. Additionally, it must
- (i) recite a short and plain basis for the civil contempt proceeding under (c)(2) or (c)(3);
 - (ii) schedule deadline for the filing of an answer by the alleged contemnor;
 - (iii) state the time and place of any prehearing conference or hearing; and
 - (iv) state the purge conditions requested, if any, under (c)(2) or contemplated by the court under (b)(3), including, fines and any period of incarceration.
- (5) After a prehearing conference or hearing is concluded, the court must determine if the following elements are established by clear and convincing evidence:
- (i) A valid order or decree of the court was in effect;
 - (ii) The alleged contemnor knew of that order or decree; and
 - (iii) The alleged contemnor breached it.
- (6) If the court determines that the alleged contemnor was guilty of civil contempt, the court must issue an order that
- (i) provides a short and concise explanation of its disposition;

- (ii) lists the purge conditions imposed to enforce compliance with the breached order or decree; and
- (iii) states the precise manner in which the purge conditions must be satisfied.

(7) If the court issues an order finding an alleged contemnor guilty of civil contempt and imposes incarceration as a purge condition, that order can be served and enforced in any district. All other orders issued in a civil contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

(d) Purge Conditions. Purge conditions for civil contempt must involve the least possible power adequate to the end proposed and must be possible to perform. They may be imposed individually or in combination. They may be imposed immediately upon a finding of civil contempt or as a contingent liability of the contemnor does not comply with an order of court by a specified deadline. The following is an inexhaustive list of purge conditions:

(1) Reprimand;

(2) Report to any state bar or equivalent professional body; and

(3) Fine;

- (i) A fine may be payable to the court, to a party prejudiced by the contempt as compensation, or some other recipient for the purpose of promoting compliance.

- (ii) A fine must be calculated according to the character and magnitude of the harm threatened by continued breach of the court's order or decree.
- (e) Incarceration. The court may impose a period of incarceration on the contemnor immediately until they comply with the breached order or decree or until another purge condition is satisfied.
- (f) Criminal Contempt. Nothing in this rule can be construed to detract from the court's authority to levy sanctions under Federal Rule of Civil Procedure 11, contempt under Federal Rule of Criminal Procedure 42, or any other relevant authorities as an alternative or in addition to civil contempt under this rule.

D. *FED. R. CIV. P. 45: Subpoena [Renumbered Civil Rule 46]*

~~(g) Contempt. The court for the district where compliance is required and also, after a motion is transferred, the issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.~~

E. *FED. R. CIV. P. 53: Masters (Renumbered Civil Rule 54)*

(a) Master's Authority

- (1) In General. Unless the appointing order directs otherwise, a master may:
 - (A) regulate all proceedings;
 - (B) take all appropriate measures to perform the assigned duties fairly and efficiently; and

(C) if conducting an evidentiary hearing, exercise the appointing court's power to compel, take, and record evidence.

(2) Sanctions.

(A) The master may by order impose on a party any noncontempt sanction ~~provided by~~ under Federal Rules of Civil Procedure 37 or 45, ~~and may recommend a contempt sanction against a party and sanctions against a nonparty~~ the master;

(B) The master may recommend a contempt sanction and certify it for disposition under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

F. *FED. R. CIV. P. 56: Summary Judgment [Renumbered Civil Rule 57]*

(g) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—~~may sanction the imposing party. may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.~~

G. *FED. R. CIV. P. 70: Enforcing a Judgment for a Specific Act [Renumbered Civil Rule 71]*

~~(e) Holding in Contempt. The court may also hold the disobedient party in contempt.~~

H. *Fed. R. Crim. P. 6: The Grand Jury*

(e) Recording and Disclosing the Proceedings.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. ~~A knowing~~ ~~v~~ Violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court under Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

I. *FED. R. CRIM. P. 7: The Indictment and the Information*

(a) When Used.

(1) Felony. An offense (other than criminal contempt under Federal Rule of Criminal Procedure 42) must be prosecuted by an indictment if it is punishable:

(A) by death; or

(B) by imprisonment for more than one year.

J. *Fed. R. Crim. P. 17: Subpoenas*

~~(g) Contempt. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge~~

~~may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate as provided in 28 U.S.C. § 636(e).~~

K. *Fed. R. Crim. P. 42: Criminal Contempt*

(a) Definition.

- (1) Any disrespect or violation of the court's dignity may be liable for criminal contempt.
- (2) Criminal contempt is punitive, not coercive.
- (3) Direct criminal contempt is misbehavior in the court's presence or so near to it as to obstruct the administration of justice.
- (4) Constructive criminal contempt is disobedience to the court outside of the court's presence, and can involve the following:
 - (i) violation of a court order or decree;
 - (ii) interference with or obstruction of the administration of justice, including improper threats, tampering, or other undue influences directed toward grand jurors, petit jurors, witnesses, officers of the court, and other persons operating under court order or decree;
 - (iii) violation of bail or parole conditions;
 - (iv) material misrepresentation to the court, including perjury;
 - (v) violation of a local rule or chambers policy promulgated under Federal Rule of Civil Procedure 83; and

- (vi) violation of a statute constituting contempt per se.

(b) Authority.

- (1) Courts that possess inherent, constitutional, or statutory authority to adjudicate civil contempt proceedings are governed by this rule.
- (2) Masters can recommend criminal contempt sanctions and certify them for disposition by a court with proper authority to adjudicate the matter under Federal Rule of Civil Procedure 54 [former Rule 53].
- (3) Other persons or courts that do not possess authority to adjudicate civil contempt proceedings but are authorized to recommend them may certify those recommendations for disposition under this rule.

(c) Direct Criminal Contempt Procedure

- (1) Misbehavior committed in the court's presence can be adjudicated through summary proceedings if the presiding judge certifies that he saw or heard the misbehavior.
- (2) Direct criminal contempts are sui generis and therefore have no elements, mens rea, or standard of proof.
- (3) Following a summary proceeding, the presiding judge must promptly issue a signed order filed with the clerk providing a short and concise statement of facts and an explanation for his disposition.
- (4) The court cannot enter a summary contempt judgment relating to misbehavior in its presence nunc pro tunc.

- (5) A presiding judge who can lawfully preside over summary proceeding for direct criminal contempt can nevertheless refer the matter for constructive criminal contempt proceedings under section (d) of this rule if doing so is in the interest of justice.

(d) Constructive Criminal Contempt Procedure

- (1) Constructive criminal contempts must be adjudicated through a separate proceeding with a separate caption from the action where the contempt arose.
- (2) The court may initiate a constructive criminal contempt proceeding sua sponte or by petition.
- (3) The court must give the alleged contemnor notice in open court and issue a show cause order or an arrest order. The alleged contemnor must be released or detained as Federal Rule of Criminal Procedure 47 [former Rule 46] provides. The alleged contemnor is entitled to a trial by jury. The show cause order or arrest order must
 - (i) Recite a short and plain basis for the criminal contempt proceeding, including the essential facts constituting the criminal contempt charged;
 - (ii) Schedule the time and place of a trial;
 - (iii) Allow the alleged contemnor a reasonable time to prepare a defense; and
 - (iv) Expressly state any penalties requested under (d)(2) if offered.
- (4) The court may request that the alleged criminal contempt be prosecuted by the government or, if in interest of justice so requires, another attorney. If the government declines

to prosecute, the court must appoint another attorney to prosecute.

(5) The prosecuting attorney must prove the following elements beyond a reasonable doubt:

(i) There was a lawful and reasonably specific order, decree, or proceeding;

(ii) The alleged contemnor violated that order or decree, or misbehaved in the court's presence; and

(iii) The alleged contemnor's conduct was willful.

(6) If the alleged criminal contempt involved disrespect or criticism towards a judge, that judge is disqualified from presiding over the trial or hearing unless the alleged contemnor consents.

(7) Upon a finding or verdict of guilty, the court may impose punishment.

(e) Punishment. Punishment for criminal contempt must involve the least possible power adequate to the end proposed. Penalties for direct and constructive criminal contempt can be imposed individually or in combination. The following is an inexhaustive list of potential penalties:

(1) Reprimand

(2) Fines

(i) The fine can be imposed on a per diem basis or consist of a single sum.

(ii) The fine may be payable to the court, to a party prejudiced by the contempt as compensation,

or some other recipient for the purpose of promoting compliance.

- (iii) The fine must be calculated according to the character and magnitude of the disrespect or dignity suffered by the court.

(3) Incarceration

- (i) **Direct Criminal Contempt.** If the alleged contemnor is found guilty of direct criminal contempt, he can be sentenced to a period of incarceration not exceeding six months for a single contemptuous act. He may, however, be sentenced to a period of incarceration exceeding more than six months for more than one contemptuous acts, provided that the increment of incarceration attributed to each act does not exceed six months.
 - (ii) **Constructive Criminal Contempt.** If the alleged contemnor is found guilty of constructive criminal contempt, he can be sentenced to a period of incarceration exceeding six months.
- (f) **Civil Contempt.** Nothing in this rule can be construed to detract from the court's authority to correct defiance with its orders or decrees through civil contempt proceedings under Federal Rule of Civil Procedure 42 and any other relevant authorities.

L. Fed. R. Bankr. P. 9020: Contempt Proceedings

Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest. Enforcement of Local Rules. Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42 govern contempt proceedings.

M. *[New] FED. R. APP. P. 42: Contempt*

Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42 govern contempt proceedings.

N. *FED. R. EVID. 1101: Applicability of the Rules*

(b) To Cases and Proceedings. These rules apply in

- (1) civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
- (2) criminal cases and proceedings; and
- (3) contempt proceedings ~~except those in which the court may act summarily.~~ proceedings for direct criminal contempts governed by Federal Rule of Criminal Procedure 42(c).

O. *Judicial-Conduct and Judicial-Disability Rule 13(d)*

(a) Delegation of Subpoena Power; Contempt. The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena. Contempt proceedings under Section 332(d) are governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

VII. APPENDIX C: PROPOSED LOCAL RULES

Below are proposed model local rules for the United States Supreme Court, Article III circuit courts of appeal, Article III district courts, Article IV territorial courts, Article III, specialty courts, and Article I specialty courts.

A. *[New] Supreme Ct. L. R. 1: Scope; Enforcement*

- (a) Scope. These rules govern procedure in all actions in the Supreme Court of the United States. They must be construed, administered, and employed by the Court and the parties to secure the just, speedy, and inexpensive determination of every action of proceeding.
- (b) Enforcement. The Court possesses both inherent and implied constitutional authority to sanction disrespect and correct disobedience, such as through civil contempt and criminal contempt proceedings.

B. *Model Local Rule for United States Circuits Courts of Appeal*

Enforcement of Local Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

C. *Model Local Rule for Article III United States District Courts*

Enforcement of Local Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

D. *Model Local Rule for Article IV Territorial Courts*

Enforcement of Rules. The Court may enforce these local rules with sanctions, such as through civil or criminal contempt proceedings governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

E. Model Rule for Article III Specialty Courts

Enforcement of Rules. The Court may enforce these rules with sanctions, such as through sanctions under Federal Rule of Civil Procedure 11, Federal Rule of Civil Procedure 42, and Federal Rule of Criminal Procedure 42.

F. Model Rule for Article I Specialty Courts Delegated the Contempt Power

Enforcement of Rules. The Court may enforce these rules through contempt proceedings. Contempt proceedings will be governed in the same manner as that prescribed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42.

G. Model Local Rule for Article I Specialty Courts Not-Delegated Contempt Power

Enforcement of Rules. These rules are enforceable through certification to any district court with jurisdiction over this court or the alleged contemnor. Contempt proceedings before the federal district court are governed by Federal Rule of Civil Procedure 42 and Federal Rule of Criminal Procedure 42. A certification must include a concise statement reciting the facts underlying the allegation of contempt and a recommendation for the district court's disposition.

VIII. APPENDIX D: PROPOSED JURY INSTRUCTIONS

Below are proposed jury instructions for Title 18, Sections 401 and 403 of the United States Code.

A. 1 Mod. Fed. Jury Instr.-Crim. P. 20.01; 20.02

1. Instruction 20-10: The Indictment and the Statute

The indictment charges the defendant with contempt. The indictment reads as follows

[Read indictment]

The defendant has been charged with violating section 401(a)(1) of Title 18 of the United States Code. That subsection provides that:

A court of the United States ~~shall have~~ ~~has discretionary~~ ~~power~~ has power to punish . . . ~~such~~ contempt of its authority . . . ~~as~~ including— Misbehavior or disobedience of any person in its presence or so near thereto as to obstruct the administration of justice.

2. Instruction 20-10: The Indictment and the Statute

The indictment charges the defendant with the crime of [describe the offense]. The indictment reads as follows:

[Read indictment]

The defendant has been charged with violating section 401(a)(3) of Title 18 of the United States Code. That subsection provides that:

‘A court of the United States ~~shall have~~ ~~has~~ ~~the~~ power to punish . . . ~~such—~~contempt of its authority, ~~as~~ including—. . . ~~[d]~~Disobedience or resistance to its lawful writ, process, rule, decree or command.

IX. APPENDIX E: SUPREME COURT CONTEMPT CASES

1. *Ex parte Bollman*, 8 U.S. 75 (1807)
2. *United States v. Hudson*, 11 U.S. 32 (1812)
3. *Anderson v. Dunn*, 19 U.S. 204 (1821)
4. *Ex parte Kearney*, 20 U.S. 38 (1822)
5. *Ex parte Tillinghast*, 4 Pet. 108 (1830)
6. *Ex parte Watkins*, 28 U.S. 193 (1830)
7. *Lord v. Veazie*, 49 U.S. 251 (1850)
8. *Wiswall v. Sampson*, 55 U.S. 52 (1852)
9. *Cleveland v. Chamberlain*, 66 U.S. 419 (1861)
10. *Ex parte Yerger*, 75 U.S. 85 (1868)
11. *In re Bradley*, 74 U.S. 364 (1868)
12. *Davis v. Gray*, 83 U.S. 203 (1872)
13. *Ex parte Robinson*, 86 U.S. 505 (1873)

14. *City of New Orleans v. N.Y. Mail S.S. Co.*, 87 U.S. 387 (1874)
15. *In re Chiles*, 89 U.S. 157 (1874)
16. *Hayes v. Fischer*, 102 U.S. 121 (1880)
17. *Kilbourn v. Thompson*, 103 U.S. 168 (1880)
18. *Barton v. Barbour*, 104 U.S. 126 (1881)
19. *Ex parte Rowland*, 104 U.S. 604 (1881)
20. *The Laura*, 114 U.S. 411 (1885)
21. *In re Terry*, 128 U.S. 289 (1888)
22. *Ex parte Cuddy*, 131 U.S. 280 (1889)
23. *Ex parte Savin*, 131 U.S. 267 (1889)
24. *Eilenbecker v. Dist. Ct. of Plymouth Cnty.*, 134 U.S. 31 (1890)
25. *Delgado v. Chavez*, 140 U.S. 586 (1891)
26. *Pettibone v. United States*, 148 U.S. 197 (1893)
27. *Ex parte Tyler*, 149 U.S. 164 (1893)
28. *In re Swan*, 150 U.S. 637 (1893)
29. *Interstate Comm. Comm'n v. Brimson*, 154 U.S. 447 (1894)
30. *In re Debs*, 158 U.S. 564 (1895)
31. *Ex parte Chetwood*, 165 U.S. 443 (1897)
32. *In re Chapman*, 166 U.S. 661 (1897)
33. *Hovey v. Elliott*, 167 U.S. 409 (1897)
34. *Tinsley v. Anderson*, 171 U.S. 101 (1898)
35. *Mueller v. Nugent*, 184 U.S. 1 (1902)
36. *In re Watts*, 190 U.S. 1 (1903)
37. *Bessette v. W.B. Conkey Co.*, 194 U.S. 324 (1904)
38. *In re Christensen Engineering Co.*, 194 U.S. 458 (1904)
39. *Alexander v. United States*, 201 U.S. 117 (1906)
40. *Nelson v. United States*, 201 U.S. 92 (1906)
41. *Doyle v. London Guar. & Accident Co.*, 204 U.S. 599 (1907)
42. *United States v. Shipp*, 214 U.S. 386 (1909)
43. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911)
44. *Merrimack River Sav. Bank v. City of Clay Ctr.*, 219 U.S. 527 (1911)
45. *Wilson v. United States*, 221 U.S. 361 (1911)
46. *Grant v. United States*, 227 U.S. 74 (1913)
47. *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918)
48. *Ex parte Hudgings*, 249 U.S. 378 (1919)
49. *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922)
50. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923)

51. *Michaelson v. United States*, 266 U.S. 42 (1924)
52. *Myers v. United States*, 264 U.S. 95 (1924)
53. *Cooke v. United States*, 267 U.S. 517 (1925)
54. *Farmers' & Mech.'s Nat. Bank v. Wilkinson*, 266 U.S. 503 (1925)
55. *Ex parte Grossman*, 267 U.S. 87 (1925)
56. *United States v. Goldman*, 277 U.S. 229 (1928)
57. *Sinclair v. United States*, 279 U.S. 749 (1929)
58. *Blackmer v. United States*, 284 U.S. 421 (1932)
59. *Lamb v. Cramer*, 285 U.S. 217 (1932)
60. *Bevan v. Krieger*, 289 U.S. 459 (1933)
61. *Clark v. United States*, 289 U.S. 1 (1933)
62. *Fox v. Capital Co.*, 299 U.S. 105 (1936)
63. *Hill v. United States*, 300 U.S. 105 (1937)
64. *McCrone v. United States*, 307 U.S. 61 (1939)
65. *Amalgamated Utility Workers v. Consol. Edison Co.*, 309 U.S. 261 (1940)
66. *Bridges v. State of Cal.*, 314 U.S. 252 (1941)
67. *Nye v. United States*, 313 U.S. 33 (1941)
68. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941)
69. *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426 (1941)
70. *Cudahy Packing Co. of La. v. Holland*, 315 U.S. 788 (1942)
71. *St. Pierre v. United States*, 319 U.S. 41 (1943)
72. *In re Bradley*, 318 U.S. 50 (1943)
73. *In re Michael*, 326 U.S. 224 (1945)
74. *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9 (1945)
75. *May Dept. Stores Co. v. N.L.R.B.*, 326 U.S. 376 (1945)
76. *Pennekamp v. State of Fla.*, 328 U.S. 331 (1946)
77. *Craig v. Harney*, 331 U.S. 367 (1947)
78. *Penfield Co. of Cal. v. S.E.C.*, 330 U.S. 585 (1947)
79. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947)
80. *Maggio v. Zeitz*, 333 U.S. 56 (1948)
81. *In re Oliver*, 333 U.S. 257 (1948)
82. *Fisher v. Pace*, 336 U.S. 155 (1949)
83. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)
84. *State of Md. v. Balt. Radio Show*, 338 U.S. 912 (1950)
85. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950)
86. *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951)

87. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)
88. *Sacher v. United States*, 343 U.S. 1 (1952)
89. *Brown v. United States*, 348 U.S. 11 (1954)
90. *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954)
91. *N.L.R.B. v. Warren Co.*, 350 U.S. 107 (1955)
92. *In re Murchison*, 349 U.S. 133 (1955)
93. *Cammer v. United States*, 350 U.S. 399 (1956)
94. *Ullmann v. United States*, 350 U.S. 422 (1956)
95. *Nilva v. United States*, 352 U.S. 385 (1957)
96. *Watkins v. United States*, 354 U.S. 178 (1957)
97. *Yates v. United States*, 355 U.S. 66 (1957)
98. *Brown v. United States*, 356 U.S. 148 (1958)
99. *Knapp v. Schweitzer*, 357 U.S. 371 (1958)
100. *Green v. United States*, 356 U.S. 165 (1958)
101. *N.A.A.C.P. v. State of Ala., ex rel. Patterson*, 357 U.S. 449 (1958)
102. *Anonymous Nos. 6 and 7 v. Baker*, 360 U.S. 287 (1959)
103. *Brown v. United States*, 359 U.S. 41 (1959)
104. *Scull v. Virginia*, 359 U.S. 344 (1959)
105. *Uphaus v. Wyman*, 360 U.S. 72 (1959)
106. *N.A.A.C.P. v. Williams*, 359 U.S. 550 (1959)
107. *Levine v. United States*, 362 U.S. 610 (1960)
108. *N.L.R.B. v. Deena Artware, Inc.*, 361 U.S. 398 (1960)
109. *Reina v. United States*, 364 U.S. 507 (1960)
110. *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961)
111. *Ex parte George*, 371 U.S. 72 (1962)
112. *Petition of Green*, 369 U.S. 689 (1962)
113. *In re McConnell*, 370 U.S. 230 (1962)
114. *Russell v. United States*, 369 U.S. 749 (1962)
115. *Wood v. Ga.*, 370 U.S. 375 (1962)
116. *Yellin v. United States*, 374 U.S. 109 (1963)
117. *Johnson v. State of Va.*, 373 U.S. 61 (1963)
118. *Panico v. United States*, 375 U.S. 29 (1963)
119. *Ungar v. Sarafite*, 376 U.S. 575 (1964)
120. *Reisman v. Caplin*, 375 U.S. 440 (1964)
121. *Donovan v. City of Dallas*, 377 U.S. 408 (1964)
122. *United States v. Barnett*, 376 U.S. 681 (1964)

123. *First Sec. Nat. Bank & Trust Co. v. United States*, 382 U.S. 34 (1965)
124. *Harris v. United States*, 382 U.S. 162 (1965)
125. *Holt v. Va.*, 381 U.S. 131 (1965)
126. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966)
127. *State of S.C. v. Katzenbach*, 383 U.S. 301 (1966)
128. *Stevens v. Marks*, 383 U.S. 234 (1966)
129. *Shillitani v. United States*, 384 U.S. 364 (1966)
130. *Bitter v. United States*, 389 U.S. 15 (1967)
131. *I.L.A.C. 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64 (1967)
132. *Bloom v. Illinois*, 391 U.S. 194, 202 (1968)
133. *DeStefano v. Woods*, 392 U.S. 631 (1968)
134. *Brussel v. United States*, 396 U.S. 1229 (1969)
135. *In re Herndon*, 394 U.S. 399 (1969)
136. *Frank v. United States*, 395 U.S. 147 (1969)
137. *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383 (1970)
138. *Rowan v. United States Post Office Dep't.*, 397 U.S. 728 (1970)
139. *Russo v. United States*, 404 U.S. 1209 (1971)
140. *Mayberry v. Penn.*, 400 U.S. 455 (1971)
141. *Johnson v. Miss.*, 403 U.S. 212 (1971)
142. *Donaldson v. United States*, 400 U.S. 517 (1971)
143. *United States v. Ryan*, 402 U.S. 530 (1971)
144. *Gelbard v. United States*, 408 U.S. 41 (1972)
145. *In re Little*, 404 U.S. 553 (1972)
146. *Colombo v. N.Y.*, 405 U.S. 9 (1972)
147. *Tierney v. United States*, 409 U.S. 1232 (1972)
148. *Lefkowitz v. Turley*, 414 U.S. 70 (1973)
149. *Farr v. Pitchess*, 409 U.S. 1243 (1973)
150. *Taylor v. Hayes*, 418 U.S. 488 (1974)
151. *Codispoti v. Penn.*, 418 U.S. 506 (1974)
152. *Eaton v. City of Tulsa*, 415 U.S. 697 (1974)
153. *Menna v. New York*, 423 U.S. 61 (1975)
154. *United States v. United Mine Workers of Am.*, 330 U.S. 258 (1947)
155. *Maness v. Meyers*, 419 U.S. 449 (1975)
156. *Withrow v. Larkin*, 421 U.S. 35 (1975)
157. *Muniz v. Hoffman*, 422 U.S. 454 (1975)

158. *Gruner v. Sup. Ct. of Cal. in and for Fresno Cnty.*, 429 U.S. 1314 (1976)
159. *United States v. Mandujano*, 425 U.S. 564 (1976)
160. *Juidice v. Vail*, 430 U.S. 327 (1977)
161. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)
162. *Dolman v. United States*, 439 U.S. 1395 (1978)
163. *N.Y.T. Co. v. Jasclevich*, 439 U.S. 1317 (1978)
164. *Orr v. Orr*, 440 U.S. 268 (1979)
165. *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375 (1980)
166. *In re Roche*, 448 U.S.1312 (1980)
167. *In re Snyder*, 472 U.S. 634 (1985)
168. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987)
169. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988)
170. *United States v. Providence J. Co.*, 485 U.S. 693 (1988)
171. *Morrison v. Olson*, 487 U.S. 654 (1988)
172. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992)
173. *United States v. Dixon*, 509 U.S. 688 (1993)
174. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994)
175. *Pounders v. Watson*, 521 U.S. 982 (1997)
176. *United States v. Martinez-Salazar*, 528 U.S. 304 (2000)
177. *Multimedia Holdings Corp. v. Circuit Ct. of Fla.*, 544 U.S. 1301 (2005)
178. *Turner v. Rogers*, 564 U.S. 431 (2011)

X. APPENDIX F: FEDERAL RULES OF PRACTICE AND PROCEDURE

1. FED. R. CIV. P. 4.1
2. FED. R. CIV. P. 37(b)
3. FED. R. CIV. P. 45(g)
4. FED. R. CIV. P. 53(c)
5. FED. R. CIV. P. 56(h)
6. FED. R. CIV. P. 70(e)
7. FED. R. CRIM. P. 6(e)
8. FED. R. CRIM. P. 7(a)
9. FED. R. CRIM. P. 17(g)
10. FED. R. CRIM. P. 42
11. FED. R. BANKR. P. 9020
12. FED. R. EVID. 1101
13. C.A.A.F. L.R. 41(b)
14. CIT L.R. 37(b)(1), (2)(A)
15. CIT L.R. 45(f)
16. CIT L.R. 53(c)
17. CIT L.R. 56(h)
18. CIT L.R. 86.2
19. Ct. Fed. Cl. L.R. 4.1
20. Ct. Fed. Cl. L.R. 37(b)
21. Ct. Fed. Cl. L.R. 45(g)
22. Ct. Fed. Cl. L.R. 56(h)
23. Ct. Fed. Cl. L.R. 83.2(n)
24. F.I.S.C. L.R. 19
25. Tax Ct. 13(d)
26. Tax Ct. 104(a), (c)
27. Tax Ct. L.R. 147(e)
28. Tax Ct. L.R. 202(c), (i)
29. TTAB L.R. 404.03(a)(2)
30. TTAB L.R. 411.05
31. TTAB L.R. 502.05
32. TTAB L.R. 527.01(a)
33. TTAB L.R. 528
34. ASBCA L.R. 22(g)
35. 33 C.F.R. § 210.5 (1980)
36. 37 C.F.R. § 2.120 (2017)
37. 37 C.F.R. § 2.127 (2017)

XI. APPENDIX G: CIRCUIT RULES

1. 1st Cir. L.R. 9(a)
2. 1st Cir. L.R. 11
3. 4th Cir. L.R. 9(c)
4. 5th Cir. I.O.P. B.S. (J)
5. 6th Cir. I.O.P. 28(c)
6. 6th Cir. L.R. 31(c)(2)(A)
7. 6th Cir. L.R. 34(c)(2)
8. 9th Cir. L.R. 3-5
9. 11th Cir. I.O.P. 15-4.4(a)
10. J. C. & D. R. 13(d)

XII. APPENDIX H: LOCAL RULES

- | | |
|--------------------------------------|-------------------------------------|
| 1. N.D. ALA. L.R. 83.1(k) | 19. D. COLO. L.R. ATT'Y.
7(d)(2) |
| 2. S.D. ALA. L.R. 83.1 | 20. D. COLO. L.R. ATT'Y
10(a)(1) |
| 3. D. ALASKA L.R. CRIM.
32.2(g) | 21. D. CONN. L.R. 32 |
| 4. D. ARIZ. L.R. CIV. 83.1(f) | 22. D. CONN. L.R. 83.5(4) |
| 5. E.D. ARK. L.R. 14 | 23. D. DEL. L.R. CIV. 83.6(m) |
| 6. W.D. ARK. L.R. 14 | 24. D.D.C. L.R. 40.9(b) |
| 7. C.D. CAL. L.R. 7-8 | 25. D.D.C. 83.8(b)(4) |
| 8. C.D. CAL. L.R. 83-3.2.7 | 26. D.D.C. 83.13(b) |
| 9. C.D. CAL. L.R. 83-6 | 27. D.D.C. 83.15(b)(3), (d) |
| 10. C.D. CAL. 83-6.4.1 | 28. D.D.C. L.R. 83.16(d)(5), (8) |
| 11. E.D. CAL. L.R. 184(a) | 29. D.D.C. L.R. CRIM. 6.1 |
| 12. S.D. CAL. 83.5 | 30. D.D.C. L.R. CRIM. 57.15(b) |
| 13. D. COLO. L.R. CIV.
72.1(b)(7) | 31. D.D.C. L.R. CRIM. 57.21(b) |
| 14. D. COLO. L.R. CIV. 83.1(d) | 32. D.D.C. L.R. CRIM. 57.26 |
| 15. D. COLO. L.R. CIV. 83.2(a) | 33. D.D.C. L.R. CRIM. 57.27(d) |
| 16. D. COLO. L.R. CRIM.
57.1(b) | 34. M.D. FLA. L.R. 2.04(g) |
| 17. D. COLO. L.R. CRIM.
57.3(c) | 35. N.D. FLA. L.R. 11.1(g) |
| 18. D. COLO. L.R. CRIM. 57.4 | 36. S.D. FLA. L.R. 11.1(b) |
| | 37. N.D. GA. L.R. CIV. 83.1(F) |
| | 38. N.D. GA. L.R. 83.5(C) |

39. S.D. GA. L.R. 72.4(k)
40. S.D. GA. L.R. 83.5
41. S.D. GA. 83.31
42. D. IDAHO L.R. CIV.
83.5(b)(1)
43. C.D. ILL. L.R. 72.1(A)(2)
44. C.D. ILL. L.R. 83.5(G)
45. C.D. ILL. 83.6(C)
46. C.D. ILL. 16.2(E)
47. N.D. ILL. R. 37.1(a)-(c)
48. N.D. ILL. L.R. 40.1(c)
49. N.D. ILL. L.R. 83.25
50. N.D. ILL. L.R. CRIM.
32.1(j)
51. N.D. ILL. L.R. CRIM. 50.2
52. S.D. ILL. L.R. 83.3(a)(5), (g)
53. N.D. IND. L.R. 40-1
54. N.D. IND. L.R. 83-6.1(b),
55. N.D. IND. L.R. APP'X C.(h)
56. S.D. IND. L.R. 40-1
57. S.D. IND. L.R. CRIM. 31-1(i)
58. N.D. IOWA L.R. 72(i)(28)
59. N.D. IOWA L.R. 83(g)(5)
60. S.D. IOWA L.R. 72(i)(28)
61. S.D. IOWA L.R. 83(g)95)
62. E.D. KY. L.R. CIV. 83.3(d)
63. E.D. KY. L.R. CRIM.
57.3(d)
64. W.D. KY. L.R. CIV.
83.3(d)
65. W.D. KY. L.R. CRIM.
57.3(d)
66. W.D. LA. L.R. 83.3.13
67. D. ME. L.R. 83.3(1)
68. D. MD. L.R. 204(6)
69. D. MD. L.R. 301(6)
70. D. MD. L.R. 506(3)
71. D. MD. L.R. 602
72. D. MASS. L.R. 83.6.4
73. E.D. MICH. L.R. 16.3(h)
74. E.D. MICH. L.R. 83.20
75. E.D. MICH. L.R. 83.22
76. E.D. MICH. L.R. 83.31
77. E.D. MICH. L.R. 83.32(g)(3)
78. E.D. MICH. L.R. CRIM.
56.5(d)
79. E.D. MICH. L.R. CRIM. 57.1
80. E.D. MICH. L.R. CRIM. 57.4
81. D. MINN. L.R. 83.6(b)
82. D. MINN. L.R. 83.13
83. N.D. MISS. L.R. CIV. 83.1(d)
84. S.D. MISS. L.R. CIV. 83.1(d)
85. E.D. MO. L.R. 83.12.02
86. W.D. MO. L.R. 83.6(k), (l)
87. W.D. MO. L.R. 99.3
88. W.D. MO. L.R. 83.6(k), (l)
89. W.D. MO. L.R. 99.3
90. D. MONT. L.R. CIV. 83(d)
91. D. MONT. APP'X B.1.B
92. D. NEV. L.R. IA 11-7
93. D. N.H. L.R. 47.1
94. D. N.H. L.R. 83.5, DR-12
95. D. N.J. L.R. CIV. 27.1
96. D. N.J. L.R. CIV. 104.1(m)
97. D. N.M. L.R. CIV. 30.2
98. E.D.N.Y. L.R. CIV. 1.3(a)
99. E.D.N.Y. L.R. CIV. 83.6
100. N.D.N.Y. L.R. 83.1(a)(1)
101. N.D.N.Y. L.R. 83.49(k)
102. N.D.N.Y. L.R. 83.5
103. S.D.N.Y. L.R. CIV. 1.3(a)
104. S.D.N.Y. L.R. CIV. 83.6
105. W.D.N.Y. L.R. CIV. 83.4
106. E.D.N.C. L.R. CIV.
83.1(k)
107. E.D.N.C. L.R. CIV. 83.9

108. E.D.N.C. L.R. CIV. 100.1
109. E.D.N.C. L.R. 100.3
110. E.D.N.C. L.R. CRIM. 83.1(k)
111. E.D.N.C. L.R. CIV. 100.1
112. M.D.N.C. L.R. CIV. 83.10m
113. M.D.N.C. L.R. CRIM. 32.2
114. W.D.N.C. L.R. 83.2(b)
115. W.D.N.C. L.R. 83.3(b)(2)
116. W.D.N.C. L.R. L.R. 32.1(k)
117. N.D. OHIO L.R. CIV. 83.7(m)
118. E.D. OKLA. L.R. CIV. 83.6
119. E.D. OKLA. L.R. CIV. 83.7
120. N.D. OKLA. L.R. CIV. 83.6
121. N.D. OKLA. L.R. CIV. 83.7
122. N.D. OKLA. L.R. CRIM. 44.5
123. N.D. OKLA. L.R. CRIM. 44.7
124. W.D. OKLA. L.R. 83.6(g), (h)
125. D. ORE. L.R. CIV. 83-1(d)
126. D. ORE. L.R. CRIM. 3003
127. E.D. PA. L.R. CIV. 83.6.11
128. E.D. PA. L.R. CRIM. 41.1(a)
129. W.D. PA. L.R. 32
130. W.D. PA. L.R. 83.3(J)
131. D. P.R. 83E(d)
132. D. S.C. L.R. CIV. 83.I.08
133. E.D. TENN. L.R. 83.7(a)
134. M.D. TENN. L.R. 160.02(f)
135. M.D. TENN. L.R. 72.05
136. M.D. TENN. L.R. 83.01(e)(1)
137. W.D. TENN. L.R. 72.1
138. D. VT. L.R. P. 83.2(b)(5)
139. E.D. VA. L.R. CIV. 45(c)
140. E.D. VA. L.R. CIV. 83.1(H)
141. E.D. VA. L.R. CIV. 83.1
142. E.D. VA. L.R. CRIM. 57.4(H)
143. W.D. WASH. L.R. CIV. 83.3
144. W.D. WASH. L.R. CRIM. 42
145. S.D. W. VA. L.R. P. 4.1.1
146. S.D. W. VA. L.R. P. 4.1.2
147. S.D. VA. L.R. P. 4.1.3
148. D. N. M.I. L.R. 83.2(e)
149. D. N. M.I. L.R. 83.6
150. D. V.I. L.R. P. 83.2(d)
151. D. V.I. L.R. A.D. 1(c)

XIII. APPENDIX I: STATUTES

1. 2 U.S.C. § 288d (1986)
2. 5 U.S.C. § 552 (2016)
3. 5 U.S.C. § 555 (1966)
4. 5 U.S.C. § 1204 (2014)
5. 5 U.S.C. § 1507 (1978)
6. 5 U.S.C. § 7132 (1978)
7. 5 U.S.C. § 8125 (1966)
8. 5 U.S.C. § 8480 (2009)
9. 7 U.S.C. § 9 (2010)
10. 7 U.S.C. § 87f (1994)
11. 7 U.S.C. § 499m (1978)
12. 7 U.S.C. § 1446 (1991)
13. 7 U.S.C. § 2115 (1970)
14. 7 U.S.C. § 2354 (1994)

15. 7 U.S.C. § 2622 (1990)
16. 7 U.S.C. § 2717 (1974)
17. 7 U.S.C. § 2909 (1985)
18. 7 U.S.C. § 3412 (1977)
19. 7 U.S.C. § 4317 (1981)
20. 7 U.S.C. § 4511 (1983)
21. 7 U.S.C. § 4610a (1991)
22. 7 U.S.C. § 4816 (1985)
23. 7 U.S.C. § 4911 (1993)
24. 7 U.S.C. § 6010 (1991)
25. 7 U.S.C. § 6108 (1991)
26. 7 U.S.C. § 6208 (1991)
27. 7 U.S.C. § 6809 (1993)
28. 7 U.S.C. § 7420 (1996)
29. 7 U.S.C. § 7449 (1996)
30. 7 U.S.C. § 7469 (1996)
31. 7 U.S.C. § 7488 (1996)
32. 7 U.S.C. § 7733 (2008)
33. 7 U.S.C. § 7808 (2000)
34. 7 U.S.C. § 8314 (2008)
35. 8 U.S.C. § 1225 (2009)
36. 8 U.S.C. § 1229a (2006)
37. 8 U.S.C. § 1324b (1996)
38. 8 U.S.C. § 1324c (1996)
39. 8 U.S.C. § 1451 (1994)
40. 8 U.S.C. § 1446 (1991)
41. 9 U.S.C. § 7 (1951)
42. 10 U.S.C. § 848 Art. 48 (2011)
43. 11 U.S.C. § 110 (2010)
44. 12 U.S.C. § 1784 (2006)
45. 12 U.S.C. § 1833a (2006)
46. 12 U.S.C. § 2404 (1974)
47. 12 U.S.C. § 2617 (2011)
48. 12 U.S.C. § 5562 (2010)
49. 15 U.S.C. § 49 (1975)
50. 15 U.S.C. § 57b-1 (1994)
51. 15 U.S.C. § 77v (2010)
52. 15 U.S.C. § 78dd-2 (1998)
53. 15 U.S.C. § 78dd-3 (1998)
54. 15 U.S.C. § 78jjj (2010)
55. 15 U.S.C. § 78u (2015)
56. 15 U.S.C. § 80b-9 (2010)
57. 15 U.S.C. § 155 (1970)
58. 15 U.S.C. § 330c (1971)
59. 15 U.S.C. § 634 (2018)
60. 15 U.S.C. § 687b (2000)
61. 15 U.S.C. § 717m (1970)
62. 15 U.S.C. § 771 (1974)
63. 15 U.S.C. § 772 (1976)
64. 15 U.S.C. § 796 (2004)
65. 15 U.S.C. § 1116 (2008)
66. 15 U.S.C. § 1267 (1960)
67. 15 U.S.C. § 1314 (1980)
68. 15 U.S.C. § 1714 (2011)
69. 15 U.S.C. § 2076 (2011)
70. 15 U.S.C. § 2610 (2016)
71. 15 U.S.C. § 3364 (1978)
72. 15 U.S.C. § 5408 (1999)
73. 15 U.S.C. § 6107 (1994)
74. 15 U.S.C. § 7304 (2002)
75. 16 U.S.C. § 470ff (1979)
76. 16 U.S.C. § 470ff (1979)
77. 16 U.S.C. § 1174 (1983)
78. 16 U.S.C. § 1858 (1996)
79. 16 U.S.C. § 2407 (1978)
80. 16 U.S.C. § 2437 (2015)
81. 16 U.S.C. § 3373 (2008)
82. 16 U.S.C. § 5507 (1995)
83. 17 U.S.C. § 502 (1976)
84. 18 U.S.C. § 401 (2002)
85. 18 U.S.C. § 402 (1994)
86. 18 U.S.C. § 403 (1990)
87. 18 U.S.C. § 1507 (1994)
88. 18 U.S.C. § 3148 (1986)
89. 18 U.S.C. § 3285 (1948)
90. 18 U.S.C. § 3484 (1948)

91. 18 U.S.C. § 3486 (2012)
92. 18 U.S.C. § 3498 (1948)
93. 18 U.S.C. § 3499 (1948)
94. 18 U.S.C. § 3511 (2015)
95. 18 U.S.C. § 3600 (2016)
96. 18 U.S.C. § 3613A (1996)
97. 18 U.S.C. § 3691 (1948)
98. 18 U.S.C. § 3692 (1948)
99. 18 U.S.C. § 3693 (1948)
100. 19 U.S.C. § 1333 (1990)
101. 19 U.S.C. § 1510 (1993)
102. 21 U.S.C. § 853 (2009)
103. 21 U.S.C. § 876 (1988)
104. 21 U.S.C. § 969 (1955)
105. 22 U.S.C. § 703 (1946)
106. 22 U.S.C. § 286f (1945)
107. 25 U.S.C. § 2715 (1988)
108. 26 U.S.C. § 7456 (2008)
109. 26 U.S.C. § 7604 (1990)
110. 28 U.S.C. § 332 (2002)
111. 28 U.S.C. § 1365 (1996)
112. 28 U.S.C. § 1784 (1964)
113. 28 U.S.C. § 2521 (1992)
114. 28 U.S.C. § 2405 (1948)
115. 28 U.S.C. § 3003 (1990)
116. 29 U.S.C. § 161 (1980)
117. 29 U.S.C. § 528 (1959)
118. 29 U.S.C. § 657 (1998)
119. 29 U.S.C. § 660 (1984)
120. 29 U.S.C. § 1303 (2014)
121. 30 U.S.C. § 813 (2006)
122. 30 U.S.C. § 816 (1984)
123. 30 U.S.C. § 823 (1979)
124. 30 U.S.C. § 1717 (1983)
125. 31 U.S.C. § 313 (2010)
126. 31 U.S.C. § 716 (2017)
127. 31 U.S.C. § 3733 (2009)
128. 31 U.S.C. § 3804 (1986)
129. 31 U.S.C. § 5318 (2014)
130. 33 U.S.C. § 927 (1972)
131. 33 U.S.C. § 1319 (1990)
132. 33 U.S.C. § 1321 (2017)
133. 33 U.S.C. § 1322 (2008)
134. 33 U.S.C. § 1369 (1988)
135. 34 U.S.C. § 12391 (2017)
136. 34 U.S.C. § 20142 (2017)
137. 38 U.S.C. § 4323 (2008)
138. 38 U.S.C. § 5713 (1991)
139. 38 U.S.C. § 7265 (1991)
140. 39 U.S.C. § 504 (2006)
141. 39 U.S.C. § 3008 (1970)
142. 39 U.S.C. § 3016 (1999)
143. 41 U.S.C. § 7103 (2011)
144. 41 U.S.C. § 7105 (2011)
145. 42 U.S.C. § 405 (2018)
146. 42 U.S.C. § 2000h (1964)
147. 42 U.S.C. § 2000h-1 (1964)
148. 42 U.S.C. § 2281 (1992)
149. 42 U.S.C. § 2286b (2019)
150. 42 U.S.C. § 4915 (1972)
151. 42 U.S.C. § 5411 (1980)
152. 42 U.S.C. § 5413 (2000)
153. 42 U.S.C. § 6299 (1987)
154. 42 U.S.C. § 6384 (2004)
155. 42 U.S.C. § 7607 (1990)
156. 42 U.S.C. § 7617 (1978)
157. 42 U.S.C. § 7621 (1977)
158. 42 U.S.C. § 9622 (2002)
159. 42 U.S.C. § 9609 (1986)
160. 42 U.S.C. § 11045 (1986)
161. 43 U.S.C. § 1619 (1971)
162. 46 U.S.C. § 50306 (2006)
163. 46 U.S.C. § 6304 (1983)
164. 47 U.S.C. § 409 (1990)
165. 49 U.S.C. § 502 (1994)
166. 49 U.S.C. § 1113 (2011)

167. 49 U.S.C. § 1321 (2015)
168. 49 U.S.C. § 13301 (1995)
169. 49 U.S.C. § 32505 (1994)
170. 49 U.S.C. § 32706 (1997)
171. 49 U.S.C. § 32307 (1994)
172. 49 U.S.C. § 32910 (1994)
173. 49 U.S.C. § 33115 (1994)
174. 49 U.S.C. § 46104 (2001)
175. 49 U.S.C. § 60120 (2012)
176. 50 U.S.C. § 4101 (1980)
177. 50 U.S.C. § 4555 (2003)
178. 52 U.S.C. § 20504 (1993)
179. 52 U.S.C. § 10101 (1965)
180. 52 U.S.C. § 10310 (2006)
181. 52 U.S.C. § 30107 (1986)
182. 52 U.S.C. § 30109 (2013)

XIV. APPENDIX J: REGULATIONS

1. 5 C.F.R. § 5501.106 (2005)
2. 5 C.F.R. § 8301.105 (2020)
3. 8 C.F.R. § 1003.102 (2017)
4. 10 C.F.R. § 207.8 (1997)
5. 10 C.F.R. § 429.8 (2011)
6. 10 C.F.R. § 431.406 (2011)
7. 11 C.F.R. § 111.53 (2014)
8. 12 C.F.R. § 308.146 (2015)
9. 12 C.F.R. § 1080.10 (2012)
10. 14 C.F.R. § 13.205 (1990)
11. 14 C.F.R. § 406.109 (2007)
12. 15 C.F.R. Pt. 0, App. A
13. 15 C.F.R. § 270.315 (2003)
14. 15 C.F.R. § 280.211 (2000)
15. 15 C.F.R. § 719.11 (2006)
16. 15 C.F.R. § 785.9 (2008)
17. 16 C.F.R. § 2.13 (2012)
18. 16 C.F.R. § 3.42 (2015)
19. 18 C.F.R. § 1308.55 (1979)
20. 28 C.F.R. § 163.10 (2013)
21. 20 C.F.R. § 10.617 (2011)
22. 20 C.F.R. § 725.351 (2016)
23. 20 C.F.R. § 802.103 (2006)
24. 20 C.F.R. § 1002.289 (2006)
25. 20 C.F.R. § 1002.314 (2006)
26. 22 C.F.R. § 92.87 (1995)
27. 25 C.F.R. § 11.311 (2008)
28. 25 C.F.R. § 11.315 (2008)
29. 25 C.F.R. § 11.912 (2008)
30. 25 C.F.R. § 11.1206 (2008)
31. 25 C.F.R. § 11.1212 (2008)
32. 26 C.F.R. § 301.6503(j)-1 (2009)
33. 26 C.F.R. § 301.7604-1 (1973)
34. 27 C.F.R. § 70.24 (2006)
35. 27 C.F.R. § 478.103 (2014)
36. 28 C.F.R. § 0.45 (2008)
37. 28 C.F.R. § 2.10 (1982)
38. 28 C.F.R. § 2.20 (2003)
39. 28 C.F.R. § 2.51 (1998)
40. 28 C.F.R. § 2.104 (2002)
41. 28 C.F.R. § 2.217 (2003)
42. 28 C.F.R. § 522.10 (2010)
43. 28 C.F.R. § 522.11 (2005)
44. 28 C.F.R. § 522.12 (2005)
45. 28 C.F.R. § 522.13 (2005)
46. 28 C.F.R. § 522.14 (2005)
47. 28 C.F.R. § 522.15 (2005)
48. 28 C.F.R. § 523.17 (2005)
49. 28 C.F.R. § 551.101 (2004)
50. 28 C.F.R. § 802.27 (2017)

51. 29 C.F.R. Pt. 18, Subpt. B, App.
52. 29 C.F.R. § 101.9 (1988)
53. 29 C.F.R. § 101.15 (1988)
54. 29 C.F.R. § 102.31 (2017)
55. 29 C.F.R. § 102.119 (2020)
56. 29 C.F.R. § 580.18 (2019)
57. 31 C.F.R. § 212.10 (2011)
58. 31 C.F.R. § 1010.916 (2011)
59. 32 C.F.R. § 66.7 (2016)
60. 32 C.F.R. § 93.5 (2003)
61. 32 C.F.R. § 516.8 (1994)
62. 32 C.F.R. § 589.2 (1990)
63. 32 C.F.R. § 589.4 (1991)
64. 32 C.F.R. § 719.112 (1991)
65. 32 C.F.R. § 719.142 (1985)
66. 32 C.F.R. § 720.42 (1990)
67. 32 C.F.R. § 720.45 (1990)
68. 32 C.F.R. § 725.9 (1993)
69. 32 C.F.R. § 935.53 (2002)
70. 33 C.F.R. § 210.5 (1980)
71. 36 C.F.R. § 1220.30 (2009)
72. 36 C.F.R. § 1222.24 (2009)
73. 37 C.F.R. § 2.120 (2017)
74. 37 C.F.R. § 2.127 (2017)
75. 38 C.F.R. § 2.2 (1999)
76. 38 C.F.R. § 20.709 (2019)
77. 39 C.F.R. § 273.5 (1991)
78. 39 C.F.R. § 913.3 (2000)
79. 39 C.F.R. § 952.19 (2011)
80. 39 C.F.R. § 955.35 (2009)
81. 39 C.F.R. § 962.14 (2016)
82. 40 C.F.R. § 52.1470 (2019)
83. 40 C.F.R. § 282.86 (2019)
84. 42 C.F.R. § 51.42 (1997)
85. 42 C.F.R. § 430.86 (2012)
86. 45 C.F.R. § 99.23 (1998)
87. 45 C.F.R. § 213.23a (1975)
88. 45 C.F.R. § 303.6 (2017)
89. 45 C.F.R. § 304.20 (2017)
90. 45 C.F.R. § 702.12 (2002)
91. 45 C.F.R. § 1626.4 (2014)
92. 45 C.F.R. § 1326.103 (2016)
93. 45 C.F.R. § 1326.110 (2016)
94. 48 C.F.R. Ch. 2, App. A
95. 49 C.F.R. § 1503.607 (2009)

XV. APPENDIX K: SENTENCING GUIDELINES

1. USSG § 2J1.1 (2018)