

RULE 4(K), NATIONWIDE PERSONAL
JURISDICTION, AND THE CIVIL RULES ADVISORY
COMMITTEE: LESSONS FROM ATTEMPTED
REFORM

A. Benjamin Spencer

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*A. Benjamin Spencer**

INTRODUCTION

On multiple occasions, I have advocated for a revision to Rule 4(k) of the *Federal Rules of Civil Procedure* that would disconnect personal jurisdiction in federal courts from the jurisdictional limits of their respective host states—to no avail. In this Essay, I will review—one final time—my argument for nationwide personal jurisdiction in the federal courts, recount my (failed) attempt to persuade the Advisory Committee on Civil Rules to embrace my view, and reflect on what lessons may be drawn from the experience regarding the civil rulemaking process. My aim is to prompt discussion around potential rulemaking reforms and to equip future would-be reformers with insights that might facilitate some degree of success.

I. THE PROPOSAL: NATIONWIDE PERSONAL JURISDICTION

In most cases, personal jurisdiction over defendants in federal court is limited to the jurisdictional reach enjoyed by the courts of the state in which the federal district court is located.¹ This is a consequence of Rule 4(k)(1)(A) which provides that “[s]erving a summons or filing a waiver of service establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.”² Importantly, this limitation is not a consequence of constitutional limits on the authority of federal courts; as arms of the national sovereign, they are limited by the Due Process Clause of the Fifth Amendment³—not the Fourteenth Amendment—and thus the constitutional scope of a federal court’s

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1. *Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing FED. R. CIV. P. 4(k)(1)(A)) (“Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons.”).

2. FED. R. CIV. P. 4(k)(1)(A).

3. U.S. CONST. amend. V.

territorial jurisdiction extends nationally, requiring only minimum contacts with the United States as a whole.⁴

Notwithstanding the constitutional scope of federal territorial jurisdiction, the longstanding approach has been to constrain the reach of the federal courts to a smaller territorial sphere—initially to the district inhabited or occupied by the defendant⁵ and today to the territorial reach of courts of the respective host states. This approach was sound initially, both doctrinally and from a policy perspective. Doctrinally, as an emanation from the Judiciary Act of 1789, limiting the effective reach of process was a proper exercise of Congress’s authority to create and regulate inferior federal courts.⁶ Policy wise, as a geographically dispersed nation comprised of a union of previously separate colonies, limiting the ability of federal courts to summon persons from one state to another (by horse-driven means) likely was the only approach that was tenable if the federal courts were to exist at all.

Today’s limitation, however, is of a different character in a couple of important respects. The territorial reach of the federal district courts is limited by a rule of civil procedure rather than by statute, and it is styled as a jurisdictional rule rather than a rule that constrains the reach of process.⁷ The statute under which the *Federal Rules* are promulgated—the Rules Enabling Act (REA)⁸—only authorizes the development of rules of “practice and procedure”

4. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) (“Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”); *Livnat v. Palestinian Auth.*, 851 F.3d 45, 55 (D.C. Cir. 2017) (“The only difference in the personal-jurisdiction analysis under the two Amendments is the *scope* of relevant contacts: Under the Fourteenth Amendment, which defines the reach of state courts, the relevant contacts are state-specific. Under the Fifth Amendment, which defines the reach of federal courts, contacts with the United States as a whole are relevant.”); *Republic of Pan. v. BCCI Holdings (Lux.) S.A.*, 119 F.3d 935, 946–47 (11th Cir. 1997) (“[A] defendant’s contacts with the forum state play no magical role in the Fifth Amendment analysis. . . . Thus, determining whether litigation imposes an undue burden on a litigant cannot be determined by evaluating only a defendant’s contacts with the forum state. A court must therefore examine a defendant’s aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis.” (footnote omitted)); *United States v. De Ortiz*, 910 F.2d 376, 382 (7th Cir. 1990) (indicating that Fifth Amendment due process is satisfied where the defendant has “sufficient contacts with the United States as a whole rather than any particular state or other geographic area”).

5. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79 (“[N]o civil suit shall be brought before [district or circuit] courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ”) *amended by* FED. R. CIV. P. 4(k)(1)(A).

6. *See* U.S. CONST. art. I, § 8, cl. 18; *id.* art. III, § 1.

7. As originally adopted in 1938, Rule 4(f)—the predecessor to Rule 4(k)(1)(A)—confined itself to addressing the geographical reach of effective service of process; it read:

TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 45.

FED. R. CIV. P. 4(f) (1938). This, of course, is not how Rule 4(k)(1)(A) reads today. *Id.* 4(k)(1)(A) (indicating when service of process “establishes personal jurisdiction over a defendant”).

8. 28 U.S.C. § 2072.

(or evidence), not jurisdictional rules, which are what we find in Rule 4(k)(1)(A).⁹ Additionally, the policy justification for confining the reach of federal district courts to the limits of their respective host states no longer holds. Today, federal courts are well-established forums for disputes that cross state lines or touch on topics of national concern, and they should be available to hear such cases, especially when the doors to state court would be closed.¹⁰ Further, the advent of a minimum contacts approach to personal jurisdiction that focuses on purposeful contacts rather than physical presence,¹¹ combined with the minimization of inconvenience that modern communications and transportation technology provide,¹² have made it unnecessary to view state boundaries as the relevant touchpoints for the disputes that federal courts entertain. Indeed, doing so presents dubious outcomes, as federal court litigants must frequently tarry over jurisdictional fights of no (Fifth Amendment) constitutional significance,¹³ and defendants evade the grasp of federal courts for no good reason other than that their co-located state cousins would be impotent under the same circumstances.¹⁴

In any event, these perspectives led me to develop and suggest the following proposal to amend Rule 4(k):

(k) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. ~~(1) In General.~~
Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant when exercising jurisdiction is consistent with

9. A. Benjamin Spencer, *Substance, Procedure, and the Rules Enabling Act*, 66 UCLA L. REV. 654, 711–13 (2019) (laying out argument extensively).

10. A. Benjamin Spencer, *The Territorial Reach of Federal Courts*, 71 FLA. L. REV. 979, 986 (2019) (“[S]hackling federal courts to the territorial limits of their host states deprives them of the ability to fulfill a key role as providers of an important forum for qualifying civil disputes when state courts are unavailable.” (citing *Arrowsmith v. United Press Int’l*, 320 F.2d 219, 235 (2d Cir. 1963) (Clark, J., dissenting) (“[I]ndeed to put [the question of personal jurisdiction in federal court] in the hands of the states would be to destroy all reason for having a federal tribunal (in which the litigant has more confidence) enforce a litigant’s rights accorded by state law.”))).

11. *See Int’l Shoe Co. v. Washington*, 326 U.S. 310, 321 (1945).

12. *See, e.g., Kernan v. Kurz–Hastings, Inc.*, 175 F.3d 236, 244 (2d Cir. 1999) (holding that burden on Japanese defendant was insufficient to overcome its minimum contacts, particularly because “the conveniences of modern communication and transportation ease what would have been a serious burden only a few decades ago”); *Panavision Int’l, L.P. v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998) (“[I]n this era of fax machines and discount air travel’ requiring [the defendant] to litigate in [a foreign jurisdiction] is not constitutionally unreasonable.” (quoting *Panavision Int’l, L.P. v. Toeppen*, 938 F. Supp. 616, 622 (C.D. Cal. 1996))).

13. *See Spencer, supra* note 10, at 990–91 (“[P]ersonal jurisdiction doctrine with respect to the Fourteenth Amendment ‘is notoriously confusing and imprecise’; the linkage mandated by Rule 4(k)(1)(A) needlessly hobbles federal courts and litigants—in ordinary cases as well as in consolidated multidistrict proceedings—with having to perpetuate and endure expensive, wasteful, and time-consuming satellite litigation over jurisdictional disputes that would largely be obviated under a regime governed solely (or primarily) by the Due Process Clause of the Fifth Amendment.” (footnotes omitted)).

14. *See id.* at 989–90 (discussing cases in which defendants evade the jurisdictional reach of federal courts based on state jurisdictional limitations under circumstances in which the Fifth Amendment would not have precluded jurisdiction in federal court).

the United States Constitution and laws [deleting the remainder of the present rule].¹⁵

Revising Rule 4(k) in this manner would leave the matter of personal jurisdiction in the federal district courts to be governed solely by the Fifth Amendment, subject to any laws Congress might subsequently enact. That would mean that minimum contacts with the United States would suffice for jurisdictional purposes, which all U.S.-based persons and entities would satisfy based on general jurisdiction; otherwise, defendants' nationwide contacts, rather than their contacts with the forum state, would be assessed for constitutional sufficiency. Federal venue laws¹⁶ would remain as a means of steering disputes into appropriate geographical locales.

II. RULES COMMITTEE RESPONSE: A POLITE NO THANK YOU

My proposal (along with that of Professor Patrick Borchers to expand Rule 4(k)(2)'s coverage to diversity cases)¹⁷ was placed on the agenda for the April 2018 meeting of the Rules Committee. As is customary, the Reporter to the Committee, Professor Ed Cooper, crafted a "Reporter's Memorandum" that addressed my proposal by presenting a summary and analysis of it.¹⁸ After aptly summarizing my proposal, its purported benefits, and the acknowledged implications for the jurisdictional reach of federal courts, Professor Cooper noted a hesitancy that I expressed in my letter to the Committee: the amendment I had proposed retained Rule 4(k)'s posture as a jurisdictional rule, which—as noted above—I had concluded that the REA did not permit. However, I did not believe that this view would be shared by the Rules Committee, and thus my proposed language was offered using jurisdictional language notwithstanding my REA argument pooh-pooing such an approach from a doctrinal perspective (and proving that straddling the academic and practical spheres simultaneously is tricky to pull off successfully).

Professor Cooper addressed my REA concerns by laying out a brief argument as to why Rule 4(k)(1)(A), as currently written, was consistent with the REA while leaving open to debate whether my proposal would be consistent with the REA.¹⁹ That treatment left my proposal in the worst of both

15. See ADVISORY COMM. ON CIV. RULES, AGENDA, APRIL 10, 2018, at 367 (2018) [hereinafter AGENDA], <https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2018>. This language mirrors the approach taken in Federal Rule of Bankruptcy Procedure 7004(f). See FED. R. BANKR. P. 7004(f).

16. *E.g.*, 28 U.S.C. §§ 1391, 1404, 1406.

17. AGENDA, *supra* note 15, at 347.

18. *Id.* at 335.

19. *Id.* at 339 ("Professor Spencer has moved to the view that the Enabling Act does not provide authority to push personal jurisdiction to the outer limits he proposes. In short, past Committees have concluded that the Enabling Act authorizes rules that expand personal jurisdiction by providing for service of process outside the court's district or state. The explicit 'special note' provided with the adoption of Rule 4(k)(2) lends support to the view that the Supreme Court was fully aware of these questions and agreed that

worlds: potentially hobbled by my own REA argument but not bolstered by an embrace of the REA-infirmary of the current rule that I was trying to supplant. In other words, rather than my REA argument serving as an incentive for the Rules Committee to walk away from Rule 4(k)(1)(A), it was being used against me (admittedly at my own instigation) as an obstacle to considering my proposed reform. My first error, then, was to infuse a largely academic and debatable proposition—that the Rules Enabling Act could not sustain a rule such as Rule 4(k)(1)(A)—into the discussion, for it distracted and detracted from my principal objective of achieving jurisdictional reform.²⁰

The REA authority conundrum was simply the first course served in Professor Cooper's tripartite presentation of the difficulties that would accompany any embrace of what I was suggesting. His next observation was that one would have to be attentive to how choice of law would work in a world in which federal courts could entertain disputes that their host states could not. This is because under *Klaxon*, federal courts adjudicating state law claims are bound to apply the host state's choice-of-law rules,²¹ a linkage that becomes attenuated if not entirely severed if diversity and alienage cases are litigated in states whose courts would lack jurisdiction over them. As Professor Cooper mused, federal courts potentially unbound from *Klaxon* would have to develop

these rules satisfy both requirements of § 2072: They really are rules of procedure, and they do not abridge, enlarge, or modify the underlying substantive rights.”).

20. Showing that I cannot let go of the point, for those who think that the rule is a procedural one because it purports to govern the territorial limits of effective service, I simply point out that the jurisdictional constraints imposed on federal courts by Rule 4(k)(1)(A) are regularly operative outside of the Rule 4 service of process context when amended claims adding new parties and the claims of intervenors and co-parties are lodged and served under Rule 5, not Rule 4. See A. Benjamin Spencer, *Out of the Quandary: Personal Jurisdiction over Absent Class Member Claims Explained*, 39 REV. LITIG. 31, 43 (2019) (“Once a defendant has appeared in a case in response to the original service of the complaint, all subsequent pleadings are served on the defendant under Rule 5(a)(1). This means, for example, that an amended pleading asserting new claims need not be re-served under Rule 4. There is no question that—notwithstanding that such amended complaints are not served with a summons under Rule 4—new claims appearing in amended complaints must satisfy the jurisdictional constraints imposed by Rule 4(k); courts regularly apply Rule 4(k)(1)(A) limitations to the claims appearing in amended complaints.” (footnotes omitted)); *id.* at 43–44 (“[W]hen a plaintiff amends its complaint to add new plaintiffs under Rule 20, or when new plaintiffs intervene in an action under Rule 24, neither of these parties is required to serve process on the defendant under Rule 4. Instead, their claims are introduced in the action either through an amendment under Rule 15 (adding a plaintiff under Rule 20) or a motion to intervene under Rule 24, both of which are communicated to the defendant under the auspices of Rule 5, not Rule 4. Notwithstanding that, the personal jurisdiction limitations of the district court that are imposed by Rule 4(k) remain the operative constraints that district courts apply to these new claims by *newly joined* parties. It thus cannot be gainsaid that the territorial reach of federal courts over claims added to the action after the initial service of the summons is defined by Rule 4(k), even though none of those claims are served on defendants under Rule 4.” (footnotes omitted)).

21. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (“We are of opinion that the prohibition declared in Erie . . . against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts.”).

an alternate means of selecting an appropriate choice-of-law rule, a matter the *Federal Rules* might not be able to address consistent with the REA.²²

Professor Cooper's final and most effective parray was to articulate the potential complexities of a regime wholly dependent on the venue statutes to shoulder the task of infusing locational rationality in federal courts if possessed of the national reach that my proposal would give them. He wondered, "If § 1391 was not drafted, and has not yet been interpreted, to do duty in a context of nationwide minimum contacts jurisdiction, is it fair to rely on it to supply appropriate locating factors?"²³ He also rightly pointed out that because foreign defendants receive little to no protection under the general venue statute,²⁴ a nationwide jurisdiction regime would leave them vulnerable to being dragged into any federal district court in the country, no matter how unconnected its locale might be from the dispute. Perhaps most damningly, Professor Cooper explained that because the identification of an appropriate venue under 28 U.S.C. § 1391(b)(1) is closely intertwined with where entity defendants could be subjected to personal jurisdiction,²⁵ revising Rule 4(k) to make jurisdiction potentially available in every federal court could theoretically eviscerate any limitation on where venue would be proper under (b)(1) as well.²⁶ Ameliorating this problem would be tremendously difficult, wrote Professor Cooper, because it would require a congressional assist.²⁷

At the April 2018 meeting of the Rules Committee, Professor Cooper gave an oral recitation of the observations previewed in his Reporter's Memorandum,²⁸ which I was then charged with following with remarks in defense of my proposal. I laid out arguments that I later detailed in a 2019 article that I prepared specifically to address Professor Cooper's concerns,²⁹ so I won't rehearse them here. In short, I waved off the choice-of-law concern as cabined by due process constraints on applicable law but acknowledged that REA authority issues and the need for "some tweaking" of the federal venue statutes in tandem with any broadening of jurisdiction meant that the wisest course for the Committee to pursue would be to take on the issue with the goal of

22. AGENDA, *supra* note 15, at 340 ("Whether *Klaxon* is viewed with satisfaction or despair, expanding a federal court's personal jurisdiction beyond the reach of local state courts raises troubling questions about forcing adoption of local choice-of-law rules.").

23. *Id.* at 342.

24. See 28 U.S.C. § 1391(c)(3) ("[A] defendant not resident in the United States may be sued in any judicial district . . .").

25. See *id.* § 1391(b)(1), (c)(2) (providing that venue is proper where any defendant resides and defining residency for entities as "any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question").

26. AGENDA, *supra* note 15, at 341 ("On the face of it, expanding Rule 4(k) to Fifth Amendment due process limits seems to obliterate any independent venue provision for entity defendants.").

27. *Id.* ("Attempting to adjust this question through a more complicated Rule 4(k) may prove difficult. Adjusting it by amending § 1391 would require careful collaboration with Congress.").

28. CIV. RULES ADVISORY COMM., MINUTES, APRIL 10, 2018, at 26–30 (2018) [hereinafter MINUTES], https://www.uscourts.gov/sites/default/files/2018-04-10-cv_minutes_final_0.pdf.

29. Spencer, *supra* note 10, at 1005–13.

developing proposals for action by Congress.³⁰ After further discussion—which centered around the broad implications of expansion, whether it was proper for the Committee to make suggestions to Congress, and lingering concerns regarding authority under the REA—the Committee voted to carry forward the topic on the agenda without closing it out.³¹ The matter has since not reappeared on the Committee’s agenda and is unlikely to do so.

III. LESSONS

It is likely perilous to attempt generalizations regarding the rulemaking process from this single experience. Thus, I will simply offer the lessons that I am taking away from the occasion—informed by my overall experience as a member of the Committee—with the hope that others with ideas for rule reform can gain some insights that will increase their chance of success.

The power of the Reporter. First, the Reporters have a sizable influence on the will of the Committee, particularly with respect to proposals that touch upon matters with which members have had less experience. As most people are aware, the Reporter to the Committee is no mere scrivener; rather, the Reporter must be understood to be both the principal draftsman (yes, thus far the Civil Rules Advisory Committee’s Reporters have all been men) for the Committee and an advisor who provides trusted guidance to its members as they consider what is brought before them. The Reporters are not voting members of the Committee,³² and the Reporters whom I have known have honored that limitation, declining to offer opinions for or against a particular proposal under discussion. However, they do provide an analysis of every proposal, which affords them the opportunity to comment on the degree to which the problem addressed by the proposal is real or imagined, whether the proposal would be effective at addressing the perceived problem, and what disruptive effect—if any—the proposal would have on other aspects of the system were it to be adopted. To the extent the Reporter indicates less confidence in the existence or significance of a perceived problem, that view is likely to lead the Committee toward a sense that there is no need to act. If the Reporter raises the prospect of significant disruption and uncertainty that would result from adopting a proposal—as was done with respect to my Rule 4(k) proposal—the Committee is likely to be less inclined to move in that direction. This is not offered as a criticism; it is merely an observation that warrants emphasis for those who would seek to move a proposal through the Committee. My takeaway from this insight has been to vet my ideas thoroughly with the Reporter well in advance so that I can hear his reactions privately, respond to them, and adjust my

30. MINUTES, *supra* note 28, at 30–31.

31. *Id.* at 32.

32. See *Committee Membership Selection*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> (last visited Jan. 14, 2022).

proposal accordingly. In this way, the proposal is strengthened, and it is spared having the Committee members being exposed to the full range of commentary that the Reporter would have shared had I not consulted him. I failed to take this step with my Rule 4(k) proposal, and we saw where that led me.

The judicial perspective. A feature of the Committee that enhances the influence of the Reporter is its membership that is derived mostly from the judiciary. Rather than a committee of politicians, practicing lawyers, or academics, the majority of the Committee's members—including its chair—are currently drawn from the federal bench (plus one jurist from a state court).³³ Whereas academics, political appointees, or advocates might be slightly less inclined to defer to the Reporter's perspective, the jurists seem to have intense regard for the word of the Reporter. That is a good thing, because the Reporter is typically an unbiased and highly respected expert whose words should carry weight. Although law professors, Justice Department officials, and attorneys are capable of setting aside their own policy preferences when serving as members of the committee, they inevitably are susceptible to being more (small "p") partisan and thus more willing to press forward notwithstanding objections the Reporter might raise; jurists (at least those I've served with on the Committee) tend to be more or less non-ideological in their orientation towards matters that come before the Committee, with their greater degree of neutrality providing more fertile ground for the Reporter's detached perspective.

Problem-solving, not policymaking orientation. In my estimation, the Committee as currently constituted³⁴ is a practically-oriented body focused on superintending the civil rules system, making sure that the system is functioning properly, and making adjustments when defects or inefficiencies are detected or external forces necessitate reform. During my time on the Committee, its

33. This profile of the Committee dates from the 1970s, prior to which practitioners and academics enjoyed the most representation on the committee. See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1567–68 (2015) ("The data reflect that in the early 1960s, practitioners enjoyed the highest level of representation, followed by academics, with judges the least represented. A transformation followed in which, by the 1970s, judges moved from a relatively small minority to a consistent majority on the Committee. Just as precipitous as judges' ascent to majority status was the corresponding decline in the share of Committee representation garnered by practitioners and academics.")

34. I recognize this description may not accurately characterize the Committee as previously constituted, as many might critique the Committee for having endorsed value-laden reforms that arguably preferred certain interests in civil litigation. *E.g.*, Brooke D. Coleman, #*Sowbitemale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 52, 70–71 (2015) ("Almost every rule amendment reflects the Committee members' normative judgment about what litigation values should be elevated. For example, the 1983 amendment to Rule 11 provided for mandatory sanctions. That choice—to harden the sanction rule—was not simply a technical tweak. It was a choice reflecting the Committee members' normative judgment that the civil justice system would be better served if more frivolous claims were filtered out earlier. . . . The recent proportionality amendments are similarly value-laden. Rule 26(b)(1) was amended in 2015 to further restrict the scope of discovery. . . . Again, the amendment was not the mere fine-tuning of a rule. . . . Committee members decided to give primacy to their judgment that restrictive discovery is better for the civil justice system—even if that means that some plaintiffs with valid claims will be unable to get the information they need to win their cases." (footnote omitted)).

focus has been on making tweaks that address identifiable problems. At my first meeting in the fall of 2017, the Committee was considering revising Rule 30(b)(6) to address perceived difficulties that both those who represent plaintiffs and those who represent defendants were reporting experiencing.³⁵ With an acknowledgment that problems existed surrounding Rule 30(b)(6) depositions, the Committee felt that it could do no more than revise the rule to require that the parties “confer in good faith about the matters for examination” in advance.³⁶ Another topic on the Committee’s plate when I joined it in 2017 was the process for handling the review of denials of Social Security disability claims under 42 U.S.C. § 405(g). Because the Social Security Administration (SSA) indicated that the lack of uniform procedures for such cases across the federal districts presented it with significant inefficiencies, the Committee ultimately accommodated the SSA’s request for a separate set of uniform national procedural rules for such cases that acknowledged their summary judgment or appellate-like nature.³⁷ A final example of a context in which the Committee has been willing to act is in response to the challenges posed by the COVID-19 global pandemic, proposing a new Rule 87 that provides for alterations to rules concerning service of process and certain time limits during a declared “Civil Rules Emergency.”³⁸

Each of the above represent adjustments or accommodations that attempt to address an identifiable concern raised by practitioners and members of the judiciary rather than reforms designed to alleviate policy-oriented perceived ills or injustices. None of these changes threaten to be too disruptive in most cases or to the system as a whole. Contrast these changes to the rules with what my Rule 4 proposal portended: while the reforms noted above do not involve fundamental change and will likely only have an impact—if any—on the margins, adoption of my Rule 4(k) proposal would result in a sea-change in how territorial jurisdiction in the federal courts would be handled, significantly impacting the range of locales to which defendants could be called to litigate claims against them. Further, although my proposal was motivated by what I identified as a problem—that defendants could evade personal jurisdiction in

35. CIV. RULES ADVISORY COMM., MINUTES, NOVEMBER 7, 2017, at 2 (2017), https://www.uscourts.gov/sites/default/files/2017-11-7-_civil_rules_meeting_minutes_final_0.pdf (“Examples of bad practice are presented by both sides. Plaintiffs encounter poorly prepared witnesses. Defendants encounter uncertainty, vague requests, and overly broad and burdensome requests. All agree that courts do not want to become involved with these problems.”).

36. FED. R. CIV. P. 30(b)(6) (amended Dec. 1, 2020).

37. COMM. ON RULES OF PRAC. & PROC., REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES 3 (2021), https://www.uscourts.gov/sites/default/files/civil_rules_report_-_may_2021_0.pdf. The Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) take effect on December 1, 2022. *Pending Rules and Forms Amendments*, U.S. CTS., <https://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments> (last visited Feb. 11, 2022).

38. COMM. ON RULES OF PRAC. & PROC., PRELIMINARY DRAFT: PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 44–48 (2021), https://www.uscourts.gov/sites/default/files/preliminary_draft_of_proposed_amendments_2021_0.pdf.

federal court not based on any real constitutional concern or actual inconvenience but merely because the co-located state courts could not exercise jurisdiction over them—that is not the kind of problem the Committee is truly designed to perceive and address.

This orientation may arise from the dominant judicial perspective on the committee alluded to above, which tends to yield a seeming bias towards institutional conservatism. The jurists on the committee are frequent, repeat players in the civil justice drama, which gives them a useful perspective to perceive instances where the system breaks down. But their perspective is limited and tends to be oriented towards the types of snags that undermine the efficient processing of matters to some sort of resolution, as opposed to concerning themselves with the more fundamental and global implications of the rules on the regulatory and remedial goals of the civil justice system.

CONCLUSION

I confess that it is unlikely that this simple case study on the fate of a single proposal can yield meaningful generalizations about the current civil rulemaking process. Although I have identified a few lessons that I have drawn from the experience, I am happy to hear from others involved regarding what their takeaways might have been. I, for one, have taken these lessons to heart, crafting a follow-on proposal (on another topic) and accompanying Committee strategy accordingly. I have developed a proposal to amend Rule 9(b) to overcome the unfortunate misreading of that provision by the Supreme Court in *Asbcroft v. Iqbal*.³⁹ This time around, I shared the proposal with the Committee Reporter, Professor Cooper, when it was under development and adjusted my arguments accordingly. Then, I thoroughly explained my proposal in an article that I published⁴⁰ and then circulated to the Committee, whereas previously I led with my Rule 4(k) proposal and followed up with a detailed defense of it in an article⁴¹ only after it had already been tabled by the Committee. Importantly, in my piece articulating the rationale for amending Rule 9(b) as I have proposed, I focused a great deal of attention on the problem that the *Iqbal* interpretation of Rule 9(b) was causing in the lower courts, creating meaningful dissensus on the proper pleading obligations under the rule and imposing inordinate and inappropriate burdens on litigants that were never intended by the rule. In the piece, I offered textualist, originalist, and policy-based arguments as well, although it is unclear whether any of these will have any sway. After previewing the proposal with another member of the Committee, who encouraged me to

39. See 556 U.S. 662, 686–87 (2009).

40. A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 CARDOZO L. REV. 1015 (2020).

41. Spencer, *supra* note 10.

submit it, I formally submitted the Rule 9(b) proposal for consideration in August of 2020.⁴²

This time, my proposal received a much more hospitable reception by Reporter Ed Cooper. Because I had led with the article articulating the rationale for the proposal and submitted it with the proposal, Professor Cooper's memo to the Committee was able to—and did—draw heavily from the arguments that I had laid out.⁴³ This is not to say that Professor Cooper embraced the proposal; as mentioned above, that is not the Reporter's role. Rather, he outlined many fewer challenges and complexities that arose from my Rule 9(b) proposal than he had with my Rule 4(k) proposal; I'd like to think that was achieved by my benefiting from hearing his perspective privately during the proposal-formulation process (but that could be wishful thinking, revisionist history, or both). In any event, rather than tabling the Rule 9(b) proposal indefinitely, the Committee agreed to carry the proposal forward to the April 2021 meeting. The proposal was discussed further at that meeting, with a sense reached that “the proposal is worthy of serious study” and that “[t]here are concerns that need to be addressed.”⁴⁴ The discussion ended with an agreement that “[i]t may prove desirable to appoint a subcommittee to study Rule 9(b).”⁴⁵ At the October 2021 meeting of the Committee, the Chair announced that a Rule 9(b) subcommittee would indeed be appointed.⁴⁶

I offer all of this to say that I made an effort to learn from the unsuccessful experience with my Rule 4(k) proposal to develop a more successful strategy for my Rule 9(b) proposal. Consulting with the Reporter in advance and focusing largely on tangible problems with the status quo that a proposal will ameliorate seem to be two important keys to getting some consideration. I hesitate to add, however, that proposals that promise smaller, less disruptive changes might have more legs, and my Rule 9(b) proposal does not purport to be nondisruptive. That ultimately could prove to be a real obstacle to its adoption, particularly as it pushes against the Supreme Court's interpretation of a rule, something the Committee has shown that it is loath to do (see its dead-end discussion of whether to amend Rule 8 to overturn *Twombly*).

42. See ADVISORY COMM. ON CIV. RULES, AGENDA, OCTOBER 16, 2020, at 265 (2020), https://www.uscourts.gov/sites/default/files/2020-10_civil_rules_agenda_book_final.pdf.

43. See *id.* at 260–61.

44. CIV. RULES ADVISORY COMM., MINUTES, APRIL 23, 2021, at 30 (2021), https://www.uscourts.gov/sites/default/files/minutes_from_advisory_committee_on_civil_rules_meeting_april_23_2021_0.pdf; see also *id.* (observing that “this topic is “incredibly important, and deserves close attention”).

45. *Id.*

46. ADVISORY COMM. ON CIV. RULES, AGENDA, OCTOBER 5, 2021, at 259 (2021), https://www.uscourts.gov/sites/default/files/2021-10-05_civil_rules_agenda_book_final_1.pdf. At the time of publication, it was uncertain whether the Committee would proceed with undertaking any Rule 9(b) reform, although preliminary indications are that a majority of the subcommittee is not inclined to move forward after having considered the proposal.

I will hazard to offer a couple of suggestions for reform that might help the Committee become more amenable to policy-oriented changes to the rules (on the dubious assumption that moving in that direction would be a good thing).

First, the Committee might benefit from having fewer judges as members. I do not have great suggestions for how that goal could be achieved, particularly if we cannot have confidence that a committee with a larger proportion of lawyers, academics, or both, would be an improvement. But perhaps just some minor tweaking to the Committee composition, dropping a couple of jurists and bringing in a couple of additional lawyers and perhaps another academic, could leaven some of the judicial bias that currently holds sway.

Second, it might be helpful if the Chief Justice provided more guidance regarding his vision for the Committee, perhaps even going so far as to provide it with a charge to consider and address more policy-oriented, systemic concerns. That is certain not to happen with the incumbent Chief and is unlikely to be welcomed from any future Chiefs. And I can easily imagine that this suggestion could fall into the be-careful-what-you-wish-for category. My point here, however, is simply to suggest that some type of nod or indication from the Chief to the Committee that its mandate was greater than tinkering and repair but a more comprehensive consideration of the impact of the rules on yielding just outcomes could give Committee members a sense that they were more empowered to do bigger things in their role.

Finally, it would not hurt to make the Committee more inclusive in the perspectives and backgrounds that it represents. Studies have shown that white, Republican-appointed judges have been overrepresented and have a much higher likelihood of being appointed to the Committee.⁴⁷ Certainly, meritorious Committee service could be had from other sectors of the population, who might incidentally carry with them greater amenability to systemic, policy-oriented reform.

My time on the Committee is coming to a close soon. But before I leave and after, I hope to put forward one or two additional proposals for rule reform. As for my hopes of seeing Rule 4(k) revised, I've let those go, but I am

47. Professor Brooke Coleman explores the lack of diversity among Committee membership. Coleman, *supra* note 34, at 53 (“Of the 136 individuals who have served on the Civil Rules Advisory Committee since its inception, 116 are white men, fifteen are white women, and five are men of color. . . . [I]n the roughly eighty years of the Civil Rules Committee’s existence, the gender and racial identity of Committee members has remained static.”); *see also* Burbank & Farhang, *supra* note 33, at 1574 (“The race variable is significant and negative, indicating that non-white judges are less likely to serve on the Advisory Committee. By comparison, white judges’ probability of serving on the committee is about 5.1 times larger. Examining the raw data to assess the plausibility of this very large effect, we observe that although non-white judges account for 11 percent of the judge-years in the data, they account for only 2 percent of committee service-years (6 of 277), and 2 percent of appointments or reappointments (2 of 103).”); *id.* (“[C]ontrolling for the composition of the federal bench, Republican-appointed judges had more than double the estimated probability of serving on the Committee during the period of interest. . . . The probability of service for judges appointed by Republican presidents is 2.3 times larger, or 130 percent higher, than for Democratic appointees.”).

appreciative of what the experience of trying to get that rule changed has taught me about how to pursue effective reform going forward.