Federal Bar Association
Northern District of Ohio Chapter

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Winter 2024
Inside This Issue:

President's Podium—Brian Ramm

Hello again, and welcome to the Winter Issue of the FBA Northern District of Ohio Chapter Newsletter! It seems as though it was only yesterday we published the Fall Newsletter, yet since that time we have enjoyed the holidays, a college football champion was crowned and we have a new (albeit a repeat) Super Bowl winner.

Looking back on some of our significant events we shared together since our last publication:

- Our final CLE for last year was held on December 15, 2023 at the Stokes Federal Courthouse. Professor Jonathan Entin presented on Reforms and Recent Developments in Judicial Ethics, discussing his forthcoming article "Judicial Ethics and Judicial Competence," which focuses on the use of ethics complaints against judges based on their rulings. The 2.5 hour professional conduct CLE satisfied all the mandatory professional conduct CLEs attorneys must complete in their biennium reporting period and was a rousing success (please see the article below).

- Another success was the Celebration of the Bill of Rights' birthday at Campus International School on December 15, 2023. What a wonderful opportunity to engage with the younger generation (please see article below).

- The first Mentoring Happy Hour was held on February 13, 2024 at the Forest City Shuffleboard Arena and Bar (please see article below). A great level of interaction was easily noted between the more experienced members of the bar and those looking to gain valuable insight. This will only grow throughout the year and we will share more success stories in coming editions and on our social media platforms.

And of course, we are looking forward to a number of fun and informative events this winter, in particular the NEW FBA Developing Connections Committee Inaugural Happy Hour! This is an example of our continued efforts to form bonds and business relationships between our members both in our own chapter and nationally. The event kicks off from 4:30-7:00 pm, Thursday, March 28, 2024 at re:Bar 2130 E. 9th Street, Cleveland, Ohio. Hope to see you there!

As always, our editors are looking for content for upcoming issues, and this forum is a wonderful publishing opportunity, thereby enhancing your professional resume. I can't wait to see more of you in person at our various events. Please continue to monitor our social media sites such as LinkedIn, Facebook, Instagram and our website for upcoming events.

Thanks,

Brian

FBA News

Introduction to Federal Practice Seminar & New Lawyer Training

Talia S. Karas, Porter Wright

The FBA Northern District of Ohio held the Introduction to Federal Practice Seminar and New Lawyer Training CLE on November 30, 2023, and it was a great success. Judge Solomon Oliver welcomed the Northern District's newest attorneys to the Stokes Federal Courthouse and to the federal bar, and Magistrate Judge Jennifer Armstrong presented on the role of the magistrate in the federal court system. Career judicial law clerks in the Northern District provided advice for practicing successfully in our District, and attendees were also briefed on the technology in our courtrooms. At the conclusion of the morning's program, Clerk of Courts Sandy Opacich swore in attendees to federal practice in the Northern District of Ohio.

In the afternoon, attorney Chris Georgalis of Flannery | Georgalis presented on fiscal responsibilities of an attorney and the model rules of professional conduct as they relate to the attorney-client financial relationship. Dawn McFadden and Christina Bushnell spoke about their experience starting, and succeeding at, running their own law firm, McFadden Bushnell, LLC. Lastly, attorneys Michael Borden and Avery Friedman, and Judge Dan Polster brought the day to a close with an engaging presentation on professionalism and collegiality within the profession.

It would not be possible to put on these programs without the support and engagement of many individuals, especially our Clerk of Courts Sandy Opacich and all of our speakers. Thank you to everyone who worked on the CLE's and congratulations to all of our attendees.

FBA News

Bill of Rights Birthday

Warren T. McClurg, Benesch

In continuing what has become an annual tradition for the FBA Northern District of Ohio Chapter, the Civics Committee of the FBA-NDOH visited the fourth-grade class at Campus International School on December 15th to celebrate the 232nd Birthday of the Bill of Rights. The organizers of the event were Matthew Gurbach and Warren McClurg, the Chapter's Civics Committee co-chairs, and the presenters were Magistrate Judge James E. Grimes, Jr. of the U.S. District Court for the Northern District of Ohio, Judge Emily Hagan of the Cuyahoga County Court of Common Pleas, and Jim Satola, a Law Clerk to Senior Judge Donald Nugent of the U.S. District Court for the Northern District of Ohio.

The presenters gave a broad overview of the ten amendments that make up the Bill of Rights, including examples of how the amendments play a role in everyday life, and answered lots of questions from a very active and engaged fourth-grade class … ending, as always, with birthday cookies.

Shaker Heights Elementary Students Have Their Day In Court

Matthew Gurbach, Bricker Graydon

On February 1, 2024, United States District Court Judge J. Philip Calabrese presided over a "mock trial" in Larissa Martin's fourth-grade classroom at Mercer Elementary School in Shaker Heights, Ohio. Board Member and Co-Chair of the Civics Committee, Matthew Gurbach, organized the event.

The exercise focused on a hypothetical rule enacted by the school that half of the class was challenging and the other half defending. Each of the students suppressed their stage fright and nervousness to stand before the class and Judge Calabrese to deliver an argument. This unique experience provided the students with a unique opportunity to craft and present arguments at an early age. It was truly a delight to hear a classroom of young students rely on the Constitution and the Bill of Rights to support their positions.

Following the trial, Judge Calabrese entertained questions from the students about the Constitution, his path to the bench, the criminal justice system, and his daily duties as a member of the bench. David Glassner, Ph.D., the Superintendent of the Shaker Heights City School District, also attended the event.

Law School and Mentoring Committee

Eleanor Hagan, Squire Patton Boggs

The Law School and Mentoring Committee hosted a winter social at Forest City Shuffle Board on February 13, 2024. Attendees enjoyed learning (or relearning) shuffleboard while meeting new members in the legal community. The event kicks off the Northern District of Ohio's mentoring program, which pairs younger lawyers and law students with experienced practitioners to share practical advice and grow the network within the fed-eral bar. Strengthening the bonds within the legal community has become especially important in the wake of the pandemic. Stay at home orders and social distancing hindered many young lawyers and law students from building connections and soft legal skills, which the mentoring program works to address. The next structured event in the mentoring program will take place on March 9, 2024 when FBA members are invited to volunteer together for a brief advice clinic with Legal Aid.

Craig Marvinney and Liz Safier go head to head in a fierce shuffle board contest.

Luke Davis (Cleveland State) and Gilbert Jones (Cleveland State) catch up, while Brenna Fasko (US Attorney's Office) and Jacqui Meese-Martinez (Hahn Loeser) chat with Akron law students Sai Pandrangi, Sera Martin, and Devin Owens.

Articles

Thinking About Ethics Rules For Supreme Court Justices

Jonathan L. Entin*

Supreme Court justices traditionally were not subject to the sort of ethics code that binds lower-court judges. Critics raised questions about several justices' activities: Justice Alito's acceptance of private transportation to and lodging at a luxury fishing resort in Alaska that was arranged by a prominent hedge fund manager and facilitated by a leading figure in the Federalist Society; Justice Gorsuch's sale of property that he co-owned to a prominent lawyer; Justice Sotomayor's using her chambers staff to promote book sales and sitting in a case involving her publisher; and Justice Thomas's benefitting from the frequent generosity of a prominent real estate developer among other arrangements. This led to threats that Congress would impose ethics rules if the Court failed to act and claims that congressional action would violate the separation-of-powers doctrine.

Last November, the Court released a Code of Conduct to which all of the justices subscribed. Whatever prompted that development, Congress was not going to enact ethics legislation.[1] Nevertheless, we should think about what might have happened if the justices had not acted and Congress adopted ethics legislation. Would such legislation pass constitutional muster? And how would that question get litigated? Of course, the Court did act, so we should also ponder the new ethics rules. Part I explains why the blanket separation-of-powers objection to congressional adoption of Supreme Court ethics rules is unpersuasive. Part II bolsters this position by discussing disqualification and disclosure rules that Congress has already applied to Supreme Court justices. Part III considers how a legal challenge to any congressional action might unfold. Finally, Part IV explores the highlights of the Court's new ethics rules and considers the functions such rules might serve regardless of their impact.

I. The Supreme Court in the Constitution

Justice Alito provided a succinct statement of the constitutional objections to a congressionally imposed ethics code in an interview with the *Wall Street Journal*. One of the interviewers was a lawyer for the taxpayers challenging a provision of the 2017 tax law that is before the Court this term. That fact prompted calls for Alito to recuse, which he declined to do (and announced his position in a statement that never mentioned the judicial-disqualification statute that explicitly applies to Supreme Court justices).[2] Alito told the *Journal*: "Congress did not create the Supreme Court." Therefore, he said, "No provision in the Constitution gives them the authority to regulate the Supreme Court—period."[3]

This cannot be correct. Article III, which contains most of the relevant language about the courts, begins: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[4] The Vesting Clause might suggest that Alito is right. But he is right only that the Constitution, rather than Congress, created the Supreme Court. When he goes on to say that Congress has no authority to regulate the Supreme Court, he ignores the explicit terms of Article III.[5] So let's look further at Article III.

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* David L. Brennan Professor Emeritus of Law, Case Western Reserve University.

[1] Code of Conduct for Justices of the Supreme Court of the United States (Nov. 13, 2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [hereinafter Supreme Court Code].

[2] Moore v. United States, 144 S. Ct. 2 (2023) (statement of Alito, J.). On the disqualification statute, see *infra* Part II.A.

[3] David B. Rivkin, Jr.. & James Taranto, *Samuel Alito, the Supreme Court's Plain-Spoken Defender*, Wall St. J., July 28, 2023, https://www.wsj.com/articles/samuel-alito-the-supreme-courts-plain-spoken-defender-precedent-ethics-originalism-5e3e9a7. This article is behind a pay wall, but it is also available in Lexis/Nexis.

[4] U.S. Const. art. III, § 1.

[5] Alito also overlooks the role of the Senate in confirming justices. U.S. Const. art. II, § 2, cl. 2.

The text does limit what Congress can do to the Court, up to a point. Justices "shall hold their Offices during good Behavior,"[6] which allows their removal only through impeachment. Further, the justices "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office," [7]which means that Congress can't cut the justices' salaries in retaliation for controversial rulings.

But let's focus on what the Constitution allows Congress to do in connection with the Supreme Court. Article III defines the Court's jurisdiction in terms of original and appellate. The Court's appellate jurisdiction extends to both "Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[8] We don't have to resolve exactly what it means to say that Congress may create exceptions to and regulations of the Court's appellate jurisdiction to see that Alito has exaggerated his point. If Congress can regulate the Court's appellate jurisdiction, it can't be correct to say that "[n]o provision in the Constitution gives them the authority to regulate the Supreme Court—period."

That's not all. Congress can't reduce the justices' pay, but the Constitution doesn't say how much that pay should be. Nor does the Constitution tell us how many justices there will be. In fact, the size of the Court has fluctuated. Originally, Congress fixed the Court at six and briefly flirted with reducing it to five after the contentious 1800 election. Congress expanded the Court to seven justices in 1807 and nine in 1837. There was a brief period during the Civil War when Congress authorized ten justices, but by 1869 the size was set again at nine and has remained there ever since.[9]

So Congress clearly can legislate about the Court. Congress can determine the number of justices and, within limits, the amount of their compensation and the extent of their jurisdiction. There might be constraints on congressional authority, but Justice Alito plainly has overstated his position.

II. Existing Legislation About Supreme Court Ethics

Congress has passed multiple laws relating to Supreme Court ethics. Those measures regulate both disqualification and disclosure. Let's take them in turn.

A. Disqualification

The judicial-disqualification statute specifically applies to Supreme Court justices as well as to judges of the lower federal courts.[10] It contains two main provisions that specify when a justice should recuse.

The first provision requires a justice to recuse "in any proceeding in which his impartiality might reasonably be questioned."[11] A notable example involves Justice Scalia, who in 2003 disqualified himself from a case challenging the words "under God" in the Pledge of Allegiance.[12] He did so because, long before the case reached the Supreme Court, he made a speech citing the lower court's ruling against the Pledge as evidence of an effort to "exclude God from public forums and from political life."[13] His comments, he recognized, gave credence to the suspicion that he would not approach the case in an impartial way.

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[6] U.S. Const. art. III, § 1.Id.
[7] *Id.*
[8] U.S. Const. art. III, § 2, cl. 2.
[9] See Jonathan L. Entin, Court Packing and Judicial Independence: An American Perspective, in Judicial Independence: Cornerstone of Democracy (Shimon Shetreet & Hiram Chodosh eds., in press).
[10] 28 U.S.C. § 455(a).
[11] *Id.*
[12] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).
[13] Charles Lane, High Court to Consider Pledge in Schools, Wash. Post, Oct. 15, 2003, https://www.washingtonpost.com/archive/politics/2003/10/15/high-court-to-consider-pledge-in-schools/88da8d5a-310c-49a9-a08d-460bc04c845d/.

The disqualification statute also defines specific situations in which a justice *must* recuse.[14] The principal illustrations are cases in which the justice or a close family member is a party; the justice has participated in the case as a lawyer or worked with a lawyer who was involved in the case (even if the justice had no involvement in the matter); the justice or an immediate family member has a financial interest, "however small,"[15] in a party; or a close relative is a lawyer, officer of a party, or a material witness. Again, the point is that Congress has explicitly imposed these rules on Supreme Court justices.

B. Disclosure

In addition to the disqualification statute, Congress imposed disclosure requirements on Supreme Court justices in the Ethics in Government Act.[16] The Ethics Act requires that justices disclose the sources, type, and (within broad ranges) the amount of their outside income.[17] The requirement exempts "food, lodging, or entertainment received as personal hospitality of an individual."[18] The statute also requires disclosure of liabilities exceeding $10,000 (other than residential mortgages).[19] And the law further requires disclosure of outside positions such as corporate directorships, positions with nonprofit organizations, and interests in blind trusts.[20]

Some of the required disclosures might trigger disqualification, depending on whether they involve financial interests in parties. But the idea is that this information promotes public confidence in the Supreme Court. And violations of these provisions can lead to civil sanctions of up to $50,000 or criminal penalties of fines, imprisonment for up to one year, or both.[21]

Although there was highly publicized litigation about other parts of the Ethics Act,[22] the Supreme Court has never considered the constitutionality of the law's disclosure requirements.

But not long after the statute was adopted, the U.S. Court of Appeals for the Fifth Circuit upheld the disclosure requirements for lower-court judges in *Duplantier v. United States*.[23] To my knowledge, nobody has challenged the validity of the disclosure requirements for Supreme Court justices.

In *Duplantier*, the Fifth Circuit said that the plaintiff judges' objections to the reporting requirements had to be taken seriously, but it nevertheless rejected the constitutional challenge. The reporting requirements increased risk to judges and their families, but the intrusion on the judicial branch was necessary to promote countervailing interests, such as deterring conflicts of interest. Mandatory disclosure also did not violate judges' privacy rights, as financial privacy is not part of the right to privacy and disclosure can serve as a check on financial abuse by judges. Nor did the disclosure provisions violate equal protection because, although the law treated judges differently than ordinary people, Congress had a rational basis for the differential treatment of these important officials. Finally, although mandatory financial disclosure was "strong medicine,"[24] those provisions serve to maintain public confidence in the judiciary in a way that outweighs the intrusion on judicial independence.

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[14] 28 U.S.C. § 455(b).
[15] 28 U.S.C. § 455(d)(4).
[16] *See* 5 U.S.C. §§ 13101(10), 13103(f)(11).
[17] 5 U.S.C. § 13104(a), (d).
[18] 5 U.S.C. § 13104(a)(2)(A).
[19] 5 U.S.C. § 13104(a)(4)(A).
[20] 5 U.S.C. § 13104(a)(6)(A).
[21] 5 U.S.C. § 13106(a).
[22] *See* Morrison v. Olson, 487 U.S. 654 (1988) (upholding independent-counsel provisions).
[23] 606 F.2d 654 (5th Cir. 1979).
[24] *Id.* at 672.

Of course, *Duplantier* applied to federal district judges—it was a class action filed by six district judges on behalf of all of their district-court colleagues—so that ruling does not cover members of the Supreme Court. But it is noteworthy that, in the nearly half-century since *Duplantier*, no Supreme Court justice has challenged the disclosure requirements.

III. Adjudicating Congressional Imposition of an Ethics Code on the Supreme Court

As the previous discussion indicates, I am skeptical about the separation-of-powers objection to a congressionally imposed ethics code on the Supreme Court. Perhaps a narrower separation-of-powers challenge to specific features of an ethics statute might have a greater chance of success. For example, granting Congress itself the authority to enforce the ethics rules might give the legislative branch too much power over the Court and prevent it from carrying out its constitutionally assigned functions. But, again, the prospects for legislation on this subject are remote.

Whatever the strength of the separation-of-powers objection, let's think for a moment about how litigation challenging congressional action would unfold. The plaintiff—perhaps Justice Alito, based on his *Wall Street Journal* interview—would file suit in district court, and the losing side presumably would go to the court of appeals. But what happens next?

A. Quorum

When and if such a case reached the Supreme Court, we might have a problem. The ethics rules would apply to all nine justices, so they all would have a conflict of interest. There are two possibilities. First, the justices might recuse themselves due to their conflict. By statute, a quorum of the Supreme Court consists of six justices. In the absence of a quorum, the Court cannot hear or decide a case. Instead, the Court enters an order "affirming the judgment of the court from which the case was brought for review with the same effect as affirmance by an equally divided court." A decision by an equally divided court means that the judgment below is affirmed but the affirmance carries no precedential weight.

B. The Rule of Necessity

Alternatively, the justices might invoke the Rule of Necessity and decide the case despite their conflict of interest. The plaintiff justice, as a party, presumably would not sit, but all nine justices would be affected by the result in the case. The Rule of Necessity posits the existence of a judicial duty to sit so that important legal questions can be decided.

The Court invoked the Rule of Necessity in *United States v. Will*. This case involved a claim that Congress had violated the Compensation Clause by withholding or rolling back cost-of-living adjustments that federal judges otherwise would have received. More than a dozen district judges filed class actions on behalf of all Article III judges. This meant that, although no Supreme Court justice was a named plaintiff, all members of the Court had a financial interest in the outcome of the case. The Supreme Court concluded that the Rule of Necessity superseded the disqualification statute and proceeded to resolve the merits of the Compensation Clause challenges in *Will*.

The Supreme Court might well invoke the Rule of Necessity in a case challenging a congressionally imposed ethics code despite the justices' obvious conflict of interest. The argument for invoking the rule in this situation is weaker than the argument for doing so in *Will*, because here only the justices have a personal stake in the result whereas in *Will* all Article III judges had a financial stake so all of them should have recused. Here, lower-court judges lack the

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[26] *Cf.* Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) (Congress may not limit the grounds for removal of the single director of an independent agency that has rulemaking and enforcement power when the agency has other unique features that insulate it from presidential supervision); Buckley v. Valeo, 424 U.S. 1, 109–43 (1976) (per curiam) (Congress may not appoint members of federal regulatory agencies); Myers v. United States, 272 U.S. 52 (1926) (Congress may not require Senate consent for removal of civilian appointed officials).

[27] 28 U.S.C. § 1.

[28] 28 U.S.C. § 2109.

[29] *See* United States v. Pink, 315 U.S. 203, 216 (1942); Neil v. Biggers, 409 U.S. 188, 192 (1972).

[30] 449 U.S. 200, 211–17 (1980).

personal stake that the justices have, so maybe the Supreme Court should stay its hand and let the lower courts handle the case.

IV. The Supreme Court's New Code[31]

However hypothetical litigation challenging hypothetical legislation played out, the Supreme Court actually issued its first formal code of conduct in November 2023. Here are some of its highlights.

A. Canons

The Supreme Court code parallels the Code of Conduct for United States Judges that was adopted by the Judicial Conference of the United States and applies to judges of the lower federal courts. That is, the Supreme Court code contains five canons that are phrased in virtually identical language as the Judicial Conference code. But the Court's code explicitly disavows the "extensive commentary" on the Judicial Conference's code, "much of which is inapplicable" to the Supreme Court.[32] And some of the specific provisions depart from the Judicial Conference code, because the High Court is "place[d] at the head of a branch of our tripartite government structure."[33]

B. The Duty to Sit

One of the key provisions of the code addresses recusal. Canon 3(B) reiterates a presumption of impartiality and invokes each justice's presumptive duty to sit.[34] Canon 3(B) uses language drawn from the disqualification statute, saying that recusal is appropriate "in a proceeding in which the Justice's impartiality might reasonably be questioned."[35] The code goes on to list several non-exhaustive examples of such circumstances, most of which also parallel language in the disqualification statute.[33]

C. Unbiased and Reasonable Person

At the same time, the code defines the circumstances in which a justice's objectivity might reasonably be questioned to mean "where an unbiased and reasonable person who is aware of all relevant circumstances would doubt that the Justice could fairly discharge his or her duties."[36] This language draws heavily on language in Chief Justice Rehnquist's explanation for participating in a case involving Microsoft despite his son's partnership in a law firm that was serving as local counsel for Microsoft. [37]

D. The Rule of Necessity

The next provision in Canon 3(B) makes clear that "the rule of necessity may override the rule of disqualification." The commentary on Canon 3(B) emphasizes the problems that can arise when a justice recuses, particularly the increased risk of deadlock, and distinguishes the Supreme Court from the lower courts where another judge can be substituted for a disqualified judge.[39] The commentary also invokes *Will* to illustrate the Rule of Necessity,[40] but—as we saw earlier—that was a case in which *all* of the justices had a financial interest in the outcome; if the entire Court is disqualified, it can't rule on the case at all. But when a single justice is disqualified, the Court can still make a ruling—there is, of course, some risk of an equal division in that situation, but this is far from inevitable, and in any event an equally divided Court does in fact render a decision: the lower court's judgment is affirmed, albeit without an explanation that can guide other courts and the public.

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[31] With apologies to Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. Pa. L. Rev. 485 (1967).
[32] Supreme Court Code at 10.
[33] *Id.*
[34] Supreme Court Code Canon 3(B)(1).
[35] Supreme Court Code Canon 3(B)(2).
[36] *Id.*
[37] Microsoft Corp. v. United States, 530 U.S. 1301, 1301–02 (2000) (statement of Rehnquist, C.J.).
[38] Supreme Court Code Canon 3(B)(3).
[39] Supreme Court Code at 10.
[40] *Id.* at 11.

E. Gifts and Disclosure

Elsewhere, Canon 4(D) exhorts justices to comply with the Judicial Conference's restrictions on acceptance and solicitation of gifts. And Canon 4(H) observes that all of the justices "have agreed to comply with" financial disclosure statutes in the past and now "individually reaffirm that commitment." This formulation echoes Justice Alito's claim that Congress lacks power under the Constitution to impose any ethics requirements on the Court.

F. Critique

Several points about this code are worth considering. As others have pointed out, the Supreme Court code contains no enforcement mechanism. The Judicial Conduct and Disability Act specifically provides that "[a]ny person" may file a complaint against a lower-court judge with the clerk of the court of appeals for the relevant circuit, who in turn transmits the complaint to the chief judge of the circuit for preliminary review;[41] unless the chief judge dismisses the complaint for reasons specified in the statute (such as that an ethics complaint is "directly related to the merits of a decision or procedural ruling"),[42] the complaint is referred to a special committee consisting of the chief judge and an equal number of circuit and district judges from the circuit, which in turn reports to the judicial council of the circuit for disposition of the complaint. The judicial council in some circumstances may refer a matter to the Judicial Conference for ultimate disposition. Nothing like these provisions appears in the Supreme Court's code, which has led to a fair amount of criticism that the code is purely symbolic.

There certainly is some force to this claim. Not only does the code lack an enforcement mechanism, but it is far from clear that the code would restrict any of the activities that have generated controversy about the justices' ethics. For example, it allows justices to attend fundraising events as long as they do not speak or get listed as guests of honor, to aid in fundraising events for nonprofit organizations but not personally engage in fundraising activities or solicitation, or use their staff or chambers resources "to any substantial degree" for activities that go beyond official duties or other permitted functions.[43] And the code emphasizes that no presumption of impropriety will attach to a speech to groups affiliated with an educational, bar, religious, or non-partisan scholarly or cultural group.[44] Under these provisions, justices presumably may continue to speak at Federalist Society or American Constitution Society events, teach in overseas programs operated by law schools, use chambers staff to help promote book sales as long as they don't spend too much time on the promotional work, or be introduced by prominent politicians at events on university campuses.

The tone of the document suggests that the justices feel beleaguered and misperceived. We can see that not only in Canon 3(B)'s standard for determining when a justice's impartiality might reasonably be questioned, which emphasizes the "unbiased and reasonable person who is aware of all relevant circumstances," but also in the introductory statement's plaintive observation that the recent hue and cry over the absence of a binding ethics code reflects "the misunderstanding that the Justices of this Court, unlike all other jurists in this country, regard themselves as unrestricted by any ethics rules."[45]

But maybe we shouldn't dismiss the code as purely symbolic. After all, we live by symbols. The justices must have felt constrained to respond to the alleged misunderstandings and uninformed criticisms. For all its weaknesses, the

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[41] 28 U.S.C. § 351(a).
[42] 28 U.S.C. § 352(b)(1)(A)(ii); *see* Jonathan L. Entin, *Judicial Ethics and Judicial Competence*, 74 Case W. Rsrv. L. Rev. (in press).
[43] Supreme Court Code Canon 4(A)(1(d), (C).
[44] Supreme Court Code Canon 4(A)(1)(e).
[45] Statement of the Court Regarding the Code of Conduct (Nov. 13, 2023).

code represents "a much-needed dose of humility" for the Court. We should also recognize that there was never a golden age of Supreme Court ethics. Chief Justice Marshall wrote the opinion in *Marbury v. Madison* even though he was the Secretary of State who failed to deliver William Marbury's commission and therefore shouldn't have sat in the case. Multiple justices engaged in *ex parte* communications with President-elect Buchanan as the Court was resolving *Dred Scott v. Sandford*. Justice Fortas continued to advise President Lyndon Johnson after joining the Court. The point should be clear: Whatever ethical lapses current justices have made, those lapses are part of an unfortunately long tradition.

In addition, we have no reason to believe that the recent ethical problems have affected the outcome of cases. But that is like praising a candidate for public office for never having been indicted. Surely we should regard that as a minimum qualification.

* * * * *

Let's conclude by thinking about a potentially important function that an ethics code might serve. Some of the suspicious contacts with justices have involved actors who bask in the glow of proximity to power and persuade themselves of their influence. This is analogous to an unstated but frequently significant rationale for filing *amicus* briefs. Many such briefs provide no new arguments or useful information that can assist the Court. They are, as one critic described them, "amening" briefs that essentially say "amen" to the arguments of the party the brief supports. But those briefs fulfill a function for the *amicus*, which can claim credit for a decision that embraces its position or denounce the Court for ignoring its supposedly compelling argument if the decision goes the other way.

If the analogy to *amicus* briefs has any cogency, it can give the justices yet another reason to have a meaningful ethics code: such a code could help to protect the Supreme Court from interest groups' efforts to aggrandize themselves. A toothless code won't do that, but any ethics code is a step in the right direction.

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[46] Editorial, *Supreme Court's New Ethics Code Is a Bigger Deal Than the Critics Claim*, WASH. POST, Nov. 14, 2023, https://www.washingtonpost.com/opinions/2023/11/14/supreme-court-ethics-code-enforcement-good/.

[47] 5 U.S. (1 Cranch) 137 (1803).

[48] 60 U.S. (19 How.) 393 (1857).

[49] *See* CALVIN TRILLIN, *The Motto-Maker's Art*, in IF YOU CAN'T SAY SOMETHING NICE 11 (1987) (suggesting "Never Been Indicted" as an all-purpose campaign slogan).

[50] Leo Pfeffer, *Amici in Church-State Litigation*, LAW & CONTEMP. PROBS., Spring 1981, at 83, 109.

Zooming Toward A More Diverse Judiciary: Virtual Interviews in Federal Clerkship Hiring*

Benjamin R. Syroka
Career Law Clerk
U.S. District Court for the Northern District of Ohio

Imagine this scenario. You've got a friend—a bright, hard-working, first-generation law student from a modest background. She lands an interview for a coveted federal judicial clerkship on the opposite coast. The catch? Expenses—airfare, hotels, meals—mean either an empty wallet or a maxed-out credit card.

This dilemma is common. The traditional interview process, with its financial burdens, has long functioned as gatekeeper, filtering out talent based on resources rather than ability. As a former applicant, and a current clerk, I have witnessed students (often first-generation law students) struggle to navigate this process. The weight of this prohibitive cost barrier falls disproportionately on diverse applicants.[1] However, the resulting lack of clerks with diverse lived experiences, cultural and familial backgrounds, and socioeconomic statuses affects the judiciary in the long run—as clerks eventually move on to prestigious government jobs and the federal bench.[2] So how do we fix it?

Well, let's consider a second scenario. A similar friend receives a similar interview opportunity thousands of miles away. This time, however, there's no cost—no flights, no hotel rooms, no exorbitant bills. How? Her interview was on Zoom; she never left her living room. The expansion of Zoom in the federal judiciary may be one of the few unexpected silver linings of the COVID-19 pandemic. Zoom interviews, which many judges continue to use post-pandemic, can profoundly impact diversity, equity, and inclusion in the judiciary. By eliminating costs, judges can make interviews accessible to a broader pool of applicants.[3] Judges now have the ability to speak with candidates from diverse socio-economic, racial, and geographical backgrounds—individuals from all walks of life, and all corners of the country.

Apart from accessibility, Zoom also has the potential to create a more equitable process. Previously, candidates with more resources could afford several interviews, increasing their chances of securing a clerkship. Now, the many judges utilizing Zoom have provided an equality of opportunity. All candidates have an equal shot at success (at least with the "Zoom judges"), regardless of finances.

As the judiciary emerges from the shadow of the pandemic, swimming upstream against trial backlogs and heavy caseloads, it's important to keep an eye on the future. COVID-19 undeniably caused significant disruption, but it also brought about progressive changes that deserve reflection and consideration. Let's capitalize on lessons learned!

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* This proposal won first prize in the Federal Bar Association's 2023 Honorable Constance Baker Motley Diversity, Equity, and Inclusion Essay Competition. The essay was previously published in the Winter 2023 edition of the Federal Lawyer Magazine.

[1] The majority of federal clerkships are awarded to graduates from a handful of prestigious law schools; approximately 80% of these incoming clerks are white. *See* Karen Sloan, *These law schools sent the most grads to federal clerkships*, REUTERS (May 1, 2023, 11:18 AM), https://www.reuters.com/legal/government/ these-law-schools-sent-most-grads-federal-clerkships-2023-05-01/.

[2] This is not to say that federal judges are not seeking diverse candidates—several judges indicate they want diverse clerks, but struggle to hire them. Jeremy Fogel, Mary S. Hoopes & Goodwin Liu, *Law Clerk Selection and Diversity: Insights from Fifty Sitting Judges of the Federal Courts of Appeals*, 137 Harv. L. Rev. 588, 626–33 (2024).

[3] *See Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, NAT'L ASS'N FOR L. PLACEMENT (Feb. 2021), https://www.nalp.org/0221research (noting that "white graduates were overrepresented across all clerkship types [in 2019], but especially at the federal level where white graduates obtained over 79% of all federal clerkships, despite making up only 67% of the class overall").

Utilizing virtual technology should be the new normal—we must continue leveraging this technology to create a more accessible hiring process. Why? The virtual shift is a life-changer for candidates like my friend, who secured a clerkship without looming financial strain. And the benefits to the judiciary may be even greater. The diversity resulting from a more equitable process not only enriches the judiciary's discourse and decision making, it strengthens its representative nature and, in turn, its legitimacy. By "Zooming" toward a diverse judiciary that's truly representative of the public it serves, we can foster greater public trust and confidence in our country's third branch.

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[4] "The Importance of diversity is not in demographics alone or the legitimacy that may flow from those numbers. Rather, the purpose is to ensure that the judiciary benefits from a range of perspectives that more accurately reflect those who are affected by the law." Deeva Shah & Greg Washington, *Beyond Symbolism: Accepting the Substantive Value of Diversity in Law Clerk Hiring*, 97 Notre Dame L. Rev. Reflection 317, 319 (2022).
And this is not something that will simply "just happen." As Judge Jeremy Fogel recently stated: "To the extent both applicants and judges believe that greater diversity among law clerks is a desirable goal, that goal will be realized only through intentional efforts." Hannah Albarazi, *50 Judges Open Up About Law Clerk Selection And Diversity*, Law360 (Dec. 2, 2022, 4:57 PM), https://www.law360.com/articles/1554459/50-judges-open-up-about-law-clerk-selection-and-diversity.
Anyone paying attention recognizes that the judiciary currently faces a significant public-perception problem—many citizens have little confidence in the courts. *See* David F. Levi et al., *Losing Faith: Why Public Trust in the Judiciary Matters*, Judicature, Vol. 106, No. 2, 70 (Summer 2022) https://judicature.duke.edu/ articles/losing-faith-why-public-trust-in-the-judiciary-matters/ (noting that the Supreme Court's public confidence "rating hit a historic low [in 2022], with just 25 percent of Americans reporting 'quite a lot' or 'a great deal' of confidence in the Court, down from 36 percent in 2021"); s*ee also Public confidence in the U.S. Supreme Court is at its lowest since 1973*, Associated Press-NORC Ctr. for Pub. Affairs Rsch. (May 17, 2023), https://apnorc.org/projects/public-confidence -in-the-u-s-supreme-court-is-at-its-lowest-since-1973/ (summarizing polling data that reveals public confidence in the Supreme Court has reached "an all time low").

Keeping Faithful to the Facts: The Expansion of Judicial Fact-finding on Preliminary Pleading Review

Antonia Mysyk*

In 2022, the Supreme Court decided *Kennedy v. Bremerton School District* and the American public became like a jury. The majority and dissent in *Kennedy* presented conflicting factual narratives about the suspension of a public high school football coach for praying midfield postgame.[1] And Americans were left to decide which factual narrative to believe.

For legal scholars, this caused confusion and outrage.[2] By the time a case reaches the Supreme Court, one would hope and expect that each justice made their decision on the same facts. This is especially true in *Kennedy*, where the Court granted a motion for summary judgment, which can occur if the case contained no dispute of material fact.[3] So, the question arises—*how* and *why* did such a significant factual discrepancy occur at the Supreme Court level?

This Article provides an explanation. The factual dispute within *Kennedy* occurred because instead of remanding the case for a factfinder to sort out the material factual disputes, as required under Federal Rule of Civil Procedure 56, the majority and dissent kept the fact-finding power for themselves.[4] Each side then chose to resolve the factual dispute in the manner best supporting its legal conclusions, creating a factual discrepancy. *Kennedy* is a symptom of the change within the American judiciary to expand judges' fact-finding power at the preliminary pleading stage.

I. Understanding *Kennedy*

In 2008, Joseph Kennedy started work as a football coach at Bremerton High School. Throughout his employment, Kennedy, a devout Christian, always offered a postgame prayer of thanksgiving at the 50-yard line after games. As the seasons progressed, Kennedy began engaging in prayers with his team both on and off the field. In 2015, Kennedy received a letter from Bremerton to desist from all religious activities because of Establishment Clause concerns. Following Bremerton's football games on October 16th, 23rd, and 26th, Kennedy ignored the letter and prayed postgame at midfield. Although Kennedy started these midfield prayers alone, during two of the games players from the opposing team and members of the public made their way midfield and joined the prayer. Bremerton placed Kennedy on paid administrative leave due to this conduct. On his 2015 coaching evaluation, Kennedy received low marks because of his lack of cooperation with Bremerton's policies and his failure to supervise students postgame. Kennedy did not coach the following season.[5]

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* Executive Online Editor, Case Western Reserve Law Review. This is an abridged version of a Note that will be published in Volume 74, Issue 1 of the Case Western Reserve Law Review and appears here with the permission of the Law Review.

[1] *Compare* Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 514–20 (2022) *with id.* at 545–56 (Sotomayor, S., dissenting).

[2] Jeff Neal, *Supreme Court Preview: Kennedy v. Bremerton School District*, HARV. L. TODAY (Apr. 20, 2022), https://hls.harvard.edu/today/supreme-court-preview-kennedy-v-bremerton-school-district/ [https://perma.cc/K24K-4ASR]; Paul Blumenthal, *Neil Gorsuch 'Misconstrues the Facts' in School Prayer Case*, HUFFINGTON POST (June 27, 2022, 6:56 PM), https://www.huffpost.com/entry/bremerton-school-prayer-joseph-kennedy_n_62ba18c2e4b0326883a8a9b8 [https://perma.cc/L5VB-AWES].

[3] FED. R. CIV. P. 56.

[4] *Id.*

[5] *Kennedy*, 443 F. Supp. 3d at 1228–30 (District); 991 F.3d at 1010–12 (Ninth Circuit); 597 U.S. at 515–20 (Majority); *id.* at 547–56 (Sotomayor, J., dissenting).

Kennedy sued Bremerton in federal court for violating his First Amendment rights under the Free Speech and Free Exercise Clauses. Kennedy's case eventually made its way to the Supreme Court. Regarding Kennedy's free exercise claim, the Court found Bremerton's suspension of Kennedy failed the "general applicability requirement" because Bremerton treated Kennedy's postgame prayers differently than other coaches' non-religious postgame conduct.[6] Regarding Kennedy's free speech claim, the Court found Kennedy spoke as a private citizen when conducting his October postgame prayers because the prayers did not convey a government message or include BHS's players.[7] The Court found Bremerton's actions unconstitutional under even intermediate scrutiny because Bremerton did not show how an Establishment Clause violation could have reasonably resulted from Kennedy's prayer. Kennedy's religious activity could not constitute governmental religious endorsement because during the October games, Kennedy sought to pray alone in his capacity as a private citizen. Kennedy's prayers also could not constitute "impermissible government coercion" because Kennedy never forced players to join his midfield prayer and ended all locker-room prayer at Bremerton's request.[8]

The dissent completely contested the majority's reasoning. First, the dissent addressed the Establishment Clause. The dissent argued that Bremerton reasonably believed Kennedy's religious practices could have created Establishment Clause liability. Kennedy's prayer could have constituted a governmental endorsement of religious activity because during the October games, Kennedy coached and spoke as a state official, "the face and the voice" of Bremerton.[9] Second, Bremerton justifiably believed Kennedy's religious activities constituted impermissible religious coercion. Kennedy's locker room prayer and motivational religious speeches created coercive pressure. Although Kennedy stopped some of these practices, the entirety of Kennedy's religious activities affected the coercion determination. Accordingly, the dissent found that Kennedy's decision to continue praying at the 50-yard line, where he previously conducted prayers and religious speeches with his players, was a continuation of his past coercive conduct.[10] For the free speech claim, applying strict scrutiny, the dissent found that (1) Bremerton had a compelling interest to avoid an Establishment Clause violation, and (2) Bremerton's suspension of Kennedy was narrowly tailored based on Kennedy's past religious conduct, attempts to attract media attention, and unwillingness to work with Bremerton to find a suitable accommodation.[11]

II. How Did the *Kennedy* Factual Dispute Occur?

Looking at the *Kennedy* dispute, the first question to answer is *how*—how did such a large factual dispute occur at the Supreme Court level? One explanation is that the *Kennedy* record contained a genuine dispute of material fact. Yet, the Court failed to follow Rule 56 which requires the denial of summary judgment in the face of such a dispute.

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[6] A government action fails the general applicability requirement if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Kennedy*, 597 U.S. at 526 (quoting Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021)).

[7] *Id.* at 526–31.

[8] *Id.* at 532, 535–43.

[9] *Id.* at 561 (Sotomayor, J., dissenting).

[10] *Id.* 559–64.

[11] *Id.* at 562–66.

Under Federal Rule of Civil Procedure Rule 56, a court can grant summary judgment only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[12] Appellate courts review motions for summary judgment *de novo*, applying the same Rule 56 standard as the lower court but without deference to the lower court's decisions.[13] When reviewing a summary judgment motion, the appellate court can determine whether triable issues exist, but it cannot act as a factfinder, try issues of fact, or make credibility determinations.[14] Under this standard, the Court in *Kennedy* had to independently determine (1) if there were facts in dispute, (2) if the disputed facts were material, and (3) if the factual disputes created a genuine issue that a trier of fact could resolve.[15] Yet throughout the majority's opinion, not once did it acknowledge any factual dispute. The dissent, although acknowledging a factual dispute, never addressed how the dispute potentially conflicted with the summary judgment standard.[16] So, this Article takes to that task.

First, there are undoubtedly disputed facts within *Kennedy*. Upon comparison of the majority and dissenting opinions, one can find at least five points of factual dispute.[17] These disputes include (1) whether Kennedy's religious practices coerced students,[18] (2) the media involvement at the October games,[19] (3) whether Kennedy violated his postgame supervision duties when he prayed postgame,[20](4) the accommodations Bremerton offered to Kennedy,[21] and (5) the events surrounding the October 16th game.[22] Second, the disputed facts in *Kennedy* are material. For example, examine the dispute regarding whether Kennedy violated his postgame supervision duties with his midfield postgame prayer. The majority alleged that Kennedy did not violate his postgame supervision duties because during the postgame period, coaches "were free to attend briefly to personal matters—everything from checking sports scores on their phones to greeting friends and family in the stands."[23] The dissent, however, alleged

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[12] FED. R. CIV. P. 56(a); HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS ch. I, Westlaw (Updated 2018) ("Those standards are largely derived from Federal Rule of Civil Procedure 56 and the Supreme Court's seminal decisions in *Anderson v. Liberty Lobby* . . . and *Celotex Corp. v. Catrett*.").

[13] Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1076 (2003); Robert L. Arrington, *The Dirty Little Secret About Summary Judgment*, TENN. BAR. J., Sept./Oct. 1996, at 12, 13.

[14] *See Anderson*, 477 U.S. at 249.

[15] Arrington, *supra* note 13, at 12, 13.

[16] *Kennedy*, 597 U.S. at 514–20; *id.* at 545–56 (Sotomayor, J., dissenting).

[17] Although the Ninth Circuit established that the judge decides the "ultimate constitutional significance" of undisputed facts in First Amendment cases, Kennedy's majority and dissent created narratives that paint completely different pictures of what occurred in the case. *Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1260 (9th Cir. 2016). The majority told a story of a school suspending a coach for praying a quiet, personal prayer midfield after football games. The dissent, however, described a case in which a public school coach, who had a history of leading his teams in prayer, used his position to create a national spectacle surrounding his postgame prayer. *Compare Kennedy*, 597 U.S. at 514–20, *with id.* at 545–56 (Sotomayor, J., dissenting).

[18] *See, e.g.*, *Jews for Jesus, Inc. v. Jewish Community Rel. Council of New York, Inc.*, 968 F.2d 286, 291, 294 (2d Cir. 1992) (coercion is a question of fact).

[19] *Compare Kennedy*, 597 U.S. at 514–20, *with id.* at 545–56 (Sotomayor, J., dissenting).

[20] "The 'scope and content of [a public employee's] job responsibilities' is a factual question." *Coomes*, 816 F.3d at 1260.

[21] "The reasonableness of an employer's attempt at accommodation must be determined on a case-by-case basis and is generally a question of fact for the jury, rather than a question of law for the court." *E.E.O.C. v. Robert Bosch Corp.*, 169 F. App'x 942, 944 (6th Cir. 2006).

[22] *Compare Kennedy*, 597 U.S. at 514–20, *with id.* at 545–56 (Sotomayor, J., dissenting).

[23] *Id.* at 530.

Kennedy violated his coaching duties to pray midfield because coaches had a contractual duty that required the supervision of "'student activities immediately following the completion of the game' until the students were released to their parents or otherwise allowed to leave."[24] This dispute affected the Court's conclusions on (1) whether Kennedy was on duty during his postgame prayer and spoke as a government employee or private citizen and (2) whether Bremerton's suspension of Kennedy was a narrowly tailored response. And this is only one of the five disputes. Even if one or two of the disputes in isolation are not outcome-determinative, when viewing all five together, it is hard to contest their materiality.

Third, the disputed facts create a genuine issue a trier of fact could resolve. The quantity of evidence each opinion presented would allow a rational factfinder to return a verdict for either party. As noted by constitutional scholar Professor Sanford Levinson,

> Frankly, depending on which version of the facts you believe, it's an easy case either way. If you accept the district's description of what's going on, then I think it is clearly constitutional to prohibit the coach from doing that. . . . But if you accept the coach's version of events, then he ought to win . . . .[25]

Combining these three steps, it is easy to see how a material factual dispute existed for which the Supreme Court could have denied summary judgment under Rule 56 and remanded the case to a trier of fact. Instead, the majority and dissent made themselves the factfinders and resolved the factual disputes to best support their legal conclusions—creating a factual discrepancy. In other words, the majority's and dissent's clashing interpretations of the record illustrate the genuine issues of fact at the heart of *Kennedy*.

IV. Why Did the Factual Dispute Occur in *Kennedy*?

The second question to answer is *why*—why did the Court in *Kennedy* not remand the case for a factfinder to resolve the factual disputes? One explanation stems from the power shift within the American court system to expand judicial fact-finding power on preliminary motion review. Over time, case law has developed the application of the preliminary pleading standards to expand judges' power to make factual inferences and resolve factual disputes in place of the factfinder at trial. Professor Andrew Pollis argues, "[J]udges now enjoy ever-greater power to dispose of cases—and thus to draw their own inferences—instead of honoring the historic tradition of permitting juries to evaluate competing inferences. And they do so based on paper records instead of live-witness trials."[26]

1. The Shift of Fact-finding Power: Motions to Dismiss

For motions to dismiss, the shift of fact-finding power became apparent in the 2000s when the Court adjusted the pleading standard by granting judges one of their ultimate gatekeeping functions—the plausibility standard. Under Civil Rule of Federal Procedure 8(a)(2), a claimant needs only to allege in her complaint "a short and plain statement of the claim showing that the pleader is entitled to relief."[27] But in 2007 and 2008, in the landmark cases of *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Court heightened the complaint pleading standard. No longer could plaintiffs provide a short, plain statement of facts possible to support their claim; rather, they had to establish enough factual evidence to make their claim plausible.[28] Now, when reviewing a motion to dismiss under Civil

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[24] *Id.* at 547–51 (Sotomayor, J., dissenting) (quoting J.A. at 133, Kennedy v. Bremerton Sch. Dist., 597 U.S. 507 (2022) (No. 21-418)).
[25] Neal, *supra* note 2.
[26] Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. Rev. 435, 437–39, 450, 490 (2014).
[27] *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821, 824–29 (2010).
[28] *Id.* at 826–30 (discussing the background and implication of these cases); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Rule of Federal Procedure 12(b)(6), if a judge deems the facts alleged in the complaint do not plausibly support a claim, the judge can dismiss the case. Judges can resolve cases based on their interpretation of the plausibility of facts established in a single paper document in place of a factfinder's factual determinations at trial.[29] And this was "only one slice of a larger pattern of power reallocation that has diminished the jury's role in evaluating circumstantial evidence."[30]

2. The Shift of Fact-finding Power: Motions for Summary Judgment

Case law has also expanded judges' fact-finding power on summary judgment review. Courts originally approached the Rule 56 standard cautiously. Before the 1960s, Courts seemingly followed a "slightest doubt" standard, finding that "summary judgment should not be granted when there was the 'slightest doubt as to the facts.'"[31] When factual disputes arose, courts favored allowing cases to proceed to trial rather than to conduct a "trial[] by affidavit."[32] But this changed. Courts gradually started to expand judges' factual inference power under Rule 56.

First, the Court imputed a plausibility standard on summary judgment review. A judge who found an argument implausible could reject the argument to grant or deny summary judgment. For example, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Court held a judge could find a claim "implausible" if it did not make "economic sense."[33] Further, in *First National Bank of Arizona v. Cities Service Co.* the Court rejected an antitrust claim at summary judgment because it found the "defendant's lawful explanation for its conduct was 'much more plausible' than the plaintiff's theory of liability."[34]

Second, in 1986 the Court decided a trilogy of cases that substantially increased a judge's power to decide cases at summary judgment. First, in *Celotex Corp. v. Catrett*, the Court expanded judges' ability to decide summary judgment motions by reducing the evidentiary burden of movants without a burden of proof. The court established that a "party moving for summary judgment that does not bear the burden of proof . . . may discharge its burden by demonstrating that the opponent, who bears the burden of proof at trial, will be unable to present any evidence to satisfy that burden."[35] Then, in *Matsushita Electric Industrial Co.*, the Court extended judges' power even more by heightening the amount and type of evidence needed for a nonmovant to establish a material factual dispute to overcome a motion for summary judgment. The Court found that the nonmoving party must show more than a "metaphysical doubt as to the material facts" to create a "genuine issue for trial." Rather, the nonmovant had to produce sufficient evidence that could "lead a rational trier of fact to find for the non-moving party."[36] Last, in *Anderson v. Liberty Lobby Inc.*, the Court reaffirmed this heightened standard. These cases expanded the plausibility standard in summary judgment review—allowing judges to determine how a jury could rationally view the evidence based on a paper record. And the more that the Court heightened the amount of evidence needed for a nonmovant to establish a material factual dispute, the more the Court enabled judges to weigh evidence and make credibility determinations to find a party's factual narrative implausible or a dispute immaterial, a role traditionally belonging to the factfinder at trial.[37]

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[29] FED. R. CIV. P. 12(b)(6); Clermont & Yeazell, *supra* note 27, at 837–38.
[30] Pollis, *supra* note 26, at 435.
[31] Miller, *supra* note 13, at 1020–22 (quoting Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946)).
[32] Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. [33] REV. 91, 98 (2002) (quoting Douglas M. Towns, *Merit-Based Class Action Certification: Old Wine in a New Bottle*, 78 VA. L. REV. 1001, 1020 (1992)).
[33] Edward D. Cavanagh, Matsushita *at Thirty: Has the Pendulum Swung Too Far in Favor of Summary Judgment*?, 82 ANTITRUST L.J. 81, 82 (2018); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986).
[34] First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968); Pollis, *supra* note 26, at 465 (quoting *First Nat'l Bank of Ariz.*, 391 U.S. at 285).
[35] Friedenthal & Gardner, *supra* note 32, at 101–02; Celotex Corp. v. Catrett, 477 U.S. 317, 331–33 (1986).
[36] *Matsushita*, 475 U.S. at 586–87 (quoting FED. R. CIV. P. 56(e) (2009) (amended 2010)).
[37] Pollis, *supra* note 26, at 437–39.

3. **The Shift Continues Through *Scott v. Harris***

In 2007, in *Scott v. Harris*, the Court took yet another step to expand judges' power to resolve factual disputes at the summary judgment stage. In *Harris*, the Supreme Court affirmed a lower court's summary judgment grant, examining whether a driver in a police chase drove in such a dangerous fashion as to justify an officer's use of deadly force.[38] When the majority decided whether the record contained a material factual dispute, it endorsed a new summary judgment standard. Typically, on summary judgment, courts view the facts in the light most favorable to the non-moving party.[39] But in *Harris*, because the officer provided a bodycam video of the police chase, the majority decided that the video did not need to be viewed in the light most favorable to the nonmoving party. The Court stated, "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party *only if there is a 'genuine' dispute as to those facts*.'"[40]

With this new standard, it appears that the Court created a rationality standard in its review of a summary judgment record. Courts must view the evidence in favor of the nonmovant only if a judge finds that rational factfinders could genuinely dispute how to view the evidence.[41] In *Harris*, the majority determined that because they had tangible evidence, a video, the way to view that video was undisputable—the majority's interpretation was the only reasonable way. Under this view, the majority determined that "no reasonable jury could have believed" the police officer used excessive force.[42] Yet, the eight-justice majority ignored that people, whose different beliefs and experiences shape the way they see the world, can view tangible evidence in different ways.[43]

4. **Explaining *Kennedy***

The expansion of judges' fact-finding power at the pleading stage has progressed step by step from *Anderson* to *Twiqbal* to *Harris* and now to *Kennedy*. The Court has continuously adopted and expanded plausibility and rational factfinder standards for judges to apply at the pleading and summary judgment stages, respectively, when factual disputes arise. This allows judges to resolve cases that once would have gone to a factfinder to decide at trial. *Kennedy* is the logical result of this trend.

In *Kennedy*, an irreconcilable factual dispute existed between the majority and the dissent. The Court could have chosen to leave the dispute to a factfinder. Yet the *Kennedy* majority took matters into its own hands, resolved the dispute in the way it felt any "reasonable" jury would view the evidence, and granted summary judgment to Kennedy.[44] And the *Kennedy* dissent is guilty of a similar vice. The *Kennedy* dissent never demanded the Court leave the factual disputes for a factfinder. Instead, the dissent dug in its heels, published pictures of Kennedy's religious activities to support its factual narrative, and resolved the disputed facts in the manner that best supported its legal conclusions. Then, the dissent argued its narrative was the true factual perspective.[45]

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[38] Scott v. Harris, 550 U.S. 372, 374, 385–86 (2007).
[39] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).
[40] *Harris*, 550 U.S. at 379–80 (emphasis added); Tobias Barrington Wolff, Scott v. Harris *and the Future of Summary Judgment*, 15 Nev. L.J. 1351, 1359 (2015).
[41] Wolff, *supra* note 40, at 1359.
[42] *Harris*, 550 U.S. at 380.
[43] Pollis, *supra* note 26, at 474.
[44] *Kennedy*, 597 U.S. at 514–20.
[45] *Id.* at 545–56, 578–79 (Sotomayor, S., dissenting).

But *Kennedy* also goes a step beyond *Anderson, Twiqbal,* and even *Harris.* In those cases, the Court at least acknowledged the Rule 56 standard and how they interpreted the factual disputes considering this standard. The *Kennedy* majority never acknowledged the Rule 56 standard or that there even existed disputed facts in the record.[46] And the *Kennedy* dissent, although acknowledging some disputed facts, never acknowledged how the factual disputes related to or should have been interpreted under Rule 56.[47] After *Kennedy*, it appears Rule 56 is becoming empty words on paper. If *Kennedy* is the controlling precedent on how to review factual disputes on summary judgment, the new plausibility standard is that courts can resolve factual disputes in any way that most plausibly supports their desired legal conclusions. Summary judgment is a "trial on affidavits"—exactly what the Court once warned against in *Anderson*.[48]

In conclusion, the factual dispute in *Kennedy* occurred because a material dispute of fact existed in the *Kennedy* record. But the majority and dissent ignored the Rule 56 standard and resolved the dispute in the manner best serving their legal conclusions. And this explains why the majority and dissent published such different factual narratives. Reasonable people with different experiences viewed the facts in different ways. The majority in *Kennedy*, made up of six Republican-appointed justices, saw the facts in a way that promoted religious liberties. The dissent, made up of three Democrat-appointed justices, saw the facts differently based on their beliefs. This is the essence of a material factual dispute under Rule 56 that a factfinder at trial could have, and should have, resolved. But the Court stepped in and chose to take matters into its own hands and appoint itself the factfinder. The cost of this choice, at a minimum, is a severe blow to the stability and integrity of the Rule 56 summary judgment standard.

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[46] *Id.* at 512–44.
[47] *Id.* at 546–47 (Sotomayor, J., dissenting).
[48] *See Anderson*, 477 U.S. at 255.

Changes To the Civil Standing Order For The New Year

Hon. J. Philip Calabrese, District Judge, U.S. District Court for the Northern District of Ohio

With the start of a new year come updates to my Civil Standing Order. The current version (available here) contains three major updates.

Word Limits

Although the Local Rules still impose page limits for briefing, it is past time for the Northern District and lawyers to move to word limits. Using word limits instead of page limits allows lawyers to use different fonts and font sizes and to prepare briefs that use pictures, charts, tables, and other tools to help educate and advocate. They allow lawyers to avoid playing silly and unnecessary formatting games to comply with page limits—playing with margin size, line spacing, excessive use of footnotes, and so on.

Because word limits are preferable, Section 9.A. of my Civil Standing Order now encourages lawyers to file briefs that use word limits instead of page limits. As an inducement, the word limits I set are more generous than the comparable page limits. My hope is that some practical experience with word limits in the District will lead to a change to the Local Rules in short order.

Request for Feedback

Last year, I spoke on a panel with other federal judges, one of whom told the audience that he has a standing offer to the bar to provide feedback on written, oral, and trial advocacy at the conclusion of a case. After talking about it with him, I decided to make a similar offer, which I added to Section 15.B. of my Civil Standing Order. I hope that this provision will work in tandem with Section 20, which provides opportunities for newer lawyers.

Dismissal of a Case

I remain surprised at how much work it takes to get lawyers to file dismissals after resolving a case. In Section 16, I spell out my current practice. In short, if the parties undertake (or are ordered) to file a dismissal in, say, 30 days, I expect that they will. If they do not, I schedule an in-person hearing at which I expect the client to explain why the dismissal was not timely filed. Don't make me chase you.

Rule 26(f) Report

Finally, at the beginning of the year I made two changes to the report of the parties' planning meeting under Rule 26(f).

First, to head off disagreements and discovery disputes down the road, I ask the parties to confirm whether they have discussed and agreed on the timing and format for privilege logs.

Second, I add a new section for disclosure of any litigation funding. In the wake of the litigation between Sysco and Burford, disclosure appears to be a necessary precaution before the parties and the Court expend considerable time and resources attempting to reach a resolution to which a funder will object. Additionally, because of the increasing attention in the media to tenuous relationships between judges and parties, this disclosure will help ensure the discharge of ethical and recusal obligations. Litigation funding remains in flux, so I anticipate revisiting this addition to my Civil Standing Order as the landscape changes and based on feedback from counsel.

Ads, Announcements & Membership Benefits

Did your new years resolutions include developing your professional network and making connections with other federal practitioners?

Then please join the NEW FBA Developing Connections Committee for its Inaugural Happy Hour!

Come enjoy complimentary drinks and light appetizers courtesy of the FBA, while networking with fellow FBA members.

When: Thursday, March 28, 2024
Where: re:Bar
2130 E. 9th Street, Cleveland, OH 44115
Time: 4:30-7:00 pm
R.S.V.P by Thursday, March 21, 2024

The event is open to FBA members only.

Feel free to contact Brenna Fasko brenna.fasko@gmail.com or Jacqueline Meese-Martinez jmeese-martinez@hahnlaw.com with any questions.

We look forward to seeing you there!

Click here to register.

SAVE THE DATES

October 07, 2024 - 2024 State of the Court Installation of Board Officers

October 24, 2024 - Bankruptcy Bench Bar Retreat

Annual Meeting & Convention

September 5, 2024 - September 7, 2024

Save the Date

The Kansas and Western District of Missouri Chapter is excited to host the FBA 2024 Annual Meeting & Convention in Kansas City, MO. Continue to check this page for updated information.

- CLE sessions will feature a variety of legal topics that peak the interest of attorneys in a focused practice area, or want to expand their knowledge in other specialties;
- Celebrate the accomplishments of FBA members during three awards luncheons and welcome the FY25 National President on Saturday's Installation Luncheon;
- Embrace the what's unique about the local city with evening social events, including the WWI Museum on Thursday night.

Join the New FBA Law Clerk Directory!

The Judiciary Division's Federal Judicial Law Clerk Committee launched the first searchable national database of current and former federal law clerks who opt-in to the directory. The Law Clerk Directory, which is accessible only by FBA Members, serves as a robust resource to maintain contact between judges and former clerks, creates bridges for law students to learn more about federal clerkships and the application process, and connects practitioners with current and former clerks for networking opportunities.

The FBA encourages all former and current clerks to opt-in to the directory and has created a page to allow you to easily input your clerkship information. If you are a current or former federal law clerk and wish to be included in the directory, log into **www.fedbar.org** and follow these instructions.

Select "Update My Profile"

Select "My Clerkship" from the right-hand navigation ("My Account Links")

Select "+ Add"

Complete the form contents and select "Save"

Note: Leave the End Year blank if you are currently in a clerkship or if the end year is undetermined

To enter additional clerkships, simply repeat the process. You can also edit entries if needed. The details you enter will then be visible in the Law Clerk Directory. If you ever decide to opt out of the directory, simply select "Edit Demographics" from your "My Profile" page, check the box at the bottom labeled "Law Clerk Directory opt-out" and then select "Save". For further assistance entering your clerkship information, you can access these **instructions with screenshots**.

To use the new Law Clerk Directory, login to your profile at **www.fedbar.org** with your email and password. You will see several search options available including the following: Clerk Name, Judge Name, Jurisdiction, State, and Year(s) of Clerkship. Search results will display clerk name, email, state, and jurisdiction. For additional details, including the Judge's name and the relevant start and end years, select the clerk's name.

If you have questions about accessing or joining the directory, please email **sections@fedbar.org**

Federal Bar Association

www.fedbar.org | (571) 481-9100 | fba@fedbar.org

FBA-NDOH Calendar of Events:

February 21, 2024 *FBA-NDOH Board Meeting*

March 20, 2024 *FBA-NDOH Board Meeting*

March 28, 2024 ***NEW FBA Developing Connections Committee for its Inaugural Happy Hour***

April 17, 2024 *FBA-NDOH Board Meeting*

May 15, 2024 *FBA-NDOH Board Meeting*

June 19, 2024 *FBA-NDOH Board Meeting*

We add events to our calendar often so please check our website for upcoming events that may not be listed here.

Federal Bar Association
Northern District of Ohio Chapter

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Federal Bar Association

STATEMENT OF THE FEDERAL BAR ASSOCIATION BOARD OF DIRECTORS ON JUDICIAL INDEPENDENCE

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

The Federal Bar Association is comprised of over 19,000 public and private sector lawyers practicing in our federal courts, hailing from all fifty states and the U.S. Territories. The Federal Bar Association is a non-partisan professional organization created to promote the sound administration of justice and integrity, quality and independence of the judiciary.

SOLACE
Support of Lawyers/Legal Personnel – All Concern Encouraged

Our Chapter supports the FBA's SOLACE program, which provides a way for the FBA legal community to reach out in small, but meaningful and compassionate ways, to FBA members and those related to them in the legal community who experience a death, or some catastrophic event, illness, sickness, injury, or other personal crisis. For more information, please follow this link: http://www.fedbar.org/Outreach/SOLACE.aspx

INTER ALIA is the official publication of the Northern District of Ohio of the Federal Bar Association.

If you are a FBA member and are interested in submitting content for our next publication please contact James Walsh Jr., Andrew Rumschlag or Nathan Nasrallah no later than April 30, 2024

Next publication is scheduled for Spring 2024.

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