

UNFAIR FEDERAL RULES OF PROCEDURE: WHY DOES THE GOVERNMENT GET MORE TIME?

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[493] “At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen.”² Brandeis, *Burdeau v. McDowell* (1921).

Heirs of the Anglo-Saxon legal tradition are familiar with the icon Lady Justice: a woman of pure heart, holding the scales of justice in perfect balance.³ Many attorneys have scales-of-justice business cards and letterheads, and many judges have scales-of-justice plaques and statues adorning their benches and chambers. This balance signifies the stated aim of the law that parties before the courts are to have access to equal and fair hearings, fair procedures and fair adjudications. The Supreme Court building in Washington, D.C. prominently bears the motto: “Equal Justice Under Law.”

Why then do the rules of procedure in place in all federal courts plainly and explicitly tilt the procedures for civil and criminal litigation [494] in favor of the government?⁴ Specifically, why do the Federal Rules of Procedure applicable at both the trial and appellate levels provide more time to the government to respond to pleadings and briefs, greater privileges of appearance, and greater ease of prosecuting and defending litigation? For example,

- *Federal Rule of Civil Procedure* 12(a) provides that U.S. government parties have 60 days to answer civil complaints, compared with only 20 days for private-sector parties. (This same 60-day/20-day filing disparity applies to the filing of cross-claims, counterclaims and third-party claims as well);

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² *Burdeau v. McDowell*, 256 U.S. 465, 477 (1921) (Brandeis, J., dissenting).

³ See, e.g., Jeffrey J. Wallace, *John Bingham and the Meaning of the Fourteenth Amendment: Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 Akron L. Rev. 693, 695 (2003) (“Lady Justice is portrayed as being blind, with the scales of justice as equally balanced for everyone”).

⁴ Eugene R. Sullivan, *The Great Debate V: A Debate on Judicial Reform, England v. United States*, 38 Am. Crim. L. Rev. 321, 330 (2001) (quoting Master Mackenzie: “the golden lady [reminds] all of us that justice is not blind and is meant to provide a proper balance, by way of the sword and the scales, between those who prosecute offenses in the criminal courts and those who defend themselves against such prosecutions”).

- *Federal Rule of Appellate Procedure* 4(a) provides that litigants have 30 days to file appeals in civil cases, “but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry”;
- *Federal Rule of Appellate Procedure* 4(b) provides that the United States has 30 days to appeal from criminal judgments, compared with only 10 days for criminal defendants.
- *Federal Rule of Appellate Procedure* 40(a)(1) provides that petitions for rehearing “may be filed within 14 days after entry of judgment” in a civil case unless “the United States or its officer or agency is a party,” in which case any party may seek rehearing within 45 days of judgment.

There are also provisions of the *Rules* that grant the government greater privileges with regard to the filing of *amicus curiae* briefs in support of government positions:

- *Federal Rule of Appellate Procedure* 29 allows “[t]he United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia” to “file an *amicus-curiae* brief without the consent of the parties or leave of court” while “[a]ny other *amicus curiae* may file [495] a brief only by leave of court or if the brief states that all parties have consented to its filing”;
- U.S. Supreme Court Rule 37.4 provides that “No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States . . . ; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.” All other *amici* are required to seek permission to file such briefs.

These provisions of the Federal Rules of Procedure might be described as *filing requirement disparities*. In general, they grant the United States government and its attorneys more time and filing advantages with regard to preparing and submitting briefs and pleadings in U.S. courts than individuals and private-sector parties. (The exceptions are the fore-mentioned Rules 4(a) and 40(a)(1) of the *Rules of Appellate Procedure*, which grant privileges to all parties in litigation wherever the United States is a party, thus creating disparities between cases with government parties and cases without government parties.) Research into the background of these filing requirement disparities reveals that in general they were placed into the earliest editions of the *Federal Rules of Civil Procedure*, the *Federal Rules of Criminal Procedure*, and the *Federal Rules of Appellate Procedure*.⁵

⁵ Notably, the first edition of the Federal Rules of Civil Procedure in 1938 contained the 20-day/60-day disparity regarding the filing of answers (now codified at Fed.R.Civ.P.4(a)), which apparently continued a disparity found in nineteenth-century statutes. See annotations to the Federal Rules of Civil Procedure at Rule 4. The other time deadline disparities outlined in the text above also appear to have been present in the earliest editions of the Federal Rules of Criminal Procedure in 1946 and the Federal Rules of Appellate Procedure in 1968. Wright’s *Federal Practice and Procedure* suggests that the rule-making bodies established after the Rules of Civil Procedure deliberately modeled their rules on time and deadlines after the Civil Rules. See 3B Charles Alan Wright et al., *Federal Practice and Procedure* Sec. 751, at 140 (3d ed. 2004) (citing Fed. R. App. P. 26(b) (1967 Adoption)) advisory committee’s note (rule “based on “FED. R.CIV. P. 6); FED. R. BANKR. P. 9006, advisory committee’s note (“Subdivision (b) is patterned after Rule 6(b) F.R. Civ. P. and Rule 26(b) Fed. R. App. P.”).

Apparently, no justifications for these filing requirement disparities have ever been published.⁶ However, staff at the Administrative Office of U.S. Courts have suggested that these governmental advantages are warranted because the U.S. Justice Department faces greater bureaucratic burdens than do private-sector parties.⁷

It appears that these filing requirement disparities have not sparked any major legal or constitutional challenges.⁸ Nor have scholars of law or the social sciences examined the disparities in any prominent scholarly literature.⁹ Indeed, no scholars appear to have taken much notice of them.¹⁰ The law reviews are dotted with occasional criticisms of the *Federal Rules*,¹¹ but the filing requirement disparities have apparently [497] evaded scholarly criticism or controversy. There have been recurring objections and criticisms of the Rules from some federal judges,¹² but never, apparently, of the specific disparities discussed herein.

⁶ This author has invested a large number of hours searching in vain for a congressional committee report, judiciary report, anecdote in the Congressional Record or any other published statement regarding the rationale behind the filing requirement disparities. Anyone knowing or learning of published statements regarding these matters is urged to contact the author.

⁷ In October 2008, this author wrote to Chief Justice Roberts (who heads the Administrative Office of U.S. Courts as well as the Supreme Court of the United States) inquiring about the reasoning behind these disparities. In November 2008, this author received a phone call in response from an assistant at the Administrative Office of the U.S. Courts. The assistant suggested that the differential rules were most likely justified by the layers of “bureaucratic approvals” that were necessary for U.S. government attorneys to litigate cases in federal courts. He could cite no document or writing giving voice to this explanation but indicated that this reasoning represented common knowledge among the Federal bar and bench. With regard to the Rules’ greater allowances for the filing of *amicus curiae* briefs on behalf of the United States as compared to private-sector parties, the assistant suggested that perhaps *amicus curiae* filings on behalf of private-sector parties might be abused, while the filing of *amicus* briefs on behalf of the United States is generally exercised more “judiciously.” Interview with Jeff Barr, Administrative Office of the U.S. Courts, November 21, 2008.

⁸ See *infra* notes ?? and their accompanying text. Only two litigants—both nonlawyers—appear to have ever formally challenged the filing deadline periods in federal court. See *Dickens v. Lewis*, 750 F.2d 1251 (5th Cir. 1984) (involving a *pro se* litigant suing government officials); *Peth v. Breitzman*, 611 F.Supp. 50, 53 (E.D.Wis. 1985) (involving a *pro se* litigant who argued that one of the filing requirement disparities conferred a title of nobility upon the government).

⁹ See William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1866 (2002) (“scholars have spent only a few paragraphs here and an occasional passage there explicating the general value of procedural equality”).

¹⁰ Cf. William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1866 (2002) (“discussing the absence of writing on procedural equality”).

¹¹ See, e.g., Martin H. Redish and Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 *Minn. L. Rev.* 1303 (2006) (criticizing the Federal Rules on a number of grounds, and suggesting the Rules were unconstitutionally enacted); Cheryl L. Haas, *Judicial Rulemaking: Criticisms and Cures for a System in Crisis*, 70 *N.Y.U. L. Rev.* 135 (1995) (arguing for elimination of the Supreme Court’s role in procedural rulemaking); Lane Matthews, Comment, *A Survey of the December 1991 Amendments to the Federal Rules of Civil Procedure*, 59 *Tenn. L. Rev.* 367 (1992) (criticizing the process for amending the Rules for being too circuitous); Jeffrey A. Parness and Sandra B. Freeman, *The Process of Factfinding in Judicial Rulemaking: “Some Kind of Hearing” on the Factual Premises Underlying Judicial Rules*, 5 *Pace L. Rev.* 1, 3 (1984) (arguing that the rulemaking process is too closed and private); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 *Stan. L. Rev.* 673 (1975) (arguing that the Rules are not properly evaluated by the Supreme Court before their release); Howard Lesnick, *The Federal Rulemaking Process: A Time for Reexamination*, 61 *A.B.A. J.* 579 (1975) (arguing for the elimination of judiciary input over the Rules).

¹² Justice Louis Brandeis objected to the adoption of the Federal Rules of Civil Procedure in 1937, but did not state his grounds for objecting. See *Federal Rules of Civil Procedure*, Introduction, Order of December 20, 1937 (“MR. JUSTICE BRANDEIS states that he does not approve of the adoption of the Rules”). Beginning in 1939, Justice

Despite the absence of discussion and commentary regarding these unequal filing requirements, the disparate requirements almost certainly violate understood norms of constitutional law and tilt the scales of justice in favor of the United States government in federal courts.¹³ This article argues that the disparities place federal litigants on an uneven [498] playing field, giving an advantage to the government that is compounded over time and with repetition. Moreover, the disparities are not necessary to counteract any burden of bureaucratic obstacles faced by the government, as such bureaucracy actually strengthens the government's position of advantage over other litigants.¹⁴

THE HISTORY OF THE FEDERAL RULES OF PROCEDURE

The Federal Rules of Procedure are the joint creation of all three branches of government. In 1934, Congress enacted the Rules Enabling Act,¹⁵ seeking to bring the varying procedural rules applied in America's federal courts into something of national uniformity.¹⁶ The Act delegated the drafting of Rules of Civil Procedure to the Supreme Court, which was to empanel a special committee for that purpose. Executive branch input was obtained by giving the Attorney General a major role in reviewing and transmitting the Rules to Congress.¹⁷

After a painstaking four-year process, this advisory committee of the Supreme Court produced what would come to be known as the *Federal Rules of Civil Procedure* in 1938. The Rules were codified under Title 28 of the U.S. Code and thus speak with the authority of Congress as well as the judiciary. The *Federal Rules [499] of Civil Procedure* were followed by

Hugo Black began inserting objections to the Federal Rules at the end of each order adopting them. Black, later joined by Justice Douglas, repeatedly objected to the adoption of the Rules and various amendments to the Rules, because, *inter alia*, while some of the rules were "simply housekeeping details, many determine matters so substantially affecting the rights of litigants . . . that in practical effect they are the equivalent of new legislation which . . . the Constitution requires to be initiated in and enacted by the Congress." Advisory Notes to the Federal Rules of Civil Procedure (reproduced before Rule 1), Order of January 21, 1963, Section 2. Moreover, insisted Black and Douglas, there might be provisions of the proposed Rules that are unconstitutional, and it might be embarrassing for the Supreme Court "to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." *Id.* at Section 2(d)(3). *See also* Black's dissent to the Order of February 28, 1966, indicating that "the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which . . . we are without constitutional power to give"; Cheryl L. Haas, *Judicial Rulemaking: Criticisms and Cures for a System in Crisis*, 70 N.Y.U. L. Rev. 135, 135 n.4 (1995) (referencing other dissents by Supreme Court justices to the adoption of various Rules or amendments to the Rules).

¹³ *See infra* notes ?? and their accompanying text.

¹⁴ *See infra* notes ?? and their accompanying text.

¹⁵ Rules Enabling Act, ch. 651, 48 Stat. 1064, 1064 (1934) (codified as amended at 28 U.S.C. § 2072 (2000)).

¹⁶ Edward D. Cavanagh, *The Future of Pleading in the Federal System: Debating the Impact of Bell Atlantic v. Twombly: Twombly, The Federal Rules of Civil Procedure and the Courts*, 82 St. John's L. Rev. 877 (2008) (stating that federal courts operated with no uniform rules of procedure for the first 150 years of the federal judiciary).

¹⁷ Under the original Rules Enabling Act, the Rules "were transmitted by the Supreme Court to the Attorney General . . . and in turn, by the Attorney General to Congress on January 3, 1938." Jack B. Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 Brooklyn L. Rev. 1, 4 (1988). Later amendments to the Act imposed the duty directly on the Supreme Court to transmit the Rules to Congress. Representatives of the Attorney General have been continually present on each advisory committee since the enactment of the Enabling Act.

Rules of Criminal Procedure in 1946¹⁸ and *Rules of Appellate Procedure* in 1968.¹⁹ *Rules of Bankruptcy Procedure* came in 1983.²⁰

Today there are five standing Advisory Committees of the U.S. Judicial Conference,²¹ respectively responsible for considering proposed amendments to the *Federal Rules of Civil Procedure*, the *Federal Rules of Criminal Procedure*, the *Federal Rules of Bankruptcy Procedure*, the *Federal Rules of Appellate Procedure* and the *Federal Rules of Evidence*.²² Members of each committee are nominated by the Chief Justice, and each committee has always included at least one representative of the U.S. Attorney General. The advisory committees routinely propose rules, subject them to public comment, and then submit them to the Standing Committee on Rules of Practice and Procedure.²³ Amendments are then submitted to the Judicial Conference, which recommends them to the Supreme Court for approval.²⁴ The Conference is chaired by the Chief Justice of the United States and consists of the Chief Justice, the chief judge of each circuit court of appeals, a district judge from each regional circuit, and the chief judge [500] of the Court of International Trade.²⁵ The Committee's explanatory notes are published in the bound volumes of the respective Federal Rules, and are occasionally cited as authoritative sources when courts must interpret the rules.²⁶

THE RULES OF PROCEDURE AND THE PROBLEM OF UNFAIRNESS

The continuing existence of the filing requirement disparities shows that the advancement of governmental privilege is not always checked by the personal ambitions of government officeholders in supposedly rival branches.²⁷ Where the government class as a whole stands to

¹⁸ See 24 Moore et al., Sec. 601.02 (describing the process of adoption of the Federal Rules of Criminal Procedure).

¹⁹ See 20 Moore et al., Sec. 301 App.100 (discussing and describing the creation of the Rules of Appellate Procedure).

²⁰ See 9 Alan N. Resnick and Henry J. Sommer, Collier On Bankruptcy P. 1001.02[2], at 1001-4.1 to -5 (15th ed. 1996) (describing the origin and adoption of the Federal Rules of Bankruptcy Procedure).

²¹ 28 U.S.C. § 2073 (a)(2) (1988) ("The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed under section 2072 of this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.").

²² See 28 U.S.C. § 331 (1988) (establishing the Judicial Conference of the United States); 28 U.S.C. § 2073 (1988) (authorizing the appointment of committees).

²³ See Lane Matthews, *A Survey of the December 1991 Amendments to the Federal Rules of Civil Procedure*, 59 Tenn. L. Rev. 367 (1992) (detailing the structure of the advisory committees and the process for amending rules).

²⁴ See Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 Law & Contemp. Prob. 229, 235 (1998) ("amending a Federal Rule of Civil Procedure requires a dozen consultations, proceeding from public and bar suggestions to the Advisory Committee, to the Reporter, to various academic and bar organizations, back to the Advisory Committee, to the Standing Committee, back to the Advisory Committee, to public hearings, back to the Advisory Committee, again to the Standing Committee, to the Judicial Conference, to the Supreme Court, and thence to Congress").

²⁵ 28 U.S.C. §2073.

²⁶ Amendments to the Rules of Procedure have been steady and now number in the hundreds. Most published editions of the Rules print the accompanying advisory notes at the bottom of each page. These amendments have varied in purpose and effect, and it would be inaccurate to depict the amendments as proceeding in any general direction. Many amendments to the Rules are along the lines of proofreading edits or language substitutions in the interest of clarity.

²⁷ The common inclusion of nongovernmental entities such as law professors and private attorneys on the various Rule Advisory committees has surely been intended to provide outside (i.e., nongovernmental) perspectives to inform the rulemaking process. What then explains the persistent failure of the outside members to object to the filing requirement disparities? One can only speculate, but perhaps the selection process for picking "outsiders" is not discernably different from the manner in which government insiders are selected. A review of committee membership lists over several decades suggests that the prestigious seats have been typically filled by Ivy League

share [501] in an expansion of governmental power over the citizenry, separations of power among branches become illusory.²⁸ All three branches of government—with the apparent tacit approval of the legal profession—have ratified and advanced rules of procedure that have rigged the federal courts in favor of the state over the citizenry for more than half a century.²⁹

There is another problem with the cooperative, multi-branch manner in which the Rules were drafted and are maintained. With the Supreme Court granting its stamp of approval upon the Rules, few litigators have dared to challenge them. Justices Black and Douglas voiced this very concern in 1963 when they suggested that “to sit in judgment on the constitutionality of rules which we have approved” might be embarrassing for both the Court and anyone seeking to challenge the Rules.³⁰ These warnings have been shown to have been predictive. No provision of the *Rules of Civil Procedure* has been struck down in the seventy years that followed their enactment.³¹ “Since the Supreme Court’s 1941 decision in *Sibbach v. Wilson & Co.*,³² neither courts nor litigators have evinced much interest” in challenging the Federal Rules of Procedure.³³ Why challenge rules, after all, when the rules have supposedly been vetted and reviewed by the very courts that would hear any challenges?³⁴

[502] Since the origin of the Federal Rules of Procedure in the 1930s, some scholars and academics have criticized the Rules on grounds that they improperly delegate lawmaking power to the judiciary.³⁵ Never, however, do the filing-requirement disparities under consideration here

alumni with high-level law firm or political connections. Cf. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 *Law & Contemp. Prob.* 229, 247 (1998) (saying the advisory committees of the early 1970s “were very much old boys’ clubs”). Or perhaps the outsiders lack the “accumulated expertise” of Justice Department representatives, who are more savvy regarding the Rules of Procedure. See Galanter, *infra* note ??? at 100. Being “one-shotters,” or short-time participants in Judiciary politics, they may have little interest in zealously battling over rules on behalf of common individuals who rarely confer with them, unlike government representatives who are well-equipped to advocate on behalf of government constituents. Cf. Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process under Federal Rule 4(c)*, 73 *Va. L. Rev.* 1183, 1197 (1987) (noting that the federal marshal “lobbied for rules to preserve the need for his services”). Because the Chief Justice appoints members to the committees for three-year terms with an option for one-term renewals, the outsider members have little opportunity to gather enough expertise to challenge government representatives. See Winfred Brown, *Federal Rulemaking: Problems and Possibilities* 70 (1981).

²⁸ Cf. William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1873, 1878 (2002) (saying the commitment of policymakers to such equalizing mechanisms as appointment of counsel and legal aid have been “underwhelming”).

²⁹ One of the Constitution’s principal Framers, James Wilson, observed in the 1790s that judges tend to rule in ways that expand their own jurisdiction when questions of jurisdiction arise before them. See 2 James Wilson, *Collected Works of James Wilson* 945 (Kermit L. Hall and Mark David Hall, ed. 2007). Obviously, the expansion of judicial jurisdiction is in many ways the expansion of general governmental jurisdiction, so judges tend to favor governmental power over individual sovereignty. Wilson noted that this general principle, known in Latin as “ampliare jurisdictionem,” “is natural, and will operate where it is not avowed.” *Id.*

³⁰ See *supra* note ????

³¹ See *id.* (speaking of the Supreme Court’s “failure to strike down any [Rule] in the intervening fifty years” as of 1988).

³² 312 U.S. 1 (1941).

³³ Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 *Notre Dame L. Rev.* 693 (1988).

³⁴ Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 *Notre Dame L. Rev.* 693 (1988).

³⁵ In fact, this perceived constitutional problem stalled the Rules Enabling Act for some 15 years before its enactment. Senator Walsh of Montana, among others, argued that Congress did not have constitutional power to delegate such rulemaking to the judiciary. In response to such opposition, Senator Cummins added language in the bill stating that “[s]aid rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” See

appear to have been subjected to any concerted or focused challenge or objection by lawyers on grounds that they game federal courts in favor of the United States. It appears that only two individuals—both nonlawyers—have ever challenged any of the filing requirement disparities in court. In 1983, a *pro se* litigant sued Bureau of Alcohol, Tobacco and Firearms agents in their individual and official capacities, asserting that in their individual capacities the agents must answer within 20 days. The U.S. District Court for the Southern District of Texas and the U.S. Fifth Circuit both held that the agents were entitled to the government (60-day) answer period even in their individual capacities.³⁶ Another *pro se* litigant named Leonard A. Peth once challenged the government’s 60-day allowance for answering a civil complaint with the argument that the three-fold increase in time for government agents conferred an unconstitutional “title of nobility” upon the government. The U.S. District Court for the Eastern District of Wisconsin summarily denied the challenge in 1985.³⁷ No analysis was given.³⁸

[503] THE CONCEPT OF EQUAL PROCEDURES IN ANGLO-AMERICAN LAW

Upon their plain face, the filing requirement disparities violate the basic principle that parties before the courts are to be equals in an adversarial system. Constitutional standards grounded in the Equal Protection Clause, the Due Process Clauses of the Fifth and Fourteenth Amendments, and Article III itself all provide support for the mandate of symmetry and equality in court procedures. Under current versions of the Federal Rules of Civil, Appellate, and Supreme Court Procedure, litigants who face the United States government in federal court are literally playing against a stacked deck, with an opponent who enjoys a threefold advantage in time allowed to make some important decisions, and a two- or three-fold time advantage when deciding whether to appeal.³⁹ This governmental filing advantage has almost certainly helped transform the United States from a beacon of freedom into a land of expanding federal jurisdiction over national affairs, exploding prison populations, and federal conviction rates as high as 95 percent in recent years.⁴⁰

The idea that fair courts require equal rights of procedure has been a component of Anglo-American common law for centuries. James Wilson, one of only six people who signed both the Declaration of [504] Independence and the U.S. Constitution (and a member of the first panel of the U.S. Supreme Court), wrote in the 1790s that the concept of common law itself is

Martin H. Redish and Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 Minn. L. Rev. 1303, 1311-12 (2006). See also *id.* at 1303 (saying “many of the Federal Rules have a dramatic impact on fundamental socio-political and economic concerns: the allocation of governmental resources, the redistribution of private wealth, the effectiveness of legislatively imposed behavioral proscriptions, and concerns of fairness and equality,” and thus are “substantive,” rather than merely procedural in nature, and require resolution in the legislative branch rather than the judiciary).

³⁶ *Dickens v. Lewis*, 750 F.2d 1251 (5th Cir. 1984).

³⁷ *Peth v. Breitzman*, 611 F.Supp. 50, 53 (E.D.Wis. 1985).

³⁸ The disparities have also reached the appellate courts in some instances where consolidation of multiple cases into one case included a government party. In *Cablevision Systems v. Motion Picture Ass’n of America*, a 1987 D.C. Circuit decision, a three-judge panel that included future Supreme Court Justice Ruth Bader Ginsberg determined that the 60-day (government) deadline for filing an appeal would apply where even one party to a consolidated case was a government agency. 808 F.2d 133 (D.C. Cir. 1987). The *per curiam* opinion is remarkably devoid of reflection regarding the purposes, fairness, or merits of the filing requirement disparity. By clear implication, however, the Court found that the 30-day difference in appeal deadlines did not “operate to abridge, enlarge or modify the substantive rights parties would have if the cases proceeded separately.”

³⁹ See *supra* notes ?? and their accompanying text.

⁴⁰ See *infra* notes ??? and their accompanying text.

grounded in equality of procedure. “[T]he same equal right, law, or justice,” wrote Wilson, is “due to persons of all degrees.”⁴¹ Several American colonies required equal treatment for all parties before courts, regardless of wealth.⁴² For example, the Pennsylvania Charter of Privileges (October 28, 1701) stated in Section IV that “all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors”). Stephen Hopkins, Rhode Island’s eminent signer of the Declaration of the Independence, wrote in 1764 that “just and equal laws” were among the fundamental rights of the American colonists.⁴³

According to Yale Law Professor Akhil Amar, the Framers who debated the criminal procedure provisions of the Bill of Rights were obsessed with procedural fairness. “Notions of basic fairness and symmetry” were the mainstay of the Sixth Amendment.⁴⁴ “In formulating the precise wording of the compulsory process clause,” according to Amar, “Madison seems to have borrowed from Blackstone’s *Commentaries*, which also explicitly embraced the symmetry principle.”⁴⁵ The First Congress drafted a statute defining the rights of capital defendants in 1790,⁴⁶ again emphasizing what Amar calls “the symmetry principle.”⁴⁷

[505] Significantly, the Constitution’s Framers firmly rejected the lopsided inquisitorial court procedures that accompanied the notorious British Star Chamber court of the seventeenth century.⁴⁸ When colonial inquisitors repeatedly harassed and investigated John Hancock’s shipping business, Boston newspapers proclaimed that Boston was under “military rule” and that such proceedings were “more alarming than any that had appeared to the world, since the abolition of the Court of Star Chamber.”⁴⁹ In THE FEDERALIST No. 78, widely regarded as a primary source of illumination regarding the original intent behind the Constitution’s judiciary provisions, Alexander Hamilton noted the toxicity of “unjust and partial laws.” Or, as Justice Stephen J. Field wrote in 1887, “[b]etween [the accused] and the state the scales are to be evenly held.”⁵⁰

EQUAL RIGHTS OF PROCEDURE UNDER AMERICA’S ADVERSARIAL SYSTEM

Equal court procedures are not simply an end; they are a means to creating accurate and sound court outcomes.⁵¹ “Our adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants; thus

⁴¹ James Wilson, 2 *Collected Works of James Wilson* 749 (Kermit L. Hall and Mark D. Hall, editors (2007)

(quoting Richard Woodeson, *Elements of Jurisprudence* (1783) (referencing the code of King Edward the Elder).

⁴² See Paul S. Reinsch, *The English Common Law in the Early American Colonies*, in 1 *Selected Essays on Anglo-American Legal History* 367, 404-05 (1907).

⁴³ Stephen Hopkins, *The Rights of Colonies Examined*, pp. 45-61 (1764) in *American Political Writing During the Founding Era 1760-1805*, Vol. 1, 45 (Charles S. Hyneman and Donald S. Lutz 1983).

⁴⁴ Akhil R. Amar, *The Bill of Rights: Creation and Reconstruction* 116 (1998).

⁴⁵ Amar at 116.

⁴⁶ Federal Crimes Act of 1790, ch. 9, 1 Stat. 112, 118-19.

⁴⁷ Amar at 116.

⁴⁸ Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim’s Rights With the Due Process Rights of the Accused*, 23 St. John’s J.L. Comm. 167 (2008) (discussing the Framers’ fear of one-sided procedures associated with the British Star Chamber); Thomas Y. Davies, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 Brooklyn L. Rev. 105, 206-17 (2005) (discussing the Framers’ antagonism against inquisitorial justice systems).

⁴⁹ Davies, *id.* at 122 n.52 (quoting from colonial sources).

⁵⁰ *Hayes v. Missouri*, 120 U.S. 68, 70 (1887).

⁵¹ *Id.* at 1874.

the adversary system requires, if it is to achieve these goals, some measure of equality in the litigants' capacities to produce their proofs and arguments."⁵²

"[O]ur adversary system presupposes," wrote Justice Potter Stewart, that "accurate and just results are most likely to be obtained through the [506] equal contest of opposed interests."⁵³ Thus, he continued, the State's interest in child's welfare may be best served by even-handed hearings in which both parents and the State are represented by counsel, without whom the contest of interests may become unwholesomely unequal.⁵⁴ The Supreme Court also recognized this important benefit of impartial adversarial procedures in *Little v. Streater*,⁵⁵ in which the Court held that procedures that denied DNA testing to an indigent father denied due process in part because they increased the likelihood of inaccurate paternity findings.⁵⁶

But for an adversarial system to function properly, according to William Rubenstein, "the parties must be somewhat equally capable of producing their cases."⁵⁷ Under the American constitutional structure, "[l]aw would not be law as we know it without the requirement of evenhandedness."⁵⁸ If one party has more time and resources to develop its cases than others, the law is subverted by the accumulation of inaccurate or even deceptive court findings.⁵⁹ Even a filing deadline advantage of 20 or 30 days, or the ability to file *amicus* briefs without first gaining permission when opponents must draft motions and seek permission, can decrease the "accuracy and acceptability of adjudicative outcomes."⁶⁰

It must be recognized that the government's additional time for filing pleadings translates into more drafting time, more research time, and more time for government lawyers to think about and confer over litigation strategy. The government's greater ease of submitting *amicus curiae* briefs means lower litigation costs for the government compared [507] to other parties. The filing requirement disparities grant the government a privileged status that is inconsistent with a fair adversarial system.

The unequal filing provisions mandated by the Federal Rules of Procedure mean that disputes with the United States government (and in some circumstances, state governments) are always litigated from an unequal footing. When combined with extraprocedural factors such as an increasingly instrumentalist Congress,⁶¹ an empowered executive branch,⁶² a prosecution-

⁵² William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1867-68 (2002).

⁵³ *Lassiter v. Dep't of Soc. Svcs.*, 452 U.S. 18, 28 (1981).

⁵⁴ *Lassiter v. Dep't of Soc. Svcs.*, 452 U.S. 18, 28-30 (1981) (stating that inaccurate findings are a likely consequence of unequal procedural rules).

⁵⁵ *Little v. Streater*, 452 U.S. 1, 14 (1981).

⁵⁶ *See id.* For another Supreme Court decision recognizing the importance of symmetrical procedures in the generation of accurate court rulings, *see Lindsey v. Normet*, 405 U.S. 56 (1972) (striking down an Oregon statute requiring tenants seeking to appeal evictions to post a double bond).

⁵⁷ *Id.*

⁵⁸ Barbara Flagg and Katherine Goldwasser, *Fighting for Truth, Justice, and the Asymmetrical Way*, 76 *Wash. U. L.Q.* 105 (1998).

⁵⁹ Pankratz at 1097 ("All citizens have a right to "neutral access" to the courts—that is, access sufficient to provide citizens a reasonable opportunity to have the law neutrally applied to them in fact").

⁶⁰ *Id.*

⁶¹ *See, e.g., Go Directly to Jail: The Criminalization of Almost Everything*, edited by Gene Healy (2004) (collecting essays on the blurring lines between commoners and criminals and suggesting that virtually everyone is now subject to arrest and federal prosecution).

⁶² *See, e.g., Jonathan Macey, The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law: A Symposium on Executive Power*, 2006, 115 *Yale L.J.* 2416 (2006) (discussing the ascendancy of the Presidency and the executive branch).

friendly bar and bench,⁶³ and an apathetic electorate, the filing requirement disparities contribute to the growing power of the government over individuals, businesses and personal affairs.⁶⁴

THE FILING REQUIREMENT DISPARITIES VIOLATE DUE PROCESS AND EQUAL PROTECTION

It seems axiomatic that the original meaning of *due* process included a requirement of *equal* process.⁶⁵ Judge Robert Bork, whose scholarship [508] has generally cast the Fourteenth Amendment's due process and equal protection clauses in extremely limiting terms, has suggested that the Framers of the Fourteenth Amendment intended the two provisions only as guarantees of fair and equal court procedures.⁶⁶ According to this view, fair procedure was originally considered to be the central meaning of both clauses.⁶⁷ Indeed, according to John Lebsdorf, "[e]qual protection analysis [is] often interchangeable with due process analysis."⁶⁸

Although the courts have been reluctant to strike down procedural rules on equal protection grounds,⁶⁹ they have invalidated rules that explicitly game the courts in favor of one

⁶³ See, e.g., Rodney J. Uphoff, *Misjudging: On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System* 7 Nev. L.J. 521, 543 (2007) (stating that a "presumption of guilt, prosecution perspective not only affects the manner in which many judges rule on motions, evaluate witnesses, and exercise their discretion, it also adversely affects the willingness of many judges to police law enforcement agents and prosecutors"); Luke Bierman, *The Dynamics of State Constitutional Decision-making: Judicial Behavior at the New York Court of Appeals*, 68 Temp. L. Rev. 1403 (1995) (documenting the pro-prosecution bias of most New York state judges).

⁶⁴ See, e.g., Harry Litman, *Pretextual Prosecution*, 92 Geo. L.J. 1135, 1138 (2004) (noting that the federal government's "scope has expanded markedly in the last fifteen years as the federal government increasingly has acquired jurisdiction over traditionally state-law crimes").

⁶⁵ Eugene Allen Gilmore, William Charles Wermuth, eds., *Modern American Law: A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law and Procedure, Accompanied by Leading Illustrative Cases and Legal Forms* Vol. 11, pp. 103-106 (1917) (stating the primary principle of the Fourteenth Amendment's Equal Protection Clause is to ensure that all parties are treated alike).

⁶⁶ See Robert Bork, *The Tempting of America* 43 (1990) (saying that the due process clause "was designed only to require fair procedures in implementing laws"). The noted scholar Herbert Wechsler noted that "due process" might have been originally confined to "a guarantee of fair procedure . . . the analogue for us of what the barons meant in Magna Carta." Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, in *Principles, Politics, and Fundamental Law* 26 (1961).

⁶⁷ See Pankratz at 1100 (discussing the original meaning of the due process clause); John Lebsdorf, *Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 588 (1984) ("Although it is unclear just what meaning the Framers of the Bill of Rights placed on the words "due process of law," by the time of the fourteenth amendment the phrase was widely understood to require fundamentally fair judicial procedures").

⁶⁸ John Lebsdorf, *Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 589 (1984) (comparing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (opinion of the Court) (applying due process analysis) and *Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1971) (opinion of the Court) (applying due process analysis), with *Logan v. Zimmerman Brush Co.*, at 438-42 (separate opinion of Blackmun, J.) (applying equal protection analysis) and *Boddie v. Connecticut* at 383-86 (Douglas, J., concurring) (applying equal protection analysis), and at 386-89 (Brennan, J., concurring) (applying equal protection analysis)). Another Supreme Court decision, *Stanley v. Illinois*, 405 U.S. 645 (1972) applied both due process and equal protection analyses to address a similar problem.

⁶⁹ William B. Rubenstein has collected a large number of cases upholding disparate procedural rules against equal protection challenges. See Rubenstein, *The Concept of Equality in Civil Procedure*, 23 Cardozo L. Rev. 1865, 1881, 1912 n.168-82 (2002). Some of Rubenstein's cases and descriptions are as follows: *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978) (rejecting equal protection challenge to statutory scheme that required only medical malpractice claims to be filtered through a medical review panel); *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983) (same); *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (same); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982) (rejecting equal protection challenge to New Jersey scheme that removed the statute of limitations in suits against unrepresented

side over others in litigation.⁷⁰ In *Boddie v. Connecticut*, the U.S. Supreme Court struck down filing fees for indigents seeking divorce on grounds that such fees strip poor citizens of access to the legal system as required by the Constitution.⁷¹ The Court's holding was based on both the Equal Protection and [509] Due Process clauses.⁷² The Court has also held that such constitutional principles require that an indigent defendant is entitled to a free transcript of his trial court proceedings to prepare his appeal.⁷³

THE IMPACTS OF PROCEDURAL FILING DISPARITIES

The seemingly meager time advantages (*e.g.*, 60 days versus 20 days for filing civil answers; 30 days versus 10 days for filing notices of criminal appeals) provided to the government by the Federal Rules may strike some observers as trivial or unimportant. In practice, most federal courts readily grant continuances, allowing parties extra time to prepare filings.⁷⁴ Likewise, the Supreme Court rarely denies a motion to file an *amicus* brief.⁷⁵ However, it is highly likely that the disparities create real differences in the outcomes of some cases. As the Supreme Court has recognized, seemingly minor impediments to fair procedures and equal treatment (such as a \$1.50 poll tax on voters) may—in the aggregate—create

foreign corporations but not in suits against New Jersey corporations or foreign corporations with New Jersey representatives); *Vaughan v. Deitz*, 430 S.W.2d 487 (Tex. 1986) (rejecting equal protection challenge to statute of limitations that differentiated between residents and foreigners); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648 (1992) (rejecting equal protection challenge to venue rule that applied selectively to out-of-state corporations); (*Cincinnati St. Ry. Co. v. Snell*, 193 U.S. 30 (1904) (rejecting equal protection challenge to transfer rule available only to plaintiff and not defendant); *Bain Peanut Co. v. Pinson*, 282 U.S. 499 (rejecting equal protection challenge to Texas venue statute that distinguished between corporate and individual defendants); *Mitchell v. Farcass*, 112 F.3d 1483 (11th Cir. 1997) (rejecting equal protection challenge to federal statute that treats *in forma pauperis* filings by prisoners different from those by non-incarcerated litigants); *Manes v. Goldin*, 400 F. Supp. 23 (E.D.N.Y. 1950) (three-judge court) (rejecting equal protection challenge to New York state scheme that maintained higher filing fees for civil cases filed in Supreme Court in New York City than elsewhere throughout New York state); *Aeschliman v. State*, 973 P.2d 749 (Idaho 1999) (rejecting equal protection challenge to statute that limited discovery in post-conviction relief cases); *Reed v. Schwab*, 600 P.2d 387 (Ore. 1979) (*en banc*) (rejecting equal protection challenge to Oregon court rule that permitted appellate oral argument only by lawyers, while *pro se* litigants could appear only by submission); *Kreft v. Fisher Aviation*, 264 N.W.2d 297 (Iowa 1978) (rejecting equal protection challenge to default judgment scheme which provided different forms of default notice to different types of defendants); *Missouri v. Lewis*, 101 U.S. 23 (1879) (allowing Missouri to provide different appellate structures for different parts of the state); *Mallett v. North Carolina*, 181 U.S. 589 (1901) (upholding similar regional appellate differences in North Carolina).

⁷⁰ See, *e.g.*, *Power Mfg. Co. v. Saunders*, 274 U.S. 490 (1927) (finding equal protection violation in venue rule that applied selectively to foreign corporations); *Philco-Ford Corp. v. Holland*, 548 S.W.2d 828 (Ark. 1977) (finding equal protection violation in venue statute that applied selectively to out-of-state corporations); *Cornett v. Donovan*, 51 F.3d 894, 899 (9th Cir. 1995) (requiring state to provide institutionalized mentally ill an attorney for pleading purposes but no more; stating that such a rule equalizes the position of the institutionalized indigent with that of the non-institutionalized indigent).

⁷¹ *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁷² See *id.*

⁷³ *Griffin v. Illinois*, 351 U.S. 12, reh'g denied, 351 U.S. 958 (1958).

⁷⁴ Cf. *Robin E. Abrams, Note, A Capital Defendant's Right to a Continuance Between the Two Phases of a Death Penalty Trial*, 64 N.Y.U. L. Rev. 579 (1989) (discussing the factors involved in seeking and obtaining continuances in a variety of circumstances).

⁷⁵ *Id.* at 762 (“The Court's current practice in argued cases is to grant nearly all motions for leave to file as *amicus curiae* when consent is denied by a party”).

drastically unfair and unequal outcomes, with profound effects upon power and politics in American life and culture.⁷⁶

When compounded over time and jurisdictions since the 1930s, differing deadlines for drafting briefs and pleadings have translated into millions of hours of extra time for Justice Department lawyers to research, consider and prepare litigation documents. The disparities have almost certainly contributed to profound inequalities exhibited between Americans of different social, income and political strata in the [510] past seven decades,⁷⁷ and to the steady growth of prisons and convict populations that has plagued the United States over the past century.⁷⁸

We know from empirical evidence that the filing of *amicus curiae* briefs on behalf of the government is associated with successful case outcomes for the government in the U.S. Supreme Court. Over most of the past century, *amicus* filers have had a success rate of around .550, “that is, they filed briefs supporting the winning side 55% of the time.”⁷⁹ And the Solicitor General—the Justice Department official who represents the United States before the Supreme Court⁸⁰—is by far the most consistently successful *amicus* brief filer of all time.⁸¹ Indeed, the Supreme Court’s opinions have cited the Solicitor General’s *amicus* briefs in more than 40 percent of the cases where the Solicitor filed a brief. Moreover, the Supreme Court’s adoption in 1939 of procedural rules making it easier to file pro-government *amicus* briefs than anti-government *amicus* briefs is associated with increasing success rates for the U.S. Solicitor General over the past half-century.⁸² The frequency of the Court’s references to Solicitor General *amicus* briefs has risen each decade.⁸³ As [511] briefs supporting the government became privileged and more *amicus* briefs have been filed, the Solicitor General has become the Court’s closest friend and by far its most successful one.⁸⁴ “In contrast . . . no such pattern of increased incidence of citation”

⁷⁶ Harper v. Virginia Bd. Of Elections, 383 U.S. 663, 667-68 (1966) (striking down a poll tax of \$1.50 on all Virginia residents as discriminatory against the indigent’s right to vote).

⁷⁷ See, e.g., Jeffrey H. Reiman, *The Rich Get Richer and the Poor Get Prison* (1999) (discussing the wide gaps between the treatment of rich and poor in American criminal justice). Although the Supreme Court has recognized that court access is an important equalizing device for the poor and minorities, see *NAACP v. Button*, 371 U.S. 415, 430 (1963) (stating that “litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances”), the Court’s government-rigged rules of procedure almost certainly help support and sustain legal inequality for the disadvantaged in America.

⁷⁸ See, e.g., Harvey Silvergate, *Three Felonies a Day: How the Feds Target the Innocent* (2009) (describing the growing power of federal prosecutors to imprison people for victimless offenses); Marc Mauer, *Race to Incarcerate* (2006) (detailing the growth of America as a mass-incarceration state during the past 30 years).

⁷⁹ *Id.* at 769-70.

⁸⁰ 28 U.S.C. §518(a) (mandating the Solicitor General to “conduct and argue suits and appeals in the Supreme Court...in which the United States is interested”).

⁸¹ Joseph D. Kearney and Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 751 (2000).

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See Karen O'Connor and Lee Epstein, *Amicus Curiae Participation in U.S. Supreme Court Litigation: An Appraisal of Hakman's "Folklore,"* 16 Law & Soc. Rev. 311, 317 (1981) (discussing the increase in the filing of *amicus* briefs from 18.2% of noncommercial cases before the Supreme Court in the years 1941 to 1952, to 53.4% of such cases between 1970 and 1980); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 Pol. Res. Q. 505, 507, 522 (1998) (discussing the success of the Solicitor General before the Supreme Court); Reginald S. Sheehan *et al.*, *Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court*, 86 Am. Pol. Sci. Rev. 464, 466 (1992) (stating that the U.S. Solicitor General enjoys “very large net advantages against all other parties” before the Supreme Court).

exists for the other major *amicus* filers such as the ACLU or the U.S. Chamber of Commerce.⁸⁵ But the success rate began to increase only after the pro-government filing requirement disparities were imposed in 1939.⁸⁶ The rate was less than 50 percent prior to 1937; afterward, it grew to more than 50 percent and has risen each decade.⁸⁷

Of course, the filing requirement disparities are not the only structural advantages enjoyed by the government in federal court litigation. The government has been the unrecognized beneficiary of recent fee-raising and access-limiting measures which have fallen on all parties except the government during the past several years.⁸⁸ The bias of federal criminal courts in favor of the government has been frequently observed.⁸⁹ [512] Despite its purported orientation toward fairness and equality, the justice system “proves so disproportionately harmful to minority and indigent defendants” that inequality of outcome is one of its most visible attributes.⁹⁰ But the filing requirement disparities must surely play some role in what Christopher A. Bracey calls the “ongoing crisis of legitimacy in the criminal justice process.”⁹¹

ARE THE FILING REQUIREMENT DISPARITIES NECESSARY TO COUNTER STRUCTURAL DISADVANTAGES FACED BY THE U.S. GOVERNMENT?

What of the notion that the Justice Department of the United States government—by far the largest, wealthiest and most powerful law firm that has ever existed on earth—is at such a structural disadvantage on account of its bureaucracy that the differential filing requirements are necessary to counteract such disadvantage? This proposition has been offered as a possible explanation for the filing requirement disparities by staff at the Administrative Office of the U.S. Courts.⁹² As this theory goes, the “layers of bureaucratic approvals” that must be navigated before attorneys in the Justice Department are allowed to pursue a particular tactical track place time burdens upon the government not shouldered by private-sector parties.⁹³

At first glance, such a notion might make logistical sense. If attorneys for the Justice Department must communicate with and seek permission from superior officers in Washington, D.C. or elsewhere before [513] responding to events in district and appellate courts, such

⁸⁵ *Id.* at 760.

⁸⁶ *Id.* at 761 (“The Court’s formal rules regarding *amicus* participation have in broad outline remained essentially unchanged since they were first promulgated in 1939”).

⁸⁷ *Id.* at 770 (citing Puro).

⁸⁸ See, e.g., Martin D. Beier, *Economics Awry: Using Access Fees for Caseload Diversion*, 138 U. Pa. L. Rev. 1175, 1195 (1990).

⁸⁹ See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. Rev. 785, 792 (1970) (saying “the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect”). Trial judges and federal magistrates, according to Amsterdam, “are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work” of prosecuting and processing criminal defendants. *Id.*

⁹⁰ Bracey at 720. See also David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* 132-53 (1999) (demonstrating the disparity in punishment received by African-American offenders vis-à-vis their white counterparts).

⁹¹ Bracey at 720.

⁹² See *supra* note ?????; interview by the author with Jeff Barr, Administrative Office of the U.S. Courts, November 21, 2008.

⁹³ See *id.*

communications might delay tactical responses. For example, if a government lawyer facing a civil rights lawsuit arising in a federal prison must seek a superior's determination about how to defend the case, the time required for this exchange might place the government at something of a disadvantage and warrant a greater allotment of time for the government to respond to pleadings. Delays from this type of bureaucratic coordination may have been especially prevalent when the Federal Rules were originally promulgated in the pre-fax, pre-email era of the mid-twentieth century.

There are two points regarding this proposition that merit consideration. First, no known empirical fact-finding has been conducted to determine whether such (alleged) bureaucratic inefficiency actually does place the U.S. Justice Department at a disadvantage or, if so, whether the given court filing advantages are appropriate (*e.g.*, whether 40 days' advantage for filing civil answers is more appropriate than, say, 5 days). Second, such a proposition belies decades of research into political economy and organizational dynamics that suggests that large, repeat litigants actually enjoy decisive advantages in litigation.

According to Max Weber's theories of bureaucracy and rationalization, systems of interaction that are continuous over numerous repetitions naturally become more efficient.⁹⁴ And because large, powerful bureaucracies are capable of systematically substituting employees and material, and engage large numbers of duty-bound workers in a predetermined chain of command that maximizes the likelihood of completion of multiple tasks, they can overcome a wide variety of challenges that would defeat smaller organizations.⁹⁵ In many real-world circumstances, the impersonal, machine-like nature of large bureaucracies is a source of strength and speed rather than weakness or sloth.⁹⁶

[514] Large bureaucracies are expensive and sometimes cumbersome (and thus not the best business models for all circumstances); but when deployed over systems of continuous interaction such as the federal courts, they create efficient machines for accomplishing multiple complicated tasks simultaneously. Weber's theory of bureaucracy explains how the Army payroll can be disbursed in a timely, scheduled manner even if the Army is facing battlefield setbacks on multiple fronts, how General Motors can smoothly shift factory resources to produce more or fewer vehicles in response to market conditions,⁹⁷ and how Microsoft can quickly adjust retail prices of its software products so as to maximize numbers of purchasers and thereby alter the direction of the market.⁹⁸

In an insightful (and frequently referenced) 1974 article, Marc Galanter suggested that repeat litigants such as the United States Justice Department develop profound advantages over their competitors during the course of repeated litigations.⁹⁹ The grinding regularity of constant

⁹⁴ See Reinhard Bendix, *Max Weber: an intellectual portrait* (1977) (detailing Max Weber's theoretical considerations of bureaucratic organizational structures).

⁹⁵ See Michael B. Katz, Michael J. Doucet, and Mark J. Stern, *The Social Organization of Early Industrial Capitalism* 380-89 (1982) (discussing the advantages of bureaucracy in creating large, mission-focused institutions).

⁹⁶ See *From Max Weber: essays in sociology* (edited and translated by Hans H. Gerth and C. Wright Mills) (1991) (reprinting translations of Max Weber's essays on bureaucracy and rationalization).

⁹⁷ See Alfred Pritchard Sloan, John McDonald and Catharine Stevens, *My Years With General Motors* 199-205 (1990) (discussing the advantages GM enjoyed from its large array of production facilities when market conditions demanded different production schedules).

⁹⁸ See Randall E. Stross, *The Microsoft Way: The Real Story of How the Company Outsmarts its Competition* (1997) (detailing the company's information-intensive manner of monitoring retail demands for determining optimum pricing).

⁹⁹ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974).

litigation generates a momentum in favor of repeat players, wrote Galanter, explaining why the “haves” tend to dominate the “have-nots” in both civil and criminal litigation.¹⁰⁰¹⁰¹

The Justice Department—“a repeat player *par excellence*”¹⁰²—benefits from its massive economy of scale, enjoying low start-up costs for addressing multifaceted cases, issues and arguments.¹⁰³ The Department’s bureaucratic organizational structure means it can coordinate an array of personnel for litigation having profound public impacts. Its vast [515] filing cabinets of memoranda allow Assistant U.S. Attorneys to quickly redraft briefs used in one district to suit the facts and circumstances of cases in other districts.

Most importantly, the U.S. Justice Department’s regularity of appearance allows it to “structure the next transaction” while litigating its current cases.¹⁰⁴ It can adopt “strategies calculated to maximize gain over a long series of cases, and influence the making of rules through accumulated expertise.”¹⁰⁵ This greater range of focus allows the government to continually expand legal rules that increase government power over American life.¹⁰⁶ By contrast, most private parties are “one-shotters” who focus only on the outcomes of their own cases and have little interest in establishing rules for generations afterward.

In short, repeat litigants impose ever-increasing control over *the system*, as opposed to individual case outcomes. Over time, wrote Galanter, repeat players are able to influence the body of “precedent cases” to be skewed in their favor.¹⁰⁷ Finally, repeat players are able to “concentrate their resources on rule-changes that are likely to make a tangible difference. They can trade off symbolic defeats for tangible gains”¹⁰⁸ and the ability to invest resources necessary to secure the “penetration of rules favorable to them.”¹⁰⁹

To the extent that “bureaucratic” problems—those associated with multi-exchange, decision-based delays—do represent burdens to litigators, [516] such burdens are *commonly shouldered by private parties more than government parties*. Private-sector parties are often in a far worse position than federal prosecutors to answer civil complaints or criminal indictments because they lack a clear avenue for identifying and retaining counsel with the special expertise required to litigate their cases effectively. By contrast, when the government is faced with a legal claim or pleading, the government’s counsel of record is often predetermined. When it is not, the Justice Department can readily delegate cases to Assistant U.S. Attorneys having specific knowledge or experience in the policy areas at issue.

¹⁰⁰ Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc’y Rev. 95, 95 (1974).

¹⁰¹ See *id.* at 98-107.

¹⁰² See Rebecca Mae Salokar, *The Solicitor General: The Politics of Law* 31 (1994) (referencing Galanter’s research).

¹⁰³ See Galanter, *supra*.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 99-100.

¹⁰⁶ See Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 Gonzaga L. Rev. 1 (2009) (detailing the long history of decline of Fourth Amendment protections).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 103. See also Thomas W. Merrill, *High-Level, “Tenured” Lawyers*, 61 Law & Contemp. Probs., Spring 1998, at 95-99 (suggesting that government attorneys sometimes act against their short-term interests in order to enhance their long-term access to the federal judiciary); Linda R. Cohen and Matthew Spitzer, *Government Litigant Advantage: Implications for the Law*, 28 Fla. St. U. L. Rev. 413 (2000-2001) (documenting numerous instances where the Justice Department opted not to appeal losses in lower courts for reasons of long-term strategy and overarching policy concerns).

¹⁰⁹ *Id.* at 103.

Remember that the Justice Department’s advocacy for its client (“the United States”) is by conceptual proxy. Never do government lawyers actually need to meet or negotiate with their client(s). But attorneys for private litigants must certainly do so, and this requirement adds a very real and complicating “bureaucratic” burden to the work of private lawyers that is not shouldered by government lawyers. In many situations, attorneys for criminal defendants must scramble to meet with clients (who may be in prison or otherwise of restricted mobility), relatives of clients who might hold the purse strings for payment, and/or defense witnesses. Unlike government lawyers—who are generally supported by investigative teams of FBI, DEA or BATFE agents—private lawyers often moonlight as their own investigators, engaging in time-consuming detective work in addition to their legal advocacy. A dozen or more in-person or telephone conversations may be called for before a private attorney can properly complete a legal filing.

The Justice Department’s increasing dominance over the direction of federal jurisprudence is one of the most striking features of American law since the nineteenth century. In the Department’s 140-year history, criminal conviction rates have increased from general averages often below fifty percent¹¹⁰ in the 1800s to generally above 90 percent by [517] the twenty-first century.¹¹¹ The number of federal prisoners has grown from around 1,000¹¹² in the 1880s¹¹³ to more than 190,000 by 2006,¹¹⁴ a multiple of 190 times, while the U.S. population increased by only six times.¹¹⁵ Federal sentences have generally increased over time,¹¹⁶ and the

¹¹⁰ It is difficult to reconstruct jury conviction rates from the mid-1800s, but sources indicate that American juries in most jurisdictions generally declined to convict in criminal cases more than half the time during much of the nineteenth century. *See, e.g.*, Roger Lane, *Murder in America: A History* (1997) (suggesting that conviction rates in most American jurisdictions were generally between 30 and 50 percent prior to the twentieth century). *See also* Michael S. Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (1980) (reporting conviction rates from South Carolina and Massachusetts during portions of the nineteenth century). Although Hindus reports trial conviction rates of 86 percent and 72 percent for Massachusetts and South Carolina, respectively, he argues that grand jury practice in both states provided important case screening. The “effective conviction rate” (combined grand jury and trial jury) was 66 percent for Massachusetts and 31 percent for South Carolina. *Id.* at 90. Half or more of South Carolina murder, arson and white-collar-crime defendants were acquitted at trials during the period 1800-1860. *See id.* Going back further in time yields even lower conviction rates. *See* Robert J. McWhirter, *Baby, Don’t Be Cruel: Part 2: What’s So “Cruel & Unusual” About the Eighth Amendment?*, 46 *AZ Attorney* 38 (2010) (“acquittal rates for homicide cases in the 14th century were 80 percent to 90 percent. Moreover, from the end of Edward I’s reign until the middle of the 15th century, the conviction rate for indicted defendants was between 10 percent and 30 percent”).

¹¹¹ *See, e.g.*, Amy Bach, *Ordinary Injustice: How America Holds Court* 138 (2009) (saying federal conviction rates are around 90 percent); Douglas W. Hillman, *Judicial Independence: Linchpin of Our Constitutional Democracy*, 76 *Mich. B.J.* 1300, 1302 (1997) (stating that the federal conviction rate is around 95%). Compare these high federal conviction rates with the slightly lower rates in some state jurisdictions. *See, e.g.*, David E. Rovella, *Convictions Slowly Rising: Criminal Court Juries Are Not Increasingly Nullifying, A New Study Shows*, *Nat’l L.J.*, June 30, 1997, at A6 (noting that New York’s conviction rate is 75% and Texas’s conviction rate is 84%).

¹¹² There were no federal prisons until the late 1890s, so people convicted in federal courts were housed in state prisons and jails. 1,027 federal inmates were reported nationwide in 1885. *See* Gregory L. Hershberger, *The Development of the Federal Prison System*, 43 *Fed. Probation* 13 (1979).

¹¹³ Defendants convicted in court for violating federal laws were held in state prisons and jails prior to the 1890s when the first federal prison was built at Leavenworth, Kansas. *See* Mary Bosworth, *The U.S. Federal Prison System* (2002).

¹¹⁴ William J. Sabol, Heather Couture and Paige M. Harrison, *Prisoners in 2006* (U.S. Bureau of Justice Statistics 2007).

¹¹⁵ *See* Ron Goeken, *et al.*, *The 1880 U.S. population database*, 36 *Historical Methods* 1 (2003).

ability of federal victims to sue (and, especially, to win against)[518]¹¹⁷ government officials has diminished since the 1800s.¹¹⁸ Justice Department advocacy has steadily expanded the power of federal agents to investigate, surveil and monitor the American people, often in contradiction of centuries of precedents.¹¹⁹

The filing requirement advantages provided in the Federal rules have allowed the government to select the most favorable forums for employing government strategy; to emphasize different issues in different courts; drop or compromise unpromising cases without financial loss; stall some cases and push others; and create rule conflicts in lower courts to encourage assumption of jurisdiction in higher courts.¹²⁰ The aggregate advantage enjoyed by the Justice Department is especially great regarding governmental impositions of policies of questionable constitu[519]tionality. In *The New Deal Lawyers* (1993), Peter H. Irons described the deliberate and calculating methods with which the F.D.R. Justice Department waged a war of litigation against Supreme Court precedent and constitutional case law.¹²¹ Roosevelt's agency lawyers plotted and strategized before every filing, letting some defeats stand in lower courts but appealing others, forum-shopping for government-leaning judges, and deliberately avoiding Supreme Court review of the most controversial New Deal enactments.¹²²

CONCLUSION

If rigging the federal courts in favor of the U.S. government was not the intention of the drafters of the Federal Rules of Procedure, one has difficulty guessing this in light of the filing

¹¹⁶ David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 *Journal of Law and Economics* 285 (April 2001) (discussing the increase in federal sentences since the 1980s and its impact on racial, ethnic and gender disparities).

¹¹⁷ See Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 *Gonzaga Law Review* 1 (2009) (showing that victims of trespass and misconduct routinely sued and recovered from early constables and sheriffs).

¹¹⁸ Over the past century, the Justice Department has succeeded in cloaking federal officers and agents with greater and greater immunity from civil suit. Such immunities are contrary to common law, which made federal officials civilly liable for much of their misconduct in office. See Michael G. Faure, Ingeborg M. Koopmans, and Johannes C. Oudijk, *Imposing Criminal Liability on Government Officials Under Environmental Law: A Legal and Economic Analysis*, 18 *Loy. L.A. Int'l & Comp. L.J.* 529, 530 (1996) (saying "Ancient Anglo-American law held that government officials were not immune from the sanctions of law applicable to private individuals"). Although the Supreme Court has expanded access to courts for some types of suits against federal officials in the past century (notably, so-called Bivens suits), the general trend of federal law has been to limit the liability of federal actors. See Helen P. McClure, *Note: Liability of Administrative Agencies and Officials: Liability of Administrative Officials*, 53 *Geo. Wash. L. Rev.* 206 (1984) (discussing the growing hostility of federal courts toward lawsuits against federal officials). See also Roger Roots, *Are Cops Constitutional?*, 11 *Seton Hall Constitutional Law Journal* 685-757 (2001) (discussing the gradual loss of the ability of victims of police violence to seek redress in civil court).

¹¹⁹ See, e.g., Patrick R. Keefe, *Chatter: Uncovering the Echelon Surveillance Network and the Secret World of Global Eavesdropping* (2006) (detailing an immense network of federal government surveillance upon people around the country and the world); James Bovard, *Lost Rights: The Destruction of American Liberty* (1995) (detailing the gradual abandonment of liberty in American courts and common practice); James Bovard, *Freedom In Chains: The Rise of the State and the Demise of the Citizen* (2000) (discussing numerous governmental measures in recent decades that have deprived U.S. citizens of their former liberties).

¹²⁰ See Karen O'Connor, *The Amicus Curiae Role of the U.S. Solicitor General in Supreme Court Litigation*, 66 *Judicature* 256 (1983) (stating the Solicitor General has had a major impact on public policy through its involvement in litigation); Lawrence Rothstein, *The Myth of Sisyphus: Legal Service Efforts on Behalf of the Poor*, 7 *U. of Mich. J. of Law Reform* 493, 501 (1974) (discussing the steady increase of government power by means of litigation).

¹²¹ Peter H. Irons, *The New Deal Lawyers* (1993).

¹²² See *id.*

requirement disparities discussed herein. The filing requirement disparities allow the United States government and its attorneys more time and filing advantages with regard to preparing and submitting certain briefs and pleadings in U.S. courts than individuals and private-sector parties. These disparities almost certainly result in unequal treatment, unequal outcomes, and unequal bargaining power between the United States government and the people who inhabit and visit the United States. Although the disparities plainly violate norms of constitutional fairness, equality and due process, they have provoked nothing but silence from the American bar and bench.

The notion suggested by staff at the U.S. Administrative Office of U.S. Courts—that the U.S. government needs greater time and privileges for filing pleadings and briefs than other parties on account of the government’s bureaucracy—evaporates upon inspection. Bureaucratic organizational structures are used by large, powerful institutions for a reason: they operate with profound advantages over smaller autocratic structures because they can consistently deliver a wide variety of goods and services in response to myriad circumstances. When such bureaucracies are repeat players in courts of law, they are able to impose a long-term strategy upon the development of the law. The [520] U.S. government’s constant advocacy in favor of increasing government power and discretion and decreasing individual freedom is one of the most salient aspects of governance in American life over the past century.

The filing requirement disparities discussed herein—which provide the government three-fold time advantages for filing notices of appeal in criminal cases, three-fold time advantages for filing civil answers, counterclaims and cross-claims, and greater ease of filing pro-government as opposed to anti-government *amicus curiae* briefs in federal courts—imbue the government with advantages that are expanded and compounded over time. If federal courts are to become true venues for fairly resolving legal disputes with the government, the filing disparities must be abolished.