ARTICLES

Appellate Court Mandates: An Introduction and Proposed Reform

JACK BUCKLEY DISORBO*

ABSTRACT

After an appellate court announces its opinion and judgment, it issues the "mandate," returning jurisdiction to the lower court and commanding it to implement the judgment. In the time between judgment and mandate, appellate judges have power to "hold" the mandate, or to order that the mandate not issue until further notice. This is usually done because the judge—who may or may not be a member of the original panel—intends to seek revision of the opinion or request that the case be reheard by the en banc court. But courts typically do not notify the parties when a judge holds the mandate. This leads to inaccuracy in legal writing, with parties unknowingly citing cases that may cease to be good authority. A survey of the relevant data shows that when a judge holds the mandate, the original panel opinion is vacated ***62.1%*** *of the time. The lack of information also takes litigants out of the equation, depriving courts of the ordinary benefits of party presentation. In addition to introducing the basic nature of an appellate court mandate, this Article advocates for the adoption of local rules that provide for notification on the public docket when a judge holds the mandate on his or her own motion.*

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* Former law clerk to Judge Jennifer Walker Elrod and Judge Charles R. Eskridge III, and former litigation fellow, Office of the Attorney General of Texas. This article was inspired during my clerkship with Judge Elrod; it is dedicated to her and to my co-clerks of that year. And as always, to my wife.

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INTRODUCTION

When it comes to legal decisions, a court's opinion gets the most attention. That makes sense. After all, the opinion comprises the holding and legal reasoning that judges use to support future decisions and that lawyers use to bolster legal arguments. Written opinions establish the "mode of analysis" that lower courts follow, ensuring, as Justice Scalia said, that the rule of law is a "law of rules."[1] The judgment gets a lot of airtime too. It contains the decretal language that specifies what relief the parties will receive—*i.e.*, "affirm," "reverse," "vacate," "remand," and so on. The authority to render and amend final judgments is perhaps one of the most fundamental components of the judicial power.[2]

But in the federal courts of appeals, the "mandate"—the formal document telling the lower court to execute the higher court's judgment—is also important. Regardless of what the opinion and judgment say, nothing happens until the mandate issues. The Federal Rules of Appellate Procedure establish an interval after the opinion is announced where the mandate will not issue, allowing the parties to seek reconsideration before the original panel or the *en banc* court.[3]

During this time, judges often "hold" the mandate, ordering the court clerk not to issue the mandate until further notice. Judges may (and often do) give this order even if they did not serve on the original panel, and even if the parties did not file a petition for rehearing. There are many reasons why a judge might hold the mandate *sua sponte*. But perhaps the two most common motivations are that the judge believes the decision is incorrect and wishes to request revision

1. Antonin Scalia, Oliver Wendell Holmes, Jr. Lecture at Harvard Law School (Feb. 14, 1989). *See generally* Thomas W. Merrill, *Judicial Opinions as Binding Law and Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993) (discussing the question of whether the reasoning of a judicial opinion has the status of binding law).

2. *See, e.g.*, Hayburn's Case, 2 U.S. (2 Dall.) 408, 410 (1792); Miller v. French, 530 U.S. 327, 344 (2000); Pope v. United States, 323 U.S. 1, 8–9 (1944). *See also* Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1990) ("Article III of the Constitution creates the 'judicial Power of the United States,' and a 'judicial Power' is one to render dispositive judgements.").

3. FED. R. APP. P. 41(b).

from the panel and that a judge intends to seek rehearing *en banc*. By and large, the mandate-hold procedure is a good thing. It increases the likelihood that mistakes will be corrected and that important issues will be flagged for *en banc* review.

But the practice causes a serious problem. In nearly all cases, courts do not file a mandate-hold order on the public docket. As such, the parties (and the public) do not know that the mandate has been held. The lack of information causes at least two harmful effects. Most prominently, it creates uncertainty in legal citation. Opinions where a judge has held the mandate are likely to change. A survey of data from the Eleventh Circuit—where some orders withholding the mandate are filed on the public docket—shows that, after a judge held the mandate, the original panel opinion was vacated **62.1%** of the time.[4] And in **40.9%** of such cases, the court ultimately arrived at a significantly different result (meaning that the judgment was changed at least in part). For these reasons and more, a mandate hold is a powerful indicator of precedential uncertainty.

If nothing else, that a judge has held the mandate is a better predictor that a holding will be reconsidered than the filing of a petition for rehearing or for certiorari. Indeed, recent estimates put success rates for certiorari petitions, petitions for rehearing *en banc*, and petitions for panel rehearing at somewhere between 1 and 3%.[5] Despite the relatively low probability that review will be granted, we flag those events in legal citation, like so: *Tyler v. Hennepin County*, 26 F.4th 789 (8th Cir. 2022), *petition for cert. filed* (Aug. 19, 2022); *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *petition for reh' g en banc filed* (July 1, 2022). We do that because we want to tell the reader that there is some uncertainty associated with the given authority.

But recent data shows that an opinion is over **21 times** more likely to be altered after a judge holds the mandate than after a party files a cert petition or petition for rehearing. If we really want legal writing to be honest about the weight of a particular source, we should indicate whether a judge has held the mandate. For example: *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. 2005), *mandate held* (June 21, 2005). Litigants and judges create downstream issues when they cite cases that—at best—are likely to be altered.

The lack of public disclosure also cuts litigants out of the picture. In doing so, current practice unnecessarily deprives the courts of appeals of the traditional benefits of the adversarial legal system. It makes perfect sense to allow judges to raise issues the original panel may have overlooked or to call for broader attention to especially significant issues. But party participation would only advance those endeavors. If notified that a judge has held the mandate, the losing party may

4. *See infra* Part III.A.2.

5. *See* Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 3 n.3 (2011) (reporting the Supreme Court's rate of granting cert petitions at just over 1%); CLERK'S ANNUAL REPORT JULY 2021 – JUNE 2022, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, at 25, 31, https://perma.cc/2BPV-U28H (showing that the Fifth Circuit denied 163 of 168 petitions for rehearing en banc acted on during the 2021 term); Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 29 & nn. 2–3 (2001) (reporting success rates of 1.3% and 3.1% for rehearing petitions).

decide to file a petition for rehearing, if it has not already determined to do so. The mandate-holding judge could then compare his or her concerns to petition and opposition, using the briefs to reinforce or refine the objection.

At the same time, judges can obtain valuable information in the event that the parties decide *not* to file a petition for rehearing even after being told that the mandate is stayed. If a self-interested party does not question the panel opinion, perhaps that weighs against revision. As Justice Ginsburg once stated: "courts are essentially passive instruments of government . . . . They do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties."[6] The failure to give public notice when a judge holds the mandate creates avoidable tension with this basic principle.

To remedy these problems, this Article advocates for new local circuit rules that provide for notification on the public docket whenever a mandate is held. Of course, the notice should be anonymous and general to avoid disclosing any confidential information. The Eleventh Circuit recently promulgated such a rule—the first of its kind—that strikes an appropriate balance between affording public disclosure and maintaining judicial confidentiality.[7] Still, the Eleventh Circuit's rule applies only when a judge calls for a poll for rehearing *en banc* on his or her own motion; it does not cover the many other situations in which a judge might hold the mandate. This Article recommends rules that provide similar public notice whenever a judge holds the mandate. This simple reform would ensure greater accuracy in legal citation and would maintain party adversity throughout the entire litigation process.

I. BACKGROUND ON MANDATES

Before considering the problems caused by non-disclosure of judicial mandate holds, it is important to understand what a mandate is, and how it works. In the federal courts of appeals, a mandate is an official court order, commanding that the receiving court do whatever it is that the appellate court has ordered it to do. Mandates operate according to federal and local procedural rules, buttressed where necessary by common law.

A. Mandates Generally

The concept of a mandate has existed since well before the founding. The word derives from the Latin *mandatum*, meaning "command" or "order."[8] Usage varies, but the term retained its general nature in 16th and 17th Century England; a leading dictionary defined the term as follows: "In our Common Law [a mandate] is a commandement judicial of the King or his Justices to have any thing

6. United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2021) (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J.)) (quotation marks omitted).

7. *See* 11TH CIR. R. 35 I.O.P. 5; *see, e.g.*, Brown v. HHS, No. 20-14210, Doc. 49 (11th Cir. July 19, 2021) ("A judge of this Court withholds issuance of the mandate in this appeal.").

8. *Mandate*, OXFORD ENGLISH DICTIONARY (3d ed. Dec. 2022 update).

done for the dispatch of Justice."[9] English courts used the word in that same flexible sense. For example, a court might have issued a "mandate" to the sheriff to arrest someone.[10] Or it might have delivered a mandate to order a person to appear before it, or to show cause.[11]

Eventually, however, courts of review began to use "mandate" to refer to their commands to lower courts. For instance, in the 18th century case *Kent v. Kent*, the King's Bench issued the following order: "Judgment therefore must be affirmed as to the recovery of dower, and the award of seisin thereon, and reversed as to the damages; and a mandate to issue to the Court of King's Bench in Ireland to award such writ of enquiry."[12] American courts carried this convention forward with the establishment of the federal judiciary. Arguing before the U.S. Supreme Court in 1807, one advocate gave a succinct explanation of appellate mandates: "If a judgment at common law is rendered against a plaintiff in the circuit court, and that judgment reversed in the supreme court . . . a mandate issues to the circuit court to execute the judgment of the supreme court[.]"[13] And so in today's ordinary parlance, a mandate is simply "[a]n order from an appellate court directing a lower court to take a specified action."[14] The same is generally true of the state courts, though they are outside the scope of this Article.[15]

Functionally, a mandate implements the appellate court's judgment.[16] For instance, if an appellate court vacates a preliminary injunction entered by a district court, the injunction will remain in effect until the mandate issues.[17] In other

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9. *Mandate*, THOMAS BLOUNT, GLOSSOGRAPHIA (1656).

10. *See* Clough v. Cross (1779), 21 Eng. Rep. 386, 387; Dick. 555, 557; Greeting v. Allcock (1733), 25 Eng. Rep. 546, W. Kel. 161.

11. *See* Capel v. Child (1832), 149 Eng. Rep. 235, 236–37; 2 C. & J. 558, 560–61.

12. Kent v. Kent (1733), 87 Eng. Rep. 1180, 1182; 7 Mod. 187, 190.

13. Jennings v. Carson, 8 U.S. (4 Cranch) 2, 10 (1807). *See also* Himely v. Rose, 9 U.S. (5 Cranch) 313 (1809); The Santa Maria, 23 U.S. 431 (1825); Davis v. Packard, 33 U.S. 312 (1834).

14. *E.g.*, *Skinner* v. Govorchin, 463 F.3d 518, 522 (6th Cir. 2006) (quoting BLACK'S LAW DICTIONARY (7th ed. 1999)); Serrano v. Williams, 383 F.3d 1181, 1185 (10th Cir. 2004) (same). *Cf. Mandate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

15. *See, e.g.*, Ex parte Webb, 270 S.W.3d 108, 109 n.1 (Tex. Crim. App. 2008) ("A 'mandate' is an appellate court's official notice, directed to the court below, advising it of the appellate court's decision and directing it to have the appellate court's judgment duly recognized, obeyed, and executed.") (citing 5 AM. JUR. 2D APPELLATE REVIEW §§ 725, 733 (2007)); *see also* Stacy Obenhaus, *It Ain't Over 'Til It's Over: The Appellate Mandate in Texas Courts*, 15 APP. ADVOC. 4 (2003); Barbara Green, *Cracking the Code: Interpreting and Enforcing the Appellate Court's Decision and Mandate*, 32 STETSON L. REV. 393 (2003) (regarding mandates in Florida state courts).

16. *See generally* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3987, Westlaw (database updated July 2023); 5 AM. JUR. 2D APPELLATE REVIEW §§ 679–680, Westlaw (database updated Feb. 2023 update); JEAN-CLAUDE ANDRÉ, FEDERAL APPEALS JURISDICTION AND PRACTICE § 14:3, Westlaw (database updated December 2022); DAVID G. KNIBB, FEDERAL COURT APPEAL MANUAL § 34:11, Westlaw (database updated May 2023). For an example of a case that treats these concepts at length, see Westfall v. McDonald, 27 Vet. App. 341, 342–46 (Ct. App. Vet. Cl. 2015).

17. *See* 5 AM. JUR. APPELLATE REVIEW, *supra* note 16, at § 679 ("Thus, until the mandate is issued, the lower court order remains in effect, even if vacated on appeal."); *see, e.g.*, Hawaii v. Trump, 871 F.3d 646, 664 (9th Cir. 2017); Mo. Republican Party v. Lamb, 270 F.3d 567, 572 n.1 (8th Cir. 2001) (Gibson, J., concurring in part and dissenting in part).

words, the mandate vests the lower court with authority to effectuate the judgment.[18] In this sense, it has the opposite effect of a notice of appeal, which deprives the district court of jurisdiction.[19] Even after issuance, however, a court of appeals has inherent power to recall the mandate in certain "extraordinary circumstances."[20]

Mandates can take several forms. In federal court, the court's opinion and judgment serve as the mandate by default.[21] And so in the vast majority of cases, at the end of the appeal, the court clerk will send a certified copy of those documents along with a short cover letter. For example: "Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion."[22] The Supreme Court also follows this practice in the usual course.[23] But a court may also issue a "formal mandate," which is essentially a document specifically designed to act as the mandate. For instance: "This court's order dismissing this appeal pursuant to Local Rule 42(b) takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure."[24] But regardless of the form, a mandate's effect is the same: to execute the judgment of the court of appeals.

Although the particular form does not really matter, understanding the form often helps to understand the substance. In that regard, it may be helpful to visualize what mandates actually looks like, in their many different shapes and sizes. Images of the circuit court and Supreme Court mandates discussed in the paragraph above are reproduced in the following pages, with minor cropping to preserve space.

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18. *See, e.g.*, Clarke v. United States, 915 F.2d 699, 707–08 (D.C. Cir. 1990); United States v. Rivera, 844 F.2d 916, 920–22 (2d Cir. 1988).

19. Griggs v. Provident Cons. Disc. Co., 459 U.S. 56, 58 (1982) (per curiam) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). *See also* WRIGHT & MILLER, *supra* note 16 at § 3949.1.

20. Calderon v. Thompson, 523 U.S. 538, 550 (1998) (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3938 (2d ed. 1996)). *See, e.g.*, Patterson v. Haskins, 470 F.3d 645, 661–65 (6th Cir. 2006).

21. FED. R. APP. P. 41(a) ("Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.").

22. Judgement Cover Letter at 1, Cargill v. Garland, No. 20-51016, Doc. 266 (5th Cir. Feb. 28, 2023).

23. SUP. CT. R. 45.3 ("In a case on review from any court of the United States, as defined by 28 U.S. C. § 451, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment."); *e.g.*, Copy of Judgment at 1, Shurtleff v. City of Boston, No. 20-1158 (1st Cir. June 3, 2022). By contrast, the Supreme Court issues a formal mandate in cases "on review from a state court." SUP. CT. R. 45.2; *e.g.*, Mandate at 1, Bush v. Gore, No. 00-836, (Dec. 4, 2000). This difference may be due to the fact that, by rule, federal courts recognize the opinion and judgment as the mandate. FED. R. APP. P. 41(a). The same is not necessarily true for state courts. *See, e.g.*, TEX. R. APP. P. 18 (not prescribing the contents of the mandate); FLA. R. APP. P. 9.430 (same).

24. *E.g.*, Carriage Hill Mgmt., LLC v. Boston Lobster Feast, Inc., No. 18-1895, 2018 WL 7204101, at *1 (4th Cir. Oct. 5, 2018).

B. Different Forms of Mandates

1. Circuit Court Mandate: Judgment and Opinion

Case: 20-51016 Document: 00516658632 Page: 1 Date Filed: 02/28/2023

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 28, 2023

Mr. Philip Devlin
Western District of Texas, Austin
United States District Court
501 W. 5th Street
Austin, TX 78701-0000

No. 20-51016 Cargill v. Garland
USDC No. 1:19-CV-349

Dear Mr. Devlin,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk
Renee McDonough
By: _____
Renee S. McDonough, Deputy Clerk
504-310-7673

cc:
Mr. Trevor Caldwell Burrus
Mr. John D. Cline
Mr. John Cutonilli
Mr. Joseph Greenlee
Mr. Bradley Hinshelwood
Mr. Michael Jean
Mr. Jeffrey Jennings
Mr. Robert Michael Miller
Mr. Stephen Obermeier
Mr. William Jeffrey Olson
Mr. Daniel Ortner
Mr. Joshua James Prince
Ms. Glenn Evans Roper
Mr. Richard Abbott Samp
Mr. Ian Simmons
Mr. Mark Bernard Stern
Ms. Abby Christine Wright

Case: 20-51016 Document: 00516658630 Page: 1 Date Filed: 02/28/2023

United States Court of Appeals for the Fifth Circuit

Certified as a true copy and issued as the mandate on Feb 28, 2023

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 6, 2023
Lyle W. Cayce
Clerk

No. 20-51016

MICHAEL CARGILL,

Plaintiff—Appellant,

versus

MERRICK GARLAND, *U.S. Attorney General*; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, *in his official capacity as Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives*; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, and EXPLOSIVES,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-349

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

Case: 20-51016 Document: 00516658630 Page: 2 Date Filed: 02/28/2023

No. 20-51016

IT IS ORDERED and ADJUDGED that the judgment of the District Court is REVERSED and REMANDED to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

Case: 20-51016 Document: 00516658629 Page: 1 Date Filed: 02/28/2023

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 6, 2023
Lyle W. Cayce
Clerk

No. 20-51016

MICHAEL CARGILL,

Plaintiff—Appellant,

versus

MERRICK GARLAND, *in his official capacity as U.S. Attorney General*; UNITED STATES DEPARTMENT OF JUSTICE; STEVEN DETTELBACH, *in his official capacity as Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives*; BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES,

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:19-CV-349

Before RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, DENNIS, ELROD, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*.

Case: 20-51016 Document: 00516658629 Page: 2 Date Filed: 02/28/2023

JENNIFER WALKER ELROD, *Circuit Judge*, joined by RICHMAN, *Chief Judge*, and JONES, SMITH, STEWART, SOUTHWICK, HAYNES, WILLETT, HO, DUNCAN, ENGELHARDT, OLDHAM, and WILSON, *Circuit Judges*:*

Since the National Firearms Act of 1934, federal law has heavily regulated machineguns. Indeed, as proposed, that law was known to many as "the Anti-Machine Gun Bill." The possession or transfer of a machinegun was eventually banned through the Gun Control Act of 1968 and the Firearms Owners' Protection Act of 1986. Today, possession of a machinegun is a federal crime, carrying a penalty of up to ten years' incarceration.

2. Circuit Court Mandate: Separate Document

FILED: October 5, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1895
(8:17-cv-02208-GJH)

CARRIAGE HILL MANAGEMENT, LLC

Plaintiff - Appellee

v.

BOSTON LOBSTER FEAST, INC.

Defendant - Appellant

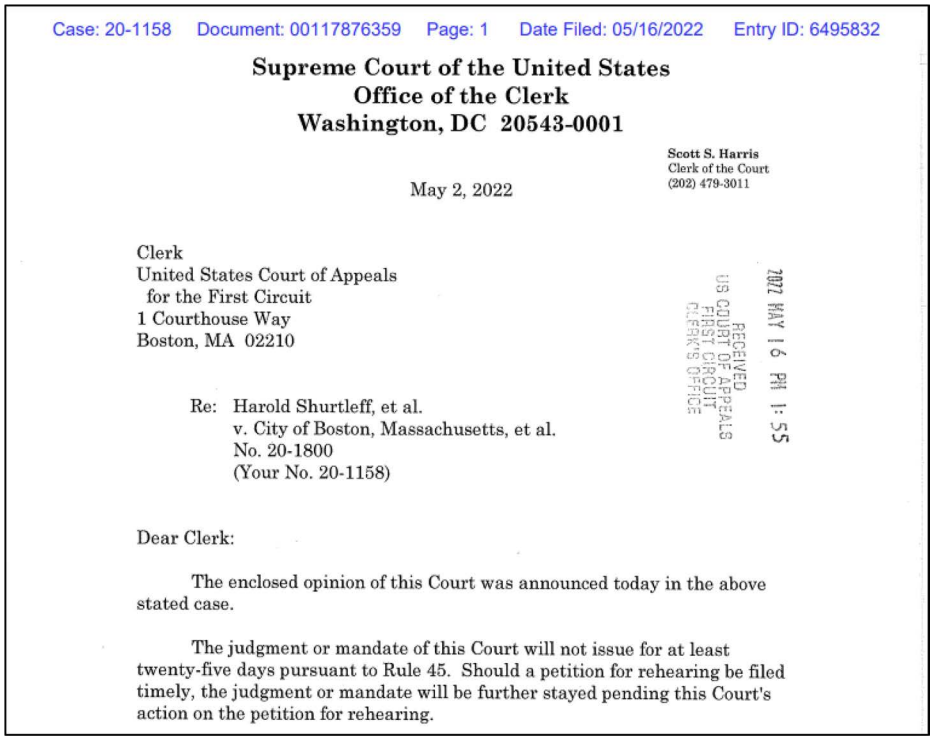
RULE 42(b) MANDATE

This court's order dismissing this appeal pursuant to Local Rule 42(b) takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

3. Supreme Court Mandate: Judgment and Opinion



Case: 20-1158 Document: 00117876359 Page: 1 Date Filed: 05/16/2022 Entry ID: 6495832

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

May 2, 2022

Clerk
United States Court of Appeals
for the First Circuit
1 Courthouse Way
Boston, MA 02210

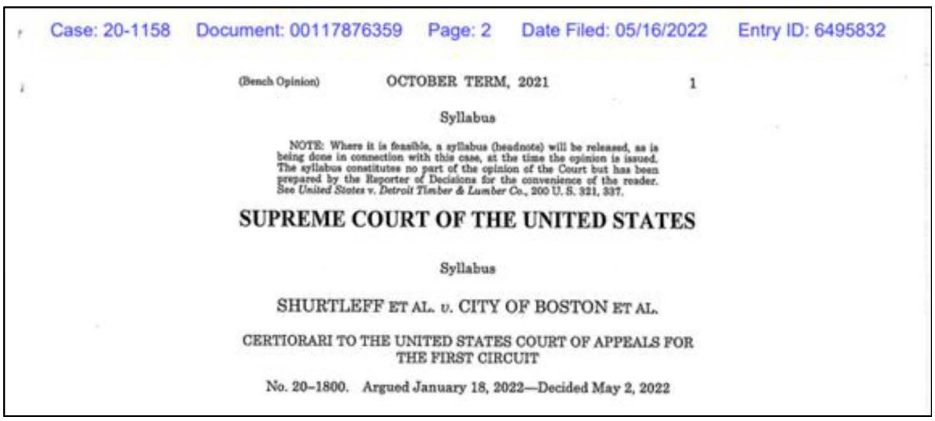
RECEIVED
US COURT OF APPEALS
FIRST CIRCUIT
CLERK'S OFFICE
2022 MAY 16 PM 1:55

Re: Harold Shurtleff, et al.
v. City of Boston, Massachusetts, et al.
No. 20-1800
(Your No. 20-1158)

Dear Clerk:

The enclosed opinion of this Court was announced today in the above stated case.

The judgment or mandate of this Court will not issue for at least twenty-five days pursuant to Rule 45. Should a petition for rehearing be filed timely, the judgment or mandate will be further stayed pending this Court's action on the petition for rehearing.



Case: 20-1158 Document: 00117876359 Page: 2 Date Filed: 05/16/2022 Entry ID: 6495832

(Bench Opinion) OCTOBER TERM, 2021 1

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SHURTLEFF ET AL. *v.* CITY OF BOSTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 20–1800. Argued January 18, 2022—Decided May 2, 2022

Case: 20-1158 Document: 00117883384 Page: 1 Date Filed: 06/03/2022 Entry ID: 6499615

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

June 3, 2022

Clerk
United States Court of Appeals
for the First Circuit
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210-3004

Re: Harold Shurtleff, et al.
v. City of Boston, Mass., et al.,
No. 20-1800 (Your docket No. 20-1158)

Dear Clerk:

Attached please find a certified copy of the judgment of this Court in the above-entitled case.

Case: 20-1158 Document: 00117883384 Page: 3 Date Filed: 06/03/2022 Entry ID: 6499615

Supreme Court of the United States

No. 20-1800

HAROLD SHURTLEFF, ET AL.,

Petitioners

v.

CITY OF BOSTON, MASSACHUSETTS, ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the First Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed with costs, and the case is remanded to the United States Court of Appeals for the First Circuit for further proceedings consistent with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioners Harold Shurtleff, et al. recover from the City of Boston, Massachusetts, et al., Three Hundred Dollars ($300.00) for costs herein expended.

4. Supreme Court Mandate: Separate Document

United States of America, ss:

FILED
THOMAS D. HALL
DEC 12 2000
CLERK, SUPREME COURT
BY_____

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Justices
of the Supreme Court
of Florida

GREETINGS:

WHEREAS, lately in the Supreme Court of Florida, there came before you a cause between Albert Gore, Jr., and Joseph I. Lieberman, Appellants, and Katherine Harris, as Secretary, etc., et al., Appellees, No. SC00-2431, wherein the judgment of the said Supreme Court was duly entered on the 8th day of December, 2000, as appears by an inspection of the record.

AND WHEREAS, in the October 2000 Term, the said cause having been submitted to the **SUPREME COURT OF THE UNITED STATES** on the transcript of the record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged on December 12, 2000, by this Court that the judgment of the above court in this cause is reversed, and the case is remanded to the Supreme Court of Florida for further proceedings not inconsistent with the opinion of this Court.

Witness the Honorable **WILLIAM H. REHNQUIST,** Chief Justice of the United States, the 12th day of December, in the year Two Thousand.

William K. Suter
Clerk of the Supreme Court
of the United States

C. Federal Rules

On the subject of how mandates work, the starting point is Rule 41 of the Federal Rules of Appellate Procedure. That Rule provides that the mandate issues seven days after the expiration of the time to file a petition for rehearing, or seven days after the entry of an order denying such a petition.[25] As the alternative deadline suggests, the filing of a rehearing petition automatically stays the mandate.[26] The Rule also authorizes parties to move to stay the mandate pending the filing of a petition for writ of certiorari, and there is a substantial corpus of caselaw dedicated to considering when such a stay is appropriate.[27]

Central to this Article, Rule 41 allows courts to "shorten or extend" the mandate-issuance deadline "by order."[28] Sometimes a court will reduce the seven-day period or order that the mandate issue immediately (or "forthwith"), usually because the need for relief is especially time-sensitive, or because the likelihood of revision upon further review is especially low.[29] And courts often stay issuance of the mandate for uncontroversial reasons, such as to wait for a decision of a related case by another court or to allow the parties to seek some form of relief.[30]

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25. FED. R. APP. P. 41(b).

26. The Rule used to explicitly recognize this effect. FED. R. APP. P. 41(d)(1) (2016) (repealed 2018). ("The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise."). A 2018 amendment removed that enumeration: the Rules Advisory Committee explained that the prior rule was "redundant" in light of the two deadlines provided in subsection (b). FED. R. APP. P. 41 advisory committee note to 2018 amendment. It further clarified that the deletion "is intended to streamline the rule; no substantive change is intended." *Id.*

27. *See, e.g.*, United States v. Holland, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers); Am. Axle & Mfg., Inc. v. Neapco Holdings LLC, 977 F.3d 1379, 1380 (Fed. Cir. 2020) (quoting Teva Pharms. USA, Inc. v. Sandoz, Inc., 572 U.S. 1301, 1301–02 (2014) (Roberts, C.J., in chambers)); Senne v. Vill. of Palatine, 695 F.3d 617, 619 (7th Cir. 2012); Doe v. Miller, 418 F.3d 950, 951 (8th Cir. 2005).

28. FED. R. APP. P. 41(b). *See also* Note, *Vacatur Pending En Banc Review*, 120 MICH. L. REV. 505, 530–31 (2021) (discussing *sua sponte* mandate holds in connection with Rule 41).

29. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 716 (1974) ("Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith."); *see also* Whole Women's Health v. Jackson, 142 S. Ct. 522 (2021); Bush v. Gore, 531 U.S. 98, 111 (2000). Courts of appeals also expedite the issuance of the mandate for similar reasons. *See, e.g.*, Hoots v. Pennsylvania, 639 F.2d 972 (3d Cir. 1981) (finding it appropriate to issue the mandate forthwith where the court was "obligated to ensure that relief be implemented as promptly and as practicably as possible"); Ostrer v. United States, 584 F.2d 594 (2d Cir. 1978) (holding it appropriate to issue the mandate forthwith if "our own Court would not change its decision upon rehearing, much less hear the case en banc, and . . . there is no reasonable likelihood that the Supreme Court would grant review"); Johnson v. Bechtel Assoc. Prof. Corp., 801 F.2d 412, 415 (D.C. Cir. 1986) (same); *see also* In re Petition of Buscaglia, 145 F.2d 428, 428–29 (1st Cir. 1944) (delaying mandate to avoid consequences of judgment issuing immediately).

30. As to decisions by other courts, *see* Somers v. United States, 66 F.4th 890, 893 (11th Cir. 2023) (holding mandate pending decision of Supreme Court in related case), Babbitt v. Health, No. 18-56576, 2023 WL 1281668, at * (9th Cir. Jan. 31, 2023) (same), United States v. Peralta, 664 F. Appx. 116, 118 n.2 (2d Cir. 2016) (same), United States v. Randle, 304 F.3d 373, 374 (5th Cir. 2002) (holding mandate pending decision of Fifth Circuit), and Babineaux v. McBroom Rig Bldg. Serv., Inc., 817 F.2d 1126 (5th Cir. 1987) (holding mandate pending decision of state supreme court). *Cf.* United States v. Watts, 79 F.3d 768, 769 (9th Cir. 1996) (allowing supplemental briefing on new Supreme Court case). As to other forms of relief, *see* King v. County of Los Angeles, 885 F.3d 548, 559 (9th Cir. 2018) (allowing for

But courts of appeals also frequently "hold" the mandate on their own motion, and before the parties file a rehearing petition. This is typically done via a communication to the court clerk, instructing him or her to stay the mandate's issuance pending further notice. This communication constitutes an "order" that "extend[s]" the mandate deadline for purposes of Rule 41. As explained by the Fifth Circuit: "The rule grants us power to shorten or enlarge the specified period by order. This we did by instructions to the clerk to withhold issuance of the mandate."[31]

Significantly, courts do not notify the parties (or the public) when a judge holds the mandate on his or her own motion. "There is no requirement in the rule that such an order be formal, written, or that the parties be given notice of it, though this might be desirable."[32] A judge might hold the mandate for any of several purposes. But insight into these purposes is limited for obvious reasons; the mandate-hold orders are not typically published on the public docket. And if a mandate hold is addressed in a public filing at all, the court usually does not elaborate on why the mandate was held.[33]

However, it is not unheard of for judges to address the circumstances of a particular mandate being held, most commonly in a dissent or other separate writing. For instance, a judge (usually not a member of the merits panel) might hold the mandate because he or she believes a decision is incorrect and wants to request that the panel make changes to the opinion.[34] Sometimes a panel will even hold the mandate on one of its own cases if it believes correction is necessary.[35] As explained by one circuit judge:

> Until the mandate has issued, opinions can be, and regularly are, amended or withdrawn, by the merits panel at the request of the parties pursuant to a petition for panel rehearing, in response to an internal memorandum from another member of the court who believes that some part of the published opinion is in error, or *sua sponte* by the panel itself.[36]

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party substitution following appellant's death), Penaloza-Mendoza v. INS, 210 F.3d 384, 2000 WL 123428, at *1 (9th Cir. Jan. 28, 2000) (allowing plaintiff, subject to removal, to file habeas petition in the district court), and Nichols v. Petroleum Helicopters, Inc., 955 F.2d 85 (5th Cir. 1993) (per curiam) (allowing oral argument).

31. Sparks v. Duval Cnty. Ranch Co., 604 F.2d 976 (5th Cir. 1979) (en banc).

32. *Id*.

33. *See* Smith v. Texaco, Inc., 281 F.3d 477, 478 (5th Cir. 2002) (stating without further elaboration that "the mandate of this court had been held by one or more judges").

34. *See* Ovalles v. United States, 905 F.3d 1231, 1278 n.1 (11th Cir. 2018) (J. Pryor, J., dissenting) ("I held the mandate because I believed that *Johnson*'s reasoning applied with equal force to § 924(c)(3)(B)."); Brown v. Bryan County, 219 F.3d 450, 469 (5th Cir. 2000) (DeMoss, J., dissenting) ("Following issuance of this opinion on June 2, 1995, another judge of this Court held the mandate and initiated correspondence with the original panel because the portion of *Brown I* . . . was in conflict with a prior decision of this Court[.]").

35. *See* Herbst v. Scott, 42 F.3d 902, 904 (5th Cir. 1995) ("On our own motion we held the mandate in this matter. Having reconsidered the case we recall our prior opinion and substitute the following.").

36. Carver v. Lehman, 558 F.3d 869, 878–79 (9th Cir. 2009).

Judges also hold the mandate to seek rehearing *en banc*. Sometimes a panel is willing to change its opinion. But more often than not, it will choose to adhere.[37] As Judge Richard Arnold has quipped: "Why don't judges like petitions for rehearing? The answer should be obvious: People don't like being told they're wrong."[38] So if a panel declines to change its opinion in response to a judge's inquiry, if that judge still wants to pursue the desired change, he or she will need to hold the mandate and call for an *en banc* poll. In addition, most circuits maintain a practice resembling what the Fifth Circuit calls the "rule of orderliness"—whereby a panel cannot overrule another panel decision.[39] A judge may thus hold the mandate and call for a poll on whether to rehear a case *en banc* if he or she wishes to reconsider an older panel opinion on which a new panel opinion relied.

This is precisely what happened in *United States v. McFarland*.[40] There, federal law enforcement charged the defendant with four counts of interference with interstate commerce in violation of the Hobbs Act and four counts of using a firearm in connection with a federal felony. This was despite the fact that Texas state authorities were the ones who investigated and arrested the defendant. The defendant argued that the federal government's use of the Hobbs Act to prosecute a crime traditionally regulated by the State (robbery) unconstitutionally exceeded Congress's power under the Commerce Clause. The panel was receptive to this argument but determined that it was bound by previous panel precedent rejecting the theory.[41] Judge DeMoss joined the opinion but wrote separately to explain that he intended to hold the mandate and call for rehearing *en banc* to reexamine the prior panel opinion:

> I concur in the conclusion reached by the panel that our rule of orderliness and considerations of collegiality within the Court require our adherence to the Circuit precedents in *Robinson* unless and until changed by an en banc decision. I write separately to advise the parties and the rest of the Court that, in due course after issuance of this opinion, I will timely hold the mandate and call for a ballot for en banc reconsideration.[42]

And indeed, the court voted to rehear the case *en banc*, though it ultimately deadlocked 8–8, by rule affirming the judgment of the district

37. *See, e.g.*, United States v. Sykes, 864 F.3d 842, 844 (8th Cir. 2017) (criticizing the panel for adhering to its decision in response to a petition for rehearing).

38. Arnold, *supra* note 5, at 37.

39. *See, e.g.*, Bertrand v. Garland, 36 F.4th 627, 633 (5th Cir. 2022) (citing *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) ("Under our rule of orderliness, one panel of our court may not overturn another panel's decision, absent an intervening change in the law[.]")). *See also* Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755, 755–56 (1993) ("Instead, all thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit."); *id.* at 757 n.7 (collecting cases).

40. 264 F.3d 557 (5th Cir. 2001) (per curiam), *vacated*, 281 F.3d 506 (5th Cir. 2002) (mem.).

41. *Id.* at 558–59.

42. *Id.* at 559 (DeMoss, J., specially concurring).

court.[43] As shown above, it is not uncommon for a judge to hold the mandate in a number of cases presenting similar issues.[44]

The power to hold the mandate is consequential. It allows a judge to either influence a panel decision even if he or she did not sit on the panel, or encourage that a case be reheard *en banc* even if the parties did not file a rehearing petition. And Rule 41 does not place any limits on this discretionary power; all that is required is an "order." And that order need not be made public. The Supreme Court has identified at least one limit on a judge's discretion to hold the mandate, relating to how long a mandate may be held after the Court denies a cert petition.[45] But on the whole, the Federal Rules confer broad latitude on judges to decide when to hold the mandate, why, and for how long.

D. Local Rules

Appellate courts supplement the baseline procedural rules with their own local rules. Most circuits have promulgated local rules, internal operating procedures, or both, with respect to mandates and *en banc* procedures.[46] For example, some circuits expressly provide that judges may *sua sponte* call for rehearing *en banc* (something all circuits recognize at least implicitly).[47] The Eleventh Circuit goes as far as to explain the confidential process and to notify the public when a judge calls for an *en banc* poll on his or her own motion:

> Any active Eleventh Circuit judge may request that the court be polled on whether rehearing *en banc* should be granted whether or not a petition for rehearing *en banc* has been filed by a party. This is ordinarily done by a letter from the requesting judge to the chief judge with copies to the other active and senior judges of the court and any other panel member. At the same time the judge shall notify the clerk to withhold the mandate, and the clerk will enter an order withholding the mandate. The identity of the judge will not be disclosed in the order.[48]

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43. United States v. McFarland, 311 F.3d 376, 377 (5th Cir. 2002) (*en banc*) (per curiam) ("By reason of an equally divided *en banc* court, we affirm the district court's judgment of conviction and sentence.").

44. *See* Nelson v. Quarterman, 472 F.3d 287, 348–51 (5th Cir. 2006) (Smith, J., dissenting) (discussing several related cases where the mandate has been held).

45. *See* Bell v. Thompson, 545 U.S. 794, 803–06 (2005) (holding that the Sixth Circuit abused its discretion by holding its mandate for over five months after the Supreme Court announced its prior opinion); Henry v. Ryan, 766 F.3d 1059, 1062–66 (9th Cir. 2014) (applying *Bell* and discussing related cases). *See generally* Jim L. Phillips III, Comment, *"It Ain't Over 'Til It's Over," But Will It Ever Be?: The Elusive Procedural Finality of* Bell v. Thompson *and an Appellate Court's Mandate*, 60 ARK. L. REV. 319 (2007) (using *Bell* to discuss issues relating to the stay and issuance of an appellate court's mandate).

46. *See* 1ST CIR. R. 35, 41; 2D CIR. R. 35.1; 2D CIR. I.O.P. 35.1; 3D CIR. R. 35; 3D CIR. I.O.P. 10.8.2; 4TH CIR. R. 35(b), 41; 4TH CIR. I.O.P. 41; 5TH CIR. R. 35, 41; 5TH CIR. I.O.P. 35, 41; 6TH CIR. R. 35, 41; 6TH CIR. I.O.P. 35, 41; 7TH CIR. R. 35, 41; 8TH CIR. R. 35A; 9TH CIR. R. 35-1, 41-1; 10TH CIR. R. 35, 41; 11TH CIR. R. 35, 41; 11TH CIR. I.O.P. 35, 41; D.C. CIR. R. 35, 41; D.C. I.O.P. XIII.A.2, B.1, B.2; FED. CIR. R. 35, 41; FED. CIR. PRAC. N. 35, 41.

47. 4TH CIR. R. 35; 5TH CIR. R. 35; 6TH CIR. I.O.P. 35(e); 11TH CIR. R. 35-5; FED. CIR. PRAC. N. 35.

48. 11TH CIR. R. 35 I.O.P. 5.

Some local rules set forth circumstances where the court will presumptively issue the mandate forthwith.[49] And others warn parties that motions to stay the mandate pending certiorari[50] or motions to recall the mandate[51] are rarely granted.

But there are almost no local rules dealing with the process for judges to hold the mandate on their own accord. The Eleventh Circuit rule seen above is an obvious exception, but its terms do not appear to apply to situations where a judge holds the mandate in order to request changes from the panel, in lieu of calling for a poll to rehear the case *en banc*. A Sixth Circuit rule might contemplate this process; it notes that "an independent determination of this court" may be sufficient grounds to stay the mandate.[52] But other than those two outliers, no circuit rule addresses *sua sponte* mandate holds or even acknowledges that the practice exists. As such, in the vast majority of cases, the courts of appeals give no public notice when a judge holds the mandate.

II. PROBLEMS WITH THE LACK OF PUBLIC DISCLOSURE

As it stands, lawyers and judges reading briefs or opinions do not know whether a judge has held the mandate in a particular case. There are a couple of clues. Of course, a petition for rehearing stays the mandate automatically.[53] A reader could also check to see if the default deadline for the mandate to issue has passed. If so, and if the mandate has not issued, the reader can conclude that a judge has held the mandate.[54] But that level of diligence can hardly be expected for ordinary research, especially given the general unfamiliarity with mandates.

And so to a great degree, the fact that a mandate has been held *sua sponte* will go unnoticed. This policy (or more precisely, lack of a policy) causes at least two serious problems. Most concretely, the inability to note that a mandate has been held injects inaccuracy into legal writing. The authority of such a case is shaky at best, but that uncertainty is not communicated to the reader. Also important, though perhaps less tangible, are secondary effects on the litigation process. *Sua*

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49. *See* 9TH CIR. R. 41-1 Ad. Comm. N. ("Only in exceptional circumstances will a panel order the mandate to issue immediately upon the filing of a disposition. Such circumstances include cases where a petition for rehearing, or petition for writ of certiorari would be legally frivolous; or where an emergency situation requires that the action of the Court become final and mandate issue at once."); *see also* 5TH CIR. I.O.P. 41; 7TH CIR. R. 41; 11TH CIR. R. 41-2.

50. 3D CIR. I.O.P. 10.8.2 ("Inasmuch as a stay of mandate is ordinarily not a requirement for filing a petition for a writ of certiorari, it is the practice of this court not to grant a motion for stay of the mandate or to recall the mandate unless the failure to grant a stay affects a substantive right of the applicant."); *see also* 1ST CIR. R. 41; 10TH CIR. R. 41.1; D.C. CIR. R. 41(a)(2).

51. 10TH CIR. R. 41.2 ("When a motion to recall the mandate is tendered for filing more than one year after issuance of the mandate, the Clerk shall not accept the motion for filing unless the motion states with specificity why it was not filed sooner. The court will not grant the request unless the movant has established good cause for the delay in filing the motion."); *see also* 11TH CIR. R. 41-1.

52. 6TH CIR. R. 41(a).

53. *Supra* note 6 and accompanying text.

54. In one extreme example, a judge held the mandate for eighteen months. *See* Nelson, 472 F.3d at 349 (Smith, J., dissenting).

sponte mandate holds shift some control of the case from the parties to the judges. Whereas the litigants ordinarily argue for a particular result based on vested legal interests, a judge who holds the mandate presents his or her view of a case without the traditional limitations of party adversity.

A. Inaccuracy of Legal Citation

1. The General Principle

First and foremost, without public disclosure, *sua sponte* mandate holds frustrate accurate legal citation. The trouble begins with the rule that published decisions are binding precedent when the opinion is announced—not when the mandate issues. The Ninth Circuit explains this rule as follows: "[W]e have unequivocally stated that a published decision constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so."[55] At least one circuit's rules specify as much: "Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result."[56] For this reason, a case in which a judge has held the mandate remains binding.

This is so even though panels frequently modify their own opinions after a judge holds the mandate. As illustrated by one Eleventh Circuit panel: "An active judge of this court withheld the mandate prompting reconsideration by the panel of the procedural bar issue raised in the appellee's brief . . . . We now withdraw the opinion previously issued and published at 979 F.2d 807, and substitute the following judgment and opinion."[57] Indeed, one Ninth Circuit decision recounts twenty opinions being withdrawn or amended in a span of ninety days.[58] These

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55. *See, e.g.*, In re Zermeno-Gomez, 868 F.3d 1048, 1053 (9th Cir. 2017). *See also* Hamdi v. Rumsfeld, 337 F.3d 335, 362 (4th Cir. 2003) (Luttig, J., dissenting from denial of rehearing en banc) (explaining that "the parties (and the public) are bound by the panel opinion as it was written and issued"); Chambers v. United States, 22 F.3d 939, 942 n.3 (9th Cir. 1994), *vacated*, 47 F.3d 1015 (9th Cir. 1995) ("We reject the government's argument that *X–Citement Video* is not binding precedent until the mandate issues in that case. In this circuit, once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court."). Similarly, it is uncontroversial that an opinion is binding until overturned upon rehearing en banc or by the Supreme Court. *See, e.g.*, United States v. Vega, 960 F.3d 669, 675 (5th Cir. 2020). That principle logically extends to opinions that have not been modified by the original panel.

56. 11TH CIR. R. 36 I.O.P. 2.

57. Tower v. Phillips, 7 F.3d 206, 207 (11th Cir. 1993) (per curiam). *See also* Sepulveda v. United States Att'y Gen., 401 F.3d 1226, 1228 (11th Cir. 2005) (per curiam) ("An active judge of this court having withheld the mandate in this case, the Court, upon reconsideration, orders that its prior opinion, published at 378 F.3d 1260, be withdrawn, and substitutes the following opinion."); Lewis v. Brown & Root, Inc., 722 F.2d 209, 210 (5th Cir. 1984) (per curiam) ("Despite the absence of a petition for rehearing addressed to our earlier opinion reported at 711 F.2d 1287, we have withheld our mandate because of a concern that we have developed, sua sponte, regarding a portion of the award of attorney's fees against plaintiff's counsel. We now VACATE that award and remand to the trial court for further proceedings as to it and other matters."); Stephenson v. Gaskins, 539 F.2d 1066, 1067 (5th Cir. 1976) ("Having withheld the mandate, the court on its own motion withdraws its original panel opinion, dated May 14, 1976, and substitutes this modified opinion in lieu thereof.").

58. Carver v. Lehman, 558 F.3d 869, 879 & nn. 17–18 (collecting cases).

examples stand for the general proposition that there is a significant possibility that the opinion will be modified if a judge holds the mandate.

For precisely the same reason, legal citation rules direct writers to provide all subsequent history, such as if a party has filed a rehearing or cert petition.[59] But the overwhelming majority of such petitions fail. As introduced earlier, success rates are estimated between 1 and 3% for cert petitions, petitions for rehearing en banc, and petitions for panel rehearing.[60] By comparison, a *sua sponte* mandate hold is a much more reliable predictor of precedential uncertainty—if for no other reason than it shows that a neutral decision-maker has questioned the opinion, rather than one of the self-interested litigants.

The danger for inaccurate legal citation is real. As an example, consider a recent Fifth Circuit case, *United States v. McMaryion*.[61] The opinion was published on March 28, 2023; according to Rule 41, the mandate was scheduled to issue on April 19. That day came and went, and no rehearing petition was filed. But as described by the publicly available docket, the mandate did not issue.[62]

Court of Appeals Docket #: 21-50450 — **Docketed:** 05/25/2021
USA v. McMaryion — **Termed:** 03/28/2023
Appeal From: Western District of Texas, Midland Odessa
Fee Status: In Forma Pauperis

Case Type Information:
1) Criminal (NCRIM)
2) Post-Conviction
3)

Originating Court Information:
District: 0542-7 : 7:13-CR-141-1
Originating Judge: Walter David Counts, III, U.S. District Judge
Date Filed: 04/24/2013
Date NOA Filed: 05/21/2021
Date Rec'd COA: 05/24/2021

Prior Cases:
13-51112 **Date Filed:** 12/02/2013 **Date Disposed:** 10/30/2014 **Disposition:** Affirmed

Current Cases:
None

Panel Assignment: Not available

United States of America,

Plaintiff - Appellee

v.

Jeffrey Allan McMaryion,

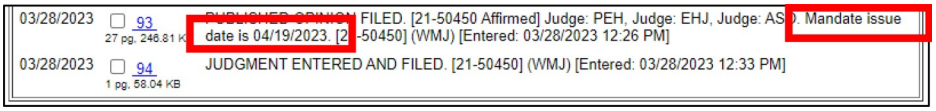
Defendant - Appellant

59. *See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020); *see also id.* Table 8.

60. *Supra* note 5 and accompanying text.

61. 64 F.4th 257 (5th Cir. 2023).

62. These images were taken from the publicly available docket on June 20, 2023.



That means that a judge held the mandate *sua sponte*. And as a matter of fact, the court subsequently withdrew its opinion and replaced it with one that reached a different result.[63]

But lawyers and district courts relied extensively on the first opinion before it was withdrawn. As reported by Westlaw, before the opinion was replaced, it was cited by thirteen district court opinions,[64] two appellate opinions (in multiple circuits),[65] a proposed revision to the federal Sentencing Guidelines,[66] ten briefs,[67] and an untold number of motions, 28(j)s, and other filings. Because the public is not notified when a judge holds the mandate, those writers unknowingly relied on an authority that was likely to be altered and eventually was altered. Had those writers known that the mandate had been held, they might have decided to take a different position or cite different authority.[68]

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63. United States v. McMaryion, No. 21-50450, 2023 WL 4118015 (5th Cir. June 22, 2023).

64. United States v. Johnson, No. 16-CR-32, 2023 WL 4133020, at *4 (E.D. La. June 22, 2023); United States v. Martinez, No. 17-CR-0561-1, 2023 WL 4033165, at *2–3 (S.D. Tex. June 15, 2023); United States v. Heredia, No. 01-CR-91-1, 2023 WL 3938868, at *1–2 (S.D. Tex. June 9, 2023); United States v. Benavides, No. 20-CR-101-5, 2023 WL 3872205, at *1–2 (S.D. Tex. June 6, 2023); United States v. Molina, No. 19-CR-0695-2, 2023 WL 3632762, at *2–3 (S.D. Tex. May 24, 2023); United States v. Contreras, No. 90-CR-226, 2023 WL 3509704, at *2–3 (S.D. Tex. May 17, 2023); Guidry v. United States, No. 17-CR-00040-01, 2023 WL 3246657, at *1–2 nn. 9, 21 (W.D. La. May 4, 2023); United States v. Lopez, No. 14-CR-96-1, 2023 WL 3075937, at *1–2 (S.D. Tex. Apr. 25, 2023); United States v. Holder, No. 18-CR-00332-06, 2023 WL 2992649, at *1–2 (W.D. La. Apr. 18, 2023); United States v. Jackson, No. 99-CR-35, 2023 WL 3216775, at *2 nn. 14, 17–18 (M.D. La. Apr. 14, 2023); United States v. Thompson, No. 11-CR-70, 2023 WL 2913446, at *5 (E.D. La. Apr. 12, 2023); United States v. Solomon, No. 14-CR-00340-K-5, 2023 WL 2920945, at *4 (N.D. Tex. Apr. 11, 2023); United States v. Antunes-Aguirre, No. 03-CR-351-D(01), 2023 WL 2700717, at *3 (N.D. Tex. Mar. 29, 2023).

65. United States v. Alicea, No. 22-2176, 2023 WL 3947212, at *4 (3d Cir. June 12, 2023) (Phipps, J., dissenting); United States v. Cisneros, No. 21-40860, 2023 WL 2823903, at *1 n.1 (5th Cir. Apr. 7, 2023).

66. A Notice of Submission to Congress of Amendments to the Sentencing Guidelines, 88 Fed. Reg. 28254, 28258 (May 3, 2023).

67. Reply Brief for Appellant at 5–7, 9–10, United States v. Cardenas, No. 21-40543 (5th Cir. 2023); Appellee's Brief for the United States at 13, United States v. Eruotor, No. 23-50099 (5th Cir. 2023); Appellee's Letter Brief at 4, United States v. McLean, No. 23-40064 (5th Cir. 2023); Appellee's Brief for the United States at 4, 6, 8, 16, 19–22, United States v. Morales, No. 22-51102 (5th Cir. 2023); Answering Brief for the United States at 12, 18, United States v. Villarreal, No. 22-50067 (9th Cir. 2023); Defendant-Appellant's Reply Brief at 13–14, United States v. Naranjo, No. 22-50938 (5th Cir. 2023); Brief of Plaintiff-Appellee at 17–18, 20–27, United States v. Cardenas, No. 19-40425 (5th Cir. 2023); Appellee's Brief for the United States at 9, United States v. Dominguez, No. 23-50024 (5th Cir. 2023); Brief of Plaintiff-Appellee at 8–9, United States v. Mateo, No. 22-20579 (5th Cir. 2023); Letter Brief on Behalf of the Appellee, The United States of America at 10–11, United States v. Gaharan, No. 22-30364 (5th Cir. 2023).

68. *See also* Taylor v. Leblanc, 60 F.4th 246 (5th Cir. 2023). No party filed a petition for rehearing, so the mandate should have issued March 8, 2023. But the mandate did not issue then, which means a judge has held the mandate. And indeed, the opinion has since been withdrawn and reissued as amended. *See* 68 F.4th 223, 225 (5th Cir. 2023). But the opinion was cited by one opinion and one brief before it

2. Survey of Mandate-Hold Cases

An examination of Eleventh Circuit cases shows that this phenomenon is endemic. As explained above, an Eleventh Circuit local rule provides that, where a judge requests an *en banc* poll, he or she directs the court clerk to hold the mandate, and the order withholding the mandate is filed on the public docket.[69] The same language is used each time: "A judge of this Court withholds issuance of the mandate in this appeal."[70]

In an attempt to study the significance of a judge's order to hold the mandate, this Article has recorded each instance of that order since August 1, 2019 (when the local rule took effect). Key indicators have also been tracked, such as whether the original panel opinion was vacated and, if so, whether the new opinion reached a new result.[71] This data confirms the theory that a mandate hold is a better indicator of precedential uncertainty than a rehearing petition or petition for certiorari.

As an initial matter, the public-mandate-hold procedure appears to be used more broadly than the local rule's terms require. First, the mandate-hold order appears in some cases that do not implicate the *en banc* review process.[72] That is, the docket reflects neither a petition for rehearing *en banc* nor that a judge called for an *en banc* poll *sua sponte*. That data tends to show that the court issues the public mandate hold order even in cases where a judge seeks only to revise the panel opinion, rather than to take the case *en banc*.

And second, the mandate-order appears in some case after a petition for rehearing *en banc* has already been filed.[73] There is no need to hold the mandate at that point because the filing of the petition stays the mandate automatically.[74] It is possible that this phenomenon indicates some extra attention greater than that given to the run-of-the-mill petition for rehearing *en banc*. That is, even though the mandate has been stayed by rule, the holding judge wants to make sure that the mandate does not issue while he or she studies the issues further.

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was withdrawn. Patterson v. Oakes, No. 19-CV-00055, 2023 WL 2712477, at *5 (E.D. Tex. Mar. 30, 2023); Reply Brief of Appellant Deanna Thomas at 19, Thomas v. Tewis, No. 22-30662 (5th Cir. 2023).

69. 11TH CIR. R. 35 I.O.P. 5. The Eleventh Circuit adopted this rule in August of 2019. Before, the clerk would note on the docket if the mandate was held after the time passed where the mandate would ordinarily issue. *See* 11TH CIR. R. 35 I.O.P. 5 (Jan. 10, 2019), https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Rules_Bookmark_JAN19.pdf [https://perma.cc/KT5X-YEQA]. But then the court changed the rule to provide that notice is given immediately upon the mandate being held. 11TH CIR. R. 35 I.O.P. 5. The court described the rule change as follows: "Amend FRAP 35, IOP 5 Requesting a Poll on Court's Own Motion to reflect that a judge's notice to the clerk to withhold the mandate operates as direction to enter an order withholding the mandate." 11TH CIR. R. (Aug. 1, 2019), https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Rules_Bookmark_AUG19.pdf [https://perma.cc/JL4Q-ZRKC]. The change has the clear effect of giving earlier notice that a mandate has been held.

70. *See, e.g.*, Brown v. HHS, No. 20-14210, Doc. 49 (11th Cir. July 19, 2021).

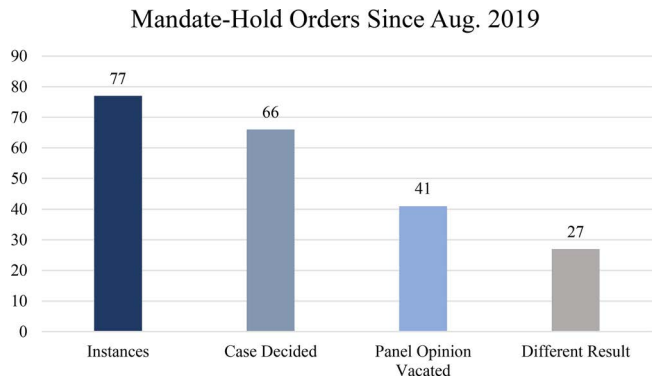
71. *See* Appendix, *infra*. A new result is defined as one in which the judgment is different at least in part.

72. *See, e.g.*, Senter v. United States, No. 18-11627, Doc. 42 (11th Cir. Nov. 19, 2020); Bilal v. GEO Care, LLC, No. 16-11722, Doc. 67 (11th Cir. Nov. 13, 2020); United States v. Hunt, No. 17-12365, Doc. 50 (11th Cir. Sept. 12, 2019).

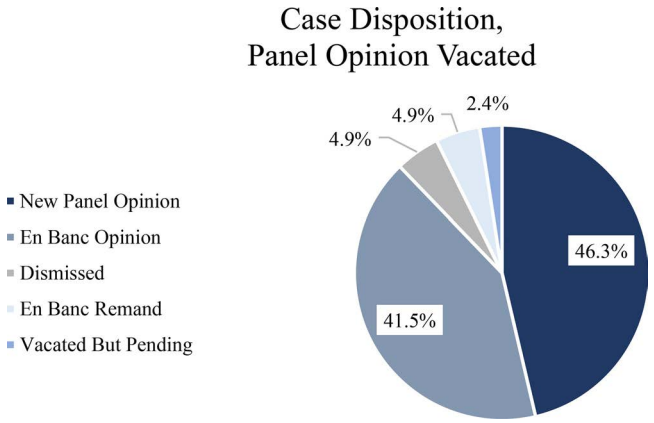
73. *See, e.g.*, Hoever v. Marks, No. 17-10792, Doc. 72 (11th Cir. Sept. 16, 2020); United States v. Brown, No. 17-15470, Doc. 89 (11th Cir. Mar. 4, 2020); United States v. Ross, No. 18-11679, Doc. 43 (11th Cir. Dec. 18, 2019).

74. *Supra* note 26 and accompanying text.

Turning to the data's substance, since August of 2019, the Eleventh Circuit has issued seventy-seven mandate-hold orders.[75] Of those, sixty-six have reached final disposition and eleven remain pending. Of the sixty-six, the court vacated its original panel opinion on forty-one occasions—or **62.1%** of the time. In addition, the court ultimately reached a different result in twenty-seven of the sixty-six cases, for a rate of **40.9%**. Those figures demonstrate that a panel opinion is very likely to be altered if a judge holds the mandate—especially as compared with other events such as the filing of a petition for certiorari.

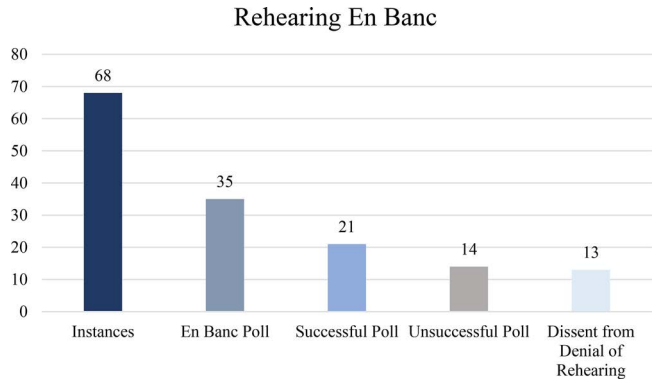


Once the court vacated the original panel opinion, it most frequently replaced the old opinion with a new panel opinion or with an opinion of the *en banc* court. A minority of the time, the *en banc* court remanded the case to the original merits panel for further consideration or the court dismissed the appeal as moot (due to settlement or some other reason). And in several instances, the case remains pending even though the panel opinion has been vacated.



75. This data is current to December 31, 2023.

A mandate hold is also a good predictor that the case will be reconsidered by the *en banc* court. Of the sixty-eight cases in the sample,[76] a judge called for an *en banc* poll in thirty-five cases, or **51.5%** of the time. Of those thirty-two polls, twenty-one (**60.0%**) were successful. And of the fourteen polls that were unsuccessful, a published dissenting opinion was filed with the order denying rehearing *en banc* on thirteen occasions—a rate of **92.9%**. This data tends to show that judges hold the mandate in cases that they believe pose important issues—important enough to be heard by the *en banc* court or important enough to warrant a dissenting opinion if the court votes down the poll. That trend is another reason why a panel opinion is likely to be altered if a judge holds the mandate.



At the very least, a mandate hold indicated that the case would remain pending before the appellate court for an extended period time. On average, the court did not release its hold on the mandate for **263 days** (or a median of **226 days**). For these cases, a lawyer who recognized that the mandate had been held would be able to conclude that the opinion would likely not be finalized for several months.

The data summarized above confirms what we know intuitively: an opinion is reasonably likely to be altered if a judge holds the mandate. Of course, orders like those issued by the Eleventh Circuit do not tell the public *why* the mandate has been held. They may mean that the panel intends to make some insignificant change. They could even mean that there has been an administrative mistake. But, at least for the sample analyzed here, a mandate hold predicted that the panel opinion would be vacated over 50% of the time. And it predicted that the result would change in 40% of cases.

That is actionable information. If a lawyer or judge knew that an opinion was *that* likely to be altered, the writer may well choose a different opinion to support the given legal assertion. Or at the very least, the writer might note the uncertainty

76. This sample excludes pending cases where a poll may still be called, but has not yet been called.

in the case citation ("*mandate held*"), like we do for cases where a petition for certiorari has been filed. The failure to notify the parties of a *sua sponte* mandate hold prevents legal writers from communicating the substantial uncertainty associated with a given legal authority. And in turn, that sows inaccuracy in judicial decisions and in the law generally.

B. Removal of Party Participation

A secondary repercussion of the failure to notify the parties of a *sua sponte* mandate hold is the inhibition of party participation. Said another way, when a judge holds the mandate, responsibility for the case's development shifts away from parties and toward judges. That displacement creates tension with our adversarial legal system—and limits all of the ordinary benefits that flow from it.

The adversarial process is a hallmark of the American legal system, and provides many well recognized benefits.[77] Among other things, it helps judges get the right answer. Party adversity "sharpens the presentation of issues," relying on the combatants' self-interest to come up with the best legal arguments.[78] For this reason, federal courts "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."[79] The adversarial system also anchors a judge's role in the litigation process. A judge, Justice Cardozo famously said, "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."[80] On the contrary, judges' role in our system of government is limited to resolving disputes, not making law. In this regard, "adversarialism and the party-presentation principle exist, at their shared core, to protect and ensure judicial neutrality and humility."[81] And of course,

77. For a recent reflection on party adversity, *see* Judges Newsom and Jordan's excellent dissent in *United States v. Campbell*, 26 F.4th 860, 891–98 (11th Cir. 2022) (en banc) (Newsom & Jordan, JJ., dissenting).

78. Baker v. Carr, 369 U.S. 186, 204 (1962); *see also* Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error[.]").

79. Greenlaw v. United States, 554 U.S. 237, 243 (2008); *see also* Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) ("Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.").

80. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). It takes no strain of the imagination to hear the echoes of Justice Cardozo's words in Justice Scalia's celebrated quotation in *Carducci v. Reagan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

81. *Campbell*, 26 F.4th at 894 (Newsom and Jordan, JJ., dissenting); *see also* Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 431–32 (1960) ("[T]he American system exploits the free-wheeling energies of counsel and places them in adversary confrontation before a detached judge. . . . Vigorous counsel will search out the facts and lawfully and carefully; the clash between them will bring out the true points at issue; the judge will come to a sounder decision if he has not sought to advise the litigants and been thus obligated to carry successive opposing briefs.").

preserving the limited role of the judge simultaneously preserves the judiciary's impartiality—and the public's perception of it.[82]

The policy of not disclosing mandate-hold orders unnecessarily dispenses with these judicial benefits. As an initial matter, such orders are an excellent opportunity to prompt the parties to give their views. That is, if such a hold *were* made public, it might cue the losing party to file a rehearing petition. In fact, it is not out of the ordinary for such a petition to come shortly after the mandate is held.[83]

In addition, current practice supports a more active role for judges. It is not uncommon for judges to exchange internal memos, challenging and defending particular legal conclusions and discussing potential revisions.[84] This departure from party control can sometimes extend to the decision's substance. That is, a judge might hold the mandate and request modification for legal reasons not addressed by the parties. For example:

> After a member of this Court withheld the mandate, the panel majority sua sponte withdrew its initial opinion and issued a revised opinion, again affirming the district court over a revised dissent but on grounds that were neither substantively discussed in the initial panel opinion nor substantively made by any party[.][85]

And even if judges decline the invitation to pursue legal avenues not forwarded by the parties, the authority to do so without public disclosure might unwittingly give the impression that it serves as a means to develop favored jurisprudence. At its best, the adversary legal system helps to ensure that cases are decided accurately and that judges maintain a limited role in our federal government. The failure to notify the public when a judge holds the mandate unnecessarily hampers both of those goals.

III. PUBLIC DISCLOSURE AS A SOLUTION

Here, the simplest solution may be the best one. The answer to the issues caused by the lack of public notice is public notice. The disclosure need not be detailed or adapted to a particular case. The Eleventh Circuit has used the following language: "Mandate withheld pursuant to Court Instructions."[86] The entry is nonspecific and reveals no confidential information. On the docket, it looks like this:

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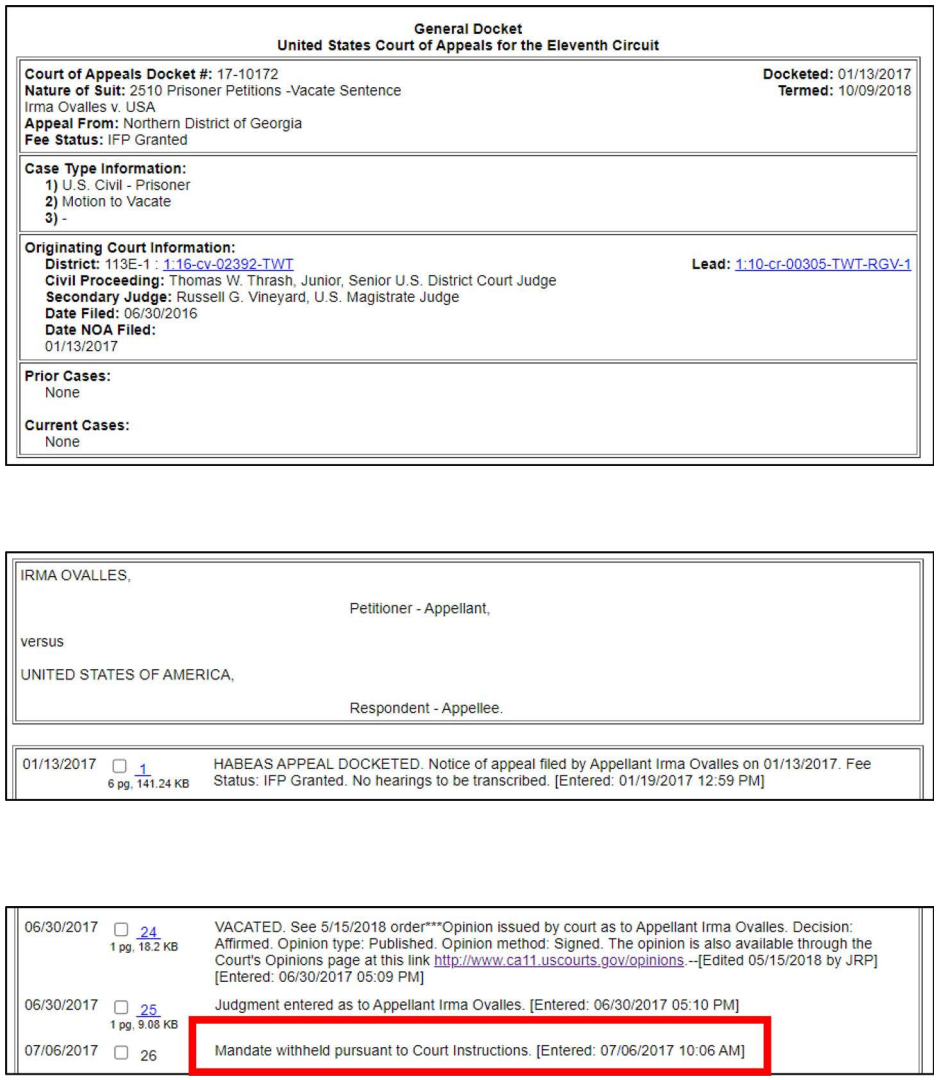
82. *See* STEPHEN LANDMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 44–45 (1984); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 383 n.41 (1982).

83. United States v. Custer, 407 F.3d 1267, 1268 (11th Cir. 2005).

84. *See, e.g.*, Brown v. Bryan Cnty., 219 F.3d 450, 469 (5th Cir. 2000) (DeMoss, J., dissenting) ("Considerable exchange of memoranda finally resulted in a decision by the original panel in October 1995 to rewrite its opinion and substitute a new opinion, *Brown II*, for *Brown I*.").

85. Adams v. Sch. Bd. of St. John's Cnty., 57 F.4th 791, 798–99 (11th Cir. 2022).

86. Solomon v. United States, No. 17-10172, Doc. 26 (11th Cir. July 6, 2017).



General Docket
United States Court of Appeals for the Eleventh Circuit

Court of Appeals Docket #: 17-10172 — **Docketed:** 01/13/2017
Nature of Suit: 2510 Prisoner Petitions -Vacate Sentence — **Termed:** 10/09/2018
Irma Ovalles v. USA
Appeal From: Northern District of Georgia
Fee Status: IFP Granted

Case Type Information:
1) U.S. Civil - Prisoner
2) Motion to Vacate
3) -

Originating Court Information:
District: 113E-1 : 1:16-cv-02392-TWT — **Lead:** 1:10-cr-00305-TWT-RGV-1
Civil Proceeding: Thomas W. Thrash, Junior, Senior U.S. District Court Judge
Secondary Judge: Russell G. Vineyard, U.S. Magistrate Judge
Date Filed: 06/30/2016
Date NOA Filed:
01/13/2017

Prior Cases:
None

Current Cases:
None

IRMA OVALLES,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

01/13/2017	☐ 1 (6 pg, 141.24 KB)	HABEAS APPEAL DOCKETED. Notice of appeal filed by Appellant Irma Ovalles on 01/13/2017. Fee Status: IFP Granted. No hearings to be transcribed. [Entered: 01/19/2017 12:59 PM]
06/30/2017	☐ 24 (1 pg, 18.2 KB)	VACATED. See 5/15/2018 order***Opinion issued by court as to Appellant Irma Ovalles. Decision: Affirmed. Opinion type: Published. Opinion method: Signed. The opinion is also available through the Court's Opinions page at this link http://www.ca11.uscourts.gov/opinions.--[Edited 05/15/2018 by JRP] [Entered: 06/30/2017 05:09 PM]
06/30/2017	☐ 25 (1 pg, 9.08 KB)	Judgment entered as to Appellant Irma Ovalles. [Entered: 06/30/2017 05:10 PM]
07/06/2017	☐ 26	Mandate withheld pursuant to Court Instructions. [Entered: 07/06/2017 10:06 AM]

The exact form is not especially important. All that matters is that the public know that the mandate has been held. Of course, the disclosure should be anonymous and general to avoid disclosing the identity of the judge or the reason he or she held the mandate. This information—though narrow—would improve appellate practice without posing any significant drawbacks.

First, public disclosure would allow the parties to note that the mandate has been held in legal citation. A recent Eleventh Circuit decision offers a case in point. In *Solomon v. United States*, the defendant was convicted of conspiracy to commit Hobbs Act robbery based on the residual clause of the Armed Career Criminal Act. Solomon challenged that conviction, pointing to a recent Supreme

Court decision that held part of the Act unconstitutional.[87] The Government defended against this argument by pointing to a recent Eleventh Circuit decision, *Ovalles v. United States*,[88] in which the court reasoned that the Supreme Court's decision had not categorically invalidated the residual clause. In response, Solomon pointed out that the mandate had been held in *Ovalles*. He explained:

> [T]his Court should refrain from relying on *Ovalles* at this time . . . [because] on July 6, 2017—one week after *Ovalles* was issued, and before a rehearing petition was filed—the Eleventh Circuit *sua sponte* withheld the mandate in *Ovalles*, 11th Cir. Case No. 17-10712 (DE of July 6, 2017) ("Mandate Withheld Pursuant to Court Instructions."). This near immediate, *sua sponte* reaction indicates that there is an interest on the Court in rehearing *Ovalles* en banc.[89]

The district court ultimately rejected the mandate argument, but as Solomon predicted, the Eleventh Circuit did indeed take *Ovalles en banc* and reach a different result.[90] (Incidentally, neither *Solomon* nor *Ovalles* remain good law in light of the Supreme Court's 2019 decision in *United States v. Davis*).[91] The point, however, is that the Eleventh Circuit's rule allowed Solomon to flag for the district court that there was some uncertainty involved with *Ovalles*.

The purpose of legal citation is to clearly communicate the authority supporting a given assertion. And it is a corollary of that goal that a writer should candidly acknowledge any uncertainty associated with the authority. For this reason, when citing court opinions, legal writers note whether an appeal has been docketed or a cert petition filed. They should also be able to indicate whether the mandate has been held. What a reader does with that information is for him or her to decide. But public disclosure of *sua sponte* mandate holds would undoubtedly facilitate better informed decisions.

Public disclosure would also ensure that the court benefits from the adversarial system. As an initial matter, a losing party who learns that the mandate has been held may be inspired to file a petition for panel rehearing or rehearing *en banc*. In that case, the court can compare the issues presented by the petition and opposition to the concerns motivating the mandate hold. Perhaps the petition raises the same question as the one raised by the mandate-holding judge, reinforcing the case for rehearing. The petition might also raise a different issue—prompting the court to consider a different angle. And, after public disclosure, the losing party

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87. Solomon v. United States, 911 F.3d 1356, 1358 (11th Cir. 2019), *cert. granted, judgment vacated*, 140 S. Ct. 103 (2019) (citing Johnson v. United States, 576 U.S. 591 (2015)).

88. 861 F.3d 1257 (11th Cir. 2017).

89. Objections to Report and Recommendation, Solomon v. United States, No. 0:16-cv-61410, ECF 23 at 1–2 (S.D. Fla. July 21, 2017).

90. *Id.* at 1359 (explaining that the district court ruled in the Government's favor). *See* Ovalles v. United States, 905 F.3d 1231 (11th Cir. 2018) (en banc) (vacating the panel opinion).

91. 139 S. Ct. 2319 (2019).

might not file a rehearing petition at all, suggesting to the court that the parties see no actionable error with the panel opinion.

For all its merit, though, the adversarial system is not perfect. Parties cannot always be expected to boil the ocean for every potentially relevant legal authority. And so, at times, it is appropriate for judges to conduct their own research and to pose questions different than those raised by the parties.[92] Such independent legal inquiry is unavoidable—judges with different philosophies will naturally see cases differently and request that other judges modify their opinions to conform with a particular point of view.

The recent publication of Justice Stevens's papers offers an example of typical judicial dialogue. Among the documents is a memo that Justice Scalia sent to Justice Stevens regarding the presidential-immunity case, *Clinton v. Jones*.[93] There, Justice Scalia states his agreement with most of Justice Stevens's proposed opinion, but expresses disagreement with several aspects of the draft and solicits changes:

> The implication of Part VI (pages 24-26) is that a court's "broad discretion to stay proceedings as an incident to its power to control its own docket" extends so far as to permit a stay during petitioner's entire presidency. I do not agree with that[.] To avoid the implication of a much broader discretionary power (which I am not sure you intend), a few changes would suffice[.][94]

This sort of judicial back-and-forth is bound to happen and is perfectly appropriate. Judges *should* discuss their views with one another because that discussion will help generate more accurate legal decisions. Public disclosure of *sua sponte* mandate holds in no way threatens this freedom. It only ensures that, when these conversations occur, judges have the parties' views as well. (If the parties choose to weigh in, that is.)

But public disclosure would deter the occurrence and appearance of judge-based legal development, as contrasted with case-based legal development. To be sure, judges will sometimes develop a concern that the parties did not brief. But rather than address that concern exclusively in an off-the-record exchange of legal memos,[95] holding the mandate offers options designed to let the litigants do the arguing. Just to name a few, the parties might cover the new issue in a rehearing petition, the panel could order supplemental briefing,[96] or the judges could

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92. *See Campbell*, 26 F.4th at 872 (Pryor, C.J.) ("Accordingly, it is inappropriate for a court to raise an issue *sua sponte* in most situations. However, the 'party presentation principle is supple, not ironclad,' and there are 'no doubt circumstances in which a modest initiating role for a court is appropriate.'") (quoting *Sineneng-Smith*, 140 S. Ct. at 1579).

93. 520 U.S. 681 (1997).

94. Memorandum at 3, Justice Antonin Scalia to Justice John Paul Stevens, Re: 95-1853, Clinton v. Jones (Apr. 4, 1997).

95. *See Brown*, 219 F.3d at 469 (DeMoss, J., dissenting).

96. Courts often order supplemental briefing on subjects not addressed by the parties. *See, e.g.*, Peck v. United States Dept. of Labor, 996 F.3d 224, 228 (4th Cir. 2021) ("The parties have not questioned our power to decide the case. . . . [W]e identified our concerns *sua sponte* and requested the parties to submit

question counsel on the topic at oral argument if the case is reheard by the panel or by the en banc court. Judges do (and should) stay abreast of new legal theories. But as much as possible, those theories should be tested in the crucible of the adversarial system rather than in the libraries of judicial chambers. Public disclosure helps accomplish that purpose. And it also provides an opportunity to be seen by the public as relying on the litigants. Judges do not make law out of whole cloth. They decide cases and controversies. They "call balls and strikes," some might say.[97] Public disclosure of mandate-hold orders reinforces that reputation.

CONCLUSION

Mandates are not a well-known aspect of appellate procedure. And even among those who recognize mandates, a judge's power to hold the mandate is unfamiliar. But the practice of holding the mandate *sua sponte* has significant consequences, even if most people don't know about them. Judges hold dozens, probably hundreds, of mandates every year—often modifying the opinion or changing the result altogether. Rule 41 of the Federal Rules of Appellate Procedure is silent on whether courts of appeals must notify the parties when a judge orders the mandate held, and almost no local circuit rules require public disclosure of those orders.

Local rules should be amended to require such disclosure. That simple rule change would allow legal writers—judges, lawyers, and others—to flag that the mandate has been held in a particular case. In so doing, the writer tells the reader to view the authority with caution, just like we do with certiorari petitions or petitions for rehearing. Caution is especially important in this context because a case is over **21 times** more likely to be altered after the mandate has been held than after a certiorari petition or petition for rehearing has been filed. Disclosure of mandate holds would also keep the parties informed of case developments, allowing them to control the litigation as much as possible, in accordance with the American adversarial legal system. And none of this would threaten judges' rightful ability to communicate internally about legal disagreements in particular cases.

To be clear—the power to hold the mandate is a good one. It enables judicial scrutiny of a legal decision by members of the court who were not assigned to the merits panel. That, in turn, helps to ensure accuracy and to identify important questions that warrant *en banc* consideration. But when a judge chooses to exercise this power and hold the mandate, the court should tell the parties. In doing so, the court would improve legal citation and the litigation process itself, at little to no cost.

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supplemental briefing on whether this court has jurisdiction over this petition."); *see also* Bayo v. Napolitano, 593 F.3d 495, 500 (7th Cir. 2010) (requesting supplemental briefing of a "potentially dispositive" issue where "the parties did not address the question . . . [i]n their original briefs"); United States v. Cardona-Diaz, 524 F.3d 20, 23 (1st Cir. 2008) (same).

97. Hearing Before the Senate Judiciary Comm. on the Nomination of The Honorable John G. Roberts, U.S.C.J., to be the Chief Justice of the United States, 109th Cong. (Sept. 12, 2005).

APPENDIX

Key

Abbreviation	Meaning
Pet. P.R.	Petition for panel rehearing
Pet. R.E.B.	Petition for rehearing e*n banc*
Held Before Pet.	Whether the mandate was held before a rehearing petition was filed
E.B. Poll	Whether an *en banc* poll was called
Dissent	Whether a dissent was filed from the denial of rehearing *en banc*
Original Op. Vac.	Whether the original panel opinion was vacated
New Op.	Form of the new opinion, if any
NPO	New panel opinion
EB	*En banc* opinion
EB / NPO	*En banc* opinion, remanded to the original merits panel
D	Dismissed
P	Pending
Diff. Result	Whether the new opinion reaches a significantly different result

Data

Case	Held	Released	Pet. P.R.?	Pet. R.E.B.?	Held Before Pet.?	E.B. Poll?	Poll Result	Dissent?	Original Op. Vac.?	New Op.	Diff. Result?	Days Held
13-12034	8/9/19	4/10/20	Y	Y	N	Y	Unsuccessful	Y	N	N	N	245
16-15705	8/9/19	1/7/20	Y	Y	Y	N	N/A	N	Y	NPO	Y	151
17-12365	9/12/19	11/19/19	N	N	Y	N	N/A	N/A	Y	NPO	N	68
18-10579	9/19/19	5/14/20	Y	Y	N	Y	Unsuccessful	Y	N	N	N	238
18-13152	9/27/19	4/27/20	Y	Y	N	Y	Unsuccessful	Y	N	N	N	213
17-12524	10/24/19	7/16/20	Y	Y	N	N	N/A	N	Y	NPO	N	266
17-13376	10/25/19	2/3/20	Y	Y	N	N	N/A	N	N	N	N	101
17-13595	11/20/19	1/3/22	Y	Y	N	Y	Unsuccessful	Y	N	N	N	775
16-17147	12/3/19	3/5/20	Y	Y	N	N	N/A	N	N	N	N	93
17-15787	12/17/19	3/16/21	Y	Y	N	Y	Unsuccessful	Y	N	N	N	455
18-11679	12/18/19	8/19/20	Y	Y	N	Y	Successful	N/A	Y	EB	Y	245
17-15565	1/7/20	6/19/20	Y	N	Y	N	N/A	N/A	Y	NPO	Y	164
18-12786	2/28/20	12/8/20	Y	Y	N	N	N/A	N	Y	NPO	N	284
17-15470	3/4/20	9/2/21	Y	Y	N	Y	Successful	N/A	Y	EB	Y	547
19-11484	3/5/20	9/28/21	Y	Y	N	N	N/A	N	Y	NPO	N	572
19-13843	4/23/20	5/20/21	Y	Y	Y	Y	Successful	N/A	Y	EB	N	392
18-14096	4/28/20	12/11/20	Y	Y	N	Y	Unsuccessful	Y	N	N	N	227
18-13592	8/10/20	1/20/23	Y	Y	Y	Y	Successful	N/A	Y	EB	Y	893

CONTINUED

Case	Held	Released	Pet. P.R.?	Pet. R.E.B.?	Held Before Pet.?	E.B. Poll?	Poll Result	Dissent?	Original Op. Vac.?	New Op.	Diff. Result?	Days Held
17-13693	9/1/20	10/20/20	Y	Y	N	N	N/A	Y	N	N	N	49
19-12227	8/12/20	8/16/21	N	N	Y	Y	Successful	N/A	Y	EB	Y	369
20-11622	8/13/20	10/7/20	Y	Y	N	N	N/A	N	N	N	N	55
18-10151	9/10/20	6/1/21	Y	Y	N	Y	Unsuccessful	Y	Y	NPO	N	264
17-10792	9/16/20	4/13/21	Y	Y	N	Y	Successful	N/A	Y	EB	Y	209
19-10083	9/18/20	5/14/21	Y	Y	N	N	N/A	N	Y	NPO	N	238
19-11955	9/30/20	5/3/21	Y	Y	N	Y	Unsuccessful	Y	N	N	N	215
20-12649	10/30/20	11/13/20	N	N	N	N	N/A	N/A	N	N	N	14
18-12344	11/9/20	10/17/22	Y	Y	N	Y	Unsuccessful	Y	N	N	N	707
16-11722	11/13/20	11/24/20	N	N	Y	N	N/A	N/A	Y	NPO	N	11
18-11627	11/19/20	1/4/21	N	N	Y	N	N/A	N/A	Y	NPO	Y	46
20-11393	12/9/20	4/21/21	Y	Y	Y	Y	Unsuccessful	Y	N	N	N	133
19-11257	12/29/20	5/3/21	Y	Y	N	N	Unsuccessful	N	N	N	N	125
19-10604	12/31/20	7/20/22	Y	Y	N	Y	Unsuccessful	Y	N	N	N	566
18-14336	1/19/21	10/15/21	Y	Y	N	Y	Successful	N/A	Y	EB / NPO	Y	269
19-11720	2/4/21	5/27/21	Y	Y	N	N	N/A	N	Y	NPO	Y	112
17-13467	4/9/21	12/28/21	Y	Y	Y	N	N/A	N	Y	NPO	Y	263
19-14650	5/28/21	1/4/23	Y	Y	Y	Y	Successful	N/A	Y	EB	Y	586

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Case	Held	Released	Pet. P.R.?	Pet. R.E.B.?	Held Before Pet.?	E.B. Poll?	Poll Result	Dissent?	Original Op. Vac.?	New Op.	Diff. Result?	Days Held
19-14434	6/14/21	10/21/22	Y	Y	N	Y	Successful	N/A	Y	EB	Y	494
18-12147	6/16/21	3/17/23	Y	Y	N	Y	Successful	N/A	Y	EB	Y	639
18-14214	6/28/21	10/4/21	Y	Y	N	N	N/A	N	N	N	N	98
17-13561	7/1/21	7/21/22	Y	Y	Y	Y	Successful	N/A	Y	D	Y	385
20-11469	7/1/21	9/22/22	Y	Y	N	N	N/A	N	N	N	N	448
20-14210	7/19/21	12/29/21	Y	Y	Y	N	N/A	N	Y	NPO	Y	163
19-14227	7/19/21	5/13/22	Y	Y	Y	N	N/A	N	Y	D	Y	298
19-13776	8/19/21	1/27/23	Y	Y	N	Y	Successful	N/A	Y	EB	Y	526
20-13414	9/1/21	1/14/22	N	N	Y	N	N/A	N/A	N	N	N	135
20-12781	10/4/21	1/20/23	N	N	Y	Y	Successful	N/A	Y	EB / NPO	Y	473
21-10550	12/2/21	2/1/23	Y	Y	Y	Y	Successful	N/A	Y	EB	Y	426
21-10514	12/16/21	3/4/22	Y	N	N	N	N/A	N/A	Y	NPO	Y	78
20-10604	1/3/22	7/18/23	N	N	Y	Y	Successful	N/A	Y	EB	Y	561
21-13963	6/13/22	1/23/23	N	N	Y	N	N/A	N/A	Y	NPO	Y	224
20-14540	7/6/22	8/16/22	Y	Y	Y	N	N/A	N	N	N	N	41
20-13039	7/15/22	5/15/23	Y	Y	N	Y	Successful	N/A	Y	EB	Y	304
20-10545	8/12/22	P	Y	Y	Y	Y	Successful	N/A	Y	P	P	445
20-13024	8/16/22	10/12/22	N	N	Y	N	N/A	N/A	N	N	N	57

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Case	Held	Released	Pet. P.R.?	Pet. R.E.B.?	Held Before Pet.?	E.B. Poll?	Poll Result	Dissent?	Original Op. Vac.?	New Op.	Diff. Result?	Days Held
21-10994	9/28/22	7/11/23	Y	Y	N	Y	Successful	N/A	Y	EB	Y	286
21-10199	10/11/22	8/17/23	Y	Y	N	Y	Successful	N/A	Y	EB	Y	310
20-13735	1/17/23	3/20/23	Y	Y	Y	Y	Unsuccessful	N	N	N	N	62
21-13496	3/1/23	6/21/23	Y	Y	N	N	N/A	N	Y	NPO	N	112
19-13390	3/1/23	3/20/23	Y	Y	N	N	N/A	N	N	N	N	19
21-12314	3/9/23	P	Y	Y	Y	Y	Successful	N/A	Y	P	P	236
22-10168	3/31/23	9/18/23	Y	Y	N	Y	Unsuccessful	Y	N	N	N	171
19-15077	4/10/23	P	Y	Y	N	P	P	P	P	P	P	204
22-11143	5/8/23	9/21/23	Y	Y	Y	Y	Unsuccessful	Y	N	N	N	136
22-11232	6/5/23	7/28/23	Y	Y	N	N	N/A	N	N	N	N	53
22-10445	6/14/23	7/5/23	N	N	Y	N	N/A	N/A	Y	NPO	N	21
22-10877	7/7/23	P	Y	Y	N	P	P	P	P	P	P	116
22-10713	7/7/23	10/5/23	Y	Y	N	N	N/A	N/A	N	N	N	90
22-11059	7/7/23	10/5/23	Y	Y	N	N	N/A	N/A	Y	NPO	N	90
21-14275	7/12/23	P	Y	Y	N	Y	Successful	N/A	Y	EB	P	111
21-13756	8/4/2023	P	Y	Y	Y	P	P	P	P	P	P	88
22-1107	9/15/2023	P	Y	Y	N	P	P	P	P	P	P	46
21-14396	9/27/2023		Y	Y	Y	N	N/A	N/A	Y	NPO	N	26

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Case	Held	Released	Pet. P.R.?	Pet. R.E.B.?	Held Before Pet.?	E.B. Poll?	Poll Result	Dissent?	Original Op. Vac.?	New Op.	Diff. Result?	Days Held
		10/23/2023										
22-10742	10/4/2023	P	Y	Y	y	P	P	P	P	P	P	27
22-13738	10/31/2023	P	N	N	Y	P	P	P	P	P	P	0
20-10545	8/12/22	11/20/2023	Y	Y	Y	Y	Successful	N/A	Y	EB	Y	445
20-13024	8/16/22	10/12/22	N	N	Y	N	N/A	N/A	N	N	N	57
21-10994	9/28/22	7/11/23	Y	Y	N	Y	Successful	N/A	Y	EB	Y	286
21-10199	10/11/22	8/17/23	Y	Y	N	Y	Successful	N/A	Y	EB	Y	310
20-13735	1/17/23	3/20/23	Y	Y	Y	Y	Unsuccessful	N	N	N	N	62
21-13496	3/1/23	6/21/23	Y	Y	N	N	N/A	N	Y	NPO	N	112
19-13390	3/1/23	3/20/23	Y	Y	N	N	N/A	N	N	N	N	19
21-10670	11/22/2023	P	Y	Y	N	P	P	P	P	P	P	39
22-10017	11/27/2023	P	Y	Y	N	P	P	P	P	P	P	34
22-12593	12/18/2023	P	N	N	Y	P	P	P	P	P	P	13