NOTES

RULE 60(B): A RULE SUITABLE FOR A *SUA SPONTE* MOTION

I. INTRODUCTION

Finality in litigation has particular importance in our system of justice.[1] It "secure[s] the peace and repose of society" by settling disputes between parties.[2] Once a court renders a judgment, it is final and binding on all parties.[3] In fact, the doctrine of preclusion prohibits the parties and their privies from raising, in future suits, issues actually litigated as well as issues that were not litigated but have a close relationship with the original claim.[4]

However, the Federal Rules of Civil Procedure allow cases to be re-opened in particular circumstances. Specifically, Federal Rule of Civil Procedure 60(b) (Rule 60(b)) offers a party relief from a judgment on motion when it is "inequitable to permit a judgment to stand."[5] The rule applies only to final judgments.[6] Thus, Rule 60(b) strikes at the heart of the concern for resolving disputes between parties. Because of the importance of final judgments, a court should only grant 60(b) relief in exceptional circumstances.[7]

Rule 60(b) is significant for other reasons as well. For example, it safeguards

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[1] *See* S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897).

[2] *Id.*

[3] San Remo Hotel, L.P. v. City & County of San Francisco, 125 S. Ct. 2491, 2500 n.16 (2005). Not only does the decision foreclose bringing a future suit based on the same claim, but *res judicata* further proscribes bringing future suits that have a close relationship with the first suit. *Id*. It implicates issue preclusion as well. The lasting effects are thus not insubstantial.

[4] Lawlor v. Nat'l Screen Service Corp., 349 U.S. 322, 326 (1955); *see also S. Pac. R.R.. Co.*, 168 U.S. at 48-49.

[5] *See* FED. R. CIV. P. 60(b); Ackerman v. United States, 340 U.S. 193, 202 (1950) (Black, J., dissenting).

[6] Farr Man & Co. v. M/V Rozita, 903 F.2d 871, 874 (1st Cir. 1990).

[7] R.C. by Ala. Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682, 690 (M.D. Ala. 1997).

against potential due process violations. In *Link v. Wabash Railroad Co.*, the plaintiff challenged the court's 41(b) *sua sponte* motion.[8] The Court recognized that when a court exercises its inherent power under Rule 41(b) sua sponte, it may do so without informing the party adversely affected by such a motion and not be in derogation of the due process clause.[9]

> [T]he availability of a corrective remedy such as is provided by Federal Rule of Civil Procedure 60(b)—which authorizes the reopening of cases in which final orders have been inadvisedly [sic] entered—renders the lack of prior notice of less consequence. Petitioner never sought to avail himself of the escape hatch provided by Rule 60(b).[10]

Additionally, some courts have held that Rule 60(b) motions apply in *habeas corpus* proceedings, liberating the challenging party from the strictures of the Antiterrorism and Effective Death Penalty Act of 1996.[11] Rule 60(b), therefore, has very powerful strategic and substantive implications, albeit in limited circumstances.

The question that remains, though, is *who* may move a court to revisit and overturn a judgment under Rule 60(b). The circuits are split on this issue, and it has yet to be resolved by the Supreme Court. This note will examine that very question and conclude that a court may raise a Rule 60(b) motion *sua sponte* because the rule effectuates a court's inherent authority and not a party's constitutional right.[12] Section II will describe the circuit court split, recognizing that each side of the split confines its analysis to the text of Rule 60(b). This section concludes that both interpretations are insufficient to resolve this issue. Section III suggests an alternative approach. The premise of this note is that *sua sponte* motions rest on the concepts of power and defendant waiver: where a rule

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[8] *See* Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

[9] *Id.* at 630-632.

[10] *Id.* at 632.

[11] Abdur'Rahman v. Bell (In re Abdur'Rahman), 392 F.3d 174, 177 (6th Cir. 2004).

> [A] Rule 60(b) motion should be treated as a second or successive *habeas corpus* petition only if the factual predicate in support of the motion constitutes a direct challenge to the constitutionality of the underlying conviction. In cases, which the factual predicate in support of the motion attacks the manner in the which the earlier habeas judgment was procured and is based on one or more of the grounds enumerated in Rule 60(b), the motion should be adjudicated pursuant to Rule 60(b) . . . . [Under AEDPA], granting a second or successive habeas petition invalidates a prisoner's conviction and/or sentence. Granting a Rule 60(b) motion has no such effect. It merely reinstates the previously-dismissed habeas petition, opening the way for further proceedings.

Id.; *cf.* Gonzalez v. Sec'y for Dep't of Corrs., 366 F.3d 1253 (11th Cir. 2004); Lopez v. Douglas, 141 F.3d 974, 975 (10th Cir. 1998).

[12] A *sua sponte* motion is one that the court raises itself without any prompting from either party. *See* BLACK'S LAW DICTIONARY 1437 (7th ed. 1999).

codifies a court's inherent power, a court may act *sua sponte*;[13] where a rule defines a constitutional right of the defendant a court may not act on a motion *sua sponte*.[14] By analyzing courts' decisions interpreting other Federal Rules, this section also identifies those rules that implicate a court's inherent power to (1) efficiently dispose of cases and manage its own process, and (2) preserve the court's institutional integrity. Also, this section will conclude that waiver is at issue when a rule involves a party's constitutional right. Finally, Section IV concludes that a Rule 60(b) motion may be raised *sua sponte* because it concerns those issues that implicate a court's inherent power.

II. THE CIRCUIT SPLIT

Rule 60(b) states that "on motion, and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment . . . ."[15] The Rule omits the identity of the movant, and the circuits are split over whether

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[13] *Link*, 370 U.S. at 630.

[14] *See* Ins. Corp. of Ireland v. Compagnie Des des Bauxites De de Guinee, 456 U.S. 694, 703 (1982); *see also* Muyet v. United States, 2005 U.S. Dist. LEXIS 2733 (2005) (holding that a court's *sua sponte* motion to deny a plaintiff's COA was legitimate because the plaintiff failed to show a denial of a constitutional right); Perez v. Ortiz, 849 F.2d 793, 797 (2nd Cir. 1988) (noting that *sua sponte* motions are invalid if there is no notice to the parties that the court is exercising that power because this violates a party's due process rights).

[15] FED. R. CIV. P. 60(b). The full text of Rule 60(b) states:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. *Id*.

the subject of "on motion" includes the courts. The Sixth and Tenth Circuits have held that the Rule requires a motion from the affected party.[16] In addition, they note that while Rule 60(a) explicitly permits courts to raise that motion on their own initiative,[17] Rule 60(b) does not have such affirmative language. The drafters[18] knew how to grant *sua sponte* authority in 60(a), the argument goes, but omitted such language in 60(b).[19] Therefore, the drafters did not intend to grant courts similar power under Rule 60(b).

The Second, Fourth, Fifth, and Ninth Circuits, however, have held that "on motion" is a general grant of authority because "nothing forbids the court to grant such relief."[20] These Circuits proffer their own contextual analysis: if the drafters intended to limit the court's authority, they could have used more restrictive language in the Rule such as "on motion by a party" as they did in 60(a).[21] The language of Rule 60(b) is not so restricted. Therefore, the drafters intended to vest the courts with the authority to raise a 60(b) motion.[22]

The existence of a circuit split over the meaning of the text suggests that the plain meaning is in fact inconclusive.[23] The texts of other Federal Rules have language similar to Rule 60(b), but the ability to raise those motions *sua sponte* will differ. For example, Rule 12(b) states that several defenses may be raised on motion "at the option of the pleader."[24] Under the Sixth and Tenth Circuits'

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[16] Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 351 (9th Cir. 1999) (citing Eaton v. Jamrog, 984 F.2d 760, 762 (6th Cir. 1993)); Dow v. Baird, 389 F.2d 882, 884-85 (10th Cir. 1968).

[17] FED. R. CIV. P. 60(a). The full text of Rule 60(a) states:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected *by the court at any time of its own initiative* or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. *Id* (emphasis added).

[18] The Supreme Court drafts the Federal Rules of Civil Procedure under the statutory authority of 28 U.S.C. § 2072.

[19] *See Dow*, 389 F.2d at 884-885.

[20] Fort Knox Music, Inc. v. Baptiste, 257 F.3d 108, 111 (2nd Cir. 2001); Kingvision Pay-Per-View Ltd., 168 F.3d at 351-352; United States v. Jacobs, 298 F.2d 469, 472 (4th Cir. 1961); McDowell v. Celebrezze, 310 F.2d 43, 44 (5th Cir. 1962).

[21] *Kingvision*, 168 F.3d at 351.

[22] *See Fort Knox Music, Inc.*, 257 F.3d at 111; *Kingvision*, 168 F.3d at 352; *Jacobs*, 298 U.S. at 472; *McDowell,* 310 F.2d at 44.

[23] *Kingvision*, 168 F.3d at 351.

[24] FED. R. CIV. P. 12(b). The relevant texts reads:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion.

interpretation of the Federal Rules, because Rule 12(b) does not explicitly grant a court the authority to raise this motion, it may not do so *sua sponte*.[25] This interpretation is obviously incorrect, given that it is well-settled law that a court may raise a 12(b)(1) motion *sua sponte*.[26]

Under the Second, Fourth, Fifth and Ninth Circuits' interpretations, a court may raise a 12(b) motion *sua sponte* because the granting language of "at the option of the pleader" does not explicitly deny a court the power to raise a 12(b) motion.[27] However, a court may not raise a 12(b)(2) motion *sua sponte*.[28] Consequently, the text alone cannot explain the different treatment of 12(b)(1) and 12(b)(2) motions, even though the text allows a pleader to move under both subsections.[29] The circuits' inconclusive analyses warrant an alternative method of interpretation.

III. A THEORY OF *SUA SPONTE* MOTIONS

Two issues underlie *sua sponte* motions: power and waiver. A rule that implicates judicial power may be raised *sua sponte*. Conversely, a rule that implicates the constitutional rights of the litigants may not be raised *sua sponte*. The Supreme Court has held that a court's power to raise a motion *sua sponte* turns on whether it is exercising an "inherent power . . . necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[30] When a Federal Rule codifies that inherent power, a court may raise that motion *sua sponte*.[31]

Waiver occurs when a party expressly or implicitly relinquishes a legal right.[32] However, only the party who possesses that right may waive it. If a court waives a litigant's constitutional rights, the waiver is considered a "contumacious action . . . directed against the roots of our system of federalism."[33] Thus, the constitutional rights of the litigants restrict judicial power as a matter of individual

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[25] *See supra* note 18.

[26] *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908). For a more thorough analysis, see *infra* Section III(a)(i).

[27] *See Fort Knox Music, Inc.*, 257 F.3d at 111; *Kingvision*, 168 F.3d at 352; *Jacobs*, 298 U.S. at 472; *McDowell,* 310 F.2d at 44.

[28] *See* Ins. Corp. of Ireland v. Compagnie Des des Bauxites De de Guinee, 456 U.S. 694, 704 (1982).

[29] "[E]very defense, in law or fact, to a claim for relief in any pleading . . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . ." FED. R. CIV. P. 12(b). The "plain meaning" of the text suggests that all of the 12(b) motions may be raised only by a party because it specifically refers to "the pleader." However, a court may raise a 12(b)(1) motion *sua sponte*. Thus, Rule 12(b) contains even more explicit granting language than Rule 60(b).

[30] Link v. Wabash R.R. Co., 370 U.S. 626, 630-31 (1962).

[31] *See* Chambers v. NASCO, Inc., 501 U.S. 32, 42-43 (1991).

[32] BLACK'S LAW DICTIONARY 1574 (7th ed. 1999).

[33] *In re* Asbestos Sch. Litig., No. 83-0268, 1988 U.S. Dist. LEXIS 11480, at *32-33 (E.D. Pa. Oct. 7, 1988).

liberty.[34]

A. Power

Courts have power that is inherent in the judicial institution. Indeed, the themes of power that resonate in Rule 60(b) also exist in other Federal Rules. These themes are: (1) the court's efficient disposition of cases and management of its own process; and (2) the confrontation of issues broader than the constitutional rights of the parties, i.e., the preservation of the institutional integrity of the court.

1. An Inherent Power Exists: An Analysis of Federal Rule 12(b)(1)

The Supreme Court has recognized that an inherent power exists.[35] However, one does not need to rely on the Court's interpretation to arrive at this conclusion. For example, Federal Rule 12(b)(1) requires the courts to dismiss a case when they lack subject matter jurisdiction.[36] Federal statute 28 U.S.C. § 1331 requires this of courts.[37] Section 1331 defines the scope of a court's federal question jurisdiction. It states that "the district courts *shall* have original jurisdiction . . . ."[38] The use of "shall" demonstrates that Congress requires a court to entertain a claim when it is properly within the court's jurisdictional scope. If it is not, either a party or the court *must* dispose of the case through a 12(b)(1) motion.[39]

While authority that is explicitly granted by Congress has little bearing on the inherent authority of courts, these explicit grants may still express the underlying principle of power. In effect, Congress codifies the power already inherent in a court's authority. More importantly, the statute codifies the *scope* of a court's power which presumes that the power exists in the first place.[40] As one commentator explains, "[t]he Constitution grants the judicial Power of the United States to all federal courts. Because this power is undefined, and because the Constitution does not invest the judiciary with any other power, at least some core

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[34] *Id*. at *32.

[35] *Chambers*, 501 U.S. at 42.

[36] *See* FED. R. CIV. P. 12(b)(1).

[37] "The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ." U.S. CONST. art. III § 2, cl.1.

[38] 28 U.S.C. § 1331 (1980) (emphasis added). The language of § 1331 parrots the language of Article III of the United States Constitution, but the Supreme Court has read § 1331 more narrowly. *See e.g.* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804 (1986); Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1983). Thus, the Supreme Court may entertain any claim that contains a federal issue, but for a court of original jurisdiction to entertain a federal issue a party must show that a federal issue dominates the claim. *Merrell Dow Pharm., Inc.*, 478 U.S. 804; *Franchise Tax Bd.*, 463 U.S. 1.

[39] *Franchise Tax Bd.*, 463 U.S. at 8.

[40] William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 783-84 (1997).

judicial functions must inhere within the very grant of judicial power."[41]

Initially, it seems paradoxical for a court to deal with a case for the limited purpose of deciding whether a court has subject matter jurisdiction when the court lacks it. In other words, if a district court has no subject matter jurisdiction, then how can a court even entertain motions by any party, let alone motions raised *sua sponte*? Any judicial action would seem to be unwarranted by the terms of the federal statute.

Courts exercising original jurisdiction are not so constrained.[42] If neither party challenges the subject matter jurisdiction, a federal court cannot entertain an issue that it has no authority to resolve.[43] This dilemma proves that an inherent power must exist to raise a 12(b)(1) motion for at least the limited purpose of disposing of a case not properly before the court.[44] Rule 12(b)(1) codifies this inherent power and, consequently, a court may (and in some cases *must*) raise this motion *sua sponte*.[45]

2. Rule 41(b): Efficiently Disposing of Claims and Managing Its Own Process

Rule 41(b) demonstrates that judicial power involves a court's ability to manage its own affairs. It permits a defendant to move for dismissal if the plaintiff fails to prosecute.[46] This rule effectively compels the plaintiff to waive his right to prosecute a valid claim, which seems contrary to general principles of waiver because it is not voluntary.[47] Based on this reasoning, the plaintiff in *Link v. Wabash* challenged the district court's 41(b) motion made *sua sponte*.[48] The Supreme Court dismissed the argument that the explicit language in the rule

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[41] *Id.*

[42] *See* Grupo Dataflux v. Atlas Global Group, L.P., 541 U.S. 567, 592 (2004).

[43] *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

[44] *Id.*

[45] *Grupo Dataflux*, 541 U.S. at 593 (citing United States v. Southern Cal. Edison Co., 300 F. Supp. 2d 964, 972 (E.D. Cal. 2004)).

[46] The text of this rule is as follows:

> Involuntary Dismissal: Effect Thereof
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> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. FED. R. CIV. P. 41(b).

[47] For example, a plaintiff may try to delay the proceedings for a strategic and perhaps inappropriate reason. Nonetheless, the plaintiff does not intend to "fail to litigate." However, regardless of the plaintiff's intention, a court may still determine that the plaintiff failed to litigate and dismiss the case. Plaintiffs have a right to litigate claims when they are wronged, and the court has taken away that right.

[48] Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962).

precludes the court from raising this motion on its own:

> Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief.[49]

The power to dismiss a case for failure to prosecute falls squarely within the court's "inherent power" to manage its own affairs "so as to achieve the orderly and expeditious disposition of cases."[50] The Court further noted that district courts have historically exercised this authority, often by developing rules to dispose of stale cases.[51] The Court was unwilling to assume that Rule 41(b) intended to undermine a well-established power.[52] If a plaintiff has effectively decided to withdraw her claim, there is no point of law in dispute. Thus, a court is merely engaging in "housekeeping" by dispensing of stale cases. Rule 41(b) prevents unnecessary delays that run up litigation costs and waste judicial resources.[53] The

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[49] *Id*.

[50] *Id.* at 630-31. The title of the Rule is "Involuntary Dismissal." The effect of an involuntary dismissal seems to implicate Fourteenth and Fifth Amendment due process rights if the plaintiff is not served with notice of the court's order dismissing the suit. However, if a plaintiff chose to file a suit and did not vigorously pursue it, needlessly drawing out the litigation in hopes of driving up the defendant's costs and forcing settlement, it would be an abuse and perversion of this right. As long as a plaintiff filed in time, he would forever be insulated from dismissal, sitting on a cause of action until the opportune time to litigate. *See id.*

[51] *See* R.C. by Ala. Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682, 689-90 (M.D. Ala. 1997); s*ee also Link*, 370 U.S. at 631 n.7:

> In the more populous districts, where calendar congestion has become a severe problem, the District Courts, acting on their own initiative, have from time to time established special call calendars of 'stale' cases for the purpose of dismissing those as to which neither adequate excuse for past delays nor reason for a further continuance appears. See, for example, the local rules of the following District Courts: Alaska Rule 16; Ariz. Rule 14; N. D. Cal. Rule 14; S. D. Cal. Rule 10 (d); Colo. Rule 24; Conn. Rule 15; Del. Rule 12; D. C. Rule 13; N. D. Fla. Rule 7; S. D. Fla. Rule 11; N. D. Ga. Rule 13 (c); *Id*aho Rule 8 (c); E. D. Ill. Rule 9; N. D. Ill. Gen. Rule 21; N. D. Ind. Rule 10; S. D. Ind. Rule 16; N. D. Iowa Rule 22; S. D. Iowa Rule 22; Kan. Rule 13; E. D. La. Gen. Rule 12; Me. Rule 15; Mass. Rule 12; W. D. Mich. Rule 8; Minn. Rule 3 (3); E. D. Mo. Rule 8 (g); Neb. Rule 18; Nev. Rule 9 (b); N. J. Rule 12; N. M. Rule 13; E. D. N. Y. Gen. Rule 23; N. D. N. Y. Gen. Rule 11; S. D. N. Y. Gen Rule 23; W. D. N. Y. Gen. Rule 11; N. D. Ohio Rule 6; S. D. Ohio Rule 8; E. D. Okla. Rule 12; E. D. Pa. Rule 18; M. D. Pa. Rule 21-A; S. Dak. Rule 9, § 4; S. D. Tex. Gen. Rule 22; Utah Rule 4 (c); E. D. Wash. Rule 23 (a); W. D. Wash. Rule 41; N. D. W. Va. Art. II, Rule 8; S. D. W. Va. Rule 8; E. D. Wis. Rule 11; W. D. Wis. Rule 15; Wyo. Rule 14.

[52] *Link*, 370 U.S. at 631-32.

[53] *Id*.

inherent power exists so that a court can "effectively manage [its] own affairs."[54]

Rule 41(b), however, does not implicate issues of waiver. If a plaintiff fails to prosecute, it would make no sense to allow the defendant to waive the right to dismiss the action. First, the defendant has no "right to litigate" when there is no plaintiff, because having been pulled into the suit, he had no independent right to litigate in the first place. Thus, he has nothing to waive. Second, such a waiver would have no effect on the plaintiff's choice to continue litigation or the court's ability to entertain the case when there is only one party participating in the suit. Courts, therefore, possess the inherent power to dispose of stale cases and may accomplish this on their own initiative.[55] Similarly, Rule 60(b) ensures that a court can manage it own process by modifying its final judgment when it is equitable in order to conserve judicial resources. Rule 60(b), therefore, may likewise be raised *sua sponte*.

3. Rule 11-Like Sanctions: Upholding the Integrity of the Court

Sanctioning a litigant for improper conduct is an inherent power of the court.[56] Rule 11 illustrates another manifestation of inherent power because exercising this power vindicates a court's judicial integrity.[57] If parties are allowed to manipulate, and otherwise make a mockery of the "the temple of justice" through acts of fraud and unnecessary delay,[58] the public will lose faith in the court's ability to settle disputes based on the facts and substantive law.[59] In this case, sanctions preserve the integrity of the court.[60]

The Supreme Court has determined that courts may sanction a party to "impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[61] In *Chambers v. NASCO*, the defendant purposefully created delay and attempted to deny the court its jurisdiction.[62] The Supreme Court deemed Rule 11 unsuitable to sanction the defendant's conduct because the rule applies only to papers filed with the court and not to conduct.[63] Despite this limitation, the Court upheld the sanctions, finding that courts have the inherent power to sanction, even when not codified by the Federal Rules.[64]

Rule 11 codifies a sub-species of the court's inherent power as it applies to the filing of papers. In fact, the rule has its genesis in the inherent power of the courts

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[54] *Id*. at 630.
[55] *See id.* at 630-631.
[56] Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991).
[57] *Id.*
[58] *Id*.
[59] *Id.* at 44.
[60] *Id*. at 43.
[61] *Id*. (quoting Anderson v. Dunn, 19 U.S. 204, 227 (1821)).
[62] *See id*. at 36-39.
[63] *Id*. at 41.
[64] *Id*. at 46.

to sanction a party for more general misconduct.[65] The Supreme Court noted that "the Advisory Committee's Notes on the 1983 Amendment to Rule 11 . . . . declared that the Rule 'build[s] upon and expand[s] the equitable doctrine permitting the court to award expenses . . . . to a litigant whose opponent acts in bad faith instituting or conducting litigation . . . .'"[66] For example, Rule 11 proscribes filing papers with the court for the sole purpose of "harass[ing] or . . . . caus[ing] unnecessary delay or needless increase in the cost of litigation."[67]

From a waiver standpoint, no party has a right to gain immunity from sanctions for its own misconduct. The court's power to punish misconduct and Rule 11 are "appropriate sanction[s] for conduct which abuses the judicial process."[68] While sanctions have monetary consequences that affect the parties, their purpose reaches issues broader than the parties' rights. Rule 60(b) also deals with providing relief from fraud; therefore, a court should similarly have the power to raise this motion *sua sponte*.

B. Waiver

Waiver preserves a party's personal rights and protects the defendant from undue burdens during litigation. Examples of constitutional rights that are effectuated through the Federal Rules are the due process right of personal jurisdiction and the right to a jury trial. When a rule concerns issues of waiver, a court may not move *sua sponte*.[69] Rule 60(b) does not concern the personal rights of the litigants and therefore a court's *sua sponte* motion is not inappropriate.

1. Rule 12(b)(2): The Due Process Right of Personal Jurisdiction

Personal jurisdiction exists when a defendant has sufficient minimum contacts in the forum state.[70] The right of personal jurisdiction flows from the Due Process Clause.[71] Because the Due Process Clause confers individual rights, it can be waived.[72] Without the requirement of personal jurisdiction, a plaintiff could unfairly prejudice the lawsuit either by making it inconvenient and expensive for the defendant to litigate in a venue to which the defendant has no connection, or by choosing a state whose law is more plaintiff-friendly.[73] While a plaintiff has some

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[65] *Id*. at 48.

[66] *Id*.

[67] *Id*. at 46 n.10.

[68] *Id*. at 44-5.

[69] *See* Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962).

[70] Int'l. Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[71] Ins. Corp. of Ireland v. Compagnie Des des Bauxites De de Guinee, 456 U.S. 694, 702 (1982). Although 12(b)(1) codifies specifically what is already granted by the due process clause of the Fourteenth Amendment, the very fact of its codification does not undermine the analysis of what motion may and may not be raised *sua sponte*.

[72] *Id*. at 703.

[73] Of course, even with the requirement of personal jurisdiction, plaintiffs are often able to make venue choices based on the favorability of the law as well as other

power to control which state's procedural rules and substantive law shall apply, the requirement of personal jurisdiction stands as a check to that discretion in the interest of "traditional notions of fair play and substantial justice."[74]

Personal jurisdiction is not a right of the court.[75] If personal jurisdiction were an issue of court power, the doctrine would make little sense. Personal jurisdiction ensures that the defendant has some check against the plaintiff's choice of forum.[76] Those determinations are of absolutely no concern to the court. Our system is not so paternalistic as to assume what is in the best interest of the defendant.[77] Because personal jurisdiction is a right solely exercisable at the discretion of the defendant, the court cannot waive it.[78] By contrast, Rule 60(b), does not implicate a defendant's rights, and therefore the court is not barred from raising it *sua sponte*.

2. Rule 38(d): Right to a Jury Trial

The Seventh Amendment gives a party the right to a jury trial in some civil cases.[79] Federal Rule 38 articulates the procedure through which a party may invoke that right, and indicates that failure to follow this procedure constitutes a waiver.[80] Whether a party wishes to have a jury trial is of little concern to the court. None of the requirements in Rule 38 implicate maintaining the integrity of the court, or disposing of cases.

Rule 39, however, permits a court, on its own initiative, to deny a request for a jury trial if it finds that the right to a jury trial does not exist under the Constitution or federal statutes.[81] This may seem inconsistent with the analysis of Rule 38. However, Rule 38 pertains to requests for jury trial *of right* under the

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considerations such as potential jury demographics, plaintiff friendly jurisdictions, etc.

[74] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (quoting *Int'l. Shoe Co*., 326 U.S. at 316). While it is true that the plaintiff has some degree of discretion in choosing its forum, there are issues out of either party's control that may dictate where the plaintiff can bring the suit. For example, some legal issues are only appropriate for state courts.

[75] *See Ins. Corp. of Ireland*, 456 U.S. at 703.

[76] Hobson v. Princeton-New York Investors, Inc., 799 F. Supp. 802, 805 (S.D. Ohio 1992). In this case the court was discussing why there must also be proper *venue*. Although venue is different than personal jurisdiction, there are similar concerns for defendant fairness. After all, the requirement of personal jurisdiction derives from the due process clause ensuring a process that abides by "traditional notions of *fair play*." *Ins. Corp. of Ireland*, 456 U.S. at 703 (emphasis added). "Fair play" ensures that plaintiff's choice of forum is not too prejudicial to the defendant for reasons other than the merits of the case.

[77] *See Ins. Corp. of Ireland*, 456 U.S. at 705.

[78] *See* Perez v. Ortiz, 849 F.2d 793, 797 (2nd Cir. 1988).

[79] U.S. CONST. amend. VII. *See also* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

[80] FED. R. CIV. P. 38(d).

[81] FED. R. CIV. P. 39(a)(2).

Seventh Amendment.[82] In cases where a party's Seventh Amendment right is not implicated, a court can permit a jury trial at its own discretion.[83]

3. Rule 12(h)(1): A Difficult Case

Even when a defendant challenges the court's personal jurisdiction under 12(b)(2), Federal Rule 12(h)(1) imposes a waiver on the defendant over his objections to personal jurisdiction.[84] It seems at odds with traditional notions of fairness to the defendant for a Federal Rule to frustrate a defendant's due process right, particularly in light of the discussion in Section III(B)(i) above indicating that the personal jurisdiction right cannot be waived.

Waiver, however, may be either an express or implied relinquishment of a right.[85] Although a court may not interfere with a defendant exercising his due process right, an individual, by participating in the legal process, subjects himself to the rules of the court, which may limit the defendant's rights.[86] Therefore, Rule 12(h) merely outlines what a court will recognize as an implied waiver.[87]

> The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—*i.e.*, certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.[88]

The rule further defines a defendant's right without obstructing it. "[U]nlike subject-matter jurisdiction, which even an appellate court may review *sua sponte*, under Rule 12(h), ... '[a] defense of lack of jurisdiction over the person . . . . is waived if not timely raised in the answer or a responsive pleading."[89]

If a defendant were able to litigate an entire case, but on appeal raise a 12(b)(2) motion, the losing defendant would essentially get a second chance at having the case dismissed. To re-litigate issues already determined by another court would undermine the judicial system.[90] Therefore, Rule 12(h)(1) merely defines what

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[82] Usually, when money damages are requested, jury trials exist as of right in civil cases. A court sitting in equity traditionally does not have jury trials. However, as Rule 39 contemplates, even in those cases a court in its discretion can grant a party's request for a jury trial. FED. R. CIV. P. 39.

[83] *See id*.

[84] FED. R. CIV. P. 12(h)(1).

[85] *See* Int'l. Shoe Co. v. Washington, 326 U.S. 310 (1945).

[86] Ins. Corp. of Ireland v. Compagnie Des des Bauxites De de Guinee, 456 U.S. 694, 703 (1982).

[87] *Id*. at 704-705

[88] *Id*.

[89] *Id*. at 704.

[90] S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897):

> [Preclusion] is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of

constitutes an implied waiver of personal jurisdiction.[91] When a defendant submits himself to the federal courts, he accepts the limits and definitions of their procedural rules. Actions that comport with the Rules will have consequences, and the defendant will be held accountable.

IV. ANALYSIS OF RULE 60(B)

Rule 60(b) strikes a balance between finality of judgments and fairness in the proceedings.[92] It implicates the court's institutional integrity and enables the court to manage its own affairs. As a result, a court can raise it *sua sponte*.

As discussed in section A(iii), protecting against fraud is an inherent power of the court.[93] Consequently, it is grounds for relief from judgment under both 60(b)(3) and 60(b)(6).[94] Rule 60(b)(3) codifies an "'historic power of equity to set aside fraudulently begotten judgments'. . . . [which] is necessary to [uphold] the integrity of the courts . . . ."[95] Protecting against fraud under this rule is the same as the court's ability to impose sanctions through its Rule 11-like power.[96] If courts can exercise their inherent powers *sua sponte*, and these powers are codified

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> matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

[91] *See* FED. R. CIV. P. 12(h).

[92] R.C. by Ala. Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682, 690 (M.D. Ala. 1997); *see also* Drake v. Dennis, 209 B.R. 20, 28 (S.D. Ga. 1996).

[93] Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citing Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944)); *see also* United States v. Buck, 281 F.3d 1336, 1339 (10th Cir. 2002); Abdur'Rahman v. Bell (In re Abdur'Rahman), 392 F.3d 174, 193 (6th Cir. 2004) (Siler, J., dissenting).

[94] Fraud upon the court is extended to officers of the court, and when an attorney exerts improper influence on the court "the integrity of the court and its ability to function impartially is directly impinged." *R.C. by Ala. Disabilities Advocacy Program*, 969 F. Supp. at 691 (citing Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085-86 (Fed. Cir. 1993)). In addition, although 60(b)(3) seems to cover fraud, it only concerns fraud *of an adverse party*. *See* FED. R. CIV. P. 60. Rule 60(b)(6), on the other hand, has very broad language: "any other reason justifying relief from the operation of the judgment." FED. R. CIV. P. 60. However, there are some limitations. A motion under this subsection cannot be based on any other clauses under section (b). *Drake*, 209 B.R. at 27. Therefore, fraud of an adverse party is not actionable under 60(b)(6). A sub-species of 60(b)(6), fraud upon the court, is subsumed in the broad language of 60(b)(6).

[95] *Chambers*, 501 U.S. at 44 (quoting *Hazel-Atlas Glass Co.*, 322 U.S. at 238).

[96] *See R.C. by Ala. Disabilities Advocacy Program*, 969 F. Supp. at 690. The fraud dealt with in Rule 11, in the inherent power to sanction discussed in Section III(iii), and in 60(b), is the same type of fraud; thus, the same issues of institutional integrity are relevant in all three contexts.

in 60(b)(3) and 60(b)(6), then a court can move *sua sponte* pursuant to at least those clauses of the Federal Rule.

Subclauses 60(b)(1) and 60(b)(2) concern relief from judgment for mistake and newly discovered evidence,[97] and subclauses 60(b)(4) and 60(b)(5) permit relief from judgment when the judgment is void or when "it is no longer equitable to impose the judgment."[98] These rules address the broad equitable powers of the courts.[99] Specifically, "Rule 60(b)(5) represents a codification of preexisting law, recognizing the inherent power of a court sitting in equity to modify its decrees prospectively to achieve equity."[100] Parties bring their disputes to court to receive justice. If courts cannot provide justice under the law, then the system will fail. These Rules are designed to give the court flexibility to manage cases equitably by ensuring that a court's holding is accurately reflected in its decision and is based on all of the facts.[101] Therefore, these Rules maintain the integrity of the court so that the institution will guarantee verdicts that reflect a court's intention.[102]

Like 41(b), Rule 60(b) enhances a court's ability to fairly manage its own affairs and efficiently dispose of cases. This Rule and its subsections allow the court to do post-trial what an appellate court can do on appeal. However, to require parties to re-litigate issues proscribed under the Rule would be expensive. Furthermore, it would be "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities."[103] Under 41(b), it would be inequitable to permit a party to delay proceedings, run up litigation costs, and waste judicial resources.[104] Similarly, Rule 60(b) allows a court to bypass the appellate process by relieving parties from its judgments, saving the parties time and money on appeal and conserving judicial resources. Because these subsections implicate a court's inherent power, courts should be able to raise them *sua sponte*.

Rule 60(b) would make little sense if viewed in terms of waiver. In order to

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[97] Rule 60(b)(1) and 60(b)(2) state:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

FED. R. CIV. P. 60(b).

[98] *Id.*

[99] SEC v. Worthen, 98 F.3d 480, 482 (9th Cir. 1996).

[100] *Id.* (citing Transgo, Inc. v. Ajac Transmission Parts Corp., 911 F.2d 363, 365 (9th Cir. 1990)).

[101] *Id.*; *see also* Drake v. Dennis, 209 B.R. 20, 28 (S.D. Ga. 1996).

[102] *See* FED. R. CIV. P. 60(b); *see also* Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 CREIGHTON L. REV. 683, 690 (April 1995).

[103] Foman v. Davis, 371 U.S. 178, 181 (1962).

[104] Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962).

waive a right, a defendant must first have a right to waive. While Rule 12(b)(2) defines a defendant's due process right, and Rule 38 effectuates a party's Seventh Amendment right to a jury trial, Rule 60(b) does not purport to describe any right of the parties.[105] Instead, it defines a procedure for which a party may obtain relief from judgment.[106] The issue of fraud does concern the parties because it may influence the disposition of a case. However, Rule 60(b) is not necessary to ensure that fraud is remedied, as a party will always have the option of bringing an independent action to get relief from judgment.[107] Similarly, parties do have an interest in obtaining closure in a lawsuit; but if the judgment is the result of error or fraud, then finality impedes the pursuit of justice.[108]

In cases dealing with a court's inherent power, the harm inflicted influences issues that are broader than the two parties to the suit—it affects the entire judicial institution.[109] Rule 60(b) cures fraud, mistake, and error that implicate the court's institutional integrity.[110] The drafters did not "inten[d] to displace the inherent power, but rather simply to provide courts with an additional tool by which to control the judicial process."[111]

V. CONCLUSION

A strict textual analysis is insufficient when examining any federal rule regarding whether a court can raise a motion *sua sponte*. The purport of each rule will expose whether the rule touches on issues of power or waiver. Rule 60(b) concerns the maintenance and integrity of the courts and the efficient disposition of cases.[112] It codifies a court's equitable authority to give relief to judgments when appropriate and reinforces the proscription of fraudulent behavior.[113] Judges must be equipped with the tools to maintain the integrity of the courts, and Rule 60(b) is such a tool.[114] Therefore, judges should be able to raise Rule 60(b) motions *sua sponte*.

Of course, one should not second-guess the language of the Federal Rules in every instance. The "inherent power" analysis involves power that a court must

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[105] FED. R. CIV. P. 60 advisory committee note.

[106] *Id.*

[107] FED. R. CIV. P. 60(b):

> This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C., § 1655, or to set aside a judgment for fraud upon the court.

See also Link, 370 U.S. at 632.

[108] S. Pac. R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897).

[109] Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991).

[110] *Id.*

[111] *Id.* at 49 n.13.

[112] *See* SEC v. Worthen, 98 F.3d 480, 482 (9th Cir. 1996); R.C. by Ala. Disabilities Advocacy Program v. Nachman, 969 F. Supp. 682, 690 (M.D. Ala. 1997).

[113] *Worthen*, 98 F.3d at 482.

[114] *See id.*

necessarily have. Therefore, when the Federal Rules explicitly permit a court to raise a motion, no further analysis should be performed to determine if it is in fact a necessary power of the court.[115] Where there is explicit language granting such power, the drafters are either codifying the power a court already possesses or they are identifying a power that a court *should* have regardless of its necessity. Similarly, simply because a rule permits other parties to raise motions, does not mean that the drafters intended to abrogate a court's inherent authority.[116] The inherent authority is in fact a "limited source; an implied power squeezed from the need to make the court function."[117] However, when the Rules fail to explicitly indicate who may raise motions, power and waiver are appropriate lenses through which to interpret a rule.

Henry Brownstein

[115] Carlisle v. United States, 517 U.S. 416, 426 (1996).

[116] Link v. Wabash R.R. Co., 370 U.S. 626, 630 (1962); Kingvision Pay-Per-View Ltd. v. Lake Alice Bar, 168 F.3d 347, 352 (9th Cir. 1999).

[117] Chambers v. NASCO, Inc., 501 U.S. 32, 42 (1991) (citing NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990)).