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## Some Concerns About Sua Sponte

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## SOME CONCERNS ABOUT SUA SPONTE

*BRADLEY SCOTT SHANNON\**

*United States National Bank* highlights and exemplifies several well-established propositions about the ability of courts to raise legal issues, including dispositive legal issues, sua sponte: (1) American courts are universally regarded as having such power; (2) that power is not limited to matters that affect the court's jurisdiction; (3) there are, however, strong currents in the law that are hostile to the exercise of such power; (4) the power to raise sua sponte will not always be exercised, so that many, and perhaps even most, waivers of legal issues by parties will be honored; and (5) there is no articulated set of criteria for determining when such power should or will be exercised.<sup>1</sup>

Quietly, and without much fanfare, sua sponte<sup>2</sup> decisionmaking has become *de rigueur*. The Supreme Court of the United States has shown a particular interest in sua sponte decisionmaking, having confronted this issue in a number of recent cases.<sup>3</sup> Further evidence of its growing popularity can be found in Federal Rule of Civil Procedure 56, which was recently amended to expressly approve of sua sponte consideration of summary judgment.<sup>4</sup> For the most part, this movement toward a greater use of sua sponte decisionmaking has generated little opposition or scholarly criticism.<sup>5</sup>

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<sup>1</sup> Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1217 (2011) (citing *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993)).

<sup>2</sup> "Sua sponte" means "[w]ithout prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY 1560 (9<sup>th</sup> ed. 2009).

<sup>3</sup> *See, e.g.*, *Wood v. Milyard*, \_\_\_ S. Ct. \_\_\_ (2012) (reversing a court of appeals' sua sponte dismissal of a habeas corpus proceeding for expiration of the applicable statute of limitations); *Greenlaw v. United States*, 128 S. Ct. 2559 (2008) (reversing a court of appeals' sua sponte increase in a criminal defendant's sentence); *Day v. McDonough*, 547 U.S. 198 (2006) (affirming a district court's sua sponte dismissal of a habeas corpus proceeding for expiration of the applicable statute of limitations).

<sup>4</sup> *See* FED. R. CIV. P. 56(f). Rule 56(f) ("Judgment Independent of Motion") now provides:

After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties

material facts that may not be genuinely in dispute.

<sup>5</sup> Though the focus of this Essay is on federal practice (both civil and criminal), the same considerations presumably would apply to state court practice.

This new-found interest in sua sponte decisionmaking seems somewhat surprising, for this practice has long been largely discredited.<sup>6</sup> Admittedly, the notion that federal court judges have at least some *power* to act sua sponte seems beyond dispute.<sup>7</sup> Also seemingly beyond dispute are at least certain aspects of the *process* that should be employed in this context—for example, that the parties ordinarily should be given notice of the act contemplated by the court and an opportunity to respond thereto.<sup>8</sup> Still, some concerns about sua sponte decisionmaking remain. This is, broadly speaking, the purpose of this Essay: to explore in greater detail the nature of sua sponte decisionmaking, and in the course of doing so, to consider some of the problems associated therewith, problems that of late might have been under-appreciated. Hopefully, this Essay will provide some guidance as to when sua sponte decisionmaking might be appropriate and when it might not, and whether there exist alternative procedures for accomplishing essentially the same goals, but at less cost.

A. Isolating the sua sponte act

Before considering the relative desirability of sua sponte decisionmaking, an opening observation might be made. It seems that it might be useful, when discussing sua sponte decisionmaking, to separate the sua sponte aspect (i.e., the decision to *act* sua sponte) from the underlying decision itself. For example, in *Greenlaw*, the Supreme Court held that the court of appeals improperly increased a criminal defendant's sentence

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<sup>6</sup> See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 385 (1978) (concluding that “the adjudicative process should normally not be initiated by the tribunal itself”); *id.* at 388 (concluding that an “arbiter” should “rest[] his decision wholly on the proofs and arguments presented to him by the parties”). (Though not published in this form until 1978, after Professor Fuller’s death, his article was based on lectures he delivered in the late 1950’s and early 1960’s. See *id.* at 353 (special editor’s note).)

<sup>7</sup> See *supra* note 1 and accompanying text. For more on this notion, see *infra* Part B.

<sup>8</sup> See *Day*, 547 U.S. at 210 (“Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.”).

on its own motion and in the absence of an appeal by the government.<sup>9</sup> Yet no one seemed to believe that the court of appeals' calculation as to the appropriate sentence was incorrect as a substantive matter; the problem, rather, related to the *manner* in which this error was corrected. *Greenlaw* therefore demonstrates that there might be occasions in which sua sponte decisionmaking is inappropriate, or less desirable, even if the decision reached is (in some sense) substantively correct.<sup>10</sup> And it also seems that the opposite is almost certainly true as well, for there must be times when a court appropriately acts sua sponte, yet reaches the wrong result.<sup>11</sup> So the first point is that, when discussing the propriety of sua sponte decisionmaking, one should focus on the decision to act sua sponte itself, and not necessarily on the result of that decision. The one might well be proper even if the other is not.<sup>12</sup>

B. The ubiquity of sua sponte decisionmaking

In order to further understand sua sponte decisionmaking, it also might be helpful to consider the breadth of this subject. Though the Supreme Court tends to focus on some of the more controversial exercises of sua sponte decisionmaking, this practice actually is much more pervasive than might first appear. Indeed, even the terminology in

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<sup>9</sup> See *Greenlaw v. United States*, 128 S. Ct. 2559, 2562 (2008).

<sup>10</sup> Actually, the situation in *Greenlaw* was more complicated than that, as the court of appeals' act also ran afoul of another norm: the norm against raising new issues on appeal. See *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is a general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Generally speaking, concerns about sua sponte decisionmaking and raising new issues on appeal are both rooted in the preservation of our adversary system of justice. The concept of dicta raises similar concerns. See Brianna J. Gorod, *The Adversarial Myth*, 61 DUKE L.J. 1, 19 n.72 (2011) (discussing the connection between dicta doctrine and adversity). Though much might be gained from a study of the similarities between these subjects (and perhaps others), that is an undertaking for another time. But for more on the relationship between sua sponte decisionmaking and the adversary process, see *infra* Part C.

<sup>11</sup> Indeed, it might well be that a court would be more likely to reach the wrong decision when it acts sua sponte. For more on this notion, see *infra* Part C.

<sup>12</sup> Thus, though this Article will continue to refer to sua sponte decisionmaking, it should now be clear that it is the sua sponte aspect that is at issue here, and accordingly that this process may be distinguished from non-sua sponte (i.e., "traditional" judicial) decisionmaking.

this area masks its pervasiveness, as sua sponte decisionmaking tends to be described in a number of different ways,<sup>13</sup> and sometimes it is not described at all.

Consider, for example, two events that occur in almost every case<sup>14</sup>: the assignment of the presiding judge, and the selection of the trial date. In most cases, the assignment of the presiding judge and the selection of the date of trial are fairly inconsequential; neither should substantially affect the ultimate outcome. But as many lawyers know, the identity of the presiding judge sometimes can have a significant effect on the outcome. And even the date of trial can have some effect on the outcome, as many lawyers who have been assigned a trial date in December or immediately after some traumatic event (such as occurred on September 11, 2001) can attest. And yet, as important as those choices might be, the parties generally have little, if any, input with respect to either.<sup>15</sup> It is true that the assignment of the presiding judge is usually limited to those judges assigned to the district in which the case is pending, and might be influenced by some factors within the parties' control, such as the location of the particular courthouse where the case was initiated. Similarly, the parties might be asked or permitted to provide their views regarding the estimated length of the trial and the time needed to prepare for trial. But the parties ultimately have little or no control over the

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<sup>13</sup> See, e.g., FED. R. CIV. P. 56(f) (variously describing the authority of the district court to “grant summary judgment for a nonmovant”; grant a motion for summary judgment “on grounds not raised by a party”; and grant summary judgment in favor of a party “on its own”).

<sup>14</sup> Because sua sponte decisionmaking arises in both civil actions and criminal cases, this Essay uses the generic term “case” to refer to both.

<sup>15</sup> The process for the selection of the presiding judge is prescribed generally by 28 U.S.C. § 137 (2006), which provides (in pertinent part): “The business of the court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.” Pursuant to this statute, the federal district courts have devised various schemes for making this determination, none of which appear to involve direct input from the parties. See United States Courts, Frequently Asked Questions, How are judges assigned to cases?, available at <http://www.uscourts.gov/Common/FAQS.aspx>.

Regarding the selection of the trial date, Federal Rule of Civil Procedure 16 (for example) generally requires the district court to issue a “scheduling order” in every case, and provides that this order may “set dates for pretrial conferences and for trial.” FED. R. CIV. P. 16(b)(3)(v). But again, this particular aspect of that process seems to be done with little party input.

assignment of the presiding judge or the selection of the trial date; those are decisions almost exclusively within the control of the court.

And upon further reflection, one could easily come up with numerous other examples. One had already been mentioned: the ability of courts to raise legal issues *sua sponte*.<sup>16</sup> Indeed, virtually every question posed to the parties by a judge, such as frequently occurs during a typical motion hearing or appellate oral argument, could be regarded as a form of *sua sponte* decisionmaking. So the second point is simply that *sua sponte* decisionmaking is quite widespread, and probably more widespread than many imagine.

Why is this so? Some of the reasons will be explored in the next Part, but one reason why *sua sponte* decisionmaking is so widespread is that it is probably both inevitable and unavoidable, at least to some extent. Perhaps one could imagine a world in which virtually everything currently being done by judges without significant party input could be left to the parties themselves, such that even the most perfunctory matters would become adversarial proceedings. But at least with respect to some matters, this seems neither feasible nor desirable. Thus, it seems that the proper inquiry is not whether *sua sponte* decisionmaking should or should not be allowed, but rather when and to what extent *sua sponte* decisionmaking is desirable.

### C. The discretionary nature of *sua sponte* decisionmaking

Yet another aspect of *sua sponte* decisionmaking relates to the discretionary nature of the decision to act *sua sponte*.

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<sup>16</sup> See *supra* note 1 and accompanying text. See also *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”)

In order to understand its discretionary nature, one might consider sua sponte decisionmaking generally as a spectrum, with what might appear to be the most permissible forms at one end, and the least permissible at the other. At the most permissible end of the spectrum one might place decisions that seem to be mandatory, such as dismissals for lack of subject-matter jurisdiction.<sup>17</sup> At the other, least permissible end, one might place decisions that seem more or less prohibited, such as that made by the court of appeals in *Wood* to dismiss a habeas corpus proceeding for expiration of the applicable statute of limitations,<sup>18</sup> or in *Greenlaw* to increase a criminal defendant's sentence.<sup>19</sup>

But this preliminary view might not be entirely accurate. Consider, again, what many consider to be the paradigmatic example of mandatory sua sponte decisionmaking: the dismissal for lack of subject-matter jurisdiction. Certainly, some authorities in this area might be construed as requiring courts to dismiss in this context. For example, Federal Rule of Civil Procedure 12 provides: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."<sup>20</sup> But what these authorities actually seem to be saying is that if a federal district court becomes *aware* of a

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<sup>17</sup> See, e.g., *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) ("Courts do not usually raise claims or arguments on their own. But federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.").

<sup>18</sup> See *Wood v. Milyard*, \_\_\_ S. Ct. \_\_\_, \_\_\_ (2012).

<sup>19</sup> See *Greenlaw v. United States*, 128 S. Ct. 2559, 2562 (2008).

<sup>20</sup> FED. R. CIV. P. 12(h)(3). See also *Day v. McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense . . . is not 'jurisdictional,' hence courts are under no *obligation* to raise the time bar *sua sponte*.").

lack of subject-matter jurisdiction, it must dismiss.<sup>21</sup> It does not seem to require the court to conduct an independent inquiry regarding subject-matter jurisdiction in every case.

At the other end of the spectrum, *Greenlaw* might be read as involving a situation (increasing a criminal defendant's sentence) in which sua sponte decisionmaking is prohibited. But upon closer inspection, the Court's holding actually seems more limited. For example, if a computational error in a defendant's sentence were noticed by a *district* court prior to the entry of judgment, rather than by the court of appeals, there seems to be little doubt that the error could be corrected, even sua sponte. The problem in *Greenlaw*, then, was really more of timing, among other things. It was not the decision to act sua sponte per se. Similarly, in *Wood*, the Court reversed a dismissal by the court of appeals of the same nature as that affirmed by the Court in *Day* (expiration of the applicable statute of limitations) on the ground that in *Wood*, the defense in question had been waived by the defendant.<sup>22</sup>

Thus, it appears that there are probably few, if any, decisions in which a court is *required* to act sua sponte, and even fewer in which a court is *prohibited* from so acting. Rather, the propriety of sua sponte decisionmaking, or rather the decision to act of sua sponte, is dependent upon a number of other, highly context-specific factors. There does not appear to be anything inherent in the concept of sua sponte decisionmaking that either compels or prevents its use. It is, essentially, a discretionary concept.<sup>23</sup>

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<sup>21</sup> See, e.g., *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 95 (1998) (“[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it . . . .”) (internal quotation marks omitted).

<sup>22</sup> See *Wood*, \_\_\_ S. Ct. at \_\_\_.

<sup>23</sup> See, e.g., *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (“The Court of Appeals, accordingly, had discretion to consider the validity of section 92, and under the circumstances did not abuse it.”). Of course, when this Essay speaks of “discretion,” it is speaking of “judicial discretion,” which might be more accurately termed “judgment.” See, e.g., *Telltabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2515 (2007) (Scalia, J., concurring in the judgment) (“Courts must

But if sua sponte decisionmaking is a discretionary concept, one again might fairly ask why. The answer seems to be essentially the same as that given in any situation involving an exercise of a court's discretion: that the court in this situation is attempting to balance competing policy interests. And here, the primary policy interest standing in opposition to sua sponte decisionmaking seems to relate to "the role of courts in our adversary system."<sup>24</sup>

"The United States' commitment to an adversarial system of justice is a defining and distinctive feature of its legal system."<sup>25</sup> And "[i]n our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."<sup>26</sup> A fear of judicial bias seems to lie at its core,<sup>27</sup> though other concerns are implicated as well.<sup>28</sup>

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apply judgment, to be sure. But judgment is not discretion."). For more on the topic of judicial discretion, see Bradley Scott Shannon, *Should Summary Judgment Be Granted?*, 58 AM. U. L. REV. 85, 102-103 (2008).

<sup>24</sup> *Greenlaw*, 128 S. Ct. at 2562.

<sup>25</sup> Gorod, *supra* note 10, at 2.

<sup>26</sup> *Greenlaw*, 128 S. Ct. at 2564. *Accord* Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011) ("Under [our adversary] system, courts are generally limited to addressing the claims and arguments advanced by the parties."); *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 2 (1984) ("The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.")

<sup>27</sup> *See, e.g.*, Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 502 (2009) ("The fear is that judges will be unable to remain impartial when deciding legal questions that they themselves have inserted into the litigation. Furthermore, the appearance of justice might suffer because the litigants and the general public might conclude that the judge is now a partisan player in the litigation rather than a detached observer to the dispute."); Fuller, *supra* note 6, at 386 (arguing that a judge that engages in sua sponte decisionmaking "forms theories about what happened" and "cannot bring to the public hearing an uncommitted mind," and that "the effectiveness of participation through proofs and reasoned arguments is accordingly reduced").

<sup>28</sup> *See, e.g.*, ROBERT A. CARP ET AL., *JUDICIAL PROCESS IN AMERICA* 157 (4<sup>th</sup> ed. 1998) ("The theory (or hope) underlying this model is that the truth will emerge if each party is given unbridled opportunity to present the full panoply of evidence, facts, and arguments before a neutral and attentive judge (and jury)."); Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENVER U. L. REV. 287, 306

The adversary system (and the reasoning behind it) represents a powerful interest, so powerful that, in most situations, it should hold sway. On the other side of the balance, though, are competing interests that sometimes weigh in favor of judicial intervention and occasionally tip the balance in favor of sua sponte decisionmaking.<sup>29</sup> Thus, though a court might be under no obligation to investigate the existence of subject-matter jurisdiction, once a defect is found, that court seemingly has no option but to dismiss.<sup>30</sup> Courts also have some obligation to administer justice, a duty that might at times call for some assistance to the unrepresented (or underrepresented).<sup>31</sup> The need for efficiency also plays a role and sometimes calls for sua sponte decisionmaking,<sup>32</sup> as does

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(2010) (“Our procedural system appears to value a party’s personal participation for reasons of dignity and legitimacy in addition to outcome quality.”).

Incidentally, whether the adversary system represents the “best” judicial system (at least in its “pure” form) is debatable, and as the authorities discussed in this Part indicate, some have questioned its ability to ascertain the truth and administer justice, among other qualities. But like so many other works touching on this subject, the purpose here is not to criticize the adversary system. That the Supreme Court appears to be quite committed to it, at least as a general matter, seems reason enough to rely on it for present purposes.

<sup>29</sup> See Gorod, *supra* note 10, at 2-3 & n.3 (“[A]lthough the U.S. legal system generally lives up to this adversarial ideal, there are many cases in which it does not. . . . Surprisingly often, for example, the Supreme Court will reach out to decide an issue that was not raised by the parties.”).

<sup>30</sup> See *supra* notes 17, 20-21 and accompanying text.

<sup>31</sup> As Professor Frost explains:

By raising overlooked issues and legal authority, a judge can ameliorate the imbalances that undermine the adversarial system. For that very reason, judges have a tradition of assisting pro se litigants with case presentation. The same rationale that permits judges to depart from the party presentation rule in pro se cases should apply in cases in which one lawyer is clearly outgunned. This exception to the principle of party presentation should be viewed not as a deviation from adversary theory, but rather as a means of promoting adversarialism by ensuring that it works as best it can. The judge can make the adversary system more efficient at reaching just and accurate outcomes by helping to right the imbalance in opposing lawyers’ skills and resources.

Frost, *supra* note 27, at 501. See also William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge’s Role*, 92 HARV. L. REV. 633, 639 (1980) (“If the process by which justice is administered is to work as intended, lawyers must perform their functions adequately. When it appears in the course of litigation that a lawyer’s performance is falling short, it should be the trial judge’s responsibility, as the person responsible for the manner in which justice is administered in his court, to take appropriate action. The question confronting the trial judge, therefore, is not whether intervention can be reconciled with the adversarial process, but how to exercise the discretion to intervene so as to accommodate the competing demands of that process.”).

<sup>32</sup> See, e.g., *Day v. McDonough*, 547 U.S. 198, 205-06 (2006) (justifying the sua sponte dismissal of a habeas corpus proceeding for expiration of the applicable statute of limitation on the grounds that the statute “promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state

the need to avoid grievous errors<sup>33</sup> and to make correct statements as to the governing law.<sup>34</sup>

But these competing interests that sometimes call for departures from our adversarial model themselves should be exercised with due regard for the limits of what some have called “managerial” judging.<sup>35</sup> Though federal judges generally bring a wealth of legal knowledge and experience to the adjudication of a case,<sup>36</sup> they also have some substantial deficiencies vis-a-vis the parties. For one thing, judges never know as much about the case as the parties.<sup>37</sup> For this reason, a judge acting *sua sponte* might well take some action that makes little sense to the parties and that would not be taken had the judge had more information.<sup>38</sup> As the Supreme Court explained long ago, “the

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court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time”).

<sup>33</sup> See, e.g., *Greenlaw v. United States*, 128 S. Ct. 2559, 2575 (2008) (Alito, J., dissenting) (“[T]he interest of the public and the judiciary in correcting grossly prejudicial errors of law may sometimes outweigh other interests normally furthered by fidelity to our adversarial tradition.”).

<sup>34</sup> See, e.g., Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQUETTE L. REV. 251, 251-52 (2004) (arguing that “judges should at least be strongly encouraged to be more “involved” . . . by using their discretion to improve the law by implementing the most correct reasoning”). As noted previously, though (see *supra* note 10), *sua sponte* decisionmaking is but one of a number of challenges to the adversary system. See, e.g., *Wood*, \_\_\_ S. Ct. at \_\_\_ (observing that the “exhaustion doctrine,” which generally prohibits appellate courts from considering issues not raised below, “is founded on concerns broader than those of the parties,” and therefore “is not absolute”).

<sup>35</sup> See generally Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

<sup>36</sup> See, e.g., Frost, *supra* note 27, at 507 (“Most federal judges practiced law for several decades before taking the bench, and many were selected for a federal judgeship precisely because they were unusually successful lawyers. Federal judges are conditioned to think about the case as an advocate, and thus to formulate the best legal arguments for each side.”).

<sup>37</sup> See *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment) (observing that “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”). Indeed, if a judge did know as much about the case as the parties, the judge might well have to recuse. See 28 U.S.C. § 455(b)(1) (2006) (requiring a federal judge to “disqualify himself” if he has “personal knowledge of disputed evidentiary facts concerning the proceedings.”).

<sup>38</sup> See Frost, *supra* note 27, at 506:

Adversary process is praised for its compatibility with judges’ core institutional competences. Judges are well suited to resolving disputes initiated by the parties, but lack the institutional capacity to frame cases themselves. Judges do not have the staff or funds to personally investigate the facts of the cases that come before them, nor do they share the parties’ incentives to uncover all the information that could assist them in making their case.

determination of what may be useful to [a party] can properly and effectively be made only by an advocate."<sup>39</sup> Similarly, judges never know the circumstances surrounding cases as well as the parties. For example, what if, in *Day*, the State of Florida had good and valid reasons for not asserting a statute of limitations defense? What if it preferred to get a decision on the merits that would have settled the underlying substantive issue raised in that case once and for all?<sup>40</sup> By raising an issue sua sponte, the court potentially places at least one of the parties in the awkward (and time-consuming) position either of defending a position it would not have asserted or explaining to the court why it is not pursuing what might seem to a relative outsider to be a preferable course.<sup>41</sup> Regardless of the decision made, the dynamic of the litigation is changed, probably to the disadvantage of one of the parties.<sup>42</sup> Thus, though sua sponte decisionmaking might be tolerable for

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<sup>39</sup> *Dennis v. United States*, 384 U.S. 855, 875 (1966). See also *Frost*, *supra* note 27, at 506-07 (“In contrast [to judges], private litigants will bring those cases most important to them, and are well situated, and highly motivated, to unearth the facts and sources of law that will support their case.”).

<sup>40</sup> See *Day v. McDonough*, 547 U.S. 198, 217-18 (2006) (Scalia, J., dissenting) (“There are many reasons why the State may wish to disregard the statute of limitations, including the simple belief that it would be unfair to impose the limitations defense on a particular defendant.”)

<sup>41</sup> There are other problems potentially associated with managerial judging. For a more thorough discussion (that also references much of the earlier scholarship in this area), see Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961 (2007).

<sup>42</sup> There are undoubtedly a host of other factors that, depending on the circumstances, might counsel against the exercise of sua sponte decisionmaking. Though it is not the purpose of this Essay to catalog all of them, some that immediately come to mind include the following:

- *The stage in the proceedings.* Generally speaking, sua sponte decisionmaking occurring later in the proceedings seems to be more problematic than that occurring earlier, if for no other reason than there is less time to compensate for those impacts and because materiality tends to increase.

- *The nature of the court.* Trial courts are primarily courts of original jurisdiction. Their function is to try the issues presented by the parties as a matter of first impression, to determine the facts and to apply the law. Appellate courts, on the other hand, are primarily courts of appellate jurisdiction; their function is one of review and of error correction. The record on appeal tends to be limited, as is those courts’ ability to consider new evidence. See *Wood v. Milyard*, \_\_\_ S. Ct. \_\_\_, \_\_\_ (2012) (“When a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on that ground, the district court’s labor is discounted and the appellate court acts not as a court of review but as one of first view.”); *id.* at \_\_\_ (Thomas, J., concurring in the judgment) (Appellate courts . . . are particularly ill suited to consider issues forfeited below.”). For these reasons, sua sponte decisionmaking might be more appropriate in the trial courts than the appellate courts.

- *The nature and purpose of the act.* Presumably, a court should be more hesitant to act sua sponte if the resulting decision would have a significant, or even dispositive, impact on the case. *Greenlaw* again provides an example, wherein the court of appeals increased the defendant’s sentence by 15 years.

certain perfunctory, housekeeping-type matters, with respect to more significant matters, a court's discretion in this area probably should be exercised only in the most exceptional of circumstances.<sup>43</sup>

D. A note on the codification of sua sponte procedures

Assuming that sua sponte decisionmaking, though something that should be invoked only rarely, is sometimes appropriate, at least two questions remain. One question relates to how such decisionmaking should be accomplished. That is the subject

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*See* 128 S. Ct. at 2562. Sometimes, though, the nature or purpose of the decision can mollify its significance. For example, a sua sponte *decrease* in a criminal defendant's sentence seems more acceptable than a sua sponte increase. (One might consider, for example, what the outcome might have been in *Greenlaw* had this been the scenario.) And there is little question but that the dismissal of a case on statute of limitations grounds, as in *Day*, has certain salutary effects on the judicial system regardless of how it is accomplished.

- *The existence of alternative procedures.* Courts should be sensitive to the existence of alternative procedures (particularly express or otherwise well-established procedures) that might obviate or alleviate the need for sua sponte decisionmaking. *Day* again provides a good example. *See* 547 U.S. at 216-17 (Scalia, J., dissenting) (observing, in contrast to the sua sponte assertion of an unpleaded statute of limitations defense, that "there already exists a well-developed body of law to govern the district courts' exercise of discretion under Rule 15(a)" that would have allowed the defendant to amend its answer and assert the same).

- *The ability to challenge the court's decision.* Some thought might be given to the ability to realistically challenge a decision made sua sponte. Consider again the assignment of the presiding judge and the selection of the trial date. Though the parties generally have little input with respect to either, there is the opportunity, by statute, to seek a recusal in appropriate circumstances, *see, e.g.*, 28 U.S.C. § 455 (2006) ("Disqualification of justice, judge, or magistrate judge"), and to modify the trial date, *see* FED. R. CIV. P. 16(b)(4) (providing that the trial date "may be modified . . . for good cause and with the judge's consent."). These procedures stand in some contrast to the typical "motion for reconsideration," a procedure that presumably would have little chance of succeeding in this context. Additional problems can occur when sua sponte decisionmaking occurs on appeal. If a district court decides to act sua sponte, the losing party likely will have the opportunity seek review of that decision, such as occurred in *Day*. But what if the decision to act sua sponte occurs in the court of appeals? In *Wood*, as well as in *Greenlaw*, the parties had the opportunity for further review by the Supreme Court. But that will not be true in the vast majority of cases. Only rarely does the Supreme Court grant petitions for a writ of certiorari, meaning most sua sponte decisionmaking in the court of appeals probably goes unreviewed.

<sup>43</sup> As Professor Frost concludes:

The parties are . . . in the best position to find and make all the arguments in their favor, and usually (though not always) can be relied upon to do so. Issue creation should not be an everyday occurrence, because it can lead to delay, disrupt settled expectations, and undermine litigant autonomy.

Frost, *supra* note 27, at 453. *See also* *Greenlaw v. United States*, 128 S. Ct. 2559, 2575 (2008) (Alito, J., dissenting) ("A reviewing court will generally address an argument *sua sponte* only to correct the most patent and serious errors."); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1307-08 (2002) (concluding that "appellate courts should be permitted to raise non-jurisdictional matters sua sponte only in the most exceptional cases, to remedy the gravest injustices").

of the last Part. Another question is whether sua sponte decisionmaking should be codified in some manner, and if so, how.

There are numerous provisions in the Federal Rules of Civil Procedure that authorize sua sponte decisionmaking.<sup>44</sup> This is not particularly surprising, for as discussed previously,<sup>45</sup> there appear to be few, if any, situations in which sua sponte decisionmaking is prohibited in all cases.<sup>46</sup> But if this conclusion is true—i.e., if sua sponte decisionmaking is broadly discretionary—then why the need to provide for sua sponte decisionmaking on a piecemeal basis? Perhaps it would be better (simpler, clearer, etc.) to provide for the possibility of sua sponte decisionmaking more generally in a single rule, which could then be applied by courts regardless of the specific nature of the act contemplated.

Yet, given that sua sponte decisionmaking represents an extraordinary act that should be invoked by courts only rarely, perhaps there is an even better solution. Courts have long been regarded as having the power to act sua sponte even in the absence of any positive authority along that line. For example, Rule 56, even prior to its recent amendment,<sup>47</sup> had long been understood as allowing for sua sponte motions for summary judgment.<sup>48</sup> Moreover, as Professor Lawson observes, courts have had difficulty

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<sup>44</sup> See, e.g., FED. R. CIV. P. 4(m); 5(c)(1); 6(b)(1)(A); 11(c)(3), (5)(B); 12(f)(1), (h)(3); 16; 17(c)(2); 21; 25(d); 26(b)(2)(C); 39(a)(2); 39(a)(2), (c); 48(c); 56(f); 59(d); 60(a); 71.1(i)(2); 73(b)(3). This list is not intended to be exhaustive; indeed, because it includes only rules that clearly seem to authorize sua sponte decisionmaking, it is almost certainly under-inclusive. Variations in terminology, among other problems, make it difficult in some instances to determine whether sua sponte decisionmaking was actually intended.

<sup>45</sup> See *supra* Part C.

<sup>46</sup> Indeed, given the number of specific references to sua sponte decisionmaking in the Rules, an uninitiated reader might draw the negative inference that sua sponte decisionmaking is *prohibited* in all other situations. It seems unlikely, though, that this was the drafters' intent.

<sup>47</sup> See *supra* note 4 and accompanying text.

<sup>48</sup> See 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2720, at 339-55 (3d ed. 1998).

articulating the criteria for determining when sua sponte decisionmaking is appropriate,<sup>49</sup> and no such articulation has found its way into the Rules. For these reasons, perhaps sua sponte decisionmaking is a matter that is better left unstated. Perhaps it should not be included in the Rules at all, and instead be considered just another aspect of the federal courts' inherent authority.<sup>50</sup>

E. A better way?

A final thought relates to the manner in which a court should conduct sua sponte decisionmaking. As has already been discussed, a court certainly should give the parties notice of the act being considered and an opportunity to be heard on that issue.<sup>51</sup> But there are times when notice and an opportunity to be heard are not enough. For example, in *Day*, “the Magistrate Judge gave Day due notice and a fair opportunity to show why the limitation period should not yield dismissal of the petition.”<sup>52</sup> But the Magistrate Judge did not seem at all interested in the antecedent question whether the court should have acted sua sponte in the first instance. Yet, given the extraordinary nature of sua sponte decisionmaking, as well as the problems potentially associated therewith, perhaps courts should *never* act sua sponte, at least as an initial matter. Perhaps instead courts

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<sup>49</sup> See *supra* note 1 and accompanying text. See also *Greenlaw*, 128 S. Ct. at 2570 n.9 (“Was the error so “grossly prejudicial,” so harmful to our system of justice, as to warrant *sua sponte* correction? By what standard is the Court of Appeals to make such an assessment?”); *Cravens*, *supra* note 34, at 261 (observing that case law in this area “leaves unclear the extent or scope of discretion or obligation on the part of courts, and it also leaves very unclear the level of involvement of the parties and the power of courts to issue their own decisions on the matters”); *Frost*, *supra* note 27, at 503 n.204 (“Unfortunately, the judiciary’s reputation for impartiality has suffered under the status quo, in which courts make ad hoc exceptions to the norm of party presentation without articulating a rationale for doing so.”). Cf. *Wood*, \_\_\_ S. Ct. at \_\_\_ (Thomas, J., concurring in the judgment) (questioning the Court’s distinction in this context between forfeited and waived defenses).

<sup>50</sup> See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (describing powers “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases”). See also FED. R. CIV. P. 83(b) (“Procedure When There Is No Controlling Law”) (“A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district’s local rules.”).

<sup>51</sup> See *supra* note 8 and accompanying text.

<sup>52</sup> *Day v. McDonough*, 547 U.S. 198, 210 (2006).

should begin by giving the parties the opportunity to express their views as to whether the court should act *sua sponte* at all. For example, in *Day*, the Court admonished: “[T]he court must assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and determine whether the interests of justice would be better served by addressing the merits or by dismissing the petition as time barred.”<sup>53</sup> But why not let the parties conduct this analysis? Why not simply alert counsel to the issue and allow the parties to take whatever action they think appropriate?<sup>54</sup> The parties will usually take the same (or better) tack as that that would be taken by the court, though with less disruption to the norm of party presentation.<sup>55</sup> Thus, the choice is not, as the *Day* Court suggested, between acting *sua sponte* and doing nothing.<sup>56</sup> There is a middle ground.

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<sup>53</sup> *Day*, 547 U.S. at 210 (internal quotation marks omitted).

<sup>54</sup> This is essentially the approach suggested by Justice Scalia in *Day*. See *Day*, 547 U.S. at 216 n.2 (Scalia, J., dissenting) (“Rather, a judge may call the timeliness issue to the State’s attention and invite a motion to amend the pleadings under Civil Rule 15(a) . . .”). The *Day* majority also acknowledged the propriety of this approach. See *Day*, 547 U.S. at 209 (observing that the trial court, “instead of acting *sua sponte*, might have informed the State of its obvious computation error and entertained an amendment to the State’s answer”).

<sup>55</sup> There might be a few situations in which the court will be required to act even in the absence of party action. For example, though the parties should be permitted to explain (or argue) why the court has subject-matter jurisdiction, an unpersuaded court must dismiss, even in the absence of a motion by a party. But in most situations, the court will not be in a good position to second-guess the decision made by the parties. See *supra* notes 35-42 and accompanying text.

<sup>56</sup> See *Day*, 547 U.S. at 208 (“In lieu of an inflexible rule requiring dismissal whenever AEDPA’s one-year clock has run, or, at the opposite extreme, a rule treating the State’s failure initially to plead the one-year bar as an absolute waiver, [the Court] reads the statutes, Rules, and decisions in point to permit the exercise of discretion in each case to decide whether the administration of justice is better served by dismissing the case on statute of limitations grounds or by reaching the merits of the petition.”) (internal quotation marks omitted).