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LIMITS ON LIMITING INHERENT AUTHORITY: RULE 37(E) AND THE POWER TO SANCTION

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I. INTRODUCTION

This article examines the interplay between inherent judicial authority and Rule 37(e) of the Federal Rules of Civil Pro-

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cedure, which governs remedies for the spoliation of electronically stored information. Part II provides a brief outline of the genesis and current status of Rule 37(e). Part III explores the doctrine of inherent authority generally, with particular attention to the historical and constitutional bases for a federal court's exercise of its inherent authority in light of the tradition of congressional control over the distribution of the judicial power and the doctrine of separation of powers. Part IV discusses the extent to which a federal court retains inherent authority to impose sanctions or order remedies in light of amended Rule 37(e). Finally, Part V summarizes our conclusions.

II. THE BIRTH OF A NEW RULE OF SANCTIONS

In December 2015, a package of amendments to the Civil Rules went into effect. No amendment was more sweeping than the rewriting of Rule 37(e). Previously, it had consisted of a "safe harbor," which provided in its entirety that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as the result of the routine, good faith operation of an electronic information system."[1] The protection provided to parties under an obligation to preserve electronically stored information was narrow. By its terms, the safe harbor applied only where the loss of data was attributable to automatic features of a computer system, such as the auto-delete function, and even then the protection could be lost if the preserving party failed to implement an adequate litigation hold.[2]

1. This section was originally adopted as Rule 37(f), but was redesignated as 37(e) as part of the restyling of the Rules in 2007. For purposes of clarity, we will refer to all iterations of the Rule as "37(e)" in this article.

2. According to the Advisory Committee on the Federal Rules of Civil Procedure [hereinafter *Advisory Committee*]:

Furthermore, the Rule precluded only sanctions imposed "under these rules." Accordingly, even when the loss of information occurred as the result of routine, good faith computer operation, a court was still theoretically free to impose sanctions under its inherent authority. Both before and after introduction of the Rule in 2006, it was criticized as overly limited and ultimately ineffectual.[3]

> Rule [37(e)] applies only to information lost due to the "routine operation of an electronic information system"—the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.
>
> The good faith requirement of Rule [37(e)] means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of a pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

FED. R. CIV. P. 37 advisory committee's note to 2006 amendment.

3. *See, e.g.*, Alexander Nourse Gross, *A Safe Harbor From Spoliation Sanctions: Can An Amended Federal Rule of Civil Procedure 37(e) Protect Producing Parties?*, 2015 COL. BUS. L. REV. 705, 717–24 (2015) [hereinafter Gross]; Nicole D. Wright, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 812–14 (2009); Gal Davidovitch, *Why Rule 37(e) Does Not Create a New Safe Harbor for Electronic Evidence Spoliation*, 38 SETON HALL L. REV. 1131, 1136–40 (2008); Daniel Renwick Hodgman, *A Port in the Storm?: The Problematic and Shallow Safe Harbor for Electronic Discovery*, 101 NW. U. L. REV. 259, 285 (2007) ("[E]ven if one concedes the existence of the

In drafting the next major set of amendments, the Advisory Committee on the Federal Rules of Civil Procedure attempted to address some of the perceived flaws in the safe harbor provision of Rule 37(e). The Advisory Committee released a package of amendments for public comment in August 2013, including a substantially revised Rule 37(e).[4] That iteration of the amended Rule received substantial feedback during the comment period.[5] In response, the Discovery Subcommittee drafted an entirely new version of the Rule, literally overnight, which was adopted by the Advisory Committee and forwarded to the Standing Committee on Rules of Practice and Procedure without again being circulated for public comment.[6] This is the permutation that ultimately became effective in December 2015.

> (e) Failure to Preserve Electronically Stored Information.
>
> If electronically stored information that should have been preserved in anticipation or conduct of litigation is lost because a party failed to take rea-

'electronic discovery problem,' the proposed Safe Harbor in Rule 37(f) provides little, if any, protection outside of the common law spoliation doctrine. Because no court has ever sanctioned a party for the routine operation of its electronic information system, litigants gain no protection under the "shallow" Safe Harbor the Committee has created."); Mark R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J. L & TECH. 14, 47–51 (2006).

4. Gross, *supra* note 3, at 729.

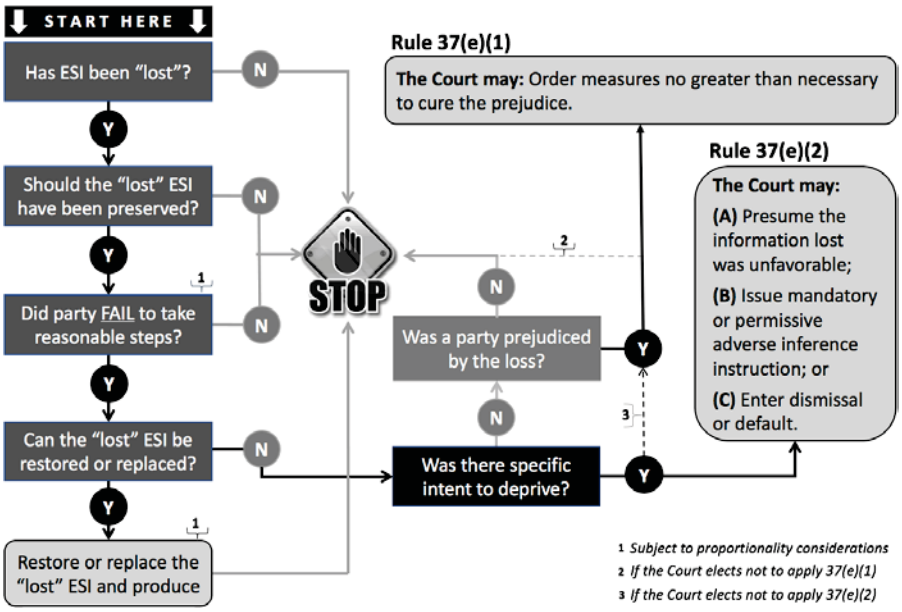
5. Out of a total of 2,343 written comments received by the Advisory Committee, 287 specifically addressed the proposed amendment to Rule 37(e). Gross, *supra* note 3, at 729.

6. Michele Lange, *FRCP Amendments: The Long and Winding Road*, THE EDISCOVERY BLOG (April 21, 2014), http://www.theediscoveryblog.com/2014/04/21/frcp-amendments-long-winding-road/.

sonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

> (1) upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with intent to deprive another party of the information's use in the litigation, may:
>
> > (A) presume that the lost information was unfavorable to the party;
> > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > (C) dismiss the action or enter a default judgment.

The amended Rule thus creates a series of gateways or decision points that will determine whether a remedial measure may be ordered in the event of spoliation and what form it may take. The following chart provides a graphic representation of the resulting decision-making process:



To analyze whether courts retain inherent power to issue spoliation sanctions following the adoption of this scheme, it is first necessary to understand the origin and contours of inherent authority.

III. THE DOCTRINE OF INHERENT JUDICIAL AUTHORITY

Both the academic literature and case law reflect highly divergent views of the appropriate scope of inherent authority. As the Third Circuit noted in 1985, "[d]espite historical reliance on inherent powers, including Supreme Court jurisprudence

dating back to 1812, the notion of inherent power has been described as nebulous, and its bounds as 'shadowy.'"[7] The court recognized several factors that give rise to this lack of clarity, including: (1) the paucity of published decisions;[8] (2) the inconsistent use of generic terms to describe "several distinguishable court powers;"[9] and (3) reliance on precedent underlying one form of inherent power to support the use of a different power.[10]

One commentator summarized the doctrinal uncertainty in this area as arising from two sources. The first is the lack of clear standards establishing when courts may invoke their inherent authority absent express statutory authorization, a situation resulting in the Supreme Court jurisprudence appearing "schizophrenic."[11] The second source of confusion is a lack of consensus over the constitutional authority of Congress to abrogate common-law rules governing the use of inherent authority.[12] As the Third Circuit has observed, the Supreme Court has failed to provide clarity with respect to "the conceptual and definitional problems regarding inherent power that have bedeviled commentators for years."[13] The confusion is reflected, and perhaps exacerbated, by regular use of the term "inherent

7. Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561 (3d Cir. 1985) (en banc) (citing Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 485 (1958); Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 HOFSTRA L. REV. 997, 1004 (1983); R. Rodes, K. Ripple & C. Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 179 n.466 (Federal Judicial Center 1981)).

8. *See id*.

9. *Id.* (citations omitted).

10. *See id*.

11. Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, *41–42 (2008) [hereinafter Anclien].

12. *Id*.

13. *Eash*, 757 F.2d at 561.

power" that conflates "certain implied powers" purportedly arising from the structure of the Constitution itself, with "inherent authority" which refers to powers originating outside of the Constitution. Notwithstanding the semantic distinction,[14] the Supreme Court and the lower courts have repeatedly used the terms "implied power" and "inherent power" interchangeably. This article will therefore treat these terms as synonymous unless otherwise indicated.

In part III.A, below, we examine what might be termed the "narrow" view of inherent authority, which is characterized by a correspondingly broad view of the power of Congress to limit judicial authority. Next, in part III.B, we discuss the "expansive" view, where the balance of power tips in favor of the judicial branch. Then, in part III.C, we consider the somewhat tortured path that inherent authority has taken in Supreme Court jurisprudence and address the current status of the doctrine.

A. The Narrow View of Inherent Authority

Several scholars have concluded that Congress has virtually unlimited authority over the exercise of judicial power. A principal proponent of this position is Professor Robert J. Pushaw, Jr., who summarizes this view as follows:

> Any judicial invocation of inherent power [] seems to clash with three principles of constitutional structure that the Court has long endorsed. First, the American government is founded upon a written Constitution that enumerates and limits

14. *Compare* Anclien, *supra* note 11, at n.10 ("neither the caselaw nor the underlying concepts admit such a sharp distinction"), *with* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 43, 45–52 (2001) (proposing a fundamental distinction between "implied" and "inherent" powers).

> the powers of each department, with particularly stringent restrictions placed on the judiciary. Second, the Court's claim that federal judges may act without statutory authorization appears to conflict with its longstanding position that the Constitution vests Congress with full power over the judiciary's structure, jurisdiction, and operations. Third, the Court's development of rules to govern the exercise of inherent powers cannot be squared with its axiom that Congress makes federal law, both substantive and procedural, which judges merely interpret and apply.[15]

In general, these scholars extrapolate from Congress' long-standing exercise of control over the judiciary, and they infer that the drafters of the Constitution intended to vest in the legislative branch the authority to establish not only substantive law, but also procedural and operational rules for the judiciary pursuant the "necessary and proper" clause or the "tribunals" clause of Article I, Section 8. The former provides that "Congress shall have power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer

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15. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001) [hereinafter Pushaw]; *see also* Benjamin H. Barton, *An Article I Theory of the Inherent Powers of the Federal Courts*, 61 CATH. U. L. REV. 1 (2011) [hereinafter Barton] ("An examination of the Constitution's history and text, the ratification debates, and early case law establishes that Article I's Necessary and Proper Clause—not Article III's usage of the words 'judicial power' and 'courts'—controls any inherent judicial authority. Thus, . . . Congress has near plenary authority over the structure and procedure of the federal courts.").

thereof."[16] The latter states, "The Congress shall have power . . . [t]o constitute tribunals inferior to the Supreme Court."[17] The inference that these scholars draw from the "tribunals" clause is that Congress, having been assigned the authority to constitute the inferior courts of the United States, can, by "necessary implication," limit those courts and control all aspects of their exercise of the judicial power.[18]

In this view, inherent authority is limited to powers that are necessary to preserve very narrowly defined judicial functions:

> By vesting 'judicial power' in independent 'courts,' Article III incorporated the English understanding that judges were to administer justice impartially by applying pre-existing law to the facts in a particular case, then rendering a final and binding judgment that the political branches

16. U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have power . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

17. U.S. CONST. art. I, § 8, cl. 9. ("The Congress shall have power . . . To constitute tribunals inferior to the Supreme Court."). The asserted inference stemming from the "tribunals" clause is that Congress, having been assigned the authority to constitute the inferior courts of the United States, can by "necessary implication" destroy those courts, and control all aspects of their exercise of the judicial power while in existence.

18. *See* Pushaw, *supra* note 15, at 832 (arguing from statements made during the ratification debates, as reported in *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot, 1827): "Most significantly, the Constitution's ratifiers often asserted that Congress had authority over rules of judicial procedure and evidence, derived by necessary implication from both general democratic principles and Congress's specific power to establish inferior federal courts and to regulate the Supreme Court's appellate jurisdiction.").

> could not alter. The Court has always adhered to this sound interpretation of Article III, which assumes that the constitutional provisions concerning congressional regulation of the judiciary do not pertain to the courts' exercise of their essential function of adjudication.[19]

Proponents of the narrow view draw support from what Congress has actually done in defining the limits of judicial authority and prescribing procedural rules. In its first session, Congress passed the Judiciary Act of 1789 to establish the courts of the United States pursuant to Article III.[20] The Act defined the roles of the Supreme Court, the circuit courts, and the district courts, including their respective jurisdictions.[21] Additionally, Section 17 of the Act expressly granted the judiciary the power to "impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States."[22]

B. The Expansive View of Inherent Authority

The arguments favoring a more expansive view of inherent judicial authority are partly historical, partly structural, and partly based on an analysis of the intent of the Founders.

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19. Pushaw, *supra* note 15, at 741.

20. *See* 1 Stat. 73.

21. *See id.* §§ 1–16.

22. *Id.* § 17. The fact that Congress included the power to punish contempt in the Judiciary Act of 1789 could be taken as implying that Congress did not believe that the courts possessed such power as a matter of inherent authority.

1. Historical Underpinnings

Well prior to the American Revolution, English courts had relied on their inherent authority—as opposed to a grant of authority from the crown or parliament—to assert control over proceedings and the conduct of parties and counsel on a wide variety of matters, including the dismissal of cases for vexatiousness or failure to prosecute.[23] Thus, for example, the implied power to fine or imprison a contemnor existed in the English courts of common law and chancery long before the ratification of the U.S. Constitution.[24] As Professor Benjamin H. Barton notes, "Courts in 1787 would have been at a loss without the power to act in the absence of legislative authority."[25] The argument, then, is that the use of inherent authority by courts to regulate themselves was well-established in the colonies prior to the Revolution, and was inherited by the Judiciary of the United States upon the ratification of the Constitution in 1789.[26]

23. *See* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, *1806 (1994) [hereinafter Meador] ("American concepts of judicial functions and the nature of judicial power are rooted in English common law and chancery practice. Long before the American Revolution, English courts assumed the authority to prevent abuses of their processes and procedures and to control the conduct of persons appearing before them or interfering with their business.").

24. *Id.* at *1806–07.

25. Barton, *supra* note 15, referencing Pushaw, *supra* note 15, at 817–18 (noting the uniqueness of the Virginia Assembly's decision to enact a code of judicial procedure, given that most courts addressed such issues as they arose).

26. *See* Barton, *supra* note 15; Pushaw, *supra* note 15; Meador, *supra* note 23.

2. Separation of Powers

The broad view of judicial authority also rests on a separation-of-powers argument,[27] which emphasizes the co-equal roles of the legislative and judicial branches. Congress is vested with the constitutional authority to utilize the legislative power of the United States within the scope of Article I, including establishing substantive rights and obligations. Article III vests the judicial power of the United States "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[28] Once Congress acts, these lower

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27. *See generally* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1284 (1993). The uninitiated may be forgiven for wondering why separation of powers doctrine is implicated by the relationship between decisions by courts created under Article III of the Constitution and rules promulgated by committees composed largely of Article III judges. The answer lies in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. That statute constitutes the delegation by Congress of its power to enact rules governing the conduct of proceedings in the federal courts. The proposed rules must be laid before Congress for a prescribed period giving Congress the opportunity to modify or reject them before they become effective. 28 U.S.C. § 2074(a). *See* Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleadings in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."); Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941) ("Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States . . . ."); Mullenix, *supra*, at 1323–31. Thus, in a sense, judges act as agents of Congress when they amend the Federal Rules, a structure that some commentators consider a violation of separation of powers when those rules are procedural. Mullenix, *supra,* at 1331.

28. U.S. CONST., art. III, § 1. The Constitution is silent as to the meaning of "judicial power." However, Article III, Section 2 states, "The judicial

federal courts are expressly vested with judicial power of the United States, which historically has included the authority to, among other things, (1) establish procedural rules for litigation and (2) regulate and enforce standards of conduct for those appearing before the court. According to this argument, when Congress creates non-substantive rules for the federal courts, it usurps the judicial power vested exclusively in the judiciary under Article III.

3. Original Intent

Adherents to the expansive view buttress this structural argument with an analysis of original intent. One aspect of this analysis is an examination of the legislative history of what ultimately became Article III. According to the records of the Constitutional Convention, on Monday, August 6, 1787, the Committee of Detail delivered to the Committee of the Whole a proposed draft of the Constitution for consideration.[29] Article XI of the August 6 draft was dedicated to the national judiciary,[30] and is reproduced in Appendix A. On August 27, 1787, the Committee of the Whole took up the proposed Article XI, and,

power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." U.S. CONST., art. III, § 2, cl. 1.

29. *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, vol. 2, 176 (Max Farrand, ed. 1911) [hereinafter Farrand].

30. 2 Farrand, *supra* note 29, at 186–187.

toward the end of that day, two motions were made and considered to amend Section 3, the provision that would establish the subject matter jurisdiction of the federal courts.[31]

The first motion, no. 383, was to append a sentence to the end of Section 3 that would read: "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct."[32] Motion 383 was rejected by a vote of 2 states in favor and 6 states in opposition.[33]

The second motion, no. 384, sought to strike the last sentence in Section 3—as proposed by the Committee of Detail—which read: "The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner and under the limitations which it shall think proper, to such inferior courts as it shall constitute from time to time."[34] Motion no. 384 to strike this sentence was passed unanimously.[35]

Thus, it can be maintained that the delegates to the Constitutional Convention rejected the proposition that Congress should have the constitutional authority to direct the federal court's exercise of the judicial power by statute, or to otherwise

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31. *Id.; see also* Appendix A, *infra* (Much of the approved text from the August 6, 1787, draft of Article XI, § 3 was subsequently moved by the Committee on Style into Article III, § 2 of the Constitution.).

32. 2 Farrand 425, 426 (motion 383), 431.

33. *Id.* (Delaware and Virginia voted in "aye," while New Hampshire, Connecticut, Pennsylvania, Maryland, South Carolina, and Georgia voted "no." Massachusetts, New York, New Jersey, North Carolina, and Rhode Island were not present.).

34. 2 Farrand 425, 426 (motion 384), 431.

35. *Id.* (New Hampshire, Connecticut, Pennsylvania, Maryland, South Carolina, Georgia, Delaware, and Virginia voted "aye." Massachusetts, New York, New Jersey, North Carolina, and Rhode Island were not present.).

limit or control the distribution of the jurisdiction except as otherwise expressly granted in Article III, Section 2.[36]

This view is supported by the writings of James Madison, both before and after the ratification of the Constitution. In *The Federalist* No. 51, Madison is credited with explaining that the constitutional partition of the legislative, executive, and judicial powers into three distinct branches was designed to ensure that the constituent parts of the federal government would each be kept "in their proper places" and that the danger that arises from encroachment by one branch would be counteracted by another branch.[37]

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36. Of course, caution must be exercised in drawing inferences from the rejection of proposed language by the delegates to the Constitutional Convention, just as courts are careful about divining congressional intent from inaction. *See* United States v. Craft, 535 U.S. 274, 287 (2002) ("[C]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.") (internal punctuation and alterations omitted); Federal Election Commission v. Arlen Specter '96, 150 F. Supp. 2d 797, 815 (E.D. Pa. 2001) ("[W]e are skeptical about the amount of weight that can be properly given to a failed amendment that died in committee.").

37. THE FEDERALIST NO. 51 (James Madison) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to

Madison further reflected on his views of the separation of powers during the 1789 House debate on the Executive branch power to remove the principal officers of the United States who were appointed by the President with the advice and consent of the Senate.[38] The Constitution is silent as to whether these principal officers are to serve at the pleasure of the President, or may only be removed from office by Congress through its impeachment power. Speaking from the floor of the House of Representatives, Madison explained how the separation-of-powers doctrine should be applied in the absence of direct instruction in the Constitution on whether the power of removal should rest in the hands of the President or the hands of Congress:

> There is another maxim which ought to direct us in expounding the constitution, and is of great importance. It is laid down, in most of the constitutions or bills of rights in the republics of America; it is to be found in the political writings of the most celebrated civilians, and is everywhere held as essential to the preservation of liberty, that the three great departments of Government be kept separate and distinct; and if in any case they are

control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.").

38. Under the proposed Act to create the Executive department of Foreign Affairs, the President was given the authority to remove the principal officer (Secretary) of the department. U.S. CONST. Art. II, § 2, Cl. 2 provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . all other officers of the United States."

> blended, it is in order to admit a partial qualification, in order more effectually to guard against an entire consolidation. I think, therefore, when we review the several parts of this constitution, when it says that the legislative powers shall be vested in a Congress of the United States under certain exceptions, and the executive power vested in the President with certain exceptions, we must suppose they were intended to be kept separate in all cases in which they are not blended, and ought, consequently, to expound the constitution so as to blend them as little as possible.[39]

Thus, according to Madison, the Constitution should be interpreted so as to permit the intrusion of one branch on another "as little as possible."[40] During this same debate,[41] Madison expressed his strong conviction about the separation of powers between the judicial and the legislative branches:

> The judicial power is vested in a Supreme Court; but will gentlemen say the judicial power can be placed elsewhere, unless the constitution has made an exception? The constitution justifies the Senate in exercising a judiciary power in determining on impeachments; but can the judicial power be further blended with the powers of that body? They cannot.[42]

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39. 1 ANNALS OF CONG. 518–519 (June 17, 1789).

40. *Id.*

41. This debate occurred five weeks before the House received the Judiciary Act from the Senate.

42. 1 ANNALS OF CONG. 482 (June 16, 1789). In the continuing debate the following day, Madison examined and rejected the argument often asserted by those who believe that under the "tribunals" clause the power of

Thus, to the extent that the views of Madison carry special weight, they support the broad view of inherent judicial authority.

C. The Course of Inherent Authority in the Supreme Court

As noted above, Supreme Court opinions reflect a less than consistent approach to inherent authority. One of the first cases to address the reach of a federal court's power in the absence of a statutory grant of authority was *Turner v. Bank of North America*, decided in 1799.[43] There, the Supreme Court was

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Congress to create the inferior courts implies the power to control all aspects of those courts:

> The gentleman from Connecticut (Mr. Sherman) has advanced a doctrine which was not touched upon before. He seems to think (if I understood him rightly) that the power of displacing from office is subject to legislative discretion; because it having a right to create, it may limit or modify as it thinks proper. I shall not say but at first review this doctrine may seem to have some plausibility. But when I consider, that the constitution clearly intended to maintain a marked distinction between the legislative, executive, and judicial powers of Government; and when I consider, that if the Legislature has a power, such as contended for, they may subject and transfer at discretion powers from one department of our Government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give it to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress; or they may reserve it to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the constitution, I own that I cannot subscribe to it.

Id. at 515 (June 17, 1789).

43. Turner v. Bank of North America, 4 U.S. (4 Dall.) 8 (1799).

faced with the argument that, because the Constitution authorized suits between citizens of different states, a federal court had jurisdiction to hear such a case even though Congress had not enacted a parallel jurisdictional provision. The Court rejected this contention, and its reasoning is captured in an exchange between two of the justices, contained in a footnote to the opinion:

> ELLSWORTH, Chief Justice.—How far is it meant to carry this argument? Will it be affirmed, that in every case, to which the judicial power of the United States extends, the federal courts may exercise a jurisdiction, without the intervention of the legislature, to distribute and regulate the power?
>
> CHASE, Justice.—The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise: and if congress has not given the power to us, or to any other court, it still remains at the legislative disposal. Besides, congress is not bound, and it would, perhaps, be inexpedient, to enlarge the jurisdiction of the federal courts, to every subject, in every form, which the constitution might warrant.[44]

In *United States v. Hudson & Goodwin* in 1812, the Supreme Court took a different view with respect to powers other than those defining the jurisdiction of the federal courts, and it held that the federal judiciary has "certain implied powers" and

44. *Id.* at 9, n."a."

"inherent authority" independent of any statutory grant from Congress.[45] In *Hudson*, the Court distinguished between the existence of inherent powers, specifically the power "[t]o fine for contempt—imprison for contumacy—inforce the observance of order, &c." that "cannot be dispensed with in a Court," and the exclusive role of Congress under the Constitution to establish the subject matter jurisdiction of the inferior courts of the United States.[46] To be sure, the Court offered these pronouncements only after Section 17 of the Judiciary Act of 1789 had expressly granted authority to the courts to "punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same."[47]

In 1821 in *Anderson v. Dunn*,[48] the Supreme Court examined the power of Congress to issue its own warrant to have the Sergeant-at-Arms arrest and imprison the plaintiff, a member of Congress, for contempt committed in the presence of the House. The plaintiff asserted that the authority to charge contempt was within the judicial power solely granted under the Constitution

45. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) [hereinafter *Hudson*].

46. *Id.* ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence. Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others: and so far our Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.").

47. 1 Stat. 87, § 17.

48. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

to the judiciary of the United States, and thus could not be exercised by Congress.[49] In rejecting the plaintiff's assertion and holding in favor of Congress, the Court noted that to deny Congress the implied power to guard itself from contempt would "leave it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may meditate against it."[50] The Court likened this congressional power to the inherent authority vested in the courts, stating that "[c]ourts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."[51] The Court then noted that while the Judiciary Act of 1789 provided for the courts to fine or imprison for contempt, this did no more than endorse the inherent authority already existing in the

49. *Id.* at 224 ("The power of issuing warrants is manifestly *judicial*. This may be assumed as an axiom. The Constitution ordains, that the judicial power (which is equivalent to all the judicial power) shall be vested in one Supreme Court, and other inferior Courts (art. 3. sec. 1.) Thus, the right of the *Courts* to exercise such a power, is *exclusive*, and an assumption of it by any other department, is an usurpation . . . Courts enforce the laws; they must, therefore, be clothed with authority to compel obedience to them: whereas, the Legislature is merely deliberative.").

50. *Id*. at 228–29 ("This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate asembly [sic], clothed with the majesty of the people, and charged with the care of all that is dear to them; composed of the most distinguished citizens, selected and drawn together from every quarter of a great nation; whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.").

51. *Id.*

courts, which should "not extend beyond its known and acknowledged limits."[52]

The Court appeared to take a more circumscribed view of inherent power in 1845 in *Cary v. Curtis*.[53] Writing for the Court, Justice Daniel held that "the courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them."[54] He reasoned:

> This argument is in nowise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have

52. *Id.* at 227–28 ("On this principle it is, that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution. It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute, or not, in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.").

53. Cary v. Curtis, 44 U.S. 236 (1845).

54. *Id*. at 245.

> been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.[55]

A more generous doctrine of inherent authority emerged again in 1874 in *Ex Parte Robinson*,[56] in which the Supreme Court considered the power of a federal court to summarily disbar an attorney for insolence. The Court reiterated that the inherent authority to punish for contempt was "essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice."[57] It declared that the judiciary obtained its inherent powers through a combination of the grant of judicial power to the courts under the Constitution and the grant of subject matter jurisdiction to the courts by Congress.[58]

In *Ex Parte Peterson*,[59] the Supreme Court addressed inherent authority in a different context: the power to appoint an auditor to prepare a summary of damages in the absence of statutory authority to make such an appointment. It found the exercise of such authority appropriate:

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55. *Id*.

56. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873).

57. *Id.* at 510.

58. *Id.* ("The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.").

59. *Ex parte* Peterson, 253 U.S. 300 (1920).

> Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties. This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause. From the commencement of our government it has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners. To take and report testimony; to audit and state accounts; to make computations; to determine, where the facts are complicated and the evidence voluminous, what questions are actually in issue; to hear conflicting evidence and make [a] finding thereon are among the purposes for which such aids to the judges have been appointed.[60]

In 1962, in *Link v. Wabash Railroad Co.*,[61] the Supreme Court examined the power of a United States District Court to exercise its inherent authority to dismiss a plaintiff's action with prejudice *sua sponte* for lack of prosecution. The plaintiff asserted on appeal that Rule 41(b), and not the court's inherent authority controlled, and that the Rule required that any motion for involuntary dismissal be made by the defendant. Thus, the plaintiff argued, the District Court lacked authority to act on its own.[62] In response, the Court held:

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60. *Id.* at 312–13 (internal citations omitted).

61. Link v. Wabash R. Co., 370 U.S. 626 (1962).

62. *Id.* at 630–32.

> 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. The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power," 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. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even from language in this Court's opinion in *Redfield v. Ystalyfera Iron Co.*, 110 U.S. 174, 176. It also has the sanction of wide usage among the District Courts. It would require a much clearer expression of purpose than Rule 41 (b) provides for us to assume that it was intended to abrogate so well-acknowledged a proposition.[63]

Thus, the Court adopted the principle that inherent authority is not supplanted by a rule, absent a clear indication that the rule was intended to achieve that result.

In *Roadway Express v. Piper*,[64] the Supreme Court addressed the exercise of inherent authority in connection with sanctions. Plaintiff's counsel had failed to comply with discovery requirements and related orders of the District Court.[65] The

63. *Id.*

64. Roadway Express v. Piper, 447 U.S. 752 (1980).

65. *Id.* at 755.

defense moved for dismissal under Rule 37, and the District Court granted the motion, followed by a hearing on costs and fees.[66] Having concluded that plaintiff's counsel "'improvidently enlarged and inadequately prosecuted' the action, . . . [a]s a sanction, the court ordered them to pay Roadway's costs and attorney's fees for the entire lawsuit."[67] Plaintiff's counsel appealed on the basis that the sanction conflicted with the statutory scheme for setting of fees and costs codified in 28 U.S.C. § 1920 and § 1927. The Supreme Court held that, notwithstanding these statutes, "in narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel."[68] The Court did caution, however, that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion."[69] The Court then remanded the case for determination as to whether plaintiff's counsel had acted in bad faith so as to justify the use of inherent authority for issuing sanctions.[70]

Chambers v. NASCO, Inc.,[71] decided in 1991, brought together many of the threads of prior Supreme Court cases addressing inherent authority, and it did so in connection with sanctions. A vexatious litigant, Chambers, was found to have repeatedly abused the judicial process, attempted to deprive the court of its jurisdiction through a fraudulent transfer, and violated court orders. After determining the merits of the case in favor of NASCO, the District Court considered sanctions

66. *Id*.

67. *Id.* at 756.

68. *Id*. at 764.

69. *Id.* (citing Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450–451 (1911); Green v. United States, 356 U.S. 165, 193–194 (1958) (Black, J., dissenting)).

70. *Id.* at 767–768.

71. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

against Chambers under Rule 11, 28 U.S.C. § 1927, and the court's inherent authority. Concluding that the Rule 11 and § 1927 were inadequate to reach Chambers directly, the District Court utilized its inherent authority to impose monetary sanctions on Chambers in the amount of NASCO's entire litigation expense, noting that "the wielding of that inherent power is particularly appropriate when the offending parties have practiced a fraud upon the court."[72] The Court of Appeals affirmed. The question presented to the Supreme Court was whether sanctions under the Court's inherent authority were appropriate in light of the existing statutory and rule-based sanctioning scheme established by Congress.

The Supreme Court held that Rule 11 and § 1927 did not abrogate "the inherent power to impose sanctions for the bad-faith conduct" that was found by the District Court.[73]

> These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.[74]

Noting that it had previously "determined that 'Congress had not repudiated the judicially fashioned exceptions' to the American Rule, which were founded in the inherent power

72. *Id*. at 42 (citing the District Court opinion at 124 F.R.D. 120, 139 (W.D. La. 1989).

73. *Id.* at 46.

74. *Id*.

of the courts,"[75] the Court stated that "[n]othing since then has changed that assessment, and we have thus reaffirmed the scope and the existence of the exceptions since the most recent amendments to § 1927 and Rule 11, the other sanctioning mechanisms invoked by NASCO here."[76] The Court went on to hold:

> There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.[77]

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75. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 (1975).

76. *Chambers*, 501 U.S. at 47–48.

77. *Id.* at 50 (internal citation omitted).

The most recent word from the Supreme Court on inherent authority is *Dietz v. Bouldin*,[78] decided after the 2015 amendments to the Federal Rules came into effect. There, the Court concluded that a district court possesses the inherent power in a civil case to rescind an order discharging a jury and recall the jurors for further deliberations where the court discovers an error in the jury's verdict.[79] In so holding, the Court noted that it had long recognized that district courts may exercise inherent power, independent of any statute or rule, to manage cases.[80] It then went on to identify two limitations on that power: First, the exercise of an inherent power must be a "reasonable response to the problems and needs" confronting the court's fair administration of justice. Second, the exercise of an inherent power cannot be contrary to any express grant of or limitation on the district court's power contained in a rule or statute.[81]

Significantly, the Court articulated these limits in the context of an issue that did not implicate the integrity of the judicial process; whether a discharged jury could be recalled might affect the efficiency of litigation, but a rule prohibiting recall would not threaten the dignity of the court or the legitimacy of any ultimate adjudication.[82]

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78. Dietz v. Bouldin, __ U.S. __, 136 S. Ct. 1885 (2016).

79. *Id.* at 1892, 1897.

80. *Id.* at 1891.

81. *Id.* at 1892 (internal citations omitted).

82. The case cited by the Court for the proposition that the exercise of inherent authority cannot be contrary to a rule dealt with Rule 52(a) of the Federal Rules of Criminal Procedure, which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988). There, as in *Dietz*, the rule in question did not threaten to undermine core judicial functions.

Regardless of how one comes down on the debate between advocates of the narrow and the expansive views of inherent authority, certain general principles reflecting the current state of the law can be derived from existing Supreme Court precedent: (1) even where Congress has addressed an issue by statute or rule, inherent judicial authority may be invoked to fill any remaining interstices where the statute or rule is not "up to the task"; (2) inherent authority may be exercised even where it conflicts with a statute or rule, where to do so is necessary to protect a core judicial function.[83]

IV. APPLICATION OF INHERENT AUTHORITY TO RULE 37(E)

A. The Advisory Committee Note

This brings us to the question of what role, if any, inherent authority might play as a basis for imposing sanctions for spoliation in light of Rule 37(e). The advisory committee note to the 2015 amendment to Rule 37(e) suggests that it might have no role at all:

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83. Summarizing the circumstances in which a court may exercise inherent powers, the Third Circuit has concluded that notwithstanding the absence of statutory authority, courts may: (1) issue contempt sanctions; (2) regulate the conduct of the members of the bar by disbarment, suspension from practice, or reprimand (including monetary sanctions) for abuse of the judicial process; (3) provide tools for docket management; (4) dismiss a case for failure to prosecute; (5) in the absence of a statute, tax costs in the appellate court; (6) declare attorneys who choose to be absent from docket call "ready for trial," even though this may lead ineluctably to the entry of a default judgment; (7) appoint persons unconnected with the court to aid judges in the performance of specific judicial duties; (8) elect to use a state mechanism for certification of a question of doubtful state law; (9) grant bail in a situation not dealt with by statute; (10) dismiss a suit pursuant to the doctrine of *forum non conveniens*; and (11) process litigation to a just and equitable conclusion (when sitting in equity). Eash v. Riggins Trucking, Inc., 757 F.2d 557, 561–64 (3d Cir. 1985) (en banc) (internal citations omitted).

> New rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used.[84]

But the intent of the Advisory Committee to proscribe reliance on inherent authority with respect to the entire arena of spoliation sanctions applicable to ESI is less than clear. And, even if it were, there is substantial question whether the Advisory Committee could effect such an outcome by means of a note.

"[A]n advisory committee's note is not part of the Rule itself."[85] Rather, "[a]n Advisory Committee note is an explanation of, or an aid to interpretation of, a procedural rule. It is somewhat similar to a legislative history not having the force of law."[86] Perhaps the most complete explanation of this principle was articulated by Justice Scalia in *Tome v. United States*:[87]

> Having been prepared by a body of experts, the Notes are assuredly persuasive scholarly com-

84. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

85. United States v. Bainbridge, 746 F.3d 943, 947 (9th Cir. 2014).

86. United States v. Sandini, 816 F.2d 869, 875 n.7 (3d Cir. 1987); *see also* Moody National Bank of Galveston v. GE Life and Annuity Assurance Co, 383 F.3d 249, 253 (5th Cir. 2004); Clark v. Long, 255 F.3d 555, 559 (8th Cir. 2001) ("An advisory committee note, of course, does not have the force of law . . . ."); Coates v. Mystic Blue Cruises Inc., No. 11 C 1986, 2012 WL 3860036, at *2 n.2 (N.D. Ill. Aug. 9, 2012); McKnight v. Purdue Pharma Co., 422 F. Supp. 2d 756, 758 (E.D. Tex. 2006); *In re* Habeas Corpus Cases, 216 F.R.D. 52, 53–54 (E.D.N.Y. 2003) ("An Advisory Committee note, while helpful, cannot replace the plain language of a rule or statute.") .

87. Tome v. United States, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and concurring in the judgment).

> mentaries—ordinarily *the* most persuasive—concerning the meaning of the Rules. But they bear no special authoritativeness as the work of the draftsmen, any more than the views of Alexander Hamilton (a draftsman) bear more authority than the views of Thomas Jefferson (not a draftsman) with regard to the meaning of the Constitution. It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change. See 28 U.S.C. §§ 2072, 2074 (1988 ed. and Supp. IV). In my view even the adopting Justices' thoughts, unpromulgated as Rules, have no authoritative (as opposed to persuasive) effect, any more than their thoughts regarding an opinion (reflected in exchanges of memoranda before the opinion issues) authoritatively demonstrate the meaning of that opinion. And the same for the thoughts of congressional draftsmen who prepare statutory amendments to the Rules. Like a judicial opinion and like a statute, the promulgated Rule says what it says, regardless of the intent of its drafters. The Notes are, to be sure, submitted to us and to the Members of Congress as the thoughts of the body initiating the recommendations, see [28 U.S.C.] § 2073(d); but there is no certainty that either we or they read those thoughts, nor is there any procedure by which we formally endorse or disclaim them. That being so, the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear.[88]

88. *Id.* at 168.

Furthermore, like legislative history, advisory committee notes are most persuasive when they elucidate an otherwise unclear or ambiguous aspect of a rule.[89]

Here, the text of Rule 37(e) is devoid of any reference to inherent authority. Thus, the advisory committee note cannot be said to aid in the interpretation of some textual ambiguity. And the import of the note, if construed in the broadest terms, would be to overrule *sub silentio Chambers*[90] and similar Supreme Court precedent that stands for the proposition that courts retain inherent authority to exercise power where the integrity of the judicial process is at issue. It strains credulity to suggest that this would be accomplished by means of a note which, as Justice Scalia pointed out, might never have been read by the Justices or the Members of Congress who reviewed the proposed amendments.

Furthermore, the 2015 advisory committee note to Rule 37 does not specifically allude to *Chambers* or other relevant Supreme Court jurisprudence, and does not flag the substantial constitutional and separation-of-powers issues that would be raised in any attempt to foreclose entirely the exercise of inherent authority.[91] Yet, when the Advisory Committee did intend to abrogate precedent in the 2015 amendments to the Federal Rules of Civil Procedure, it identified the specific case law that

89. *See* United States v. Vonn, 535 U.S. 55, 64 (2002) ("In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed."); Federal Trade Commission v. Boehringer Ingelheim Pharmaceuticals, Inc., 778 F.3d 142, 154–55 (D.C. Cir. 2015); Republic of Ecuador v. Kelsh, 742 F.3d 860, 865 (9th Cir. 2014).

90. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

91. *See* Section III.C., *supra*.

the rule was designed to supersede.[92] Thus, even if an advisory committee note accompanying an amendment to the Federal Rules of Civil Procedure could in some circumstances displace Supreme Court precedent, this note does not do so with the requisite specificity in regards to inherent authority and the long line of Supreme Court cases.

B. Spoliation Remedies and Inherent Authority

As discussed above, inherent powers are those "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."[93] The Supreme Court has found these powers to include the authority to admit and discipline attorneys,[94] to punish contempt,[95] to vacate a judgment upon proof of fraud on the court,[96] to bar a disruptive criminal defendant from the courtroom,[97] to dismiss a lawsuit for failure to

92. For example, the Advisory Committee addressed a split among the circuits concerning the degree of culpability necessary for the imposition of severe sanctions such as dismissal, default, or an adverse inference. The note states that the amendment to Rule 37(e) "is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically preserved information. It rejects cases such as Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence." FED. R. CIV. P. 37 advisory committee's note to 2015 amendment. There is no such reference to *Chambers*.

93. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

94. *Ex parte* Burr, 22 U.S. (9 Wheat.) 529, 531 (1824).

95. *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 510 (1874).

96. Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 580 (1946); Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244–50 (1944).

97. Illinois v. Allen, 397 U.S. 337, 343 (1970).

prosecute,[98] and to impose attorneys' fees as a sanction for bad faith litigation.[99]

Similarly, courts must have the power to deter spoliation and to remedy its effects, since the destruction of evidence undermines the integrity of the fact-finding process. Although the Supreme Court has not addressed it, lower courts have explicitly recognized that the ability to use their inherent powers to impose spoliation sanctions is necessary to the exercise of the judicial function. "The policy underlying this inherent power of the courts is the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth."[100] One federal court has described, rather colorfully, the negative consequences that would flow if the judiciary lacked such power:

> Aside perhaps from perjury, no act serves to threaten the integrity of the judicial process more than the spoliation of evidence. Our adversarial process is designed to tolerate human failings—erring judges can be reversed, uncooperative counsel can be shepherded, and recalcitrant witnesses compelled to testify. But, when critical documents go missing, judges and litigants alike descend into a world of *ad hocery* and half measures—and our civil justice system suffers.[101]

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98. Link v. Wabash Railway Co., 370 U.S. 626, 630–31 (1962).

99. Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991).

100. Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001); *accord* Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 517–18 (D. Md. 2010).

101. United Medical Supply Co. v. United States, 77 Fed. Cl. 257, 258–59 (2007).

Another court has observed that "[s]anctions for spoliation may also be designed to promote accurate fact finding by the court or jury."[102] Still another has tied spoliation sanctions to the need to preserve the judicial process both by deterring misconduct and by remediating its effects:

> Sanctions are appropriate when there is evidence that a party's spoliation of evidence threatens the integrity of this Court. Spoliation sanctions serve a remedial function by leveling the playing field or restoring the prejudiced party to the position it would have been without spoliation. They also serve a punitive function, by punishing the spoliator for its actions, and a deterrent function, by sending a clear message to other potential litigants that this type of behavior will not be tolerated and will be dealt with appropriately if need be.[103]

State courts, as well, recognize the need to exercise inherent authority in order to defend the fact-finding process against the destruction of evidence. The Supreme Court of Montana has articulated the relationship this way:

> Relevant evidence is critical to the search for the truth. The intentional or negligent destruction or spoliation of evidence cannot be condoned and threatens the very integrity of our judicial system. There can be no truth, fairness, or justice in a civil action where relevant evidence has been de-

102. United States ex rel. Koch v. Koch Industries, Inc., 197 F.R.D. 488, 490 (D. Kan. 1999); *accord* United States *ex rel*. Baker v. Community Health Systems, Inc., No. CIV. 05-297, 2012 WL 12294413, at *17 (D.N.M. Aug. 31, 2012).

103. Mosaid Technology, Inc. v. Samsung Electronics, Co., 348 F. Supp. 2d 332, 335 (D.N.J. 2004).

> stroyed before trial. Historically, our judicial system has fostered methods and safeguards to insure that relevant evidence is preserved. Ultimately, the responsibility rests with both the trial and appellate courts to insure that the parties to the litigation have a fair opportunity to present their claims or defenses.[104]

Likewise, the Supreme Court of California has observed that "[d]estroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action."[105]

Indeed, at the state level, concern for the integrity of the judicial system has led to advocacy for the creation of a common law tort of spoliation.[106] One commentator presented the argument in favor of such a cause of action as follows:

> The practice of spoliation is universally acknowledged as an affront to the integrity of the judicial system. Evidence destruction flies in the face of the liberal discovery rules that provide a vehicle for both damning and exculpatory evidence to come to the light. Judgments can be relied upon only when the trier of fact has examined and weighed the best and most probative evidence

104. Oliver v. Stimson Lumber Co., 297 Mont. 336, 344–45, 993 P.2d 11, 17 (1999).

105. Cedars-Sinai Medical Center v. Superior Court, 18 Cal 4th 1, 8, 254 P.2d 511, 515 (1998).

106. *See* Danielle "Dani" Borel, *The Land of OZ: Spoliation of Evidence in Louisiana*, 74 LA. L. REV. 507, 540–41 (2014); Michael A. Zuckerman, *Yes, I Destroyed the Evidence — Sue Me? Intentional Spoliation of Evidence in Illinois*, 27 J. MARSHALL J. COMPUTER & INFO. L. 235, 251–52 (2009); Rachel L. Sykes, *A Phantom Menace: Spoliation of Evidence in Idaho*, 42 IDAHO L. REV. 821, 846–49 (2006).

> each litigant has to offer. When a jury must render a verdict despite the loss of a crucial piece of proof, the accuracy of its findings is compromised, which in turn substantially impairs an individual's chances of receiving a remedy for his injury. The act of evidence destruction should give rise to an independent claim in tort when the loss occurs with a state of mind typifying any measure of culpability—intentionality, recklessness, or negligence.[107]

Heeding such admonitions, about half the states recognize spoliation as an actionable tort.[108] Alaska,[109] Louisiana,[110] New Mexico,[111] Ohio,[112] and West Virginia[113] are among the states that have recognized a cause of action for intentional destruction of evidence.[114] Florida, Illinois, New Jersey, Kansas,

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107. Virginia L. H. Nesbitt, *A Thoughtless Act of a Single Day: Should Tennessee Recognize Spoliation of Evidence as an Independent Tort?*, 37 U. MEM. L. REV. 555, 614 (2007).

108. 22 CHARLES ALAN WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5178 (2d ed. 2012).

109. Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986).

110. Guillory v. Dillard's Dept. Store, Inc., 777 So. 2d 1 (La. App. 3 Cir. 2000).

111. Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (N.M. 1995).

112. Smith v. Howard Johnson Co., Inc., 67 Ohio St. 3d 28, 615 N.E.2d 1037 (Ohio 1993).

113. Hannah v. Heeter, 213 W.Va. 704, 584 S.E.2d 560 (W. Va. 2003).

114. While the California intermediate appellate courts adopted an independent tort of spoliation, *see* Smith v. Superior Court, 151 Cal. App. 3d 491, 495-96, 198 Cal. Rptr. 829, 832 (Cal. Ct. App. 1984), in 1998 the California Supreme Court subsequently rejected such a cause of action, in part on the ground that existing remedies, including the authority to impose an adverse inference, were sufficient to cure any prejudice. Cedars-Sinai Medical Center v. Superior Court, 18 Cal 4th 1, 11–13, 254 P.2d 511, 517–18 (Cal. 1998).

and the District of Columbia have gone further: they have created a tort for negligent spoliation.[115] Spoliation, then, is widely recognized as conduct that, because it threatens the reliability of the judicial process, warrants the exercise of inherent authority.

C. Inherent Authority in the Interstices in Rule 37(e)

The need for inherent authority to remedy spoliation is most evident in circumstances where Rule 37(e) itself does not clearly apply. It is in those situations that the Rule is most clearly not "up to the task."[116] And, as long as inherent authority is used only to fill the interstices in the Rule, Federal courts avoid the difficult separation-of-powers issues that arise when judges assert inherent power where Congress has directly addressed an issue through the rulemaking process.

Because Rule 37(e) establishes certain threshold requirements that must be met before a court may impose remedies for spoliation, it necessarily creates lacunae where inherent authority might continue to play a role.

1. Spoliation of Physical Evidence

The express language of Rule 37 states that it only applies to electronically stored information.[117] Accordingly, it seems uncontroversial that a court would retain the inherent authority to impose sanctions for the destruction of physical evidence for which Rule 37(e) does not apply. Indeed, in transmitting the proposed amendment to the Standing Committee on Rules of Practice and Procedure, the Advisory Committee on Federal Rules of Civil Procedure specifically noted that "[a]lthough the

115. Carole S. Gailor, *In-Depth Examination of the Law Regarding Spoliation in State and Federal Courts*, 23 J. AM. ACAD. MATRIM. LAW. 71, 92 (2010).

116. Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991).

117. FED. R. CIV. P. 37(e) ("If electronically stored information that should have been preserved in anticipation of litigation . . . .").

Committee considered proposing a rule that would apply to all forms of information, it ultimately concluded that an ESI-only rule was appropriate for several reasons."[118] One of those reasons was that

> the law of spoliation for evidence other than ESI is well developed and longstanding, and should not be supplanted without good reason. There has been little complaint to the Committee about this body of law as applied to information other than ESI, and the Committee concludes that this law should be left undisturbed by a new rule designed to address the unprecedented challenges presented by ESI.[119]

Whether inherent authority may be used to fill latent gaps in Rule 37(e) may prove more contentious.

2. Attempted Destruction of Evidence

Take, for example, attempted spoliation, where a party tries, but fails, to destroy evidence, sometimes informally referred to as the problem of the "incompetent spoliator." In this instance, the amended rule would seem not to apply because the information at issue has not been "lost."[120]

Victor Stanley, Inc. v. Creative Pipe, Inc.,[121] was a prominent case, decided prior to the current version of Rule 37(e), which

118. Judicial Conference Comm. on Rules of Practice & Procedure, Report of the Judicial Conference Committee on Rules of Practice and Procedure, app. B-15 (Sept. 2014), http://www.uscourts.gov/rules-policies/archives/committee-reports/reports-judicial-conference-september-2014 [hereinafter Sept. 2014 Report].

119. *Id.* at app. B-16.

120. FED. R. CIV. P. 37(e).

121. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 517–18 (D. Md. 2010).

involved attempted spoliation. In that action, the individual defendant, Mark Pappas, engaged in "dogged but unsuccessful attempts to prevent the discovery of ESI evidence against him."[122] Moreover, he also accomplished "successful, permanent deletions of countless ESI."[123] The court observed that

> Plaintiff [] is fortunate that Pappas's zeal considerably exceeded his destructive skill and his judgment in selecting confederates to assist in his efforts to destroy ESI without detection. While Pappas succeeded in destroying a considerable amount of ESI, Plaintiff was able to document this fact and ascertain the relevance of many deleted files. At the end of the day, this is the case of the "gang that couldn't spoliate straight."[124]

Some "attempted deletions" thus "caused delay but no loss of evidence."[125] Nevertheless, the spoliating party was subject to sanctions.

Indeed, attempted spoliation has long been sanctionable. *The Stephen Hart*,[126] a "prize case" arising out of the seizure of a vessel during the Civil War, provides a dramatic example. On January 29, 1862, a United States vessel enforcing the blockade of the Confederate states captured the schooner Stephen Hart as a prize of war in the waters between Key West and Cuba.[127] When boarded, she was found to contain a substantial cargo of

122. *Id.* at 501.

123. *Id*.

124. *Id*.

125. *Id*.

126. The Stephen Hart, 22 F. Cas. 1253 (S.D.N.Y. 1863).

127. *Id.* at 1255.

munitions and other military supplies.[128] The owners of the vessel and of her cargo filed claims, contending that The Stephen Hart was a British vessel carrying cargo between neutral ports in England and Cuba, and was therefore not subject to seizure.[129] The evidence showed that, as the ship was being seized, the first mate, one Benjamin H. Chadwick, gave letters to the ship's cook, with directions to put them out of sight by placing them in a teapot.[130] Unfortunately, the letters were found by one of the boarding officers.[131] In his testimony, the cook described the demeanor of the first mate:

> When the first officer handed me those papers, he seemed anxious and uneasy, and, when he returned to the schooner to get his clothes, the first thing he said to me was, "Have you got those papers?" I told him they were found by the officer. He then said, "Why in hell did you not destroy them?" and likewise, "By God, I am done."[132]

The letters were indeed incriminating, for they included communications from a Confederate agent and directions for entering Charleston harbor; one letter concluded, "If you should fail, destroy."[133]

The court observed that, even if the papers had not been recovered, it would have been appropriate to draw what in modern terms is known as an adverse inference: "In all cases [spoliation] must be considered as proof of mala fides; and, where that appears, it is a universal rule to presume the worst

128. *Id.* at 1256.

129. *Id.* at 1255, 1262.

130. *Id.* at 1256, 1270.

131. *Id.* at 1270.

132. *Id*.

133. *Id.* at 1270–71.

against those who are convicted of it."[134] So, too, with failed attempts at the destruction of evidence:

> So, also, the concealment by Chadwick of the letters to him, which showed the true character of the enterprise of the Stephen Hart, would have been as effectually a destruction of those papers, for the purposes of this case, if they had not been found in the search, as if they had been actually thrown into the sea and lost. And the suspicion which the law attaches to a spoliation of papers arises with equal force from an attempted spoliation.[135]

Notwithstanding that courts have thus traditionally treated such acts as spoliation, they would seem to be beyond the reach of Rule 37(e) because no evidence has been "lost."

3. Attempted Alteration of Evidence

The same is true of circumstances in which evidence is fabricated or materially altered. Fabrication, like destruction, is simply a form of spoliation of evidence intended to skew the fact-finding process. Dean Wigmore recognized this in his seminal treatise on evidence when addressing the adverse inference:

> It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication that his case is a weak or unfounded one; and from that consciousness

134. *Id.* at 1271.

135. *Id.* (emphasis added).

> may be inferred the fact itself of the cause's lack of truth or merit.[136]

Courts have traditionally treated fabrication and destruction cases alike.[137] Yet, by definition, where information is fabricated, it has not been "lost," and this conduct is therefore not addressed by Rule 37(e).

A similar gap in Rule 37(e) exists where information has, in fact, been lost or materially altered, but can be restored or replaced. An example of this arose in *Cat3, LLC v. Black Lineage, Inc.*[138] There, the court addressed alleged spoliation under amended Rule 37(e).[139] In that case, the plaintiffs asserted rights in the trademark "SLAMXHYPE" and the domain name www.slamxhype.com, which they used in connection with the sale of clothing and the operation of a website and online magazine.[140] The plaintiffs asserted that the defendants' use of the trademark "FLASHXHYPE" and the domain name www.flashxhype.com infringed their trademark rights.[141] Since one of the key issues in the case was whether the defendants developed their FLASHXHYPE mark independently or, instead, sought to trade on the plaintiffs' reputation after learning of the SLAMXHYPE mark, it was significant at what point in

136. J. WIGMORE, EVIDENCE, § 278 (3d ed. 1940) (emphasis omitted).

137. *See, e.g.*, Guttierez v. P.A.L. Ltd., No. 10 CV 4152, 2011 WL 6019393, at *2 (N.D. Ill. Nov. 23, 2011); Jackson v. N'Genuity, No. 09 C 6010, 2011 WL 1134302, at *1–2 (N.D. Ill. March 28, 2011); Flottman v. Hickman County, No. 3:09-770, 2010 WL 4537911, at *1 (M.D. Tenn. Nov 3, 2010).

138. Cat3, LLC v. Black Lineage, Inc., __ F. Supp. 3d __, 2016 WL 154116, 2015 U.S. Dist. LEXIS 125879 (S.D.N.Y. 2016).

139. One of the authors of this article wrote the opinion in *Cat3*; the case has been settled.

140. *Id.* at *1.

141. *Id*.

time the defendants learned of the plaintiffs' mark. The plaintiffs alleged that they had disclosed to the defendants their use of the SLAMXHYPE mark before the defendants adopted the FLASHXHYPE mark, and the plaintiffs produced emails they had sent to the defendants from an email address with the domain name slamxhype.com, apparently supporting this assertion.[142]

However, when the defendants located the copies of the same emails that they had received, the defendants' copies showed that the emails were sent from a different address—one that did not have a slamxhype extension.[143] After an investigation, the defendants moved for sanctions under Rule 37 on the ground that the plaintiffs had spoliated evidence by altering the emails at issue.[144] They presented expert evidence that the plaintiffs' computer system contained two versions of the relevant emails: the most recent version, which contained the slamxhype extension, and an underlying, deleted version, that did not.[145] The plaintiffs opposed the motion, arguing in part that, under Rule 37(e), the evidence could be "restored or replaced" since the defendants had their own versions of the emails.[146] In effect, the plaintiffs argued that, at worst, they could only be charged with attempted spoliation, which would not be sanctionable under the rule.[147]

The court responded to this argument in two ways. First, it found that, because the existence of duplicate emails with different file extensions had cast doubt on the authenticity of both

142. *Id*.

143. *Id*.

144. *Id.* at *2–3.

145. *Id.* at *2.

146. *Id.* at *5.

147. *Id.* at *6.

versions, the original emails had not been fully restored, so Rule 37(e) applied.[148] Second, if this were not the case, and there was a gap in the rule such that it did not address the conduct at issue, the court held that it could exercise inherent authority to remedy any prejudice to the defendants.[149]

4. Spoliation of Metadata and Other Non-Apparent Information

A variant of this is the situation in which a party that is subject to a litigation hold downgrades electronically stored information to a less usable and accessible form, thereby increasing both the cost and burden to the requesting party to review, and potentially destroying relevant, discoverable information not contained on the face of an electronic document. The 2006 advisory committee notes expressed a clear and persuasive assertion that parties should avoid intentionally degrading ESI,[150] and courts have regularly characterized such conduct as spoliation.[151] Yet, because the information can still be obtained in some

148. *Id*.

149. *Id.* at *6–7.

150. FED. R. CIV. P. 34 advisory committee's note to 2006 amendment ("If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.").

151. Mazzei v. The Money Store, No. 01 Civ. 5694, 2014 WL 3610894, at *2, 5, 8 (S.D.N.Y. July 21, 2014); Orbit One Communications, Inc. v. Numerex Corp., 271 F.R.D. 429, 437 (S.D.N.Y. 2010); Scalera v. Electrograph Systems, Inc., 262 F.R.D. 162, 175 (E.D.N.Y. 2009); Treppel v. Biovail Corp., 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006) ("[P]ermitting the downgrading of data to a less accessible form—which systematically hinders future discovery by making the recovery of information more costly and burdensome—is a violation of the preservation obligation."). This view is not universal. In *Quinby v. WestLB AG*, No. 04 Civ. 8406, 2005 WL 3453908, at *8 n.10 (S.D.N.Y. Dec. 15, 2005), the court declined to sanction a party for converting data from an accessible

form,[152] it would seem not to come within the purview of Rule 37(e).

Each of these examples, then, is a circumstance where spoliation may be beyond the reach of the amended Rule 37(e), yet where the court could properly exercise its inherent powers to remedy any prejudice.

5. The Use of Inherent Authority to Remedy Negligent Spoliation

Are there also situations where the Rule is inapplicable but inherent authority is precluded? One such instance arises when information is lost as the result of negligent conduct by the party that had a duty to preserve. Rule 37(e) provides that serious sanctions, including dismissal, entry of a default judgment, and imposition of an adverse inference, may only be imposed where the court has found an intent to deprive the innocent party of the use of the evidence in the litigation.[153] Thus, by

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to an inaccessible form, stating, "I am unaware of any case[] that states that the duty to preserve electronic data includes a duty to keep the data in an accessible format." That position has been subjected to criticism. *See Orbit One*, 271 F.R.D. at 437; Kara A. Schiermeyer, *The Artful Dodger: Responding Parties' Ability to Avoid Electronic Discovery Costs Under 26(b)(2)(B) and 26(b)(2)(C) and the Preservation Obligation*, 42 CREIGHTON L. REV. 227 (2009) (discussing *Treppel* and *Quinby* and arguing that downgrading form of ESI should be considered spoliation). In any event, even a subsequent opinion in *Quinby* held that the responding party should bear the greater costs of production caused by its downgrading of data. Quinby v. WestLB AG, 245 F.R.D. 94, 111 (S.D.N.Y. 2006).

152. Intentional degradation of ESI from searchable to non-searchable forms virtually always results in the loss of metadata, and so constitutes the destruction of evidence if the metadata is relevant to the litigation. It also may make access to information more difficult and expensive, and lead to discovery disputes and motion practice.

153. FED. R. CIV. P. 37(e)(2).

its terms, the Rule does not authorize such serious sanctions where the spoliation is merely negligent.

The Advisory Committee made clear that it affirmatively sought to prevent the use of severe sanctions in response to negligent conduct.[154] In its memorandum to the Standing Committee on Rules of Practice and Procedure, the Advisory Committee reasoned that "[p]reservation of ESI is a major issue confronting parties and courts, and loss of ESI has produced a significant split in the circuits. Some circuits hold that adverse inference instructions (viewed by most as a serious sanction) can be imposed for the negligent loss of ESI. Others require a showing of bad faith."[155] The Advisory Committee then examined at length the rationales behind the competing holdings, epitomized on one side by *Aramburu v. Boeing Co.*,[156] which held that "[t]he adverse inference must be predicated on the bad faith of the party destroying records,"[157] and on the other by *Residential Funding Corp. v. DeGeorge Financial Corp.*,[158] which found negligent spoliation to be a sufficient basis for an adverse inference.[159] The

154. *Id.* ("only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation").

155. Sept. 2014 Report, *supra* note 118, at app. B-14.

156. Aramburu v. Boeing Co., 112 F.3d 1398 (10th Cir. 1997).

157. *Id.* at 1407. The Advisory Committee observed that "[adverse inference] instructions historically have been based on a logical conclusion: when a party destroys evidence for the purpose of preventing another party from using it in litigation, one reasonably can infer that the evidence was unfavorable to the destroying party. Some courts hold to this traditional rationale and limit adverse inference instructions to instances of bad faith loss of the information." Sept. 2014 Report, *supra* note 118, at app. B-17.

158. Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002).

159. *Id.* at 102. The Advisory Committee stated that:

Advisory Committee came down decisively on the side of requiring a showing of intent.[160] This is reflected in the advisory committee note addressing the pertinent part of the rule:

> [c]ircuits that permit adverse inference instructions on a showing of negligence adopt a different rationale: the adverse inference restores the evidentiary balance, and the party that lost the information should bear the risk that it was unfavorable. Although this approach has some equitable appeal, the Committee has several concerns when it is applied to ESI. First, negligently lost information may have been favorable or unfavorable to the party that lost it—negligence does not necessarily reveal the nature of the lost information. Consequently, an adverse inference may do far more than restore the evidentiary balance; it may tip the balance in ways the lost evidence never would have. Second, in a world where ESI is more easily lost than tangible evidence, particularly by unsophisticated parties, the sanction of an adverse inference instruction imposes a heavy penalty for losses that are likely to become increasingly frequent as ESI multiplies. Third, permitting an adverse inference for negligence creates powerful incentives to over-preserve, often at great cost. Fourth, the ubiquitous nature of ESI and the fact that it often may be found in many locations presents less risk of severe prejudice from negligent loss than may be present due to the loss of tangible things or hard-copy documents.

Sept. 2014 Report, *supra* note 118, at app. B-17–18.

160. In the memorandum to the Standing Committee, the Advisory Committee wrote, "These reasons have caused the Committee to conclude that the circuit split should be resolved in favor of the traditional reasons for an adverse inference. ESI-related adverse inferences drawn by courts when ruling on pretrial motions or ruling in bench trials, and adverse inference jury instructions, should be limited to cases where the party who lost the ESI did so with an attempt to deprive the opposing party of its use in the litigation." Sept. 2014 Report, *supra* note 118, at app. B-18.

> This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects such cases as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.[161]

Thus, the limitation of sanctions specified in Rule 37(e)(2) to instances of spoliation resulting from the specific intent to deprive another party of the information in the litigation is not a gap to be filled by the exercise of inherent authority under the Supreme Court precedent.[162]

Furthermore, even if it were, mere negligent destruction of ESI is not the type of instance where inherent authority has traditionally been exercised. Recall that the justification for relying on inherent power is that, without it, the integrity of the judicial process is threatened. There is no doubt that if intentional spoliation went unremedied, the judicial process would be in jeopardy since parties would not be deterred from destroying unfavorable evidence. On the other hand, while the negligent spoliation of information may significantly affect the outcome in any particular case, acts of unintentional carelessness are less likely to jeopardize the integrity of the system as a

161. FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

162. *See* Section III.C, *supra*.

whole, particularly since there are a variety of factors apart from sanctions under either Rule 37(e) or the inherent power of the courts that would discourage the careless loss of evidence.[163]

Indeed, even within a specific case, the "gap" left by Rule 37(e) is a narrow one, since potent tools remain available to the courts to address negligent spoliation. For example, in order to prevent the party that has destroyed evidence from obtaining an unfair advantage, a court may issue an order precluding that party from asserting certain claims or introducing certain evidence.[164]

Thus, the severe sanctions of dismissal, judgment by default, or imposition of an adverse inference recognized under

163. These include the simple motivation of self-interest: a party would tend to safeguard information that may be as likely to be beneficial as to be detrimental to its legal interests. Moreover, the obligation to preserve information in anticipation of litigation remains. As the Advisory Committee noted, "the proposed Rule 37(e) does not purport to create a duty to preserve. The new rule takes the duty as it is established by case law, which uniformly holds that a duty to preserve information arises when litigation is reasonably anticipated." 2014 Report, *supra* note 118, at app. B-15; *see, e.g.*, Fujitsu Ltd. V. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."). Even when the most severe sanctions for a violation of the duty to preserve evidence are unavailable under Rule 37(e)(2), other forms of remedial measures remain available to the courts under Rule 37(e)(1) that should, under most circumstances, serve as a general deterrent against spoliation.

164. *See* Cat3, LLC v. Black Lineage, Inc., __ F. Supp. 3d at __, 2016 WL 154116, at *10–11 (S.D.N.Y. 2016) (precluding party from relying on evidence found to have been fabricated); *see also In re* Wrt Energy Securities Litigation, 246 F.R.D. 185, 199–201 (S.D.N.Y. 2007) (precluding party from challenging representativeness of sample data after that party had permitted destruction of remainder of universe of data).

Rule 37(e)(2) are not available to the courts under their inherent authority for the negligent destruction of evidence.[165]

6. Remedial Measures v. Sanctions

Finally, what role might inherent authority play in any gap that exists between remedial measures available under Rule 37(e)(1) and severe measures permitted only after a finding of intent to deprive under Rule 37(e)(2)? This question is prompted by the Advisory Committee note to subdivision (e)(1), which states:

> [i]n an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding a party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument,

165. Justice Scalia might have disagreed. He dissented from the Court's opinion in *Chambers* not because he did not believe that a court could exercise inherent power to impose sanctions, but because he concluded the district court imposed sanctions for the "petitioner's flagrant, bad-faith breach of contract," not for his abuse of the judicial process during the litigation. Chambers v. NASCO, Inc., 501 U.S. 32, 60 (1991) (Scalia, J., dissenting). Justice Scalia agreed with the majority that "[s]ome implied powers must necessarily result to our Courts of justice from the nature of their institution." *Id.* (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)). But then he went on to point out that "[s]ince necessity does not depend upon a litigant's state of mind, the inherent sanctioning power must extend to situations involving less than bad faith. For example, a court has the power to dismiss when counsel fails to appear for trial, even if this is a consequence of negligence rather than bad faith." *Id.* Accordingly, Justice Scalia might have considered negligent spoliation to warrant sanctions under the inherent power, since it has consequences, at least in any particular case, equivalent to those that flow from the intentional destruction of evidence.

> other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.[166]

If the note is taken to suggest that some remedies under subdivision (e)(2) are forbidden because they "look" too much like the severe sanctions enumerated in (e)(2), even if those remedies are necessary to cure prejudice, then there is a gap in the Rule. However, this note is better read as simply reinforcing the concept that remedial measures may be no greater than necessary to cure any prejudice to the innocent party. So long as that is the case, there is no gap to be filled and no occasion for a court to invoke its inherent authority.[167]

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166. FED. R. CIV. P. 37 advisory committee's note to 2015 amendment.

167. There are at least two other instances in which there may be gaps relating to Rule 37(e)(2), to the extent that it specifically requires a finding that "the party acted with the intent to deprive another party of the information's use in the litigation." First, suppose that a party destroys electronically stored information that it was under a duty to preserve with the intent of depriving a government agency of the use of that information in connection with a regulatory or criminal investigation. Although related civil litigation was reasonably anticipated and subsequently filed, the party destroyed

V. CONCLUSION

Regardless of one's view of the proper scope of inherent judicial power under the Constitution, the use of inherent authority to protect the integrity of the courts and the judicial process has been endorsed by the Supreme Court for more than two centuries. Under existing precedent, that authority may be exercised where a statute or rule governing procedure contains gaps or where necessary to enable the courts to fulfill their core functions. Therefore, Rule 37(e) does not displace inherent authority insofar as there are interstices in the Rule or the Rule is not up to the task of ensuring the ability of the federal courts to exercise their constitutional role. Going forward, the issue will be not whether the federal courts retain inherent authority to issue spoliation sanctions, but under what circumstances and to what extent they may exercise that authority.

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the evidence specifically out of concern about its use in the government inquiry. Does this constitute the "intent to deprive another party of the information's use in the litigation"? Second, assume that a party, fully intending to prevent its adversary in litigation from obtaining information, simply does nothing to preserve the evidence, willfully failing to institute a litigation hold. As a result, electronically stored information is automatically deleted or overwritten. Has the party, by inaction, "acted with the intent to deprive"? A complete analysis of whether Rule 37(e) adequately addresses these and similar situations, and whether a court has inherent authority to respond in such circumstances with an adverse inference instruction or case-terminating sanctions, is beyond the scope of this article.

APPENDIX "A"

Draft of the United States Constitution, Article XI, prepared by the Committee of Detail and reported to the Convention on Monday, August 6, 1787.[168]

Article XI

Sect. I. The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

Sect. 2. The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Sect. 3. The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers and Consuls; to the trial of impeachments of Officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State or the Citizens thereof and foreign States, citizens or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of

168. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, vol. 2, 186–187 (Max Farrand, ed. 1911).

the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.

Sect. 4. The trial of all criminal offences (except in cases of impeachments) shall be in the State where they shall be committed; and shall be by Jury.

Sect. 5. Judgment, in cases of Impeachment, shall not extend further than to removal from Office, and disqualification to hold and enjoy any office of honour, trust or profit, under the United States. But the party convicted shall, nevertheless be liable and subject to indictment, trial, judgment and punishment according to law.