THE SUPREME COURT'S TREATMENT OF SOVEREIGNS AS AMICI CURIAE

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THE SUPREME COURT'S RULE on briefs of amici curiae does not treat all sovereigns the same. In particular, Indian Tribes and foreign nations are treated less generously than the United States, any State or territory, and even local governments. This article explores the origin of this disparate treatment and comments on its propriety.

SUPREME COURT RULE 37.4 AND ITS HISTORY

Current Supreme Court Rule 37.4 provides as follows:

> 37.4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State,

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> Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.[1]

Prior to 1939, no Supreme Court rule addressed amicus briefs.[2] The first rule – Rule 27.9, a subsection of Rule 27 ("Briefs") – promulgated in 1939, stated:

> 27.9. A brief of an *amicus curiae* may be filed when accompanied by written consent of all parties to the case,

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[1] By comparison, current Federal Rule of Appellate Procedure 29(a) is narrower, providing as follows:

> The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

[2] Although it had no published rules on the subject prior to 1939, the Court eventually developed practices regarding amicus participation, and perhaps even had internal procedures regarding such participation. Supporting this observation is a 1903 order denying a request to file an amicus brief:

> In support of this motion certain letters were presented showing that request was made of counsel for the respective parties for their consent to the application, and that they withheld direct consent, leaving the matter entirely to the court to determine. When the motion was submitted, objection to the granting of leave was made by counsel for appellees.
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> Where, in a pending case, application to file briefs is made by counsel not employed therein, but interested in some other pending case involving similar questions, and consent is given, the court has always exercised great liberality in permitting this to be done. And doubtless it is within our discretion to allow it in any case when justified by the circumstances. *Green* v. *Biddle*, 8 Wheat. 17; *Florida* v. *Georgia*, 17 How. 491; *The Gray Jacket*, 5 Wall. 370. It does not appear that applicant is interested in any other case which will be affected by the decision of this case; as the parties are represented by competent counsel, the need of assistance cannot be assumed and consent has not been given.
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> Leave to file must, therefore, be *denied*.

Northern Securities Co. v. United States, 191 U.S. 555 (1903).

> except that consent need not be had when the brief is presented by the United States or an officer or agency thereof and sponsored by the Solicitor General, or by a State or a political subdivision thereof.[3]

The Court created a separate rule specifically for amicus curiae briefs (Rule 42 – "Briefs Of An Amicus Curiae") in 1954, providing that:

> 42.4. Consent to the filing of a brief of an *amicus curiae* need not be had when the brief is presented for the United States sponsored by the Solicitor General; for any agency of the United States authorized by law to appear in its own behalf, sponsored by its appropriate legal representative; for a State, Territory, or Commonwealth sponsored by its Attorney General; or for a political subdivision of a State, Territory, or Commonwealth sponsored by the authorized law officer thereof.

The 1954 rule prompted a published comment by Justice Black, who was critical of the rule: "I have never favored the almost insuperable obstacles our rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more people than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs."[4] Presumably he was referring to Rules 42.1, .2, and .3, all of which were new in 1954, and which emphasized the requirements that an amicus curiae either obtain the consent of all of the parties or make a motion to the Court for leave to file. Moreover, Rule 42.1 expressly noted that motions to file amicus curiae briefs were "not favored" at the certiorari stage.

Notably, the substance of current Rule 37.4 is virtually unchanged from that of Rule 27.9, first adopted in 1939.[5] Thus, for

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[3] *See* 306 U.S. 707-09 (1939).

[4] 346 U.S. 946, 947 (1954) (Statement of Black, J.).

[5] Prior to 1995, the rule was phrased differently with respect to local govern-

over 70 years the Court has included three and only three categories of "sovereigns" in its amicus curiae brief rules: (1) the United States; (2) the States (and territories); and (3) local governments.

A Brief History of Amicus Curiae Appearances by Sovereigns in the Supreme Court

There is no clear indication of amicus curiae briefs being filed in the Supreme Court until well into the 19th century.[6] One reason is that it was not until 1833 that the Supreme Court even encouraged the parties to file briefs, or "printed arguments" as the rule stated, and even then briefs were *optional* not mandatory.[7]

There are, however, a few examples of amici curiae appearing before the Court prior to the Civil War. A Westlaw search for the words "amici" or "amicus" in Supreme Court opinions turns up a dozen references prior to 1864, but several of those do not involve amici curiae appearing before the Court. Ultimately, there appear to be seven appearances by amici curiae (as noted in the *U.S. Reports*) prior to the Civil War.[8]

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ments. For example, the 1990 version read in pertinent part:

> 37.4. Consent to the filing of a brief of an *amicus curiae* is not necessary when the brief is presented on behalf of . . . a political subdivision of a State, Territory, or Commonwealth when submitted by its authorized law officer.

[6] *See generally* Samuel Krislov, *The Amicus Curiae Brief: From Friendship To Advocacy*, 72 Yale L.J. 694 (1963).

[7] *See* David C. Frederick, *Supreme Court Advocacy in the Early Nineteenth Century*, 30 J. S. Ct. History, Issue 1, at 12 n. 64 (2005) (quoting Sup. Ct. Rule XL, promulgated in 1833, declaring that, "in all cases brought here on appeal, writ of error, or otherwise, the court will receive printed arguments, if the Counsel on either or both sides shall choose so to submit the same").

[8] *See Day v. Washburn*, 64 U.S. (23 How.) 309 (1860); *Harrison v. Nixon*, 34 U.S. (9 Pet.) 483 (1835); *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823); *Brown v. United States*, 12 U.S. (8 Cranch) 109 (1814); *Beatty's Adm'rs v. Burnes' Adm'rs*, 12 U.S. (8 Cranch) 98 (1814); *Livingston v. Dorgenois*, 11 U.S. (7 Cranch) 577 (1813).

Of these early amicus appearances, three were by particularly notable figures. The first two were by William Pinkney, (part-time) Attorney General of the United States (1811-1814), appointed by President James Madison. In *Livingston v. Dorgenois*, Pinkney "[s]tated that he did not appear for the United States, nor for Dorgenois. . . . He appeared as *amicus curiae* . . . ."[9] Similarly, in *Beatty's Adm'rs v. Burnes' Adm'rs*, Pinkney again appeared "as *amicus curiae*."[10] The other notable early amicus appearance was by none other than Henry Clay, who appeared in a case (under instructions from Kentucky) in 1823.[11]

The first amicus curiae appearance by a lawyer clearly representing private rather than potentially sovereign interests is suggested in *Brown v. United States*, a case that involved competing claims to cargo on a sailing vessel. Though none of the arguing counsel are described in the *U.S. Reports* as appearing as amicus curiae, Justice Joseph Story describes the counsel for Mr. Brown in that way: "On the part of claimant's counsel (who, under the circumstances, must be considered as arguing as *amicus curiae* to inform the conscience of the court), it is contended . . . ."[12]

Thus, "amicus curiae" participation was rare during the first half of the 19th century. One factor that may have contributed to the dearth of amicus curiae participation was the Court's occasional practice of permitting the United States *to intervene* or otherwise participate in cases in situations that today likely would result in an amicus curiae appearance.[13]

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[9] 11 U.S. (7 Cranch) at 582.

[10] 12 U.S. (8 Cranch) at 106.

[11] *Green v. Biddle*, 21 U.S. (8 Wheat.) at 17, 38.

[12] 12 U.S. (8 Cranch) at 135.

[13] There are several examples of earlier cases permitting the United States to "intervene," sometimes when the government expressly disclaimed any proprietary or sovereign stake in the outcome. A dramatic example is the *The United States v. The Amistad*, 40 U.S. (15 Pet.) 518, 591 (1841) (emphasis added), in which Justice Story explained the United States' position in the case of the captured slave ship as follows:

With respect to the sovereigns ultimately encompassed in Supreme Court Rule 37.4, the historical experience varies. Only during the mid-19th century does the United States appear in the *U.S. Reports* with recognition of amicus curiae status,[14] although in some instances it is the Attorney General[15] who asserts that status, and nothing in the Court's reported decision formally acknowledges amicus curiae participation.[16] Formal notations of amicus curiae appearances (listed before the beginning of the Court's opinion, as is familiar to Supreme Court practitioners today) do not occur until

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> Before entering upon the discussion of the main points involved in this interesting and important controversy, it may be necessary to say a few words as to the actual posture of the case as it now stands before us. In the first place, then, the only parties now before the Court on one side, are the United States, *intervening for the sole purpose of procuring restitution of the property as Spanish property, pursuant to the treaty*, upon the grounds stated by the other parties claiming the property in their respective libels. *The United States do not assert any property in themselves, or any violation of their own rights, or sovereignty, or laws, by the acts complained of.*

[14] *See*, *e.g.*, *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854) (permitting U.S. to appear as an "amicus curiae" in an original jurisdiction case involving a boundary dispute between the two States).

[15] The Court itself eventually made clear that the Attorney General is *the* representative of the United States in the Supreme Court. In 1867 Chief Justice Chase issued an opinion declaring that "[t]he court has considered the question . . . and has instructed me to say that in causes where the United States is a party, and is represented by the Attorney-General or the Assistant Attorney-General, or special counsel employed by the Attorney-General, no counsel can be heard in opposition on behalf of any other of the departments of the government." *The Gray Jacket*, 72 U.S. (5 Wall.) 370, 371 (1867).

[16] *See*, *e.g.*, *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 491 (1867) (In a suit by Mississippi against President Andrew Johnson to enjoin him from enforcing the Reconstruction Acts, U.S. Attorney General Henry Stanberry explained that "it is as amicus curiae, or as law officer next the President, I have felt bound, at the first motion made to file this bill, to attempt to keep so scandalous a thing from the records of this court."). Almost 60 years later, another Attorney General would appear on behalf of another President in *Ex parte Grossman*, 267 U.S. 87 (1925), but his appearance was formally recognized in the *U.S. Reports* as "Mr. Attorney General Stone for the President of the United States as amicus curiae by special leave of Court." *Id.* at 101.

the 1890s.[17] And it is not until well into the 20th century that the *U.S. Reports* identify the actual amicus curiae as opposed to the lawyer representing them, making it difficult to pinpoint details of amicus participation prior to the 20th century. That said, by the early part of the 20th century, the United States was making frequent amicus curiae appearances, both by filing briefs and by participating in oral arguments.[18]

States appear with amicus curiae status later than the United States, and not prior to the Civil War,[19] putting aside Clay's appearance in 1823 at the urging of Kentucky. Early state amicus curiae appearances generally involve only a single state, but by 1917 the States at least occasionally were joining forces (as is common today) and making amicus curiae appearances collectively.[20] Indeed, between 1900 and 1939, there are numerous appearances by a State or several States as amicus curiae, with State amici both filing briefs and participating in oral argument.

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[17] *See*, *e.g.*, *In re Claasen*, 140 U.S. 200, 201 (1891) ("Geo. F. Edmunds, amicus curiae" included in the list of counsel appearing in the case).

[18] *See*, *e.g.*, *Howard v. Illinois Central R. Co.*, 207 U.S. 463 (1908) (West headnote 1, stating that "In the Supreme Court the Attorney General was allowed to take part by printed brief and oral argument as a friend of the court."); *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 10 (1916) ("the United States, as amicus curiae, has at bar been heard both orally and by brief").

[19] The earliest instance I have seen is *Steamship Co. v. Jolliffe*, 69 U.S. (2 Wall.) 450, 454 (1864) ("The case had been called at the last term; when it being suggested that the constitutionality of the statute of the State of California would be involved in the consideration, a decision was suspended until the State of California could be represented. The Attorney-General of the State now accordingly appeared and filed a brief."); *see also*, *e.g.*, *Mining Co. v. Consolidated Mining Co.*, 102 U.S. (12 Otto) 167, 168 (1880) ("As the question to be decided necessarily involves the title to much other mineral land in California, in which the authorities of the State of California and the officers of the Land Department of the United States entertain and act upon conflicting views of the rights of the State and the general government, the State of California by her counsel, and the United States by the Attorney-General, have been permitted to take part in the argument.").

[20] *See James Clark Distilling Co. v. Western Maryland R. Co.*, 242 U.S. 311, 315 (1917) (listing 15 state Attorneys General as amici curiae); *New York v. United States*, 257 U.S. 591, 597 (1922) (noting counsel "for 45 States, amici curiae"); *Railroad Comm'n of Wisconsin v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 578 (1922) (same).

Local governments appear as amicus curiae later than the States, but at least once prior to 1900.[21] My sense is that in the early years municipal entities appeared much less frequently than either the United States or the States, and not with any frequency until the 1930s,[22] at which time they also began to participate at least occasionally in oral arguments.[23] From the reported cases, it is apparent that prior to adopting its first amicus curiae rule in 1939 the Court would have had some experience, if not a great deal, with amicus participation by local governments.

In sharp contrast, I have found no indication of an Indian Tribe filing an amicus curiae brief or making an appearance as amicus until 1938,[24] despite the many earlier Supreme Court cases involving Indian Tribes and their interests. Thus, Tribes were relatively unknown amici in 1939.

The amicus participation of foreign governments is similar to that of Tribes, though with one wrinkle. The *U.S. Reports* do not clearly indicate that a foreign government filed an amicus curiae brief in the Court prior to 1952, or at least not in a brief identifying the amicus as a foreign nation.[25] The "British Embassy" did appear as

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[21] *See California v. So. Pac. Co.*, 157 U.S. 229, 254 (1895) (Discussing an argument made "[o]n behalf of the City of Oakland, which was permitted to be heard at the bar by counsel, as an amicus curiae . . . .").

[22] Their amicus curiae participation is specifically noted on a number of occasions beginning in 1930. *See*, *e.g.*, *Eliason v. Wilborn*, 281 U.S. 457 (1930) (counsel appearing "as amicus curiae for Registrar of Titles of Cook County, Illinois"); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 482 (1933) (counsel "filed brief for the City of New York as amicus curiae"); *City of Marion v. Sneeden*, 291 U.S. 651 (1934) (counsel appearing "for the City of Chicago, amicus curiae"); *Arizona v. California*, 292 U.S. 341 (1934) (noting that there was "a brief amicus curiae by the city and county of Denver, Colo.").

[23] In *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352 (1937), for example, the Court permitted a number of amici to participate in oral argument, including "the City of New York," *id*. at 353, "the State of New York," *id*. at 356, and even "certain employees of the City of New York". *Id*. at 359.

[24] *See Minnesota v. United States*, 305 U.S. 382 (1939) ("Brief of Minnesota Chippewa Tribe and Grand Portage-Grand Marais Band, Subsidiary Organization of Said Tribe, Amicus Curiae").

[25] *See Lauritzen v. Larsen*, 345 U.S. 571 (1953) (merits amicus brief filed by the

an amicus curiae a handful of times prior to 1939,[26] but in none of those cases is the amicus identified as the sovereign government. Even if these instances are considered amicus appearances by a foreign nation, there still were only three of them. Like Indian Tribes, foreign nations were virtually unknown amici in 1939.

Thus, when the Court adopted Rule 27.9 in 1939 there was a clear ranking of sovereign amici based on past participation, a ranking that continues today: the United States was the "big dog," the States were second, and local governments were a somewhat distant third.[27] Indian Tribes and foreign governments were not even in the game, at least not in any significant way. Based on this history, it is not too surprising that the Court's 1939 amicus rule included only three categories of sovereigns. Making allowances for the Tribes and foreign nations simply may not have occurred to the Court.

SOME OBSERVATIONS ON SUPREME COURT RULE 37.4

As discussed above, a strong potential explanation for the exclusion of Indian Tribes and foreign nations from Rule 27.9 in 1939 was simply historical happenstance – the Tribes and foreign

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"Royal Danish Government"; certiorari amicus briefs filed by the "Royal Danish Government", the "Royal Norwegian Government", and the "Government of the United Kingdom of Great Britain and Northern Ireland").

[26] *See*, *e.g.*, *Strathearn S.S. Co. v. Dillon*, 39 S. Ct. 495 (1919) ("Motion of counsel for the British Embassy for leave to intervene herein as amicus curiae, and for leave to file brief and take part in oral argument granted."); *In re Muir*, 254 U.S. 522, 527 (1921) ("private counsel for the British Embassy in Washington, appearing as amici curiae, presented to the court a suggestion in writing . . . ."); *Jackson v. The Archimedes*, 275 U.S. 463, 464 (1928) (identifying counsel "for British Embassy, amicus curiae").

[27] This generalization is based on a review of all cases prior to 1939 in which the words "amicus curiae" appear in the *U.S. Reports*, but a precise count of the number of cases in which the United States, the States, or municipal entities appeared is impossible to obtain because, for many years, the *U.S. Reports* simply noted the lawyer who appeared as amicus curiae, without specifying on whose behalf the lawyer was appearing.

nations had virtually no amicus curiae appearances in the Court prior to that time. But historical experience subsequent to 1939 does not explain why current Rule 37.4 still does not include these sovereigns some 70 years later.

In January 2010, I contacted Supreme Court Deputy Clerk Chris Vasil to discuss amicus participation by Indian Tribes and foreign nations. He in turn discussed some of my questions with the Clerk of the Court, William K. Suter, and then Vasil and I had further discussions. According to Vasil, neither he nor the Clerk could recall any discussion in the past 20 years about the question whether Indian Tribes or foreign nations might or should be included in Rule 37.4. Neither of them recalled any requests by Tribes or foreign nations for inclusion in the rule, nor did they recall any discussion of the topic within the Clerk's Office.[28]

Deputy Clerk Vasil indicated that both Indian Tribes and foreign nations have filed amicus briefs, typically on the merits after certiorari has been granted.[29] Further, the Clerk's Office did not recall any instances in which such sovereign amici were denied permission

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[28] The Clerk's Office explained that the 1995 change in Rule 37.4's language to refer to "a city, county, town, or similar entity" instead of "a political subdivision of a State, Territory, or Commonwealth" was the result of questions about whether particular local government entities were in fact "political subdivisions" of their States. A potentially problematic example under the pre-1995 version of the rule might have been a local school board, which is not a city, county or town, but might be considered a political subdivision of the State. The Clerk's Office did not recall any discussion regarding Tribes or foreign nations at the time the rules were amended in this respect in 1995.

[29] The Deputy Clerk did not provide any specific examples, but they are relatively easy to find with a simple Westlaw search, which the author subsequently conducted. For recent examples of such amici filings, see *Carcieri v. Salazar*, 129 S. Ct. 1058 (2009) (amicus briefs filed by several tribes and tribal organizations); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 129 S. Ct. 491 (2008) (amicus briefs filed by tribes and tribal organizations); *JTEKT Corp. v. United States*, 552 U.S. 1007 (2007) (granting motion by Government of Japan to file amicus curiae brief, but denying certiorari); *Powerex Corp. v. Reliant Energy Services, Inc.*, 552 U.S. 224 (2007) (amicus brief on the merits filed by the Government of Canada).

to file a brief so long as their requests were timely.[30] Finally, the Clerk's Office observed that in many instances the parties consent to all amicus curiae filings, making it unnecessary for any amici, including Indian Tribes and foreign nations, to file a motion for leave to file their briefs with the Court (even with consent, however, amici not included in Rule 37.4 remain subject to the disclosure requirements of Rule 37.6[31]).

Legally, the status of Indian Tribes and foreign nations is most analogous to that of the States, though certainly not exactly the same. In some settings, the Court has held that the States, Tribes, and foreign nations are on the same legal footing. For example, the Court has held that neither States nor Indian Tribes are "persons" under 42 U.S.C. § 1983,[32] reasoning in part that the word "person" typically is not used to refer to "sovereign" entities such as the States and Tribes. Local governments, however, are "persons" under § 1983, because their legal status is viewed as more "corporate" than sovereign in nature.[33] The Court also has held that both States and foreign nations are "persons" who can sue under the federal antitrust laws.[34]

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[30] For an example of the Court denying an untimely request see *Sharifi v. Alabama*, 129 S. Ct. 491 (2008) (denying Government of Islamic Republic of Iran's motion for leave to file a brief as amicus curiae out of time; also denying certiorari).

[31] Supreme Court Rule 37.6 provides:

> Except for briefs presented on behalf of an *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution.

[32] *See Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (States are not "persons" who can be sued under § 1983); *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, 538 U.S. 701 (2003) (Tribes are not "persons" who can sue or be sued under § 1983).

[33] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

[34] *See*, *e.g.*, *Georgia v. Evans*, 316 U.S. 159 (1942) (States); *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (foreign governments).

Of course, the Court also has distinguished between the United States and the States on the one hand, and Tribes and foreign nations on the other hand, for constitutional (Eleventh Amendment) immunity purposes, holding that both the United States and a State may sue another State,[35] but that the constitutional immunity prevents Tribes and foreign nations from suing a State.[36] Municipal entities cannot sue States but can themselves be sued because they are treated as lesser sovereigns that do not share the constitutional immunity.[37]

Whether or not from a constitutional or other legal perspective Tribes and foreign nations have the same sovereign status as the States, or at least a greater status than local governments, there are dignitary reasons to include them in Rule 37.4. It is easy to see what the Supreme Court would gain in comity and goodwill from the Indian Tribes and foreign nations by according those sovereigns the same respect as the United States, the States, and local governments. In contrast, it is difficult to see any cost to expanding Rule 37.4 to include these sovereigns. Expanding the rule seems very unlikely to impose any additional costs on the Court or its Clerk's Office. In fact, inclusion might even save the Clerk's Office time and expense by eliminating the need for proof of the parties' consent or a motion for leave to file by Tribes and foreign nations. In any event, broadening the scope of Rule 37.4 would show no disrespect to the United States, the States or local governments.

One response to the proposed expansion of Rule 37.4 may be that the Indian Tribes' and foreign nations' requests to file amicus briefs are never denied, and that the parties in Supreme Court cases generally consent to all amicus filings, often making such requests unnecessary. Those considerations, however, are equally applicable to the United States, the States, and local governments. It is hard to

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[35] *United States v. Mississippi*, 380 U.S. 128 (1965); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838).

[36] *Blatchford v. Native Village*, 501 U.S. 775 (1991); *Monaco v. Mississippi*, 292 U.S. 313 (1934).

[37] *Lincoln County v. Luning*, 133 U.S. 529 (1890).

imagine that the Court would deny amicus requests by these sovereigns even if there were no Rule 37.4.

Nor would including Tribes and foreign nations in current Rule 27.4 likely result in a flood of new amicus curiae filings in the Supreme Court. From a pragmatic perspective, the United States currently recognizes 564 federally-registered Indian Tribes,[38] and 194 nations ("independent states") in the world.[39] Those numbers of potential amicus curiae that could take advantage of an expanded Rule 37.4 are dwarfed by the number of cities, counties and towns in the United States already included in Rule 37.4. In my home state of Kansas alone, for example, there are 105 counties and over 350 cities and towns, and Kansas is a modest-sized state, both in terms of population and geographic boundaries. Indeed, the number of amici included in an expanded Rule 37.4 would be a marginal addition to the thousands of amici the rule already covers.

Thus, although the original rule's scope may be explained by historical experience prior to 1939, continuing its substance unchanged to the present day cannot be justified on the same basis. There are persuasive arguments that the United States plays a unique role in the Supreme Court, and undoubtedly the States collectively have direct interests in more Supreme Court cases than the Indian Tribes or foreign nations. But it is difficult to deny that the Tribes and foreign nations in some cases may be at least as important and helpful as amicus curiae as are the United States, the States, and local governments. Indeed, the Court's now 70-year-old decision to include local governments in its amicus brief rules but not Tribes or foreign sovereigns looks anachronistic and difficult to maintain, either philosophically or as a practical matter, especially given the legal sophistication of many Tribes today, some of which have their own attorneys general and legal systems.

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[38] 74 Fed. Reg. 40218 (Aug. 11, 2009).

[39] *See* "Independent States in the World" (Fact Sheet) (July 29, 2009) at www.state.gov/s/inr/rls/4250.htm.

Conclusion

Rule 37.4 (and likely also Fed. R. App. P. 29(a)) easily could be changed to recognize the dignity of all sovereigns that may wish to appear as amicus curiae. The benefits of such a change are readily apparent, even if they are largely intangible or dignitary in nature. Dignitary interests are important, and the Tribes and foreign nations deserve at least the same dignity as the *literally thousands* of local governments already included in Rule 37.4. Furthermore, expanding the rules to include more sovereigns might actually lessen the burden on clerks' offices by eliminating some paperwork currently required of such amici (whose briefs almost certainly will be accepted anyway). What's to lose?