

MEMORANDUM

TO: Judges Jeffrey Sutton, David Campbell, and John D. Bates

FROM: Judges Neil Gorsuch and Susan Graber

DATE: June 13, 2016

RE: Jury Trials in Civil Cases

We write to suggest that the Advisory Committee on the Rules of Civil Procedure consider a significant revision to the rules concerning demands for a jury trial. This proposal would affect, at a minimum, Rules 38, 39, and 81. We have not drafted proposed text; our suggestion is conceptual, though we would be happy to work on this issue further.

The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue.

Several reasons animate our proposal. First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully.

Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

We recognize that this would be a huge change, and we also recognize that problems could result, especially in pro se cases. Nevertheless, we encourage the advisory committee to discuss our idea. Thank you.