Dear Committee on Federal Rules of Civil Procedure —

Currently, suits against the Federal Government cannot begin without first serving summons, in paper form, on a long list of recipients under FRCP 4(i).

To give one common scenario, suppose an employee at a major agency, located in D.C., is sued in both individual and official capacities — with the agency and its head (in official capacity) named as well. The current rule requires six separate services, which can *only* be done by mail: the United States and Attorney General (which aren't parties); the agency; the agency head; the employee in official capacity; and the employee in individual capacity. Add another for each extra employee named (doubled if in both capacities). In practice, however, these likely all go to just two places: the civil intake clerk at the U.S. Attorney's Office for D.C., and the U.S. A.G.'s office.[1]

Virtually everyone "subject to service" has a "duty to avoid unnecessary expenses of serving the summons" under FRCP 4(d)(1). There are only two exceptions: governments, and "a minor or an incompetent person". The Government, like an incompetent, can't even *voluntarily* waive service.

There isn't even a provision for hand delivery. The rule explicitly says mail *only*. In the event of a PI/TRO or other emergency, where suit must be filed immediately, this presents a problem — after all, you can't file a motion before summons.

I propose to cure this by revising FRCP 4(i) to add a new section, providing that service can be also be accomplished by a subset of the usual means in FRCP 5(b): CM/ECF (if they're registered), hand delivery, or consent (which, in practice, I expect to mean "it's urgent, just email me a copy"). I've also

[1] If you're suing the Department of Justice itself — e.g. under FOIA — these go to the same place: the Mail Referral Unit.

provided that there should be only one service per actual recipient. There are conforming deletions.

My proposal would save substantial time and resources. In the example above, this would reduce six services to two (five through the USAO/DC in one copy, one to the AG). Multiply this by literally *all* civil litigation against the Government[2], agencies, officers, and employees — not a small category, nor a small service list!

Although my rule doesn't require Government attorneys to register with CM/ECF, Rule 5(d)(3)(A) does (if they've ever filed before). The AG and all USAOs are registered, as are all "repeat players", who are likely to be defending cases. Non-ECF service should only be needed when an officer or employee is represented by an attorney who's not litigated in that court before — or the rare individual capacity employee *not* represented by the Government, who's exempt from my rule.

This places no additional burden on the Government or its attorneys. They have already, by registering with CM/ECF, agreed to electronic service thereby. Getting served by ECF is hardly new. Indeed, during COVID, it's questionable whether the Government even wants or obeys the current mail-only rule, considering that basically every government entity that can divert formerly paper mailings to electronic format has done so as much as possible.[3]

Courts can themselves attest to this being less burdensome than paper, since the vast majority of cases are initiated electronically, and "served" on the clerk through exactly the same system as would be the primary service on the Government under my rule.

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[2] I have deliberately omitted any change to non-Federal governments for now, since it'd affect issues of comity etc.

[3] My proposed rule does *not* mandate electronic service. I believe that this should be considered, but separately. If it is, I believe that it should be directly tied to Rule 5(d)(3)'s rule for when electronic service is required.

I believe one should always take an available opportunity to improve clarity and correct technical errors, and found many. I've therefore included a restructuring and clarification of Rule 4(i) **in blue**, distinguished from the **above proposal in green**, with footnotes explaining my reasoning.

Lastly, I note that this rule almost exclusively benefits those who can *initiate* a case through CM/ECF. Please see my concurrently revived proposal to not deprive *pro se* litigants of this benefit.

I therefore petition for rulemaking under the Rules Enabling Act to amend FRCP 4 as follows:[4]

RULE 4. SUMMONS

i. SERVING THE UNITED STATES AND ITS AGENCIES, CORPORATIONS, OFFICERS, OR EMPLOYEES

1. *United States.*[5]

The United States must also be served if any other person is required to be served under Rule 4(i).[6]

To serve the United States, a party must **deliver a copy of the summons and of the complaint**:

A. to:

i. ~~deliver a copy of the summons and of the complaint to~~ the United States attorney for the district where the action is brought~~, or to~~;

ii. an assistant United States attorney or clerical employee whom ~~the~~ **that** United States attorney designates in a writing filed with the court clerk~~, or~~ **and published on both the court and United States Attorney's websites**[7]**; or**[8]

~~ii.~~**iii.** ~~by registered or certified mail to~~ the civil-process clerk at ~~the~~ **that** United States attorney's office; **and**

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[4] ~~Strikethrough = deletion~~, **bold = addition**, plain = original. Plain italics are either original, or to better show structure. Bold italics are intended *sic*.

[5] Line breaks are intended to be added after headings, for better style. *See* Matthew Butterick, *Typography for Lawyers*:
https://typographyforlawyers.com/headings.html
https://typographyforlawyers.com/space-above-and-below.html
I strongly recommend that the Committees read and adopt the recommendations in the full book.

[6] Placing the "must serve the United States and" clauses in all of the rest is messy, duplicative, confusing, and technically incorrect.
It's inaccurate to say e.g. that serving an individual capacity employee involves serving the United States. It's a *separate* interested party. Service can be completed on the individual even if not completed on the United States. Likewise, the current Rule 4(i)(4)(A) causes a recursion — because this clause is *in* 4(i)(2), it also includes the USAO, AG, and (if applicable) ordering agency. So, under Rule 4(i)(4)(A), one can get an extension to serve the AG or ordering agency if one has served the USAO. Obviously, that's not intended — but a strict reading requires it, and the rule is "must".
For an excessively cautious layperson, the current rules could also be read to mean that the United States has to be served as many times as the command appears — e.g. once for itself, *plus* once for *each* employee named, in *each* capacity. Again, obviously this is not intended, but it's an entirely reasonable way that a naïve, well-intentioned *pro se* litigant, trying to very strictly obey the rules, could easily read the current Rule.
I've made a simple fix: the very first line of 4(i) now says that the United States also has to be served if anyone is, and deleted the later clauses, with conforming edits. This clearly states the interest, removes duplication and other awkwardness further down, and is unambiguous. And it fixes all of those technicalities.

[7] The purpose of this designation is to tell the *public*, not the *court*, whom to contact. It must be published to be effective.

[8] I note that the current Rule is silent as to *how* the USA / AUSA is to be served, while specifying for everyone else. I don't know why there is the current lacuna — but the core proposal, addressing manner of service for all of Rule 4(i) at once — cures it as a byproduct.

B. ~~send a copy of each~~[9] ~~by registered or certified mail~~ to the Attorney General of the United States at Washington, D.C.~~, and~~

~~C. if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.~~[10]

2. *Agency~~, or~~ Corporation~~, Officer or Employee Sued in an Official Capacity.~~*[11]

A. Sued

To serve a United States agency or corporation~~, or a United States officer or employee sued only in an official capacity~~, a party must ~~serve the United States and also~~ send a copy of the summons and of the complaint ~~by registered or certified mail~~ to the agency~~,~~ **or** corporation~~, officer, or employee~~.

B. Non-party Agencies

If the action challenges an order of a nonparty agency of the United States,[12] **a party must also serve that agency, as under (A).**

3. *Officer or Employee*

If an officer or employee is sued in both official and individual capacity, they must be served under both (A) and (B).[13]

A. Sued in an Official Capacity

To serve a United States officer or employee sued ~~only~~[14] in an official capacity, a party must ~~serve the United States and also~~ send a copy of the summons and of the complaint ~~by registered or certified mail~~ to the officer~~;~~

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[9] Although the intent is clear, technically speaking, "each" no longer has a valid referent here — its scope was limited to subparagraph (1)(A). I've fixed this by moving the clause to the lede of (1).

[10] This simply isn't service *on* "the United States", and therefore doesn't belong here. *Contrast* current Rule 4(i)(2) (distinguishing service on *agency* or *officer*). It's also very rare, so it doesn't belong in the clause that will be most frequently read. Finally, it needlessly complicates in other references, e.g. Rule 4(i)(4)(A), that should only reference service on the United States; their awkwardness is due to the fact that this element isn't.

I've reorganized this as the last parts of the reorganized (2)(B) & (3)(C), i.e. as tack-on instructions for when agency and official capacity individuals must be served, which aren't actually part of "how to serve X".

[11] I believe this structure is needlessly confusing, especially since individual vs. official capacity is often a point of confusion. I've therefore reorganized it as (2) agency & (3) individual ((A) official capacity, (B) individual capacity).

I believe this much more closely matches how people, both lay and professional, actually categorize these concepts. It has the added benefit of not intermixing language that only applies to individuals with sections about agencies, and creating a much more natural place and manner to give a "remember to serve both capacities separately" warning, which I've added.

[12] Text that has been moved (including duplicated) — but not otherwise changed — is in blue, but not bold.

[13] Clarifying note. See footnote on deletion below.

[14] This "only" creates a lacuna, or at least an ambiguity: the rule doesn't address service on the official capacity if an officer is sued in both individual and official capacities. (2) is for "only" official; (3) is for individual, regardless of dual status; so what covers the official in dual? Deleting this fixes it.

or employee.

B. Sued **in an** Individual~~ly~~[15] **Capacity**~~:~~

To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf ~~(whether or not the officer or employee is also sued in an official capacity)~~[16], a party must ~~serve the United States and also~~ serve the officer or employee under Rule 4(e), (f), or (g).

C. Non-party Officers

If the action challenges an order of a nonparty officer of the United States, **a party must also serve that officer, as under (A).**

4. *Extending Time*~~:~~

The court must allow a party a reasonable time to cure its failure to:

A. serve a person required to be served under Rule 4(i)(2) **or 4(i)(3)**, if the party has served ~~either the United States attorney or the Attorney General of the United States~~ [17]**the United States under any part of Rule 4(i)(1)**; or
B. serve the United States ~~under Rule 4(i)(3),~~[18] if the party has served the United States officer or employee under Rule **4(i)(3)(A) or**[19] 4(i)(3)**(B)**[20].

5. ***Method of Service***

The following rules apply to all service under Rule 4(i)(1), 4(i)(2), and 4(i)(3)(A).

They also apply to all service under Rule 4(i)(3)(B) if the individual to be served is represented by the United States (or United States agency or corporation), or by an attorney thereof.

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[15] "Individually" doesn't match the rest of the rule, and is confusing. Individual capacity has a clear legal definition; individually could be taken to mean e.g. "… separately, singly; one by one. Frequently opposed to collectively.", OED *individually* (adv., entry 3) rather than "… in an individual or personal capacity" (*id.* entry 4). I've corrected it to match.

[16] This is inconsistent with the lack of similar caveat for official capacity. I've rephrased the warning to apply to both, and moved it to the top of the reorganized paragraph.

[17] The current rule's intent is clear, but it has technical defects that don't match (A) or reality. First, neither the USA nor the USAG is the entity "served" *per se*; the *United States* is served under (1), by *delivery* to the district USA and the USAG. Second, under (1)(A), the actual USA is hardly ever the recipient, nor even an AUSA, nor likely a direct clerical designee either — it's virtually always going to be the civil-process clerk. I've changed this to exactly mirror the intended meaning, but by reference to (A).

[18] Moved for clarity, given reorganized United States notification rule.

[19] It seems to me that both cases of service on an employee should match. However, I freely admit that this specific edit is based at least partially on my subjective opinion of fairness, which is outside the scope of my proposal. If this edit raises a significant policy issue, please disregard it. I do not believe that any other blue edits have a substantial subjective policy element.

[20] This is a conforming edit.

A. Manner of delivery

Delivery may be made by:

i. Rule 5(b)(2)(E) electronic filing, if the recipient or their attorney is registered;

ii. Rule 5(b)(2)(F) consent;

iii. Rule 5(b)(2)(A) hand delivery;

iv. certified mail; or

v. registered mail.

B. Non-duplication

Only one service is required for each ultimate recipient of service under Rule 4(i), regardless of the number of entities for whom that recipient is receiving service.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[21]
President, Fiat Fiendum, Inc.
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April 14, 2021

[21] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.