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IN THE SUPREME COURT OF THE UNITED STATES

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DALE G. BECKER, :
Petitioner :
v. : No. 00-6374
BETTY MONTGOMERY, ATTORNEY :
GENERAL OF OHIO, ET AL. :
- - - - - X

Washington, D.C.
Monday, April 16, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:

JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of
the Petitioner.
STEWART A. BAKER, ESQ., Washington, D.C.; invited to brief
and argue as amicus curiae in support of judgment
below.

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C O N T E N T S

PAGE

ORAL ARGUMENT OF

JEFFREY S. SUTTON, ESQ.

On behalf of the Petitioner

3

STEWART A. BAKER, ESQ.

On behalf of the Respondent

27

REBUTTAL ARGUMENT OF

JEFFREY S. SUTTON, ESQ.

On behalf of the Petitioner

48

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No.00-6374, Dale Becker v. Betty Montgomery.

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONER

MR. SUTTON: Thank you, Mr. Chief Justice, and may it please the Court:

There are two arguments that I would like to press this morning. The first is that a timely notice of appeal will never be dismissed for lack of jurisdiction solely because it lacks a signature. The second is an alternative argument, and that's that a typewritten signature would suffice to meet any such requirement.

Let me start with the sixth circuit's review of this particular case. In their view, there is a jurisdictional signature requirement in light of the thirty-day rule under Appellate Rule 4, and in light of Civil Rule 11, which indeed does contain a signature requirement. The problem with the sixth circuit's reliance on Civil Rule 11 is that it not only contains a signature requirement, but it also contains a remedy for the absence of a signature. And in this particular case, everyone agrees -- the court-appointed amicus curiae

1 included -- that Mr. Becker was never given an opportunity
2 to correct this omission of a signature, whether at the
3 district court or the court of appeals level.

4 QUESTION: I should know this -- when you file a
5 notice of appeal, do you file with the district court?

6 MR. SUTTON: You do, Your Honor.

7 QUESTION: So Rule 11 applies at that point?

8 MR. SUTTON: It does technically. In fact,
9 Appellate Rule 1 arguably acknowledges that when it says
10 all filings in a district court -- all filings in the
11 courts of appeals that have been made through district
12 courts have to comply with district court rules. So it
13 does seem, as odd as it would appear, that Civil Rule 11
14 does apply to a notice of appeal, keeping in mind that
15 Civil Rule 11 is pretty broad in nature. It says
16 pleadings and quote other papers. So arguably that does
17 include a notice of appeal.

18 QUESTION: If I were on the court of appeals and
19 I thought that Rule 11 requires a signature --

20 MR. SUTTON: Handwritten signature.

21 QUESTION: -- and I was a little fussy about it,
22 what would I do? Just under Rule 11 just say, well, will
23 you please cure this non-jurisdictional deficiency?

24 MR. SUTTON: It is problematic, Your Honor, and
25 I think the answer is Appellate Rule 1 which does, as I

1 noted, make clear that you do have to comply with the
2 district court rules and the Rules of Civil Procedure.

3 In light of Appellate Rule 1, a court of appeals
4 or a court of appeals clerk's office would be fully within
5 its rights to contact in this case Mr. Becker, saying, Mr.
6 Becker, we see you've typed your signature. In this
7 circuit we prefer a handwritten pen and ink signature.

8 QUESTION: And please clean up your act a
9 little, okay?

10 MR. SUTTON: Well --

11 QUESTION: Clean -- clean it up within thirty
12 days. I mean, that's the problem. You do have a remedy,
13 but why doesn't the remedy have to have been applied
14 within the thirty-day time limit?

15 MR. SUTTON: Your Honor, the only thing that has
16 to be done within thirty days is to make sure you've
17 established an intent to appeal. You can establish an
18 intent to appeal as this Court is --

19 QUESTION: Does it say that -- it says you have
20 to establish an intent to appeal within thirty days? I
21 thought it said that you had to file within thirty days a
22 notice of appeal which includes a signature, which I take
23 to mean a written signature in normal parts.

24 MR. SUTTON: Well, as this Court has construed
25 Rule 4 and Rule 3 of the Appellate Rules in Smith and

1 Torres, it has said the touchstone for jurisdiction is to
2 establish the intent to appeal within thirty days. That's
3 --

4 QUESTION: I don't know how good law Smith is.

5 MR. SUTTON: You don't know how good law Smith
6 is?

7 QUESTION: Yeah. There were a couple of cases
8 decided back in the 1960s that really stretch the
9 language, I think.

10 MR. SUTTON: Well, I may be referring to the
11 wrong Smith decision. I'm referring to Smith v. Barry,
12 Your Honor, which is a 9-0 decision in which the Court
13 said that a merits brief would suffice to establish a --
14 or could suffice to establish intent to appeal within
15 thirty days. That was the case in which the appellant
16 missed the time for filing the notice of appeal because
17 they weren't sure when -- they hadn't -- weren't sure when
18 the notice -- the judgment was entered. They then
19 fortuitously filed their merits brief within the thirty-
20 day period, and this Court said in a 9-0 decision that --

21 QUESTION: I wasn't referring to Smith.

22 MR. SUTTON: I do think there are some older
23 cases that aren't necessarily reflected in the current
24 rules, but --

25 QUESTION: Mr. Sutton, could we go back to your

1 answer to Justice Kennedy about Rule 11 -- isn't the
2 answer on the other side that once you file the notice of
3 appeal, authority over the case passes from the district
4 court to the court of appeals, so at that point, up until
5 the notice of appeal, you're in the district court. Once
6 you file that notice, you are in the court of appeals and
7 Rule 11 is a rule directed to district court and not the
8 court of appeals. So the cure that Rule 11 provides, at
9 least so the argument goes, would not be available in the
10 court of appeals.

11 MR. SUTTON: And Your Honor, that is why I was
12 relying on Appellate Rule 1 which incorporates those
13 rules, and that would therefore give appellate courts
14 authority to make sure that someone did correct the
15 signature. If they wanted at that point to decide, well,
16 if you're not going to correct it -- you're going to be
17 unrepentant when it comes to this particular requirement,
18 at that point we are going to dismiss your appeal, and in
19 fact will do so on the merits.

20 QUESTION: Of course, I suppose if you haven't
21 filed a proper notice of appeal, you're still in the
22 district court. I mean, you could argue it the other way
23 that if indeed a signature is required and you file it
24 without a signature in the court of appeals, it is
25 ineffective and so the case remains in the district court.

1 MR. SUTTON: What the court has said and what
2 the rules reflect is that as soon as the district court
3 clerk receives the notice of appeal, it doesn't say
4 anything about validity, it is immediately sent to the
5 court of appeals. And I think -- but I think that does
6 raise a second answer to Mr. Baker's argument -- the point
7 Justice Ginsburg is getting at, it is true that to find a
8 notice of appeal immediately vests jurisdiction in the
9 court of appeals over the merits of the case, but that
10 doesn't preclude district courts from acting on collateral
11 matters; that's when they can act on stay motions, bond
12 motions, attorney fee motions. This arguably could be such
13 a collateral act. It wouldn't go to the merits of the
14 case. It would, however, and I think there would be one
15 problem here, and that would be interpretation. The
16 district courts would have authority to enforce this as a
17 jurisdictional rule, and you would have district court
18 judges dismissing appeals of their own cases. That seems
19 problematic, and I think kind --

20 QUESTION: Mr. -- Mr. Sutton, the Federal Rule
21 of Appellate Procedure 3 does say that a pro se notice of
22 appeal is considered filed on behalf of the signer --

23 MR. SUTTON: Yes.

24 QUESTION: -- which gives some indication that a
25 signature is expected.

1 MR. SUTTON: Yes, Justice O'Connor, and if I
2 could answer this question, it may be helpful to be
3 looking at the rules. I am looking at the State of Ohio's
4 red brief, I'm at 5(A) where they've got a helpful
5 collection of what I think were pertinent rules.

6 QUESTION: What page?

7 MR. SUTTON: 5(A).

8 QUESTION: 5(A).

9 MR. SUTTON: I'm at the Appendix -- so it's the
10 very back.

11 QUESTION: Okay.

12 MR. SUTTON: And Justice O'Connor correctly is
13 pointing to what I think is the best argument that has
14 been made -- the amicus curiae argument -- and that's
15 Appellate Rule 3(C)(2) which does refer to the word
16 signer, and it does come out of nowhere -- that there is
17 nothing else in the Appellate Rules that refers to the
18 verbs sign, or the noun sign, or a signature, and suddenly
19 in 1993 they do this.

20 Well, I guess one quick question is if Mr.
21 Baker's interpretation is correct, how in the world would
22 you enforce it? Put yourself in the position of the poor
23 clerk of, let's say, the sixth circuit. They get, let's
24 say, Mr. Becker's notice of appeal but instead of a
25 typewritten signature, it just says Becker in the caption,

1 Becker in the body, blank -- we'll say for the sake of
2 argument -- signature line. How would you know whether
3 the person is represented or not? You would have no way
4 of knowing whether the attorney -- you don't have to sign
5 rule -- or the pro se -- you do have to sign rule,
6 applies.

7 Indeed, the only way to enforce it would have
8 the clerk do what I think they should be doing in these
9 cases, which is picking up the phone and calling and
10 saying you need to be signing, you need to include that
11 appellant.

12 Of course if the question under Mr. Baker's rule
13 was the clerk now calls and says are you represented,
14 well, there is a good answer and a bad answer to that
15 question. If you say you're represented, you're okay.
16 Jurisdiction vested, you didn't have to sign, and if you
17 say you're pro se, you're gone. So I can't imagine that's
18 what they meant, given that particular problem.

19 The only problem with it -- there is actually a
20 few -- is if you turn the page to 6(a) and look at Rule
21 3(C)(4) --

22 QUESTION: Let me interrupt you for a second
23 with that first hypothetical, you're assuming that he
24 calls a person up and he says he is represented, but then
25 everything is okay?

1 MR. SUTTON: Because Mr. Baker, I think, as he
2 has to say --

3 QUESTION: But no lawyer signed anything. You
4 are assuming that there would be appeals in which the
5 lawyer signed them -- filed them without ever signing
6 anything.

7 MR. SUTTON: Exactly, which does happen. Some
8 of the lower court cases are cases where even the attorney
9 didn't sign -- in other words, you don't have to be a pro
10 se litigant to make a mistake. I mean, many of the lower
11 court cases involve non-pro se situations. You've got a
12 caption, notice of appeal, no signature at all.

13 QUESTION: And your position is that if there's
14 an unsigned notice of appeal, it vests jurisdiction if the
15 man has a lawyer, but it does not if the man does not have
16 a lawyer? I mean, you're saying --

17 MR. SUTTON: That's Mr. Baker's -- that's Mr.
18 Baker's -- excuse, me that's not his position. That's a
19 consequence of his position in my view, and I'm making the
20 point I can't imagine doing that. I mean, that's utterly
21 bizarre. But I think it's confirmed -- this, the reading
22 --

23 QUESTION: Well, maybe the answer is that there
24 shouldn't be jurisdiction in either case if nobody signed
25 anything.

1 MR. SUTTON: Well, that may be the right res --
2 the best policy, but there's nothing that supports that
3 view. There is nothing in appellate rules that says as to
4 individuals represented by counsel -- they must sign.
5 That requirement doesn't exist anywhere, so that we would
6 be making up after the fact, right now, just for Dale
7 Becker's case.

8 QUESTION: Well, while you're on that, I know
9 you want to read number 4 which says if you make a
10 mistake, it's a stupid mistake; it doesn't count.

11 MR. SUTTON: And 3(A)(2) while we're at it.

12 QUESTION: I realize.

13 MR. SUTTON: Yes, yes.

14 QUESTION: All right. That says that at the top
15 of page 6(A).

16 MR. SUTTON: Exactly.

17 QUESTION: But I did have a question direct --

18 MR. SUTTON: Justice Breyer, can I just add one?
19 You're doing a very good job for me, but I just want to
20 add this point -- the clause you are relying -- you are
21 pointed out was added in 1993. In other words, it was
22 added the same time Appellate Rule 3(C)(2) was added.
23 These were all post-Torres amendments liberalizing, making
24 it easier to indicate an intent to -- I'm sorry.

25 QUESTION: I mean, just while you were on the

1 jurisdictional mysticism of, you know, whether it
2 dissolves or where the jurisdiction is, as I read this,
3 and tell me if this is correct or not, whether it supports
4 you or not, I want to know if it is right.

5 As I read it, if your notice complies with all
6 the conditions of Rule 4, it is valid. Nowhere in that
7 does it say that you actually have to sign. So suppose
8 you don't sign it? It's still valid.

9 MR. SUTTON: Right.

10 QUESTION: It still does everything the thing
11 does, but under Rule 11 if you didn't sign it, it could be
12 stricken. It doesn't say it wasn't valid; it says
13 specifically what you do. You failed to sign it;
14 therefore the valid notice would be stricken if somebody
15 discovers it wasn't signed. But before you strike it, you
16 give a person a chance to sign it.

17 MR. SUTTON: Yes.

18 QUESTION: Is that right?

19 MR. SUTTON: Yes.

20 QUESTION: So all this jurisdictional stuff is
21 beside the point, because the rules are fairly clear that
22 there is just -- even if it isn't signed, it acts just
23 like it was signed, but it is subject to being stricken.

24 MR. SUTTON: In the first respect and that
25 respect you've made the argument that --

1 QUESTION: Mr. Sutton, let me go back --

2 MR. SUTTON: That's right.

3 QUESTION: That's right.

4 QUESTION: Mr. Sutton, we go back to the problem
5 that you and discussed before in relation to Justice
6 Breyer's question. The argument that Rule 11 is out of
7 it. Once you file the notice of appeal, authority passes
8 to the court of appeals; therefore, the part of Rule 11
9 that says you can hear it is no longer operative because
10 that rule is directed to district courts and not court of
11 appeals, and it sets the argument.

12 MR. SUTTON: And you're in this -- you know --
13 metaphysical netherworld where you can never correct and
14 you can never appeal.

15 QUESTION: But in the real world I'm wondering
16 how this mistake -- who caught it? Because there was
17 already a briefing schedule when this turned up. Who
18 found that the notice of appeal hadn't been signed?

19 MR. SUTTON: I have no idea. I mean, before
20 this, before Mr. Becker's case the sixth circuit had a
21 general rule that they'd applied only in multiple
22 appellant pro se cases where the absence of, quote, a
23 signature created this jurisdictional defect, and that's,
24 they dismissed the appellants who had not signed. And I
25 assume what happened, but again, I am assuming, I have no

1 idea what happened. All I know is that it took seven
2 months for the appeal to be dismissed. So that leads me
3 to believe this went to the section of the sixth circuits
4 that handles those types of appeals.

5 Someone, at least partly correctly, realized
6 their Mattingly Rule, saw that you had the typewritten
7 signature, and I guess in an act of, you know, precision,
8 at least in their view, thought that didn't count, but
9 didn't give Mr. Becker an opportunity to argue otherwise
10 that, you know, his typewritten signature would suffice
11 or, for that matter, to make the point you should never
12 apply this multiple party rule on the contest of a single
13 appellant who's put his name on the notice of appeal three
14 times.

15 QUESTION: Mr. Sutton -- oh, excuse me. You
16 mentioned the multiple appellants, and that was the
17 problem of one person filing a notice of appeal, putting
18 down a lot of other names, and you didn't know whether the
19 other names really wanted to appeal. How is that situation
20 handled today?

21 MR. SUTTON: Well, this is division that really
22 -- that did exist in the lower courts. There was not a
23 division on the single appellant problem -- they've all
24 ruled our way. But in the lower courts you've got some,
25 take the seventh circuit as an example, that said it's

1 nonjurisdictional and they say they just simply ask
2 someone to correct it and clarify whether all three
3 appellants meant to appeal, even though only one of them
4 hand-signed the notice.

5 And others say, no, that's jurisdictional. They
6 look at this Court's decision in Torres and say you've got
7 to establish within the four corners of the document
8 within thirty days a, quote, intent to appeal. I think
9 the seventh circuit view is the better view.

10 I mean, this is a minimalistic requirement. In
11 fact, it all comes from a statute. The Rules aren't
12 allowed under Rule 1 to expand or shrink the courts of
13 appeals' jurisdictions; the only statutory requirement is
14 28 U.S.C. 2107, and that just says just get your intent,
15 just file the notice of appeals within thirty days. And
16 if you --

17 QUESTION: Are you suggesting that the Rules
18 could not put conditions on what you have to do to file a
19 notice of appeal other than this statute?

20 MR. SUTTON: Not jurisdictional ones, Your
21 Honor.

22 QUESTION: Why is that? What is the authority
23 for that?

24 MR. SUTTON: The Rules Enabling Act. The Rules
25 Enabling Act says that you can only create these rules for

1 the purposes applying and implementing these Court
2 decisions and the administration of the lower court. It
3 doesn't allow this Court or the lower courts or advisory
4 committees to create rules that expand or shrink this
5 Court's jurisdiction. Let me give you an example --

6 QUESTION: Well, that doesn't shrink the
7 jurisdiction. You mean that a court would have, must
8 under the statute accept a notice of appeal that consists
9 of somebody coming in and singing it? It's not even in
10 writing? I mean, surely -- surely the statute envisions
11 that the court is going to set forth the procedures for
12 effecting a notice of appeal.

13 MR. SUTTON: There's no doubt. You can set up
14 procedures, and you can set up consequences for failing to
15 follow those procedures. That's not this case. This is a
16 case about the jurisdiction of the court of appeals, and
17 I'm not sure I really want to answer your question or some
18 others going down that road, because I've got a lot of
19 angry mail from the court of appeals clerks, but I don't
20 know why you can do that.

21 Let me give you an example in response to Mr.
22 Chief Justice's question. I mean, I don't know why, in
23 Rule 3 this Court can't promulgate rules that are then
24 ultimately approved by Congress that say -- silently
25 approved by Congress -- that says in order to have

1 jurisdiction in the Court of Appeals, you must have your
2 facsimile number on the notice of appeals. How -- where
3 do they have the authority to shrink the jurisdiction of
4 that court of appeals? They could say you need to put
5 your facsimile number on the notice of appeal as a rule,
6 and then enforce that rule however they wish.

7 QUESTION: Well, how about the simple pro --
8 does the statute say it has to be in writing?

9 MR. SUTTON: No.

10 QUESTION: Well, then how -- why not -- Answer
11 the implied question from Justice Ginsburg -- can a court say
12 the notice of appeal must be in writing and have it
13 jurisdictional?

14 MR. SUTTON: I think that probably is not a
15 problem. I mean, I think all you've got to do is
16 establish an intent to appeal within thirty days, and it
17 would seem -- the assumption there is that it is in
18 writing, and I am sure that's what Congress assumed; I'm
19 sure they didn't --

20 QUESTION: I'm interested in this statute. Now,
21 what is that statute?

22 MR. SUTTON: 28 U.S.C. 2107.

23 QUESTION: 2107.

24 MR. SUTTON: That's the 30-day, it's in the back
25 of our brief, the blue brief.

1 QUESTION: I know.

2 MR. SUTTON: If I could turn to this -- to the
3 quote signature requirement, which is an alternative issue
4 here, and as I think everyone knows, if you look at JA12,
5 that is Mr. Becker's notice of appeal, and you will see
6 he's got his name in three places, including on the,
7 quote, signature line where he typed rather than hand-
8 wrote his signature. And the question is whether the
9 Appellate, Civil Rules or any other rules somehow require
10 a pen-and-ink signature. There is no definition of the
11 verb signed or the noun signature or signer anywhere in
12 the Rules; that's not of much help.

13 The dictionary definition circa 1938 or even
14 1993 are equivocal -- they go both directions -- so that's
15 not of much help. And you've got the very real problem -
16 - not in Mr. Becker's case but surely in the case of some
17 appellants -- that some individuals may well not be able
18 to, quote, pen and ink a notice of appeal.

19 You could imagine someone with a disability that
20 could only type a notice of appeal; you could imagine an
21 individual in a maximum security prison -- a pro se
22 appellant -- where that particular warden doesn't allow
23 the inmates to have --

24 QUESTION: Mr. Sutton, do you think if somebody
25 said would you please sign this check and I typed my name

1 on it that I would have signed it?

2 MR. SUTTON: Well, some of our cases actually
3 are bank note cases, Your Honor. But I do think the answer
4 to your question is most people would pen and ink it. I
5 agree with you. But that's also why most banks have on
6 hand a copy of each client's signature. We don't do that
7 in courts of appeals.

8 QUESTION: Is pen and ink it a term you have
9 coined for this case?

10 MR. SUTTON: That's a fair criticism, Your
11 Honor. I have.

12 QUESTION: Although you do say that the bank
13 keeps a record of each client's signature, by which you
14 mean pen and ink, right?

15 MR. SUTTON: I do mean pen and ink. I think
16 everyone ought to have some liberty to coin phrases here
17 since there are no definitions at all, and I think the
18 advocates are stuck a little bit for that reason.

19 But there doesn't seem -- I mean, form follows
20 function here. There's no reason which it comes to a
21 notice of appeal why it has to be in pen and ink. The
22 point is to establish an intent to appeal. It is a
23 minimal threshold. At that point, any doubt about who is
24 involved and who's not can be readily clarified by the
25 court --

1 QUESTION: It's just that the argument that you
2 could just type it in, rather than to the problem with
3 multiple parties again. The one appellant can just type
4 in the names of a lot of people who don't want to appeal.

5 MR. SUTTON: That is true, but Your Honor, that
6 is assuming that pro se appellants and pro se appellants
7 only are more likely to commit fraud. I don't think that
8 that's a fair assumption. I mean, the notion of an
9 impostor appellant --

10 QUESTION: Well, I'm not just saying anything
11 about pro se -- just someone types in his own name and two
12 other names of people who were parties in the district
13 court but who haven't signed it.

14 MR. SUTTON: My point is the only reason to
15 require a pen and ink signature requirement is because
16 you're fearful that the individual that did the typing is
17 somehow misleading the court and pulling a fast one on his
18 or her co-appellants. That is not confirming they do
19 indeed want to appeal.

20 I think it's a fair assumption when you see in
21 the body of the notice of appeal all three parties listed,
22 or for that matter in the caption as the Rule allows --
23 that's enough. I mean, I don't care whether it has one
24 signature or no signatures -- you've conveyed an intent to
25 appeal.

1 QUESTION: Mr. Sutton, what about filing by e-
2 e-mail? Do you think that would be okay?

3 MR. SUTTON: Well, it's an interesting point. We
4 do have a situation where some district courts are
5 allowing e-mail type signatures --

6 QUESTION: On notices of appeal?

7 MR. SUTTON: Well, they're allowing -- I don't
8 know whether the Northern District of Ohio is doing that.
9 I know they're doing that generally when it comes to cases
10 in their courts, and I think that --

11 QUESTION: They don't have to allow it. You're
12 telling us they have no power to forbid it.

13 MR. SUTTON: A less common --

14 QUESTION: Under the statute, I mean, that's
15 your position under the statute, isn't it?

16 MR. SUTTON: Your Honor, of all people, this --
17 I mean, we've got a separation of powers problem here.
18 Congress says there is -- there is a thirty-day
19 requirement in the statute, and that's all it says. And
20 suddenly the courts are allowed to decide who to push out
21 and who to include in?

22 QUESTION: But the Congress had used the word
23 notice of appeal, and the notice of appeal, as the
24 understanding has been, means a document that says notice
25 of appeal, and I hereby, and then it has a signature which

1 you sign or counsel signs.

2 MR. SUTTON: And I think that is the best
3 argument when it comes to interpreting the Congressional
4 statute -- that in other words, the notice of appeal does
5 come with certain assumptions. There is nowhere, though,
6 that that assumption has to include the handwritten
7 signature. There's no assumption on that?

8 QUESTION: Shouldn't --

9 MR. SUTTON: Based on the law or the cases?

10 QUESTION: Mr. Sutton, you reach an interesting
11 conclusion if you put together the first and the second
12 parts of your argument. In the first part you assume that
13 a signature meant a written signature and you said, well,
14 you know, if it isn't written but so long as your name is
15 there, that's good enough -- it's properly filed. In the
16 second part of your argument you're now assuming that
17 signature just means a typewritten signature, so I assume
18 it would follow that if you left that out, it will also be
19 properly filed. So I could file a sheet of paper with no
20 name on it and I've filed a proper appeal.

21 MR. SUTTON: Your Honor, I --

22 QUESTION: Not even a typewritten name, because
23 in the first part of your argument you say you don't need
24 the signature, so if I apply that to your second part of
25 the argument -- we have appeals, we don't know who has

1 appealed. We know somebody has filed a notice of appeal,
2 but --

3 MR. SUTTON: Your Honor, I'm not sure -- first
4 of all, I'm not entirely sure I understood the way you
5 characterized the first part of my argument, so let me
6 tell you how I have been trying to argue it which is that
7 you don't need anything. That is my point. The first
8 argument is that you don't need a typewritten,
9 handwritten, an X, anything.

10 QUESTION: Not even a name?

11 MR. SUTTON: Yes, you do need a name.

12 QUESTION: Why do you need a name? It is only
13 the signature requirement that says you need the name.

14 MR. SUTTON: Look at 12 -- look at 12(A). Look
15 at 12(A) which is the joint -- in the Joint Appendix --
16 and this is the sample notice of appeal that Mr. Becker
17 got from the sixth circuit and he used, and this is what
18 most notice of appeals look like -- they are one page.
19 What you do have to do is within thirty days convey an
20 intent to appeal.

21 You can do that without any signature at all.
22 You can do that with your name in the caption. In fact,
23 Rule 3 says that. You can --

24 QUESTION: You're saying intent includes who --
25 who intends. That's your answer to these questions.

1 MR. SUTTON: Exactly.

2 QUESTION: But what if you have a multi-party
3 case, and no signature at all on the appeal? That doesn't
4 tell you who is appealing.

5 MR. SUTTON: Sure it does, Your Honor. If in
6 the, it says notice is hereby given that blank -- and it
7 says Dale G. Becker, John Smith and John Moore -- and then
8 you've got a blank signature line.

9 QUESTION: But the courts made up those forms,
10 no? I mean -- you say that, you know, you could draft
11 your own form, right --

12 MR. SUTTON: Absolutely.

13 QUESTION: -- under the statute.

14 MR. SUTTON: Absolutely.

15 QUESTION: And we're exceeding -- we're
16 destroying the separation of powers if we stick to that
17 form, right?

18 MR. SUTTON: Your Honor, I'm not saying the
19 forms are jurisdictional. I'm using the forms to try to
20 visualize the issue. I'm not making any concession
21 they're jurisdictional -- I'm just trying to help us
22 visualize it, and you were suggesting you've got the poor
23 clerk at the sixth circuit gets a notice of appeal with no
24 signature, and they don't know what to do.

25 That's just not true. Whether it is one

1 appellant or fifty-five appellants. If in the body of the
2 notice of appeal or the caption, as the rules say, the
3 appellants are all listed, how can there possibly be any
4 jurisdictional doubt as to who is trying to appeal? There
5 is no doubt.

6 QUESTION: Except that when you sign something,
7 you give your own individual imprimatur to what is said in
8 the text that you're signing, and to simply have your name
9 incorporated in the text that you have indicated no
10 approval of, I think, falls short.

11 MR. SUTTON: But, Your Honor, that's one
12 possibility, and your suggestion is that when they don't
13 sign, they somehow decide at the last second -- I'm going
14 to put my name in the pile --

15 QUESTION: For all I know, they've never seen
16 it.

17 MR. SUTTON: That's possible, Your Honor, but
18 that goes back to my response to Justice Ginsburg.
19 Somehow the assumption that there's someone committing
20 fraud or there are impostor appellants out there -- that's
21 not a problem that exists.

22 QUESTION: But certainly if you're not judgment-
23 proof, you don't likely undertake an appeal because you
24 can be assessed for costs if you lose it. But if you are
25 judgment-proof, presuming there's no real harm, you're not

1 going to suffer anything if you do appeal.

2 MR. SUTTON: Your Honor, the reason this lenity
3 exists is not because people decide, oh, boy, I'm having
4 doubts at the last second whether to put my signature
5 here, it's because they make mistakes. And people make
6 them all the time. God knows -- I mean, I can't think of a
7 lawyer that hasn't made this kind of mistake. It gets
8 filed without the signature, and that's exactly --

9 QUESTION: But isn't that -- you have gone, I
10 think, a lot farther than you need to go. All you needed
11 to do was just say the signature is curable after the
12 thirty days, right?

13 MR. SUTTON: Absolutely. And that's what Rule
14 3(C)(4) means exactly. So any doubt about this problem
15 can be resolved after the thirty-day window which is the
16 jurisdictional window. If I could save the rest of my
17 time for rebuttal.

18 QUESTION: Very well, Mr. Sutton.

19 Mr. Baker, we'll hear from you.

20 ORAL ARGUMENT OF STEWART A. BAKER

21 ON BEHALF OF THE RESPONDENT

22 MR. BAKER: Thank you Mr. Chief Justice, and may
23 it please the Court:

24 I would like to just correct one point that
25 Petitioner's attorney made -- the Sixth Circuit has

1 applied their jurisdictional rule excluding unsigned
2 notice of appeal to single appellants. They've done so in
3 numerous unpublished opinions. The fact that they're
4 unpublished, I think, suggests that they don't believe
5 that there is any difference between single or multiple
6 appellants, and that distinction has been introduced by
7 Petitioner's attorney at this stage, and this stage only.

8 QUESTION: Mr. Baker, are there not courts where
9 something like this would come into the clerk's office,
10 the signature is lacking, the clerk would say, well, it
11 was filed within the ninety days, so we'll send it back
12 with the letter, very much as this Court does. When
13 something is filed in this Court -- a cert petition and it
14 is deficient but it is on time -- our clerk will send it
15 back for the deficiency to be cured.

16 MR. BAKER: Yes. The -- the difficulty with
17 that is that Rule 4 sets a thirty-day limit on filing of
18 proper notice of appeal, and therefore if you can correct
19 it within the thirty days there is not a problem, but if
20 you can't correct it within the thirty days, there is a
21 jurisdictional issue that arises. It arises --

22 QUESTION: Well, why should that be so if the
23 intent to appeal is clear from the face of what was filed?
24 We have spoken, I guess, in the Torres case that the
25 touchstone is the clear intent to appeal, and if the

1 document is clear as it was in this case, who the
2 appellant is and that it was timely filed and so on, why
3 should that be jurisdictional and not correctable later?

4 MR. BAKER: The signature requirement is part of
5 expressing the intent of the party to appeal. It's --
6 since 1980, the courts of appeals have said that specify
7 the party or parties taking the appeal includes in a pro
8 se context the signature of the party who intends to take
9 the appeal. Even in a single --

10 QUESTION: Well, there is no clear statutory
11 rule requirement that it be signed.

12 MR. BAKER: I think that Rule 11 clearly
13 requires that it be signed. I -- Rule 11 is incorporated,
14 at least as far as the form of the filing, into the
15 Federal Rules of Appellate Procedure. And then Rule 3(c)
16 clearly references an expectation that there will be a
17 signer in every pro se notice of appeal.

18 QUESTION: There is. There is. But Rule 11
19 says that you have to sign it, so if it's not signed,
20 here's what we do. We strike it, but before we strike it
21 we give the person a chance to sign it. That's what it
22 says.

23 MR. BAKER: It says it shall be struck unless
24 it's been cured after notice, which I think is a slightly
25 more emphatic statement than --

1 QUESTION: So all right, all right, it says we
2 really, really, really will strike it unless you sign it.
3 Now, I think that that is -- I think it is hard given that
4 to say that, you know, it will go through this
5 jurisdictional thing or anything. I take it the problem
6 here is he wasn't given a chance to sign it.

7 MR. BAKER: Well, the difficulty with taking
8 that approach is first that Rule 11 is a district court
9 rule; it sets form requirements and it tells the court
10 what it can do in response to an unsigned notice of
11 appeal. A portion of that comes to the Federal Rules of
12 Appellate Procedure but simply the form requirements --
13 not the authority to take action -- it would be very --

14 QUESTION: Why? I mean, why do you draw that
15 line?

16 MR. BAKER: Uh --

17 QUESTION: If the one is incorporated, why isn't
18 the other?

19 MR. BAKER: Well, the legislative history for
20 that says that in some instances the Federal Rules of
21 Appellate Procedure provide that a motion must or may be
22 filed in the district court -- I'm reading from our
23 footnote on page seventeen in the green brief. And then
24 it goes on to say the proposed amendment would make it
25 clear that when this is so, the motion or application is

1 to be made in the form and manner prescribed in the
2 Federal Rules of Civil Procedure. In other words it says
3 that if there is a form and manner requirement, you must
4 meet it in the district court.

5 I think it would be unusual for the Federal
6 Rules of Appellate Procedure to say, and by the way you
7 can borrow whatever authority the district court may have.

8 QUESTION: Well, isn't -- isn't it authority
9 that goes to the satisfaction of a form and manner
10 requirement? Sure it is.

11 MR. BAKER: Well, it says -- but the requirement
12 is that it be signed. I think the requirement is not that
13 it be signed if you've gotten a notice from the court. It
14 simply says it must be signed; it shall be stricken unless
15 certain -- certain things have happened. Those --

16 QUESTION: It says it must be signed, and if it
17 isn't signed, you have to sign it if you get a notice from
18 the court. And if you don't do that, we strike it.
19 That's what it --

20 MR. BAKER: If -- if we were only borrowing Rule
21 11 here, I think this argument would be much stronger, but
22 we -- the Advisory Committee has gone over this territory
23 already, the courts of appeals, as I said, since 1980 have
24 found that the jurisdictional language of Rule 3 includes
25 the signature requirements -- not all of them, but the

1 Fourth Circuit, the Ninth Circuit, and others. And the
2 Advisory Committee, which addressed this question after
3 Torres made it quite clear that specify the parties is a
4 jurisdictional requirement, had in front of them language
5 that would have gotten rid of the signature requirement,
6 and instead modified that language to make it clear that a
7 signature was expected from every pro se party filing a
8 notice of appeal.

9 QUESTION: Well, again, that's -- that's not --
10 that's really not clear. I mean the one thing that rule
11 -- that thing does is to say that the widow or the wife
12 and the child can come along without signing it, I mean,
13 we know that when they made that change in Rule 3, what
14 they wanted to do is enable people to be parties who
15 hadn't signed, and then to say, well, now, that instituted
16 for the first time a -- a statement in the Rules that the
17 pro se litigant must sign is kind of a backdoor way to
18 create a signing requirement.

19 MR. BAKER: It's -- it's -- it's obviously not
20 perfect, Your Honor. On the other hand, I have difficulty
21 reading it as only saying that the signature requirement
22 for the spouse and children which would be the result of
23 saying, well, this -- this says there's a signature
24 requirement of the spouse and child but it's met by the
25 signature of the pro se party. I -- I'm not sure that

1 produces a more sensible rule than one that says it treats
2 the pro se party and the pro se party's family members all
3 the same. They are --

4 QUESTION: It may be it had in mind Torres and
5 the problem of the person other than the one who files the
6 notice, adding names. So that I think that the -- that
7 that problem of the multi-party of appeal is what prompted
8 -- prompted the change in the Rule.

9 MR. BAKER: I think that that's -- that's
10 plausible if it were not for the fact that the Advisory
11 Committee had in front of it language that would have
12 achieved that without introducing a signature requirement
13 or any notion of a signature requirement provided by
14 public citizens. The -- the language provided by public
15 citizens would have clearly undone the signature
16 requirements that had been imposed by some of the courts
17 of appeals.

18 QUESTION: Maybe they thought the signature
19 requirement was there but non-jurisdictional. I mean,
20 take a look at Rule 1 -- it says when these rules provide
21 for filing a document in the district court, the procedure
22 must comply with the practice of the district court. So
23 it seems to me that if you file a -- perhaps a Rule
24 (1)(a)(2), then you pick up all of Rule 11 and not just a
25 piece of it.

1 MR. BAKER: That may well be, I -- but I think
2 that it's -- it's impossible to pick up that Rule -- the
3 -- the -- the Civil Rule of Procedure -- without taking
4 into account Rule 4 which says the Notice of Appeal has to
5 be filed within thirty days.

6 There is clearly a signature requirement under
7 Rule 11; there is no doubt about that.

8 QUESTION: Why doesn't that mean that defects
9 can be cured after the thirty days, just as it does in
10 this Court?

11 MR. BAKER: I think the reason that it can't be
12 is that the signature requirement has been pulled into
13 Rule 3 for pro se parties by the direct reference to an
14 expectation that the pro se party will sign the notice of
15 appeal. It is hard to read that language without coming
16 to the conclusion that there is something about the notice
17 of appeal, and the standards for notice of appeal, that is
18 --that requires a signature from pro se parties, and there
19 are good, obviously policy, reasons for wanting to do
20 that.

21 QUESTION: So then you are making the
22 distinction that -- that Mr. Sutton suggested you were --
23 that this is a requirement -- the signing requirement --
24 this jurisdictional signing requirement applies only to
25 pro se litigants and not to litigants with counsel.

1 MR. BAKER: I think though that the principal
2 problem that the signature requirement addresses is the
3 risk that someone is practicing law -- probably without a
4 license -- on behalf of a party who may or may not
5 understand what is being done in his name. The signature
6 requirement allows the court to be sure that the party who
7 is nominally appearing pro se in fact has had a chance to
8 think about what he is doing, and to examine the contents
9 of what has been filed in his name. That is the reason
10 that in multiple appellant cases -- this rule has been
11 applied without controversy, yet because it is obvious
12 there that one party may be proceeding to draft pleadings
13 that the others may not have seen. But in the context of
14 single appellants as well, there are numerous areas of law
15 where there is an active cottage industry of assisting pro
16 se litigants -- not just prison cases but bankruptcy
17 cases, immigration cases, where people who hold themselves
18 out as grievance consultants or other forms of quasi-
19 lawyer, have taken to filing pro se papers on behalf of
20 parties.

21 The signature requirement at least requires that
22 those pro se parties have a chance to see what has been
23 done in their names.

24 QUESTION: But you agree that it's -- that it's
25 not jurisdictional with regard to -- to an attorney?

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1 MR. BAKER: I -- I do agree with that. I think
2 that if one reads this as narrowly as possible, that the
3 signature requirement does not apply to represented
4 parties. It applies, but the attorney --

5 QUESTION: Under the jurisdictional --

6 MR. BAKER: Right. And -- and there are reasons
7 for that. If an attorney says I represent these parties
8 and they're taking the appeal and he's not telling the
9 truth, he's subject to a wide variety of sanctions that
10 would not apply to a non-lawyer who made that same
11 representation and therefore, it's a -- it's a plausible
12 distinction to -- to draw.

13 QUESTION: Mr. Baker, one of the problems since
14 we're dealing with a pro se litigant, gets this form from
15 the Sixth Circuit, and it doesn't say, as the -- the
16 sample attached to the Rules do, S with a signature. So
17 then he gets a document from a court that doesn't even
18 warn him that a signature is required, and then he's out
19 the door because he -- he did everything that the -- that
20 the document he got from the court called for.

21 MR. BAKER: I -- I -- think that's a difficulty.
22 I -- I would suggest -- I don't know how Mr. Becker got
23 that form. I -- I think it would be useful to take a look
24 at the yellow brief pages of A-2 and A-3 because, in fact,
25 the form that Mr. Becker got is outdated even by the sixth

1 circuit standards. If you go to the sixth circuit
2 website, you go to the notices and download the forms, the
3 form you will get is the form on page A-3 of the yellow
4 brief, not on page A-2 which is the form that Mr. Becker
5 submitted.

6 Indeed, if you look at the -- at the lower
7 lefthand corner of each of those documents, you'll see
8 that each of them is labeled 6CA3, which is the name of
9 the -- the number of the form. Each of them in fact on
10 the originals has a GPO designation, but the notice on
11 page A-3 is dated January '99 as opposed to August of '79,
12 and this is the pages -- the form on page A-3 is the form
13 that is available to litigants, and that should be sent
14 out, and it certainly calls for a signature, has the
15 little s.

16 So there may well have been a mistake here in
17 Mr. Becker's case, but I think it would be going beyond
18 the facts that we have in the record to assume that this
19 is a policy on the part of the Sixth Circuit to send out a
20 notice of appeal when it's not --

21 QUESTION: The whole problem is that he wasn't
22 given an opportunity. The Sixth Circuit said, thirty days
23 are up, no signature, that's it. Nothing else is
24 relevant.

25 MR. BAKER: Mr. Becker has filed nearly twenty

1 cases in the Federal and State courts in Ohio; he has
2 signed practically every paper he's filed in practically
3 every one of those cases, including all of his notices of
4 appeal to the Sixth Circuit in past cases. Rule 11 says
5 sign everything you file in the district court. I -- I
6 think it would be aggressive for him to suggest that
7 simply because the s was missing from this form, he
8 doesn't have to pay any attention to those -- those rules.

9 QUESTION: Well, again it's not a question of
10 not paying attention; it's a question of whether it can be
11 cured, whether we know that the thirty days can't be cured
12 once that runs, but the -- the question is whether
13 something like the signature shouldn't be curable, when
14 everything is there, his name is -- is in the caption, his
15 name is in the body of the notice.

16 MR. BAKER: But when one has that one is
17 confronted with a notice of appeal, as is the typical case
18 -- and here we've had a half a dozen substantive motions
19 and briefs, and so we're starting to get a feel for Mr.
20 Becker and what his intent was -- but the purpose of the
21 requirement is to know immediately, and in a way that's
22 not easily deniable by the appellant -- what his intent
23 is, that he actually intends to file this appeal and be
24 bound by the consequences, even if they're bad, as they
25 may well be for a frivolous appeal.

1 If I could touch briefly on the question of
2 whether the Rules Enabling Act prevents the application of
3 this rule, I think it is answered by the Torres case which
4 said, after all, that even though it was perfectly obvious
5 in that case that all of the plaintiffs who had lost
6 intended to seek the appeal, the fact that one of the
7 plaintiffs' names had been left off of the document meant
8 that there was no notice of appeal as to him, and that the
9 requirements of the parties be specified with a
10 jurisdictional requirement. I don't think the Rules
11 Enabling Act said, wait a minute, you're narrowing the
12 scope of the notice of appeal.

13 QUESTION: But there was a total absence of the
14 name any place, and I think -- if I understand you right,
15 Mr. Baker, you are asking us to equate the lack of a
16 signature with the total absence of the name of the would-
17 be appellant any place in the notice.

18 MR. BAKER: Yes, I am, because that was the
19 position since at least 1980 of some of the courts of
20 appeals and the position that we believe was adopted by
21 the Advisory Committee in 1993.

22 QUESTION: It is one thing to say, look, you --
23 you weren't even named any place in this notice within
24 the thirty days, so we're not going to let you -- you
25 can't become an appellant after as opposed to yes, you're

1 named in the caption, yes, you're named in the body, all
2 that's lacking is the signature. That we can let you do
3 after the thirty days.

4 MR. BAKER: Of course, one could draw the
5 distinction -- I'm not sure that the Rules Enabling Act
6 would say that that distinction is the -- is the limit of
7 what the Court's authority is. I think the Court has the
8 authority to say we want you to specify the party -- the
9 party taking the appeal in a manner that leaves the party
10 no room to back out later.

11 QUESTION: Have the courts of appeals which you
12 say have applied this Rule since 1980, have they applied
13 it only to pro se filings, or do they apply it to --

14 MR. BAKER: The cases that I have seen apply it
15 to pro se pleadings. I have not seen it applied
16 jurisdictionally to represented parties.

17 QUESTION: Mr. Baker, let me just ask you, one
18 of the tough things about your -- your position, of
19 course, is this contrast between the pro se litigant and
20 the represented litigant, and your response, in part, is
21 that while there are disciplinary sanctions on the lawyer
22 who doesn't -- who actually fails to sign and so forth,
23 but does that -- is that really a complete response
24 because isn't there still the danger that a representative
25 -- a represented appellant might have some friend who,

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1 without authority, went ahead and filed a notice of appeal
2 without even the lawyer knowing about it.

3 MR. BAKER: Well, if he -- if he did then it
4 wouldn't have the lawyer's signature on it. It would have
5 someone else's signature on it.

6 QUESTION: Well, but I thought -- I thought you
7 were saying even if the lawyer had not signed it, it would
8 not be jurisdictional.

9 MR. BAKER: Even if the lawyer had -- if he was
10 a represented party, he filed pro se?

11 QUESTION: No, a represented -- my hypothetical
12 is a represented party on whose behalf a typewritten
13 notice of appeal is filed without the knowledge of either
14 the lawyer who represents him or the man himself -- the
15 man or woman himself. That's not a jurisdictional defect,
16 is it?

17 MR. BAKER: I would say it was because it
18 doesn't have a signature from the pro se party, and it's
19 not -- you haven't specified the party's intent to --

20 QUESTION: Well, then there isn't this
21 distinction between representative and non-representative
22 parties.

23 MR. BAKER: I -- I -- I -- if I have thought of
24 it in terms of a represented party where the lawyer is
25 actually pursuing the appeal.

1 QUESTION: But am I correct then -- maybe I
2 don't have the facts right in my mind. Assume a
3 represented party who has a lawyer -- a paper is filed
4 which purports to be a notice of appeal on behalf of that
5 person and not signed by anybody. Is that a jurisdictional
6 defect or is it not?

7 MR. BAKER: It may not be a jurisdictional
8 defect, but it is obviously easily struck because it
9 doesn't represent the intent of the party. If it -- if it
10 purports to be a pro se petition, notice of appeal, then
11 it's jurisdictionally deficient. If it purports to be on
12 an attorney notice of appeal, then it's fraught.

13 QUESTION: Even though, in fact, it was not
14 prepared by the attorney?

15 MR. BAKER: Yes.

16 QUESTION: Okay.

17 I would like to take just a minute on the
18 question of the -- whether a typed name can constitute a
19 signature. I think that's been addressed at considerable
20 length already. My first point, and I apologize for
21 raising it at this stage, is there is a question whether
22 this is fairly covered by the question presented, but the
23 Court drafted a question presented that presumes there has
24 been a failure to sign here. It did so after the
25 petitioner had filed a petition that made reference to

1 some of the cases that address the question whether a
2 signed notice of appeal could be -- whether a signing
3 constituted typing. So there is a real question whether
4 the Court in framing this question didn't exclude this
5 issue or --

6 QUESTION: You're saying we've proceeded on the
7 assumption that there was a failure to sign.

8 MR. BAKER: Exactly, and therefore either you've
9 already decided this, which I suspect is not the
10 appropriate answer, or it's not part of the case because
11 there was no conflict in the circuits on that question.

12 If I could turn also to the question of a lawyer
13 not signing -- I think Mr. Sutton made the argument that
14 an attorney -- if you were a represented party and you did
15 not sign, it would not be jurisdictional. If you were a
16 non-represented party and you did not sign, it would be
17 jurisdictional, and that there would be some doubt about
18 that possibility raised the prospect, I think, of people
19 trying to game the system by rushing out and hiring
20 lawyers or having lawyers submit things that weren't
21 signed.

22 I think it's worth remembering this is not a
23 difficult requirement to meet. Signing the notice of
24 appeal is an easy thing to do; it provides useful
25 confirmation to the court that every party who is part of

1 the notice of appeal actually has seen and has willingly
2 joined in it. And so the likelihood that people will game
3 this system in order to avoid signing the notice of appeal
4 I think is -- is highly unlikely.

5 QUESTION: Mr. Baker, is there anything in your
6 view that is quote jurisdictional, other than the one
7 thing we all agree, is the thirty days is jurisdictional.
8 Now you say the signing requirement, at least to a pro se
9 litigant, is. Is there anything else that you would rank
10 as jurisdictional so you would be disqualified as an
11 appellant?

12 MR. BAKER: This Court has -- has tended to say
13 that Rule 3 is jurisdictional in general terms. Certainly
14 I would say that Rule 3(c) and its provisions which say
15 that you must specify the party or parties taking the
16 appeal -- that's what the Torres case held, that failure
17 to specify is a jurisdictional fault, designation of the
18 judgment appealed from, designation of the court appealed
19 to. And as I said, most -- many courts had held that to
20 specify the party included a signature requirement as part
21 of determining intent to appeal.

22 QUESTION: But is anything other than naming a
23 person as a party that couldn't be cured after the thirty
24 days are up, and some of the other things that you
25 mentioned?

1 MR. BAKER: None of those things can be cured
2 after the thirty days has -- has run, and I believe that's
3 established law.

4 I would like to --

5 QUESTION: I know that the Torres establishes
6 law, but I don't know that any of the others say that you
7 can't cure a defect. As long as something is clearly
8 identifiable as a notice of appeal, what is it that says
9 that errors in designating the, the details, are
10 incurable?

11 MR. BAKER: The -- the court in Smith against
12 Barry, and to a degree in Torres, suggested that the
13 functional equivalent of a notice of appeal is all that is
14 required, but by functional equivalent the -- the Court
15 has essentially treated the three elements that must be in
16 a notice of appeal as what must be conveyed in one form or
17 another. It doesn't have to be in the form of a notice of
18 appeal, but that information has got to be part of the
19 notice of appeal or, in the absence of one of those
20 elements, it's jurisdictionally --

21 QUESTION: And the elements are who is
22 appealing, and what else?

23 MR. BAKER: What he's appealing, and where he's
24 appealing to.

25 QUESTION: Yes. And all of that is in this

1 notice -- who is appealing, what he's appealing, and who
2 he's appealing to.

3 MR. BAKER: I -- I -- I would -- I would argue
4 that in fact when the Advisory Committee -- the only
5 substantive revision of Rule 3(c) that's been made was
6 made in 1993 by the Advisory Committee. When they made
7 that change, there was none of this division into sub --
8 separate subparagraphs of 3(C). There was a requirement
9 to do the three things -- to specify the three things.
10 The first was specify the parties, and what the Advisory
11 Committee did was insert this reference to a signature by
12 a pro se party directly after the requirement that the
13 party taking the appeal be specified, and I think the only
14 conclusion you can draw from that is they believed that
15 they were providing a gloss on how to specify the party or
16 parties taking the appeal.

17 QUESTION: And yet there's not one word from the
18 Advisory Committee that suggests this is quote
19 jurisdictional.

20 MR. BAKER: Torres had already done that most
21 emphatically --

22 QUESTION: With respect to a party not being
23 named at all.

24 MR. BAKER: Yes. But as I said, the entire
25 effort by the Advisory Committee was to insert -- it was

1 to clarify what it meant to specify the party so people
2 wouldn't make mistakes in the future.

3 If I could make one point in closing, it's that
4 I was struck as I was reading the cases that we've been
5 talking about here, such as Torres, the Foman case from
6 the '60s, Houston and Flack -- all of the cases that
7 construe the rules of the court -- of the appellate courts
8 -- that almost none of them have survived in terms of
9 their holdings. Almost every one has been modified by the
10 Advisory Committee and the rules process.

11 Given the number of problems we've turned up in
12 this area, I think that it's inevitable that this issue is
13 bound for the Advisory Committee one way or the other, and
14 yet we still cite all those cases, and we cite them not
15 for their particular holding, but for the way they
16 analyzed these problems. If they say, well, you know, the
17 rules can be bent to achieve a certain aim, then that's
18 what they stand for. If they say the rules should be read
19 in as straightforward and lawyerly a way as one can and
20 take the consequences, then that's what those rules --
21 those cases stand for. I would submit that if you take
22 the latter course, the Sixth Circuit should be affirmed.

23 Thank you.

24 QUESTION: Mr. Baker, you served as an amicus
25 for the Court in this case, and we thank you for your

1 services. Mr. Sutton, you have four minutes remaining.

2 REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

3 ON BEHALF OF THE PETITIONER

4 MR. SUTTON: A few brief points. First of all,
5 in defense of Dale Becker, the form he used is actually
6 the form that's now attached to the Sixth Circuit rules.
7 It is not outdated. It is attached to their current
8 rules.

9 Second, the notion that prison inmates should be
10 consulting websites to get the forms doesn't seem to me
11 plausible.

12 Third, when it comes to the forms that Mr. Baker
13 has relied upon, if you look at our yellow brief, there is
14 a great irony here to his argument that this signature
15 rule only applies to pro se appellants. Every one of the
16 forms refers to signatures for attorneys. If you look at
17 the one that's attached to the Federal Rules -- that's at
18 A-1 -- it's clear the signature requirement is not for the
19 pro se -- it says the s and then attorney. And then you
20 look at Mr Becker's -- Baker's -- Becker's form, it's
21 counsel for appellant. You then look at the next one and
22 it has attorney. Every single one of them, if there is a
23 signature requirement at all, it's referring to attorneys.
24 There is no indication that pro se litigants and pro se
25 litigants alone are expected to sign these things in

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1 whatever manner.

2 Every other point that Mr. Baker has raised --
3 and there are many policy problems out there -- they are
4 all problems that show at most there is a signature
5 requirement, not a signature jurisdictional requirement.

6 Every single one of those issues can be cured
7 and addressed after the thirty days. Thank you.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.
9 The case is submitted.

10 (Whereupon, at 10:56 a.m., the case in the
11 above-entitled matter was submitted.)

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