

# NOTE

## WHEN A COMPANY CONFESSES

*Christopher Jackson\**

*Under the Federal Rules of Criminal Procedure, a defendant is normally obligated to attend all of the proceedings against her. However, Rule 43(b)(2) carves out an exception for organizational defendants, stating that they “need not be present” if represented by an attorney. But on its face, the language of 43(b)(2) is ambiguous: is it the defendant or the judge who has the discretion to decide whether the defendant appears? That is, may a judge compel the presence of an organizational defendant? This Note addresses the ambiguity in the context of the plea colloquy, considering the text of several of the Rules, the purposes behind the plea colloquy proceeding, and the inherent powers doctrine. It argues that district court judges do in fact have the authority to compel an organizational defendant’s presence at a plea colloquy.*

### TABLE OF CONTENTS

INTRODUCTION .....	388
I. OTHER RULES ON ATTENDANCE.....	392
A. Arraignments Under Rule 10(b).....	393
B. Presence Under Rule 43(a).....	396
C. Proceedings Under 43(b)(2).....	397
D. Proceedings Under 43(b)(3).....	399
E. Proceedings Under 43(b)(4).....	399
F. Waiving Presence Under Rule 43(c).....	400
II. THE IMPORTANCE OF THE 11(B) PLEA COLLOQUY .....	401
A. <i>The Importance of a Defendant’s Presence</i> <i>at the Plea Colloquy Generally</i> .....	401
B. <i>The Importance of an Organization’s Presence</i> <i>at the Plea Colloquy in Particular</i> .....	402
C. <i>The Rights Implicated in a Guilty Plea</i> .....	406
D. <i>Flexibility in Plea Colloquy Procedure</i> .....	407
III. THE INHERENT POWERS OF THE COURT TO COMPEL ATTENDANCE .....	408

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A. <i>The Inherent Powers Doctrine</i> .....	408
B. <i>Undue Delay and Attendance</i> .....	409
CONCLUSION .....	413

## INTRODUCTION

In the late 1990s an oil tanker collided with a man-made structure as a result of the captain's negligent conduct, severely damaging the ship and dumping tens of thousands of gallons of oil into a bay.<sup>1</sup> Federal investigators found that the corporation that owned the ship—a foreign company—had committed gross negligence by failing to train the ship's crew members and had falsified documents in an attempt to avoid liability. In a federal prosecution for violations of the Clean Water Act and other federal statutes, the defendant chose not to have any individual from the corporation attend any hearing, in an attempt to distance itself from the incident and avoid a public relations disaster. Instead, the company appeared in court through its attorney.

After a plea deal was negotiated, the judge tried to hold a plea colloquy at which the defendant would formally plead guilty to the charges in the indictment. At the colloquy, the judge asked the defendant's counsel for specific details about the crimes.<sup>2</sup> The attorney, apparently not familiar with the intricacies of the case, was unable to answer the judge's questions. The judge adjourned the hearing and rescheduled, requesting that someone from the defendant corporation appear. At that second colloquy, the defendant still refused to send anyone to court besides its attorney. The judge again asked a series of questions regarding the facts of the case, but the defendant's attorney could not provide the relevant details. The judge, frustrated that the defendant's failure to appear was delaying the case and concerned that the defendant was trying to avoid the public condemnation that usually accompanies a guilty plea, wasn't sure whether she had any authority to compel the corporation to attend its own plea.

The Federal Rules of Criminal Procedure (the "Rules") generally require a defendant to be present in court at all stages of a criminal case against her.<sup>3</sup> Specifically, under Rule 43(a) the defendant must be present at the initial appearance, arraignment, plea, trial, and sentencing.<sup>4</sup> There are, however, a number of exceptions to this general requirement. For example, if certain conditions are met, a defendant is not obligated to be present at her initial appearance<sup>5</sup> or arraignment.<sup>6</sup> Unfortunately, not all exceptions to the atten-

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1. This hypothetical is based on actual events, but some of the details have been altered to ensure there is no unintentional breach of confidential information.

2. FED. R. CRIM. P. 11(b) requires district courts to inquire about a number of different subjects at a plea colloquy.

3. FED. R. CRIM. P. 43(a).

4. *Id.* If the defendant fails to appear, she is subject to arrest. FED. R. CRIM. P. 4(a).

5. FED. R. CRIM. P. 43(a) (citing FED. R. CRIM. P. 5(a)(2)).

6. *Id.* (citing FED. R. CRIM. P. 10(b)).

dance requirement are so clear-cut. In particular, Rule 43(b)(1) creates a blanket exception to the attendance requirement for organizational defendants, stating that they “need not be present” if represented by counsel who is present at the proceeding.<sup>7</sup> On its face, however, this subsection is ambiguous: while an organizational defendant “need not be present,” it is unclear who has the discretion to decide whether the defendant will personally appear—the defendant or the judge.<sup>8</sup> That is, the Rule does not clearly answer the question of whether a district court may compel the attendance of an organizational defendant. This ambiguity is particularly apparent in the context of a plea colloquy.<sup>9</sup>

There are three broad reasons why this ambiguity ought to be resolved. First, an examination of Rule 43(b)(1) will illuminate the proper interpretation of a host of other Rules, among them 4, 10, 11(b), and several other subsections of 43, and provide helpful clarification about how the Rules work in practice. Second, the issue of compelling attendance forms a part of a larger discussion about the nature of criminal corporate liability in general. There are four general justifications for punishment—incapacitation, deterrence, rehabilitation, and retribution<sup>10</sup>—that might apply in the organizational context. While it is clear that compelling an organization’s attendance cannot incapacitate that organization,<sup>11</sup> it is possible that doing so

7. The Rule states in full:

- (b) **When Not Required.** A defendant need not be present under any of the following circumstances:
- (1) **Organizational Defendant.** The defendant is an organization represented by counsel who is present.
  - (2) **Misdemeanor Offense.** The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant’s written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant’s absence.

FED. R. CRIM. P. 43(b). An “organization” is defined broadly as “a person other than an individual.” 18 U.S.C. § 18 (2006). This definition includes corporations. FED. R. CRIM. P. 43 advisory committee’s note (1995) (stating the word “corporation” was changed to “organization” in order to broaden the reach of the Rule); FED. R. CRIM. P. 43(c) (amended 2002) (“A defendant need not be present . . . when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18 . . .”).

8. The Advisory Committee Notes offer little clarification. The sole reference to 43(b)(2) states only that “the rule is amended to extend to organizational defendants.” See FED. R. CRIM. P. 10 advisory committee’s note (1995); see also 27 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 643.06 (3d ed. 2010) (“It is questionable whether direct sanctions under the Rules are available against a defaulting organization.”). For one slip opinion that explicitly punts the question, see *United States v. Cota*, No. CR 08-00160 SR, 2009 WL 1765647, at \*3 (N.D. Cal. June 22, 2009) (“The parties dispute whether, notwithstanding Rule 43(b)(1), this Court may nonetheless order an officer of Fleet to appear at the hearing. The Court need not decide this issue because it finds, under all of the circumstances of this case, that such an order is not warranted.”).

9. Governed by Rule 11(b), a plea colloquy is a hearing where a defendant formally enters a plea of guilty or nolo contendere. FED. R. CRIM. P. 11(b).

10. E.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1890 (1991).

11. It might theoretically be possible to incapacitate an organization by compelling presence at a plea colloquy. If, for example, a court were to compel the CEO of a corporation to appear, the corporation may not be able to function well during the CEO’s absence. However, given the short

will further the goal of deterrence,<sup>12</sup> rehabilitation,<sup>13</sup> and retribution.<sup>14</sup> Third and finally, resolving the ambiguity of 43(b)(2)'s "need not be present" language is important for the general principle that it is better to know what federal district court judges may and may not do in their official capacity. The use of this power may be an effective means to bring about an efficient, equitable outcome in matters coming before our nation's courts. For example, compelling the attendance of an organizational defendant may increase the efficiency of the judicial process. An organizational defendant may be able to delay the legal process by refusing to appear at various critical junctures, forcing the court to stay or postpone the proceedings while the defendant's attorneys consult with their client. The ability to compel attendance may be one more useful tool a court has to ensure that matters are handled in a cost-effective manner. On the other hand, the use of this power also opens the door to judicial abuse, providing the courts with yet another way to impose unjust hardships on innocent defendants.

The issue of compelling the presence of organizational defendants rarely arises in either academic writing or legal practice. This may be due to the odd procedural posture necessary for appellate review of the issue;<sup>15</sup> alterna-

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duration of the incapacity and the fact that larger organizations wouldn't have a serious problem functioning with one fewer officer for such a short length of time, incapacity cannot be a realistic justification for compelling attendance.

12. It is an empirical question whether compelling organizations to appear at plea colloquies will in fact reduce the number of offenses committed by those organizations. See V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1500 (1996) (discussing the impact of reputational loss on a corporation resulting from criminal sanctions). While Khanna believes that the same goals can be attained more cheaply through civil liability, *id.* at 1508–09, the administrative costs of compelling attendance would be quite low, insofar as it consists only in the court ordering the organization to appear.

13. This is again an empirical question. See *id.* at 1500 (discussing the impact of reputational loss on a corporation resulting from criminal sanctions). There are two unique ways in which criminally sanctioning an organization may serve as an effective deterrent or method of rehabilitation. Organizations are generally required to report pending criminal liabilities in their annual financial statements, magnifying the effect a conviction has on the organization's credibility or reputation. Daniel L. Cheyette, *Policing the Corporate Citizen: Arguments for Prosecuting Organizations*, 25 ALASKA L. REV. 175, 199 (2008). Organizations are also subject to debarment, wherein the federal or state governments refuse to do business with an organization that has been convicted of a crime. *Id.* at 199 & n.146.

14. Whatever one's views on the legitimacy of retributive justice as a moral theory, it cannot be denied that retributivism is a basic feature of our criminal justice system. Whether retributivism ought to be a goal in the context of corporate criminal liability in particular, however, has been hotly contested. Compare Khanna, *supra* note 12, with *United States v. Turner*, 532 F. Supp. 913, 915 (N.D. Cal. 1982) ("[I]t may sometimes be important that the convicted man be called to account publicly for what he has done, not to be made an instrument of the general deterrent, but to acknowledge symbolically his personal responsibility for his acts and to receive personally the official expression of society's condemnation of his conduct."). See generally *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1237–38 (1979) (arguing that retributivism is a goal of corporate criminal liability). Given the recent rise in public anger directed toward corporations, e.g., Gretchen Morgenson, *Behind Insurer's Crisis, Blind Eye to a Web of Risk*, N.Y. TIMES, Sept. 28, 2008, the topic of retributivism as it applies to organizations has become a particularly important public issue.

15. There may only be two contexts in which compelling an organizational defendant's presence would be appealed. First, if there were a plea agreement between the organizational defendant and the prosecutor; the district court compelled the attendance of the organization; the

tively, the literature's silence may simply reflect the fact that defendants are unlikely to challenge a district court's request to appear at a plea colloquy.<sup>16</sup> Regardless, the three foregoing reasons make it clear it is important to determine whether courts have this authority.

Even if a district court does have the authority to compel an organization's attendance, it remains unclear who it might compel.<sup>17</sup> Because an organizational defendant is not an individual person,<sup>18</sup> the organization itself cannot appear in court: unlike a human being, it has no physical manifestation. Historically, English courts had trouble applying criminal law—a system designed to punish individual persons—to organizations for precisely this reason.<sup>19</sup> However, since 1909 American courts have recognized the applicability of criminal sanctions to organizations,<sup>20</sup> and the Rules clearly contemplate that *someone* may be compelled to attend: Rule 43 states that an organizational defendant need not be present so long as it is represented by counsel.<sup>21</sup> In the same vein, Rule 11(a)(4) states, “If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.”<sup>22</sup> This language implicitly assumes the existence of someone who could attend the proceedings. The Rules simply do not indicate who that person is.<sup>23</sup> For purposes of this

organization refused to appear; the plea was not entered; the organization went to trial and was found guilty; and the organization was given a harsher punishment than it would have received under the plea agreement. Alternatively, a prosecutor could request a writ of mandamus from the district court compelling the presence of the defendant.

16. “[F]ew corporations or other organizations in active business will incur the risks of non-appearance.” MOORE ET AL., *supra* note 8, at ¶ 643.06.

17. Whoever appears as the representative must also be accompanied by the organization's counsel. *E.g.*, Palazzo v. Gulf Oil Corp., 764 F.2d 1381, 1385 (11th Cir. 1985) (holding that a corporation may not represent itself pro se, but rather must employ an attorney to represent it in court); Jones v. Niagara Frontier Transp. Auth., 722 F.2d 20, 22 (2d Cir. 1983) (same); Simbraw, Inc. v. United States, 367 F.2d 373, 373 (3d Cir. 1966) (same).

18. This is not to say the law does not consider organizations to be persons in some respects. *See, e.g.*, Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. 497, 558 (1844) (holding that a corporation doing business in a particular state is a person, and therefore an inhabitant of that state, “much as a natural person”).

19. *See* L.H. LEIGH, THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW 1–12 (1969) (analyzing the way in which English courts developed corporate criminal liability).

20. Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 YALE L.J. 353, 353 n.2 (1979) (“The Supreme Court first recognized the criminal liability of corporations in New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).”); *see also* Emmett H. Miller III, Note, *Federal Sentencing Guidelines for Organizational Defendants*, 46 VAND. L. REV. 197, 201–03 (1993) (discussing the current state of the law with regard to criminal sanctions against organizations).

21. FED. R. CRIM. P. 43(b)(1).

22. FED. R. CRIM. P. 11(a)(4).

23. The only clue the Rules give us comes from 4(c)(3)(C): “A summons is served on an organization by delivering a copy to an *officer*, to a *managing or general agent*, or to *another agent appointed or legally authorized* to receive service of process.” FED. R. CRIM. P. 4(c)(3)(C) (emphasis added). The individual appearing for a corporation must be appointed by the organization's board of directors. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2010) (“The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . .”). For all other organizations, the individual must be authorized as an agent of the

Note, however, the important point is that the individual is *not* the organization's counsel.<sup>24</sup>

This Note argues that federal district courts have the authority under Federal Rule of Criminal Procedure 43(b)(1) to compel the attendance of organizational defendants<sup>25</sup> at plea colloquies. Part I demonstrates that the Rules are best read together in a way that gives the district courts this power. Part II discusses the underlying purposes of plea colloquies and contends that they are best achieved by giving district courts the discretion to compel attendance. Lastly, Part III argues that the inherent powers of the court provide another, independent basis for the view that district courts can compel organizational defendants' presence.

### I. OTHER RULES ON ATTENDANCE

This Part examines six other subsections of the Rules relating to attendance: 10(b), which governs the defendant's presence at an arraignment; 43(a), which requires the defendant's presence at various stages of the proceedings against her; 43(b)(2), which concerns the presence of a defendant charged with a misdemeanor; 43(b)(3), which deals with the defendant's presence at a conference on a legal question; 43(b)(4), which governs the defendant's presence at a sentencing correction hearing; and 43(c), which permits the defendant to waive her right to be present in some circumstances. This examination lends support to the claim that district courts can compel the presence of an organizational defendant at a plea colloquy under 43(b)(1).

One point needs to be made before delving into the statutory analysis. This Part discusses several topics—among them capital punishment and obstreperous defendants—that do not seem to be applicable to *organizational* defendants. These topics are relevant not because they apply directly to an organization; rather, they are discussed as part of a larger argument that the Rules must be read in a particular way. Having argued for a particular reading of the Rules, this Note then applies that reading to organizational defendants, finding they may be compelled to attend a plea colloquy.

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organization, *e.g.*, Palazzo v. Gulf Oil Corp., 764 F.2d 1381, 1385 (11th Cir. 1985). That person may be an officer, a high managerial agent, or another individual all together.

The justification used to require an individual to appear at a plea colloquy may determine which individual should be compelled to appear. For example, if the purpose of the presence requirement is to ensure that the plea colloquy can be completed, the judge would prefer to have someone intimately familiar with the details of the criminal activity appear, who may or may not be a particularly high-ranking manager. Alternatively, if the purpose is to validate retributivist goals of punishment or perhaps send a clear message to the corporation, the court might very well prefer that the chief executive officer, or some other person from senior management, attend.

24. Since Rule 43(b)(1) permits the organization's absence so long as that organization is represented by counsel, the question posed by the provision's ambiguity is whether a district court judge can compel the attendance of another individual associated with the organization.

25. All references to the appearance of an "organizational defendant" refer to the attendance of a person affiliated with the organization who is not that organization's attorney.

## A. Arraignments Under Rule 10(b)

Rule 10(b) permits criminal defendants (whether organizations or individuals) to be absent from their arraignments, but district judges have discretion to compel defendants' attendance. Rule 10 is concerned with arraigning defendants.<sup>26</sup> While Rule 43 compels a defendant's presence at an arraignment generally,<sup>27</sup> subpart (b) of Rule 10 provides an exception: a defendant does not need to appear at the arraignment if, among other conditions, she submits a written waiver of attendance and the court accepts that waiver.<sup>28</sup> It is within the discretion of the court to reject the waiver and compel attendance. The Advisory Committee Notes<sup>29</sup> make this clear by observing that "[i]f the trial court has reason to believe . . . the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court."<sup>30</sup> Further, 10(b) uses the same language as 43(b)(1), stating the defendant "need not be present" at the arraignment.<sup>31</sup> It is a canon of statutory construction that identical language utilized throughout one statute has a single meaning.<sup>32</sup> Consequently, the phrase "need not be present" in 43(b)(1) should be interpreted to mean just what it means in 10(b), giving district courts the discretion to compel attendance.

The reasoning behind the adoption of Rule 10 further justifies interpreting 43(b)(1) in this manner. In determining whether the defendant should be allowed to be absent for her arraignment, the Committee noted it "was concerned that permitting a defendant to be absent from the arraignment could be viewed as an erosion of an important element of the judicial process."<sup>33</sup> In the end, however, "[t]he Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment in the defendant's absence."<sup>34</sup> The prospect of permitting absence at a hearing to enter a *guilty plea*, however, was firmly foreclosed: "it [is] more appropriate for the defendant to appear personally before the court" when pleading guilty.<sup>35</sup> While the Committee did not

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26. FED. R. CRIM. P. 10.

27. FED. R. CRIM. P. 43(a); *see also* Valenzuela-Gonzales v. U.S. Dist. Court, 915 F.2d 1276, 1280 (9th Cir. 1990) (holding that Rules 10 and 43 require a defendant to be present in court for the arraignment).

28. FED. R. CRIM. P. 10(b).

29. While the Advisory Committee's Notes are not binding, these "well-considered Notes [serve] as a useful guide in ascertaining the meaning of the Rules." *Tome v. United States*, 513 U.S. 150, 160 (1995) (plurality opinion) (citing *Huddleston v. United States*, 485 U.S. 681, 688 (1988) (referencing the Federal Rules of Evidence, which are promulgated in the same manner via the Rules Enabling Act)); *United States v. Owens*, 484 U.S. 554, 562 (1988).

30. FED. R. CRIM. P. 10 advisory committee's note (2002).

31. FED. R. CRIM. P. 10(b).

32. *E.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

33. FED. R. CRIM. P. 10 advisory committee's note (2002).

34. *Id.*

35. *Id.*

explain why it refused to extend the 10(b) waiver process to guilty pleas,<sup>36</sup> the concern might have had something to do with the fact that substantially more rights are implicated at the plea colloquy than at arraignment.<sup>37</sup> Either way, if the Rules express a clear preference for defendants to be present at the plea colloquy—and the Committee Notes to Rule 10 make it clear they do—then Rule 43 should be read to give district courts the discretion to compel attendance at a plea colloquy.

One counter-argument to this interpretation should be considered. It is possible to interpret 10(b)(3) as a provision that gives power to the district courts (the “power-granting” interpretation). The argument for this interpretation goes as follows: 10(b)(3) specifies that a district court must accept the defendant’s submitted waiver for that defendant’s absence to be permitted at her arraignment. But if the court had the discretion to either accept or reject the waiver without 10(b)(3), then 10(b)(3) would be superfluous. Since no language in the Rules is superfluous,<sup>38</sup> 10(b)’s statement that the defendant “need not be present” must be read to mean that the court does *not* have the discretion to refuse the defendant’s waiver. And since the same phrase—“need not be present”—is used in 43(b)(1), the same interpretation must likewise apply: 43(b)(1)’s statement that an organizational defendant need not be present must be read to mean the court does not have the power to compel attendance.

There is, however, a different interpretation of Rule 10(b)(3) that is consistent with the idea that the phrase “need not be present” rests the discretion with the district courts, rather than the defendant (the “satisfying-the-waiver” interpretation). Under this interpretation, Rule 43 broadly allows an organizational defendant to be absent from any proceeding, while Rule 10 carves out a specific exception in the case of arraignments only. Under Rule 10, the waiver the defendant submits must satisfy a series of conditions: (1) both the defendant and her counsel must have signed the waiver;<sup>39</sup> (2) the waiver must affirm that the defendant has received a copy

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36. *Id.* (noting only that it is “more appropriate” for a defendant to appear when pleading guilty). It is of course possible that the rationale behind this decision is motivated by a concern that applies to individual defendants only, and not to organizations. However, because (1) we don’t have any indication from the Advisory Committee about what the rationale actually is, (2) the Rules apply with equal force both to organizational and individual defendants, and (3) the Rules very clearly express a preference for defendants generally to be present at plea colloquies, the Rules ought to be interpreted in that manner until some plausible counter-interpretation is put forward.

37. *See infra* Section II.B.

38. *E.g.*, *Boise Cascade Corp. v. U.S. Envtl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991) (“Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.”).

39. 10(b)(2) might be read to *require* pro se defendants to appear at their arraignments, depending on whether the phrase “signed *both* by defendant *and* defense counsel,” FED. R. CRIM. P. 10(b) (emphasis added), means that two separate individuals must sign the waiver, or rather that the defendant may sign both as the defendant and as her own counsel. Given that the Advisory Committee was concerned with “difficulties in providing the defendant with effective and confidential assistance of counsel if counsel, but not the defendant, appears at the arraignment,” FED. R. CRIM. P.

of the indictment or information; and (3) the plea must be not guilty.<sup>40</sup> Further, 10(b)(1) requires that the defendant be charged with a misdemeanor, and not a felony.<sup>41</sup> As a result, 10(b)(3), requiring the court to accept the defendant's waiver in order to permit the defendant's absence, was included to ensure that the court is satisfied that all the conditions listed above have been met. 10(b)(3), in other words, does not vest the district court with the authority to compel attendance where it would not have had it otherwise. Rather, it requires that the court find that the conditions laid out in 10(b) are met by accepting the waiver. At the same time, the district court *does* have the discretion to compel attendance.<sup>42</sup> Consequently, the phrase in 10(b) that vests the court with this discretion is not 10(b)(3), but rather 10(b)'s "need not be present" language. Finally, the same interpretation of "need not be present" should be given to 43(b)(1), and so 43(b)(1) must be read to vest discretion in the district courts.

There are two reasons why the satisfying-the-waiver interpretation of 10(b)(3) is the correct one. First, this interpretation appears to be what the Advisory Committee had in mind when it drafted the Rule. The Committee Notes state that Rule 10 "provides that the court may hold an arraignment in the defendant's absence when the defendant has waived her right to be present in writing and the court *consents to that waiver*."<sup>43</sup> This sentence does not suggest that the court must consent to the absence of the defendant generally, but rather to the waiver specifically. The district court, in other words, must be satisfied that the conditions of the waiver are met before permitting the defendant's absence.

Second, the construction courts have given to a similar provision in Rule 43(c) also supports the satisfying-the-waiver interpretation. 43(c), like 10(b), permits a defendant in some cases to waive her presence in the courtroom.<sup>44</sup> From the caselaw it is clear that under 43(c) a judge has the discretion to compel the presence of the defendant even if the defendant has waived her continued presence pursuant to the Rule.<sup>45</sup> This is the case even though 43(c) does not have any provision like 10(b)(3).<sup>46</sup> It follows from these premises that a court may have the authority to refuse to accept a waiver of attendance *even if* the relevant Rule does not explicitly give the court this authority: if an explicit provision under the Rules were required, then the district courts would not have the authority to reject a waiver under 43(c). And if a district court has the authority to reject a waiver, though the Rule does not explicitly say so, then 10(b)(3)—requiring that the court

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10(b) advisory committee's note (2002), the Committee might well have had this requirement in mind.

40. FED. R. CRIM. P. 10(b).

41. *Id.*

42. *See supra* notes 36–38 and accompanying text.

43. FED. R. CRIM. P. 10(b) advisory committee's note (2002) (emphasis added).

44. FED. R. CRIM. P. 43(c).

45. *See infra* Section I.D.

46. *See* FED. R. CRIM. P. 43(c).

accept the waiver—should *not* be given the power-granting interpretation: it is not necessary for 10(b)(3) to be interpreted this way for the district courts to have this authority (because, as noted, such authority exists in cases where the language of 10(b)(3) is absent), and so this subsection would be mere surplusage if it were read in that manner. Since no part of a statute should be read to be superfluous,<sup>47</sup> the alternative, satisfying-the-waiver, interpretation should be accepted.

### B. Presence Under Rule 43(a)

District courts have some discretion regarding attendance even in cases where Rule 43(a), on its face, compels the defendant's presence. Rule 43(a) has a general requirement that a defendant be present during her trial.<sup>48</sup> In *United States v. Cannatella*,<sup>49</sup> the Second Circuit considered whether a district court could permit the absence of a defendant when none of the exceptions in Rule 43 applied. There the defendant filed a request to permit his absence from trial because of a serious heart condition.<sup>50</sup> The court held that while a judge can and normally should compel the defendant's presence, in "exceptional circumstances" the judge may "exercise his discretion to accept a waiver of appearance . . . in a criminal trial . . ."<sup>51</sup> The court held that even though Rule 43 explicitly requires the defendant's presence, district courts can still determine whether or not a defendant will be permitted to absent herself from the proceedings. Other circuit courts have also followed suit.<sup>52</sup>

Although the Second Circuit never made it clear how far this power extends, *Cannatella* does demonstrate that district courts may determine whether or not a defendant will be required to appear even when the plain language of Rule 43 does not permit the courts to make this decision.<sup>53</sup> And if a district court has discretion in matters of attendance even when the text of the Rule appears to forbid it, an ambiguous provision of the same Rule should be interpreted in a way that vests the same kind of discretion in the court.

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47. See *supra* note 38, 46 and accompanying text.

48. FED. R. CRIM. P. 43(a). However, 43(c) creates several exceptions to this requirement—for example, if a defendant voluntarily absents herself from trial. FED. R. CRIM. P. 43(c).

49. 597 F.2d 27 (2d Cir. 1979) (per curiam).

50. *Id.* at 27.

51. *Id.* at 28.

52. *E.g.*, *United States v. Blue*, No. 91-00165, 1993 WL 14978, at \*1 (6th Cir. Jan. 25, 1993) (holding that because the defendant did not show good cause for being absent at trial, the trial court did not abuse its discretion in denying his request) (citing *Cannatella*, 597 F.2d at 28); *In re United States*, 784 F.2d 1062, 1063 (11th Cir. 1986) (citing *Cannatella*, 597 F.2d at 28).

53. FED. R. CRIM. P. 43(a)(2). The court might have considered resting its decision on Rule 43(c), which permits a defendant to waive her presence at trial. That subsection, however, requires a defendant to initially be present at trial; in this case, the defendant requested the trial court permit his absence "at all stages of the trial." *Cannatella*, 597 F.2d at 27 (emphasis added).

*C. Proceedings Under 43(b)(2)*

While Rule 43(b)(2) permits a defendant to be absent from court when charged with a misdemeanor, district courts are still empowered to compel attendance in spite of this Rule. This further supports the view that the same discretion exists under 43(b)(1). Rule 43(b)(2) states that a defendant is not obligated to be present in cases where the charged offense is a misdemeanor.<sup>54</sup> This subsection of Rule 43 utilizes the same language as 43(b)(1)—the language at issue in this Note—stating the defendant “need not be present.”<sup>55</sup> Rule 43 is written such that the phrase “need not be present” only appears once in subsection (b), applying equally to (b)(1) and (b)(2). As a result, any interpretation of the phrase will necessarily apply to both subsections of Rule 43.

The Advisory Committee Notes on Rule 43 make it clear that it is within the court’s discretion to decide whether or not to permit the absence of a defendant under 43(b)(2). The committee stated that the Rule “empower[s] the court *in its discretion*, with the defendant’s written consent, to conduct proceedings in misdemeanor cases in defendant’s absence . . . . The Rule . . . *leaves it discretionary with the court* to permit defendants in misdemeanor cases to absent themselves . . . .”<sup>56</sup> Because the same interpretation of the phrase “need not be present” will apply to Rule 43(b)(1) and (b)(2), the district court should therefore have the same discretion to compel the attendance of an organizational defendant.

One argument cuts against this interpretation of Rule 43(b). While 43(b)(1) and (b)(2) utilize the same “need not be present” language, 43(b)(2) imposes an additional requirement before a defendant may be absent: the Rule also requires the court to “permit . . . arraignment, *plea*, trial, and sentencing to occur in the defendant’s absence.”<sup>57</sup> Rule 43(b)(2) explicitly says the court has the discretion to decide whether the defendant may be absent; 43(b)(1), on the other hand, has no corresponding language. Consequently, the argument goes, the drafters must have intended the courts *not* to have that discretion in cases where the defendant is an organization (the “nondiscretionary” interpretation).<sup>58</sup>

However, that interpretation ignores the fact that while the Rule does require the court to permit the proceedings to continue in the defendant’s absence, it uses the conjunctive form—the Rule requires the court to permit “arraignment, plea, trial, *and* sentencing” all to occur without the

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54. FED. R. CRIM. P. 43(b)(2).

55. *Id.* 43(b).

56. FED. R. CRIM. P. 43 advisory committee’s note (1946) (emphasis added).

57. FED. R. CRIM. P. 43(b)(2) (emphasis added).

58. This conclusion follows from the canon of statutory construction *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. *See, e.g.*, *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168–69 (2003) (discussing this canon, but holding also that it normally applies only in cases where “the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence” (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002))).

defendant.<sup>59</sup> The Rule, in other words, does not give the district court any powers it would not have had otherwise. Rather, it is imposing an additional requirement not found in 43(b)(1): the court, if it is to permit the absence of a defendant pursuant to 43(b)(2) at all, must permit the absence through *every* proceeding from arraignment through sentencing (the “conjunctive” interpretation). As a result, three requirements must be met for a defendant to be absent under 43(b)(2): (1) the crime charged must be a misdemeanor; (2) the court must permit the defendant’s absence; and (3) that permission must extend not just to some of the proceedings, but to all of them.<sup>60</sup>

Policy concerns underlying 43(b)(2) further support the conjunctive interpretation. Permitting a defendant to be absent from the proceedings against her for a misdemeanor charge recognizes that larger districts may impose considerable hardship and expense on a defendant who would be obligated to travel great distances to appear.<sup>61</sup> This hardship may not be “commensurate with the gravity of the charge,” and so the court is empowered to permit the defendant’s absence.<sup>62</sup> 43(b)(2) asks district courts to weigh the hardship that would be imposed on the defendant by forcing her to appear against the gravity of the misdemeanor charge.<sup>63</sup> Because the defendant will usually have to appear at the same court for all of the proceedings,<sup>64</sup> the same degree of hardship will befall the defendant at each proceeding. The Rule, in other words, is concerned with the *aggregate* hardship imposed on the defendant through all the proceedings, rather than with the hardship imposed by each individual appearance.

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59. FED. R. CRIM. P. 43(b)(2) (emphasis added).

60. This leaves open the question of what would happen if a defendant gave her written consent to be absent at some time midway through the proceedings—for example, after the arraignment but before the trial. Rule 43 may be read either to require the defendant’s presence for the remainder of the proceedings because, since the arraignment has already taken place, the district court cannot permit the defendant’s absence at the arraignment; or alternatively, to give the judge the discretion to allow the defendant to be absent at any time after the written consent is given to the court, on the theory that the judge can retroactively permit the defendant’s absence.

61. FED. R. CRIM. P. 43 advisory committee’s note (1946).

62. *Id.*

63. The same policy concerns will apply to an organizational defendant as well. While it is true that a larger organization with resources may be able to more easily bear the cost of travel than an individual, that is not always the case: a small, financially strapped organization will have a much harder time allocating resources to attend a plea colloquy than a wealthy individual. Moreover, permitting a defendant to be absent rests the discretion with the district court, which can make a determination based on the particular case whether there is in fact a burden on the organization. Finally, if it *is* true that an organization can easily bear this cost, that would only serve to bolster the claim that organizations may be compelled to attend.

64. However, this is not always the case. For example, the defendant might move partway through the proceedings to a location farther or closer to the court. The Advisory Committee Notes do not appear to consider this possibility. *See* FED. R. CRIM. P. 43 advisory committee’s note (1944).

#### D. Proceedings Under 43(b)(3)

43(b)(3) does not require a defendant's presence where the proceeding "involves only a conference or hearing on a question of law."<sup>65</sup> As with 43(b)(1), this subsection utilizes the same "need not be present" language, requiring any interpretation of this subsection to apply with equal force to 43(b)(3).<sup>66</sup> Federal caselaw implies that a district court is permitted to require the presence of a defendant at a 43(b)(3) hearing or conference. In *United States v. Sherman*, the Ninth Circuit considered an appeal by a defendant who claimed the district court was obligated to require him to be present at an in-chambers discussion of jury instructions.<sup>67</sup> The court ruled that 43(b)(3) permitted the trial court not to compel the defendant's presence, holding that "[t]he district court's failure to require that Sherman be present during the in-chambers proceedings regarding the jury instructions was not error."<sup>68</sup> While the Ninth Circuit did not directly assert that a district judge had the power to affirmatively compel the defendant's presence if it wanted, this holding implies that the court has this authority: the Ninth Circuit opinion gave no indication that the judge would have been forbidden from requiring attendance. In *United States v. Graves*, the Fifth Circuit adopted the same view, holding that the district court did not err in refraining from requiring the defendant's presence at meeting in the judge's chambers.<sup>69</sup>

#### E. Proceedings Under 43(b)(4)

43(b)(4) permits a defendant's absence where the proceeding involves "the correction or reduction of sentence."<sup>70</sup> The interpretation of "need not be present" in this subsection must be applied equally to 43(b)(1).<sup>71</sup> Parallel to the argument already made in Section I.C, the Advisory Committee Notes contemplate that it is within the court's discretion whether to permit the absence of the defendant pursuant to this subsection. The notes state, "Rule 43(c)(4) [now 43(b)(4)] would *permit a court* to reduce or correct a sentence under Rule 35(b) or (c), respectively, without the defendant being present."<sup>72</sup> Therefore, 43(b)(1) must also give the district courts discretion.

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65. FED. R. CRIM. P. 43(b)(3).

66. See FED. R. CRIM. P. 43(b); *supra* note 7 and accompanying text.

67. 821 F.2d 1337, 1338–39 (9th Cir. 1987). The defendant argued that the court never required him to attend and that because he didn't attend the conference, his conviction should be overturned. *Id.*

68. *Id.* at 1339.

69. 669 F.2d 964, 972–73 (5th Cir. 1982).

70. FED. R. CRIM. P. 43(b)(4).

71. *Id.*; *supra* note 55 and accompanying text.

72. FED. R. CRIM. P. 43(b)(4) advisory committee's note (1998) (emphasis added).

F. *Waiving Presence Under Rule 43(c)*

The Rules do not give the defendant the *right* to be absent even when 43(c) explicitly allows the defendant to waive her right to be present. Rule 43(c) states that a defendant waives her right to be present when she is voluntarily absent or is engaged in disruptive behavior that justifies removal from the courtroom, so long as she “was initially present at trial, or . . . had pleaded guilty or nolo contendere.”<sup>73</sup> This provision ensures that a defendant does not “defeat the proceedings by voluntarily absenting himself” or by being so disruptive as to prevent the proceedings from continuing.<sup>74</sup> This portion of Rule 43 was included to reflect the Supreme Court’s decision in *Illinois v. Allen*, where the Court held that in dealing with an obstreperous defendant, a district court may “take him out of the courtroom until he promises to conduct himself properly.”<sup>75</sup>

Even in cases where Rule 43(c) permits a defendant to waive her presence and the court has no *explicit* power to compel attendance, the defendant lacks the ultimate discretion to decide whether or not she will attend. There are two types of cases where a defendant, having properly waived her right to be present under 43(c), can still be compelled to attend the proceedings against her. First, the defendant’s right to be present during a trial for a capital offense may be so fundamental that it is unwaivable.<sup>76</sup> Second, the district court may simply choose to compel the attendance of the defendant, notwithstanding 43(c). The Third Circuit held in *United States v. Moore* that “[w]hile Rule 43 does permit the court to continue the trial when the defendant absents himself, it does not, concomitantly, vest a *right of absence* in a defendant.”<sup>77</sup> Similarly, in *United States v. Lunitap*, the Ninth Circuit considered the defendant’s argument that, because Rule 43(c)<sup>78</sup> permits a trial to continue in spite of the defendant’s absence, the Rule gives

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73. FED. R. CRIM. P. 43(c)(1). Because of the requirement that the defendant was either initially present *at trial* or *already* pled guilty, this subsection does not normally apply to 11(b) plea colloquies.

74. FED. R. CRIM. P. 43(c) advisory committee’s note (1946); *see also, e.g.*, *United States v. Bradford*, 237 F.3d 1306, 1309 (11th Cir. 2001); *Gaither v. United States*, 413 F.2d 1061, 1080 (D.C. Cir. 1969); *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963).

75. *Illinois v. Allen*, 397 U.S. 337, 343–44 (1970); *see also Taylor v. United States*, 414 U.S. 17, 18 (1973).

76. *Compare Diaz v. United States*, 223 U.S. 442, 455 (1912) (“[A]n accused who is in custody and one who is charged with a capital offense [is] incapable of waiving the right . . .”), *and Near v. Cunningham*, 313 F.2d 929, 931 (4th Cir. 1963) (“Petitioner’s first claim is based on the contention that due process guarantees to an accused the right to be present . . . especially where capital punishment is involved. So fundamental is this right that it may not be waived.”) (citing *Hopt v. Utah*, 110 U.S. 574 (1884)), *with Campbell v. Wood*, 18 F.3d 662, 671 (9th Cir. 1994) (holding a defendant may waive his constitutional right not to be present), *and People v. Robertson*, 767 P.2d 1109, 1133–34 (Cal. 1989) (same).

77. 466 F.2d 547, 548 (3d Cir. 1972). *But see United States v. Cannatella*, 597 F.2d 27, 27 (2d Cir. 1979) (“We see no necessity at this point, however, to go as far as the Third Circuit did in *United States v. Moore*, 466 F.2d 547 (1972) . . .”) (dictum).

78. In its opinion, the Ninth Circuit refers to 43(b). 111 F.3d 81, 83 (9th Cir. 1997). The Rules were restyled in 2002 so that the current Rule 43(c) is the former Rule 43(b). FED. R. CRIM. P. 43 advisory committee’s note (2002).

the defendant an affirmative right to waive his presence at trial in order to avoid being identified.<sup>79</sup> The court held that it was not an abuse of the trial court's discretion to deny the defendant's request not to be present.<sup>80</sup>

In sum, the Rules vest the district courts with a great deal of discretion in deciding whether a defendant needs to be present throughout the proceedings against her. Read together, they are best interpreted to give the district courts the power to compel the attendance of an organizational defendant at a plea colloquy.

## II. THE IMPORTANCE OF THE 11(B) PLEA COLLOQUY

The previous Part primarily dealt with an interpretation of the meaning of 43(b)(1)'s phrase "need not be present," providing a general argument that district courts may compel an organizational defendant's presence at any proceeding. This Part focuses in on attendance at the plea colloquy in particular, making several claims. The Rules and the Supreme Court recognize the particular importance of the defendant's presence at a plea colloquy generally; there may be good reasons to require the presence of an organizational defendant in particular; there are a great many rights implicated during a plea colloquy; and finally, courts have traditionally been accorded flexibility in plea colloquy procedure. Taken together, these arguments provide good reason to find that district courts have the power to compel organizational defendants' presence at such proceedings.

### A. *The Importance of a Defendant's Presence at the Plea Colloquy Generally*

The Rules recognize the particular importance of the defendant's presence at a plea colloquy. The text of Rule 11 and the Advisory Committee Notes accompanying the Rule make it clear that attendance at a plea colloquy is exceedingly important. Although 43(a) already requires that the defendant attend the plea colloquy,<sup>81</sup> Rule 11 still makes the attendance requirement explicit on its own terms, and does so more than once.<sup>82</sup> The Advisory Committee Notes on Rule 11 further emphasize the importance of the presence of the defendant when they say, "[b]y *personally* interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack."<sup>83</sup> The Advisory

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79. *Lumitap*, 111 F.3d at 83.

80. *Id.* at 84 (citing *United States v. Fitzpatrick*, 437 F.2d 19 (2d Cir. 1970)).

81. FED. R. CRIM. P. 43(a)(1).

82. FED. R. CRIM. P. 11(b)(1) ("[T]he court must address the defendant personally in open court."); FED. R. CRIM. P. 11(b)(2) (same).

83. FED. R. CRIM. P. 11 advisory committee's note (1974) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)) (emphasis added). As discussed in the Introduction *supra*, this justification—that personally interrogating the defendant will develop a more complete record of the

Committee further underscored the importance of the plea colloquy by noting that “[t]he fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.”<sup>84</sup> Finally, the degree of detail and specificity with which Rule 11 lists the conditions that must be satisfied for the court to accept a plea might be seen as a further indication of the importance of the plea colloquy.<sup>85</sup>

The Supreme Court has also recognized the importance of having the defendant present at the plea colloquy. In *Boykin v. Alabama* the Court considered a case in which the defendant pleaded guilty to five separate counts of armed robbery and was later sentenced to death.<sup>86</sup> At the colloquy, however, the judge did not ask the defendant any questions regarding his plea, and the defendant did not address the court.<sup>87</sup> Noting the importance of a plea colloquy, the Supreme Court ruled that “[a] plea of guilty is more than a confession which admits that the accused did various acts; *it is itself a conviction*; nothing remains but to give judgment and determine punishment.”<sup>88</sup> Consequently, it held that a waiver of the constitutional rights implicated by a guilty plea cannot be assumed from a silent record.<sup>89</sup> Presence, in other words, was necessary for a proper plea colloquy, but not sufficient to protect the defendant’s rights.

#### B. *The Importance of an Organization’s Presence at the Plea Colloquy in Particular*

Compelling the presence of the organizational defendant itself, rather than having the organization’s attorney appear on its behalf, is important for two reasons. It addresses the concerns raised by the Advisory Committee and the Supreme Court discussed above in Section II.A and it may further the goals of corporate criminal liability.

Compelling attendance will adequately deal with the concerns of the Advisory Committee and the Supreme Court. These two authorities have identified several reasons why it is important for a defendant to appear personally at a plea colloquy, and each of those reasons applies to an organizational defendant. First, the Advisory Committee notes that personally interrogating the defendant “will . . . develop a more complete record to

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plea colloquy—suggests that particular individuals should be compelled to appear. That is, to address this concern it would be better to have someone from the organization who knows a great deal about the criminal conduct attend the hearing, rather than trying to find the highest-ranking executive or manager.

84. FED. R. CRIM. P. 11 advisory committee’s note (1966).

85. Rule 11 has no fewer than eighteen separate conditions that must be satisfied for the court to accept a defendant’s guilty or nolo contendere plea. FED. R. CRIM. P. 11(b)(1)–(3).

86. *Boykin v. Alabama*, 395 U.S. 238, 239–40 (1969).

87. *Id.* at 239.

88. *Id.* at 242 (emphasis added).

89. *Id.* at 243.

support his determination in a subsequent post-conviction attack.”<sup>90</sup> As discussed in the Introduction, requiring the organization to appear will reduce the probability that the organization’s counsel will be unable to give details about the criminal conduct. Interrogating the individuals most closely associated with the relevant conduct will better ensure that the record is complete.

Second, the Advisory Committee considered the defendant’s presence an important safeguard to protect the “fairness and adequacy of the procedures [and provide for] equal justice to all in the federal courts.”<sup>91</sup> The Supreme Court echoed this concern in *Boykin*.<sup>92</sup> In the case of organizations, that purpose is also served by having the organization appear, rather than its attorney: while attorneys have an ethical obligation to act in the best interests of their clients, having the defendant appear would at least mitigate any claim a defendant has that it did not receive fair or just treatment in the courts, as it actually would witness and play a role in the hearings.

Third and finally, the Advisory Committee stated it has a strong preference that defendants appear at the plea colloquy, though it did not provide any specific rationale.<sup>93</sup> Since the Rules apply equally to individual and organizational defendants—courts have in fact indicated that an organization may challenge the sufficiency of the plea colloquy on the same terms as an individual defendant<sup>94</sup>—that preference must be read to apply to organizations as well.

The goals of corporate criminal liability may also be furthered by compelling an organization’s attendance. To be sure, it is a complex question whether requiring an organization’s attendance will satisfy the goals of corporate criminal liability. To find the answer, one must first consider the three applicable justifications for punishment—retribution, deterrence, and rehabilitation<sup>95</sup>—and establish which ones are relevant in the organizational context, and how important each is relative to the others. Given the large

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90. FED. R. CRIM. P. 11 advisory committee’s note (1974) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

91. FED. R. CRIM. P. 11 advisory committee’s note (1966) (emphasis added).

92. 395 U.S. at 242–43.

93. See *supra* Section II.A.

94. See *United States v. Electrodyne Sys. Corp.*, 147 F.3d 250, 252–53 (3d Cir. 1998) (holding that the organizational defendant’s plea colloquy was not faulty and applying the same legal standard used for individual defendants); *United States v. Cota*, No. CR 08–00160 SI, 2009 WL 1765647, at \*2–3 (N.D. Cal. June 22, 2009) (treating the requirements of a plea colloquy as applying with equal force to organizations as to individuals); *United States v. Manuli Rubber Indus., S.P.A.*, No. 08-60198-CR, 2008 WL 5533574 (S.D. Fla. Dec. 10, 2008) (treating a corporation’s plea colloquy in exactly the same manner as it would an individual’s plea colloquy). *Cota* is particularly relevant in that the court considered whether the filing of a plea application, which laid out the information needed for a plea colloquy down on paper, fulfilled the requirements in 11(b). The court concluded that the application was insufficient, and that an actual colloquy, held in open court, was necessary for the corporate defendant. 2009 WL 1765647, at \*3–4.

95. As discussed in the Introduction, the fourth justification for punishment, incapacitation, doesn’t apply in this context. See *supra* notes 10–11 and accompanying text for a discussion of the four theories of punishment and how they relate to the thesis of this Note.

scope of such a project, however, it will have to be put to the side. At the same time, it is worthwhile to consider the ways that compelling organizational attendance at a plea colloquy may further or limit the realization of the purposes of corporate criminal law.

Compelling attendance may further the goals of the criminal law in four ways. First, a retributive effect may be brought about insofar as compelling the organizational defendant to appear imposes an additional burden on that organization and requires that the organization “personally” answer for its criminal wrongdoing and be publicly condemned.<sup>96</sup> Both of these consequences can be understood as a method of punishing the corporation, viewed as a good in its own right under the retributivist framework. Second, requiring attendance may serve to deter other organizations from committing criminal acts, as those who work for other organizations may wish to avoid being haled into court and forced to go through a similar public proceeding. Third, compelling the organization to appear may serve to rehabilitate the offending organization in two ways. As in the case of deterrence, the additional burdens imposed by requiring attendance could serve equally well to directly disincentivize individuals within that organization from committing another criminal act. Rehabilitation may also be brought about indirectly by forcing a manager of the organization to appear: doing so may “pierce” through to the decision makers of the organization in a way that merely having counsel appear will not.

This last point deserves greater discussion. Much has been written on the problems that attorneys for organizations face. In-house counsel, for example, frequently confront difficult ethical dilemmas in which they are given the choice of either failing to fulfill their obligations to ensure compliance and root out misconduct, or resigning or being terminated and becoming a “pariah in the industry.”<sup>97</sup> This dilemma tends to incentivize in-house counsel to avoid giving the full, negative legal picture to the officers or board of directors.<sup>98</sup> Moreover, corporate officers and directors are incentivized to distribute the legal work of the organization to different attorneys, both in-house and outside, in order to “shop around” for lawyers who will approve their proposals.<sup>99</sup> While these kinds of issues are much discussed in the literature,<sup>100</sup> the general point is that a disconnect frequently arises be-

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96. *E.g.*, *Garcia-Aguilar v. U.S. Dist. Court*, 535 F.3d 1021, 1026 (9th Cir. 2008) (“A defendant’s guilty plea is a confession, freely and publicly made, that he is a criminal. This has immediate and enduring effects on the defendant’s standing in the community, and for that reason and many others is often an excruciating experience.”).

97. Lisa H. Nicholson, *Sarbox 307’s Impact on Subordinate In-House Counsel: Between a Rock and a Hard Place*, 2004 MICH. S. L. REV. 559, 598.

98. *Id.* at 598–99 (“[I]t may not be easy for any in-house counsel to bring situations where the company’s senior management is failing to take appropriate actions to the attention of the company’s board of directors . . .”).

99. *Id.* at 599–600.

100. *See, e.g., id.*; E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1 (2006); Sally R. Weaver, *Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing—Or Something?*, 30 U.C. DAVIS L. REV. 483 (1997); Jan C.

tween what an organization's attorneys know and what its managers know, making it more likely that the organization will engage in wrongful behavior. Forcing a manager to appear personally at a plea colloquy may be a means for the court to pierce through to the organization's decision makers, thereby decreasing the likelihood that the organization will engage in criminal conduct in the future.

Fourth and finally, compelling attendance may help to bring about a more efficient system of justice: a court would be less likely to have to adjourn and reschedule a plea colloquy due to ill-informed counsel, as illustrated by the hypothetical in the Introduction, if the organization is obligated to attend the proceeding.

The other side of the coin, however, is that compelling attendance comes with disadvantages. First, requiring someone from the organization to appear can impose a significant burden on the individual actually appearing: she will have to prepare for the hearing, travel to court, and suffer the negative publicity brought about by the plea colloquy. This may seem particularly unfair as it is the organization, and not the individual appearing on the organization's behalf, that is being held criminally liable. Second, giving federal judges the discretion to compel attendance necessarily creates the possibility that the discretion will be abused. As with any other power given to the courts, judges may use their authority to compel attendance in a way that is abusive or unjust to the organization or the individual being required to attend.<sup>101</sup>

Empirical data must be gathered to determine the extent to which compelling an organizational defendant to appear brings about these benefits and disadvantages. However the facts turn out, Congress has already decided that, at least in some contexts, high-ranking corporate officers must personally involve themselves in legal matters. Section 302 of the Sarbanes-Oxley Act of 2002 requires the CEO and CFO of a corporation to "certify in each annual or quarterly report" that the officer has reviewed the report, that the report is accurate to the best of the officer's knowledge, that internal controls are in place to ensure such material information is made known to the officers, and that the officer has disclosed the information to the corporation's auditors.<sup>102</sup> The act, passed in the wake of several corporate scandals, was intended to hold corporations accountable for their misconduct on the theory that requiring senior management to become personally involved in SEC filings would make criminal acts less likely. Importantly, the act didn't expand or diminish any officer's legal responsibilities, but only required that the CEO and CFO "certify" what they were already required to do.

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Nishizawa, Note, *Ethical Conflicts Facing In-House Counsel: Dealing with Recent Trends and an Opportunity for Positive Change*, 20 GEO. J. LEGAL ETHICS 849 (2007).

101. Whether and how much these disadvantages occur is, of course, an empirical question beyond the scope of this Note.

102. Sarbanes-Oxley Act, 15 U.S.C. § 7241(a) (2006).

### C. *The Rights Implicated in a Guilty Plea*

A plea colloquy implicates a great number of the defendant's rights. While it isn't necessary to go into great detail to support such an uncontroversial claim, it is worth recalling some of the rights waived at a plea colloquy. Subdivisions (c)(3) and (c)(4) of Rule 11 were designed to satisfy the requirements of understanding for a valid waiver set forth in *Boykin v. Alabama*.<sup>103</sup> *Boykin* explicitly noted three constitutional rights implicated by a guilty plea: the Fifth Amendment's protection against self-incrimination,<sup>104</sup> the Seventh Amendment's right to trial by jury,<sup>105</sup> and the Sixth Amendment's right to confront one's accusers.<sup>106</sup> But there are a number of other rights not mentioned in *Boykin* that are implicated by a plea colloquy. By pleading guilty, an organizational defendant waives its right against double jeopardy,<sup>107</sup> its right to be presumed innocent until proven guilty,<sup>108</sup> its right against unreasonable searches and seizures,<sup>109</sup> and its right to due process under both the Fifth and Fourteenth Amendments.<sup>110</sup>

Even more rights are implicated when an *individual* pleads guilty. For example, whereas organizations do not have a right against self-incrimination,<sup>111</sup> individual defendants do,<sup>112</sup> and they waive this right at a plea colloquy. Further, while it is an open question whether a corporation has a right to confront its accusers<sup>113</sup> or a right against cruel and unusual punishment,<sup>114</sup> the Constitution does vest these rights in individual defendants.<sup>115</sup> The fact that there are a great many fundamental rights implicated

103. 395 U.S. 238 (1969); *see also* FED. R. CRIM. P. 11 advisory committee's note (1974).

104. 395 U.S. at 243. However, the right against self-incrimination doesn't apply to corporations. *Braswell v. United States*, 487 U.S. 99, 104–05 (1988).

105. *Boykin*, 395 U.S. at 243. Corporations *do* have the right to a trial by jury. *See* *Ross v. Bernhard*, 396 U.S. 531, 533–34 (1970).

106. *Boykin*, 395 U.S. at 243. It is unclear whether corporations have any rights under the Confrontation Clause. *See* *United States v. King*, 134 F.3d 1173, 1175–77 (2d Cir. 1998).

107. *Smith v. United States*, 359 F.2d 481, 483 (8th Cir. 1966); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568–76 (1977) (holding a corporation has a right against double jeopardy). *See generally* Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341 (2002) (discussing the policy rationales underlying appeal rights under the Double Jeopardy Clause).

108. *See* *United States v. Mfrs' Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49, 50–51 (9th Cir. 1972).

109. A corporation has a right against unreasonable searches and seizures, *see* *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978); *Hale v. Henkel*, 201 U.S. 43 (1906), but when found guilty, it no longer has any remedy available by invoking that right, having already been convicted.

110. *See Relocatable Bldg.*, 462 F.2d at 49–50; *see also* *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893); *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886).

111. *Braswell v. United States*, 487 U.S. 99, 104–05 (1988).

112. U.S. CONST. amend. V.

113. *See* *United States v. King*, 134 F.3d 1173, 1175–77 (2d Cir. 1998).

114. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989).

115. U.S. CONST. amend. VI; U.S. CONST. amend. VIII.

when an individual pleads guilty is one more reason to think that Rule 11 places a great deal of importance on the defendant's presence. Because 11(b) applies to all defendants—both organizational and individual<sup>116</sup>—that preference must apply with equal force to organizational defendants.

#### D. Flexibility in Plea Colloquy Procedure

Federal district courts have a fair degree of flexibility in plea colloquy procedures. In *Brady v. United States*, the Supreme Court considered the validity of a guilty plea and held that the waiver of a constitutional right in this context must be voluntary, knowing, and intelligent, “done with sufficient awareness of the relevant circumstances and likely consequences.”<sup>117</sup> The Court further held in *McCarthy v. United States* that district courts are obligated to strictly comply with the procedures provided in Rule 11.<sup>118</sup> At the same time, while Rule 11's procedure is mandatory, “literal compliance with its *substance*, not mere talismanic utterance of its words, is imperative.”<sup>119</sup> Even if all the literal requirements of Rule 11 are satisfied, that does not mean that the district court has complied with the requirements of the plea colloquy: “[t]he objective of [this rule] . . . is to flush out and resolve all . . . issues [of voluntariness of plea], but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge . . . .”<sup>120</sup> The district courts must ensure that the substantive protections the Rule attempts to give the defendant are in fact upheld. In that vein, the Supreme Court held that Rule 11 “is designed to *assist* the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary . . . [and] to produce a complete record at the time the plea is entered . . . .”<sup>121</sup>

Federal courts of appeals have made a similar determination. In *United States v. Saft*, the Second Circuit held that in enacting the Rule:

Congress meant to strip district judges of freedom to decide *what* they must explain to a defendant . . . *not to tell them precisely how to perform this important task in the great variety of cases that would come before them*. . . . [I]t cannot be supposed that Congress preferred this to a more

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116. See, e.g., *United States v. Manuli Rubber Indus., S.P.A.*, No. 08-60198-CR, 2008 WL 5533574 (S.D. Fla. Dec. 10, 2008) (adopting a corporate defendant's plea colloquy, finding that the defendant understands the rights being waived by the plea and is pleading knowingly and voluntarily); see also *supra* note 94.

117. *Brady v. United States*, 397 U.S. 742, 748 (1970).

118. *McCarthy v. United States*, 394 U.S. 459, 463 (1969).

119. *United States v. Clark*, 574 F.2d 1357, 1358 (5th Cir. 1978) (per curiam) (emphasis added).

120. *Fontaine v. United States*, 411 U.S. 213, 215 (1973).

121. *McCarthy*, 394 U.S. at 465 (emphasis added).

meaningful explanation, provided that all the specified elements were covered.<sup>122</sup>

As a result, while district courts must abide by Rule 11's procedures, they may choose to go further.

Two circuits have specifically considered whether statements by an individual<sup>123</sup> defendant's counsel are enough to satisfy the requirements of Rule 11. In *United States v. Tucker*, the Fourth Circuit held that such statements "do not satisfy Rule 11's requirement that the court personally address the defendant."<sup>124</sup> In *United States v. Cammisano*, the Eighth Circuit made the same determination, finding that the "defendant's statements expressing confidence in his attorney and adopting his attorney's remarks were [insufficient] to show compliance with [the rule governing entry of guilty pleas]."<sup>125</sup>

The fundamental importance of the plea colloquy has thus been affirmed by the language and history of the Rules, the Supreme Court's jurisprudence, and the large number of constitutional rights implicated in the proceeding. District courts have flexibility in plea colloquy procedure and there is a significant possibility that compelling attendance will further the goals of the criminal law. These conclusions together support the view that district courts have the authority to compel the attendance of organizational defendants at plea colloquies.

### III. THE INHERENT POWERS OF THE COURT TO COMPEL ATTENDANCE

While the inherent powers of the federal courts are notoriously difficult to define precisely, the doctrine tends to give wide latitude to the courts regarding undue delay and attendance. Because the doctrine is not based on any statute, rule, or regulation, this Part constitutes an entirely separate and independent justification for the thesis of this Note.

#### A. *The Inherent Powers Doctrine*

The Supreme Court has held that district courts have certain "inherent" or "implied" powers, those that a court must have "because they are necessary to the exercise of all others."<sup>126</sup> "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own

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122. 558 F.2d 1073, 1079 (2d Cir. 1977) (second emphasis added); see also *United States v. Scharf*, 551 F.2d 1124, 1129 (8th Cir. 1977) ("[The] district courts are required to act in substantial compliance with it although, as in the case of other subdivisions of Rule 11, ritualistic compliance is not required.").

123. These cases necessarily apply only to individual, rather than organizational, defendants, as 43(b)(1) on its face permits the absence of organizational defendants at a plea colloquy. However, these cases serve to demonstrate the importance the federal courts have placed on plea colloquies.

124. *United States v. Tucker*, 425 F.2d 624, 629 (4th Cir. 1970).

125. *United States v. Cammisano*, 599 F.2d 851, 855 (8th Cir. 1979).

126. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).

affairs so as to achieve the orderly and expeditious disposition of cases.’<sup>127</sup> The inherent powers doctrine has been interpreted broadly by various federal courts, encapsulating a number of different powers not found in any rule or statute.<sup>128</sup> Inherent powers include the ability of a district court to manage its docket and ensure that matters are dealt with expeditiously.<sup>129</sup> Courts may hold parties in contempt<sup>130</sup> and impose sanctions on those appearing before the court.<sup>131</sup> The Supreme Court has gone so far as to say that the adoption of the Federal Rules did not limit the scope of the court’s inherent powers.<sup>132</sup>

At the same time, the limits of the power are nebulous. Some commentators have suggested, for instance, that the doctrine should be extended to give district courts the power to compel parties to participate in alternative dispute resolution, arguing that this fits broadly into the established framework of the doctrine.<sup>133</sup> The issue, however, remains open. Other commentators have suggested that the doctrine corroborates the view that Federal Rule of Civil Procedure 16<sup>134</sup> gives the courts the power to compel participation in settlement conferences; that issue, too, remains undecided.<sup>135</sup> Given the established ambiguity of the courts’ inherent powers, it is no surprise that commentators have called the doctrine “shadowy” and difficult to define.<sup>136</sup>

### B. *Undue Delay and Attendance*

While the precise outline of courts’ inherent powers has never been clearly drawn, there are two aspects of the doctrine which support the notion

127. *Id.* (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962)); *see also* *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987); *Thomas v. Arn*, 474 U.S. 140, 146 (1985).

128. *See, e.g., Chambers*, 501 U.S. at 43–46; *Link*, 370 U.S. at 629.

129. Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 760 (2001).

130. *Chambers*, 501 U.S. at 43–44.

131. *Id.* at 43–45.

132. *See id.* at 42–43 (holding that the Federal Rules of Civil Procedure do not diminish the inherent powers of the courts and that the doctrine applies to all cases heard by the federal courts).

133. *E.g.,* Amy M. Pugh & Richard A. Bales, *The Inherent Powers of the Federal Courts to Compel Participation in Nonbinding Forms of Alternative Dispute Resolution*, 42 DUQ. L. REV. 1 (2003).

134. This rule permits a court to order the parties to appear at a pretrial conference to accomplish any one of a number of broad goals. FED. R. CIV. P. 16.

135. *E.g.,* Jennifer O’Hearne, Comment, *Compelled Participation in Innovative Pretrial Proceedings*, 84 NW. U. L. REV. 290 (1989); Tony J. Masciopinto, Note, *G. Heileman Brewing Co. v. Joseph Oat Corp.: Expanding Rule 16’s Scope To Compel Represented Parties with Full Settlement Authority To Attend Pretrial Conferences*, 39 DEPAUL L. REV. 931 (1990). *See generally* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989); *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988).

136. *E.g.,* Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 485 (1958). For background information on the inherent powers, *see generally* Pushaw, *supra* note 129, at 760–82.

that a district court can compel the attendance of an organizational defendant at a plea colloquy: undue delay and the compelling of attendance of parties.

The Supreme Court has applied the inherent powers doctrine to cases involving undue delay to the court's proceedings. In *Link v. Wabash*, the Supreme Court considered a civil case that had been ongoing for six years.<sup>137</sup> The trial judge had notified all parties that there would be a pretrial conference on a particular date at 1:00 p.m. At 10:30 a.m. on the date of the conference, the petitioner called the court and asked the judge's secretary to inform the judge that he would not be able to attend because he was taking care of some paperwork. The judge, finding that the petitioner had not articulated a reasonable basis for failing to appear, dismissed the action, explicitly finding its ability to do so under the inherent powers doctrine. Noting that "[t]he authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted," the Court held that district courts have the inherent power to invoke such a sanction to prevent "undue delays in the disposition of pending cases and to avoid congestion."<sup>138</sup>

A district court judge might find that compelling the presence of an organizational defendant at the plea colloquy is necessary to prevent undue delay. For example, a court might believe that the defendant's counsel does not have sufficient information to respond to the long series of questions that are usually propounded at a plea colloquy,<sup>139</sup> and rather than have several separate hearings, would prefer to have all parties present to avoid any delay in the final disposition of the case. And if a district court may dismiss a case with prejudice to avoid undue delay, it is plausible to assume it may compel the attendance of the criminal defendant for the same reason.

The inherent powers doctrine has also given courts latitude in matters of attendance. There are two circumstances in which a district court has the authority to compel attendance or permit absence of an individual under the inherent powers doctrine.<sup>140</sup> First, a district court may compel the attendance of the parties to a hearing to discuss the disappearance of evidence. In *Brockton Savings Bank v. Peat, Marwick, Mitchell & Co.*, the First Circuit considered a case where the lower court entered a default judgment against the defendant in a civil case involving a securities transaction.<sup>141</sup> After failing to produce several documents for discovery, the defendant later claimed that it did not have the documents in its possession. The magistrate ordered the appearance of the defendant's president and a secretary to explain the

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137. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 627 (1962).

138. *Id.* at 629.

139. *See* FED. R. CRIM. P. 11(b)(1). A court is in fact forbidden from accepting a guilty plea without first determining that the plea has a factual basis. *E.g.*, FED. R. CRIM. P. 11(b)(3); *Libretti v. United States*, 516 U.S. 29, 37–38 (1995).

140. This does not include compelling the parties' attendance for alternative dispute resolution. *See supra* note 133 and accompanying text.

141. 771 F.2d 5, 8–9 (1st Cir. 1985).

issue, but they did not attend.<sup>142</sup> The court then adopted the magistrate's recommendation to enter a default judgment for the plaintiff and impose sanctions on the defendant.<sup>143</sup> The First Circuit upheld the trial court's decision, finding that the magistrate did have the authority to compel the defendant's attendance and that the "failure to appear [is] one of several grounds supporting the entry of a default judgment."<sup>144</sup> Similarly, if a trial court finds that the absence of an organizational defendant impedes the progress of the proceedings—for example, as discussed above, in cases where the organizational defendant's absence makes fulfilling the requirements of 10(b) take significantly longer—the same reasoning in *Brockton* would apply and the appellate courts might very well uphold the decision to compel attendance on inherent powers grounds.

Second, district courts have the authority to order a criminal defendant to leave the courtroom during her own trial. In *Illinois v. Allen*, the Supreme Court decided a case where a state court judge ordered the defendant to leave the courtroom because his behavior was so disruptive that the trial could not proceed.<sup>145</sup> Though the Court noted that the right to be present at trial was "[o]ne of the most basic of the rights guaranteed by the Confrontation Clause,"<sup>146</sup> it still held that the defendant can waive her right to be present if she continues to be disruptive even after the judge has warned her.<sup>147</sup> And if a judge is permitted to order a defendant's absence, thereby limiting the scope of her constitutional rights, then surely a judge may make a similar order and compel the defendant's presence, thereby ensuring that the defendant's rights are protected.

There are two points to make regarding how the *Allen* decision relates to compelling the attendance of an organizational defendant. First, while *Allen* dealt with the authority of a state court judge, the Supreme Court's ruling applies with equal force to federal district courts. *Allen* deals with a federal constitutional issue;<sup>148</sup> moreover, the Advisory Committee Notes to Rule 43 explicitly state the Rule was amended to incorporate *Allen*.<sup>149</sup>

Second, while the authority to remove a criminal defendant may appear to be based on the Federal Rules of Criminal Procedure, the Supreme Court based its decision on the inherent powers doctrine. The holding in *Allen* has been incorporated into the Federal Rules of Criminal Procedure,<sup>150</sup> and this may suggest that the decision was based on the text of the Rules. However, the basis of the *Allen* decision is explicitly grounded in the

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142. *Id.* at 9.

143. *Id.*

144. *Id.* at 12.

145. *Illinois v. Allen*, 397 U.S. 337, 339 (1970).

146. *Id.* at 338.

147. *Id.* at 342–43.

148. *Id.* at 342; *see also* U.S. CONST. amend. VI.

149. FED. R. CRIM. P. 43 advisory committee's note (1974).

150. FED. R. CRIM. P. 43(c)(1)(C).

inherent powers doctrine. The *Allen* Court appeared to reference the concept when it stated, “Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect *inherent in the concept of courts and judicial proceedings.*”<sup>151</sup> In *Chambers*, the Court held in dicta that *Allen* was based on the inherent powers doctrine, citing *Allen* for the proposition that “[t]here are other facets to a federal court’s inherent power. The court may bar from the courtroom a criminal defendant who disrupts a trial.”<sup>152</sup> As a result, the Court’s decision in *Allen*, which permits a federal district court judge to remove an obstreperous defendant from her own trial, is another example where the inherent powers doctrine gives the district courts latitude in determining matters of attendance.

There is a counterpoint to consider. The inherent powers doctrine is primarily concerned with the ability of trial judges to efficiently manage their courts.<sup>153</sup> That concern does not seem relevant when a court is trying to protect the rights of a party appearing before it: the concern about the fair administration of justice or the importance of the rights that are waived at a guilty plea does not bear on the issue of efficiency.<sup>154</sup> However, the narrow point being made here is that if the inherent powers doctrine permits a court to limit a defendant’s constitutional rights to further some recognized goal of the doctrine, then giving a court the power to enforce a similar order that *protects* a constitutional right does not seem far-fetched, especially if some goal of the inherent powers doctrine is also furthered. Section III.B notes that compelling the presence of an organizational defendant may very well serve the goal of efficient court management, which furthers a recognized goal of the doctrine. At the same time, it would be odd to say that a court has the ability to compel an organizational defendant under the inherent powers doctrine *only* in cases where doing so would promote efficiency, but *not* in cases where doing so would better protect a criminal defendant’s rights. It seems much more plausible to find that (1) because this power furthers a recognized goal of the inherent powers doctrine, it may be used at any time by the court for any legitimate purpose, or (2) protecting a defendant’s rights is in fact a goal of the inherent powers doctrine. In either case, the doctrine would give the district courts the power to compel an organizational defendant’s presence.

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151. 397 U.S. at 343 (emphasis added).

152. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

153. *See, e.g., id.* at 43 (“It has long been understood that ‘[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,’ powers ‘which cannot be dispensed with in a Court, because they are *necessary* to the exercise of all others.’ ” (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)) (emphasis added)).

154. Thanks to Professor Radin for this critique.

## CONCLUSION

The Federal Rules of Criminal Procedure state that organizational defendants need not be present at plea colloquies, but the Rules do not explicitly state whether district courts can compel the attendance of unwilling defendants. Three main lines of reasoning indicate that district courts do have this authority. First, a detailed analysis of a number of other Rules suggests that judges have the ability to compel attendance. Second, plea colloquies implicate the most basic rights that our Constitution and justice system vest in criminal defendants, and district courts traditionally have been given a great deal of leeway in conducting those colloquies; moreover, requiring an organization's attendance may substantially further the goals of criminal law. Finally, the inherent powers doctrine gives district courts authority not found in any particular statute, rule, or regulation. The doctrine has provided courts with flexibility in matters of undue delay and attendance in particular.

While a detailed argument concerning a relatively minor subsection of the Rules of Criminal Procedure might at first appear to be an obscure topic, a deeper look reveals that the issue goes to the heart of why we have a criminal law in the first place. This analysis has clarified a number of other provisions in the Rules, providing further guidance on the way our courts should proceed in criminal cases. It has shown how compelling an organizational defendant's presence can serve to further the goals of deterrence, rehabilitation, and retribution. And finally, it is an independent good that federal judges know what powers they have in their official capacity.

In sum, this Note has sought to provide some insight into the ways our federal courts can ensure criminal defendants appearing before them are dealt with in a manner that is not only efficient, but also just.

