A Primer on the Jurisdiction of the U.S. Courts of Appeals

Second Edition

Thomas E. Baker
Florida International University
College of Law

Federal Judicial Center
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Contents

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Thomas E. Baker
Miami, Florida

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Dedication

From August 1977 to August 1979, I was privileged to serve as a law clerk to the Honorable James C. Hill, then a judge of the U.S. Court of Appeals for the Fifth Circuit, now serving in the Eleventh Circuit. I dedicate this monograph to my mentor and friend who has served for over three decades in the grand tradition of the Third Article.

T.E.B.

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CHAPTER 1

Introduction, Background, and Overview

§ 1.01 Purpose of This Primer

A primer is a brief introductory text about a subject, and that is what this modest primer is meant to be: a brief introduction to the complexity and nuance in the subject-matter jurisdiction of the U.S. courts of appeals. The organization is topical in seven chapters, followed by an annotated bibliography. Chapter 1 provides some introduction, background, and overview. Chapter 2 covers procedures related to the exercise of subject-matter jurisdiction. Civil appeals are discussed in two chapters: Chapter 3 deals with appeals from final judgments, and Chapter 4 deals with interlocutory appeals. Extraordinary writs are covered in Chapter 5. Criminal appeals are the subject of Chapter 6. Chapter 7 summarizes the review of federal administrative agencies.

That this is not a full-length treatise should not be lost on the reader. A complete, thorough, and self-contained work on this subject necessarily would be several times longer with many more digressions. Each of the two leading multivolume treatises takes up several feet of library shelf space, and scores of supplements are added annually. Discussion here is meant to be introductory. As a research tool this effort is derivative, as well. The reader is directed to primary and secondary treatments of each topic by selective footnote references. The annotated bibliography surveys the literature more widely.

Finally, the reader should bear in mind that this primer is meant as a supplement, not a substitute, for the jurisdictional outlines and guides that the various courts of appeals have prepared for the benefit of their new judges. Likewise, over the years the Federal Judicial Center has published numerous studies and reports on particular topics relevant to

the courts of appeals, and many of these reports are downloadable at the Center's website.[1]

§ 1.02 Scope of This Primer

In order to demarcate the scope of this primer, it is useful to identify various matters that will not be discussed.

First, there are a number of "second-look" procedures available in the district court.[2] The most common are motion for judgment as a matter of law;[3] motion to amend or make additional findings;[4] motion for a new trial;[5] motion to alter or amend a judgment;[6] motion for relief from clerical mistake;[7] motion for relief from mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, void judgment, enforcement inequity, or some "other reason";[8] and motion for stay of proceeding.[9]

Second, the appellate jurisdiction of the Supreme Court is beyond the scope of this primer.[10] In 1988, Congress eliminated substantially all of what remained of the Supreme Court's statutory mandatory appellate jurisdiction, which previously had provided a direct appeal from the district court, bypassing review in the court of appeals.[11] Still, a very few of the arcane provisions for convening a three-judge district court with di-

1. The Center's site on the World Wide Web can be found at http://www.fjc.gov. Judges and federal court staff can also find these materials on the Center's intranet site, FJC Online, at http://cwn.fjc.dcn. The courts of appeals have their own websites that contain a wealth of online materials. For example, the Seventh Circuit has a Practitioner's Handbook online in a "wiki" format that allows members of the bar to post and revise its content. *See* http://www.ca7.uscourts.gov/.

2. *See infra* § 2.06.

3. Fed. R. Civ. P. 50(b).

4. Fed. R. Civ. P. 52(b).

5. Fed. R. Civ. P. 59(a).

6. Fed. R. Civ. P. 59(e).

7. Fed. R. Civ. P. 60(a).

8. Fed. R. Civ. P. 60(b).

9. Fed. R. Civ. P. 62.

10. *See generally* Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, Supreme Court Practice (8th ed. 2002); Thomas E. Baker, *A Primer on Supreme Court Procedures*, A.B.A. Preview of United States Supreme Court Cases 475–85 (Aug. 9, 2004) (available at http://www.abanet.org/publiced/preview/home.html).

11. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

rect appeal to the Supreme Court survive today.[12] And occasionally Congress enacts a statute containing an explicit authorization for a direct appeal to the Supreme Court for constitutional challenges to the statute.[13]

Third, standards of review are not detailed here. The various phrases for defining the relevant scope of appellate review of a given appellate issue prescribe the following: the degree of deference owed to the court being reviewed; the affirmative power of the reviewing court; the relevant materials appropriate for consideration; the level of scrutiny on review; and the framework of analysis for questions of fact and law. A thoughtful elaboration of these functions would require a separate treatise.[14] A standard of review determines the analytical process for deciding the merits of an issue on appeal over which the appellate court previously has concluded that it has jurisdiction. Although the two concepts are related, this primer is limited to the process of reaching the preliminary conclusion, i.e., the decision to decide the appeal.

Fourth, this primer cannot summarize all the complexities of federal appellate procedure. Full-length books have been given over to the art of appellate advocacy.[15] The Federal Rules of Appellate Procedure create a national framework for appellate procedure, which has been embellished in each court of appeals by local rules and internal operating pro-

12. 28 U.S.C. § 1253 (2000). As of this writing, the 2006 edition of the U.S. Code was still in production and not completely available. Therefore, all U.S. Code citations in this primer are to the year 2000 unless otherwise cited. *See generally* 17 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Vikram David Amar, Federal Practice & Procedure: Jurisdiction § 4040 (3d ed. 2007) [hereinafter Federal Practice & Procedure]; 22 James Wm. Moore, Daniel R. Coquillette, Gregory P. Joseph, Sol Schreiber, Jerold S. Solovy & Georgene M. Vairo, Moore's Federal Practice §§ 404.01–494.32 (3d ed. 2006) [hereinafter Moore's Federal Practice].

13. *Compare* United States v. Eichman, 496 U.S. 310 (1990) (deciding appeal under the Flag Protection Act, 18 U.S.C. § 700(d) (1988 & Supp. I 1989)), *with* Office of Senator Mark Dayton v. Hanson, 127 S. Ct. 2018 (2007) (dismissing appeal under the Congressional Accountability Act, 2 U.S.C. § 1301 (2000 & Supp. IV 2004)).

14. *See generally* Steven Alan Childress & Martha S. Davis, Federal Standards of Review (3d ed. 1999).

15. *E.g.*, David G. Knibb, Federal Court of Appeals Manual (5th ed. 2007) [hereinafter Federal Court of Appeals Manual]; Robert J. Martineau, Modern Appellate Practice: Federal and State Civil Appeals (1983); Michael E. Tigar & Jane B. Tigar, Federal Appeals: Jurisdiction and Practice (3d ed. 1999) [hereinafter Federal Appeals: Jurisdiction and Practice]; Frederick Bernays Wiener, Briefing and Arguing Federal Appeals (2d ed. 1961).

cedures.[16] Only those appellate procedures that determine directly the power to decide an appeal are deemed relevant here.

Fifth and finally, this primer focuses only on the decision-making responsibility of the courts of appeals to review cases. Matters of judicial administration for the courts of the circuit other than the courts of appeals, although quite important, are left to the judicial council in each circuit. The Judicial Conference of the United States is the national administrative authority.[17] Thus such matters as the promulgation of the rules of procedure generally[18] and the procedures for judicial disability or misconduct[19] are beyond this treatment.

§ 1.03 History of the Courts of Appeals

Any study of the federal courts or their jurisdiction must be informed by some sense of history.[20] More particularly, the major historical stages of the federal court system have been reflected in the creation and the reforms of the middle tier.[21] Article III of the Constitution vested the federal judicial power "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[22] The original implementing statute, the historic Judiciary Act of 1789,[23] provided for two tiers of courts below the Supreme Court. The district courts were exclusively trial courts of limited jurisdiction. The circuit courts were the principal trial courts, convened in each district with

16. Fed. R. App. P. 1, 47. *See infra* § 1.07.

17. *See* Russell R. Wheeler, A New Judge's Introduction to Federal Judicial Administration (Federal Judicial Center 2003); Russell R. Wheeler, Origins of the Elements of Federal Court Governance (Federal Judicial Center 1992); 16 Federal Practice & Procedure, *supra* note 12, § 3939.

18. Fed. R. App. P. 47; 28 U.S.C. § 2071 (2000 & Supp. V 2005). *See infra* § 1.07.

19. 28 U.S.C. §§ 351–364 (Supp. V 2005), 372 (2000 & Supp. V 2005). *See generally* Russell R. Wheeler & Cynthia Harrison, Creating the Federal Judicial System (Federal Judicial Center 3d ed. 2005).

20. *See generally* Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (5th ed. 2003); Felix Frankfurter & James M. Landis, The Business of the Supreme Court (1928); Erwin C. Surrency, History of the Federal Courts (2d ed. 2002).

21. *See* Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 Sw. L.J. 687, 688 (1981).

22. U.S. Const. art. III, § 1.

23. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

original jurisdiction over more serious criminal offenses, diversity suits above a set monetary amount in controversy, and cases in which the United States was a party. The circuit courts also had some appellate jurisdiction to review specified categories of district court decisions, although the Supreme Court was the principal appellate court. The circuits were arranged geographically and had no judges of their own; two Supreme Court justices "rode circuit" to sit with a district judge as a panel. Soon afterwards, Congress reconstituted the circuit courts to require a panel of one justice and one district judge in order to lessen the travel burden on the justices.[24]

The famous, though short-lived, "Midnight Judges" Act of 1801 would have created permanent circuit judgeships and would have reconstituted the circuit courts in three-judge panels for each of the newly numbered six circuits.[25] Charging court-packing by the Federalists, the successor Jeffersonian Congress repealed the 1801 Act and returned the circuit courts to the status quo ante, except that their quorum was further reduced to require only one district judge sitting alone.[26]

For a time, congressional alteration of the court system was driven only by geography. The duty of riding circuit continued for the justices, which obliged Congress to add to the membership of the Supreme Court to accommodate western expansion and the creation of new circuits. A seventh circuit and a seventh justice were added in 1807.[27] Congress resisted increasing the size of the Supreme Court, for a time, simply by not bringing new states into the circuits. In 1837, pent-up demand resulted in an increase to nine justices, with a concomitant redrawing of circuit lines to create nine circuits.[28] A tenth circuit was added, not too long after, to include the west coast states, and a tenth justice was added to the Supreme Court.[29] In 1862, and again in 1866, Congress rearranged the

24. Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333–34.

25. Act of Feb. 13, 1801, ch. 4, §§ 6–7, 2 Stat. 89, 90–91 (repealed 1802).

26. Act of Apr. 29, 1802, ch. 31, §§ 1–5, 2 Stat. 156, 156–59, *amended by* Act of Mar. 3, 1803, ch. 40, 2 Stat. 244.

27. Act of Feb. 24, 1807, ch. 16, 2 Stat. 420, *amended by* Act of Mar. 22, 1808, ch. 38, 2 Stat. 477, and Act of Feb. 4, 1809, ch. 14, 2 Stat. 516.

28. Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

29. Act of Mar. 2, 1855, ch. 142, § 1, 10 Stat. 631, 631; Act of Mar. 3, 1863, ch. 100, 12 Stat. 794, *amended by* Act of Feb. 19, 1864, ch. 11, 13 Stat. 4.

circuits, settling on nine circuits; in 1869, a separate circuit judgeship was created for each circuit, which further reduced the justices' circuit-riding responsibility.[30]

From 1870 to 1891, federal court litigation increased dramatically, as a result of geographical expansion, population growth, commercial development, and congressional extensions of jurisdiction. When House and Senate reformers could not agree on what to do, nothing was done, and the courts were hard-pressed to keep up with their work. The country had become too large for circuit riding to be a feasible duty for the justices. A complement of fewer than a dozen circuit judges could not alone supervise the growing number of district courts, which by then had reached sixty-five. Consequently, an appeal from a district court decision taken to a circuit court "panel" composed of the same district judge was viewed as a waste of time; by statute, appeals from the circuit court to the Supreme Court were almost eliminated, as well.

With the Circuit Court of Appeals Act of 1891, commonly known as the Evarts Act, Congress made a long overdue structural change, which marks the system's modern organization and structure.[31] The Evarts Act created a circuit court of appeals for each circuit, composed of two circuit judges (the Act created a second judgeship in each circuit) and either one circuit justice or one district judge. The circuit court continued as a trial court, but its appellate jurisdiction was transferred to the circuit court of appeals. A second appeal as of right to the Supreme Court from the circuit court of appeals was limited by subject matter and by an amount-in-controversy requirement. In the remaining cases, the decision of the circuit court of appeals was final, subject only to discretionary review by the Supreme Court by a writ of certiorari or by certification. The structure was streamlined further in 1911, when the anachronistic circuit courts were abolished and their trial jurisdiction was transferred to the district courts.[32] In 1925, Congress dramatically expanded the Supreme Court's discretion over its docket.[33] Thus the modern structure

30. Act of July 15, 1862, ch. 178, 12 Stat. 576; Act of July 23, 1866, ch. 210, 14 Stat. 209; Act of Apr. 10, 1869, ch. 22, 16 Stat. 44.

31. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

32. Act of Mar. 11, 1911, Pub. L. No. 61-475, §§ 1–135, 36 Stat. 1087, 1087–1135.

33. Act of Feb. 13, 1925, Pub. L. No. 68-415, 43 Stat. 936.

contemplates the district court for trial, the court of appeals for the appeal as of right, and the Supreme Court for the discretionary final review.[34]

The federal court system has not evolved much beyond the 1911 structure, except for the occasional redrawing of the geographical lines. In the 1948 Judicial Code, Congress formally added the District of Columbia Circuit, and the circuit courts of appeals were formally renamed the courts of appeals for the various circuits.[35] Congress added a tenth circuit in 1929,[36] an eleventh circuit in 1981,[37] and the Federal Circuit in 1982.[38] For decades, members of Congress, judges, and federal court scholars have been debating whether or not to divide the Ninth Circuit and how to go about doing so.[39]

Two relevant lessons may be gleaned from even as brief an historical account as this. First, the evolution of our federal court structure demonstrates a congressional preoccupation with the middle tier—today the courts of appeals for the various circuits. The jurisdiction of these courts significantly regulates the flow of cases to the Supreme Court of the United States, and, in the other direction, their jurisdiction allows for the direct judicial supervision of the district courts. Second, an understanding of the historical function of the intermediate courts can shed light on their current jurisdiction. The first courts of the circuits were trial and appellate hybrid tribunals. Some aspects of each function remain.[40] Their position in the middle orients today's courts of appeals simultaneously toward the High Court and the trial court. Until relatively recently, the essential function of the courts of appeals was understood to be to correct errors, and it was deemed to be the unique functions of the Su-

34. The Court of Appeals for the Armed Services is part of the military, and separate from the judicial branch, except that the Supreme Court has jurisdiction to review its decisions by a writ of certiorari. 10 U.S.C. § 867; 28 U.S.C. § 1259.

35. Act of June 25, 1948, Pub. L. No. 80-773, §§ 41, 43(a), 62 Stat. 869, 870.

36. Act of Feb. 28, 1929, Pub. L. No. 70-840, § 116, 45 Stat. 1346, 1346–47.

37. Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994.

38. Act of Apr. 2, 1982, Pub. L. No. 97-164, 96 Stat. 25.

39. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998); Symposium, *Ninth Circuit Conference*, 48 Ariz. L. Rev. 221 (2006) (chronicling proposals for splitting the Ninth Circuit).

40. *See infra* § 5.01.

preme Court to declare law and to achieve uniformity. Docket growth, however, has rendered the courts of appeals more autonomous in the federal hierarchy, and their final power to declare law has grown concomitantly. Subject-matter jurisdiction—the judicial power—cannot be understood in the abstract or without some appreciation for role or function.[41] Error correction and law declaration are distinct tasks, theoretically assigned to distinct courts. Over the last decade or so, the actual outcomes were rather one-sided: the Supreme Court reversed two out of three of its cases; the courts of appeals affirmed nine out of ten cases.[42]

§ 1.04 Future of the Courts of Appeals

Toward the end of the last century, futures studies and long-range planning were the rage among court administrators and judges, including the administrators and judges of the federal appellate courts.[43] There were more than a dozen such undertakings: studies, committees, commissions, and reports that contemplated the future of the federal appellate courts in terms of their jurisdiction, structure, and organization.[44] Of these reform studies, four deserve brief mention here.

First, in 1990, the Federal Courts Study Committee issued its report.[45] This statutorily created committee included representatives of the three branches of the federal government, state government officials, practitioners, and academics. The report concluded that the federal appellate courts were faced with a "crisis of volume" that it predicted would worsen, requiring "fundamental change."[46] Rather than endorse any one

41. *See generally* Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 Ga. L. Rev. 507 (1969); Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751 (1957).

42. "Reversals are a defining feature of the Supreme Court: over the last decade, the Supreme Court *reversed* 64% of the cases it heard. Affirmances are a defining feature of the courts of appeals: the courts of appeals *affirmed* 90% of the cases they decided during the same period." Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Affect" on the United States Courts of Appeals*, 32 Fla. St. U. L. Rev. 357, 358 (2005).

43. *See, e.g.*, The Federal Appellate Judiciary in the Twenty-first Century (Cynthia Harrison & Russell R. Wheeler eds., Federal Judicial Center 1989).

44. *See* Thomas E. Baker, *A Generation Spent Studying the United States Courts of Appeals: A Chronology*, 34 U.C. Davis L. Rev. 395 (2000) (detailing those proposals).

45. Report of the Federal Courts Study Committee (Apr. 2, 1990).

46. *Id.* at 109.

proposal, however, the report described various possible restructurings and urged further study.

Next, an important "further study" was released in 1993: In response to a congressional request, the Federal Judicial Center published a report to the Congress and the Judicial Conference titled *Structural and Other Alternatives for the Federal Courts of Appeals*.[47] The report elaborately detailed the pros and cons of various futuristic reforms: total or partial consolidation of the circuits; subdividing and increasing the number of circuits; multiple appellate tiers; discretionary appeals; differentiated case management; district court error review; overall jurisdiction reduction; and miscellaneous other nonjurisdictional options. Significantly, the report rejected the need for any radical change in the organization and structure of the federal appellate courts in the foreseeable future.[48]

Third, the Judicial Conference formally approved a *Long Range Plan for the Federal Courts*[49] in 1995. The portion of the *Long Range Plan* that focused on the courts of appeals imagined alternative future appellate scenarios, including some rather Malthusian docket scenarios, but concluded with a note of skepticism about future appellate reforms:

> Each court of appeals should comprise a number of judges sufficient to maintain access to and excellence of federal appellate justice. Circuit restructuring should occur only if compelling empirical evidence demonstrates adjudicative or administrative dysfunction in a court so that it cannot continue to deliver quality justice and coherent, consistent circuit law in the face of increasing workload.[50]

Thus, once again, the insider-expert group concluded that the familiar, present organization and structure of the federal appellate courts was preferable over the uncertain, radical reform proposals for the future.

Fourth, the Commission on Structural Alternatives for the Federal Courts of Appeals issued its *Final Report* to the President and the Con-

47. Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States (Federal Judicial Center 1993).

48. *Id*. at 155.

49. Judicial Conference of the United States, Long Range Plan for the Federal Courts (1995).

50. *Id*. at 44.

gress in 1998.[51] Popularly known as the "White Commission," named after its chair, Justice Byron White, the Commission was charged by Congress to make recommendations about the courts of appeals generally and about the Ninth Circuit in particular. The White Commission rejected various proposals for dividing the Ninth Circuit, proposals that had been debated over the years. Instead, the Commission proposed a novel reform that reconceptualized the court of appeals as being separate and distinct from the circuit, so that the courts of appeals could be reorganized while maintaining the existing circuits. As the inevitability of more and more appeals resulted in the appointment of more and more circuit judges, the larger courts of appeals would be authorized to organize themselves into "regional divisions."[52] The more authorized judgeships on a court of appeals, the more divisions it could create to further accommodate the growing docket. From the decision of the district court, there would be an appeal-as-of-right before a three-judge panel of a "regional division" followed by a petition for rehearing to the "divisional en banc court." If and only if the decision created a conflict with a decision of another regional division could there be a discretionary rehearing before the "circuit division" for conflict resolution. Otherwise, the next appellate procedure would be a petition for certiorari in the Supreme Court. The Commission proposed an eight-year experiment with regional divisions in the Ninth Circuit.[53] Bills were drafted for congressional consideration, but they were ignored amid the decades-long impasse among members of Congress and Ninth Circuit judges over dividing that court of appeals.

Several relevant generalizations are suggested by even this brief account of these studies and reports. The basic structure of the Evarts Act[54] has proven remarkably resilient and remains intact today, over one hundred years after its enactment. The three-judge panel still today is the en-

51. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (1998).

52. *Id*. at 45.

53. At the end of the study period, the Federal Judicial Center would have reported to the Judicial Conference, which would then have recommended to Congress whether the division arrangement should be continued with or without modification. *Id*. at 95 (Appendix C).

54. *See supra* § 1.03.

gine that runs the courts of appeals. Beginning in the 1960s and continuing into the 1990s, however, docket growth had significant effects on the courts of appeals.[55] Congress added judgeships, but not nearly enough to keep pace with new appellate filings; after a period of rapid increases, the creation of new judgeships slowed.[56] Appellate resources were added to the system in the guise of additional law clerks and staff attorneys, and with broadened responsibilities and duties.[57] Judicial resources were more effectively managed by various procedural reforms in differentiated appellate processes, such as screening some appeals to a nonargument calendar and relying on unpublished opinions or omitting opinions altogether for some appeals.[58] Alternate dispute resolution programs were instituted for appeals.[59] The advent of new technologies, such as the personal computer, Westlaw, Lexis-Nexis, the internet, e-mail, videoconferencing, and software programs for court administration also contributed greater interconnectivity to increase judicial productivity.[60]

During this period, Congress resisted the urgings of academics who called for dramatic, even radical, jurisdictional and structural appellate reform. Instead, the judges sought to streamline and modernize appellate procedures in order to preserve the essential federal appellate tradition. Judges, lawyers, and court experts have adjusted to the new appellate procedural paradigm, and this period of equipoise is likely to continue. Indeed, no one is currently agitating for radical reform. Thus, it appears

55. 1955–2004 Statistical Data Regarding Federal Courts, compiled by the Federal Judicial Center for the 2005 National Conference on Appellate Justice, *reprinted in* 8 J. App. Prac. & Process 21–37 (2006).

56. *See* Gordon Bermant, Edward Sussman, William W Schwarzer & Russell R. Wheeler, Imposing a Moratorium on the Number of Federal Judges: Analysis of Arguments and Implications (Federal Judicial Center 1993).

57. Roger A. Hanson, Carol R. Flango & Randall M. Hansen, The Work of Appellate Court Legal Staff (National Center for State Courts 2000); Donna Stienstra & Joe S. Cecil, The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking—A View from the Tenth Circuit (Federal Judicial Center 1989).

58. Judith A. McKenna, Laural L. Hooper & Mary Clark, Case Management Procedure in the Federal Courts of Appeals (Federal Judicial Center 2000).

59. *See* Fed. R. App. P. 33; Robert J. Niemic, Mediation & Conference Programs in the Federal Courts of Appeals—A Sourcebook for Judges and Lawyers (Federal Judicial Center 2d ed. 2006).

60. *E.g.*, Meghan Dunn, Report of a Survey of Videoconferencing in the Courts of Appeals (Federal Judicial Center 2006).

that the subject-matter jurisdiction of the courts of appeals, as described in this primer, will have lasting explanatory power for the foreseeable future.[61]

§ 1.05 Limited Jurisdiction

At the outset, a fundamental proposition deserves reiteration: "It is a principle of first importance that the federal courts are courts of limited jurisdiction."[62] Thus, in effect, every federal court decision is a kind of precedent in federal jurisdiction, for a federal court must conclude, explicitly or implicitly, that it has the power to decide before it may decide any case or controversy. From the time of the framers, the federal jurisdictional inquiry has been twofold: first, to determine whether the case comes within the judicial power of Article III and, second, to determine whether the case comes within some particular enabling act of Congress.[63] The opposite of the presumption of subject-matter jurisdiction in the state court system applies in federal court: a federal court, as a court of limited jurisdiction of a limited sovereign, is presumed to lack jurisdiction unless the invoking party demonstrates the court's constitutional and statutory power to decide the case. The Supreme Court has made this self-executing duty of the court of appeals quite clear: "An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review."[64]

As any other federal court is limited in its jurisdictional power by the constitutional principles that elaborate some aspects of the "case" or "controversy" requirement in Article III (the doctrines of standing and

61. *See generally* Thomas E. Baker, Rationing Justice on Appeal—The Problems of the U.S. Courts of Appeals 279–84 (1994); Daniel J. Meador, Thomas E. Baker & Joan E. Steinman, Appellate Courts: Structures, Functions, Processes, and Personnel 951–1056 (2d ed. 2006).

62. Charles Alan Wright & Mary Kay Kane, Law of Federal Courts § 7, at 27 (6th ed. 2002). *See generally* 13 Federal Practice & Procedure, *supra* note 12, § 3522; 15 Moore's Federal Practice, *supra* note 12, § 100.02[1].

63. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 442 (1850); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809). "As preliminary to any investigation of the merits . . . this court deems it proper to declare, that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.).

64. Mitchell v. Maurer, 293 U.S. 237, 244 (1934). *See also* Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981).

mootness are examples), so too is the court of appeals limited. When such doctrines are unsatisfied, it would not be merely an error of discretion for the court to decide an appeal, it would be a violation of the Constitution. This primer must discuss some of these constitutional principles for the relatively few cases in which events first trigger such principles on appeal, but it will not otherwise emphasize them. These principles are more typically contested in the district court and form the stuff of issues on the merits on direct appeal.

The Supreme Court has rejected the "doctrine of hypothetical jurisdiction," under which some courts of appeals had found it proper to proceed immediately to the merits question, despite jurisdictional objections, when the merits question was more readily resolved than the jurisdictional question, and when the prevailing party on the merits would have been the same as the prevailing party were jurisdiction denied.[65] That ersatz doctrine offended fundamental separation-of-powers principles. Without proper jurisdiction, a court of appeals cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit. The Court concluded such "an ultra vires act,"[66] by any federal court, offends the constitutional principle of limited federal sovereignty.

While the Supreme Court has disapproved of the idea of "hypothetical jurisdiction" and has instructed lower federal courts to consider jurisdiction at the threshold, the Court has made it clear that this means that a determination of subject-matter jurisdiction is the sine qua non only for reaching and resolving the merits and actually deciding the appeal. Decision-avoidance scenarios trigger the opposite logic: there is no constitutional or statutory priority among possible reasons to not decide the merits and to dismiss the case. This is an important distinction. For example, the Supreme Court has held that an Article III court need not first resolve whether it has subject-matter jurisdiction or personal jurisdiction over the parties if it determines that, in any event, a foreign tribunal is a more suitable arbiter of the merits of the case under the doctrine

65. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93–103 (1998).
66. *Id*. at 102.

of forum non conveniens.[67] An outright and immediate dismissal is appropriate without more.

The Supreme Court also has been careful to distinguish between "two sometimes confused and conflated concepts: federal court 'subject-matter' jurisdiction over a controversy [and] the essential ingredients of a federal claim for relief."[68] Furthermore, in their opinions, the justices have been debating the distinction between truly "jurisdictional rules"—which are statutory based and cannot be waived or forgiven by a court—and "mandatory case-processing rules"—which are judicially created and can be waived or forgiven by a court.[69] This area of the law is somewhat in a state of flux, as of this writing, but the relevant congressional intent, once judicially discerned, is controlling. The inconsistent usage of the word *jurisdiction* can be a source of some confusion and is the occasion for careful reading of appellate opinions. As the Supreme Court has observed, "'Jurisdiction . . . is a word of many, too many meanings.'"[70]

Finally, that the Constitution limits appellate jurisdiction does not imply that there is a constitutional right to an appeal. Neither in civil matters, nor even in criminal matters, does the Constitution itself guarantee an appeal as of right, according to Supreme Court dicta (never directly tested) and the hornbook wisdom (often skeptically expressed).[71] For the most part, any effort to understand the jurisdiction of the courts of appeals is an effort in statutory interpretation, and therefore that is the emphasis in this primer.

67. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 127 S. Ct. 1184 (2007) (unanimous decision).

68. Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

69. *See* Bowles v. Russell, 127 S. Ct. 2360 (2007) (a 5–4 decision closely debating the precedents and disagreeing over the proper distinction between statutory-based versus rule-based jurisdictional provisions).

70. *Citizens for a Better Environment*, 523 U.S. at 90 (citations omitted).

71. McKane v. Durston, 153 U.S. 684, 687–88 (1984). There are procedural due process and equal protection requirements of fair and equal access to the appellate court, once an appeal has been provided. *E.g.*, Wayne LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 27.1, at 1272 (4th ed. 2004); John E. Nowak & Ronald D. Rotunda, Constitutional Law § 13.10, at 674–79 (7th ed. 2004).

§ 1.06 Rules of Precedent

The individual courts of appeals have developed something of an artificial autonomy in their stare decisis. As previously described, Congress first created circuit courts of appeals in 1891 to correct error, reserving the judicial lawmaking function of federal law for the Supreme Court. When federal dockets grew, Congress added judges and authorized the courts of appeals to sit in panels of three. More judges meant more permutations of three-judge panels. These permutations posed a threat to two institutional values: uniformity among panel decisions and effective control over the law of the circuit by the majority of its judges. The first administrative mechanism designed to turn back the threat of disuniformity was the en banc rehearing before all the judges of the circuit.[72] As the years passed and circuit caseloads greatly expanded, en banc rehearings proved inefficient and ineffective, for they added delay and expense, and they consumed premium judicial resources. The so-called "rule of interpanel accord" was developed as a variant of stare decisis to preserve uniformity and majority control and to avoid too frequent empanelling of the en banc court.[73] This rule, sometimes called "the law of the circuit," obliges a three-judge panel to treat earlier panel decisions as binding authority absent intervening en banc or Supreme Court decisions on the issue.[74] Decisions of sister courts of appeals, however, are deemed merely persuasive. Thus, each court of appeals has developed a parallel but independent stare decisis.[75] This Balkanization of precedent allows a federal agency that fails to persuade one court of appeals of its legal ar-

72. *See* Fed. R. App. P. 35.

73. *See, e.g.*, Davis v. Estelle, 529 F.2d 437, 441 (5th Cir. 1976) ("One panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a change in the statutory law, only the Court en banc can do this.").

74. The Eighth Circuit follows a unique variation on the general rule: when there are two conflicting three-judge panel decisions, the next three-judge panel confronted with the same issue may follow whichever of the two earlier decisions it deems to have been better decided. *See, e.g.*, Kostelec v. State Farm Fire & Cas. Co., 64 F.3d 1220, 1228 n.8 (8th Cir. 1995).

75. *See generally* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 Wash. L. Rev. 213 (1999); Henry J. Friendly, *The "Law of the Circuit" and All That*, 46 St. John's L. Rev. 406 (1972); Neil D. McFeeley, *En Banc Proceedings in the United States Courts of Appeals*, 24 Idaho L. Rev. 255 (1988).

gument to practice nonacquiescence and continue to relitigate the same position on the same issue of federal law in subsequent appeals in other courts of appeals, unless or until a Supreme Court decision settles the matter.[76]

The rules of precedent for the jurisdiction of the courts of appeals are merely an application of this Balkanized stare decisis. Decisions of the Supreme Court interpreting the federal jurisdictional statutes, of course, bind each court of appeals. Jurisdictional decisions by a particular court of appeals, however, directly bind that court only. Although the courts of appeals often rely on precedents on appellate jurisdiction from sister circuits, not all the nuance of one court's precedents may translate to one of the other courts of appeals, and careful research must be circuit specific.

There is a related subtlety of jurisdictional stare decisis between the Supreme Court and the courts of appeals. Supreme Court jurisdiction to review state court decisions is couched in statutory language of "final judgments or decrees" nearly identical to the courts of appeals' statutory grant of jurisdiction to review "all final decisions of the district court," although the complications of interlocutory review found in the federal court of appeals schema do not apply to Supreme Court review of state court decisions.[77] Decisions under the two statutes are frequently cited interchangeably, implying an overlapping, if not common, meaning and content of jurisdiction.[78] There are some differences that apply in each context—state court to Supreme Court or district court to court of appeals—that militate against a wholly indiscriminate cross-application.[79] It is sufficient for present purposes, however, to note the general rule and to sound a caution against automatic cross-reference.[80]

76. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989). *See infra* § 7.01.

77. *Compare* 28 U.S.C. § 1257, *with* 28 U.S.C. § 1291. *See infra* §§ 4.01–4.03.

78. *E.g.*, Nat'l Socialist Party of Am. v. Village of Skokie, 432 U.S. 43, 44 (1977); Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152–54 (1964).

79. Flanagan v. United States, 465 U.S. 259, 265 n.3 (1984).

80. *Cf.* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 56–57 (1989). *See generally* 15 Federal Practice & Procedure, *supra* note 12, § 3908; 22 Moore's Federal Practice, *supra* note 12, § 406.03[3][b][iii].

§ 1.07 Rule Making

The Federal Rules of Appellate Procedure are promulgated within the federal rule-making apparatus, which can be briefly sketched for present purposes.[81] By the Rules Enabling Act, Congress has authorized the federal judiciary to prescribe rules of practice, procedure, and evidence for the federal courts, subject to the ultimate congressional authority to reject, modify, or defer any of the proposed rules—and to legislate rule changes independently of the Rules Enabling Act process.[82] The Judicial Conference of the United States is required by statute to "carry on a continuous study of the operation and effect of the general rules of practice and procedure."[83] The Judicial Conference's rule-making efforts are coordinated by its Committee on Rules of Practice and Procedure, known as the "Standing Committee."[84] Five "advisory committees" assist the Standing Committee, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules.[85] The Standing Committee and the advisory committees are composed of federal judges, lawyers, academics, state jurists—all appointed by the Chief Justice—and representatives of the Department of Justice. Each committee has a reporter, typically a prominent law professor, who is responsible for maintaining the committee's agenda and drafting appropriate rules amendments and accompanying committee notes that are published along with the proposed rules as a guide to the drafters' intentions. Otherwise, the Administrative Office of the U.S. Courts staffs the committees,[86] and the Federal Judicial Center provides them research support.[87]

81. *See generally A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 679 (1995); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655 (1995).

82. 28 U.S.C. §§ 2071 (2000 & Supp. V 2005), 2072, 2073 (2000 & Supp. V 2005), 2074 (Supp. V 2005), 2075 (2000 & Supp. V 2005), 2076.

83. 28 U.S.C. § 331 (2000 & Supp. V 2005).

84. *Id*. § 2073(b).

85. *Id*. § 2073(a)(2).

86. *See* http://www.uscourts.gov/rules/index.html.

87. *See, e.g.*, Robert Timothy Reagan et al., Citing Unpublished Opinions in Federal Appeals (Federal Judicial Center 2005) (empirical analysis of then-proposed Rule 32.1 permitting the citation of unpublished opinions).

In theory and in practice, a proposal for a rule change can come from anywhere or anyone. Once an advisory committee has voted in favor of a new or amended rule and an accompanying committee note, the Standing Committee must decide whether to approve the proposal for publication and comment. Every proposed rule change is circulated widely within the legal profession and beyond. The advisory committee accepts responses and holds one or more public hearings on the proposal during a six-month comment period. The advisory committee summarizes the public commentary on the proposal, makes any revisions it deems appropriate, and reports its recommendation to the Standing Committee. The Standing Committee either accepts, rejects, or modifies the proposal and transmits its own report, along with the advisory committee's report, to the Judicial Conference. If the Judicial Conference approves the proposal, the amendments are transmitted to the Supreme Court, which has the formal statutory authority to promulgate federal rules, subject to a waiting period.[88] The deadline for the Court to transmit to Congress proposed rules of which it approves is May 1 of the year the rules will take effect.[89] Congress then has a seven-month period to act—i.e., if Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on the first of December of that year.[90]

In addition to the Federal Rules of Appellate Procedure, each court of appeals has promulgated its own local rules and internal operating procedures; all such local procedural provisions must be consistent with the national rules and the applicable statutes.[91] Rule making, thus, is an important background aspect of appellate procedure. This primer emphasizes the particular rules that affect the determination of subject-matter jurisdiction of the courts of appeals.

88. 28 U.S.C. §§ 2072, 2075.
89. *Id.* §§ 2074, 2075.
90. *Id.*
91. Fed. R. App. P. 1, 47.

§ 1.08 Clarity, Capacity, and Closure

The two most important policy concerns behind the principles of appellate jurisdiction are "clarity" and "capacity." A final introductory chapter concern is for achieving appellate "closure" in the court system.

"Clarity" in the principles of appellate jurisdiction minimizes the undesirable, though sometimes inevitable, litigation over jurisdiction, thus furthering efficiency in the court system. For most issues in most appeals today, it is readily apparent whether or not there is appellate jurisdiction. The rules, as stated, appear to be clear enough, although their application may be somewhat sophisticated and complicated. In those few remaining appeals in which jurisdiction is uncertain, the lack of clarity about jurisdiction may be attributed to a purposeful pragmatism that has characterized the courts in their administration of the jurisdictional rules—an effort, in short, to avoid automatic or extreme approaches.

As for "capacity," the abstract concern is to define appellate jurisdiction so as to keep appellate caseloads manageable—but properly understood, that concern is only indirectly implicated. Statutory and decisional policies relating to appellate jurisdiction did not contribute significantly to the docket crisis in the courts of appeals during the decades of the 1960s, 1970s, and 1980s, but that was a small comfort. Congress did not keep judicial capacity in line with caseload demands during that period: the number of judgeships increased in absolute numbers, but the rate of appeals and the number of appeals increased exponentially.[92] This necessarily placed great strains on the federal appellate system, as has been discussed, but the solution for that problem is not for the courts of appeals to give the jurisdictional statutes an unreasonable interpretation or an improperly narrow interpretation in order to avoid having to decide appeals. That would compromise the separation of powers. The courts of appeals, however, have frequently celebrated in dicta that the particular holding sub judice strictly applying the jurisdictional statutes has the additional beneficial byproduct of preventing a threatened flood of appeals.[93] Nonetheless, it would be just as improper for a court of appeals to refuse to decide a case within its jurisdiction for the reason that it

92. *See supra* § 1.04.
93. *See* 15A Federal Practice & Procedure, *supra* note 12, § 3901.

had a large docket as it would be for it to decide a case outside its jurisdiction.

Finally, the policy of "closure" applies to the federal appellate system. Viewed most broadly and cumulatively, the various statutes and case decisions on appealability structure a dynamic relationship between the reviewing court and the court being reviewed. In this relationship, everything is reviewable, in its own way and at its own time. Every order that a district court enters or fails to enter in an adversarial setting may be reviewed. The different bases for appellate review are best considered aggregatively and alternatively; the sections of this primer are best understood to be cumulative. The appropriate methodology is to go down the table of contents like a checklist to determine if there is one or more bases for appellate review, now or later.[94] Indeed, there is a principle of "cumulative finality" that may be invoked when a series of orders disposing of various claims and parties results in the termination of the action; an order disposing of part of the case may be followed by voluntary dismissal of the balance of the case in order to achieve the requisite jurisdictional finality.[95] And once the appeals are completed and the matter is fully and finally resolved, that determination is conclusively final under the Constitution.[96]

Solving the jurisdictional puzzle on appeal requires knowing *who* and *when* and *where* and *how* . . . and ultimately understanding *why*. Describing the complete solution is a more ambitious task than writing an introductory text such as this. Indeed, the Supreme Court's own disclaimer may be invoked here, in all candor and humility: "No verbal formula yet devised can explain prior [appellate jurisdiction] . . . decisions with unerring accuracy or provide an utterly reliable guide for the future."[97]

94. *E.g.*, Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 374–79 (1987).

95. *See* 15A Federal Practice & Procedure, *supra* note 12, § 3914.9; Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973). *See also infra* § 3.05.

96. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) (Article III grants the "Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy.").

97. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

CHAPTER 2

Procedures Related to the Exercise of Subject-Matter Jurisdiction

§ 2.01 Derivative Jurisdiction

The introductory chapter explored the "federalness" of the U.S. courts of appeals and what it means that they are courts of limited jurisdiction.[98] While a lack of personal jurisdiction may be a defect cured by acquiescence (actual, assumed, or imposed),[99] subject-matter jurisdiction is different.[100] Subject-matter jurisdiction in the court of appeals derives in large part from the subject-matter jurisdiction of the district court or other tribunal whose decision is being reviewed. For the court of appeals to have subject-matter jurisdiction over the appeal, at the proper time and in the proper manner, the district court must have had subject-matter jurisdiction over the original matter under one of the various statutory heads of original subject-matter jurisdiction, such as diversity,[101] general federal question,[102] or special federal question.[103] These statutory provisions are refracted through a judicial gloss, an accumulation of court interpretations and doctrines, such as the rules for calculating the amount in controversy, the well-pleaded complaint rule, and abstention. It is enough here to emphasize the important point that appellate subject-matter jurisdiction derives from the original jurisdiction of the district court or agency and must continue to exist independently on

98. *See supra* § 1.05.
99. *See* Fed. R. Civ. P. 12(b)(1), 12(h)(1).
100. *See* Fed. R. Civ. P. 12(h)(3).
101. 28 U.S.C. § 1332 (2000 & Supp. V 2005).
102. *Id.* § 1331.
103. *E.g.*, 28 U.S.C. §§ 1333 (admiralty), 1337 (commerce), 1338 (patents), 1339 (postal), 1352 (bonds).

appeal. Thus, the myriad of doctrines and concepts concerning original subject-matter jurisdiction are relevant on appeal.[104] Of course, a court of appeals has jurisdiction to review and affirm the decision of a district court dismissing a case because it lacked subject-matter jurisdiction, so long as there is a final decision[105] and a timely notice of appeal.[106]

Similarly, it is important to keep in mind that a lack of jurisdiction differs conceptually from a lack of merit. On appeal, as on original jurisdiction, the power to decide depends on the subject matter of the action and the status of the parties. It is axiomatic that there is jurisdiction to decide a case on appeal even though there is no merit to the appeal and even if there was no merit to the original complaint.[107]

The essential jurisdictional requirement added by the advent of an appeal is the notion of finality or some reason to excuse finality for interlocutory review. This notion is best understood as the deep structure of the relationship between the reviewing court and the court being reviewed. For example, because a timely appeal is a procedural prerequisite, a court of appeals may not consider an untimely appeal, even if the appeal only involves a challenge to the subject-matter jurisdiction of the district court. The reviewing court always should first consider its own jurisdiction as a necessary condition precedent to any further action on appeal. That, of course, is the subject of the remainder of this primer.

§ 2.02 Scope of Review

Once jurisdiction attaches, the appellate power is plenary. By statute (28 U.S.C. § 2106), the court of appeals is vested with the power to "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause, and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the cir-

104. *See generally* Charles Alan Wright & Mary Kay Kane, Law of Federal Courts (6th ed. 2002).

105. *See also infra* § 3.01.

106. *See infra* § 2.06.

107. Bell v. Hood, 327 U.S. 678, 682 (1946). *See* 13 Federal Practice & Procedure, *supra* note 12, § 3522, at 78–79; 19 Moore's Federal Practice, *supra* note 12, § 201.03.

cumstances."[108] Thus, federal court wags have suggested, somewhat facetiously, that a circuit judge with a concurring second vote can "do justice" within constitutional and statutory constructs. However, a few limits on the appellate power, beyond institutional limits of precedent and judicial hierarchy, deserve brief mention.

By a general statute Congress has narrowed the scope of review, in both civil and criminal matters, to remove from consideration "errors or defects which do not affect the substantial rights of the parties."[109] Application of this concept of "harmless error" varies with the character of the issue being raised on appeal; different analyses may obtain depending on whether the error was preserved by an objection, whether the matter is civil or criminal, and whether the issue is of constitutional proportion.[110]

A second general, although rarely mentioned, statute provides that there shall be no reversal in the courts of appeals "for error in ruling upon matters in abatement which do not involve jurisdiction."[111] This provision reaches nonjurisdictional motions, which, if granted, would result in the dismissal of an action without prejudice to its reconsideration when refiled as another pleading or in another forum.[112]

Title 28 contains a few particular limits on the jurisdiction of the courts of appeals.[113] An order of a district court remanding a case previously removed to it from a state court "is not reviewable on appeal or otherwise."[114] Likewise, there is a prohibition on appeals from final or-

108. 28 U.S.C. § 2106. *See, e.g.*, United States v. White, 855 F.2d 201 (5th Cir. 1988) (exercise of supervisory power over all district courts in the circuit). *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3901, at 25–30; 20A Moore's Federal Practice, *supra* note 12, § 336.03.

109. 28 U.S.C. § 2111. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 553 (1984). *See also* Fed. R. Civ. P. 61; Fed. R. Evid. 103(a).

110. *See* Steven Alan Childress & Martha S. Davis, Federal Standards of Review §§ 4.03, 7.03 (3d ed. 1999). *See generally* 11 Federal Practice & Procedure, *supra* note 12, §§ 2881–2883; 12 Moore's Federal Practice, *supra* note 12, § 61.02; 19 Moore's Federal Practice, *supra* note 12, § 206.07.

111. 28 U.S.C. § 2105.

112. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3903, at 141–48; 22 Moore's Federal Practice, *supra* note 12, § 408.41.

113. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3903; 19 Moore's Federal Practice, *supra* note 12, §§ 201.03, 205.08.

114. 28 U.S.C. § 1447(d). Judicial interpretations of this statute tend to be rather Byzantine. *See, e.g.*, Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411 (2007); Osborn v. Haley,

ders in proceedings in the nature of habeas corpus brought to test the validity of a warrant to remove a person charged with a federal crime to a different district or place of confinement.[115]

Although the courts of appeals are courts of limited jurisdiction and are subject to these and various other statutory limitations, the plenary power to fully decide a proper appeal has an underlying dimension of inherent authority. There is a somewhat vague notion of what might be labeled "supplemental appellate jurisdiction" that is implicated when the reviewing court contemplates the scope of its own reviewing authority to go beyond the particular questions properly presented on appeal.

Underlying the traditional concept of supplemental jurisdiction ("pendent" or "ancillary" jurisdiction in the older procedural vernacular) at the district court level is the basic notion that if a federal court qua court has some jurisdiction in a matter, then it has the power to reach and decide the case or controversy in its entirety, including aspects over which there is no independent jurisdictional basis. This is a rather curious proposition when juxtaposed with the notion of a limited federal jurisdiction, but is understandable as an inherent power of the federal court qua court.

Although the exercise of supplemental jurisdiction is more commonplace at the district court level, courts of appeals likewise have exercised it.[116] Some applications involve the court of appeals' determination of the proper scope of appeal from a final judgment. More frequently, the concept has been applied by the courts of appeals to broaden the scope of an interlocutory appeal to allow consideration of matters beyond the particular order on review. Since the disruption, delay, and expense of an appeal prior to final judgment already have taken place, this pragmatic approach makes good common sense. However, in *Swint v. Chambers County Commission*,[117] a unanimous Supreme Court explicitly warned

127 S. Ct. 881 (2007); Kircher v. Putnam Funds Trust, 547 U.S. 633 (2006). *But see infra* § 5.03 (review by writ). There also is an exception to this limitation for civil rights cases removed under 28 U.S.C. § 1443. *See* Georgia v. Rachel, 384 U.S. 780 (1966).

115. 28 U.S.C. § 2253(b).

116. 16 Federal Practice & Procedure, *supra* note 12, § 3937; 19 Moore's Federal Practice, *supra* note 12, § 205.03[3].

117. 514 U.S. 35 (1995).

the courts of appeals not to over-rely on the concept of supplemental appellate jurisdiction; otherwise, the theory and philosophy of limited appellate jurisdiction would be undone. Still, the Supreme Court did not go so far as to delegitimize the concept.[118] The issue "whether or when it is proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related rulings that are not themselves independently appealable" was not definitively resolved by the High Court.[119] Therefore, preexisting circuit precedents on supplemental appellate jurisdiction must be read with the appropriate "yellow flag" level of caution.

§ 2.03 Standing to Appeal

In most appeals, whether the appellant has standing to prosecute the appeal is a straightforward question with an obvious answer.[120] Generally, a plaintiff who does not have standing to sue does not have standing to bring an appeal, although the rules and decisions on the former status are much more detailed than those on the latter. A simple rule of thumb is to determine whether the judgment being challenged has an adverse impact on the individual appellant or, in the case of a cross appeal, whether the issues raised might have an adverse effect if there is a reversal on the main appeal. Deciding whether an impact is adverse may, at times, become somewhat metaphysical. In a leading opinion, the Supreme Court neatly summarized the operative rules:

> Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted

118. *Id.* at 49 (citing with approval Abney v. United States, 431 U.S. 651 (1977)).

119. *Id.* at 50–51. *See* Joan Steinman, *The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After Swint*, 49 Hastings L.J. 1337 (1998).

120. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3902; 19 Moore's Federal Practice, *supra* note 12, § 205.02[2].

> from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III.[121]

It almost goes without saying that each of these propositions has a certain "tip of the iceberg" quality.

The rule for a cross appeal is related.[122] An appellee usually may argue for an affirmance on a ground not decided by the district court without filing a cross appeal. Generally, the appellee may not rely on the original appeal to obtain a modification of the judgment, but must bring a cross appeal. The consequences of an appellee's failure to bring a cross appeal are governed by two linked principles.[123] First, absent a cross appeal, the appellee may urge in support of a decree any matter appearing in the record. Second, the appellee's argument may involve an attack on the reasoning of the lower court, but may not attack the decree in an effort either to enlarge the appellee's own rights or to lessen the rights of the appellee's adversary under the decree.

Finally, the term "standing to appeal," while of common usage, can become an unfortunate misnomer when it is confused with the Article III requirement of "standing to sue," i.e., the requirement that the person bringing the lawsuit has suffered some injury in fact that is fairly traceable to the person being sued and that is redressable by a court decision. Appellate jurisdiction, at bottom, depends not on whether one litigant has injured the other litigant; rather, it depends on whether the appellant has been aggrieved by the judgment or order that is being appealed. That is entirely a feature of the jurisdictional statute. For example, a nonnamed class member who had objected in a timely manner at the fairness hearing was considered a "party" who could appeal the approval of the class settlement without intervening in the lawsuit.[124]

121. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 333–34 (1980) (citations omitted). *See also* Karcher v. May, 484 U.S. 72, 75–81 (1987); Bender v. Williamsport Area School Dist., 475 U.S. 534, 546–49 (1986).

122. 15A Federal Practice & Procedure, *supra* note 12, § 3904; 19 Moore's Federal Practice, *supra* note 12, § 304.11[3].

123. El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473 (1999).

124. Devlin v. Scardelletti, 536 U.S. 1 (2002). *See also infra* § 6.04 (nonparty appeals).

§ 2.04 Sources of Appeals

The district courts are the most significant source of appeals to the courts of appeals. In civil[125] and criminal matters,[126] these appeals include final judgments,[127] orders in the nature of final judgments,[128] interlocutory orders entitled[129] or permitted[130] to be appealed, and review by way of extraordinary writ.[131] Historically, between 10% and 20% of the appellate docket (more for the District of Columbia Circuit) involves judicial review of final decisions and certain interim or interlocutory orders of dozens of federal agencies, boards, and officers.[132] By statute, the appropriate court of appeals has exclusive jurisdiction to review decisions of the U.S. Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury."[133] Bankruptcy cases are subject to a two-tiered system of review: from bankruptcy judge to either a district court or a bankruptcy appellate panel ("BAP") and then to the court of appeals.[134] The courts of appeals have jurisdiction to hear appeals from a final judgment, order, or decree of a BAP or a district court.[135] In addition to the general provision allowing for permissive interlocutory appeals,[136] there is a particular appellate by-

125. *See infra* §§ 3.01–3.05, 4.01–4.03.

126. *See infra* §§ 6.01–6.04.

127. *See infra* § 3.02.

128. *See infra* §§ 3.03–3.05.

129. *See infra* § 4.02.

130. *See infra* § 4.03.

131. *See infra* § 5.03.

132. 1955–2004 Statistical Data Regarding Federal Courts, compiled by the Federal Judicial Center for the 2005 National Conference on Appellate Justice, *reprinted in* 8 J. App. Prac. & Process 28–31 (2006) (Table 3A). *See infra* §§ 7.01–7.03.

133. 26 U.S.C. § 7482(a)(1) (court of appeals venue provision). *See generally* Marvin Joseph Garbis, Allen L. Schwait & Sarah H. Ruddy, Tax Court Practice: Text, Comprehensive Forms and Rules (1974). *See also* 17 Federal Practice & Procedure, *supra* note 12, § 4102; 20 Moore's Federal Practice, *supra* note 12, § 313.16.

134. 28 U.S.C. § 158(b)(1). *See generally* Federal Court of Appeals Manual, *supra* note 15, §§ 14.1–14.8; Federal Appeals: Jurisdiction and Practice, *supra* note 15, § 2.14. *See also* Judith A. McKenna & Elizabeth C. Wiggins, Alternative Structures for Bankruptcy Appeals (Federal Judicial Center 2002), *reprinted in* 76 Am. Bankr. L.J. 625 (2002).

135. 28 U.S.C. § 158(d)(1) (2000 & Supp. V 2005). *See infra* § 3.02.

136. 28 U.S.C. § 1292(b); Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992). *See infra* § 4.03.

pass provision authorizing interlocutory appeals in bankruptcy cases from a bankruptcy court to the court of appeals.[137] Generally, when a magistrate judge is authorized by the district court to hold trial proceedings and the parties also consent, an appeal lies in the court of appeals in the same manner as an appeal from a district court.[138] Circuit judges still retain the statutory power to entertain petitions for a writ of habeas corpus;[139] however, Federal Rule of Appellate Procedure 22 directs that any such application for the writ must be transferred to the appropriate district court.[140] A certificate of appealability is required to review the denial of relief.[141]

Among the courts of appeals, the U.S. Court of Appeals for the Federal Circuit is unique in its subject-matter jurisdiction.[142] The Federal Circuit was created in 1982 with national jurisdiction over a variety of subject matters and over cases by origin from the U.S. Court of Federal Claims, the Board of Patent Appeals, district courts in patent matters, the U.S. Court of International Trade, the U.S. Court of Appeals for Veterans Claims, and other miscellaneous agencies and executive officers.[143]

137. The district court or the BAP, sua sponte or on motion, must certify (1) there is no controlling precedent or the question of law is important; (2) the decision creates a conflict among the courts; or (3) an immediate appeal would materially advance the progress of the case. The court of appeals then may authorize the interlocutory appeal. 28 U.S.C. § 158(d)(2)(A)(i–iii) (2000 & Supp. V 2005). *See* 16 Federal Practice & Procedure, *supra* note 12, § 3926.1; 20 Moore's Federal Practice, *supra* note 12, § 306.10. What is "interlocutory" in bankruptcy depends more on bankruptcy law than procedural law. *See also infra* § 4.03.

138. 28 U.S.C. § 636(c)(3). *See* 15A Federal Practice & Procedure, *supra* note 12, § 3901.1; 14 Moore's Federal Practice, *supra* note 12, § 73.06.

139. 28 U.S.C. § 2241(a).

140. Fed. R. App. P. 22(a).

141. 28 U.S.C. § 2253(c)(1). *See infra* § 5.02.

142. *See, e.g.*, Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 Case W. Res. L. Rev. 769 (2004); *United States Court of Appeals for the Federal Circuit 20th Anniversary Judicial Conference*, 217 F.R.D. 548 (2002).

143. 28 U.S.C. § 1295. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3903.1, at 156–95; 19 Moore's Federal Practice, *supra* note 12, §§ 201.01[2], 208.01–208.26. *See also* Gregory C. Sisk, *The Trial Courts of the Federal Circuit: Diversity By Design*, 13 Fed. Cir. B.J. 241 (2003).

§ 2.05 Locus of Appeals

In most cases, the proper locus of an appeal is obvious. The notice of appeal designates the court of appeals for the circuit geographically encompassing the district court in which the suit was filed.[144] There may be optional appellate venues in certain matters, such as in reviews of administrative agency matters, creating a potential for multiple petitions for review in multiple courts, but these multiple petitions will be designated to one court of appeals by the Judicial Panel on Multidistrict Litigation.[145] Furthermore, appellate venue may be manipulated by a strategic choice among optional trial venues: for example, in tax cases,[146] or by a motion for a general change of venue in civil matters.[147] The provisions governing the Federal Circuit are too complex to cover in this primer.[148]

§ 2.06 Notice of Appeal

The requirements for the form of the notice of appeal are simple and straightforward.[149] Federal Rule of Appellate Procedure 3 requires a notice to be filed with the clerk of the court that rendered the judgment, and the notice must "specify the party or parties taking the appeal"; "designate the judgment, order or part thereof appealed"; and "name the court to which the appeal is taken."[150] Even such minimal content requirements are excused as long as the true intent of the appellant is ascertainable, the courts have not been misled, and there has been no prejudice to

144. 28 U.S.C. § 1294. *See also* 28 U.S.C. § 1407(b) (multidistrict cases).

145. 28 U.S.C. §§ 2112(a)(3), 2342 (2000 & Supp. V 2005); R.P. J.P.M.L. 17.1 (random selection of one circuit). *See also* Fed. R. App. P. 15–20. *See infra* § 7.01.

146. *See generally* 17 Federal Practice & Procedure, *supra* note 12, § 4102; 20 Moore's Federal Practice, *supra* note 12, §§ 313.01–313.18.

147. *See* 28 U.S.C. §§ 1404 (2000 & Supp. V 2005), 1406 (2000 & Supp. V 2005). An order granting or denying a motion for a change of venue is not ordinarily reviewable, except perhaps by an extraordinary writ of mandamus or prohibition. *See infra* § 5.03.

148. *See supra* § 2.04.

149. *See generally* 16A Federal Practice & Procedure, *supra* note 12, § 3949; 20 Moore's Federal Practice, *supra* note 12, §§ 303.30–303.51.

150. Fed. R. App. P. 3(c)(1). *See also* Fed. R. App. P. 12(a) (docketing the appeal); Federal Court of Appeals Manual, *supra* note 15, §§ 8.1–8.17; Federal Appeals: Jurisdiction and Practice, *supra* note 15, §§ 6.01–6.17.

the other parties.[151] The requirements for timeliness of the notice of appeal, by contrast, are of another magnitude of complexity and trigger draconian consequences upon their breach.

Timeliness of the notice of appeal is jurisdictional, at least insofar as the deadline is statutory, as opposed to being a rule-based deadline.[152] Determining the timeliness of a notice of appeal, however, can be one of the more obscure aspects of appellate jurisdiction. Separate rules apply for permissive interlocutory appeals,[153] agency review,[154] bankruptcy appeals,[155] Tax Court review,[156] and habeas corpus cases.[157] Generally, Federal Rule of Appellate Procedure 4 governs appeals as of right in civil and criminal matters.[158]

In civil cases, the notice of appeal must be filed within thirty days after entry of judgment, unless the United States is a party, in which case sixty days is allowed.[159] In criminal cases, the notice is due within ten days of entry of the judgment or order and within thirty days for government appeals.[160] Both periods may be extended for thirty days on

151. "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R. App. P. 3(c)(4). *E.g.*, Becker v. Montgomery, 532 U.S. 757 (2001) (Fed. R. Civ. P. 11 requirement that notice of appeal be signed was not jurisdictional); Smith v. Barry, 502 U.S. 244 (1992) (informal pro se brief can serve as notice of appeal).

152. *Compare* Eberhart v. United States, 546 U.S. 12 (2005) (time limits in Federal Rules of Criminal Procedure are nonjurisdictional claim-processing rules), *with* Houston v. Lack, 487 U.S. 266 (1988) (time for bringing an appeal in a civil action is controlled by the relevant statute).

153. Fed. R. App. P. 5. *See* 16A Federal Practice & Procedure, *supra* note 12, § 3951; 19 Moore's Federal Practice, *supra* note 12, § 203.32[1]–[2][b].

154. Fed. R. App. P. 15. *See* 16A Federal Practice & Procedure, *supra* note 12, §§ 3961–3964; 20 Moore's Federal Practice, *supra* note 12, §§ 315.01–320.11.

155. Fed. R. App. P. 6. *See* 16A Federal Practice & Procedure, *supra* note 12, § 3952; 20 Moore's Federal Practice, *supra* note 12, §§ 306.10–306.11.

156. Fed. R. App. P. 13. *See* 16A Federal Practice & Procedure, *supra* note 12, §§ 3959–3960; 20 Moore's Federal Practice, *supra* note 12, §§ 313.01–314.02.

157. Fed. R. App. P. 23. *See* 16A Federal Practice & Procedure, *supra* note 12, §§ 3968–3970; 20A Moore's Federal Practice, *supra* note 12, §§ 322.01–323.12.

158. Fed. R. App. P. 4. *See* 16A Federal Practice & Procedure, *supra* note 12, § 3950; 20 Moore's Federal Practice, *supra* note 12, §§ 304.01–304.41. *See also* Fed. R. App. P. 2, 26(b) (court of appeals may suspend other rules of appellate procedure, but not the time for filing a notice of appeal).

159. Fed. R. App. P. 4(a)(1). *See also* Fed. R. App. P. 26 (computing and extending time).

160. Fed. R. App. P. 4(b).

grounds of "excusable neglect or good cause."[161] Cross appeals must be filed within fourteen days of the filing of the first notice.[162]

The chief complication of these timetables has to do with the judgment-suspending effect of various motions in the district court. Several posttrial motions suspend the finality of the judgment, and the time for filing the notice of appeal begins to run from the decision on the motion.[163] In civil cases, motions with this effect include the following: motion for judgment as a matter of law;[164] motion for new trial;[165] motion to amend the findings;[166] motion to alter or amend the judgment;[167] and motion for relief from the judgment or order for mistake, inadvertence, excusable neglect, or newly discovered evidence.[168] In criminal cases, the motions with this effect include a motion for judgment of acquittal,[169] a motion for a new trial,[170] and a motion for arrest of judgment.[171] A notice of appeal filed before one of the above-mentioned motions, or after the motion but before its disposition, is deemed to be suspended until the disposition of the motion, when the previously filed notice of appeal becomes effective.[172] The posttrial motion itself must have been timely filed, as well. The subsequent disposition of the motion may also require that the notice of appeal be amended in some particulars.[173] Finally, a motion for reconsideration of an adverse ruling on one of these timely filed motions generally does not extend the time limit for taking an appeal.

161. Fed. R. App. P. 4(a)(5)(A); 28 U.S.C. § 2107(c).
162. Fed. R. App. P. 4(a)(3).
163. Fed. R. App. P. 4(a)(4)(A), 4(b)(3)(A). *See supra* § 1.02.
164. Fed. R. Civ. P. 50(b).
165. Fed. R. Civ. P. 59(a).
166. Fed. R. Civ. P. 52(b).
167. Fed. R. Civ. P. 59(e).
168. Fed. R. Civ. P. 60.
169. Fed. R. Crim. P. 29.
170. Fed. R. Crim. P. 33.
171. Fed. R. Crim. P. 34.
172. Fed. R. App. P. 4(a)(4)(B)(i) (civil), 4(b)(3)(C) (criminal). *See* Firstier Mortgage Co. v. Investors Mortgage Ins. Co., 498 U.S. 269 (1991).
173. Fed. R. App. P. 4(a)(4)(B)(ii).

§ 2.07 Transferring Appeals

If an appeal in a civil action or a petition for agency review is filed in the wrong court of appeals so that there is a want of jurisdiction, the matter may be transferred to the court of appeals in which the appeal could have been brought at the time notice was incorrectly filed, by the authority of 28 U.S.C. § 1631, if such transfer is "in the interest of justice."[174] This sometimes-overlooked provision is usually invoked to transfer appeals between the regional courts of appeals and the court of appeals for the Federal Circuit, although it is not limited to that usage.[175] The transfer provision also may be put to good use in administrative agency appeals, because the underlying jurisdictional statutes designate the appropriate reviewing court based on contestable factual bases such as residence, place of employment, principal place of business, or where the underlying facts occurred, which are likely to yield multiple alternative appellate venues.[176]

§ 2.08 Miscellaneous Procedures

Every circuit judge participates in numerous appellate procedural decisions and can appreciate firsthand how procedure informs substance: how resolution of procedural questions can shape the consideration of an appeal and determine its outcome. This represents an important dimension of the jurisdiction of the courts of appeals: determining how to go about exercising the power to decide appeals.[177] Most relevant here are motion practice[178] and procedures of mandate.[179]

174. 28 U.S.C. § 1631.

175. *E.g.*, Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988). *See* 15A Federal Practice & Procedure, *supra* note 12, § 3901, at 12; 19 Moore's Federal Practice, *supra* note 12, § 208.14[2][b]. *See supra* § 2.04 (Federal Circuit).

176. *See infra* §§ 7.01–7.03.

177. *See generally* 16A Federal Practice & Procedure, *supra* note 12, §§ 3971–3994; 20A Moore's Federal Practice, *supra* note 12, §§ 325.01–348.11.

178. Federal Court of Appeals Manual, *supra* note 15, § 30.2; Federal Appeals: Jurisdiction and Practice, *supra* note 15, §§ 8.01–8.10.

179. Federal Court of Appeals Manual, *supra* note 15, §§ 34.10–34.13; Federal Appeals: Jurisdiction and Practice, *supra* note 15, §§ 11.01–11.05.

Motion practice is not monolithic. According to the Federal Rules of Appellate Procedure and local rules in each circuit, specified motions are decided by the clerk's office, a single circuit judge, a multijudge administrative panel, or a hearing panel.[180] Internal operating procedures vary from circuit to circuit.[181] Lesser matters, such as perfunctory filing extensions, are best left to the clerk's office or staff attorneys. While an appellate rule does explicitly prohibit a single judge from dismissing an appeal,[182] the advisory committee notes list dozens of matters placed within the jurisdiction of a single circuit judge, by rule and statute, including entering a stay, issuing a certificate of probable cause, permitting intervention, and appointing counsel.[183] However, the Federal Rules of Appellate Procedure provide that a court of appeals, in turn, may provide by local rule that any type of motion must be acted on by the court, rather than a single judge, and the various circuits have accepted this suggestion to varying degrees.[184] Still, other motions are explicitly placed beyond the power of a single judge by the Federal Rules of Appellate Procedure, including requests for permission to appeal,[185] requests for extraordinary relief,[186] and petitions for rehearing.[187] The most common appellate motions include a motion to voluntarily withdraw and dismiss the appeal;[188] a motion for stay or injunction pending review;[189] a motion to expedite the appeal;[190] and a motion for leave to file an amicus curiae brief.[191]

The "mandate" simply is the order issued by the court of appeals, after decision of the appeal, directing that some action be taken or some

180. *See* Fed. R. App. P. 27, 47.

181. *See* 28 U.S.C. § 2077 (requiring that local rules of court and internal operating procedure be published and an advisory committee be appointed to study them).

182. Fed. R. App. P. 27(c).

183. Fed. R. App. P. 27 advisory committee's notes.

184. Fed. R. App. P. 27(c).

185. Fed. R. App. P. 5, 6.

186. Fed. R. App. P. 21.

187. Fed. R. App. P. 40.

188. Fed. R. App. P. 42(b).

189. Fed. R. App. P. 8(a)(2) (stay or injunction), 18(a)(2) (stay pending review of administrative agency).

190. *See* Fed. R. App. P. 31(a)(2).

191. Fed. R. App. P. 29.

disposition be made of the matter in the court or agency whose decision is being reviewed. A mandate is composed of a certified copy of the judgment or order of the court of appeals, along with the written opinion, if any, and any court order regarding appellate costs.[192] Until the mandate officially and formally issues, all jurisdiction is retained by the appellate court and, once issued, the mandate binds the reviewed court or agency. The issuance of the mandate is stayed by the timely filing of a petition for panel rehearing, a petition for rehearing en banc, or a motion to stay the mandate. A party may move for a stay pending the filing of a writ of certiorari in the Supreme Court, but must show a substantial question and good cause.[193] Upon the filing of the petition, the stay continues until the Supreme Court's final determination.[194] The mandate issues immediately upon an order denying the petition for a writ of certiorari.[195] In addition, there is a kind of inherent power in a court of appeals to recall a mandate, on rare and undefined occasions, to prevent some manifest injustice.[196] But that inherent power is limited in habeas corpus proceedings brought by a state prisoner and is subject to review in the Supreme Court under an abuse-of-discretion standard.[197]

192. Fed. R. App. P. 41(a).

193. Fed. R. App. P. 41(d)(2)(A).

194. Fed. R. App. P. 41(d)(2)(B).

195. Fed. R. App. P. 41(d)(2)(D).

196. 16 Federal Practice & Procedure, *supra* note 12, § 3938; 20A Moore's Federal Practice, *supra* note 12, § 341.15[1].

197. *See* Bell v. Thompson, 545 U.S. 794 (2005).

CHAPTER 3

Appeals from Final Decisions—Civil

§ 3.01 Generally

The primary grant of jurisdiction to the courts of appeals confers power to review "all final decisions of the district courts."[198] Therefore, unless an appeal fits into one of the relatively narrow statutes authorizing interlocutory appeals,[199] the power to review a judgment or order depends on the characteristic of "finality."

Finality has been a statutory requirement for as long as there have been federal appeals.[200] Courts have consistently deemed the requirement of a final decision to be jurisdictional.[201] Functionally, the requirement structures the relationship between appellate court and trial court; within this relationship, each court performs its complementary role.[202]

To continue past a ruling that is reversible error in order to complete the trial, and then to require an appeal and retrial, expends scarce judicial resources, arguably unnecessarily. The postponement of review imposed by the final-decision requirement is justified implicitly by an assumption that an even greater inefficiency, or waste of resources, would result if each and every ruling that might be reversed on appeal were immediately and separately appealable. The function of the trial court is to find facts and apply general principles of law. Most rulings, then, do not

198. 28 U.S.C. § 1291. *See also id.* § 1295 (Federal Circuit).

199. *See infra* §§ 4.01–4.03, 5.01–5.03.

200. Act of Sept. 24, 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83–86. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3906; 10 Moore's Federal Practice, *supra* note 12, § 54 App. 101.

201. *E.g.*, Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981). *See also supra* § 1.05.

202. 15A Federal Practice & Procedure, *supra* note 12, § 3907; 19 Moore's Federal Practice, *supra* note 12, § 202.03.

result in reversal, and most often fact-finding is a necessary precedent to deciding legal questions. The final-decision requirement thus preserves the integrity of the trial court function.

The value of self-correction also is preserved by the postponement of review at least until the trial judge has had an opportunity to rule finally and fully on the matter. Frequently, interlocutory trial court rulings are reconsidered. Postponing review of a ruling may deemphasize the issue, for example, if the parties settle, or if the trial outcome turns out not to depend on the ruling, or if there is simply no subsequent appeal. Repeated interlocutory appeals would impede and prolong the trial and could exacerbate any inequality of resources between adversaries. Pragmatically, the final-decision requirement recognizes that most decisions appealed after final judgment—more than four out of five—are affirmed, and presumably so would be most interlocutory appeals. The critical underlying concern is for systemic efficiency.

All of this is not to say that there is no "downside" to the finality policy. Indeed, countervailing concerns have resulted in qualifications of the finality requirement by judicial decision, by rule, and by statute.[203] Some rulings (e.g., a preliminary injunction) may work an independent and irreparable harm during trial and may so profoundly affect the trial that the appeal–reversal–retrial routine may be "too little too late."[204] The liberal joinder rules in modern complex litigation give rise to rulings that affect severable parties or claims and that do not influence the remainder of the case in a way that would manifest the evils of piecemeal review.[205] Finality is, after all, in the eyes of the beholder, and appellate judges should and do have a knack for doing justice in their application of the finality requirement.[206]

The policy of finality is not so self-contradictory as to pose an insoluble dilemma. The rules of finality are not unduly complex and uncertain, nor are they so malleable as to be completely manipulable. What should be expected, and what characterizes the principles of appellate jurisdiction found in the statutes, rules, and court decisions, is a kind of

203. *See infra* §§ 3.03–3.05, 4.02.
204. *See infra* § 4.02.
205. *See infra* §§ 3.03, 3.04.
206. *See supra* § 2.02.

categorical balancing. Thus, the requirement of finality, along with its qualifications, accommodates competing values—sometimes favoring awaiting a final judgment and sometimes favoring an interlocutory appeal.

In 1990, in a noteworthy legislative development, Congress amended the general rule-making statute to provide that the Supreme Court "may define when a ruling of a district court is final for purposes of appeal" under § 1291.[207] No such finality rules have yet been promulgated; therefore, appellate jurisdiction remains a function of court opinions interpreting and applying the statute.[208] If the rule makers ever do accept this explicit congressional invitation, it could result in a sea change in finality jurisprudence.[209] But it would be mere speculation to try to predict what those future changes might be. In the meantime, however, the old order is preserved under the extant case law: the jurisdictional statute requires a "final decision" for an appeal, and the courts have elaborately interpreted that statutory requirement. Indeed, one possible explanation for the lack of formal rule making under the 1990 authorization is that the judges themselves are comfortable and content with the familiar scheme of finality under the statute and its annotations. That familiar scheme is the focus of this chapter.

§ 3.02 Final-Decision Requirement

The statutory codification of finality, 28 U.S.C. § 1291, grants appellate jurisdiction to review "all final decisions," but that phrase is nowhere defined in the Code.[210] Judicial interpretation provides a study in contrast. At one logical extreme, since the statute does not refer to "judgments," it might be read to permit an appeal from every ruling or order—

207. 28 U.S.C. § 2072(c), *as amended by* Act of Dec. 1, 1990, Pub. L. 101-650, 104 Stat. 5115. *See also* 28 U.S.C. § 1292(e) (authorization for rule making to provide additional interlocutory appeals, discussed *infra* § 4.01).

208. While the Supreme Court itself has never stated it so pithily, the Fifth Circuit once encapsulated the concept of finality: "an order, otherwise nonappealable, determining substantial rights of the parties which will be irreparably lost if review is delayed until final judgment may be appealed immediately under section 1291." United States v. Wood, 295 F.2d 772, 778 (5th Cir.), *cert. denied*, 369 U.S. 850 (1961).

209. *See also supra* § 1.07.

210. 28 U.S.C. § 1291.

every "decision"—of the district court. At the other logical extreme, the phrase might be read to emphasize "final" and thus to require that the litigation in the district court be literally and wholly completed and finished. Courts have rejected both extremes.[211] The first extreme would allow too many appeals and would wholly frustrate the policy of finality. The second extreme would be too strict and would ignore the occasional need for immediate review of orders with serious and direct consequences, both in terms of unnecessary trial proceedings and in terms of irreparable injury to rights that cannot be restored effectively by a later appeal. The resulting judicial holdings are purposeful and pragmatic.

Lawyers, and lawyers who become judges, are prone to look for "good language" in opinions to rely on. The following are six examples of some of the best language on the final-decision statute.[212]

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> A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

Catlin v. United States[213] (holding order denying motion by property owners to vacate a "judgment" vesting title to condemned property in the government, which was already in possession, was not final and reviewable; the order left the question of compensation undecided and an appeal would be improper piecemeal review). This opinion is much cited but it does not say much.

211. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3909; 19 Moore's Federal Practice, *supra* note 12, § 202.02. *See also* Fed. R. Civ. P. 58(a) (requirement of entry of every judgment on a separate document).

212. 15A Federal Practice & Procedure, *supra* note 12, § 3909 (Leading Finality Decisions).

213. 324 U.S. 229, 233 (1945).

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> Finality as a condition of review . . . . has been departed from only when observance of it would practically defeat the right to any review at all.

Cobbledick v. United States[214] (holding order denying a motion to quash made by persons served with subpoenas duces tecum for appearance and production of documents before a grand jury was not final and reviewable; witnesses could test subpoenas by disobedience and appeal from a final contempt adjudication). This case is often cited when review is being denied.

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> But even so circumscribed a legal concept as appealable finality has a penumbral area. . . . [A] judgment directing immediate delivery of physical property is reviewable and is to be deemed dissociated from a provision for an accounting even though that is decreed in the same order. In effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled.

Radio Station WOW, Inc. v. Johnson[215] (holding state supreme court judgment ordering immediate delivery of physical possession of a radio station and a continuation of the proceedings for an accounting was final and reviewable). This case is much cited when review is being allowed.

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> [T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is re-

214. 309 U.S. 323, 324–25 (1940).
215. 326 U.S. 120, 124–26 (1945).

> garded as concluding the case and is immediately reviewable. There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing.

Republic Natural Gas Co. v. Oklahoma[216] (five-to-four holding that order giving company three choices—to stop withdrawing gas, to purchase from another company, or to sell on behalf of another company—was not final and reviewable; the election might substantially affect the questions presented for review). This case demonstrates the difficulty of determining finality in close cases.

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> [The] struggle of the courts [is] sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.

Dickinson v. Petroleum Conversion Corp.[217] (holding an earlier decree disposing of a party's claims but requiring further proceedings to divide awarded funds among other parties had been final and reviewable; appeal taken from later, clearly final decree was too late to raise issues about earlier decree). This case illustrates the metaphysical nature of the determination of finality and demonstrates how categorical balancing is inevitable.

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> The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered "final." A pragmatic approach to the question of finality has

216. 334 U.S. 62, 68 (1948) (citations omitted).
217. 338 U.S. 507, 511 (1950).

> been considered essential to the achievement of the "just, speedy, and inexpensive determination of every action": the touchstones of federal procedure.

Brown Shoe Co. v. United States[218] (resolving the finality issue, raised at oral argument for the first time, in favor of appealability of an order requiring a divestiture of a subsidiary and providing that the parent company file with the court a detailed plan for carrying out the divestiture). This case demonstrates how the determination of finality is, at bottom, a pragmatic question concerned with the realities of litigation.

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The Supreme Court's persistent rejection of the opposing logical extremes inevitably results in a certain disharmony in the precedents. While some holdings and opinions take a generous attitude toward finality and appealability, others take a decidedly stricter approach. Nonetheless, the series of exemplary quotations set out above is not intended to suggest that finality determinations are merely ad hoc or wholly subjective. The precedents are numerous and particularized. There are clear holdings of appealability or nonappealability categorizing virtually every imaginable ruling a district court could render; i.e., there are controlling precedents already on the books.[219] Indeed, the Supreme Court explicitly has warned against a tabula rasa or case-by-case approach.[220] Therefore, care is required to find precedent from the High Court as well as controlling circuit precedent to determine the finality of the particular ruling being appealed. On those rare occasions when there is no controlling precedent—and only then—do the finality policies and "good language" serve as guidelines.

218. 370 U.S. 294, 306 (1962).

219. *See generally* 15A Federal Practice & Procedure, *supra* note 12, §§ 3910–3914.14; 19 Moore's Federal Practice, *supra* note 12, §§ 202.07–202.14.

220. Richardson–Merrell, Inc. v. Koller, 472 U.S. 424, 439 (1985).

All of this conceptual pulling and hauling once caused Jerome Frank to observe, tongue in cheek:

> "Final" is not a clear one-purpose word; it is slithery, tricky. It does not have a meaning constant in all contexts. . . . "The cases, it must be conceded, are not altogether harmonious." There is, still, too little finality about "finality." "A final decision" is not necessarily the ultimate judgment or decree completely closing up a proceeding. But it is not easy to determine what decisions short of that point are final.[221]

§ 3.03 Collateral Order Doctrine

The Supreme Court has fashioned the collateral order doctrine in a discrete line of cases interpreting the 18 U.S.C. § 1291 requirement for a "final decision."[222]

Under this expansive interpretation of the statute, an order is labeled final and appealable even though the ruling does not terminate the entire action or even any significant part of it. The apparent finality is that the order is a final determination of the particular issue in question. Appeal is allowed if and only if: (1) the matter involved is separate from and collateral to the merits; (2) the matter is too important to be denied effective review; (3) review later by appeal from a final judgment is not likely to be effective; and (4) the matter presents a serious and unsettled question.

The leading case is *Cohen v. Beneficial Industrial Loan Corp.*[223] In *Cohen*, a stockholders' suit, the defendant corporation moved under state law to require the plaintiff to post a bond for the defendant's costs and attorneys' fees, and then appealed from the denial of the motion. The Supreme Court held the denial was appealable. In the Court's words:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this

221. United States v. 243.22 Acres of Land in Town of Babylon, 129 F.2d 678, 680 (2d Cir.), *cert. denied*, 317 U.S. 698 (1942).

222. *See generally* 15A Federal Practice & Procedure, *supra* note 12, §§ 3911–3911.5; 19 Moore's Federal Practice, *supra* note 12, § 202.07.

223. 337 U.S. 541 (1949).

> provision of the statute this practical rather than a technical construction. . . . Here it is the right to security that presents a serious and unsettled question.[224]

The collateral order doctrine still remains viable today. Separability, finality, urgency, and importance remain the watchwords.[225] Some decisions seem to suggest a more restrictive attitude and even some reluctance to find appealability, although some particular orders have been held to satisfy the *Cohen* test. This is a narrow subcategory of finality defined by a strict test. But the Supreme Court has consistently explained that

> the [finality] statute entitles a party to appeal not only from a district court decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment," but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of "achieving a healthy legal system," nonetheless be treated as "final."[226]

Consider some representative examples of holdings going each way that follow.

The Court has held the following orders appealable under the collateral order doctrine: a pretrial order that imposed on the defendants 90% of the costs of notifying the members of the plaintiff class;[227] an order denying a claim of immunity raised by a defendant in a motion for summary judgment;[228] an order granting a motion to abstain and stay the federal litigation pending similar state litigation;[229] an order denying a state's claim to Eleventh Amendment immunity;[230] and an order rejecting the Attorney General's certification that a federal employee named as

224. *Id.* at 546–47.

225. United States v. Alcon Labs., 636 F.2d 976, 884 (1st Cir.), *cert. denied*, 451 U.S. 1017 (1981).

226. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994).

227. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974).

228. Mitchell v. Forsyth, 472 U.S. 511, 524–30 (1985) (qualified immunity); Nixon v. Fitzgerald, 457 U.S. 731, 741–43 (1983) (absolute immunity). *But see* Johnson v. Jones, 515 U.S. 304 (1995) (defendant entitled to invoke qualified immunity may not appeal district court's summary judgment order that determines whether pretrial record sets forth a genuine issue of fact for trial).

229. Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 8–13 (1983).

230. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993).

a defendant in a state court action was acting within the scope of employment and refusing to substitute the United States as a defendant in the removed action.[231]

The Court has held the following orders nonappealable under the collateral order doctrine: the determination that an action may not go forward as a class action;[232] an order refusing to disqualify opposing counsel in a civil case;[233] an order denying a motion to abstain and stay federal litigation pending similar state litigation;[234] an order denying a motion to dismiss made on the ground that an extradited person was immune from civil process;[235] a refusal to apply the Federal Tort Claims Act's judgment bar;[236] an order vacating a dismissal predicated on the parties' settlement agreement;[237] an order denying a defendant's motion to dismiss a damages action on the basis of a contractual forum-selection clause;[238] and an order imposing sanctions on an attorney for discovery abuses, not on a contempt theory but solely pursuant to Federal Rule of Civil Procedure 37.[239]

The fact that the list of nonappealable examples is longer than the list of appealable examples also demonstrates how the Supreme Court has steadfastly refused to allow the collateral order doctrine to be transformed into a purely pragmatic approach to finality. Consistent with the formalism that generally characterizes finality analysis, the Court has adhered to the formalistic, factorial approach from *Cohen*. Each factor must be taken into account; no one factor predominates. Furthermore, each factor has a high threshold to be satisfied, and, if any one factor is unsatis-

231. Osborn v. Haley, 127 S. Ct. 881 (2007).

232. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468–69 (1978). The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of title 28 of the U.S. Code), amended the traditional federal diversity jurisdiction and federal removal statutes to allow federal jurisdiction over most interstate classes.

233. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373–78 (1981). *See also* Flanagan v. United States, 465 U.S. 259, 263–70 (1984) (same for order disqualifying criminal defense attorney).

234. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275–78 (1988).

235. Van Cauwenberghe v. Biard, 486 U.S. 517, 526–30 (1988).

236. Will v. Hallock, 546 U.S. 345 (2006).

237. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994).

238. Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989).

239. Cunningham v. Hamilton County, 527 U.S. 198 (1999).

fied, then the test is not met. Even a persuasive argument that the order sought to be appealed threatens an injury that cannot effectively be remedied on a later appeal will not alone be enough to overcome the policy of finality.[240] Nonetheless, each and every collateral order that independently satisfies the *Cohen* criteria is itself independently appealable; there is no such thing as a "one-collateral-order-appeal-per-case limit." For example, a previously unsuccessful appeal by the defendant from an unfavorable qualified-immunity ruling on a motion to dismiss did not preclude a second immediate appeal, also based on qualified immunity, from a denial of a motion for summary judgment.[241]

§ 3.04 Twilight Zone Doctrine

The "twilight zone doctrine," sometimes less pejoratively called "pragmatic finality" or the "*Gillespie* doctrine," is another discrete, although somewhat tangential, line of analysis under 28 U.S.C. § 1291.[242] In the namesake and original decision, *Gillespie v. United States Steel Corp.*,[243] a Jones Act[244] case, the district court struck portions of the complaint asserting claims under state law and an unseaworthiness claim and all claims for the benefit of the members of the family of the decedent except his mother. Even though the district court refused to certify an interlocutory appeal, the plaintiff appealed and the court of appeals decided the merits and affirmed. The Supreme Court reached the merits based on the following line of reasoning:

> [O]ur cases long have recognized that whether a ruling is "final" within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a

240. Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 374–79 (1987).

241. *See* Behrens v. Pelletier, 516 U.S. 299 (1996).

242. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3913; 19 Moore's Federal Practice, *supra* note 12, § 202.10.

243. 379 U.S. 148 (1964).

244. 46 U.S.C. § 688.

> technical construction." . . . [I]n deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[245]

Opinion *language* in this line of decisions would end the finality requirement, if taken literally and applied indiscriminately. Actual case *holdings* that invoke this doctrine to allow an appeal are rather rare.[246] Indeed, this line of precedent may be described as essentially moribund, but susceptible to some future revitalization.[247]

The major significance of the twilight zone doctrine may be its potential toward modulation of the final/nonfinal dichotomy. Two preliminary cautions must be mentioned, however. First, the indefiniteness of the analysis could allow the court of appeals something of a jurisdictional "wild card" to trump nearly any district court decision on a case-by-case basis. That would avoid indirectly what the Supreme Court has refused to avoid directly: the formalism of the final-decision requirement in § 1291. For the most part, however, the courts of appeals have not given in to that temptation. Second, this is a peculiar area of finality in which the Supreme Court's role to review state court decisions may differ from the role of the courts of appeals to review district court decisions. Consequently, the precedents on finality for the Supreme Court and for the courts of appeals, respectively, are best understood as being less interchangeable than usual.[248]

As one might expect from such an enigmatic opinion, *Gillespie* is interpreted in different ways by different courts of appeals.[249] A few panels simply have overtly balanced the policies for and against immediate appeal in the particular case. Other panels have used the balancing approach to allow some appeals from orders that fit within more traditional finality precedents and to dismiss other appeals that could just as easily

245. *Gillespie*, 379 U.S. at 152–53.

246. Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978) (distinguishing *Gillespie* and refusing to apply it).

247. *Cf.* Am. Export Lines, Inc. v. Alvez, 446 U.S. 274, 277–79 (1980) (citing *Gillespie* by analogy).

248. *See supra* § 1.06.

249. *See generally* 15A Federal Practice & Procedure, *supra* note 12, § 3913; 19 Moore's Federal Practice, *supra* note 12, § 202.10.

have been dismissed under other doctrines. The theoretical potential for expansion of appellate jurisdiction threatened by this approach has not been realized. Perhaps because the *Gillespie* doctrine's twilight zone appears so boundless, the courts of appeals have been decidedly tentative in their applications, usually preferring to use the doctrine to buttress holdings of appealability based primarily on other grounds. The *Gillespie* twilight zone holding, in retrospect, may be best understood as an efficient and appropriate rationalization only (as was true in the *Gillespie* case itself) when it is invoked as a justification after the court of appeals has reached the merits and has fully decided the appeal based on a mistaken belief of finality.[250] But such a reimagining of the doctrine must come from the Supreme Court, not the courts of appeals.[251]

§ 3.05 Partial Final Judgments

The Federal Rule of Civil Procedure 54(b) certification is another application of § 1291 in civil cases. Rule 54(b) facilitates the entry of judgment on one or more but fewer than all the claims, or as to one or more but fewer than all the parties.[252] The rule provides that such a partial final judgment "is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."[253] Modern federal procedure allows for such liberal joinder of claims and parties that contemporary civil actions often become very complex. By allowing for a partial final judgment and an immediate appeal, the rule is a response to the legitimate concern that delay of any and all appeals until the entire complex action is completed could result in injustice. The rule thus relieves a successful party from any delay in a decision and from the need to participate in the extended trial proceeding. The rule allows a prompt appeal but provides some certainty for the appellate procedure given today's complex lawsuits. In doing so, the rule

250. 15 Federal Practice & Procedure, *supra* note 12, § 3913, at 479–85; 9 Moore's Federal Practice, *supra* note 12, § 110.12.

251. *But cf.* Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228, 1231 (5th Cir. 1973) (invoking a principle of "cumulative finality" *sans* Supreme Court sanction).

252. *See generally* 10 Federal Practice & Procedure, *supra* note 12, §§ 2656–2661; 10 Moore's Federal Practice, *supra* note 12, §§ 54.20–54.29.

253. Fed. R. Civ. P. 54(b).

expressly rejects the notion that an entire case is the appealable judicial unit; however, the rule reaffirms and incorporates the "final decision" requirement that still must be satisfied for the partial judgment.[254]

Generally, Rule 54(b) may be utilized if and only if: (1) more than one claim is presented, or multiple parties are involved and the matter in question is separable from the still-unresolved portions of the case; (2) the district court issues a certificate expressly determining that there is no just reason for delay; and (3) the district court expressly directs the entry of a Rule 54(b) judgment that is a final disposition of the matter.

Each of these requirements can be a catch-point. In the absence of the express determination and direction in a Rule 54(b) certificate, any order adjudicating fewer than all claims against all parties normally remains subject to revision by the district court until the entry of a final and comprehensive judgment. The entry of a Rule 54(b) certificate is not automatic or required and is committed initially to the district court's discretion. Without a Rule 54(b) certificate, an appeal must be dismissed unless the judgment is appealable on other grounds.[255] A late certification can cure this defect. The court of appeals is not bound to decide the appeal, however, even when there is a certificate. The appeal under a certificate will be dismissed if the order is not final, or if the threshold multiplicity does not exist, or if, despite the deference owed, the court of appeals concludes that the district court abused its discretion to issue the certificate. Boilerplate certificates that lack specific detail usually are found wanting.

In *Curtiss-Wright Corp. v. General Electric Co.*,[256] the Supreme Court elaborated on the respective roles of the district court and the court of appeals. In *Curtiss-Wright*, the plaintiff sued on various claims for breach of multiple contracts and included a demand for a liquidated balance that admittedly remained unpaid. The defendant filed counterclaims based on the same contracts. On a motion for summary judgment, the district court rejected the defendant's only defense against payment of

254. Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 431–38 (1956).

255. For example, a certificate will not be required when the matter is appealable under the collateral order doctrine. 10 Federal Practice & Procedure, *supra* note 12, § 2658.4. *See supra* § 3.03.

256. 446 U.S. 1 (1980).

the unpaid balance and entered a Rule 54(b) judgment on that claim. The court of appeals dismissed for an abuse of discretion because the unresolved counterclaims made the certificate inappropriate.

The Supreme Court reversed the court of appeals and held the Rule 54(b) certificate had been properly issued by the district court. The Court opined that Rule 54(b) certificates should not be reserved only for extreme cases, but added that certificates should not issue merely upon the request of the parties. The "no just reason for delay" element has two components: the interest of judicial administration and the equities of the parties. The first component requires thoughtful scrutiny by the court of appeals within contemplation of the general finality principle; the second component, by contrast, is peculiarly within the district court's informed discretion, to be exercised on a fact-bound basis.

The chief purpose of Rule 54(b) is to accommodate the final-decision requirement to the complexity of modern litigation with multiple parties and claims. The function of the rule is to define a minimum unit of litigation that is deemed final under the jurisdictional statute. In this respect, Rule 54(b) ensures flexibility to accomplish immediate enforcement and allow immediate appellate review. There is a related principle of "cumulative finality" that may be invoked when a series of orders disposing of various claims and parties in effect results in the de facto termination of the action; an order disposing of part of the case may be followed by a voluntary dismissal of the balance of the case in order to achieve the de jure jurisdictional finality for bringing an appeal from a "final decision."[257]

257. *E.g.*, Jetco Elec. Indus., Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973). *See* 15A Federal Practice & Procedure, *supra* note 12, § 3914.9.

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CHAPTER 4

Appeals from Interlocutory Orders—Civil

§ 4.01 Generally

This chapter chronicles the widening statutory exceptions to the requirement of finality.[258] Both the general policy and the general statute reckon appealability against the baseline of finality.[259] At one time, interlocutory orders were just that—*interlocutory*.[260] Not until 1891—the year the circuit courts of appeals were created—was there a provision for an interlocutory appeal, and that statute covered only orders granting or continuing injunctions.[261] However, the statutory exceptions to the general rule of finality, which was the subject of the previous chapter, have grown in number and significance ever since.[262]

As is true of the federal appellate power to review final decisions, jurisdiction over interlocutory appeals is a creature of statute and statutory interpretation. Inexorably, Congress has widened the appellate review power. The Supreme Court has described legislative developments: "[Exceptions] seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequences. When the pressure rises to a point that influences Congress, legislative remedies are enacted."[263] The various statutory exceptions demonstrate a congressional recognition that

258. *See generally* 16 Federal Practice & Procedure, *supra* note 12, §§ 3920–3936.3; 19 Moore's Federal Practice, *supra* note 12, §§ 203.10–203.34.

259. 28 U.S.C. § 1291.

260. "[I]nterlocutory, . . . adj. (Of an order, judgment, appeal, etc.) interim or temporary, not constituting a final resolution of the whole controversy." Black's Law Dictionary 832 (Bryan A. Garner ed., 8th ed. 2004).

261. Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826. *See supra* § 1.03.

262. *See* Carson v. Am. Brands, Inc., 450 U.S. 79, 83 n.8 (1981); Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 829–30 (2d Cir.) (Friendly, J., dissenting), *cert. denied*, 376 U.S. 944 (1963).

263. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955), *overruled in part by* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279–88 (1988).

too rigid an adherence to the finality requirement can work a severe hardship within the particular litigation and beyond it. Furthermore, a wooden, categorical approach to appealability can frustrate the very policies sought to be served by the requirement of finality.

Because these provisions create exceptions to the general history and tradition against interlocutory appeals, the statutes are narrow in language, interpretation, and application. There is much less "play in the joints" here than there is in the final-decision provision in § 1291.[264] Once jurisdiction obtains, however, the interlocutory appeal brings before the court of appeals all aspects of the case illuminated by the order on review.[265]

In 1992, in a noteworthy legislative development, Congress amended the jurisdictional statute on interlocutory appeals (28 U.S.C. § 1292) and authorized the Supreme Court to promulgate court rules to provide for additional categories of interlocutory appeals that are not otherwise authorized in the statute.[266] The only exercise of this judicial rule-making power thus far has been to authorize permissive interlocutory appeals of a district court order granting or denying class action certification.[267] The congressional delegation is a jurisdictional ratchet, a one-way device: judicial rule making can be used only to expand appellate jurisdiction and not to contract appellate jurisdiction that is otherwise granted by statute.[268] Thus, it remains to be seen what more will come from this judicial rule-making power, i.e., whether the courts will expand interlocutory appealability in the future and, if so, for what other kinds of additional nonfinal decisions.[269]

264. *See supra* §§ 3.02–3.05.

265. Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747, 755–57 (1986), *overruled in part on other grounds by* Planned Parenthood v. Casey, 505 U.S. 833, 870 (1992).

266. 28 U.S.C. § 1292(e). *See also infra* §§ 4.02–4.03.

267. Fed. R. Civ. P. 23(f). *See infra* § 4.03 (permissive interlocutory appeals). These orders previously were held nonappealable under the collateral order doctrine and § 1291. *See supra* § 3.03.

268. *See* H.R. Rep. No. 102-1006, at 18 (1992).

269. *See* 28 U.S.C. § 2072(c) (authorizing judicial rule making under 28 U.S.C. § 1291, discussed *supra* § 3.01). *See also supra* § 1.07.

Tautologically, interlocutory orders may be divided into reviewable orders and nonreviewable orders. (For this chapter, the terms *reviewable* and *nonreviewable* are preferred over the terms *appealable* and *nonappealable* because the former pair distinguishes orders based on the power of the court of appeals and the latter pair might be misunderstood to be under the complete control of the litigants. An appeal from an order might be taken improperly so that the court of appeals is required to dismiss for want of jurisdiction. Such an appeal may broadly and imprecisely be labeled *appealable* but could not be mistaken as being *reviewable*.) *Nonreviewable* here has something of a temporal connotation. An interlocutory order that is not immediately reviewable under the statutes considered in this chapter might serve as the basis for an immediate application for an extraordinary writ[270] and certainly would be cognizable on any eventual appeal from a final judgment under the principle of closure.[271] Interlocutory appeals of reviewable orders may be subdivided into *entitled* interlocutory appeals and *permissive* interlocutory appeals. The former are brought at the discretion of the party; the latter require court permission. It bears emphasis that so-called entitled interlocutory appeals are discretionary with the appellant, not mandatory. Should a party decline to take advantage of an earlier opportunity of an immediate appeal, the issue may still be raised on a subsequent appeal from the eventual final judgment.[272]

§ 4.02 Entitled Interlocutory Appeals

Section 1292(a) of title 28, U.S. Code, provides the courts of appeals with jurisdiction over appeals as of right of three types of interlocutory orders: those dealing with injunctions, receivers, and admiralty matters. Each type of entitled interlocutory appeal—sometimes referred to as "interlocutory appeals as of right"—will be discussed briefly here.[273]

Subsection (1) of § 1292(a) defines a category of entitled interlocutory appeals of orders "granting, continuing, modifying, refusing or dis-

270. *See infra* § 5.03.
271. *See supra* § 1.08.
272. *See* Caterpillar Inc. v. Lewis, 519 U.S. 61, 74 (1996).
273. 28 U.S.C. § 1292(c) makes a similar provision for the Federal Circuit. *See supra* § 1.03.

solving injunctions, or refusing to dissolve or modify injunctions."[274] A prolific source of appeals, this subsection accounts for the largest number of interlocutory appeals, entitled or permissive. Once obtained, appellate review extends to all matters necessary to determine the propriety of the order, going so far as to review the merits to order a dismissal. A working definition of an injunction for purposes of § 1292(a)(1) is an order "directed to a party, enforceable by contempt, and designed to accord or protect 'some or all of the substantive relief sought by a complaint' in more than a temporary fashion."[275] Based on the duration of the order and whether there was notice and a hearing, and on the nature of the showing made, the courts of appeals distinguish between preliminary injunctions (which are appealable) and temporary restraining orders (which are not appealable), the latter being of a very limited duration, usually only ten days.[276]

Denial of an injunction may be implicit. If the order has the practical effect of refusing injunctive relief, there is an entitlement to an interlocutory appeal so long as there are immediate and serious consequences.[277] In an important holding, the Supreme Court eliminated an anomalous exception: an order by a district court that relates only to the conduct or progress of litigation before that court is not considered an injunction. The Court thus put a stop to the confusing earlier practice of distinguishing the appealability of various stays based on arcane vestiges of the historical distinctions between equity and law.[278]

274. 28 U.S.C. § 1292(a)(1). *See generally* 16 Federal Practice & Procedure, *supra* note 12, §§ 3921–3924.2; 19 Moore's Federal Practice, *supra* note 12, §§ 201.31[1], 203.10.

275. 16 Federal Practice & Procedure, *supra* note 12, § 3922, at 65. *See also* 19 Moore's Federal Practice, *supra* note 12, § 203.10[2].

276. *E.g.*, Sampson v. Murray, 415 U.S. 61, 88 n.58 (1974).

277. *Compare* Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 480–82 (1978) (denial of class action status not appealable), *with* Carson v. Am. Brands, Inc., 450 U.S. 79, 86–90 (1981) (refusal to approve consent decree that would have barred racial discrimination in hiring is appealable).

278. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 279–88 (1988), *overruling in part* Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955), *and* Ettelson v. Metro. Life Ins. Co., 317 U.S. 188 (1942), *and* Enelow v. N.Y. Life Ins. Co., 293 U.S. 379 (1935). *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3923, at 132–45; 19 Moore's Federal Practice, *supra* note 12, § 203.10[6]. *See also* 9 U.S.C. § 16 (Federal Arbitration Act permits appeals from orders that give litigation precedence over arbitration and denies appeals from orders that give arbitration precedence over litigation).

In characterizing orders for purposes of appealability under § 1292(a)(1), the view taken by the district court necessarily is the beginning point of analysis. An apparent belief by the district court and the parties that the subject order was in the nature of injunctive relief goes a long way toward a finding of appealability. Nonetheless, because the label used by the district court does not control, circuit precedent elaborates on the definition of an interlocutory order "granting, continuing, modifying, refusing or dissolving . . . or refusing to dissolve or modify" an injunction.[279] The authoritative judicial gloss on this subsection is that it ought to be saved for orders of serious, perhaps irreparable, consequence so as not to unduly compromise the basic policy against piecemeal appeals.[280]

Subsection (2) of § 1292(a) defines a second category of entitled interlocutory appeals of "orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property."[281] A consistent practice of strict construction has limited this subsection to its literal meaning.[282] Consequently, appeals from orders appointing receivers typically do not present jurisdictional problems. A receiver, a character of equity practice, is appointed by the court that has managerial powers over the property.[283] Much of the litigation under this subsection considers whether an order does or does not create a receivership. The analogy, then, to subsection (1) and injunctions is obvious. The most important textual difference is that subsection (2) does not permit an appeal if the district court refuses to act, while a grant or denial of an injunction triggers an entitled appeal under subsection (1). Thus, a refusal to appoint,

279. *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3924; 19 Moore's Federal Practice, *supra* note 12, § 203.10[1]–[4].

280. *See generally Gulfstream Aerospace*, 485 U.S. at 287–88; Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 374–79 (1987); Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 480 (1978).

281. 28 U.S.C. § 1292(a)(2).

282. *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3925; 13 Moore's Federal Practice, *supra* note 12, § 66.07[1]; 19 Moore's Federal Practice, *supra* note 12, §§ 201.31[2], 203.11.

283. *See* Fed. R. Civ. P. 66. *See generally* 12 Federal Practice & Procedure, *supra* note 12, § 2983; 13 Moore's Federal Practice, *supra* note 12, § 66.04.

in the first place, is not appealable under § 1292(a)(2). An order "refusing . . . to wind up [a] receivership[ ]," which is explicitly made appealable under subsection (2), is a refusal to end a receivership that has become unnecessary or has been completed.

Subsection (3) of § 1292(a) defines a third category of entitled interlocutory appeals from decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."[284] The historical purpose of this provision was to allow an appeal immediately after a determination of liability by the district court, and before the separate determination of damages, in a typically lengthy and expensive hearing before a commissioner or special master. The courts of appeals, even panels of the same circuit, cannot seem to agree on whether this provision, which is a holdover from before the 1966 merger of the admiralty and civil procedures, should be read broadly or narrowly.[285] There is no readily apparent reason, however, why admiralty cases deserve a significantly more liberal practice of interlocutory appeals; § 1292(a)(3) was not intended to clutter the courts of appeals with flotsam and jetsam.[286]

An admiralty case is either a case cognizable only within the exclusive original jurisdiction of the district court or a case that falls within some other general head of federal jurisdiction, as well as the federal admiralty jurisdiction, and is denominated as an admiralty case in the pleadings.[287] Befitting its historical origins, the typical interlocutory appeal under subsection (3) is from an admiralty order finally determining that one party is liable to another in the first part of a bifurcated trial proceeding in the district court, before a second hearing to determine damages.[288] And, once an interlocutory appeal has been properly taken, the

284. 28 U.S.C. § 1292(a)(3).

285. *Compare* Hollywood Marine, Inc. v. M/V Artie James, 755 F.2d 414, 416 (5th Cir. 1985) (narrowly), *with* Heller & Co. v. O/S Sonny V., 595 F.2d 968, 971 (5th Cir. 1979) (broadly). *See supra* § 1.06 (rules of precedent).

286. *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3927; 19 Moore's Federal Practice, *supra* note 12, §§ 201.31[4], 203.13.

287. Fed. R. Civ. P. 9(h) reads in part: "A case that includes an admiralty claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)." *See also* Fed. R. Civ. P. XIII, Supplemental Rules for Certain Admiralty and Maritime Claims A–G.

288. *See* Schoenamsgruber v. Hamburg Am. Line, 294 U.S. 454, 458 (1935).

court of appeals may decide all matters that have been sufficiently illuminated by the district court.[289]

§ 4.03 Permissive Interlocutory Appeals

Section 1292(b) of title 28, U.S. Code, provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.[290]

Enacted in 1958, this provision is the biggest statutory qualification—the greatest legislative compromise—on the policy of finality that has marked the history of the courts of appeals.[291] The statute originated as a political compromise between, on the one hand, those who were committed to finality and hostile to interlocutory appeals and, on the other hand, those who favored giving the courts of appeals discretionary jurisdiction to review any and all interlocutory appeals. Three reasons may be suggested why this debate will not likely be rejoined along these lines anytime soon. First, beginning soon after 1958, the courts of appeals experienced a dramatic expansion of their dockets that continued for three decades.[292] In the aftermath of that sustained docket growth, the courts of appeals simply are not looking to add to their workload. Sec-

289. *See supra* § 1.08.

290. 28 U.S.C. § 1292(b). Section 1292(d) makes a similar provision for the Federal Circuit. *See supra* § 1.03.

291. *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3929; 9 Moore's Federal Practice, *supra* note 12, §§ 203.30–203.33.

292. *See supra* § 1.04.

ond, in the early 1990s, Congress enacted two statutory authorizations that assigned the responsibility to define appealability from final decisions[293] and from interlocutory orders[294] back onto the courts as delegations of judicial rule-making power.[295] These two statutes are some indication that Congress has become more reluctant to expand appellate jurisdiction statutorily and unilaterally.[296] Third, the actual experience under § 1292(b), as will be described in this section, does not indicate any significant pent-up pressure for further legislative relaxation of the finality policy.

Obviously, § 1292(b) is the most explicit statutory departure from the historical, general policy in favor of finality and against interlocutory appeals. While the available statistics do not disclose the frequency with which this provision is invoked and denied in the district courts, only an estimated 100 appeals are brought under § 1292(b) each year.[297] The provision goes largely unused then, considering that more than 30,000 civil federal appeals are filed each year.[298] Perhaps appellate attitudes influence this disuse; it is estimated that approximately half of the applications that are attempted under this section are rejected by the courts of appeals.[299]

While the legislative history and the case law support the strict attitude that § 1292(b) should be saved for the rare and exceptional order, the run of actual applications does not adhere to a narrow interpretation with an absolute consistency. In the run of cases, the certification by the district court and the permission to appeal by the court of appeals—

293. 28 U.S.C. § 2072(c). *See supra* § 3.02. No additional finality rules have been promulgated by the courts.

294. 28 U.S.C. § 1292(e). *See supra* § 4.01. The only additional permissive interlocutory appeal that the courts have authorized by rule are appeals from an order granting or denying class action certification. *See* Fed. R. Civ. P. 23(f).

295. *See also supra* § 1.07.

296. *But see* 28 U.S.C. § 158(d)(2)(A) (2000 & Supp. V 2005) (bankruptcy permissive interlocutory appeals). *See also supra* § 2.04.

297. 16 Federal Practice & Procedure, *supra* note 12, § 3929, at 363.

298. There were 30,241 total civil cases commenced during the twelve-month period ending September 30, 2007. Admin. Office of the U.S. Courts, 2007 Annual Report of the Director, Judicial Business of the United States Courts, table B-1A at 90.

299. 16 Federal Practice & Procedure, *supra* note 12, § 3929, at 363.

evaluations independent of each other—for the most part follow the procedure and criteria stated in the statute.[300]

The criteria in the statute are rather straightforward in summary, although their application is subtle and eclectic.[301] There must be "an order": the district court must enter the predicate order and decide the issue to be certified. Whether to enter the separate certificate under § 1292(b) is left to the discretion of the district court, and the certificate may be entered sua sponte or on motion; there is no officially required form. The order being certified must be "not otherwise appealable." Matters "otherwise appealable" include outright final decisions and decisions treated as the equivalent of final decisions under the collateral order doctrine or the twilight zone doctrine of finality.[302] A Rule 54(b) certificate may be deemed optional along with a § 1292(b) certificate, but for cases within the rule it is preferable to use the Rule 54(b) certificate.[303] A § 1292(b) certificate is preferred over an extraordinary writ—a general condition precedent to a writ being the unavailability of any other remedy.[304] The "controlling question of law" criterion means that factual questions generally do not qualify, and appeals from the exercise of district court discretion ordinarily are not permitted. The legal question must be central and important to the litigation. There must be a "substantial ground for difference of opinion." A paradigm example of an appropriate occasion for a § 1292(b) certificate might involve a legal issue of first impression in a circuit in which there is a conflict between the other courts of appeals. The possibility of avoiding trial proceedings or significantly simplifying pretrial or trial proceedings is enough to satisfy the related criterion that the interlocutory appeal "materially advance the ultimate termination of the proceeding."

Once the district court issues the certificate, the court of appeals "may thereupon, in its discretion, permit an appeal." This last statutory

300. *See also* Fed. R. App. P. 5 (appeal by permission). *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3930; 19 Moore's Federal Practice, *supra* note 12, §§ 203.31–203.32.

301. 16 Federal Practice & Procedure, *supra* note 12, § 3931; 19 Moore's Federal Practice, *supra* note 12, § 203.31 nn.1–23.

302. *See supra* §§ 3.02–3.04.

303. *See supra* § 3.05.

304. *See infra* § 5.03.

criterion obliges the reviewing court to evaluate the prudence of the district court's decision to issue the certificate, an evaluation somewhat analogous to the exercise of discretion on the part of the court of appeals to grant an extraordinary writ.[305] But more than this, the court of appeals is called on to exercise an independent discretion by taking into account factors beyond the proper contemplation of the district court, such as the state of the appellate docket. This appellate discretion seems so total and complete as to have a family resemblance to the Supreme Court's discretion to grant or deny a petition for a writ of certiorari.[306]

All of these statutory criteria are to be figured into the calculi of the district court and the court of appeals, along with the background purposes of § 1292(b). Once an appeal is granted, the scope of review is closely limited to the order appealed from and the issue justifying the certification, although all questions material to that order are properly before the court.[307] In conclusion, it might be observed that Congress has given the district courts and the courts of appeals, respectively, a discretionary prerogative to certify and to accept or deny the certification, and both courts have been protective of their respective prerogatives.

305. *See infra* § 5.03.

306. *See* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 883 n.9 (1994); Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 n.26 (1978).

307. *See* Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 205 (1996); United States v. Stanley, 483 U.S. 669, 676–78 (1987); Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 387 (1985).

CHAPTER 5

Review by Writ

§ 5.01 Generally

Proceedings considered in this chapter are formally commenced by an original application in the court of appeals. This original jurisdiction may be considered a remnant of the early history of the old circuit courts, with their hybrid appellate and original jurisdiction.[308] Broadly considered, however, the power to issue writs should be characterized as an appellate power. More metaphysical issues of the inherent power of the courts of appeals are preempted, for the most part, by explicit statutory authorizations and specific limitations on the power to issue the writ of habeas corpus, to grant all writs necessary or appropriate in aid of their jurisdiction, and to impose appropriate sanctions.[309]

An awareness of some basic nomenclature is helpful. Historically, a "writ" was any formal legal document in the form of a letter under seal and in the king's name. In legal usage, a writ is "a court's written command or order in the name of the sovereign, state, or other competent legal authority, directing or enjoining the addressee to do or refrain from doing some specified act."[310] Some judicial writs that are granted on appeal, such as a writ of error or a writ of certiorari, are deemed part of the ordinary appellate procedure. Other judicial writs are deemed extraordinary, such as mandamus or prohibition, and issue as a matter of discretion in the court's original jurisdiction. The language of opinions varies to refer sometimes to "granting" a "petition" for a writ, but that confuses the request with the decision; technically speaking, a court "issues" a writ upon an "application."

308. *See supra* § 1.03.
309. *See supra* § 1.05.
310. Bryan A. Garner, A Dictionary of Modern Legal Usage 945 (2d ed. 1995).

§ 5.02 Relief in the Nature of Habeas Corpus

History informs an understanding of habeas corpus jurisdiction. The old circuit courts, part original and part appellate tribunals, had jurisdiction to issue writs of habeas corpus. The Evarts Act of 1891 created additional circuit judgeships and gave the circuit judges habeas jurisdiction.[311] The 1911 legislation ended the trial jurisdiction of the circuit courts and ended their habeas jurisdiction as well. The "new" 1911 courts of appeals were not given the power to issue the writ of habeas corpus, apart from the power granted in the all writs statute.[312] One historical anomaly persists to the present day, however: the courts of appeals qua courts lack power to grant an original application for the writ, but individual circuit judges do possess that authority, at least technically. Section 2241(a), title 28 of the U.S. Code, generally authorizes "the Supreme Court, any justice thereof, the district courts and *any circuit judge*" to issue the writ of habeas corpus as an original matter.[313] The federal remedy for state prisoners also repeats the technical empowerment of an individual circuit judge.[314] However, the technical statutory authority vested in the individual circuit judge has no practical significance today, because Federal Rule of Appellate Procedure 22(a) was amended in 1996 to direct that any such original application made directly to an individual circuit judge categorically "must be transferred to the appropriate district court."[315]

The great history of the "Great Writ" is beyond the scope of this modest primer,[316] but a digression is appropriate to summarize the role of the court of appeals in the postconviction review process. The writ of

311. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (1891).

312. *See infra* § 5.03, *supra* § 1.03.

313. 28 U.S.C. § 2241(a) (emphasis added). The same statute authorizes those judicial officers to decline to issue the writ and to transfer the application to the district court for consideration. *Id.* § 2241(b).

314. 28 U.S.C. § 2254(a) (Supp. V 2005). *See also* 28 U.S.C. § 2253(c)(1)(A) (requirement of a certificate of appealability); Fed. R. App. P. 22(b)(1) (same).

315. Fed. R. App. P. 22(a). This provision applies to an application brought by a federal or a state prisoner.

316. *See* Ira P. Robbins, The Law and Processes of Post-Conviction Remedies: Cases and Materials (1982); Larry W. Yackle, Post Conviction Remedies § 18 (1981); 17A Federal Practice & Procedure, *supra* note 12, §§ 4261–4268.5.

habeas corpus, which derives from English common law, found expression in the Constitution[317] and the Judiciary Act of 1789.[318] Although federal prisoners may seek the common-law writ in limited circumstances, their more appropriate statutory remedy is a motion to vacate, set aside, or correct their sentence under 28 U.S.C. § 2255, a statutory provision in the nature of habeas corpus. The motion or application is filed in the sentencing court with an appeal to the court of appeals "as from a final judgment."[319] State prisoners may apply for federal collateral relief from a state conviction and sentence on the grounds that the state's custody violates "the Constitution or laws or treaties of the United States."[320] That federal ground must have been previously presented to the state courts, i.e., the state prisoner must exhaust state remedies before applying to a federal court.[321] Read together, the statutes and the rules contemplate a standard appellate sequence: first, an application or petition for relief is filed in the district court, then an appeal is taken to the court of appeals.[322]

Some further appellate procedures, unique to collateral attacks on criminal convictions, have to do with a certificate of appealability (COA).[323] Federal Rule of Appellate Procedure 22(b) provides that a review of the district court's decision denying a state prisoner's habeas corpus petition or a federal prisoner's motion for § 2255 relief may not proceed on appeal unless and until a COA is issued.[324] This requirement of a COA was imposed by the Antiterrorism and Effective Death Penalty

317. U.S. Const. art. I, § 9, cl. 2 (suspension only during rebellion). *See* Rasul v. Bush, 542 U.S. 466 (2004).

318. Act of Sept. 24, 1789, § 14, 1 Stat. 73.

319. 28 U.S.C. § 2255 (Supp. V 2005). *See also id.* § 2253(c)(1)(B) (requirement of a certificate of appealability to appeal); Fed. R. App. P. 22(b) (requirement of a certificate of appealability to appeal). *See generally* 16A Federal Practice & Procedure, *supra* note 12, § 3968; 20A Moore's Federal Practice, *supra* note 12, § 322.10.

320. 28 U.S.C. § 2254(a) (Supp. V 2005).

321. 28 U.S.C. § 2254(b)(1)(A) (Supp. V 2005). *See also id.* § 2254(b)(1)(B)(i) & (ii) (alternatively, there are no available state remedies, or the available state remedies are ineffective).

322. 17B Federal Practice & Procedure, *supra* note 12, § 4268.5.

323. *See generally* 16A Federal Practice & Procedure, *supra* note 12, § 3968; 20A Moore's Federal Practice, *supra* note 12, § 322.10.

324. Fed. R. App. P. 22(b). The state or government respondent in the district court need not obtain a certificate of appealability to bring an appeal of a district court order granting the petition. Fed. R. App. P. 22(b)(3).

Act of 1996.[325] The COA will issue only if "the applicant has made a substantial showing of the denial of a constitutional right."[326] In the first instance, the district judge determines whether this standard is satisfied; if a petitioner seeks a COA in the court of appeals without having first made the request in the district court, the matter must be remanded for initial district court consideration.[327] If the district court denies the COA, it must state its reasons. Then the petitioner must seek a certificate from a circuit judge, the court of appeals, or a circuit justice.[328] The COA requirement is a significant statutory development in the direction away from an appeal-as-of-right jurisdiction and toward a discretionary-review jurisdiction for the U.S. courts of appeals.

The district court and the court of appeals may issue the COA as to fewer than all the claims in the petition; if the district court issues such a limited COA, the court of appeals also may broaden the COA to cover any or all additional claims. The appellate standard is whether a hypothetical "jurist of reason" would find the legal claim "debatable."[329] So, the appellate question is not whether it is reasonably debatable that the district court decided the merits of the constitutional claim correctly. Rather, the appellate question is whether the district court was correct to have determined that it is reasonably debatable whether the state court had previously decided the constitutional claim correctly. The various courts of appeals have adopted local circuit rules governing the disposition of an application for a COA. Pursuant to Federal Rule of Appellate Procedure 22(b)(2), the application may be considered by either an individual circuit judge or a panel of three judges; if the application is denied by an individual circuit judge, that denial is reviewable by the court of appeals under Federal Rule of Appellate Procedure 27(c). The denial of a COA by a circuit judge or by the court of appeals is then reviewable

325. Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1214. The COA requirement replaced the former procedural device of a "certificate of probable cause," issued either by the district court or the court of appeals, certifying that the petition presented a substantial federal claim, which was required in order to take an appeal prior to 1996.

326. 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322 (2003).

327. Fed. R. App. P. 22(b).

328. 28 U.S.C. § 2253(c)(1). If the petitioner does not make a formal application for a COA, the notice of appeal will be deemed the equivalent of one. Fed. R. App. P. 22(b)(2).

329. *See* Slack v. McDaniel, 529 U.S. 473 (2000).

as a final judgment in the Supreme Court on a writ of certiorari.[330] Thus, the COA is the most significant jurisdictional procedure in appeals involving a state prisoner's habeas corpus petition or a federal prisoner's motion for § 2255 relief.[331]

§ 5.03 "All Writs Necessary or Appropriate"

Writ lore is a rather arcane and a concededly extraordinary aspect of federal appellate procedure.[332] It is a hornbook proposition that "[t]raditionally, the use of these writs in the federal courts has been sharply limited."[333] Section 1651(a), title 28 of the U.S. Code, provides, in part: "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[334] This grant of subject-matter jurisdiction allows for interlocutory review of district court orders through issuance of extraordinary writs by the court of appeals.[335] Mandamus and prohibi-

330. 28 U.S.C. § 1254(1); Hohn v. United States, 524 U.S. 236 (1998). *But see* Brent E. Newton, *Applications for Certificates of Appealability and the Supreme Court's "Obligatory" Jurisdiction*, 5 J. App. Prac. & Process 177 (2003).

331. Other important functions of the court of appeals in collateral review cases, mentioned merely for the sake of completeness, include the following: determining whether a successive petition meets the stringent statutory requirements in order to be filed in the district court; deciding whether allegedly defaulted issues may be relitigated; reviewing grants or denials of stays of execution in capital cases; and reviewing the grant or denial of bail on appeal from a district court decision. *See generally* David M. Maria, Lauren Oland & Ian M. Schwartz, *Habeas Relief for State Prisoners*, 88 Geo. L.J. 1649 (2000); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 Harv. L. Rev. 1868 (1997); 17B Federal Practice & Procedure, *supra* note 12, §§ 4261.1, 4265.2.

332. "We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary cases." *Ex parte* Fahey, 332 U.S. 258, 260 (1947). *See generally* 16 Federal Practice & Procedure, *supra* note 12, §§ 3932–3936.3; 19 Moore's Federal Practice, *supra* note 12, §§ 204.04, 204.06–204.08; 20A Moore's Federal Practice, *supra* note 12, §§ 321.10–321.15.

333. Charles Alan Wright & Mary Kay Kane, Law of Federal Courts § 102, at 757 (6th ed. 2002).

334. 28 U.S.C. § 1651(a). *See also* Fed. R. App. P. 21. *See generally* Federal Court of Appeals Manual, *supra* note 15, §§ 3.01–3.17; Federal Appeals: Jurisdiction and Practice, *supra* note 15, §§ 6.1–6.10.

335. In emergency circumstances, a writ may be issued by a single circuit judge, but the preferred practice is to refer the matter to a panel. *See In re* Cincinnati Enquirer, 85 F.3d 255 (6th Cir. 1996).

tion are the most often used, although "all writs" is meant to include certiorari, habeas corpus, and even a generic "no-name" writ. In marked contrast to the background restraint that typically characterizes the appellate jurisdictional determination, the courts of appeals generally exhibit a rather relaxed attitude toward the form of the writ and its actual issuance. The statute explicitly authorizes the courts of appeals to issue writs in aid of their jurisdiction. At minimum, then, the matter at issue must fall within the potential jurisdiction of the court of appeals. Writs are deemed extraordinary and, by axiom, will not be used as a mere substitute for review, although sometimes in uncertain circumstances a single appellate filing will seek an extraordinary writ and appellate review in the alternative.[336] The writ must be necessary to assert appellate supervision that cannot be subsequently asserted effectively, after entry of an otherwise appealable order, or to remove an obstruction to subsequent appellate review. Most often, a writ will issue to prevent a district court from acting beyond its jurisdiction or to compel a district court to take an action that it lacks power to withhold. Although rarely exercised, this authority is by no measure weak: the holdings admit to a naked power to review immediately even an order that could be reviewed effectively on later appeal.[337] Likewise, the right to bring a later appeal is not affected by the possibility that a petition for a writ could have been brought earlier.

The extraordinary nature of the writs is underscored by the discretion surrounding their issuance.[338] The discretion of the court of appeals to exercise the power defines the proper circumstances in which to issue a writ. But that discretion even more clearly defines particular circumstances in which to deny a writ. Writs are not entitled appeals, in the sense that review of final decisions[339] and 28 U.S.C. § 1292(a) interlocutory appeals are entitled.[340] The underlying characteristic of restraint, of discretion, of a power warily withheld, comes from the common-law

336. *E.g.*, Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380–82 (2005); Will v. United States, 389 U.S. 90, 104–07 (1967); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 30–31 (1943).

337. *E.g.*, La Buy v. Howes Leather Co., 352 U.S. 249, 255 (1957).

338. 16 Federal Practice & Procedure, *supra* note 12, §§ 3933–3933.2; 19 Moore's Federal Practice, *supra* note 12, §§ 204.02[7], 204.04[3].

339. *See supra* § 3.02.

340. *See supra* § 4.02.

history of the writs and is reinforced, of course, by the notion of limited federal court jurisdiction.[341] Although the phrase "clear and indisputable" is used to describe the rights protected by extraordinary writs, that phrase does not establish a threshold of certainty.[342] That is, the legal issue on review may be doubtful and difficult and still justify a writ. A writ will not issue to determine the merits of a ruling that has been improperly withheld; however, a writ will issue to compel a district court to rule on a matter that has been improperly deferred. In this situation, the writ will not direct the district court to rule one way or the other, but only to cease withholding a ruling. The conceptual line between the power to issue a writ and the propriety of issuing a writ often becomes blurred when a writ is denied.

Extraordinary writs are the vehicle for the exercise of two important and distinct responsibilities of the federal appellate courts. In the federal judicial hierarchy, the courts of appeals hold both a supervisory authority and an advisory authority over the district courts.[343] The courts of appeals supervise the district courts by remedying unusual categories of error, and they advise the district courts on difficult and novel issues that cannot or should not await final appeal. The issuance of an occasional extraordinary writ can accomplish these corrective and didactic purposes without establishing a permanent new pattern of appealability that would bring a flood of additional appeals. Still, the courts of appeals need to be sensitive to the potential for abuse in the writ procedure, by which a district judge becomes a potential litigant as the respondent.[344] Furthermore, while there may be a case-by-case preference for a

341. *See supra* § 1.05.

342. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). *See also* 16 Federal Practice & Procedure, *supra* note 12, § 3933; 19 Moore's Federal Practice, *supra* note 12, §§ 201.43, 204.02[8].

343. *See generally* 16 Federal Practice & Procedure, *supra* note 12, §§ 3934–3934.2; 20A Moore's Federal Practice, *supra* note 12, §§ 321.01–321.14. *Cf.* Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380–82 (2005) (advisory mandamus).

344. "The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals." Fed. R. App. P. 21(b)(4).

§ 1292(b) certificate for a permissive appeal, the writs are best understood as a supplement to the statutory routes for interlocutory appeals.[345]

Although writ practice can resemble game theory practiced by an insider,[346] a few situations regularly recur in which the writ will issue: when a jury trial has been denied improperly;[347] when an allegation of district court misconduct raises a general procedural matter of first impression;[348] and when a district court has acted improperly to remand a case previously removed from state court.[349] The "last word" on the writs from the Supreme Court, however, reemphasizes their extraordinary nature and endorses the self-restrained caution that always has characterized this aspect of appellate procedure.[350] For the most part, the courts of appeals are on the same page. While there have been a few reversals of courts of appeals for refusing to issue a writ, it has been three decades since the Supreme Court reversed a court of appeals for improperly issuing a writ.[351]

§ 5.04 Appellate Sanctions

By statute and rule, reinforced by their own inherent power, the courts of appeals have jurisdiction to impose appropriate sanctions on those who abuse the appellate process.[352] Because their incidence is relatively infrequent and because their actual imposition is so situation-specific, the law

345. *See supra* § 4.03.

346. *See* 16 Federal Practice & Procedure, *supra* note 12, § 3935; 20A Moore's Federal Practice, *supra* note 12, § 321.14.

347. *E.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469, 479–80 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959).

348. *E.g.*, Schlagenhauf v. Holder, 379 U.S. 104, 109–12 (1964).

349. *E.g.*, Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352–53 (1976), *overruled in part on other grounds by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 715 (1996). *But see* Osborn v. Haley, 127 S. Ct. 881 (2007); *In re* Amoco Petroleum Additives Co., 964 F.2d 706, 708–09 (7th Cir. 1992). *See also infra* § 6.04.

350. *E.g.*, Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam); Will v. Calvert Fire Ins. Co., 437 U.S. 655, 661–62 (1978). *See generally* Bauman v. U.S. Dist. Ct., 557 F.2d 650 (9th Cir. 1977).

351. *E.g.*, Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380–82 (2005); Mallard v. U.S. Dist. Ct., 490 U.S. 296 (1989).

352. *See generally* 16A Federal Practice & Procedure, *supra* note 12, §§ 3984–3985.1; 20A Moore's Federal Practice, *supra* note 12, §§ 338.30–338.31.

of appellate sanctions is somewhat sketchy and will be described in broad-brush terms.[353]

As amended in 1980, 28 U.S.C. § 1927 provides that any attorney who "multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."[354] These sanctions are awarded against counsel personally and individually, rather than against the party being represented on appeal.[355] Section 1927 went largely ignored until the 1980s, when a fad for sanctions hit the federal courts, engendered in part by rounds of amendments to Federal Rule of Civil Procedure 11 at the trial level[356] and by the prevailing sense of "crisis" in docket growth at the appellate level.[357] The statute is limited to attorneys but covers all cases and all proceedings in federal court, including appeals. The stated statutory criteria that the attorney's conduct be both "unreasonable" and "vexatious" in effect requires a showing akin to bad faith in engaging in what might be called frivolous lawyering. Thus, the scope of § 1927 is narrow. The statute has not been used much by the federal courts generally or by the courts of appeals in particular, either because of a reluctance to sanction attorneys or because of a greater familiarity with and more of a willingness to rely on two other provisions.[358]

Two other provisions get considerably more play in the courts of appeals, perhaps because taken together they are explicitly focused on appeals: Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1912,

353. *See, e.g.*, Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse (3d ed. 2000); Warren Freedman, Frivolous Lawsuits and Frivolous Defenses: Unjustifiable Litigation (1987).

354. 28 U.S.C. § 1927. *See generally* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980).

355. *See also* Fed. R. App. 46(b), (c) (power to suspend, disbar, and discipline attorneys); 16A Federal Practice & Procedure, *supra* note 12, §§ 3992.1–3992.2; 20A Moore's Federal Practice, *supra* note 12, §§ 346.12–346.13.

356. Fed. R. Civ. P. 11 applies in the district court, but not in the court of appeals. Cooter & Gell v. Harmarx Corp., 496 U.S. 384, 405–07 (1990). The story of the trial-sanctions rule, its amendments, and its renaissance of sanctions is beyond the scope of this primer. *See supra* § 1.02. *See generally* 5A Federal Practice & Procedure, *supra* note 12, §§ 1331–1336.

357. *See supra* § 1.04.

358. Charles Alan Wright & Mary Kay Kane, Law of Federal Courts § 69A, at 485 (6th ed. 2002).

which authorize "just damages," including attorneys' fees, and single or double costs upon a determination that an "appeal is frivolous."[359] The determination of frivolousness is within the discretion of the court of appeals. An appeal may be deemed frivolous when an affirmance is so inevitable and obvious as to be foreordained, or if the arguments raised are, in the oft-repeated phrase, "wholly without merit."[360] The test is an objective standard, and persons sanctionable in theory include anyone responsible for prosecuting the frivolous appeal: the parties, including pro se litigants and criminal defendants, and their attorneys. Sanctions can be imposed sua sponte or on motion, but there must be notice and an opportunity to respond before sanctions are imposed. Sanctions are intended to penalize the appellant for taking a frivolous appeal or for prosecuting the appeal in a vexatious manner, in order to compensate the particular appellee for the delay and expense of having to respond, and in order to generally deter others from wasting scarce judicial resources in the future. Ironically enough, sanctions are available, as well, for making frivolous motions seeking sanctions. Once quite rare, appellate sanctions seem to be becoming more common in the pages of the *Federal Reporter, 3d Series*.[361]

Beyond rule and statute, there is a more theoretical jurisprudential basis, although of less certain dimension, for a court of appeals to exercise an "inherent power" or a "residual power" to assess appellate sanctions (as a court of appeals' power qua court) to control and manage its jurisdiction and docket.[362] As with the obvious and taken-for-granted inherent power to punish contempt, the courts of appeals may be imbued with the inherent power to impose a variety of sanctions independent of any rule or statute—and without regard for any limitations otherwise expressly provided in any rule or statute. These inherent-power sanctions might conceivably include the following: attorneys' fees awards; disbarment, suspension, disqualification, or reprimand of coun-

359. Fed. R. App. P. 38 & 28 U.S.C. § 1912 (minor differences in wording).

360. *See* Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1200 (7th Cir. 1987).

361. *See* 16A Federal Practice & Procedure, *supra* note 12, § 3984.1 n.5; 20A Moore's Federal Practice, *supra* note 12, § 338.20[1] nn.1–16.

362. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32 (1991); Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Link v. Wabash R.R., 370 U.S. 626, 633 (1962).

sel; or dismissal of an appeal, or even withdrawal of a mandate, obtained by a fraud on the court. There have not been many decisions exclusively invoking this inherent power, since the rule and statute previously discussed usually have proved to be adequate and sufficient.

The level of judicial willingness to impose appellate sanctions varies, of course, from judge to judge, but interestingly from circuit to circuit, as well. A careful study of the sanctions cases found that there are "aggressive circuits" that regularly employ sanctions, "reluctant circuits" that almost never employ sanctions, and "uncertain circuits" that do not evidence either aggressiveness or reluctance.[363] There are some signals of a willingness to experiment with creative appellate sanctions fashioned to the particular situation.[364] Multiple policy considerations converge here. Access to appellate courts, although not ultimately of constitutional dimension, is at least a statutory entitlement that ought not be too easily dismissed. But appeals brought only to harass or merely to delay impose severe economic costs on opposing litigants and lawyers. Viewed systemically, frivolous appeals also siphon scarce judicial resources and serve to debase the appellate currency. Guaranteeing appellate access and policing appellate procedures are both necessary for ensuring the proper and fair judicial administration of the courts of appeals. For these reasons, sanctions are an important feature of the federal appellate landscape.

363. Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 Am. U. L. Rev. 603 (1985). *See also* Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845.

364. *See, e.g.*, *In re* McDonald, 489 U.S. 180 (1989) (pro se petitioner prohibited prospectively from filing in forma pauperis requests for extraordinary writs in the Supreme Court).

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CHAPTER 6

Appeals in Criminal Matters

§ 6.01 Generally

Appeals in federal criminal matters differ from appeals in civil matters and require separate treatment. An appeal brought by a criminal defendant[365] generally must satisfy more closely the requirement of finality. The liberalities of interpretation of the final-decision requirement and the various statutory accommodations found in civil appeals do not translate well to the criminal appeal model. When a criminal appeal is brought by the government,[366] additional special statutes must be satisfied, and there is a constitutional overlay of double jeopardy restrictions. The differences summarized here are first subdivided by the identity of the appellant—defendant or government. A separate, third category of petitions for review may be filed by nonparties[367] if certain jurisdictional specifications are satisfied.

§ 6.02 Defendant Appeals

The importance of strictly adhering to the final-decision requirement in criminal cases always has been emphasized:[368]

> These considerations of [finality] policy are especially compelling in the administration of criminal justice. . . . An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The cor-

365. *See infra* § 6.02.
366. *See infra* § 6.03.
367. *See infra* § 6.04.
368. *See generally* 15B Federal Practice & Procedure, *supra* note 12, §§ 3918–3918.10; 19 Moore's Federal Practice, *supra* note 12, § 202.14. The courts frequently issue additional reminders that, at least in theory, there is no constitutional right to an appeal. *See supra* § 1.05.

> rectness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal.[369]

In criminal matters, with few statutory exceptions,[370] the term *final decision* from 28 U.S.C. § 1291 means imposition of the sentence. However, it is enough if the defendant is put on probation after the sentence has been imposed and suspended or after the imposition of sentence has been suspended. If a sentence is imposed on some counts but deferred on other counts, there is no final judgment. A sentence entered after a guilty plea or a plea of nolo contendere is final, although the scope of review may be limited to jurisdictional issues. Thus, as is true of civil trials, most of the decisional events at a criminal trial are not immediately appealable, but must await the appeal from the final decision.[371] The collateral order doctrine is also an available basis for appeal, but it is likewise applied strictly.[372]

In detail too elaborate to accurately replicate here, the courts of appeals have made nuanced distinctions between and within categories of criminal trial orders.[373] Orders related to grand jury proceedings sometimes are and sometimes are not deemed final.[374] Orders requiring pretrial detention or imposing conditions on release are governed by the Bail Reform Act of 1984, as amended, that for all intents and purposes mirrors the collateral order doctrine.[375] There are appealability prece-

369. Cobbledick v. United States, 309 U.S. 323, 325–26 (1940). *See also* Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989). *But see* Houston v. Lack, 487 U.S. 266 (1988) (timeliness of pro se prisoner's notice of appeal, *see supra* § 2.06).

370. *See* 18 U.S.C. § 3742(a) (broadened review of sentences). *See also* United States v. Booker, 543 U.S. 220 (2005) (holding that federal Sentencing Guidelines had to be interpreted as merely advisory, and not mandatory, in order to preserve Sixth Amendment right to jury); Mistretta v. United States, 488 U.S. 361 (1989) (upholding the federal Sentencing Guidelines under the separation of powers).

371. *See supra* § 3.02 (civil).

372. *See* Sell v. United States, 539 U.S. 166 (2003). *See also supra* § 3.03 (civil).

373. *See generally* 15B Federal Practice & Procedure, *supra* note 12, §§ 3918–3918.10; 19 Moore's Federal Practice, *supra* note 12, § 202.14.

374. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3918.1; 19 Moore's Federal Practice, *supra* note 12, § 202.14[1][a].

375. 18 U.S.C. § 3145. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3918.2; 19 Moore's Federal Practice, *supra* note 12, § 202.07[1]. *See supra* § 3.03 (civil). *See generally* David N. Adair, The Bail Reform Act of 1984 (Federal Judicial Center 3d ed. 2006).

dents governing various and sundry pretrial orders, including but not limited to the following kinds of pretrial matters: the preliminary hearing; determinations of competence to stand trial; determinations whether to try the defendant as an adult or a juvenile; transferring or removing or remanding; extradition; the disposition of property; the denial of a defendant's motion to dismiss; the granting of the government's motion to dismiss without prejudice; pleadings; appointment and appearance of counsel; disqualification of the judge; discovery; access to trial; and contempt.[376] Orders dealing with the suppression of evidence or the return of property are subject to a "confusing web of decisions."[377] Pretrial appeals have been allowed from the denial of a defendant's motion to dismiss based on a claimed right not to be put on trial, typically alleging a former jeopardy.[378] As is the case in civil trials, most pretrial orders concerning the procedures to be followed at trial are not appealable.[379] The policy against piecemeal appeals is taken very seriously at the pretrial stage. For example, a denial of a motion to dismiss an indictment usually is not final, nor are orders related to a bill of particulars. Orders granting or denying discovery ordinarily are not final and appealable unless they are not part of a continuing pretrial proceeding. For the most part, denials of motions to suppress evidence are not final. Denial of a motion for a speedy trial ordinarily is not final. As a general proposition, evidentiary rulings made at trial are no more appealable in a criminal case than in a civil case. The procedural signpost for finality in a criminal case is the imposition of sentence (or dismissal of the charges), but most criminal prosecutions result in guilty pleas, which are subject to a tangle of precedents that strictly define what particular matters still remain subject to an

376. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3918.3; 24 Moore's Federal Practice, *supra* note 12, § 612.04; 25 Moore's Federal Practice, *supra* note 12, §§ 616.02[4][e], 625.03[3].

377. 15B Federal Practice & Procedure, *supra* note 12, § 3918.4, at 465. *See also* 19 Moore's Federal Practice, *supra* note 12, § 202.14[2].

378. 15B Federal Practice & Procedure, *supra* note 12, § 3918.5; 19 Moore's Federal Practice, *supra* note 12, § 202.14[3]. *Compare* Abney v. United States, 431 U.S. 651 (1977) (former jeopardy appeal allowed under collateral appeal doctrine), *with* United States v. MacDonald, 435 U.S. 850 (1978) (speedy trial appeal not allowed under collateral order doctrine).

379. 15B Federal Practice & Procedure, *supra* note 12, § 3918.6; 19 Moore's Federal Practice, *supra* note 12, § 202.08.

appeal.[380] Indeed, even on a proper appeal from a final decision, there may be some pretrial and trial orders that are deemed nonreviewable, despite the lack of any earlier opportunity to bring an appeal. Appeals from postjudgment trial orders are rather straightforward: generally, the conclusion of the postjudgment proceeding creates a new, appealable final judgment.[381] There are, for lack of a better term, miscellaneous other orders that do not easily fit into any of the foregoing categories of orders, which may or may not be appealable, depending on how the court of appeals applies the policy of finality against the exigency of the situation.[382]

Defendants' appeals of sentences have more to do with the U.S. Sentencing Guidelines[383]—which were introduced into the federal court system to increase national uniformity in criminal sentencing—than with the law and policy of appellate jurisdiction, but the Guidelines deserve mention.[384] The opportunity to obtain appellate review of the sentence was an essential feature of the original legislation.[385] Most of the sentence appeal provisions in the original statute were left undisturbed by the Supreme Court's landmark decision that downgraded the Sentencing Guidelines themselves from being mandatory to being merely advisory, so far as imposing the sentence in the district court is concerned.[386] But the standard of review dictated by the statute was severed and held invalid.[387] The Supreme Court filled this interstitial gap by decreeing that the court of appeals should determine if the district court abused its discretion, and that an unreasonable sentence must be reversed, but a sentence within the Guidelines is presumed to be reasonable.[388] The Supreme

380. 15B Federal Practice & Procedure, *supra* note 12, § 3919.7; 19 Moore's Federal Practice, *supra* note 12, § 202.13[1].

381. 15B Federal Practice & Procedure, *supra* note 12, § 3918.9; 26 Moore's Federal Practice, *supra* note 12, § 632.40. *See supra* § 5.02; 28 U.S.C. §§ 2253, 2255 (Supp. V 2005).

382. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3918.10; 19 Moore's Federal Practice, *supra* note 12, § 202.14.

383. *See generally* U.S. Sentencing Commission, Guidelines Manual (2007).

384. 15B Federal Practice & Procedure, *supra* note 12, § 3918.8; 26 Moore's Federal Practice, *supra* note 12, § 632.20.

385. *See* 18 U.S.C. § 3742 (2000 & Supp. V 2005).

386. United States v. Booker, 543 U.S. 220, 244, 258–65 (2005).

387. 18 U.S.C. § 3742(e) (2000 & Supp. V 2005).

388. Rita v. United States, 127 S. Ct. 2456, 2467–68 (2007).

Court further elaborated on the appellate review of sentences by instructing the courts of appeals to (1) check the sentence for procedural errors, such as mathematical miscalculations; (2) defer to the district court by applying a deferential abuse-of-discretion standard of review, as opposed to a de novo standard; (3) apply the same standard of review whether the sentence falls inside or outside the Guidelines; (4) avoid any rigid mathematical formulas or proportional analysis on appeal based on the degree of departure of the sentence from the Guidelines; and (5) review the sentence ultimately for substantive reasonableness.[389] The U.S. Sentencing Commission regularly revises and updates the Guidelines and commentaries in accordance with Supreme Court decisions and congressional amendments.[390]

Defendants' interlocutory appeals in criminal matters likewise are more restrictive than those in civil matters. The most general and commonly used statutes for interlocutory appeals in civil matters simply do not apply by their express terms. Section 1292(a) of title 28 of the U.S. Code, covering interlocutory appeals,[391] and § 1292(b), permissive interlocutory appeals,[392] are explicitly limited to civil actions. By comparison, the statutory jurisdiction to issue extraordinary writs applies in criminal and civil matters, although the restrictive attitude toward the writs is exaggerated further by the heightened importance afforded the final-decision requirement in criminal matters.[393]

Aside from the previously mentioned collateral orders that sometimes are judicially treated as final,[394] other matters are permitted interlocutory appeal by specific statute. The Bail Reform Act of 1984 creates

389. Gall v. United States, 128 S. Ct. 586 (2007); Kimbrough v. United States, 128 S. Ct. 558 (2007). *See generally* 3 Federal Practice & Procedure, *supra* note 12, § 533; 26 Moore's Federal Practice, *supra* note 12, § 632.40.

390. The Federal Sentencing Guidelines Manuals and "reader-friendly" versions of all amendments since 1988 are available at the homepage of the U.S. Sentencing Commission, http://www.ussc.gov/guidelin.htm.

391. *See supra* § 4.02. There is some dubious conjecture that § 1292(a)(1) might be relied on to appeal a procedural order in a criminal case in the nature of an injunction—an interim "gag order" directed at the press, for example. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3918, at 414–15. *But see infra* § 6.04 (nonparty appeals).

392. *See supra* § 4.03.

393. *E.g.*, Will v. United States, 389 U.S. 90, 96 (1967).

394. *See supra* § 3.03.

the most significant statutory exception to the regime of finality.[395] Appeals from a release or detention order, or from an order denying revocation or amendment of such an order, must satisfy 28 U.S.C. § 1291 finality, if brought by an accused, or the restrictions on government appeals, if brought by the prosecution.[396] The statutory scheme permits a defendant to appeal only after the order to detain pending trial, or the conditions imposed on an order to release, have been passed on by the district court.[397]

§ 6.03 Government Appeals

The government has no right to appeal in federal criminal cases unless the appeal is expressly authorized by statute.[398] Furthermore, statutory authorizations must comport with the Fifth Amendment's former jeopardy protection.[399] And any interlocutory government appeal must not unduly postpone the proceeding so long as to violate the defendant's constitutional and statutory right to a speedy trial. For the most part, the government does not rely on the jurisdictional provision over final judgments in 28 U.S.C. § 1291.[400] Rather, 18 U.S.C. § 3731 is the basic authorizing statute.[401] That statute authorizes appeals from three separate and distinct categories of orders: (1) a final order dismissing an indictment or information or granting a new trial after verdict or judgment on any one or more counts, unless the Double Jeopardy Clause prohibits

395. 18 U.S.C. §§ 3141 (2000 & Supp. V 2005), 3142 (2000 & Supp. V 2005), 3143–3145. *See also* Stack v. Boyle, 342 U.S. 1, 6–7 (1951).

396. 18 U.S.C. § 3145(c). *See infra* § 6.03. *See also* Fed. R. App. P. 9(a)(3) (court of appeals or circuit judge may order the defendant's release pending the appeal).

397. *See* 18 U.S.C. § 3731 (2000 & Supp. V 2005) (authorizes government appeal from any order denying a motion to modify the conditions of release). *See infra* § 6.03.

398. *See generally* 15B Federal Practice & Procedure, *supra* note 12, §§ 3919–3919.10; 19 Moore's Federal Practice, *supra* note 12, §§ 201.50, 203.15[1]–[2].

399. *See* United States v. Serfass, 420 U.S. 377 (1975); United States v. Jenkins, 420 U.S. 358 (1975), *overruled by* United States v. Scott, 437 U.S. 82 (1978); United States v. Wilson, 420 U.S. 332 (1975).

400. Carroll v. United States, 354 U.S. 394, 400 (1957). *But see* Arizona v. Manypenny, 451 U.S. 232, 241–50 (1981) (removal from state court); 28 U.S.C. §§ 2253, 2255 (Supp. V 2005) (§ 1291 applies in proceedings to vacate sentence). *See generally* 15B Federal Practice & Procedure, *supra* note 12, §§ 3919.1–3919.2.

401. 18 U.S.C. § 3731 (2000 & Supp. V 2005). *See also supra* § 5.03 (government may petition for extraordinary relief).

further prosecution; (2) an interlocutory order suppressing or excluding evidence or requiring the return of property; and (3) an interlocutory order granting the release of the defendant, before or after conviction, or denying the government's motion to revoke or to modify the conditions of release.[402]

The first category of government appeal in § 3731, with a constitutional incorporation by reference, is essentially shorthand for the former jeopardy protection in the Fifth Amendment. Although § 1291 is not strictly speaking the jurisdictional basis for the appeal, that familiar finality test is the first criterion for these appeals under § 3731, with a few specifically identified statutory exceptions. Double jeopardy principles[403] prohibit the government from taking an appeal from a verdict of "not guilty" and, further, prevent the government from litigating any issue that directly informed a "not guilty" verdict. Appeals are permitted from orders entered before jeopardy attaches; attachment occurs when the jury is sworn or when the first witness is sworn in a bench trial. Once jeopardy has attached, any acquittal on the merits will bar retrial and hence a government appeal. There is no right of government appeal if the jury's verdict acquits the defendant, but an appeal may be taken if the jury convicts and the judge thereafter absolves the defendant. The statutory intent is understood to permit all government appeals within the judicial interpretation of the constitutional outer limit.[404] An appeal by the government does not allow the defendant, by cross appeal, to raise issues not related to a judgment of dismissal.[405] Beyond these settled basics, the decisional law on double jeopardy and government appeals has interacted to "generate[] intricate bodies of doctrine that leave some questions still unanswered."[406]

402. "The provisions of this section shall be liberally construed to effectuate its purposes." 18 U.S.C. § 3731 (2000 & Supp. V 2005).

403. *See generally* Wayne LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure §§ 25.1–25.5 (4th ed. 2004).

404. Posttrial orders also are expressly included, again only subject to double jeopardy concerns. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3919.7; 24 Moore's Federal Practice, *supra* note 12, § 612.07.

405. *See supra* § 2.03.

406. 15B Federal Practice & Procedure, *supra* note 12, § 3919.2, at 604. *See also id.* §§ 3919.5 (post-jeopardy dismissals), 3919.6 (pre-jeopardy dismissals).

The second category of government appeal in § 3731—appeals from orders suppressing or excluding evidence or requiring the return of property—permits a government appeal of an order that, as a practical matter, eliminates the prosecution's case. Otherwise, an acquittal could result from an improvident suppression. The statutory intent is to allow appeals of evidentiary rulings against the government that would not be allowed in civil cases or if the suppression decision had gone the government's way. In fact, appeals under this provision are liberally allowed, in sharp contrast with the general rule that denials of a defendant's motion to suppress are not appealable.[407] Upon filing the statutorily required certificate of good faith and importance in a timely fashion, the government may appeal suppression based on the exclusionary rule or on any other reason.[408] Indeed, the government may seek a pretrial ruling on the admissibility of evidence in order to take advantage of the opportunity for appellate review within the thirty-day time limit.

The third category of government appeal provided for in 18 U.S.C. § 3731, the bail appeal provision, must be read together with the Bail Reform Act, as amended.[409] These two statutes in tandem provide for plenary review of bail decisions adverse to the government. The particular procedures to be followed and the standards to be applied are not treated here.[410]

Finally, beyond § 3731 appeals, the government's right to appellate review of criminal sentences, along with the defendant's, was broadened in 1984 by the same statute, 18 U.S.C. § 3742(b).[411] Section 3742(b) authorizes the government to appeal, in terms parallel to the defendant's authorization, if a sentence is imposed in violation of the law, or resulted from an incorrect application of the federal Sentencing Guidelines, or is less than the sentence specified in the applicable guideline, or is plainly

407. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3919.3; 24 Moore's Federal Practice, *supra* note 12, § 612.07[1]. *See also supra* § 6.02.

408. *See also* 18 U.S.C. § 2518(10)(b) (interlocutory appeal of suppression orders in wiretaps); 18 U.S.C.A. App. 3 § 7 (interlocutory appeal under the Classified Information Procedures Act).

409. 18 U.S.C. §§ 3141 (2000 & Supp. V 2005), 3142 (2000 & Supp. V 2005), 3143–3148.

410. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3919.4; 19 Moore's Federal Practice, *supra* note 12, §§ 201.50–201.53.

411. *See supra* § 6.02.

unreasonable but not covered by the Guidelines.[412] The government also may appeal if the sentence imposed is less than the sentence stipulated in a final plea agreement.[413] The personal approval of the Attorney General or the Solicitor General is required for these government appeals.[414] Government appeals falling outside these specific provisions are seldom, if ever, allowed.[415] Appeals within these provisions have become routine and unremarkable, procedurally speaking.

§ 6.04 Nonparty Appeals

Appeals by a nonparty in criminal cases are not so infrequent that they can be ignored here.[416] The miscellany of interests that have been raised by mandamus petitions brought by nonparties to criminal cases have met with limited success in the courts of appeals and do not support any useful generalizations beyond the traditional reluctance for extraordinary writs.[417] Two common scenarios, however, deserve discussion: petitions by public news media challenging orders that bar access to trial proceedings or limit press coverage,[418] and assertions of statutory rights by victims of crime.

In a series of decisions interpreting the First Amendment, the Supreme Court established a substantive right of access for the press and the public to judicial proceedings (pretrial and trial) that triggers strict scrutiny whenever a trial court restricts access to its courtroom or limits reporting on its proceedings.[419] Standing is usually straightforward. Media–

412. 18 U.S.C. § 3742(b).

413. *Id.* § 3742(c).

414. *Id.* § 3742(b).

415. *See* 15B Federal Practice & Procedure, *supra* note 12, §§ 3919.8–3919.9; 19 Moore's Federal Practice, *supra* note 12, § 201.50. *See also supra* § 5.02.

416. *See* 15B Federal Practice & Procedure, *supra* note 12, § 3914.31; 19 Moore's Federal Practice, *supra* note 12, §§ 204.01–204.08.

417. *See supra* § 5.03.

418. Press coverage of civil cases can raise the same First Amendment issues, of course, and follow the same procedural route of mandamus. *See supra* § 5.03.

419. *See, e.g.*, Florida Star v. B.J.F., 491 U.S. 524 (1989) (reporting victim's name from public proceeding); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (transcript of a preliminary hearing); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (jury voir dire); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (criminal trial); Richmond Newspapers,

press appeals challenging closure orders and gag orders usually are brought in petitions for mandamus, so they proceed along the lines of the extraordinary writs.[420] Because the substantive rights involved are so important and well-established, and because these mandamuses are so commonplace, these challenges to nonparty orders arguably are a candidate for rule-making recognition as a new category of entitled appeal.[421]

The Crime Victims' Rights Act of 2004 establishes a long list of rights that may be asserted by a crime victim, including notice and an opportunity to attend and be heard at all relevant court proceedings, and a right to consult with prosecutors.[422] "Crime victim" is defined as "a person directly or proximately harmed as a result of the commission of a Federal offense."[423] The rights afforded under the Act are subject to the discretion of the district court ruling on the record.[424] If the district court denies a request based on the statute, the victim may petition the court of appeals for a writ of mandamus. The court of appeals may assign the application to a single judge, but the application must be acted on within seventy-two hours, and any trial court stay or continuance to allow the court of appeals to consider the application is limited to five days.[425] The crime victim may move to reopen a plea or sentence to assert rights under the statute if the victim asserted the right to be heard at the hearing and was denied, and the victim petitions the court of appeals for a writ of mandamus within ten days.[426] The few early-reported appellate deci-

Inc. v. Virginia, 448 U.S. 555 (1980) (criminal trial); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (reporting victim's name from public court record).

420. The courts of appeals are divided over whether the media get an appeal or mandamus. United States v. McVeigh, 119 F.3d 806, 810 (10th Cir. 1997) (citations to the circuit split). *See* 15B Federal Practice & Procedure, *supra* note 12, § 3914.31; 19 Moore's Federal Practice, *supra* note 12, § 204.02. *See also supra* § 5.03.

421. *See* 28 U.S.C. § 1292(e) (rule-making authority to recognize additional permissive interlocutory appeals); *id.* § 2072(c) (rule-making authority to recognize additional final decision appeals). *See also supra* §§ 3.02, 4.01, 4.03.

422. 18 U.S.C. § 3771 (Supp. V 2005). The relevant public proceedings include pretrial hearing, trial, guilty plea hearing, sentencing hearing, parole hearing, and post-conviction hearing.

423. *Id.* § 3771(e).

424. *Id.* § 3771(b)(1).

425. *Id.* § 3771(d)(3).

426. *Id.* § 3771(d)(5).

sions under this Act are somewhat ambivalent.[427] The opinions suggest, as a matter of appellate jurisdiction, that the courts of appeals should be more receptive to this category of congressionally approved mandamus applications than to other garden-variety mandamus applications under the All Writs Act.[428] However, the opinions also emphasize that the rights under the Act are afforded, in the first instance, within the district court's sound discretion, and therefore the courts of appeals should apply the more forgiving abuse-of-discretion standard of review.

Of course, nonparty petitions for mandamus involve the same concerns for delay and disadvantage to the parties—the defendant and the government—that are expressed about party petitions. And nonparty interests, by definition, are distinct and different—one step removed from the primary case or controversy. But the whole point of providing for these various appellate scenarios is that the press and the crime victim have different interests than those of the government or the defendant. The courts of appeals nonetheless have demonstrated an appropriate procedural wariness, consistent with the background understanding that these extraordinary writs and statutory remedies are to be saved for extraordinary situations and their stated purposes.

427. *See, e.g.*, Kenna v. U.S. Dist. Ct., 435 F.3d 1011 (9th Cir. 2006); *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555 (2d Cir. 2005).

428. *See* 28 U.S.C. § 1651. *See supra* § 5.03.

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CHAPTER 7

Review of Administrative Matters

§ 7.01 Generally

The courts of appeals perform an essential function in the modern administrative state. For as long as there have been federal administrative agencies, Congress has deemed it appropriate to provide for direct review of administrative actions in the courts of appeals. A petition for review of an administrative matter differs from a civil or criminal appeal from a district court.

The courts of appeals have subject-matter jurisdiction to review the administrative actions of dozens of federal agencies, boards, and even individual government officials. These agency reviews account for between 10% and 20% of the docket of the courts of appeals—more for the District of Columbia Circuit.[429] These agency reviews often are disproportionately complex, esoteric, and difficult, given the scope of what is being regulated by agencies with broad mandates, such as the Federal Trade Commission, the Federal Communications Commission, the Federal Aviation Administration, and the Environmental Protection Agency. Some types of administrative reviews episodically can multiply in such numbers as to threaten to overwhelm the federal appellate dockets.[430] The substantive law and procedural rules are adjectival to the subject of administrative law, and this discussion must defer to treatises on

429. *See supra* § 2.04.

430. *See, e.g.*, Carlos Ortiz Miranda, *Administrative Appeals and Judicial Review in Immigration Law: Where Matters Stand at the Beginning of the 21st Century*, 55 Cath. U. L. Rev. 917 (2006); John R.B. Palmer, *The Nature and Causes of the Immigration Surge in the Federal Courts of Appeals: A Preliminary Analysis*, 51 N.Y.L. Sch. L. Rev. 13 (2006–2007); John R.B. Palmer, Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1 (2005).

that larger subject.[431] The focus here is on appellate jurisdiction and procedures.[432]

Judicial review of administrative agency action may take the familiar form of "nonstatutory" review by suit against the officer or agency in the district court under some general head of subject-matter jurisdiction with a regular appeal to the court of appeals.[433] These administrative appeals adhere to the general principles applicable to appeals from final decisions[434] and interlocutory appeals.[435]

With the dramatic growth of the modern administrative state, Congress began to experiment with two other review models. Some early twentieth century statutes authorized a priority suit, before a three-judge district court, to enjoin an agency order, with a direct appeal as of right to the Supreme Court. This model has fallen from favor, however, for many of the same reasons that the three-judge court has come to be considered an anachronism,[436] although there still are a few statutes adhering to this appellate review procedure.[437] Beginning with the Federal Trade Commission Act of 1914,[438] Congress authorized an exclusive jurisdiction in the (then-named) circuit courts of appeals to affirm, enforce, modify, or set aside orders of that agency, with a subsequent discretionary review in the Supreme Court.[439] Since 1950, this review model has been preferred and has become the appellate paradigm in federal administrative law.

431. *See generally* Richard J. Pierce, 4 Administrative Law Treatise §§ 18.1–18.7 (4th ed. 2002); Louis Leventhal Jaffe, Judicial Control of Administration Action (1965).

432. 5 U.S.C. §§ 702, 703. *See* 16 Federal Practice & Procedure, *supra* note 12, §§ 3940–3944; 19 Moore's Federal Practice, *supra* note 12, §§ 201.13, 205.06.

433. *See generally* 14 Federal Practice & Procedure, *supra* note 12, § 3655; 19 Moore's Federal Practice, *supra* note 12, §§ 201.13, 205.06.

434. *See supra* §§ 3.01–3.05.

435. *See supra* §§ 4.01–4.03.

436. *See supra* § 1.02.

437. *See* Act of Jan. 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917 (orders of the Interstate Commerce Commission made reviewable by court of appeals). *Compare* 28 U.S.C. § 1336(a) (district court review of orders to pay), *with* § 2321 (court of appeals review of all other orders). *See supra* § 1.02.

438. Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 717, 720.

439. *See* 28 U.S.C. §§ 2341, 2342 (2000 & Supp. V 2005), 2343, 2346–2350.

In the review model, the agency performs somewhat like a trial court through an administrative law judge who hears evidence, develops a record, and makes the initial decision on issues of law and fact. Most commonly, there is an intra-agency appeal before some internal agency review panel. Judicial review in the court of appeals thereafter deals, for the most part, with questions of law or review of the record for substantiality of the evidence. The role of the court of appeals is to supervise with deference to the agency in order to stabilize the overall administrative process, although on occasion Congress will selectively preclude appellate review altogether.[440]

The fundamental principle of limited jurisdiction is important in understanding judicial review of administrative agencies.[441] As consistently interpreted, the judicial review provisions of the Administrative Procedure Act do not actually confer appellate subject-matter jurisdiction,[442] but only prescribe appellate procedures when a court of appeals is granted review power by some other statute.[443] Countless federal statutes provide for administrative review in the courts of appeals, sometimes exclusively in the Court of Appeals for the District of Columbia Circuit, and sometimes generally in the courts of appeals. The disclaimer from a leading multivolume treatise applies even more obviously to this primer:

> [A] startling array of specific statutory provisions establish court of appeals jurisdiction to review actions of agencies that range from the major independent regulatory agencies to a large number of executive officials. . . . Complete enumeration of the statutes probably would be impossible. . . . Any enumeration . . . would soon be superseded by the march of legislative activity—if for many years it seemed inevitable that legislation would only add new categories of agencies and agency activity, it has become reasonable to expect that old categories may be eliminated with increasing frequency. It no longer

440. *See* 42 U.S.C. § 9613(h) (foreclosing judicial review unless the administrative action falls within identified and defined exceptions).

441. *See supra* § 1.05.

442. 5 U.S.C. §§ 701–706. *See* Califano v. Sanders, 430 U.S. 99, 105–06 (1977).

443. *See, e.g.*, 28 U.S.C. §§ 2341, 2342 (2000 & Supp. V 2005), 2343, 2346–2351 (orders of specified agencies subject to review in the courts of appeals). *See also* Fed. R. App. P. 15–20 (review or enforcement of an order of an administrative agency, board, commission, or officer).

> seems useful to provide even [a] partial catalogue of [the] dozens of illustrative review statutes. . . . It is enough to repeat the conclusion that the courts of appeals often become embroiled in the most complex problems addressed by the modern administrative state. The responsibilities of review are made manageable by deferring to the expert knowledge and wisdom of administrators, but can present some of the most difficult tasks to confront the courts.[444]

Issues on administrative review might range from an individual's claim for compensation under a government entitlement program to an environmental issue with national or even global impact. Jurisdictional statutes either expressly require that administrative rules be adopted by an order made reviewable in the court of appeals or simply provide for judicial review of all agency orders. Courts and judges seem to vacillate attitudinally between opposite extremes. At one extreme, the appellate attitude seems to be preoccupied with threshold procedural and jurisdictional concerns to the exclusion of reaching and deciding the merits; at the opposite extreme, the appellate attitude seems to be eager, even zealous, to reach and decide the merits.[445] To emphasize by repetition, however, those sorts of complex and subtle distinctions are left to treatises on administrative law.

The myriad of jurisdictional statutes authorizing administrative review and their particularized provisions for determining the proper court of appeals in which to bring a petition for review can lead to uncertainty and can result in multiple appellate filings in different courts of appeals.[446] When proceedings are instituted in two or more courts of appeals regarding the same administrative order, the procedure for transferring an administrative appeal from one court of appeals to another depends on two different statutes and on an additional, perceived inherent power of uncertain dimension.[447] Typically, a need for the transfer mechanism arises when multiple petitions for review of a single adminis-

444. 16 Federal Practice & Procedure, *supra* note 12, § 3941, at 761.

445. Richard J. Pierce, 4 Administrative Law Treatise § 18.2, at 1328–43 (4th ed. 2002).

446. *See also supra* § 2.07 (transferring appeals).

447. *See supra* § 2.07 (transfers for want of jurisdiction under 28 U.S.C. § 1631). *See also supra* § 5.04 (inherent power to sanction).

trative order are filed in different circuits.[448] Multiple filings are made possible by alternative grants of jurisdiction to review in more than one circuit. For example, a jurisdictional statute might authorize a person aggrieved by an order to file a petition for review wherever the person resides or does business, or where the regulated activity took place, or in the District of Columbia. Different parties affected by the order may prefer review in different circuits, and the proverbial race to the courthouse is on.

Judicial invocations in appellate opinions of an inherent power to transfer appeals predate the two statutory authorizations, and for that reason may be considered anachronistic or redundant. Alternatively, the inherent power may be reserved for those peculiar scenarios for which the statutes do not offer a particular resolution. That would make some sense because part of the general theory of inherent court powers is a sense of necessity.[449] The two transfer statutes control whenever they apply.[450]

The first transfer statute is the general all-purpose provision that allows a transfer from any federal court without jurisdiction to any other federal court with jurisdiction "in the interest of justice."[451] That provision also applies expressly to petitions for review of administrative actions and allows transfers from one court of appeals to another.

The second transfer statute, as amended, addresses, in elaborate detail, the situation of multiple petitions for review of the same agency order brought in multiple courts of appeals.[452] The second transfer statute is triggered by filing a petition for review in a court of appeals and delivering the petition, with the court's filing stamp, to the agency within ten days from the issuance of the order. If the agency receives only one petition within this ten-day period, the administrative record is filed there.[453] If the agency receives more than one petition within the ten-day period,

448. *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3944; 20 Moore's Federal Practice, *supra* note 12, § 315.12.

449. *See, e.g.*, ACLU v. FCC, 774 F.2d 24 (1st Cir. 1985); Peabody Coal Co. v. EPA, 522 F.2d 1152 (8th Cir. 1975); Eastern Air Lines, Inc. v. C.A.B., 354 F.2d 507 (D.C. Cir. 1965).

450. *See* 16 Federal Practice & Procedure, *supra* note 12, § 3944, at 845–48.

451. 28 U.S.C. § 1631. *See supra* § 2.07.

452. 28 U.S.C. § 2112(a).

453. *Id.* § 2112(a)(1).

the agency notifies the Judicial Panel on Multidistrict Litigation, and the Panel then designates a single court of appeals by "random selection" from among all the previously petitioned courts.[454] At that point, all the other courts of appeals must transfer their petitions to the court designated by the Panel.[455] The designated court of appeals, however, has the power to transfer all review proceedings to any other court of appeals for the convenience of the parties and in the interest of justice.[456] Only if the agency does not receive any petitions within the ten-day period is it to file the record in the court "in which proceedings with respect to the order were first instituted."[457] This elaborate statutory schematic thus deals with many, but not all, of the possible scenarios of multiple filings of petitions for administrative review.[458]

§ 7.02 Finality

Some of the myriad of statutes providing for court of appeals review of administrative agency actions explicitly require a "final order";[459] others have been judiciously interpreted to impliedly require administrative finality.[460] Just as the final-decision requirement serves to order the relationship of the appellate court to the trial court, the final-administrative-order requirement does the same for the appellate court and agency.[461] Courts of appeals always must keep in mind the differences and the similarities between district court finality and administrative agency finality.

In the administrative law context, the concept of finality is related to the doctrine that requires the exhaustion of administrative remedies.[462] In the context of court jurisdiction, finality is related to the policy underlying the requirement of ripeness in a case or controversy. The consideration of administrative ripeness weighs the present need for immediate

454. *Id.* § 2112(a)(3). *See* Rules for Multicircuit Petitions for Review Under 28 U.S.C. § 2112(a)(3), J.P.M.L. R. 17.1, 25.1–25.5.

455. 28 U.S.C. § 2112(a)(5).

456. *Id.* § 2112(a)(5). *See also* 28 U.S.C. § 1631.

457. 28 U.S.C. § 2112(a)(1).

458. *See* 16 Federal Practice & Procedure, *supra* note 12, § 3944.

459. *E.g.*, 28 U.S.C. § 2344.

460. *E.g.*, Fed. Power Comm'n v. Metro. Edison Co., 304 U.S. 375 (1938).

461. *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3942.

462. *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

judicial review against the predicted hardship of postponing judicial review to allow the administrative policy to continue and to await further developments.[463] The agency must have taken some specified administrative action with some tangible effect on the party that might be remedied on judicial review. The party seeking appellate review must have already pursued any administrative remedies provided by statute or agency rule. Most agency review statutes expressly preclude consideration of matters not first raised before the agency, although the failure to raise a matter may be excused on a proper showing; thus, this administrative rule and exception resemble the judicial requirement for making a timely and proper objection during trial in order to preserve an error for appeal.[464] The two ideas are related, but they remain distinct concerns. Exhaustion of administrative remedies will not render an otherwise interlocutory order "final." But a failure to exhaust administrative remedies can result in an unappealable, and hence unreviewable, "final" order.

Nevertheless, the administrative law concept of finality is something of an empty vessel to be given content by the courts of appeals. In administrative agency reviews, the Supreme Court has cautioned that "the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable."[465] The finality requirement is to be applied "pragmatically . . . focusing on whether judicial review at the time will disrupt the administrative process."[466] Although the requirement is treated as jurisdictional, these underlying purposes are reflected in its case-by-case application at the threshold of appellate review.[467] The tension between the need for immediate judicial review and the finality concept is also manifested in a tendency on the part of the courts of appeals to allow interlocutory review of agency actions via applications for one of the extraordinary

463. *See* Nat'l Park Hospitality Ass'n v. Dep't of the Interior, 538 U.S. 803, 807–08 (2003).

464. *Compare* EEOC v. FLRA, 476 U.S. 19, 22–23 (1986) (claim barred), *with* McKart v. United States, 395 U.S. 185, 193 (1969) (failure excused).

465. Mathews v. Eldridge, 424 U.S. 319, 331 n.11 (1976).

466. Bell v. New Jersey, 461 U.S. 773, 779 (1983).

467. 16 Federal Practice & Procedure, *supra* note 12, § 3942. *E.g.*, Sims v. Apfel, 530 U.S. 103, 108–11 (2000); FTC v. Standard Oil Co., 449 U.S. 232, 239–47 (1980).

writs.[468] These decisions developed from the unremarkable use of mandamus against an agency that had ignored a prior mandate of a court of appeals upon appellate review.

§ 7.03 Exclusivity

The principle of exclusivity in administrative appeals is distinct from that of finality.[469] The particular statute providing for judicial review of an agency order may provide explicitly that the jurisdiction of the court of appeals is exclusive; or district court review of matters within that appellate jurisdiction may be precluded by necessary implication.[470] Of course, if the particular matter does not come within the grant of appellate jurisdiction, then the exclusivity principle cannot apply to preempt district court review of the agency action.[471] Additionally, exclusivity may be excused to allow the district court to review immediately a matter that the court of appeals eventually would review if a showing is made akin to that required for injunctive relief: if the right being asserted is clear and important, especially if it is a constitutional right, and the harm will be irreparable if review is postponed until a later appeal in the court of appeals.[472] This possibility is a rare but noteworthy exception to the general exclusivity principle. A statutory scheme of agency regulation and judicial review may contemplate that some agency actions be reviewed in the court of appeals while other agency actions be reviewed in the district court. Generally, district court review yields to court of appeals review, if there is any conflict. At bottom, whether appellate review in a court of appeals is exclusive, and therefore forecloses any and all judicial review of an agency order in a district court, is ultimately a matter of congressional intent, as that intent is discerned by the courts.

468. *See* 28 U.S.C. § 1651. *See also supra* § 5.03.

469. *See generally* 16 Federal Practice & Procedure, *supra* note 12, § 3943; 19 Moore's Federal Practice, *supra* note 12, § 208.12.

470. *E.g.*, 15 U.S.C. § 45(d) (explicit); Whitney Nat'l Bank v. Bank of N.O. & Trust Co., 379 U.S. 411, 420–21 (1965) (implicit).

471. *Cf.* FCC v. ITT World Communications, Inc., 466 U.S. 463 (1984) (interpreting scope of exclusive jurisdiction).

472. *See, e.g.*, Leedom v. Kyne, 358 U.S. 184 (1958); Utah Fuel Co. v. Nat'l Bituminous Coal Comm'n, 306 U.S. 56 (1939).

Annotated Bibliography

The materials in this bibliography are arranged by treatises, textbooks, books and studies, manuals, and symposia. Works are listed alphabetically by author. Especially important sources for studying and understanding appellate jurisdiction are noted with an asterisk ("*").

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Carol Krafka, Joe S. Cecil & Patricia Lombard, Stalking the Increase in the Rate of Federal Appeals (Federal Judicial Center 1995): a study of the increase in the number of appeals and the increase in the rate of appeals.

Ashlyn K. Kuersten, Decisions of the U.S. Courts of Appeals (Garland 2001): outlines the structures and procedures of the courts of appeals; provides longitudinal data on litigants; utilizes statistical programs and databases; includes tables and charts.

Karl N. Llewellyn, How Appellate Courts Decide Cases (Brandeis Lawyers' Society 1951): a classic; included here for its history and timelessness, as well as out of a sense of nostalgia.

Thomas B. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversary System (Greenwood Press 1978): describes how lawyers interact with appellate courts.

*Judith A. McKenna, Structural and Other Alternatives for the Federal Courts of Appeals: Report to the United States Congress and the Judicial Conference of the United States (Federal Judicial Center 1993): commissioned by Congress; hypothesizes various futures for the federal courts and contemplates the various proposals to reform them.

Judith A. McKenna, Laural L. Hooper & Mary Clark, Case Management Procedures in the Federal Courts of Appeals (Federal Judicial Center 2000): detailed consideration of intramural procedures of appellate case management, such as screening, the nonargument calendar, and decisions without published opinions.

Daniel J. Meador & Jordana S. Bernstein, Appellate Courts in the United States (West Publishing Co. 1994): compact handbook on the appellate courts, state and federal.

Rita M. Novak & Douglas K. Somerlot, Delay on Appeal: A Process for Identifying Causes and Cures (ABA 1990): evaluates the causes and cures for appellate delay against the ABA Standards for Appellate Courts.

Origins of the Elements of Federal Court Governance (Russell R. Wheeler ed., Federal Judicial Center 2003): a helpful introduction to the institutions of governance within the Third Branch.

Anthony Partridge & E. Allan Lind, A Reevaluation of the Civil Appeals Management Plan (Federal Judicial Center 1983): an early study of case-management procedures in the courts of appeals.

*Richard A. Posner, How Judges Think (Harv. Univ. 2008): one of the most prominent jurists of his generation not to have served on the Supreme Court focuses his considerable intellect on the craft of judging; this is an intellectual tour de force

along the lines of Benjamin Cardozo's *The Nature of the Judicial Process*; a philosophical description of how judges go about deciding cases.

*Richard A. Posner, The Federal Courts—Challenge and Reform (Harv. Univ. 1996): a successor edition—the subtitle to the prior edition was "Crisis and Reform"; examines the workload and work ways of the federal courts, with an emphasis on the courts of appeals; provides equal parts history and statistics to help the reader to understand the challenges facing the federal appellate judiciary and to evaluate the proposals for its reform.

Robert Timothy Reagan, Citations to Unpublished Opinions in the Federal Courts of Appeals (Federal Judicial Center 2005): a comprehensive study of the practice.

Richard L. Revesz, Distinctive Practices in the Second Circuit (Found. Fed. Bar Council 1989): examines the local legal culture of the Second Circuit.

William L. Reynolds & William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals (Federal Judicial Center 1982): early study of the use of unpublished opinions.

Christopher E. Smith, Judicial Self-Interest: Federal Judges and Court Administration (Praeger 1995): examines how judges develop judicial policies and how they go about reforming the courts.

Donald R. Songer, Reginald S. Sheehan & Susan B. Haire, Continuity and Change on the United States Courts of Appeals (Univ. Mich. 2000): uses the National Science Foundation database of courts of appeals decisions; a comprehensive examination of the trends in appointments, changes in workload, increased levels of conflict, and regional differences among the courts of appeals.

Standing Committee on Federal Judicial Improvements, American Bar Association, The United States Courts of Appeals: Reexamining Structure and Process After a Century of Growth (1989): expresses the concern that the seemingly inexorable trend toward more appeals of greater complexity would overwhelm the courts of appeals; urges continued study; encourages consideration of various proposals addressing intercircuit conflicts, limited en bancs, subject-matter panels, and appellate case-management techniques.

Maxwell L. Stearns, Appellate Courts Inside and Out (Geo. Mason 2003): law and economics working papers.

Donna Stienstra & Joe S. Cecil, The Role of Staff Attorneys and Face-to-Face Conferencing in Non-Argument Decisionmaking: a View From the Tenth Circuit (Federal Judicial Center 1989): these appellate ADR programs have been implemented in most, if not all, of the remaining circuits since this study.

Stephen L. Wasby, Appellate Courts and Judicial Administration (Inst. Ctr. Mgmt. 1981): study of judicial administration.

Russell R. Wheeler & Cynthia Harrison, Creating the Federal Judicial System (Federal Judicial Center 3d ed. 2005): an historical account of the origins and evolution of the federal courts.

G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges (Oxford 1976): one of the leading accounts of the formation and evolution of American judicial traditions by a brilliant legal historian.

G. Edward White, The Appellate Opinion as Historical Source Material (Am. Bar Found. 1971): a prominent legal historian examines judicial opinions as history.

William L. Whittaker, Comparative Study of the Internal Operations and Process of Three U.S. Courts of Appeals (Federal Judicial Center 1972): summarizes and compares the local appellate procedures in three courts of appeals.

Larry W. Yackle, Reclaiming the Federal Courts (Harv. Univ. 1994): a leading federal courts scholar's manifesto; a critique of how the courts have closed the door to the federal courthouse by invoking case or controversy doctrines such as standing.

Manuals

*Steven A. Childress & Martha S. Davis, Standards of Review (Matthew Bender 3d ed. 1999): 2 vols.; the most thorough, comprehensive, and up-to-date treatment of standards of review; gives separate treatment for civil, criminal, and administrative matters.

*Harry T. Edwards & Linda A. Elliot, Federal Courts Standards of Review—Appellate Court Review of District Court Decisions & Agency Actions (Thomson West 2007): describes the doctrinal frameworks informing the various standards of review; examines the relevant statutes and applicable rules of procedure; focuses on leading Supreme Court decisions.

Federal Judicial Center, Chambers Handbook for Judges' Law Clerks and Secretaries (1994): combines previously separate editions of handbooks for law clerks and secretaries; useful and practical information for those serving in chambers.

Richard A. Givens, Manual of Federal Practice (Lexis Nexis Publishing 5th ed. 1998): provides two good chapters on appellate practice and procedure; guides an attorney through the various stages of an appeal.

*Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop & Edward A. Hartnett, Supreme Court Practice (Bureau of Nat'l Affairs 9th ed. 2007): the Bible of Supreme Court practice; provides a detailed treatment of review of courts of appeals; many topics are analogous to jurisdiction of the courts of appeals, such as finality and extraordinary writs.

Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure (Lexis Nexis Publishing 5th ed. 2005): 2 vols.; designed to guide the practitioner through the post-AEDPA (Anti-Terrorism and Effective Death Penalty Act) world

of habeas procedure; chapters 34–38 detail the appellate stages up to and including certiorari.

*David G. Knibb, Federal Court of Appeals Manual (West Group 4th ed. 2000): created as a practical guide for attorneys who will be bringing cases to the U.S. courts of appeals; sections written in a Q&A format but with thorough answers; primarily covers procedural matters, but does devote some space to more substantive issues, such as standards of review; frequently relied on in the writing of this primer.

Herbert Monte Levy, How to Handle an Appeal (Practicing Law Inst. 4th ed. 1999): a good practitioner's guide to appellate jurisdiction and practice; additional emphasis on advocacy skills; chapter 11 is specifically devoted to the courts of appeals.

Frank O. Loveland, The Appellate Jurisdiction of the Federal Courts (W. H. Anderson Co. 1911): too long out of date to rely on, except for historical research.

Roy B. Marker, Federal Appellate Jurisdiction and Procedure (Callaghan & Co. 1935 & Supps. to 1938): too long out of date to rely on, except for historical research.

Robert J. Martineau, Modern Appellate Practice—Federal and State Civil Appeals (Lawyers Coop. Publishing Co. 1983 & Supps. to 1994): "modern" connotes the previous twenty-five years; covers both state and federal civil appeals; scholarly and practical; well researched, with extensive citations and cross-references; not being updated, however.

Paul P. O'Brien, Manual of Federal Appellate Procedure (Pernau-Walsh Print. Co. 3d ed. 1941): a compilation of rules and statutes with brief commentary; out of date.

Roscoe Pound, Appellate Procedure in Civil Cases (Little, Brown & Co. 1941): provides an extensive history and comparative material; only one chapter devoted to the "present [twentieth] century"; presents proposals for reform; useful for perspective and history.

Thomas W. Powell, The Law of Appellate Proceedings: in Relation to Review, Error, Appeal, and Other Reliefs Upon Final Judgments (T. & J.W. Johnson & Co. 1872): noteworthy as the earliest attempt at a separate treatise on appeals; too long out of date to rely on, except for historical research.

*George K. Rahdert & Larry M. Roth, Appeals to the Fifth Circuit Manual (Butterworth Legal Publ'r 1977 & Supps. to 2005): 2 vols.; very complete guidelines to appellate practice and procedure; detailed references and synthesis of U.S. Code, Federal Rules of Appellate Procedure, local rules, internal operating procedures, etc.; cited here as being representative of other circuit-specific manuals, written for practitioners, that would provide a valuable and quick reference.

*Antonin Scalia & Bryan A. Garner, Making Your Case—The Art of Persuading Judges (2008): a new masterpiece on appellate advocacy; one of the best stylists to have sat on the Supreme Court, and the leading guru on legal usage and grammar collaborate to create an instant classic.

Standing Committee on Continuing Education of the Bar, American Bar Association, Appellate Advocacy (Peter J. Carre, Azike A. Ntephe & Helen C. Trainor eds., ABA Prof'l Educ. Publ'n 1981): a collection of essays and speeches by lawyers and judges on appellate practice; a good compilation on the nature of the appellate process; little on jurisdiction.

Robert L. Stern, Appellate Practice in the United States (Bureau of Nat'l Affairs 2d ed. 1989): a comprehensive handbook on the appellate process, with emphasis on brief writing and oral argument.

Neva B. Talley-Mooris, Appellate Civil Practice and Procedure Handbook (Prentice-Hall 1975): designed for the general practitioner; first part covers state systems and second part covers federal appeals; very basic.

Michael E. Tigar & Jane B. Tigar, Federal Appeals—Jurisdiction and Practice (West Group 3d ed. 1999): current and thorough; the jurisdiction portion elaborates the important topics; presents well-chosen and helpful citations; coauthored by one of the premier appellate lawyers of this generation; frequently relied on in the writing of this primer.

Paul G. Ulrich, Federal Appellate Practice 9th Circuit (Thomson West 2d ed. 1999): 2 vols.; another example of the comprehensive reference books commercially available to attorneys taking appeals to the various courts of appeals.

Frederick Wiener, Briefing and Arguing Federal Appeals—with an appendix of late authorities including references to the Supreme Court's 1967 rules (Bureau of Nat'l Affairs 1967): emphasizes appellate advocacy; the best treatment of its kind; regrettably dated; this is how a first-rate appellate lawyer viewed the appellate process when in his prime.

*Larry W. Yackle, Postconviction Remedies (West Group 1981 & Cumulative Supp. to 2007): the writ of habeas corpus is pure procedure, and this is the best single volume on the great writ written by one of the leading scholars on the subject.

Elijah N. Zoline, Federal Appellate Jurisdiction and Procedure (Clark Boardman Co. 2d ed. 1924): too long out of date to rely on, except for historical research.

Symposia

**2005 National Conference on Appellate Justice*, 8 J. App. Prac. & Process 65 (2006): co-sponsored by the American Academy of Appellate Lawyers, Federal Judicial Center, and the National Center for State Courts; includes comprehensive statistical tables and selected presentations and addresses; this national conference brought together jurists, lawyers, and academics to consider the current state of appellate courts, both state and federal.

Annual Review of Criminal Procedure Decisions of the Supreme Court and the Courts of Appeals, Geo. L.J.: an annual symposium.

Annual 10th Circuit Survey, Denv. U. L. Rev.: an annual symposium.

The Bicentennial Celebration of the Courts of the District of Columbia Circuit, 90 Geo. L.J. 545, 545–834 (2002): several articles describing the impact of the Court of Appeals for the District of Columbia on administrative law.

**Civil Appellate Jurisdiction: Part I*, 47 Law & Contemp. Probs., Issue 2 Spring 1984, at 1, 1–248; *Civil Appellate Jurisdiction: Part II*, 47 Law & Contemp. Probs., Issue 3 Summer 1984, at 1, 1–179: written in the form of a restatement of the law; Part I is a valuable research tool and able synthesis; Part II adds a comparative perspective to include Canada, France, and Germany.

Eighth Circuit Survey, Creighton L. Rev.: a regular feature.

Eleventh Circuit Survey, Mercer L. Rev.: an annual symposium.

Federal Courts Law Review: an electronic law review published online; editorial board consists of U.S. magistrate judges and law school professors.

Fifth Circuit Survey, Tex. Tech L. Rev.: an annual symposium.

Fifth Circuit Symposium, Loy. L. Rev.: a regular feature.

Managing the Federal Courts—Will the Ninth Circuit Be a Model for Change?, 34 U.C. Davis L. Rev. 315, 315–592 (2000): articles discuss the Ninth Circuit's experience and its implications for the future operation of the federal courts of appeals in general.

Ninth Circuit Conference, 48 Ariz. L. Rev. 221, 221–367 (2006): a symposium organized to discuss issues affecting the Ninth Circuit in particular, such as "limited" en banc rehearings, caseload, and reversals by the Supreme Court.

Ninth Circuit Survey, Golden Gate U. L. Rev.: an annual symposium.

Restructuring Federal Courts, 78 Tex. L. Rev. 1399, 1399–1866 (2000): a symposium discussing the effects recent legislation, such as the Anti-Terrorism and Effective Death Penalty Act (AEDPA), has had on judicial review of immigration and criminal appeals.

Seventh Circuit Review, Chi.-Kent L. Rev.: semi-annual online journal analyzing recent decisions of the Seventh Circuit.

**The Supreme Court [Year] Term*, Harv. L. Rev.: an annual symposium; each November issue is devoted to selected decisions from the preceding term.

Third Circuit Review, Vill. L. Rev.: an annual symposium.

Blank pages included to preserve pagination for double-sided printing.

Table of Cases

The Federal Judicial Center

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and online media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.