

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

Third Edition

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

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*Thomas E. Baker
Miami, Florida
January 2023*

Dedication

From August 1977 to August 1979, I was privileged to serve as a law clerk to the Honorable James Clinkscales Hill (1924–2017), then a judge of the United States Court of Appeals for the Fifth Circuit, who later served on the Eleventh Circuit. That experience was formative for my legal career. I rededicate this monograph to the memory of my mentor and friend who served for over four decades in the grand tradition of the Third Article. *Requiescat in Pace.*

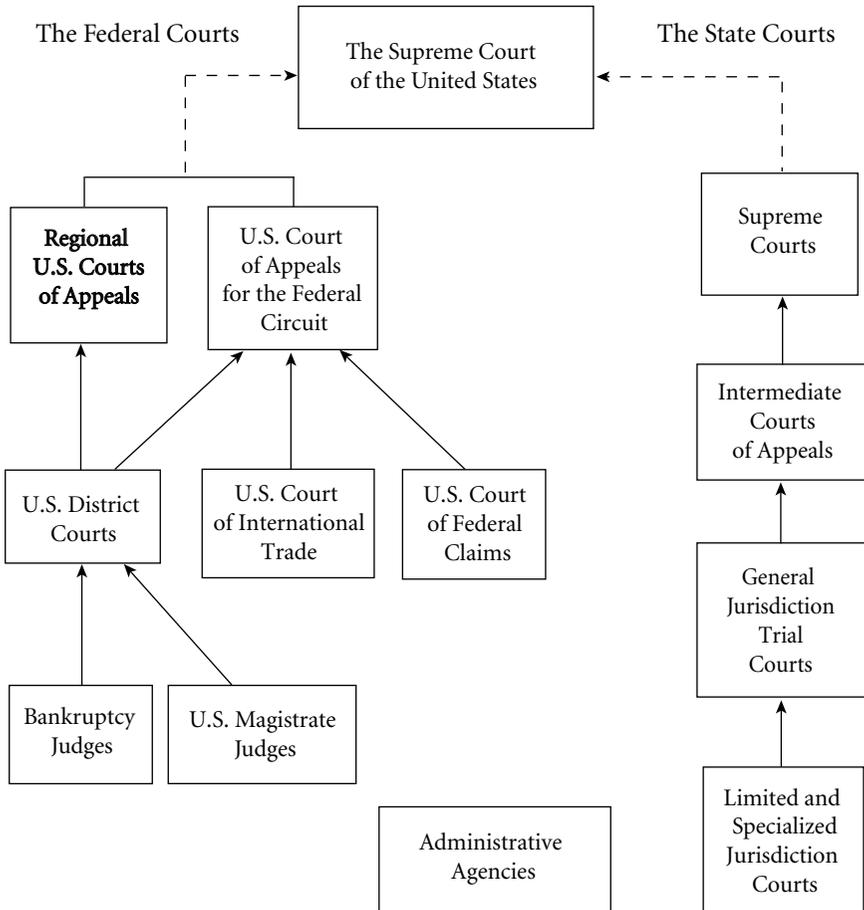
T.E.B.



The Supreme Court of the United States reviews only a small percentage of all judgments issued by the . . . courts of appeals. Each of the courts of appeals, therefore, is for all practical purposes the final expositor of the federal law within its geographical jurisdiction. This crucial fact makes each of those courts a tremendously important influence in the development of the federal law, both constitutional and statutory. Hence, it is an obviously useful and significant service to keep close track of and to publicize, particularly for the benefit of lawyers and judges, the work of the circuits.

—Byron R. White, *Dedication*, 15 Tex. Tech L. Rev. ix, ix (1984)

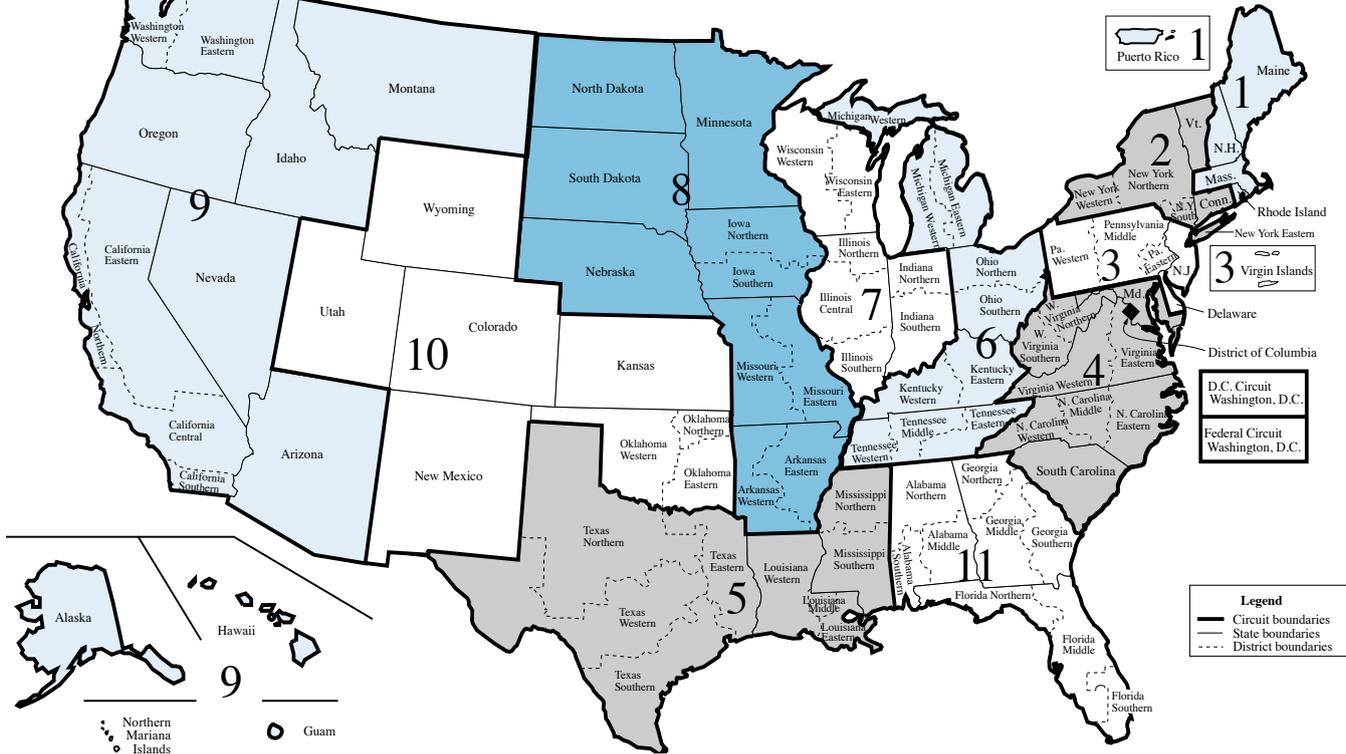
The Court Systems of the United States *



* Federal Judicial Center, *Federal Courts and What They Do* 9 (2006).

Geographical Boundaries of U.S. Courts of Appeals and U.S. District Courts

as set forth by 28 U.S.C. §§ 41, 81–131



Chapter 1

Introduction, Background, and Overview

- § 1.01 Purpose of This Primer
- § 1.02 Scope of This Primer
- § 1.03 History of the Courts of Appeals
- § 1.04 Future of the Courts of Appeals
- § 1.05 Limited Jurisdiction
- § 1.06 Rules of Precedent
- § 1.07 Rulemaking
- § 1.08 Clarity, Capacity, and Closure

§ 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 a survey of the literature. Chapter 1 provides a brief 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 intended to be merely an introductory primer and 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. Indeed, each of the two leading multi-volume treatises takes up several feet of library shelf-space, and scores of supplements are added

annually.¹ Discussion here is meant to be brief and 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 survey of literature provides comprehensive and encyclopedic references for further reading and research.

Finally, the reader should bear in mind that this primer is meant as an introduction and an overview, not a substitute, for the jurisdictional outlines and guides that the various courts of appeals have prepared for the benefit of their new judges. There also is an insider literature revealing the inner workings and peculiar eccentricities of specific circuits.² Likewise, over the years, the Federal Judicial Center has published numerous studies and reports on particular topics relevant to the courts of appeals, many of which can be downloaded from the Center's website.³

§ 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 that disappointed litigants may file in the district court.⁴ The most common are motion for judgment

1. Readers are encouraged to consult these two leading treatises by their frequent and regular citations throughout this primer: Charles Alan Wright et al., *Federal Practice & Procedure* (2022) [hereinafter *Federal Practice & Procedure*] and James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 2006) [hereinafter *Moore's Federal Practice*]. Both are online.

2. *E.g.*, Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 49 *Cumb. L. Rev.* 297 (2019); Paul Georgeson, *Appellate Practice Tips from Our Ninth Circuit Judges*, 20 *Nev. Law. J.* 6 (2012); Kevin Golembiewski & Jessica Arden Ettinger, *Advocacy Before the Eleventh Circuit: A Clerk's Perspective*, 73 *U. Miami L. Rev.* 1221 (2019); Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 *J. App. Prac. & Process* 401 (2010). Technically, a circuit is a geographical entity that includes one court of appeals and multiple district courts, etc. “Court of appeals” is the appellate court, strictly speaking. However, conventional usage sometimes uses the shorthand “circuit” to refer to the court of appeals.

3. Federal Judicial Center, <http://www.fjc.gov>. The courts of appeals have their own websites that contain a wealth of online materials aimed at practitioners, but informative to law clerks and judges as well. *E.g.*, *Practitioners' Guide to the United States Court of Appeals for the Fifth Circuit* (2021); *Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit* (2020); *U.S. Court of Appeals for the Eleventh Circuit How-To Guides* (2019).

4. *See infra* § 2.06.

as a matter of law;⁵ motion to amend or make additional findings;⁶ motion for a new trial;⁷ motion to alter or amend a judgment;⁸ motion for relief from clerical mistake;⁹ motion for relief from mistake, inadvertence, excusable neglect, newly discovered evidence, fraud, void judgment, enforcement inequity, or some “other reason”;¹⁰ and motion for stay of proceeding.¹¹

After an appeal has been docketed and while it is pending, a district court cannot grant a Rule 60(b) motion to vacate the judgment without a remand. However, the district court can (1) entertain the motion and deny it; or (2) defer consideration of the motion; or (3) make an “indicative ruling” that it would grant the motion if the court of appeals would remand for that purpose; or (4) simply declare that the motion raises a substantial issue that the district court prefers to decide if and only if the court of appeals agrees that it would be useful to decide the issue before decision of the pending appeal.¹² Thus, somewhat like Schrödinger’s cat, the merits of a case can be alive only in one court at a time, but the rules provide for communication and coordination between the district court and the court of appeals.

Second, the appellate jurisdiction of the Supreme Court is beyond the scope of this primer.¹³ In 1988 Congress eliminated substantially all of what remained of the Supreme Court’s statutory mandatory or obligatory appellate jurisdiction, which previously had provided a direct appeal from the district court that bypassed review in the court of appeals.¹⁴ Still, only a very few of the arcane provisions for convening a three-judge district court with direct appeal to the Supreme

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

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

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

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

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

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

11. Fed. R. Civ. P. 62.

12. Fed. R. Civ. P. 62.1; Fed. R. App. P. 12.1.

13. See generally Stephen M. Shapiro et al., *Supreme Court Practice* (11th ed. 2019); Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008); Thomas E. Baker, *A Primer on Supreme Court Practices and Procedures* (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3977033.

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

Court survive today.¹⁵ And occasionally Congress enacts a statute containing an explicit authorization for a direct appeal to the Supreme Court for constitutional challenges to the particular statute.¹⁶

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 degree of deference owed to the court or agency 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.¹⁷ A thoughtful elaboration of these functions would require a separate treatise.¹⁸ 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, that is, the decision to decide the appeal.

Fourth, this primer cannot summarize all the complexities of federal appellate procedure. Full-length books have been devoted to the art of appellate advocacy.¹⁹ The Federal Rules of Appellate Procedure create a national framework for appellate procedure, which has been embellished in each court of appeals by local

15. 28 U.S.C. § 1253 (citations to the U.S. Code are to the most recent version unless otherwise specified). See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *McCutcheon v. FEC*, 572 U.S. 185 (2014). Three-judge district courts do presumptively apply their circuit's precedents, even though their rulings are not subject to review in the court of appeals. See Michael T. Morely, *Vertical Stare Decisis and the Three-Judge Courts*, 108 Geo. L.J. 699 (2020). See also Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts and Democracy*, 107 Geo. L.J. 413 (2019).

16. Compare *United States v. Eichman*, 496 U.S. 310 (1990) (deciding appeal under the Flag Protection Act, 18 U.S.C. § 700(d)), with *Off. of Sen. Mark Dayton v. Hanson*, 550 U.S. 511 (2007) (dismissing appeal under the Congressional Accountability Act, 2 U.S.C. § 1301).

17. See Adam N. Steinman, *Rethinking Standards of Review*, 96 Ind. L.J. 1 (2020) (summarizing and critiquing the variations).

18. See generally Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (4th ed. 2010).

19. Two leading practitioner manuals appear frequently in the footnotes of this primer: David G. Knibb, *Federal Court of Appeals Manual* (7th ed. 2022); Eric J. Magnuson & David F. Herr, *Federal Appeals: Jurisdiction & Practice* (2019). There are other "footnote worthy" manuals: see David M. Axelrad et al., *Appellate Practice in Federal and State Courts* (2018); Brian Netter et al., eds., *Federal Appellate Practice* (3d ed. 2018); Gregory A. Castanias & Robert H. Klonoff, *Federal Appellate Practice and Procedure in a Nutshell* (3d ed. 2017); Alex Kozinski & John Rabiej, *Federal Appellate Procedure Manual* (2014); Daniel J. Meador, Thomas E. Baker & Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* (2d ed. 2006); Robert J. Martineau, *Modern Appellate Practice: Federal and State Civil Appeals* (1983); Frederick Bernays Wiener, *Briefing and Arguing Federal Appeals* (2d ed. 1961).

rules and internal operating procedures.²⁰ Only those appellate procedures that directly determine whether there is authority to decide an appeal are deemed relevant here.

Fifth, 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.²¹ Thus such matters as the promulgation of the rules of procedure generally²² and the procedures for judicial disability or misconduct²³ are beyond this treatment.

Finally, this primer does not venture into the philosophy of appellate judicial decision making. The art of judging cannot be captured in such a modest work as this.²⁴

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

21. An interactive timeline, created by the Federal Judicial Center, depicts the evolution of the roles and responsibilities of the Judicial Conference of the United States over the last century, <https://www.fjc.gov/judicial-conference-united-states-timeline>. *See also* Russell R. Wheeler, A New Judge's Introduction to Federal Judicial Administration (Federal Judicial Center 2003); Russell R. Wheeler & Gordon Bermant, Federal Court Governance: Why Congress Should—and Why Congress Should Not—Create a Full-Time Executive Judge, Abolish the Judicial Conference, and Remove Circuit Judges from District Court Governance (Federal Judicial Center 1994); Russell R. Wheeler, Origins of the Elements of Federal Court Governance (Federal Judicial Center 1992); 16 Federal Practice & Procedure, *supra* note 1, § 3939.

22. Fed. R. App. P. 47; 28 U.S.C. § 2071. *See infra* § 1.07.

23. 28 U.S.C. §§ 351–364, 372. *See generally* Russell R. Wheeler & Cynthia Harrison, Creating the Federal Judicial System (Federal Judicial Center 3d ed. 2005).

24. *See generally* Cass R. Sunstein, David Schkade, Lisa M. Ellman, & Andres Sawicki, Are Judges Political? An Empirical Analysis of the Federal Judiciary (2006). *See also* Andreas Broscheid, *Comparing Circuits: Are Some U.S. Courts of Appeals More Liberal or Conservative Than Others?*, 45 Law & Soc'y Rev. 171 (2011); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 Duke L.J. 1895 (2009); Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B.C. L. Rev 2087 (2020).

§ 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.²⁵ More particularly, the major historical stages of the federal court system have been reflected in the creation and the reforms of the middle tier.²⁶ Indeed, “the evolution of the courts of appeals and the increasing importance of their role are important themes [that] permeat[e] the broad historical overview of [the Third Branch].”²⁷ 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.”²⁸ The original implementing statute, the historic Judiciary Act of 1789,²⁹ provided for two tiers of courts below the Supreme Court. The district courts were exclusively trial courts of limited jurisdiction, principally admiralty. The circuit courts were the principal trial courts, convened in each district, for example, the “Circuit Court for the District of Maryland,” with 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.³⁰

The lame-duck Federalists’ 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

25. See generally Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler’s The Federal Courts and the Federal System* (7th ed. 2015); Wheeler & Harrison, *supra* note 23; Erwin C. Surrency, *History of the Federal Courts* (2d ed. 2002); *Legislative History of the United States Circuit Courts of Appeals and the Judges Who Served During the Period 1801 Through May 1972* (Senate Judiciary Committee Print 92d Cong. 2d Sess. 1972); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* (1928). See also Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 *Hastings L.J.* 913 (1997).

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

27. The Role of the U.S. Courts of Appeals in the Federal Judiciary (Federal Judicial Center 2022), <https://www.fjc.gov/history/courts/Role-of-the-Courts-of-Appeals>.

28. U.S. Const. art. III, § 1.

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

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

numbered six circuits.³¹ 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.³²

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. An additional seventh circuit and an additional seventh justice were added in 1807.³³ 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.³⁴ An additional tenth circuit was added, not too long after, to include the west coast states, and an additional tenth justice was added to the Supreme Court.³⁵ In 1862 and again in 1866, Congress rearranged the circuits, settling on nine circuits; in 1869 a separate circuit judgeship was created for each circuit, which further reduced the justices' circuit-riding responsibility.³⁶ This is the origin of the iconic nine-member Supreme Court.

In the period 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 and the Supreme Court docket 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 one 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.

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

32. 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.

33. 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.

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

35. 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.

36. 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.

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 modern organization and structure.³⁷ The Evarts Act created a circuit court of appeals for each of the nine circuits, 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 High Court has demonstrated a strong preference for the writ of certiorari³⁸ and has disfavored certification to the point of virtual extinction.³⁹ The structure was streamlined further in 1911, when the anachronistic circuit courts were abolished and their trial jurisdiction was transferred to the district courts.⁴⁰ In 1925 Congress dramatically expanded the Supreme Court's discretion over its docket.⁴¹ Thus the

37. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. See Ross E. Davies, *Evarts Act Day: The Birth of the U.S. Circuit Courts of Appeals*, 6 J. L. 251 (2016).

38. See 28 U.S.C. § 1254. Supreme Court Rule 10 provides in part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power

See generally Shapiro et al., *supra* note 13, §§ 2.2–2.6.

39. Supreme Court Rule 19 provides:

A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision.

See generally Kevin G. Crennan, Note, *The Viability of Certification in Federal Appellate Procedure*, 52 Wm. & Mary L. Rev. 2025, 2026 n.6 (2011) (“In the last fifty years, the Court has granted only three certificates.”).

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

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

modern structure 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.⁴² Thus, in a manner of speaking, the Supreme Court does not decide cases; rather it decides only discrete questions that it chooses to decide from a relatively small number of the annual petitions for review.⁴³

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.⁴⁴ Congress added a tenth circuit in 1929⁴⁵ by dividing the Eighth Circuit and an eleventh circuit in 1981 by dividing the Fifth Circuit;⁴⁶ and created the Federal Circuit in 1982 that is a national court with delineated subject-matter jurisdiction.⁴⁷ For decades, members of Congress, judges, and federal court scholars have been debating whether or not to divide the Ninth Circuit—which is by far the largest geographically, with the most circuit judges—and how to go about doing so.⁴⁸

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. However, reforms have been rather ad hoc to respond to perceived problems and imbalances, without there ever having been a systematic redesign. The jurisdiction of these courts significantly regulates the flow of cases to the Supreme Court, and in the other direction, their jurisdiction allows for the

42. 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. See generally Nino C. Monea, CAAF, *By the Numbers: An Empirical Study of the Court of Appeals for the Armed Forces*, 100 U. Det. Mercy L. Rev. 105 (2022); James E. Baker, *The Importance of Building Fires: Lessons Learned as a Judge on the United States Court of Appeals for the Armed Forces*, 15 J. App. Prac. & Process 201 (2014); Jay L. Thoman, *The Military's Approach to Appellate Law*, 12 J. App. Prac. & Process 283 (2011).

43. See Ben Johnson, *The Origins of Supreme Court Question Selection*, 122 Colum. L. Rev. 793 (2022).

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

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

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

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

48. Commission on Structural Alternatives for the Federal Courts of Appeals, Final Report (Dec. 18, 1998); Symposium, *Ninth Circuit Conference*, 48 Ariz. L. Rev. 221 (2006) (chronicling proposals for splitting the Ninth Circuit); Ilya Shapiro & Nathan Harvey, *Break Up the Ninth Circuit*, 26 Geo. Mason L. Rev. 1299 (2019).

direct judicial supervision of the district courts.⁴⁹ 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.⁵⁰ Their position in the middle orients today's courts of appeals simultaneously toward the High Court and the trial court.⁵¹ Until relatively recently, their essential function was understood to be to correct errors, and it was deemed to be the unique function of the Supreme 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.⁵² Subject-matter jurisdiction—the judicial power—cannot be understood in the abstract or without some appreciation for role or function.⁵³ Error correction and law declaration are distinct tasks, theoretically assigned to distinct courts. In a typical year of federal appeals, the actual results are rather one-sided: the Supreme Court reverses about 70% of its cases;⁵⁴ the courts of appeals affirm roughly nine out of ten cases.⁵⁵ Nonetheless, the role and function of the courts of appeals in the federal court structure seem to create an expectation of judicial minimalism on the part of circuit judges, a judicial temperament that requires humility in judging.⁵⁶

49. See Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. Legal Stud. 113, 115 (2015) (“[D]istrict judges are most likely to alter their decision making when their hierarchical principals, circuit judges, issue strong, published opinions that unambiguously indicate their preferred outcome and the course of action for the case.”).

50. See *infra* § 5.01.

51. See Robert L. Levine, *The Court of Appeals as the Middle Child*, 85 Fordham L. Rev. 945, 945 (2016) (“We are at once more tightly bound by Supreme Court precedent than the Supreme Court itself appears to be these days, and we are also arguably more bound by principles of deference to a trial court’s factual findings and discretionary judgment calls.”).

52. Frank B. Cross, *Decision Making in the U.S. Courts of Appeals 2* (2007) (“In large measure, it is the circuit courts that create U.S. law. They represent the true iceberg, of which the Supreme Court is but the most visible tip. The circuit courts play by far the greatest legal policymaking role in the United States judicial system.”).

53. 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).

54. Between 2007 and 2023, “the SCOTUS . . . released opinions in 1,128 cases. Of those, it reversed a lower court decision 805 times (71.4 percent) while affirming a lower court decision 315 times (27.9 percent).” *Ballotpedia*, [https://ballotpedia.org/SCOTUS_case_reversal_rates_\(2007_-_Present\)](https://ballotpedia.org/SCOTUS_case_reversal_rates_(2007_-_Present)).

55. The reversal rate among the courts of appeals varies among the circuits and differs with the type of appeal, but generally hovers a little under 10%. Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 Emory L.J. Online 1035, 1035 (2019).

56. See Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 Va. L. Rev. 829 (2022).

§ 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.⁵⁷ 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.⁵⁸ Of these reform studies, four deserve brief mention here because they focused on the courts of appeals.

First, in 1990, the Federal Courts Study Committee issued its report.⁵⁹ 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 to require “fundamental change.”⁶⁰ Rather than endorse any one proposal, however, the report described various possible restructurings and urged further study.

Soon after, 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*.⁶¹ 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.⁶²

Third, the Judicial Conference formally approved the *Long Range Plan for the Federal Courts*⁶³ in 1995. The portion of the *Long Range Plan* that focused on

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

58. 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).

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

60. *Id.* at 109.

61. *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).

62. *Id.* at 155.

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

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.⁶⁴

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 Congress in 1998.⁶⁵ Popularly known as the “White Commission,” named after its chair, Retired Justice Byron White, that commission was charged by Congress to make recommendations about the courts of appeals generally and about the Ninth Circuit’s court of appeals in particular. The White Commission rejected various proposals for dividing the Ninth Circuit as a geographic entity, which had been debated over the years. Instead, it proposed a more subtle and novel reform that self-consciously reconceptualized the court of appeals as being separate and distinct from the circuit, so that the former could be reorganized while maintaining the existing geographic 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.”⁶⁶ 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

64. *Id.* at 44.

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

66. *Id.* at 45.

experiment with regional divisions in the Ninth Circuit.⁶⁷ 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 Act⁶⁸ has proven remarkably resilient and remains intact today, over one hundred years later. The three-judge panel still today is the engine that runs the courts of appeals, although panel assignment practices vary from circuit to circuit.⁶⁹ This institutional design is not based entirely, or even mainly, on efficiency—three judges sitting alone could decide three times the number of appeals. The real purpose is to increase the quality of decisions and to reach more just results through collegial and collaborative decision making.⁷⁰ All three judges decide the case in person and then go on to participate on paper in the drafting of the opinion by the judge assigned to write.⁷¹ Judicial attention remains the most important and the most scarce appellate resource.⁷²

Beginning in the 1960s and continuing into the 1990s, however, docket growth had significant effects on the courts of appeals.⁷³ Congress added judgeships, but not nearly enough to keep pace with new appellate filings; after a period of rapid

67. 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).

68. See *supra* § 1.03.

69. Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 *Cornell L. Rev.* 65 (2017). Cf. Mitchell W. Bild, *Rethinking the Federal Courts: Why Now Is the Time for Congress to Revisit the Number of Judges That Sit on Federal Appellate Panels*, 95 *Chi.-Kent L. Rev.* 335 (2020) (proposing five-judge panels based on the experiences of the states and the Federal Circuit).

70. Harry T. Edwards, *Collegial Decision Making in the Courts of Appeals*, N.Y.U. Sch. of L., Pub. L. Rsch. Paper No. 17-47 (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3071857; Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 *U. Pa. L. Rev.* 1319, 1322 (2009); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 *U. Pa. L. Rev.* 1639, 1640–41 (2003); Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 *Mich. L. Rev.* 2297, 2362 (1999).

71. See Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 *Fla. L. Rev.* 1599 (2014).

72. Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 *Geo. Wash. L. Rev.* 401 (2013).

73. 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, 21–37 (2006). The Administrative Office of the U.S. Courts compiles detailed annual statistical reports that are available at <https://www.uscourts.gov/topics/administrative-office-us-courts>.

increases, the creation of new judgeships slowed to a halt.⁷⁴ The Judicial Conference has not asked for additional judgeships to match caseload growth and some courts of appeals, like the Eleventh Circuit, have gone on record to refuse them. The increases in cases from the late 1980s to the 2010s were significant, if not as dramatic as the prior decades, followed by a more recent leveling-off period.⁷⁵ The Judicial Conference periodically recommended omnibus judgeship bills, but Congress for its part stood pat.⁷⁶ While there have been some marginal differences among the circuits,⁷⁷ the various courts of appeals have adapted to caseload pressure in many of the same ways.⁷⁸ Appellate inputs were added to the system in the guise of additional law clerks and staff attorneys, and with broadened responsibilities and duties.⁷⁹ 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,⁸⁰ causing some judges to worry that they were at risk for being transformed “from thinkers to

74. There have been no new appellate judgeships since 1990. 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).

75. Peter Charles Hoffer, William James Hull Hoffer & N. E. H. Hull, *The Federal Courts: An Essential History* 429 (2016).

76. *Id.*

77. See Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 *Stan. L. & Pol’y Rev.* 57 (2016) (comparing the overall reversal rates, rates of dissent, and lengths of time to decide appeals in the Second and Ninth Circuits).

78. See generally Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume,”* 8 *J. App. Prac. & Process* 101 (2006).

79. Roger A. Hanson, Carol R. Flango & Randall M. Hansen, *The Work of Appellate Court Legal Staff* (Nat’l Ctr. for State Cts. 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). See also *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges* (Federal Judicial Center 4th ed. 2020); *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* (Federal Judicial Center revised 4th ed. 2019).

80. Judith A. McKenna, Laural L. Hooper & Mary Clark, *Case Management Procedure in the Federal Courts of Appeals* (Federal Judicial Center 2000). See generally David R. Cleveland, *Appellate Court Rules Governing Publication, Citation, and Precedential Value of Opinions: An Update*, 16 *J. App. Prac. & Process* 257 (2015).

managers”⁸¹ and some commentators to sound a note of caution.⁸² Perhaps this is why a majority of the circuits allow the parties and non-parties to file a motion to convert an unpublished opinion into a published and therefore binding opinion.⁸³ In 2007, Federal Rule of Appellate Procedure 32.1 was a watershed provision that allowed the citation of unpublished opinions in all the courts of appeals issued on or after January 1, 2007.⁸⁴ However, that measure was agnostic about the precedential value of unpublished opinions. Therefore, the local rules of each court of appeals must be consulted.⁸⁵

Courts of appeals instituted alternate dispute resolution programs beginning in the early 1970s.⁸⁶ The advent of modern technologies, such as the personal computer, Westlaw, Lexis-Nexis, the internet, email, videoconferencing, and software programs for court administration also contributed greater interconnectivity to increase judicial productivity.⁸⁷ More sophisticated technology resulted in more transparency. For example, an expanding case management/electronic filing system served to gradually wean judges and lawyers from paper filings and paper records in most cases, and the PACER (Public Access to Court Electronic Records) system made more and more case filings available online.⁸⁸

81. Bruce M. Seyla, *Publish and Perish: The Fate of the Federal Appeals Age in the Information Age*, 50 Ohio St. L.J. 405, 406–07 (1994).

82. See, e.g., Merritt E. McAlister, *Bottom-Rung Appeals*, 91 Fordham L. Rev. 1355 (2023); Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennet Ostadiiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1 (2021); Merritt E. McAlister, “Downright Indifference”: *Examining Unpublished Decisions in the Federal Courts of Appeals*, 119 Mich. L. Rev. 533 (2020).

83. See, e.g., 5th Cir. R. 47.5.2; 7th Cir. R. 36-3. See generally Robert Timothy Reagan, *Citing Unpublished Federal Appellate Opinions Issued Before 2007* (Federal Judicial Center 2007).

84. Fed. R. App. Proc. 32.1. The local practice in the Ninth Circuit is to delegate to law clerks to write “bare bones” memorandum dispositions that render them essentially unuseful to lawyers and judges. Alex Kozinski & Stephen Reinhardt, *Please Don’t Cite This!: Why We Don’t Allow Citation to Unpublished Dispositions*, Cal. Lawyer, June 2000, at 43, 44.

85. See David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. App. Prac. & Process 19 (2010).

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

87. See, e.g., Joseph Delehanty, Yvan Llanes, Robert Rath & Danielle Sheff, *Enhancing Efficiencies in the Appellate Process Through Technology*, 15 J. App. Prac. & Process 77 (2014); Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 U. Ill. J.L. Tech. & Pol’y 51 (2010); Joseph L. Gerken, *How Courts Use Wikipedia*, 11 J. App. Prac. & Process 191 (2010); Meghan Dunn, *Report of a Survey of Videoconferencing in the Courts of Appeals* (Federal Judicial Center 2006).

88. Cf. Ronald J. Hedges, Barbara J. Rothstein & Elizabeth C. Wiggins, *Managing Discovery of Electronic Information* (3d ed. 2017).

During this period, Congress resisted the urgings of some academics and judges who called for dramatic, even radical jurisdictional and structural appellate reform.⁸⁹ During this period, judges sought to streamline and modernize appellate procedures in order to preserve the essential federal appellate function. The various courts of appeals continue to deploy varying combinations of case management mechanisms in an effort to manage their dockets.⁹⁰ For the most part, judges,⁹¹ lawyers,⁹² and court experts⁹³ have adjusted to the new appellate procedural paradigm, and this period of equipoise seems likely to continue. Indeed, no one is currently agitating for radical reform.⁹⁴ Things seem copacetic to many federal court insiders. Rather, this generation of academic reformers is proposing far more modest tweaks of intramural appellate procedures⁹⁵—such

89. *E.g.*, William M. Richman & William L. Reynolds, *Injustice on Appeal: The United States Courts of Appeals in Crisis* (Oxford Univ. Press 2013) (comprehensive treatment of the problems and their possible solutions).

90. Laural Hooper, Dean Miletich & Angelia Levy, *Case Management Procedures in the Federal Courts of Appeals* (Federal Judicial Center 2d ed. 2011) (comprehensive study); Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 *Duke L.J.* 315 (2011) (describing the case management practices of the D.C., First, Second, Third, and Fourth Circuits); Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 *U. Rich. L. Rev.* 659 (2007) (comparative study of appellate norms and procedures among the Circuits).

91. Margaret D. McGaughey, *May It Please the Court—or Not: Appellate Judges' Preferences and Pet Peeves About Oral Argument*, 20 *J. App. Prac. & Process* 141 (2019) (judge interviews).

92. Appellate lawyers have persistently advocated for greater orality, i.e., more frequent and longer oral arguments. James C. Martin & Susan M. Freeman, *Wither Oral Argument? The American Academy of Appellate Lawyers Says Let's Resurrect It!*, 19 *J. App. Prac. & Process* 89 (2018). The Covid-19 pandemic obliged an experimental period of virtual oral arguments. Pierre H. Bergeron, *COVID-19, Zoom, and Appellate Oral Argument: Is the Future Virtual?*, 21 *J. App. Prac. & Process* 193 (2021).

93. There is an occasional commentator who sounds the alarm over the current status quo and longs for the good old days. See Adam Heavin, *Short-Circuited: How Constitutional Silence and Politicized Federalism Led to Erosion of "Judicial Hallmarks" in Federal Appellate Process*, 56 *Tulsa L. Rev.* 109 (2020).

94. *But see* Richard A. Posner, *The Federal Judiciary: Strengths and Weaknesses* (2017); Richard A. Posner, *The Federal Courts: Challenge and Reform* (1996); Richard A. Posner, *The Federal Courts: Crisis and Reform* (1985).

95. *E.g.*, Terry Skolnik, *Hot Bench: A Theory of Appellate Adjudication*, 61 *B.C. L. Rev.* 1271 (2020); Marin K. Levy, *Judging Justice on Appeal*, 1213 *Yale L.J.* 2386 (2014); Robert K. Christensen & John Szmer, *Examining the Efficiency of the U.S. Courts of Appeals: Pathologies and Prescriptions*, 32 *Int'l Rev. L. & Econ.* 30 (2012); David R. Cleveland & Steven Wisotsky, *The Decline of Oral Argument in the Federal Courts of Appeals: A Modest Proposal for Reform*, 13 *J. App. Prac. & Process* 119 (2012); Martha Dragich, *Back to the Drawing Board: Re-examining Accepted Premises of Regional Circuit Structure*, 12 *J. App. Prac. & Process* 201 (2011).

as creating more judgeships,⁹⁶ and even another study commission.⁹⁷ In the meantime, the Judicial Conference has approved enhancements to the judiciary planning process for coordination, prioritization, integration, and assessment of progress. Currently, the *Strategic Plan for the Federal Judiciary* is the ongoing guide to policymaking and administrative actions within the authority of the Judicial Conference of the United States.⁹⁸ Thus, it appears that the subject-matter jurisdiction of the courts of appeals, as described in this primer, will have lasting explanatory power for the foreseeable future.⁹⁹

In retrospect, the increasing volume of appeals has been reflected over time in the accelerated growth in the number of volumes of official reporters: 300 volumes of *Federal Reporter* (1880–1924); 999 volumes of *Federal Reporter, Second Series* (1924–1993); 999 volumes of *Federal Reporter, Third Series* (1993–2001); and *Federal Reporter, Fourth Series* has been accumulating on library shelves since 2021. Nonetheless, the courts of appeals have maintained something like an “appellate equilibrium,” that is, they manage to decide about as many appeals as are filed each year. In the process, appellate procedures have been revised and actors in the Third Branch have internalized postmodern norms of the minimalist procedural paradigm—affording appellate procedures sufficient unto the case.¹⁰⁰

§ 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.”¹⁰¹ That sentiment is strongly ingrained in the mindset of Article III judges. Thus, in effect, every federal court decision could be imagined to be a kind of precedent

96. See Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137 (2022).

97. Peter S. Menell & Ryan Vacca, *Revisiting and Confronting the Federal Judiciary Capacity “Crisis”: Charting a Path for Federal Judiciary Reform*, 108 Cal. L. Rev. 789 (2020) (proposing a study commission tasked with proposing reforms of the federal court structure which would not go into effect until the year 2030—effectively raising a “veil of ignorance” over contemporary judges and current members of Congress).

98. Strategic Plan for the Federal Judiciary (Sept. 2020), <https://www.uscourts.gov/statistics-reports/strategic-plan-federal-judiciary>.

99. 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).

100. See Baker, *supra* note 99, at 113–14.

101. Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 7, at 25 (8th ed. 2017). See generally 13 *Federal Practice & Procedure*, *supra* note 1, § 3522; 15 *Moore’s Federal Practice*, *supra* note 1, § 100.02[1].

in federal jurisdiction, since a federal court must conclude, explicitly or implicitly, that it has the Article III power to decide before it may decide any case or controversy. However, implied jurisdictional holdings are not technically binding. From the time of the framers, the federal jurisdictional inquiry has been twofold: first, to determine whether the case is properly within the “judicial power” of Article III and, second, even if it is, to determine whether the case comes within some particular enabling act of Congress.¹⁰² 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 authority to resolve 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.”¹⁰³

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 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 them 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.¹⁰⁴ 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

102. 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.).

103. *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). See also *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830–32 (1989); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

104. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–103 (1998).

suit. The Court concluded such “an ultra vires act,”¹⁰⁵ 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 of *forum non conveniens*.¹⁰⁶ 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.”¹⁰⁷ 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.¹⁰⁸ The lower courts have struggled with this distinction, 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.”¹⁰⁹ The High Court has made an effort “[t]o ward off profligate use of the term” with mixed success.¹¹⁰ Put succinctly, “the word ‘jurisdictional’ is generally reserved for prescriptions delineating the classes of cases a court may entertain

105. *Id.* at 102. See generally Joan E. Steinman, *After Steel Co.: “Hypothetical Jurisdiction” in the Federal Appellate Courts*, 59 Wash. & Lee L. Rev. 855 (2001).

106. See *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422 (2007) (unanimous decision). See also *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (applying the principle of comity to dismiss a case better heard in state court, without first determining subject-matter jurisdiction).

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

108. See *Bowles v. Russell*, 551 U.S. 205 (2007) (a 5-to-4 decision closely debating the precedents and disagreeing over the proper distinction between statutory-based versus rule-based jurisdictional provisions). See also *Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843 (2019).

109. *Steel Co.*, 523 U.S. at 90 (citations omitted).

110. *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013).

(subject-matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction).”¹¹¹

Finally, that the Constitution creates limits on 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).¹¹² 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.¹¹³

§ 1.06

Rules of Precedent

The individual courts of appeals have developed something of an artificial autonomy in how they apply principles of stare decisis. As previously described, Congress first created circuit courts of appeals in 1891, to correct error. It reserved the judicial lawmaking function of federal law for the Supreme Court. The High Court is righteously jealous of its own prerogative and has repeatedly cautioned the intermediate courts to respect court hierarchy and not to anticipate Supreme Court overrulings.¹¹⁴ Even when an opinion is only supported by a plurality, the “rule of five” goes farther to require the courts of appeals to obey the common position taken by those justices who concurred in the judgment on the narrowest grounds.¹¹⁵

111. *Ft. Bend Cnty.*, 139 S. Ct. at 1849 (holding that the Title VII requirement that plaintiffs exhaust EEOC remedies is a nonjurisdictional claims-processing rule). Perhaps these succinct rules of thumb capture the distinction: statutes with the word “jurisdiction” are jurisdictional; rules adopted under the Rules Enabling Act are never jurisdictional.

112. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996); *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. *See, e.g.*, Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 27.1, at 1548 (West Academic Publishers 6th ed. 2017); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 13.10, at 674–79 (8th ed. 2010).

113. *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 *Harv. L. Rev.* 1298 (2018).

114. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.”); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).

115. *Marks v. United States*, 430 U.S. 188 (1977). *See generally* Richard M. Re, *Beyond the Marks Rule*, 132 *Harv. L. Rev.* 1942 (2019).

As federal dockets grew, Congress added judges and authorized the courts of appeals to sit in panels of three. More and 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.¹¹⁶ The first administrative mechanism designed to turn back the threat of disuniformity was the en banc rehearing before all the judges of the circuit—which originated in a Supreme Court opinion¹¹⁷ and subsequently was codified by statute and then rule.¹¹⁸ As the years passed and circuit caseloads greatly expanded, en banc rehearings proved inefficient and ineffective, for they added delay and expense, and consumed premium judicial resources. The en banc rule itself, Federal Rule of Appellate Procedure 35, explicitly disfavors en banc review.¹¹⁹ Paradoxically, but logically and pragmatically, judges followed a rule of thumb that “most cases are either too unimportant or too important to en banc.”¹²⁰ In nine of the thirteen federal circuits, the judges

116. See Marie Leary, *Defining the “Majority” Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals* (Federal Judicial Center 2002).

117. Certainly, the result reached makes for more effective judicial administration. Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal system these courts are the courts of last resort in the run of ordinary cases.

Comm’r of Internal Revenue v. Textile Mills Sec. Corp., 314 U.S. 326, 334–35 (1941).

118. See 28 U.S.C. § 46(c); Fed. R. App. P. 35. See generally Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. Rev. 1374 (2021) (discerning a recent trend); Alexandra Sadinsky, Note, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 Fordham L. Rev. 2001 (2014) (describing the history of en banc procedures, how they vary among the circuits, and suggesting some reforms); Michael E. Solimine, *Ideology and En Banc Review*, 67 N.C. L. Rev. 29, 40 (1988) (justifying en banc review based on a belief that “more judges leads to sounder decisions”).

119. “An en banc hearing or rehearing is not favored and ordinarily will not be ordered . . .” Fed. R. App. P. 35(a). While the statute still uses the term “in banc,” 28 U.S.C. § 46 (c), the “en banc” convention will be followed here. See generally Anthony B. Sanders & Matthew Liles, *And in En Banc News . . .* (Nov. 28, 2022), <https://ssrn.com/abstract=4287808>.

120. James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 Stan. L. Rev. 387, 392 (1994).

have followed various informal en banc review procedures as workarounds for these inefficiencies.¹²¹

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.¹²² 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.¹²³ Decisions of sister courts of appeals, however, are deemed merely persuasive. Thus, each court of appeals has developed a parallel but independent stare decisis.¹²⁴ This balkanization of precedent allows a federal agency that fails to persuade one court of appeals of its legal argument to practice nonacquiescence and

121. See Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 *Fordham L. Rev.* 713 (2009). For example, when in the Eighth Circuit 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—something like a precedential tiebreaker. See, e.g., *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n. 8 (8th Cir. 1995). For another example, in the D.C. Circuit a three-judge panel that encounters a conflict in prior circuit cases will circulate its opinion among the active members of the circuit. Lacking any objection, the panel drops a footnote in the opinion that reads: “The foregoing part of the division’s decision, because it resolves an apparent conflict between two prior decisions, has been separately considered and approved by the full court, and thus constitutes the law of the circuit.” *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). And see Jonathan M. Cohen & Daniel S. Cohen, *Iron-ing out Circuit Splits: A Proposal for the Use of the Irons Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 *Cal. L. Rev.* 989 (2020). For another example, in the Eleventh Circuit the default rule or precedent to avoid en banc rehearings is to follow the earlier precedent if there are two prior cases that cannot be harmonized. See *Harris v. Lincoln Nat'l Life Ins. Co.*, 42 F.4th 1292, 1297 (11th Cir. 2022). See also Richard Luedeman, *The Flubs That Bind: Stare Decisis and the Problem of Indeliberate Doctrinal Misstatements in Appellate Opinions*, 75 *S.M.U. L. Rev.* 725 (2022).

122. 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.”).

123. Technically, the term “circuit law” is a misnomer that is better explained by the combination of vertical stare decisis—binding lower courts—and horizontal stare decisis—binding future panels. Thomas B. Bennett, *There Is No Such Thing as Circuit Law*, 107 *Minn. L. Rev.* (forthcoming 2023). See also Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 *Nev. L.J.* 787 (2012); Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 *Loy. L. Rev.* 535 (2010); Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 *Fed. Cts. L. Rev.* 17 (2009).

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

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.¹²⁵

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 only that court. 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 should 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.¹²⁶ Decisions under the two statutes most frequently are cited interchangeably, implying an overlapping, if not common, meaning and content of jurisdiction.¹²⁷ There are some complexities 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.¹²⁸ It is sufficient for present purposes, however, to note the general rule and to sound a caution against wholly indiscriminate cross-reference.¹²⁹

125. See *United States v. Mendoza*, 464 U.S. 154, 158 (1984) (doctrine of nonmutual offensive collateral estoppel does not extend to the United States as a litigant). See also Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989); Drew A. Swank, *An Argument Against Administrative Acquiescence*, 88 N.D. L. Rev. 1 (2012); see *infra* § 7.01. Nonacquiescence is not allowed if multiple challenges to an agency rule have been consolidated in one court of appeals. 28 U.S.C. § 2112(a)(3). See, e.g., *Gorss Motels, Inc. v. FCC*, 20 F. 4th 87, 98–99 (2d Cir. 2021).

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

127. 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).

128. *Flanagan v. United States*, 465 U.S. 259, 265 n.3 (1984). When the appeal to the Supreme Court is from a state court of last resort, the final-judgment rule also functions to preserve federalism. See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67 (1948).

129. Cf. *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56–57 (1989). See generally 15 Federal Practice & Procedure, *supra* note 1, § 3908; 22 Moore’s Federal Practice, *supra* note 1, § 406.03[3][b][iii].

§ 1.07

Rulemaking

The Federal Rules of Appellate Procedure are promulgated within the federal rulemaking apparatus, which can be briefly sketched for present purposes.¹³⁰ 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 rules changes independently of the Rules Enabling Act process.¹³¹ 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.”¹³² The Judicial Conference’s rulemaking efforts are coordinated by its Committee on Rules of Practice and Procedure, known as the Standing Committee.¹³³ Five advisory committees assist the Standing Committee, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules.¹³⁴ 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.¹³⁵ 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, once approved by the respective committee, are published along with the rules as a guide to the drafters’ intentions. Otherwise, the Administrative Office of the U.S. Courts staffs the committees and the Federal Judicial Center provides them research support.¹³⁶

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

130. 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).

131. 28 U.S.C. §§ 2071–2076.

132. *Id.* § 331.

133. *Id.* § 2073(b).

134. *Id.* § 2073(a)(2).

135. Committee Membership Selection, U.S. Courts, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection>.

136. 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).

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.¹³⁷ The deadline for the Court to transmit to Congress proposed rules of which it approves is May 1 of the year they will take effect.¹³⁸ Congress then has a seven-month period to act, that is, 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.¹³⁹ Congress has delegated rule-making authority to the federal courts, but Congress retains the ultimate legislative authority.

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.¹⁴⁰ Rulemaking, thus, is an important background aspect of appellate procedure. Indeed, rulemaking is a fundamental buffer that helps to maintain the effectiveness and the independence of the Third Branch.¹⁴¹ This primer emphasizes the particular rules that affect the determination of subject-matter jurisdiction of the courts of appeals.

137. 28 U.S.C. §§ 2072, 2075.

138. *Id.* §§ 2074, 2075.

139. *Id.*

140. Fed. R. App. P. 1, 47. The Fifth Circuit curiously has a set of “internal Court Policies” that apparently are relied on by judges in chambers but carry the stamp “not for public distribution.” See Josh Blackman, *Does the Fifth Circuit Permit En Banc Review of “Interim” Rulings?*, The Volokh Conspiracy (Sept. 5, 2019), <https://reason.com/volokh/2019/09/05/does-the-fifth-circuit-permit-en-banc-review-of-interim-rulings> (reporting on this revelation in a tentative slip opinion that subsequently was withdrawn so that the reference to the policies disappeared).

141. See Jordan M. Singer, *The Federal Courts’ Rulemaking Buffer*, 60 Wm. & Mary L. Rev. 2239 (2019).

§ 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 questions in most appeals today, the issue of jurisdiction is readily apparent. 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 which 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.¹⁴² 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 kind of judicial irresponsibility 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.¹⁴³ 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 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

142. See *supra* § 1.04.

143. See 15A Federal Practice & Procedure, *supra* note 1, § 3901.

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.¹⁴⁴ Nearly 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 aggregately 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 are one or more bases for appellate review, now or later.¹⁴⁵ 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.¹⁴⁶ And once the appeals are completed and the matter is fully and finally resolved, that determination is conclusively final under the Constitution.¹⁴⁷

Ultimately, 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.”¹⁴⁸

144. See generally Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. Rev. 353 (2010).

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

146. See 15A Federal Practice & Procedure, *supra* note 1, § 3914.9; *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). See also *infra* § 3.05.

147. 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”).

148. *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

§ 2.02 Scope of Review

§ 2.03 Standing to Appeal

§ 2.04 Sources of Appeals

§ 2.05 Locus of Appeals

§ 2.06 Notice of Appeal

§ 2.07 Transferring Appeals

§ 2.08 Miscellaneous Procedures

§ 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.¹⁴⁹ While a lack of personal jurisdiction may be a defect cured by acquiescence (actual, assumed, or imposed),¹⁵⁰ subject-matter jurisdiction is different.¹⁵¹ 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,¹⁵² general

149. See *supra* § 1.05.

150. See Fed. R. Civ. P. 12(b)(1), 12(h)(1).

151. See Fed. R. Civ. P. 12(h)(3).

152. 28 U.S.C. § 1332.

federal question,¹⁵³ or special federal question.¹⁵⁴ 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 appeal. Thus, the myriad of doctrines and concepts concerning original subject-matter jurisdiction are relevant on appeal.¹⁵⁵ If the district court lacked subject-matter jurisdiction, the court of appeals can exercise its appellate jurisdiction to remand the case with instructions to dismiss. 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 decision¹⁵⁶ and a timely notice of appeal.¹⁵⁷

Similarly, it is important to keep in mind that a lack of jurisdiction differs conceptually from a lack of merit. On appeal, as with original jurisdiction in the district court, 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.¹⁵⁸

The essential jurisdictional requirement added by the advent of an appeal is the notion of finality or some reason to excuse finality and allow 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 generally may not consider an untimely appeal, even if the appeal only involves a challenge to the subject-matter jurisdiction of the district court.¹⁵⁹ 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.

153. *Id.* § 1331.

154. *E.g.*, 28 U.S.C. §§ 1333 (admiralty), 1337 (commerce), 1338 (patents), 1339 (postal), 1352 (bonds).

155. *See generally* Wright & Kane, *supra* note [101](#).

156. *See also infra* [§ 3.01](#).

157. *See infra* [§ 2.06](#).

158. *Bell v. Hood*, 327 U.S. 678, 682 (1946). *See* 13 Federal Practice & Procedure, *supra* note [1](#), § 3522, at 78–79; 19 Moore’s Federal Practice, *supra* note [1](#), § 201.03.

159. In criminal appeals, an appellate court can hear an untimely appeal if the government does not object. *See Bowles v. Russell*, 551 U.S. 205 (2007). *See also infra* [chapter 6](#).

§ 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 authority 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 circumstances.¹⁶⁰

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.¹⁶¹ However, a few limits on the appellate authority beyond institutional limits of precedent and judicial hierarchy deserve brief mention.¹⁶²

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.”¹⁶³ 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; whether the proceeding is direct or collateral, such as habeas corpus; and whether the issue is of constitutional proportion.¹⁶⁴

160. 28 U.S.C. § 2106. “What that section has been held to authorize and what it has been held *not* to authorize in general could form the subject of another . . . book.” Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 N.D. L. Rev. 1521, 1558 (2012). 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 1, § 3901, at 25–30; 20A Moore’s Federal Practice, *supra* note 1, § 336.03.

161. See Steve Leben, *Getting It Right Isn’t Enough: The Appellate Court’s Role in Procedural Justice*, 69 U. Kan. L. Rev. 13 (2020).

162. Cf. *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019) (a judge who died before the court’s ruling was filed cannot be part of the en banc decision because “federal judges are appointed for life, not for eternity”).

163. 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).

164. See Larry Cunningham, *Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the “Interest of Justice,”* 11 J. App. Prac. & Process 285 (2010) (Fed. R. Crim P. 52(b) allows appellate courts to consider unpreserved claims that are “plain error”). See also 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 1, §§ 2881–2883; 12 Moore’s Federal Practice, *supra* note 1, § 61.02; 19 Moore’s Federal Practice, *supra* note 1, § 206.07.

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.”¹⁶⁵ This provision reaches nonjurisdictional motions, which, if granted, would result in the dismissal of an action without prejudice to its reconsideration when refiled by another pleading or in another forum.¹⁶⁶

Title 28 contains a few particular limits on the jurisdiction of the courts of appeals.¹⁶⁷ An order of a district court remanding a case previously removed to it from a state court “is not reviewable on appeal or otherwise.”¹⁶⁸ Likewise, there is a prohibition on appeals from final orders 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.¹⁶⁹

Although the courts of appeals are courts of limited jurisdiction and 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 it is understandable as an inherent power of the federal court *qua* court.

165. 28 U.S.C. § 2105. See Aaron R. Petty, *Matters in Abatement*, 11 J. App. Prac. & Process 137 (2010).

166. Examples might include prematurity in filing suit, death of one of the parties, or the presence of a separate but identical lawsuit pending in another court. See generally 15A Federal Practice & Procedure, *supra* note 1, § 3903, at 141–48; 22 Moore’s Federal Practice, *supra* note 1, § 408.41.

167. See generally 15A Federal Practice & Procedure, *supra* note 1, § 3903; 19 Moore’s Federal Practice, *supra* note 1, §§ 201.03, 205.08.

168. 28 U.S.C. § 1447(d). Judicial interpretations of this statute tend to be rather Byzantine because courts read it *in pari materia* with other sections that limit its scope. See, e.g., *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007); *Osborn v. Haley*, 549 U.S. 225 (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).

169. 28 U.S.C. § 2253(b).

Although the exercise of supplemental jurisdiction is more commonplace at the district court, courts of appeals likewise have exercised it.¹⁷⁰ Some applications involve the appellate court's 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*,¹⁷¹ a unanimous Supreme Court explicitly warned 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 de-legitimize the concept.¹⁷² The High Court has not definitively resolved 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.”¹⁷³ 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.¹⁷⁴ Essentially, 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 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.

170. 16 Federal Practice & Procedure, *supra* note 1, § 3937; 19 Moore's Federal Practice, *supra* note 1, § 205.03[3].

171. 514 U.S. 35 (1995). *See also* Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017).

172. *Swint*, 514 U.S. at 49 (citing with approval *Abney v. United States*, 431 U.S. 651 (1977)).

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

174. *See generally* 15A Federal Practice & Procedure, *supra* note 1, § 3902; 19 Moore's Federal Practice, *supra* note 1, § 205.02[2]. *See also* Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019) (state law determines standing to represent a state's interests on appeal).

Deciding whether an impact is adverse may, at times, become somewhat metaphysical. That may be why the courts of appeals have developed in-house mechanisms to evaluate standing. For example, the D.C. Circuit's court of appeals requires appellants to address standing to appeal in their principal briefs.¹⁷⁵ Determinations about standing at the margins may reflect attitudes shared in common among the circuit judges.¹⁷⁶ 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 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.¹⁷⁷

It almost goes without saying that each of these propositions has a certain “tip of the iceberg” quality.¹⁷⁸

The rule for a cross-appeal is related.¹⁷⁹ An appellee usually may argue for an affirmance on a ground not decided by the district court without filing a cross-appeal, so long as the appellee is not seeking to enlarge its victory or lessen the appellant's victory. 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.¹⁸⁰ 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

175. See Amy J. Wildermuth & Lincoln L. Davies, *Standing on Appeal*, 2010 U. Ill. L. Rev. 957 (2010).

176. See Erin B. Kaheny, *Appellate Judges as Gatekeepers? An Investigation of Threshold Decisions in the Federal Courts of Appeals*, 12 J. App. Prac. & Process 255 (2011).

177. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333–34 (1980) (citations omitted). See also *West Virginia v. EPA*, 142 S. Ct. 2587, 2606–07 (2022); *Bethune-Hill*, 139 S. Ct. at 1950–56; *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1414 (2019); *Camreta v. Greene*, 563 U.S. 692, 700–08 (2011); *Karcher v. May*, 484 U.S. 72, 75–81 (1987); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546–49 (1986).

178. See generally Ryan W. Scott, *Circumventing Standing to Appeal*, 72 Fla. L. Rev. 741 (2020) (exploring the constitutional theory); Joan E. Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 Ga. L. Rev. 813 (2004) (exhaustive study of the cases).

179. 15A Federal Practice & Procedure, *supra* note 1, § 3904; 19 Moore's Federal Practice, *supra* note 1, § 304.11[3].

180. *El Paso Nat. Gas Co. v. Neztosie*, 526 U.S. 473 (1999).

may involve an attack upon 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,” that is, 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.¹⁸¹ 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 non-named 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.¹⁸²

§ 2.04

Sources of Appeals

The major sources of appeals to the appellate courts are the district courts. In civil¹⁸³ and criminal matters,¹⁸⁴ these appeals include final judgments,¹⁸⁵ orders in the nature of final judgments,¹⁸⁶ interlocutory orders entitled¹⁸⁷ or permitted¹⁸⁸ to be appealed, and review by way of extraordinary writ.¹⁸⁹ In addition, 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 hundreds of federal agencies, boards, and officers.¹⁹⁰

181. *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

182. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). See Joan E. Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 Ga. L. Rev. 411 (2005). See also *infra* § 6.04 (non-party appeals).

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

184. See *infra* §§ 6.01–6.03.

185. See *infra* § 3.02.

186. See *infra* §§ 3.03–3.05.

187. See *infra* § 4.02.

188. See *infra* § 4.03.

189. See *infra* § 5.03.

190. 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* §§ 7.01–7.02. See also Sourcebook of Federal Judicial Review Statutes, Administrative Conference of the United States (2022), <https://www.acus.gov/publication/sourcebook-federal-judicial-review-statutes> (estimating there are more than 650 provisions).

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”¹⁹¹

Bankruptcy cases are subject to a two-tiered system of review: from a bankruptcy judge to either a district court or a bankruptcy appellate panel (BAP) and then to the court of appeals.¹⁹² The courts of appeals have jurisdiction to hear appeals from a final judgment, order, or decree of a BAP or district court.¹⁹³ In addition to the general provision allowing for permissive interlocutory appeals,¹⁹⁴ there is a particular appellate bypass provision authorizing interlocutory appeals in bankruptcy cases from a bankruptcy court to the court of appeals.¹⁹⁵

Generally, when a magistrate judge is authorized by the district court to hold civil trial proceedings and the parties also consent, the appeal lies in the court of appeals in the same manner as an appeal from a district court.¹⁹⁶

Circuit judges still retain the statutory authority to entertain petitions for a writ of habeas corpus;¹⁹⁷ however, Federal Rule of Appellate Procedure 22 di-

191. 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 1, § 4102; 20 Moore’s Federal Practice, *supra* note 1, § 313.16.

192. 28 U.S.C. § 158(b)(1). A bankruptcy appellate panel (BAP) of three bankruptcy judges is authorized by 28 U.S.C. § 158(b) to hear, with the consent of all parties, appeals from the decisions of the United States bankruptcy courts. BAPs have been appointed in the First, Sixth, Eighth, Ninth, and Tenth Circuits. See generally Knibb, *supra* note 19, §§ 14.1–14.8; Magnuson & Herr, *supra* note 19, § 9:6. See also Bill Rochelle, *The Circuit Court of Bankruptcy Appeals: A Modest Proposal to Solve a Major Problem*, 30 No. J. Bankr. L. & Prac. 1 (2021) (proposing a circuit court of bankruptcy appeals); Alan S. Trust & Michael A. Pantzer, *Navigating the Express Lane to the Court of Appeals*, 38 Am. Bankr. Inst. J. 26 (2019).

193. 28 U.S.C. § 158(d)(1). See Lisa Yonka Stevens & James A. Vidmar, *Act Fast on Appeal of Confirmed Plan Before Equitable Mootness*, 38 Am Bankr. Inst. J. 20 (2019) (“Equitable mootness” allows a court to abstain from granting appellate relief that would fundamentally “unscramble” a plan or work a substantial hardship on a party who has relied on a plan). See also *infra* § 3.02.

194. 28 U.S.C. § 1292(b); *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249 (1992). See *infra* § 4.03.

195. 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). See 16 Federal Practice & Procedure, *supra* note 1, § 3926.1; 20 Moore’s Federal Practice, *supra* note 1, § 306.10. What is “interlocutory” in bankruptcy depends more on bankruptcy law than procedural law. See also *infra* § 4.03.

196. 28 U.S.C. § 636(c)(3). See 15A Federal Practice & Procedure, *supra* note 1, § 3901.1; 14 Moore’s Federal Practice, *supra* note 1, § 73.06.

197. 28 U.S.C. § 2241(a) (“may”).

rects that any such application for the writ must be transferred to the appropriate district court;¹⁹⁸ a certificate of appealability is required to review the denial of relief.¹⁹⁹

Among the courts of appeals, the U.S. Court of Appeals for the Federal Circuit is unique in its subject-matter jurisdiction.²⁰⁰ Congress created the Federal Circuit in 1982 and vested it with national jurisdiction over a variety of subject matters and over cases by origin from the district courts in patent matters, the U.S. Court of International Trade, the U.S. Court of Federal Claims, the Board of Patent Appeals, the U.S. Court of Appeals for Veterans Claims, and from various other agencies and executive officers.²⁰¹ Whether the future holds another experiment with appellate subject-matter jurisdiction seems unlikely at the present.²⁰²

§ 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.²⁰³

There may be optional appellate venues in certain matters, such as in reviews of administrative agency matters. This creates 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.²⁰⁴

198. Fed. R. App. P. 22(a) (“must”).

199. 28 U.S.C. § 2253(c)(1). See *infra* § 5.02.

200. See, e.g., David L. Schwartz & Lee Petherbridge, *Legal Scholarship and the United States Court of Appeals for the Federal Circuit: An Empirical Study of a National Circuit*, 26 Berkeley Tech. L.J. 1561 (2011); 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).

201. 28 U.S.C. § 1295. See generally 15A Federal Practice & Procedure, *supra* note 1, § 3903.1 at 156–95; 19 Moore’s Federal Practice, *supra* note 1, §§ 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).

202. But see Patrick Clawson, *Change the System, not the Climate: Advocacy for a Unified Circuit Court of Appeals for Environmental Litigation*, 126 Penn St. L. Rev. 843 (2022).

203. 28 U.S.C. § 1294. See also 28 U.S.C. § 1407(b) (multidistrict cases).

204. 28 U.S.C. §§ 2112(a)(3), 2342; R.P. J.P.M.L. 25.5 (random selection of one circuit). See also Fed. R. App. P. 15–20. See *infra* § 7.01.

Furthermore, appellate venue may be manipulated by the strategic choice among optional trial venues, for example, in tax cases,²⁰⁵ or by a motion for a general change of venue in civil matters.²⁰⁶ The provisions governing the Federal Circuit are too complex to cover in this primer.²⁰⁷ However, the Supreme Court has decreed some preference that the Federal Circuit should handle a single appeal that raises both issues within and issues not within the Federal Circuit's jurisdiction.²⁰⁸

§ 2.06

Notice of Appeal

The requirements for the form of the notice of appeal are simple and straightforward.²⁰⁹ 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—or the appealable order—from which the appeal is taken”; and “name the court to which the appeal is taken.”²¹⁰ 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 the other parties.²¹¹ The requirements

205. See generally 17 Federal Practice & Procedure, *supra* note 1, § 4102; 20 Moore's Federal Practice, *supra* note 1, §§ 313.01–313.18.

206. See 28 U.S.C. §§ 1404, 1406. 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.

207. *E.g.*, *Kloeckner v. Solis*, 568 U.S. 41 (2012). See *supra* § 2.04.

208. *United States v. Hohri*, 482 U.S. 64 (1987).

209. See Fed. R. App. P. 3(7) (“An appeal must not be dismissed for informality of form or title of the notice of appeal, for failure to name a party whose intent to appeal is otherwise clear from the notice, or for failure to properly designate the judgment if the notice of appeal was filed after entry of the judgment and designates an order that merged into that judgment.”) See generally 16A Federal Practice & Procedure, *supra* note 1, § 3949; 20 Moore's Federal Practice, *supra* note 1, §§ 303.30–303.51.

210. Fed. R. App. P. 3(c)(1). See also Fed. R. App. P. 12(a) (docketing the appeal); Knibb, *supra* note 19, §§ 8.1–8.17; Magnuson & Herr, *supra* note 19, §§ 9:3 & 9:4.

211. “The notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.” 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).

for timeliness of the notice of appeal, by contrast, are of another magnitude of complexity and trigger draconian consequences upon their breach.²¹²

Timeliness of the notice of appeal is jurisdictional, at least as far as the deadline is statutory, as opposed to being a rule-based deadline.²¹³ 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,²¹⁴ agency review,²¹⁵ bankruptcy appeals,²¹⁶ tax-court review,²¹⁷ and habeas corpus cases.²¹⁸ Generally, Federal Rule of Appellate Procedure 4 governs appeals as of right in civil and criminal matters.²¹⁹

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.²²⁰ In criminal cases, the notice is due within ten days of entry of the judgment or order and within thirty days for government appeals.²²¹ Both periods may be extended for thirty days on grounds of “excusable neglect or good cause.”²²² Cross-appeals must be filed within fourteen days of the filing of the first notice.²²³

212. *Bowles v. Russell*, 551 U.S. 205, 213, 214 (2007) (An appellant “cannot rely on forfeiture or waiver to excuse [the] lack of compliance with the statute’s time limitations” and an appellate court “has no authority to create equitable exceptions to [this] jurisdictional requirement[.]”).

213. *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). *See also Nutra-ceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019); *Hamer v. Neighborhood Hous. Serv.*, 138 S. Ct. 13, 16–17 (2017).

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

215. Fed. R. App. P. 15. *See* 16A Federal Practice & Procedure, *supra* note 1, §§ 3961–3964; 20 Moore’s Federal Practice, *supra* note 1, §§ 315.01–320.11.

216. Fed. R. App. P. 6. *See* 16A Federal Practice & Procedure, *supra* note 1, § 3952; 20 Moore’s Federal Practice, *supra* note 1, §§ 306.10–306.11.

217. Fed. R. App. P. 13. *See* 16A Federal Practice & Procedure, *supra* note 1, §§ 3959–3960; 20 Moore’s Federal Practice, *supra* note 1, §§ 313.01–314.02.

218. Fed. R. App. P. 23. *See* 16A Federal Practice & Procedure, *supra* note 1, §§ 3968–3970; 20A Moore’s Federal Practice, *supra* note 1, §§ 322.01–323.12.

219. Fed. R. App. P. 4. *See* 16A Federal Practice & Procedure, *supra* note 1, § 3950; 20 Moore’s Federal Practice, *supra* note 1, §§ 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).

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

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

222. Fed. R. App. P. 4(a)(5)(A); 28 U.S.C. § 2107(c).

223. Fed. R. App. P. 4(a)(3).

The chief complication of these timetables has to do with the judgment- suspending effect of various motions in the district court. Several post-trial motions, if timely filed, suspend the finality of the judgment, and the time for filing the notice of appeal begins to run from the decision on the motion.²²⁴ In civil cases, the motions with this effect include the following: a motion for judgment as a matter of law;²²⁵ a motion for new trial;²²⁶ a motion to amend the findings;²²⁷ a motion to alter or amend the judgment;²²⁸ and a motion for relief from the judgment or order for mistake, inadvertence, excusable neglect, or newly discovered evidence.²²⁹ In criminal cases, the motions with this effect include: a motion for judgment of acquittal;²³⁰ a motion for a new trial;²³¹ and a motion for arrest of judgment.²³²

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.²³³ Again, the post-trial motion itself must have been timely filed. The subsequent disposition of the motion may also require that the notice of appeal be amended in some particulars.²³⁴ 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.

224. Fed. R. App. P. 4(a)(4)(A), 4(b)(3)(A). See *supra* § 1.02.

225. Fed. R. Civ. P. 50.

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

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

228. Fed. R. Civ. P. 59(e); *Banister v. Davis*, 140 S. Ct. 1698 (2020). There is a conflict between the circuits over when the notice of appeal must be filed after the district court allows the plaintiff either to accept remitted damages or to accept a new trial on damages. Jennifer McDonald, *An Analysis of Remittitur's Effects on the Notice of Appeal*, 53 *Suffolk U. L. Rev.* 275 (2020).

229. Fed. R. Civ. P. 60.

230. Fed. R. Crim. P. 29.

231. Fed. R. Crim. P. 33.

232. Fed. R. Crim. P. 34.

233. Fed. R. App. P. 4(a)(4)(B)(i) (civil), Fed. R. App. P. 4(b)(3)(C) (criminal). See *Manrique v. United States*, 581 U.S. 116, 124–25 (2017); *FirsTier Mortg. Co. v. Invs. Mortg. Ins. Co.*, 498 U.S. 269, 270 (1991).

234. Fed. R. App. P. 4(a)(4)(B)(ii). Special rules apply to multiple appeals, motions to extend the time to file a notice of appeal, to a party's failure to receive notice of a judgment, to appeals by imprisoned inmates, and to notices mistakenly filed in the court of appeals.

§ 2.07

Transferring Appeals

If an appeal in a civil action or a petition for agency review is filed in the wrong court, 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.”²³⁵ 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.²³⁶ But 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.²³⁷

§ 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.²³⁸ This represents an important dimension of the jurisdiction of the courts of appeals: the authority to determine how to go about exercising the authority to decide appeals.²³⁹ Most relevant here are motion practice,²⁴⁰ procedures involving the mandate, and certification of state-law questions to a state court.²⁴¹

Motion practice is not monolithic. According to the Federal Rules of Appellate Procedure and local rules in each circuit, specified motions are decided by

235. 28 U.S.C. § 1631.

236. See, e.g., *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1983 (2017); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). See 15A Federal Practice & Procedure *supra* note 1, § 3901 at 12; 19 Moore’s Federal Practice, *supra* note 1, § 208.14[2][b]. See *supra* § 2.04 (Federal Circuit).

237. See *infra* §§ 7.01–7.02.

238. The role of the chief judge has grown in administrative importance. Marin K. Levy & Jon O. Newman, *The Office of the Chief Circuit Judge*, 23 Pa. J. Const. L. 2365 (2021).

239. See generally 16A Federal Practice & Procedure, *supra* note 1, §§ 3971–3994; 20A Moore’s Federal Practice, *supra* note 1, §§ 325.01–348.11.

240. Knibb, *supra* note 19, § 30.2; Magnuson & Herr, *supra* note 19, §§ 10:1–10:6.

241. Knibb, *supra* note 19, §§ 23.3, 34.11–34.14; Magnuson & Herr, *supra* note 19, § 14:3; 17A Federal Practice & Procedure, *supra* note 1, § 4248.

the clerk's office, a single circuit judge, a multi-judge administrative panel, or a hearing panel.²⁴² Internal operating procedures vary from circuit to circuit.²⁴³ 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,²⁴⁴ 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 appealability, permitting intervention, and appointing counsel.²⁴⁵ 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 upon by the court, rather than by a single judge, and the various circuits have accepted this suggestion to varying degrees.²⁴⁶ Still, the Federal Rules of Appellate Procedure explicitly place other motions beyond the power of a single judge, including requests for permission to appeal,²⁴⁷ requests for extraordinary relief,²⁴⁸ and petitions for rehearing.²⁴⁹ The most common appellate motions include a motion for an extension of time,²⁵⁰ a motion to voluntarily withdraw and dismiss the appeal,²⁵¹ a motion for stay pending review of an injunction or an administrative order,²⁵² a motion to expedite the appeal,²⁵³ and a motion for leave to file an amicus curiae brief.²⁵⁴

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 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

242. See Fed. R. App. P. 27, 47.

243. 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).

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

245. Fed. R. App. P. 27 advisory committee's notes. See 28 U.S.C. § 2253(c).

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

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

248. Fed. R. App. P. 21.

249. Fed. R. App. P. 40.

250. Fed. R. App. P. 26(b).

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

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

253. See Fed. R. App. P. 31(a)(2).

254. Fed. R. App. P. 29. See Paul M. Collins & Wendy L. Martinek, *Who Participates as Amici Curiae in the U.S. Courts of Appeals?*, 94 *Judicature* 128 (2010).

appellate costs.²⁵⁵ Until the mandate officially and formally issues, the appellate court retains all jurisdiction, 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.²⁵⁶ Upon the filing of the petition, the stay continues until the Supreme Court's final determination.²⁵⁷ The mandate issues immediately upon an order denying the petition for a writ of certiorari.²⁵⁸ In addition, courts of appeals have a kind of inherent power to recall a mandate, on rare and undefined occasions, to prevent some manifest injustice.²⁵⁹ But in habeas corpus proceedings brought by a state prisoner, that inherent power is limited and is subject to review in the Supreme Court under an abuse-of-discretion standard.²⁶⁰

The federal appellate courts have access to a state-created procedure in all the states but North Carolina to certify novel and important questions of state law to the state's highest court.²⁶¹ The Supreme Court has endorsed this procedure but rarely uses it for itself. The experience of the courts of appeals is mixed, that is, some courts of appeals are more willing to certify questions than others. A federal court is not required to certify questions of local law merely because a state has authorized the procedure. A court of appeals may certify a question sua sponte or on the motion of a party, and it seems some courts of appeals are more willing to certify a question if and when a party makes such a request.

This is as good a place as any to borrow the observation by two scholars who have studied the local cultures of the courts of appeals and concluded that each of them has developed eccentric practices which have evolved over generations of judges. Thus, each court of appeals has a “personality” of its own determined by “norms and traditions (some written down, others not) exist[ing] on a variety of levels: rules governing oral argument and the publishing of opinions, en banc

255. Fed. R. App. P. 41(a). If the judgment is affirmed in part, reversed in part, modified, or vacated, the mandate governs the taxation of costs. Fed. R. App. P. 39(a)(4).

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

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

258. Fed. R. App. P. 41(d)(2)(D). See *Ryan v. Schad*, 570 U.S. 521 (2013) (holding court of appeals abused its discretion to decline to issue its mandate following a denial of certiorari).

259. 16 Federal Practice & Procedure, *supra* note 1, § 3938; 20A Moore's Federal Practice, *supra* note 1, § 341.15[1].

260. See *Schad*, 570 U.S. at 524–28; *Bell v. Thompson*, 545 U.S. 794, 803–04 (2005).

261. See generally Jason A. Cantone & Carly Giffin, *Certification of Questions of State Law in the U.S. Courts of Appeals for the Third, Sixth, and Ninth Circuits (2010–2018)* (Federal Judicial Center 2020). North Carolina is the exception.

practices, social customs, case discussion norms, law clerk dynamics, and even self-imposed circuit nicknames.”²⁶² The prudent reader will want to explore those norms and traditions.

262. Allison Orr Larsen & Neal Devins, *Circuit Personalities*, 108 Va. La. Rev. 1315 (2022).

Chapter 3

Appeals from Final Decisions—Civil

- § 3.01 Generally
- § 3.02 Final-Decision Requirement
- § 3.03 Collateral Order Doctrine
- § 3.04 “Twilight Zone” Doctrine
- § 3.05 Partial Final Judgments

§ 3.01

Generally

Congress’s primary grant of jurisdiction to the courts of appeals confers authority to review “all final decisions of the district courts.”²⁶³ Unless an appeal fits into one of the relatively narrow statutes authorizing interlocutory appeals,²⁶⁴ therefore, the authority 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.²⁶⁵ Courts have consistently deemed the requirement of a final decision to be jurisdictional.²⁶⁶ Functionally, the requirement structures the relationship between appellate court and trial court; within this relationship, each court performs its complementary role.²⁶⁷

To be sure, for the trial court 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. On the other hand,

263. 28 U.S.C. § 1291. *See also id.* § 1295 (Federal Circuit).

264. *See infra* §§ [4.01–4.03](#), [5.01–5.03](#).

265. Act of Sept. 24, 1789, ch. 20, §§ 21, 22, 25, 1 Stat. 73, 83–86. *See generally* 15A Federal Practice & Procedure, *supra* note [1](#), § 3906; 10 Moore’s Federal Practice, *supra* note [1](#), § 54.

266. *E.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106–07 (2009); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). *See also supra* [§ 1.05](#).

267. 15A Federal Practice & Procedure, *supra* note [1](#), § 3907; 19 Moore’s Federal Practice, *supra* note [1](#), § 202.03.

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 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. In game theory, a trial-court decision that is final and open to an appeal is “akin to a take-it-or-leave-it settlement proposal for both parties . . . for the case to not be appealed, both parties need to ‘take,’ i.e., accept, this proposal.”²⁶⁸

The value of self-correction also is preserved by the postponement of review at least until the trial court has had an opportunity to rule finally and fully on the matter. Frequently, interlocutory trial-court rulings are reconsidered. Indeed, the trial court possesses a power to reconsider interlocutory rulings at any time before final judgment “to afford such relief from them as justice requires.”²⁶⁹ Postponing review of a ruling may de-emphasize 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 appeals after final judgment—in recent years, more than nine out of ten—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.²⁷⁰ 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 is too often too little, too late.²⁷¹ 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

268. Uri Weiss, *Rethinking Appeals*, 37 *Touro L. Rev.* 1409 (2021). See also Richard L. Heppner, *Conceptualizing Appealability: Resisting the Supreme Court’s Categorical Imperative*, 55 *Tulsa L. Rev.* 395 (2020) (applying cognitive psychology to understand how judges conceive of categories of finality).

269. Fed. R. Civ. P. 60 advisory committee’s note (1946).

270. See *infra* §§ [3.03](#)–[3.04](#), [3.05](#), [4.02](#).

271. See *infra* § [4.02](#).

piecemeal review.²⁷² Finality is, after all, in the eye of the beholder, and appellate judges should and do have a knack for doing justice in their application of the finality requirement.²⁷³

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 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. Consequently, there are rules for determining when the district-court proceedings have ended so that a final appeal is proper and rules about when litigants can appeal before the proceedings have ended and rules that limit or expand the scope of appeals before the proceedings have ended.²⁷⁴

In 1990, in a noteworthy legislative development, Congress amended the general rulemaking statute to provide that the Supreme Court “may define when a ruling of a district court is final for purposes of appeal” under § 1291.²⁷⁵ The only such rules are the timeliness rules in the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, and so appellate jurisdiction otherwise remains a function of court opinions interpreting and applying the statute.²⁷⁶ If the rulemakers ever do accept this explicit congressional invitation to go further, it could result in a sea change in finality jurisprudence.²⁷⁷ 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. Perhaps, one possible explanation for the lack of formal rulemaking under the 1990 authorization

272. See *infra* §§ [3.03](#), [3.04](#).

273. See *supra* [§ 2.02](#).

274. Bryan Lammon, *Finality, Appealability, and the Scope of Interlocutory Review*, 93 Wash. L. Rev. 1809 (2018).

275. 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 rulemaking to provide additional interlocutory appeals, discussed *infra* [§ 4.01](#)).

276. While the Supreme Court itself has never stated it so pithily, the Fifth Circuit once encapsulated the concept of finality: “[A]n 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).

277. See also *supra* [§ 1.07](#).

is that the judges themselves are comfortable and content with the familiar scheme of finality under the statute and its annotations. The Supreme Court has suggested that future rulemaking may possibly overtake past precedents, but case-law interpretations of finality remain foundational.²⁷⁸ 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 U.S. Code.²⁷⁹ 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—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.²⁸⁰ 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.

278. The normal rule is that a “final decision” confers upon the losing party the immediate right to appeal. That rule provides clear guidance to litigants. Creating exceptions to such a critical step in litigation should not be undertaken lightly. Congress has granted us the authority to prescribe rules “defin[ing] when a ruling of a district court is final for the purposes of appeal under” § 1291, 28 U.S.C. § 2072(c), and we have explained that changes with respect to the meaning of final decision “are to come from rulemaking, . . . not judicial decisions in particular controversies.”

Hall v. Hall, 138 S. Ct. 1118, 1131 (2018) (quoting *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1714 (2017)).

279. 28 U.S.C. § 1291. No more guidance is provided by Fed. R. Civ. P. 54(a), which defines “judgment” with circularity as “a decree and any order from which an appeal lies.”

280. See generally 15A Federal Practice & Procedure, *supra* note 1, § 3909; 19 Moore’s Federal Practice, *supra* note 1, § 202.02. See also Fed. R. Civ. P. 58(a) (requirement of entry of every judgment on a separate document); Fed. R. App. P. 3(c)(5) (“In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates: (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or (B) an order described in Rule 4(a)(4)(A).”).

Lawyers, and judges who used to be lawyers, are professionally disposed 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 to be found in opinions from the Supreme Court.²⁸¹

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*²⁸² (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.

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*²⁸³ (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.

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.

281. 15A Federal Practice & Procedure, *supra* note 1, § 3909 (Leading Finality Decisions).

282. 324 U.S. 229, 233 (1945).

283. 309 U.S. 323, 324–25, 330 (1940) (“The doctrine of finality is a phase of the distribution of authority within the judicial hierarchy.”).

*Radio Station WOW, Inc. v. Johnson*²⁸⁴ (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.

The 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 regarded 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*²⁸⁵ (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.

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.*²⁸⁶ (holding an earlier decree disposing of a party's claims but requiring further proceedings to divide judgment funds

284. 326 U.S. 120, 124–26 (1945).

285. 334 U.S. 62, 68 (1948) (citations omitted).

286. 338 U.S. 507, 511 (1950).

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.

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 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*²⁸⁷ (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.

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 should not be read 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; that is, there are controlling precedents already on the books.²⁸⁸ Indeed, the Supreme Court explicitly has warned against a tabula rasa or case-by-case approach.²⁸⁹ 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.

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

287. 370 U.S. 294, 306 (1962).

288. See generally 15A Federal Practice & Procedure, *supra* note 1, §§ 3910–3914.14; 19 Moore’s Federal Practice, *supra* note 1, §§ 202.07–202.14.

289. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 439 (1985).

“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.²⁹⁰

§ 3.03

Collateral Order Doctrine

The Supreme Court has fashioned the collateral order doctrine in a discrete line of cases interpreting the § 1291 requirement for a “final decision.”²⁹¹

Under this expansive interpretation of the statute, an order is labeled final and appealable even though the district-court 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.*²⁹² In a stockholders’ suit, the defendant corporation moved under state law to require the plaintiff to post a bond for the defendant’s costs and attorney 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 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.²⁹³

290. *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).

291. See generally 15A Federal Practice & Procedure, *supra* note 1, § 3911–3911.5; 19 Moore’s Federal Practice, *supra* note 1, § 202.07.

292. 337 U.S. 541 (1949).

293. *Id.* at 546–47.

The collateral order doctrine still remains viable today. Separability, finality, urgency, and importance remain the watchwords.²⁹⁴ Some decisions seem to suggest a more restrictive attitude and even some reluctance to find appealability, but 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.”²⁹⁵

Consider some representative examples of holdings going each way.

For examples, the Court has held the following orders appealable under the collateral order doctrine: a pretrial order that imposed on the defendants ninety percent of the costs of notifying the members of the plaintiff class;²⁹⁶ an order denying a claim of immunity raised by a defendant in a motion for summary judgment;²⁹⁷ an order granting a motion to abstain and stay the federal litigation pending similar state litigation;²⁹⁸ an order denying a state’s claim to Eleventh Amendment immunity;²⁹⁹ and an order rejecting the Attorney General’s certification that a federal employee named as 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.³⁰⁰

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

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

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

297. *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). That qualified immunity denials account for a growing number of these appeals has not been overlooked. *See generally* Bryan Lammon, *Municipal Piggybacking in Qualified Immunity Appeals*, 126 Penn. St. L. Rev. 123 (2021); Bryan Lammon, *Sanctioning Qualified-Immunity Appeals*, 2021 U. Ill L. Rev. Online 130 (2021); Michael E. Solimine, *Are Interlocutory Qualified Immunity Appeals Lawful?*, 94 N.D. L. Rev. Online 169 (2019); Joan E. Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 Mich. St. L. Rev. 895 (2014). Courts are obliged to distinguish between a right not to be tried and a right to prevail on the merits when determining qualified immunity.

298. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712–15 (1996); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8–13 (1983).

299. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

300. *Osborn v. Haley*, 549 U.S. 225 (2007).

For examples, 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;³⁰¹ an order refusing to disqualify opposing counsel in a civil case;³⁰² an order denying a motion to abstain and stay federal litigation pending similar state litigation;³⁰³ an order denying a motion to dismiss made on the ground that an extradited person was immune from civil process;³⁰⁴ a refusal to apply the Federal Tort Claims Act's judgment bar;³⁰⁵ an order vacating a dismissal predicated on the parties' settlement agreement;³⁰⁶ an order denying a defendant's motion to dismiss a damages action on the basis of a contractual forum-selection clause;³⁰⁷ and an order imposing sanctions on an attorney for discovery abuses, solely pursuant to Federal Rule of Civil Procedure 37 and not on a contempt theory.³⁰⁸

These two lists of specific examples are some indication of how the Supreme Court has steadfastly refused to expand the collateral order doctrine into a purely pragmatic approach to finality.³⁰⁹ 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 unsatisfied, 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.³¹⁰ 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

301. *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 28 U.S.C.) amended the traditional federal diversity jurisdiction and federal removal statutes to allow federal jurisdiction over most interstate classes).

302. *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).

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

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

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

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

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

308. *Cunningham v. Hamilton Cnty.*, 527 U.S. 198 (1999).

309. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106–07 (2009).

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

based on qualified immunity, from a denial of a subsequent motion for summary judgment.³¹¹

§ 3.04

“Twilight Zone” Doctrine

The “twilight zone” doctrine, more often and less pejoratively called “pragmatic finality” or the *Gillespie* doctrine, is another discrete, although somewhat tangential, line of analysis under 28 U.S.C. § 1291.³¹² The namesake and original decision is *Gillespie v. United States Steel Corp.*³¹³ In a Jones Act³¹⁴ 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 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.”³¹⁵

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.³¹⁶ Indeed, this line of precedent

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

312. See generally 15A Federal Practice & Procedure, *supra* note 1, § 3913; 19 Moore’s Federal Practice, *supra* note 1, § 202.10.

313. 379 U.S. 148 (1964).

314. 46 U.S.C. § 688.

315. *Gillespie*, 379 U.S. at 152–53.

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

has been described as being on life support, but it is still viable on a case-by-case balancing basis.³¹⁷

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 policy in which the Supreme Court’s federalism 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.³¹⁸

As one might expect from such an enigmatic opinion, different courts of appeals have interpreted the *Gillespie* doctrine in different ways.³¹⁹ Occasionally, 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 have been dismissed under other doctrines. The theoretical potential for expansion of appellate jurisdiction threatened by this approach simply 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

317. Bryan Lammon, *Dizzying Gillespie: The Exaggerated Death of the Balancing Approach and the Inescapable Allure of Flexibility in Appellate Jurisdiction*, 51 U. Rich. L. Rev. 371 (2017) (surveying the cases).

318. See *supra* § 1.06.

319. See generally 15A Federal Practice & Procedure, *supra* note 1, § 3913; 19 Moore’s Federal Practice, *supra* note 1, § 202.10.

belief about finality.³²⁰ But such a reimagining of the doctrine must come from the Supreme Court, not some court of appeals.³²¹

§ 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.³²² 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.”³²³

Modern federal procedure allows for such liberal joinder of claims and parties that contemporary civil actions frequently 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 the successful party from any delay and the need to participate in the extended trial proceeding. Rule 54(b) allows a prompt appeal but provides some certainty for the appellate procedure given today’s complex lawsuits. In doing so, the rule expressly rejects the notion that an entire case is the judicial unit for appealability; however, the rule reaffirms and incorporates the “final decision” requirement that still must be satisfied for the partial judgment.³²⁴

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 catchpoint. In the absence of the express determination and direction in a Rule 54(b) certificate, any order adjudicating

320. 15 Federal Practice & Procedure, *supra* note 1, § 3913, at 479–85; 9 Moore’s Federal Practice, *supra* note 1, § 110.12.

321. *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).

322. See generally 10 Federal Practice & Procedure, *supra* note 1, §§ 2656–2661; 10 Moore’s Federal Practice, *supra* note 1, §§ 54.20–54.29.

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

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

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.³²⁵ A late certificate 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, however, usually are found wanting.

The Supreme Court elaborated on the respective roles of the district court and the court of appeals in *Curtiss-Wright Corp. v. General Electric Co.*³²⁶ The plaintiff sued on various claims for breach of multiple contracts, including 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 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 that the district court had properly issued the Rule 54(b) certificate. It 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 or proper appellate decision making 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 rule defines a minimum unit of litigation that the court deems final under the jurisdictional statute. In this respect Rule 54(b) assures flexibility to accomplish immediate enforcement and allow immediate appellate review.

325. For example, a certificate will not be required when the matter is appealable under the "colateral order" doctrine. 10 Federal Practice & Procedure, *supra* note 1, § 2658.4. See *supra* [§ 3.03](#).

326. 446 U.S. 1 (1980).

There is a related but relatively uncertain principle of “cumulative finality,” which 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.”³²⁷ Indeed, the trend lines in recent years indicate that trials are vanishing in the U.S. district courts and an unappreciated and troublesome consequence is a dearth of appellate review in important and innovative cases. There has been a preliminary but discernable trend in the courts of appeals toward what commentators have nicknamed “manufactured finality,” that is, the invocation of Rule 54(b) to allow appeals of adverse partial adjudications after the dismissal of any non-adjudicated claims without prejudice.³²⁸ These observations promise an uncertain future.

327. *E.g.*, *Jetco Elec. Indus., Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). See 15A Federal Practice & Procedure, *supra* note 1, § 3914.9.

328. Ankur Shah, *Increase Access to the Appellate Courts: A Critical Look at Modernizing the Final Judgment Rule*, 11 Seton Hall Cir. Rev. 40 (2014). Technically and abstractly, such a “zombie action” is over in the district court but not otherwise final—and never can be final—for appeal. *Cf.* *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017).

Chapter 4

Appeals from Interlocutory Orders—Civil

§ 4.01 Generally

§ 4.02 Entitled Interlocutory Appeals

§ 4.03 Permissive Interlocutory Appeals

§ 4.01

Generally

This chapter chronicles the widening statutory exceptions to the requirement of finality.³²⁹ Both the general policy and the general statute reckon appealability against the baseline of finality.³³⁰ At one time, interlocutory orders were just that—*interlocutory*.³³¹ Not until 1891—the year the circuit courts of appeal were created—did Congress provide for an interlocutory appeal, and that statute purportedly covered only orders granting or continuing injunctions.³³² However, the statutory exceptions to the general rule of finality (the subject of the previous chapter) have grown in number and significance ever since.³³³

As is true of the courts of appeals' authority to review final decisions, jurisdiction over interlocutory appeals is a creature of statute and statutory interpretation. Inexorably, Congress has widened the appellate review authority. The Supreme Court described these legislative expansions somewhat pragmatically and in a legal realist way: “[Exceptions] seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious,

329. See generally 16 Federal Practice & Procedure, *supra* note 1, §§ 3920–3936.3; 19 Moore's Federal Practice, *supra* note 1, §§ 203.10–203.34.

330. 28 U.S.C. § 1291.

331. “[I]nlocutory, . . . adj. (Of an order, judgment, appeal, et cetera) interim or temporary, not constituting a final resolution of the whole controversy.” Black's Law Dictionary 832 (Bryan A. Garner, ed., 8th ed. 2004).

332. Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828. See *supra* § 1.03.

333. 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).

perhaps irreparable consequences. When the pressure rises to a point that influences Congress, legislative remedies are enacted.”³³⁴ The various statutory exceptions demonstrate a congressional recognition that too rigid an adherence to the finality requirement can work a severe hardship within a 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 history and traditional bias against interlocutory appeals, the statutes are narrow in language, narrow in interpretation, and narrow in application. There is much less “play in the joints” here than there is in the final-decision provision in § 1291.³³⁵ Once jurisdiction obtains, however, the interlocutory appeal brings before the court of appeals all aspects of the case illuminated by the order on review.³³⁶

In 1992, in a noteworthy legislative development, Congress amended the jurisdictional statute on interlocutory appeals and authorized the Supreme Court to promulgate court rules to provide for additional categories of interlocutory appeals that are not otherwise authorized in that statute, 28 U.S.C. § 1292.³³⁷ The only exercise of this judicial rulemaking power thus far has been to authorize permissive interlocutory appeals of a district-court order granting or denying class-action certification.³³⁸ The congressional delegation is a jurisdictional ratchet, a one-way device: judicial rulemaking can be used only to expand appellate jurisdiction and not to contract appellate jurisdiction that is otherwise granted by statute.³³⁹ Thus, it remains to be seen what more will come from this judicial rulemaking power, that is, whether the courts will expand interlocutory appealability in the future and, if so, for what other kinds of additional nonfinal

334. *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).

335. *See supra* §§ [3.02–3.05](#).

336. *Thornburgh v. Am. Coll. 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).

337. 28 U.S.C. § 1292(e). *See also infra* §§ [4.02–4.03](#).

338. 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](#).

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

decisions.³⁴⁰ Commentators have championed their hobby horses to advocate new categories of finality to meet various expediencies.³⁴¹

Tautologically, interlocutory orders may be divided into reviewable orders and nonreviewable orders. In 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 it for want of jurisdiction. Such an appeal may broadly and imprecisely be labeled *appealable* but could not be mistaken as being *reviewable*. Also, *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 writ³⁴² and certainly would be cognizable on any eventual appeal from a final judgment under the principle of closure.³⁴³

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. One last point bears emphasis: 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 the subsequent appeal from the eventual final judgment, subject to the doctrine of mootness.³⁴⁴

§ 4.02

Entitled Interlocutory Appeals

Section 1292(a) of 28 U.S.C. provides the courts of appeals with jurisdiction over appeals as of right of three types of interlocutory orders: those dealing with injunctions, receivers, and certain admiralty matters. Each type of entitled

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

341. See, e.g., Lavi M. Ben Dor, *Finality and Foreclosure: Determining a Homeowner's Ability to Appeal in Mortgage Foreclosure Cases*, 168 U. Pa. L. Rev. 1745 (2020) (noting a conflict among the circuits and advocating a rule that orders of foreclosure—during the Covid-19 pandemic—be designated appealable).

342. See *infra* § 5.03.

343. See *supra* § 1.08.

344. See *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996).

interlocutory appeal—sometimes referred to as “interlocutory appeals as of right”—will be discussed briefly here.³⁴⁵

Subsection (1) of § 1292(a) defines a category of entitled interlocutory appeals of orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.”³⁴⁶ 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 as 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.”³⁴⁷ 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 of usually only ten days.³⁴⁸

Denial of an injunction may be implicit. If an order has the practical effect of refusing injunctive relief, the aggrieved party is entitled to an interlocutory appeal so long as there are immediate and serious consequences.³⁴⁹ In an important holding, the Supreme Court eliminated an anomalous exception to make the general rule more whole: 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.³⁵⁰

345. 28 U.S.C. § 1292(c) makes a similar provision for the Federal Circuit. See *supra* § 1.03.

346. 28 U.S.C. § 1292(a)(1). See generally 16 Federal Practice & Procedure, *supra* note 1, §§ 3921–3924.2; 19 Moore’s Federal Practice, *supra* note 1, §§ 201.31[1], 203.10.

347. 16 Federal Practice & Procedure, *supra* note 1, § 3922, at 65. See also 19 Moore’s Federal Practice, *supra* note 1, § 203.10[2].

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

349. Compare Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 480–82 (1978) (denial of class-action status is 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).

350. 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 1, § 3923, at 132–45; 19 Moore’s Federal Practice, *supra* note 1, § 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.³⁵¹ 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.³⁵²

Subsection (2) of § 1292(a) defines a second category of entitled interlocutory appeals: “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. . . .”³⁵³ A consistent practice of strict construction has limited this subsection to its literal meaning.³⁵⁴ 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.³⁵⁵ 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, in the first place, is not appealable under subsection (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.”³⁵⁶ The historical purpose of this provision was to allow an appeal immediately after a determination

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

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

353. 28 U.S.C. § 1292(a)(2).

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

355. See Fed. R. Civ. P. 66. See generally 12 Federal Practice & Procedure, *supra* note 1, § 2983; 13 Moore’s Federal Practice, *supra* note 1, § 66.04.

356. 28 U.S.C. § 1292(a)(3).

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.³⁵⁷ There is no readily apparent reason, however, why admiralty cases deserve a significantly more liberal practice of interlocutory appeals. Indeed, pun intended, § 1292(a)(3) was not intended to clutter the courts of appeals with flotsam and jetsam.³⁵⁸

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.³⁵⁹ Befitting its historical origins, the typical interlocutory appeal under subsection (3) today 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.³⁶⁰ And once an interlocutory appeal has been properly taken, the court of appeals may decide all matters that have been sufficiently illuminated by the district court.³⁶¹

§ 4.03

Permissive Interlocutory Appeals

Section 1292(b) of 28 U.S.C. 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

357. 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).

358. See generally 16 Federal Practice & Procedure, *supra* note 1, § 3927; 19 Moore’s Federal Practice, *supra* note 1, §§ 201.31[4], 203.13.

359. Fed. R. Civ. P. 9(h)(2) reads: “A case that includes an admiralty or maritime claim within this subdivision (h) is an admiralty case within 28 U.S.C. § 1292(a)(3).” See also Supplemental Rules for Certain Admiralty and Maritime Claims A–G; Robert Force, *Admiralty and Maritime Law* (Federal Judicial Center 2d ed. 2013).

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

361. See *supra* [§ 1.08](#).

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.³⁶²

Enacted in 1958, this provision is the biggest statutory qualification—arguably the greatest legislative compromise—of the policy of finality that has marked the history of the courts of appeals.³⁶³ 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. There are at least three reasons why this debate will not likely be rejoined along these lines any time soon. First, beginning soon after 1958, the courts of appeals experienced a dramatic expansion of their dockets that continued for three decades.³⁶⁴ During that period of sustained docket growth, the courts of appeals were simply not looking to add to their workload. In more recent years, the courts of appeals have been more welcoming to discretionary appeals related to bankruptcy and class actions. Second, in the early 1990s, Congress enacted two statutory authorizations that delegated the responsibility to define appealability from final decisions³⁶⁵ and from interlocutory orders³⁶⁶ back onto the courts as delegations of judicial rulemaking power.³⁶⁷ These two statutes are some indication that, more recently, Congress itself has become more reluctant to expand appellate jurisdiction statutorily and unilaterally.³⁶⁸ Third, the actual

362. 28 U.S.C. § 1292(b). 28 U.S.C. § 1292(d) makes a similar provision for the Federal Circuit. See *supra* § 1.03.

363. See generally 16 Federal Practice & Procedure, *supra* note 1, § 3929; 9 Moore’s Federal Practice, *supra* note 1, §§ 203.30–203.33.

364. See *supra* § 1.06.

365. 28 U.S.C. § 2072(c). See *supra* § 3.02. No additional finality rules have been promulgated by the courts.

366. 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). One empirical study refuted two of the main criticisms of the new rule: “There is little evidence of ‘party effects’—*i.e.*, that a relationship exists between the petitioning party (plaintiff or defendant) and the court’s decision . . . [and] little evidence that the circuits are inconsistent in granting Rule 23(f) petitions or in reversing class-certification decisions in the Rule 23(f) context. . . .” Bryan Lammon, *An Empirical Study of Class-Action Appeals*, 22 J. App. Prac. & Process 287 (2022).

367. See also *supra* § 1.07.

368. *But see* 28 U.S.C. § 158(d)(2)(A) (bankruptcy permissive interlocutory appeals). See also *supra* § 2.04.

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. Nonetheless, commentators continue to debate the need for reform and what form it should take.³⁶⁹ Some advocate categorical rules listing the interlocutory orders that may be appealed before final judgment; others advocate a system of largely discretionary jurisdiction over all interlocutory orders.

Obviously, § 1292(b) is the most explicit statutory departure from the historical, general policy in favor of finality and against interlocutory appeals. A 2020 Federal Judicial Center report provided some data on permissive interlocutory appeals for the period 2013 to 2019.³⁷⁰ Some highlights from that study inform this discussion: there were only 636 applications; a little more than half (52%) of the applications were permitted by the courts of appeal; the median time between the application and the mandate was 17.8 months; the party initiating the permissive interlocutory appeal obtained some relief approximately half of the time the court of appeals reached the merits; appeals granting some relief did not take appreciably longer than appeals that did not grant any relief. The provision goes comparatively unused then, considering that more than 20,000 civil federal appeals are filed each year, and there were only 636 applications during the six-year study.³⁷¹ This small tally may reflect district-court hostility to the procedure. In any event, an appellate-court reluctance has not encouraged litigants. Almost half (48%) of the applications were not permitted by the courts of appeal at the outset.

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

369. See generally Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 Ohio St. L.J. 423 (2013) (summarizing the debate and sampling the arguments); Bryan Lammon, *Three Ideas for Discretionary Appeals*, 53 Akron L. Rev. 639 (2019) (proposing experiments).

370. Emory G. Lee III, Jason A. Cantone & Kristin A. Garri, *Permissive Interlocutory Appeals, 2013–2019* (Federal Judicial Center 2020). See also Hannah M. Smith, *Using the Scientific Method in the Law: Examining State Interlocutory Appeals Procedures That Would Improve Uniformity, Efficiency, and Fairness in the Federal Appellate System*, 61 Clev. St. L. Rev. 259 (2013); Michael E. Solimine, *The Renaissance of Permissive Interlocutory Appeals and the Demise of the Collateral Order Doctrine*, 53 Akron L. Rev. 607 (2019) (statistical study).

371. For example, there were 23,733 total civil cases commenced during the twelve-month period ending March 31, 2021. Administrative Office of the U.S. Courts, 2021 Annual Report of the Director: Judicial Business of the United States Courts, Table B-7: U.S. Courts of Appeals—Civil and Criminal Appeals Commenced, by Cases and Nature of Suit or Offense, During the 12-Month Period Ending March 31, 2021.

to appeal by the court of appeals—evaluations independent of each other—for the most part follow the procedure and criteria stated in the statute.³⁷²

The criteria in the statute are rather straightforward in summary, although their application is subtle and eclectic.³⁷³ 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 in the discretion of the district court, and it 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 *Gillespie* “twilight zone” doctrine of finality.³⁷⁴ 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.³⁷⁵ A § 1292(b) certificate is more likely to result in appellate review than an extraordinary writ—a general condition precedent to a writ being the unavailability of any other remedy.³⁷⁶ 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, at least, 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 criterion obliges the reviewing court to evaluate the prudence of the decision by the district court 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.³⁷⁷ But more than this, the court of appeals is called upon to exercise an independent

372. See also Fed. R. App. P. 5 (appeal by permission). See generally 16 Federal Practice & Procedure, *supra* note 1, § 3930; 19 Moore’s Federal Practice, *supra* note 1, §§ 203.31–203.32.

373. 16 Federal Practice & Procedure, *supra* note 1, § 3931; 19 Moore’s Federal Practice, *supra* note 1, § 203.31 nn.1–23.

374. See *supra* §§ 3.02–3.04.

375. See *supra* § 3.05.

376. See *infra* § 5.03.

377. See *infra* § 5.03.

discretion by taking into account factors beyond the proper contemplation of the district court, such as the state of the appellate docket and the separateness of the issues that would be finalized versus the issues that would continue in the district court. In *bas-relief*, 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. The abuse-of-discretion standard is extremely difficult to satisfy.³⁷⁸

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 review 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.³⁷⁹ 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.

378. 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).

379. 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

§ 5.02 Relief in the Nature of Habeas Corpus

§ 5.03 “All Writs Necessary or Appropriate”

§ 5.04 Appellate Sanctions

§ 5.01

Generally

Proceedings considered in this chapter are formally commenced by the filing of 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.³⁸⁰ Broadly considered, however, the authority 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 authority to issue the writ of habeas corpus, to grant all writs necessary or appropriate in aid of their jurisdiction, and to impose appropriate sanctions.³⁸¹

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.”³⁸² Historically, some judicial writs are deemed part of the ordinary appellate procedure, such as a writ of error or a writ of certiorari which are granted on appeal. 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

380. See *supra* [§ 1.03](#).

381. See *supra* [§ 1.05](#).

382. Bryan A. Garner, *Garner’s Dictionary of Legal Usage* 957 (Oxford Univ. Press 3d ed. 2011).

the request with the decision; technically speaking, a court “issues” a writ upon an “application.”

§ 5.02

Relief in the Nature of Habeas Corpus

History informs an understanding of this jurisdiction. Some background is in order. 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.³⁸³ The 1911 legislation ended the trial jurisdiction of the circuit courts and ended their habeas jurisdiction as well. Congress did not authorize the “new” 1911 courts of appeals to issue writs of habeas corpus, apart from the authority granted in the “all writs” statute.³⁸⁴ 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. Title 28 U.S.C. § 2241(a) 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.³⁸⁵ The federal remedy for state prisoners also repeats the technical empowerment of an individual circuit judge.³⁸⁶ 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.”³⁸⁷

The grand history of the “Great Writ” is beyond the scope of this modest primer,³⁸⁸ but another digression is appropriate to summarize the role of the

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

384. See *infra* § 5.03.

385. 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).

386. 28 U.S.C. § 2254(a). See also 28 U.S.C. § 2253(c)(1)(A) (requirement of a certificate of appealability); Fed. R. App. P. 22(b)(1) (same).

387. Fed. R. App. P. 22(a). This provision applies to an application brought by a federal or a state prisoner. Relief in the nature of habeas corpus also applies to other forms of detention. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (military detainee).

388. See generally Brandon L. Garrett & Lee Kovarsky, *Federal Habeas Corpus: Executive Detention and Post-Conviction Litigation* (2017); Andrea D. Lyon, Emily Hughes, Mary Prosser & Justin Marceau, *Federal Habeas Corpus: Cases and Materials* (2d ed. 2011); Ira P. Robbins, *The Law and Processes of Post-Conviction Remedies: Cases and Materials* (1982); Larry W. Yackle, *Postconviction Remedies* § 18 (1981); 17A *Federal Practice & Procedure*, *supra* note 1, §§ 4261–4268.5.

court of appeals in the postconviction review process. The writ of habeas corpus, which derives from English common law, found expression in the Constitution³⁸⁹ and the Judiciary Act of 1789.³⁹⁰ 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.”³⁹¹

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.”³⁹² That federal ground must have been previously presented to the state courts, that is, the state prisoner must exhaust state remedies before applying to a federal court.³⁹³ 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.³⁹⁴

Some further appellate procedures, unique to collateral attacks on criminal convictions, have to do with a certificate of appealability (COA).³⁹⁵ 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 district judge or a circuit judge issues a COA.³⁹⁶ This requirement of a COA was imposed by the

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

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

391. 28 U.S.C. § 2255. *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 1, § 3968; 20A Moore’s Federal Practice, *supra* note 1, § 322.10.

392. 28 U.S.C. § 2254(a).

393. *Id.* § 2254(b)(1)(A). *See also id.* §§ 2254(b)(1)(B)(i) & (ii) (alternatively, there are no available state remedies or the available state remedies are ineffective).

394. 17B Federal Practice & Procedure, *supra* note 1, § 4268.5.

395. *See generally* 16A Federal Practice & Procedure, *supra* note 1, § 3968; 20A Moore’s Federal Practice, *supra* note 1, § 322.10.

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

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).³⁹⁷ The COA will issue only if “the applicant has made a substantial showing of the denial of a constitutional right.”³⁹⁸ 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.³⁹⁹ 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.⁴⁰⁰

The COA requirement is a significant statutory development in the direction away from an appeal-as-of-right jurisdiction and towards a discretionary-review jurisdiction for the courts of appeals. It is noteworthy that a plea of actual innocence can overcome the AEDPA’s one-year statute of limitations for filing habeas petitions. Furthermore, the “miscarriage of justice” exception survived passage of that statute.⁴⁰¹ If the government intentionally waives a prisoner’s noncompliance with these deadlines, the Supreme Court has said a court normally should not try *sua sponte* to enforce them.⁴⁰²

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.”⁴⁰³ 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. There must be a good reason to allow the claim to continue for further review. The various courts

397. 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. See Luis Angel Valle, *Certificates of Appealability as Rubber Stamps* (Apr. 14, 2020), <https://ssrn.com/abstract=3576026> (finding that merits analysis relies on deference to the district court’s findings).

398. 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

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

400. 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).

401. *McQuiggin v. Perkins*, 569 U.S. 383 (2013); *Schlup v. Delo*, 513 U.S. 298 (1995).

402. *Wood v. Milyard*, 566 U.S. 463 (2012).

403. See *Buck v. Davis*, 580 U.S. 100 (2017); *Slack v. McDaniel*, 529 U.S. 473 (2000).

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 as a final judgment in the Supreme Court on a writ of certiorari.⁴⁰⁴ 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.⁴⁰⁵

§ 5.03

“All Writs Necessary or Appropriate”

Writ lore is a rather arcane and a concededly extraordinary aspect of federal appellate procedure.⁴⁰⁶ It is a venerable hornbook proposition that “[t]raditionally, the use of these writs in the federal courts has been sharply limited.”⁴⁰⁷ Section 1651(a) of 28 U.S.C. provides, in part, “[A]ll 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.”⁴⁰⁸ This grant of

404. 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).

405. Other important functions of the court of appeals in collateral review cases, mentioned merely for the sake of completeness, include 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* Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 Va. L. Rev. 753 (2013); David M. Maria, Lauren Oland & Ian M. Schwartz, *Habeas Relief for State Prisoners*, 88 Geo. L.J. 1649 (2000); 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); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381 (1996); 17B Federal Practice & Procedure, *supra* note 1, §§ 4261.1, 4265.2.

406. “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 1, §§ 3932–3936.3; 19 Moore's Federal Practice, *supra* note 1, §§ 204.04, 204.06–204.08; 20A Moore's Federal Practice, *supra* note 1, §§ 321.10–321.15.

407. Wright & Kane, *supra* note 101, § 102 at 673.

408. 28 U.S.C. § 1651(a). *See also* Fed. R. App. P. 21. *See generally* Knibb, *supra* note 19, §§ 3.01–3.17; Magnuson & Herr, *supra* note 19, §§ 8:1–8:3.

subject-matter jurisdiction allows for interlocutory review of district-court orders through issuance of extraordinary writs by the court of appeals.⁴⁰⁹

Mandamus and prohibition 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 but does not elaborate further. At minimum, then, the matter at issue must fall within the potential jurisdiction of the court of appeals, that is, “[t]he authority to issue a writ under the All Writs Act is not a font of jurisdiction.”⁴¹⁰

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.⁴¹¹ 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.⁴¹² 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.⁴¹³ The discretion of the court of appeals to exercise the power defines the proper circumstances in which to issue a writ. But that discretion defines particular circumstances even more clearly in which to deny a writ. Writs are not entitled appeals, in the sense that review of final decisions⁴¹⁴ and § 1292(a) interlocutory appeals are entitled.⁴¹⁵ The underlying characteristic of

409. 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).

410. *United States v. Denedo*, 556 U.S. 904, 914 (2009).

411. *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).

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

413. 16 Federal Practice & Procedure, *supra* note 1, §§ 3933–3933.2; 19 Moore’s Federal Practice, *supra* note 1, §§ 204.02[7], 204.04[3].

414. See *supra* § 3.02.

415. See *supra* § 4.02.

restraint, of discretion, of a power warily exercised, comes from the common-law history of the writs, and is reinforced, of course, by the background notion of limited federal court jurisdiction.⁴¹⁶

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.⁴¹⁷ 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 on occasions when a writ is denied.

Extraordinary writs are the vehicle for the exercise of two important and distinct responsibilities of the federal appellate courts. The courts of appeals hold both a supervisory authority and an advisory authority over the district courts in the federal judicial hierarchy.⁴¹⁸ 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.⁴¹⁹ Furthermore, while there may be a case-by-case preference for a § 1292(b) certificate for a permissive appeal, the writs are best understood as a supplement to the statutory routes for interlocutory appeals.⁴²⁰

416. See *supra* § 1.05.

417. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). See also 16 Federal Practice & Procedure, *supra* note 1, § 3933; 19 Moore’s Federal Practice, *supra* note 1, §§ 201.43, 204.02[8].

418. See generally 16 Federal Practice & Procedure, *supra* note 1, §§ 3934–3934.2; 20A Moore’s Federal Practice, *supra* note 1, §§ 321.01–321.14. Cf. *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018); *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380–82 (2005) (advisory mandamus).

419. The rule no longer requires naming the judge as the respondent. However, “[t]he 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).

420. See *supra* § 4.03.

Although writ practice can resemble game theory practiced by an insider,⁴²¹ a few situations regularly recur in which the writ will issue: when a jury trial has been denied improperly;⁴²² when an allegation of district-court misconduct raises a general procedural matter of first impression;⁴²³ and when a district court has acted improperly to remand a case previously removed from state court.⁴²⁴ 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.⁴²⁵ 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, the Supreme Court only occasionally reverses a court of appeals for improperly issuing a writ.⁴²⁶

§ 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.⁴²⁷ Because their incidence is relatively infrequent and because their actual imposition is so situation-specific, the law of appellate sanctions is somewhat sketchy and will be described in broad-brush terms in this chapter on writs.⁴²⁸

Section 1927 of Title 28, as amended in 1980, provides that any attorney who “multiplies the proceedings in any case unreasonably and vexatiously may be

421. See 16 Federal Practice & Procedure, *supra* note 1, § 3935; 20A Moore’s Federal Practice, *supra* note 1, § 321.14.

422. *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).

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

424. *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, 549 U.S. 225, 239–45 (2007); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708–09 (7th Cir. 1992). See also *infra* § 6.04.

425. *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).

426. *E.g.*, Shoop v. Twyford, 142 S. Ct. 2037, 2044–47 (2022); Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380–82 (2005); Mallard v. U.S. Dist. Ct., 490 U.S. 296, 308–10 (1989).

427. See generally 16A Federal Practice & Procedure, *supra* note 1, §§ 3984–3985.1; 20A Moore’s Federal Practice, *supra* note 1, §§ 338.30–338.31.

428. See, *e.g.*, Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse (6th ed. 2021); Warren Freedman, Frivolous Lawsuits and Frivolous Defenses: Unjustifiable Litigation (1987).

required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct."⁴²⁹ These sanctions are awarded against counsel personally and individually, rather than against the party being represented on appeal.⁴³⁰ Section 1927 went largely ignored until the 1980s 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,⁴³¹ and the prevailing sense of "crisis" in docket growth at the appellate level.⁴³² 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.⁴³³

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, an echo of 28 U.S.C. § 1912, authorizes "just damages," including attorney fees, and single or double costs upon a determination that an "appeal is frivolous."⁴³⁴ The rule may not, however, be used to "abridge, enlarge or modify any substantive right."⁴³⁵ 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."⁴³⁶ The test is an objective standard, and persons sanctionable in theory include anyone who

429. 28 U.S.C. § 1927. *See generally* *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

430. *See also* Fed. R. App. 46(b), (c) (power to suspend, disbar, and discipline attorneys); 16A Federal Practice & Procedure, *supra* note 1, §§ 3992.1–3992.2; 20A Moore's Federal Practice, *supra* note 1, §§ 346.12–346.13.

431. 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 and its amendments and the recent renaissance of sanctions is beyond the scope of this primer. *See supra* § 1.02. *See generally* 5A Federal Practice & Procedure, *supra* note 1, §§ 1331–1336.

432. *See supra* § 1.04.

433. *Wright & Kane, supra* note 101, § 69A at 432.

434. Fed. R. App. P. 38; 28 U.S.C. § 1912 (minor differences in wording). *See Meehan Rasch, Not Taking Frivolity Lightly: Circuit Variance in Determining Frivolous Appeals Under Federal Rule of Appellate Procedure 38*, 62 Ark. L. Rev. 249 (2009).

435. 28 U.S.C. § 2072(b).

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

was 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 deemed highly unusual and quite rare, appellate sanctions seem to have become more common in the pages of the *Federal Reporter*.⁴³⁷

Beyond rule and statute, there is a more theoretical jurisprudential basis, although of less certain dimension, for a court of appeal to exercise an “inherent power” or a “residual power” to assess appellate sanctions as an appellate court’s power *qua* court to control and manage its jurisdiction and docket.⁴³⁸ 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 attorney fees awards; disbarment, suspension, disqualification, or reprimand of counsel; or even dismissal of an appeal or withdrawal of a mandate if either was 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. An early study of the sanctions cases found that there were “aggressive circuits” that regularly employ sanctions, “reluctant circuits” that almost never employ sanctions, and “uncertain circuits” that do not evidence either aggressiveness or reluctance.⁴³⁹ There also are some signals of a willingness to experiment with creative

437. See 16A Federal Practice & Procedure, *supra* note 1, § 3984.1 n.5; 20A Moore’s Federal Practice, *supra* note 1, § 338.20[1] nn.1–16. Likewise, appeals from these judicial scoldings are not infrequent. See Douglas R. Richmond, *Appealing from Judicial Scoldings*, 62 *Baylor L. Rev.* 741 (2010).

438. See, e.g., *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 107–11 & 107 n.3, 108 n.5 (2017); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link v. Wabash R.R.*, 370 U.S. 626, 633 (1962).

439. 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 (1984).

appellate sanctions fashioned to the particular situation.⁴⁴⁰ 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.

440. 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).

Chapter 6

Appeals in Criminal Matters

§ 6.01 Generally

§ 6.02 Defendant Appeals

§ 6.03 Government Appeals

§ 6.04 Non-Party Appeals

§ 6.01

Generally

Appeals in federal criminal matters differ from appeals in civil matters and require separate treatment. An appeal brought by a criminal defendant⁴⁴¹ 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 the government brings a criminal appeal,⁴⁴² 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 non-parties⁴⁴³ if certain jurisdictional specifications are satisfied.

441. See *infra* [§ 6.02](#).

442. See *infra* [§ 6.03](#).

443. See *infra* [§ 6.04](#).

§ 6.02

Defendant Appeals

The importance of strictly adhering to the final-decision requirement in criminal cases always has been emphasized:⁴⁴⁴

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 correctness 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.⁴⁴⁵

In criminal matters, with few statutory exceptions,⁴⁴⁶ the term *final decision* from § 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 in criminal proceedings are not immediately appealable but must await the appeal from the final decision.⁴⁴⁷ The collateral order doctrine is also an available basis for appeal, but it is likewise applied strictly.⁴⁴⁸

In fine detail too elaborate to accurately replicate here, the courts of appeals have made nuanced distinctions between and within categories of criminal trial

444. See generally 15B Federal Practice & Procedure, *supra* note 1, § 3918–3918.10; 19 Moore's Federal Practice, *supra* note 1, § 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.

445. *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, discussed *supra* § 2.06).

446. 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 being 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).

447. See *Manrique v. United States*, 581 U.S. 116, 120–22 (2017) (a notice of appeal filed before all components of a judgment are final permits appeal only of the portions finalized prior to the notice). See also *supra* § 3.02 (civil).

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

orders.⁴⁴⁹ Orders related to grand jury proceedings sometimes are and sometimes are not deemed final.⁴⁵⁰ 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.⁴⁵¹ There are appealability precedents 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, appearance, and disqualification of counsel; disqualification of the judge; discovery; access to trial; and contempt.⁴⁵² Orders dealing with the suppression of evidence or the return of property are subject to a "confusing web of decisions."⁴⁵³

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.⁴⁵⁴ But that is the exception. As is the case in civil trials, most pretrial orders concerning the procedures to be followed at trial are not appealable.⁴⁵⁵ 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

449. See generally 15B Federal Practice & Procedure, *supra* note 1, §§ 3918–3918.10; 19 Moore's Federal Practice, *supra* note 1, § 202.14.

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

451. 18 U.S.C § 3145. See 15B Federal Practice & Procedure, *supra* note 1, § 3918.2; 19 Moore's Federal Practice, *supra* note 1, § 202.07[1]. See *supra* § 3.03 (civil). See generally Jefri Wood, The Bail Reform Act of 1984 (Federal Judicial Center 4th ed. 2022).

452. See 15B Federal Practice & Procedure, *supra* note 1, § 3918.3; 24 Moore's Federal Practice, *supra* note 1, § 612.04; 25 Moore's Federal Practice, *supra* note 1, §§ 616.02[4][e], 625.03[3].

453. 15B Federal Practice & Procedure, *supra* note 1, § 3918.4, at 465. See also 19 Moore's Federal Practice, *supra* note 1, § 202.14[2].

454. 15B Federal Practice & Procedure, *supra* note 1, § 3918.5; 19 Moore's Federal Practice, *supra* note 1, § 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).

455. 15B Federal Practice & Procedure, *supra* note 1, § 3918.6; 19 Moore's Federal Practice, *supra* note 1, § 202.08.

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 appeal.⁴⁵⁶ 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 post-judgment trial orders are rather straightforward: generally, the conclusion of the post-judgment proceeding creates a new, appealable final judgment.⁴⁵⁷

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.⁴⁵⁸ Most of the courts of appeals have special procedures that apply in death penalty appeals.⁴⁵⁹

Defendants' appeals of sentences have more to do with the U.S. Sentencing Guidelines⁴⁶⁰—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 they deserve mention.⁴⁶¹ The opportunity to obtain appellate review of the sentence was an essential feature of the original legislation.⁴⁶² Most of the sentence appeal provisions in the 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.⁴⁶³ But the standard of review dictated by the statute was severed and held invalid.⁴⁶⁴ The Supreme Court filled this interstitial gap by decreeing the court of appeals should determine if the

456. 15B Federal Practice & Procedure, *supra* note 1, § 3919.7; 19 Moore's Federal Practice, *supra* note 1, § 202.13[1].

457. 15B Federal Practice & Procedure, *supra* note 1, § 3918.9; 26 Moore's Federal Practice, *supra* note 1, § 632.40. See *supra* § 5.02; 28 U.S.C. §§ 2253, 2255.

458. See 15B Federal Practice & Procedure, *supra* note 1, § 3918.10; 19 Moore's Federal Practice, *supra* note 1, § 202.14.

459. See Knibb, *supra* note 19, § 15.27; Magnuson & Herr, *supra* note 19, § 7:29.

460. See generally United States Sentencing Guidelines Manual (2021).

461. 15B Federal Practice & Procedure, *supra* note 1, § 3918.8; 26 Moore's Federal Practice, *supra* note 1, § 632.20.

462. See 18 U.S.C. § 3742.

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

464. 18 U.S.C. § 3742(e).

district court abused its discretion; an unreasonable sentence must be reversed, but a sentence within the guidelines may be presumed to be reasonable.⁴⁶⁵

The Supreme Court has further elaborated on the appellate review of sentences by instructing the courts of appeals to (1) check the sentence for procedural errors such as an incorrect calculation of the guideline range or other 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.⁴⁶⁶ However, the courts of appeals have adopted a deferential attitude and have been reluctant to subject sentences under the guidelines to a strict, substantive judicial review.⁴⁶⁷ The U.S. Sentencing Commission regularly revises and updates the guidelines and commentaries in accordance with Supreme Court decisions, congressional amendments, and its own empirical research.⁴⁶⁸

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), entitled interlocutory appeals,⁴⁶⁹ and § 1292(b), permissive interlocutory appeals,⁴⁷⁰ 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

465. *Rita v. United States*, 551 U.S. 338, 341 (2007). See also *Chavez-Meza v. United States*, 138 U.S. 1959, 1963 (2018); *Nelson v. United States*, 555 U.S. 350, 351–52 (2009).

466. *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007). See generally 3 Federal Practice & Procedure, *supra* note 1, § 533; 26 Moore's Federal Practice, *supra* note 1, § 632.40.

467. Nancy Gertner, *Apprendi/Booker and Anemic Appellate Review*, 99 N.C. L. Rev. 1369 (2021).

468. 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/guidelines>. In August 2022, the Sentencing Commission regained a quorum for the first time in three years. See *Commission Regains a Quorum for the First Time in Three Years, Enabling It to Amend Federal Sentencing Guidelines, Issue Sentencing Policy*, <https://www.ussc.gov/about/news/press-releases/august-5-2022>.

469. 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 1, § 3918, at 414–15. But see *infra* § 6.04, Non-Party Appeals.

470. See *supra* § 4.03.

further by the heightened importance afforded the final-decision requirement in criminal matters.⁴⁷¹

Aside from the previously mentioned collateral orders that sometimes are judicially treated as final,⁴⁷² other matters are permitted interlocutory appeal by specific statute. The Bail Reform Act of 1984 creates the most significant statutory exception to the regime of finality.⁴⁷³ Appeals from a release or detention order, or from an order denying revocation or amendment of such an order, are allowed but must satisfy 28 U.S.C. § 1291 finality, if brought by an accused, or the restrictions on government appeals, if brought by the prosecution.⁴⁷⁴ The statutory scheme permits a defendant to appeal only after the district court has ruled on the order to detain pending trial, or to appeal the conditions imposed on an order to release.⁴⁷⁵

§ 6.03

Government Appeals

The government has no right to appeal in federal criminal cases unless the appeal is expressly authorized by statute.⁴⁷⁶ Furthermore, statutory authorizations must comport with the Fifth Amendment's former jeopardy protection.⁴⁷⁷ 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. § 1291.⁴⁷⁸ Rather, 18 U.S.C. § 3731 is the

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

472. *See supra* § 3.03.

473. 18 U.S.C. §§ 3141, 3142, 3143–3145. *See also* *Stack v. Boyle*, 342 U.S. 1, 6–7 (1951).

474. 18 U.S.C. § 3145(c). *See infra* § 6.03. *See also* Fed. R. App. P. 9(a)(3) (the court of appeals or a circuit judge may order the defendant's release pending the appeal).

475. *See* 18 U.S.C. § 3731 (authorizing government appeal from any order denying a motion to modify the conditions of release). *See infra* § 6.03.

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

477. *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).

478. *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 (§ 1291 applies in proceedings to vacate sentence). *See generally* 15B Federal Practice & Procedure, *supra* note 1, §§ 3919.1–3919.2.

basic authorizing statute.⁴⁷⁹ 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 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.⁴⁸⁰

The first category of government appeals 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 principles⁴⁸¹ 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, or if the district judge acquits the defendant before the jury renders a verdict; 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.⁴⁸² An appeal by the government does not allow the defendant, by cross-appeal, to raise issues not related to a judgment of dismissal.⁴⁸³ Beyond these settled basics, the decisional law on double jeopardy and government

479. 18 U.S.C. § 3731. See Margaret D. McGaughey, *When the United States Loses in a Criminal Case: The Government Appeal Process*, 18 J. App. Prac. & Process 297 (2017). See also *supra* § 5.03 (government may petition for extraordinary relief).

480. “The provisions of this section shall be liberally construed to effectuate its purposes.” 18 U.S.C. § 3731.

481. See *generally* Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 27.3 (6th ed. 2017).

482. Post-trial orders also are expressly included, again only subject to double jeopardy concerns. See 15B Federal Practice & Procedure, *supra* note 1, § 3919.7; 24 Moore’s Federal Practice, *supra* note 1, § 612.07.

483. See *supra* § 2.03.

appeals has interacted to “generate[] intricate bodies of doctrine that leave some questions still unanswered.”⁴⁸⁴

The second category of government appeals in § 3731—appeals from orders suppressing or excluding evidence or requiring the return of property—permits the government to appeal 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.⁴⁸⁵ 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 any other reason.⁴⁸⁶ 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 § 3731, the bail appeal provision, must be read together with the Bail Reform Act, as amended.⁴⁸⁷ 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.⁴⁸⁸

Finally, beyond § 3731 appeals, the government’s right to appellate review of criminal sentences, along with the defendant’s right, was broadened in 1984 by the same statute.⁴⁸⁹ 18 U.S.C. § 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 unreasonable but not covered by the guidelines.⁴⁹⁰ The government also

484. 15B Federal Practice & Procedure, *supra* note 1, § 3919.2, at 604. *See also id.* § 3919.5 (post-jeopardy dismissals), § 3919.6 (pre-jeopardy dismissals).

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

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

487. 18 U.S.C. §§ 3141, 3142, 3143–3148.

488. *See* 15B Federal Practice & Procedure, *supra* note 1, § 3919.4; 19 Moore’s Federal Practice, *supra* note 1, §§ 201.50–201.53.

489. *See supra* § 6.02.

490. 18 U.S.C. § 3742(b).

may appeal if the sentence imposed is less than the sentence stipulated in a final plea agreement.⁴⁹¹ The personal approval of the Attorney General or the Solicitor General is required for these government appeals.⁴⁹² Government appeals falling outside these specific provisions are seldom, if ever, allowed.⁴⁹³ Appeals within these provisions have become routine and unremarkable, procedurally speaking.

§ 6.04

Non-Party Appeals

Appeals by a non-party in criminal cases are not so infrequent that they can be ignored here.⁴⁹⁴ The miscellany of interests that have been raised by mandamus petitions brought by non-parties 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.⁴⁹⁵ Two common scenarios, however, deserve brief discussion: petitions by public news media challenging court orders that bar access to trials and other proceedings or limit press coverage⁴⁹⁶ 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 a kind of strict-scrutiny analysis whenever a trial court restricts access to its courtroom or limits reporting on its proceedings.⁴⁹⁷ Standing is usually straightforward. Media-press appeals challenging closure orders and gag orders usually are brought in petitions for

491. *Id.* § 3742(c).

492. *Id.* § 3742(b).

493. See 15B Federal Practice & Procedure, *supra* note 1, §§ 3919.8–3919.9; 19 Moore’s Federal Practice, *supra* note 1, § 201.50. See also *supra* § 5.02.

494. See 15B Federal Practice & Procedure, *supra* note 1, § 3914.31; 19 Moore’s Federal Practice, *supra* note 1, §§ 204.01–204.08.

495. See *supra* § 5.03.

496. 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.

497. 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, 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).

mandamus, so they proceed along the lines of the extraordinary writs.⁴⁹⁸ Because the substantive rights involved are so important and well-established, and because these mandamus petitions are so commonplace, these challenges to non-party orders arguably are a candidate for rulemaking recognition as a new category of entitled appeal.⁴⁹⁹

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.⁵⁰⁰ "Crime victim" is defined as "a person directly or proximately harmed as a result of the commission of a Federal offense."⁵⁰¹ The rights afforded under the Act are subject to the discretion of the district court ruling on the record.⁵⁰² 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 upon 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.⁵⁰³ 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 fourteen days.⁵⁰⁴ The few early-reported appellate decisions under this Act are somewhat ambivalent.⁵⁰⁵ 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 other garden-variety mandamus applications under the All Writs Act.⁵⁰⁶ However, the opinions also emphasize that the

498. The courts of appeals are divided over whether the media get an appeal or must seek mandamus. See *United States v. McVeigh*, 119 F.3d 806, 810 (10th Cir. 1997) (citations to the circuit split). See 15B Federal Practice & Procedure, *supra* note 1, § 3914.31; 19 Moore's Federal Practice, *supra* note 1, § 204.02. See also *supra* § 5.03.

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

500. 18 U.S.C. § 3771. The relevant public proceedings include pretrial hearing, trial, guilty plea hearing, sentencing hearing, parole hearing, and postconviction hearing.

501. *Id.* § 3771(e).

502. *Id.* § 3771(b)(1).

503. *Id.* § 3771(d)(3).

504. *Id.* § 3771(d)(5)(B).

505. See, e.g., *United States v. Kovall*, 857 F.3d 1060 (9th Cir. 2017); *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011); *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).

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

district court should afford the rights under the Act, in the first instance, within its sound discretion and, therefore, the courts of appeals should apply the more forgiving abuse-of-discretion standard of review.

Of course, non-party 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 non-party 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 a different interest than the government or the defendant. The courts of appeals nonetheless demonstrate 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.

Chapter 7

Review of Administrative Matters

§ 7.01 Generally

§ 7.02 Finality

§ 7.03 Exclusivity

§ 7.01

Generally

The courts of appeals perform an essential function in the review of actions taken by executive agencies within what has been called “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 federal courts. The Administrative Conference of the United States estimates there are 650 such statutory provisions.⁵⁰⁷ By one count, 183 of those statutes channel the appeal into the courts of appeals.⁵⁰⁸ 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 ten and twenty percent of the docket of the courts of appeals—more for the District of Columbia Circuit.⁵⁰⁹ 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 accumulate in such numbers as to threaten to overwhelm the federal appellate dockets in

507. Sourcebook of Federal Judicial Review Statutes, Administrative Conference of the United States (2022), <https://www.acus.gov/publication/sourcebook-federal-judicial-review-statutes>.

508. Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. 1419, 1485 (2022) (Appendix).

509. See *supra* § 2.04.

some courts of appeals.⁵¹⁰ The substantive law and procedural rules are adjunctive to the subject of administrative law, and this discussion must defer to treatises on that larger subject.⁵¹¹ The focus here is on appellate jurisdiction and procedures.⁵¹² The equally important and contested *Chevron* doctrine⁵¹³ of administrative law and the related “major question doctrine”⁵¹⁴ are beyond the scope of this primer. Likewise, the judicial review of agency rulemaking is deemed to be more related to the Administrative Procedure Act and administrative law.⁵¹⁵

Judicial review of administrative agency action initially took the familiar form of “non-statutory” review by suit against the officer or agency in the district court under some general head of subject-matter jurisdiction with a regular

510. See, e.g., Mary Hoopes, *Judicial Deference and Agency Competence: Federal Court Review of Asylum Appeals*, 39 Berkeley J. Int'l L. 161 (2021); Jonah B. Gelback & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 Tex. L. Rev. 1097 (2018); Stacy Caplow, *After the Flood: The Legacy of the “Surge” of Federal Immigration Appeals*, 7 Nw. J.L. & Soc. Pol'y 1 (2012); 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).

511. See generally Richard J. Pierce, 4 Administrative Law Treatise §§ 10–11 (6th ed. 2019); Louis Leventhal Jaffe, *Judicial Control of Administration Action* (1965).

512. 5 U.S.C. §§ 702, 703. See 16 Federal Practice & Procedure, *supra* note 1, §§ 3940–3944; 19 Moore's Federal Practice, *supra* note 1, §§ 201.13, 205.06.

513. In 1984, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court set forth the two-step framework by which courts of appeals review an agency's interpretation of its authorizing statute with considerable deference. First, the court considers whether the statutory provision is ambiguous. If the court answers that question in the negative, the court will adopt the unambiguous statutory meaning. However, if the court deems the statutory provision ambiguous, it must go on to determine whether the agency's interpretation is reasonable. If the agency's statutory interpretation is reasonable, then the court will enforce the agency's interpretation. If the agency's statutory interpretation is not reasonable, however, the court will not adopt the agency's interpretation. This doctrine of administrative law has proved to be controversial enough to be the subject of many law review articles. In more recent decisions, the Supreme Court has seemed to favor other more restrictive approaches without addressing *Chevron*. See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *NFIB v. Dep't of Labor, OSHA*, 142 S. Ct. 661 (2022). As of this writing, the doctrine is neither settled nor stable.

514. In a number of decisions, the Supreme Court has declared that if an agency seeks to decide an issue of major national significance—a major question—its action must be supported by clear congressional authorization. The Court's reasoning is that Congress rarely provides an extraordinary grant of regulatory authority through language that is modest, vague, subtle, or ambiguous. See *West Virginia*, 142 S. Ct. 2587 (rejecting the agency's claim of an authority to require power plants not to use coal). As of this writing, this doctrine seems to be growing in proportion and importance, so it is worth noting. See generally Cong. Rsch. Serv., *The Major Question Doctrine* (Nov. 2, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF12077>.

515. Administrative Procedure Act, 5 U.S.C. §§ 551–559. See generally Todd Garvey, *A Brief History of Rulemaking and Judicial Review*, Cong. Rsch. Serv. (Mar. 27, 2017).

appeal to the court of appeals.⁵¹⁶ These administrative appeals adhere to the general principles applicable to appeals from final decisions⁵¹⁷ and interlocutory appeals.⁵¹⁸

With the dramatic growth of the modern administrative state beginning in the New Deal alphabet agencies during the 1930s, Congress began to experiment with two other review models. Some early 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,⁵¹⁹ although there still are a few statutes adhering to this appellate review procedure.⁵²⁰

Beginning with the Federal Trade Commission Act of 1914,⁵²¹ 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.⁵²² Since 1950, this review model has been preferred and has become the appellate paradigm in federal administrative law.

In the paradigm review model, the agency performs somewhat like a trial court through an administrative judge who hears evidence, develops a record, and makes the initial decision on issues of law and fact.⁵²³ 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.⁵²⁴

516. See generally 14 Federal Practice & Procedure, *supra* note 1, § 3655; 19 Moore's Federal Practice, *supra* note 1, §§ 201.13, 205.06.

517. See *supra* §§ 3.01–3.05.

518. See *supra* §§ 4.01–4.03.

519. See *supra* § 1.02.

520. 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.

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

522. See 28 U.S.C. §§ 2341–2343, 2346–2350.

523. Fed. R. App. P. 15(a)(1) refers to “a petition for review” but many of the organic statutes creating agencies use the term “appeal.”

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

The fundamental principle of limited jurisdiction is important in understanding judicial review of administrative agency actions.⁵²⁵ As consistently interpreted, the judicial review provisions of the Administrative Procedure Act do not actually confer appellate subject-matter jurisdiction,⁵²⁶ but only prescribe appellate procedures when a court of appeals is granted review authority by some other statute.⁵²⁷ 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, and the disclaimer from a leading multi-volume 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 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.⁵²⁸

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.

In the long term, courts and judges seem to vacillate between polar-opposite extreme attitudes. 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

525. See *supra* § 1.05.

526. 5 U.S.C. §§ 701–706. See *Califano v. Sanders*, 430 U.S. 99, 105–06 (1977).

527. See, e.g., 28 U.S.C. §§ 2341, 2342, 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).

528. 16 Federal Practice & Procedure, *supra* note 1, § 3941, at 761.

seems to be eager, even zealous, to reach and decide the merits.⁵²⁹ 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 result in multiple appellate filings in different courts of appeals.⁵³⁰ 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.⁵³¹ Typically, a need for the transfer mechanism arises when multiple petitions for review of a single administrative order are filed in different circuits.⁵³²

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 pre-date 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.⁵³³ The two transfer statutes control whenever they apply.⁵³⁴

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.”⁵³⁵ That provision also applies ex-

529. Richard J. Pierce, 4 *Administrative Law Treatise* § 18.2 (6th ed. 2019).

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

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

532. See generally 16 *Federal Practice & Procedure*, *supra* note 1, § 3944; 20 *Moore’s Federal Practice*, *supra* note 1, § 315.12.

533. 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).

534. See 16 *Federal Practice & Procedure*, *supra* note 1, § 3944, at 845–48.

535. 28 U.S.C. § 1631. See *supra* § 2.07.

pressly to petitions for review of administrative actions and allows transfers from one court of appeals to another.

The second transfer statute, as amended, addresses with elaborate detail the situation of multiple petitions for review of the same agency order, brought in multiple courts of appeals.⁵³⁶ 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.⁵³⁷ If the agency receives more than one petition within the ten-day period, 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.⁵³⁸ At that point, all the other courts of appeals must transfer their petitions to the court designated by the panel.⁵³⁹ The designated court of appeals, however, has the authority to transfer all review proceedings to any other court of appeals for the convenience of the parties and in the interest of justice.⁵⁴⁰ 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."⁵⁴¹ This elaborate statutory schematic thus deals with many, but not all, of the possible scenarios of multiple filings of petitions for administrative review.⁵⁴²

§ 7.02

Finality

Some of the myriad of statutes providing for court of appeals review of administrative agency actions explicitly require a "final order";⁵⁴³ others have been judiciously interpreted to impliedly require administrative finality.⁵⁴⁴ Just as the final-decision requirement serves to order the relationship of the appellate

536. 28 U.S.C. § 2112(a).

537. *Id.* § 2112(a)(1).

538. *Id.* § 2112(a)(3). See Rules for Multicircuit Petitions for Review Under 28 U.S.C. § 2112(a)(3).

539. 28 U.S.C. § 2112(a)(5).

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

541. 28 U.S.C. § 2112(a)(1).

542. See 16 Federal Practice & Procedure, *supra* note 1, § 3944. For example, one of multiple cases consolidated for multidistrict litigation can possibly become immediately appealable upon an order disposing of that case, regardless of whether any of the other cases remain pending. See *Hall v. Hall*, 138 S. Ct. 1118 (2018); *Gelboim v. Bank of America Corp.*, 575 U.S. 405 (2015).

543. *E.g.*, 28 U.S.C. § 2344.

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

court to the trial court, the final-administrative order requirement does the same for the appellate court and agency.⁵⁴⁵ 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.⁵⁴⁶ 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 judicial review against the predicted hardship of postponing judicial review to allow the challenged administrative policy to continue and to await further developments.⁵⁴⁷ The agency must have taken some specified administrative action with some tangible effect on the party that might be remedied on judicial review.⁵⁴⁸ 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.⁵⁴⁹ 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.”⁵⁵⁰ The finality requirement is to be applied “pragmatically . . . focusing on whether judicial review at the time will disrupt the administrative process.”⁵⁵¹ Although the requirement is treated as jurisdic-

545. See generally 16 Federal Practice & Procedure, *supra* note 1, § 3942.

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

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

548. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022).

549. 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).

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

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

tional, these underlying purposes are reflected in its case-by-case application at the threshold of appellate review.⁵⁵² 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 writs.⁵⁵³ 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.⁵⁵⁴ 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.⁵⁵⁵

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.⁵⁵⁶ 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 party makes a showing akin to that required for injunctive relief, that is, that 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.⁵⁵⁷ 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

552. 16 Federal Practice & Procedure, *supra* note 1, § 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).

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

554. See generally 16 Federal Practice & Procedure, *supra* note 1, § 3943; 19 Moore’s Federal Practice, *supra* note 1, § 208.12. See also *Kloeckner v. Solis*, 568 U.S. 41, 44–46, 49–50, 56 (2012) (standard for determining whether the exclusivity principle applies).

555. *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).

556. Cf. *FCC v. ITT World Commc’ns, Inc.*, 466 U.S. 463 (1984) (interpreting scope of exclusive jurisdiction).

557. 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).

yields to appellate-court 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 can be discerned by the courts.

Survey of the Literature

The goal of this Survey of the Literature is to identify and memorialize the available publications related to the subject matter of this Primer in encyclopedic fashion for the user's further study and research. The materials are arranged by treatises, textbooks, studies and books, manuals, and symposia. Works are listed alphabetically by author. Especially important sources for studying and understanding appellate jurisdiction are noted with an asterisk (*). These asterisk-marked sources are exceptionally comprehensive or unusually thorough and also are current and up to date.

Treatises

*James Wm. Moore et al., *Moore's Federal Practice* (Matthew Bender 3d ed. 2022): 31 vols.; once considered the preeminent treatise on federal jurisdiction and procedure; volumes 19 through 21 cover appeals to the courts of appeals; more comprehensive on district-court jurisdiction; a good place to begin research; citations to this treatise are routinely found in the footnotes to this primer; available online on Lexis Advance Research.

Richard J. Pierce, Jr. & Kristin E. Hickman, *Administrative Law Treatise* (Wolters Kluwer 6th ed. 2020): 3 vols.; the successor to the preeminent treatise edited by Kenneth Culp Davis; primarily devoted to administrative law, but also covers administrative procedure.

Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (Thomson Reuters 5th ed. 2012): 6 vols.; an up-to-date analysis and synthesis of constitutional law; a superior resource on the constitutional aspects of federal jurisdiction; the popular one-volume student hornbook is keyed to this treatise.

*Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (Thomson Reuters 2022): 33 vols.; the best and most usable multivolume treatise on federal courts; updated continuously with supplements; volumes 15A, 15B, 16, 16A, and 16AA cover the courts of appeals; each section amounts to a knowledgeable and thorough lecture on the topic with comprehensive and exhaustive citations; the eighth edition of Wright & Kane's student hornbook (2017) is a masterful highlight of this set; this primer relies extensively on this treatise, as should be apparent from the footnotes.

Textbooks

- *Ruggero J. Aldisert, *The Judicial Process: Text, Materials and Cases* (West Publishing Co. 2d ed. 1996): a thoughtful jurist examines his craft; a mixture of jurisprudence and procedure.
- Lea Brilmayer & Jacob Corre, *An Introduction to Jurisdiction in the American Federal System* (Michie Co. 1986): designed as a student guide to some of the more esoteric questions of jurisdiction.
- Robert C. Casad, William B. Richman & Stanley E. Cox, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (LexisNexis Publishing 4th ed. 2014): a comprehensive treatment of all aspects of district-court jurisdiction in civil actions, including constitutional limits and rules of procedure; very thorough on the original jurisdiction of the district courts.
- *Gregory A. Castanias & Robert H. Klonoff, *Federal Appellate Practice and Procedure in a Nutshell* (West Publishing Co. 2d ed. 2017): a practical overview of federal appellate procedures; a useful student guide; a concise reference for attorneys.
- Erwin Chemerinsky, *Federal Jurisdiction* (Wolters Kluwer 8th ed. 2020): a discussion of the law and policy involved with current jurisdictional issues; focus is more on the district-court level and federal-state issues; a comprehensive and thorough student guide written by a masterful teacher and prolific academic.
- Robert M. Cover, Owen M. Fiss & Judith Resnik, *The Federal Procedural System* (Foundation Press 1991): an innovative casebook that takes a theoretical approach to understanding federal-court jurisdiction; a post-modern, meta-theory approach.
- David P. Currie, *Federal Courts: Cases and Materials* (West Publishing Co. 4th ed. 1990): an effort at modern organization to emphasize major contemporary themes such as civil-rights jurisdiction; note materials seek to deepen analysis; includes a statutory appendix.
- Donald L. Doernberg, C. Keith Wingate & Donald H. Zeigler, *Federal Courts, Federalism and Separation of Powers* (Thomson West 4th ed. 2008): a comprehensive and thorough casebook with a traditional approach.
- *Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation Press 7th ed. 2015): more than a casebook, an encyclopedic reference work,

packed with history and theory; an exhaustive treatment of the federal courts in a new 1,608-page edition.

Howard P. Fink, Thomas D. Rowe, Jr. & Mark V. Tushnet, *Federal Courts in the 21st Century* (Carolina Academic Press 4th ed. 2013): a blend of history and constitutional law with practice and procedure; a casebook that describes the current state of the federal courts and considers their future.

Henry M. Hart, Jr., Albert M. Sacks, William N. Eskridge, Jr. & Philip P. Frickey, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press rev. ed. 1994): a re-publication of a classic law-school text that first defined process jurisprudence as a school of legal thought.

Arthur D. Hellman, David R. Strass, Ryan W. Scott & F. Andrew Hessick, *Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process* (Carolina Academic Press 4th ed. 2017): a comprehensive and unified treatment of litigation of federal issues in state courts and in federal courts; this casebook includes cases, notes, questions, and problems.

Peter W. Low, John C. Jeffries, Jr., Curtis A. Bradley & Tara L. Grove, *Federal Courts and the Law of Federal-State Relations* (Foundation Press 10th ed. 2022): a modern treatment that de-emphasizes procedure and emphasizes themes of federalism; provides extended notes; includes a valuable bibliography of secondary authorities.

Robert J. Martineau, Kent Sinclair, Michael E. Solimine & Randy J. Holland, *Appellate Practice and Procedures: Cases and Materials* (Thomson West 2d ed. 2005): a modern casebook on appellate practice and procedure with an emphasis on appellate litigation.

*Daniel J. Meador, Thomas E. Baker & Joan E. Steinman, *Appellate Courts: Structures, Functions, Processes, and Personnel* (LexisNexis Publishing 2d ed. 2006): a comprehensive course book on all aspects of appellate practice and procedure; includes detailed chapters on the U.S. courts of appeals and the Supreme Court; one of the coauthors is the author of this primer.

James William Moore, *Moore's Federal Practice Rules Pamphlet Part I* (Matthew Bender 2022): a handy desk reference of rules and statutes.

Linda S. Mullenix, Martin H. Redish & Georgene M. Vairo, *Understanding Federal Courts and Jurisdiction* (Carolina Academic Press 2d ed. 2013): a concise student handbook on federal courts and federal procedure.

John E. Nowak & Ronald D. Rotunda, *Constitutional Law* (West Publishing Co. 8th ed. 2009): a handbook keyed to the authors' multivolume treatise; helpful on the constitutional aspects of federal court jurisdiction.

- James E. Pfander, *Principles of Federal Jurisdiction* (West Publishing Co. 4th ed. 2021): a law-student hornbook; provides up-to-date explanations of the leading principles of federal jurisdiction.
- Richard J. Pierce, Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law and Process* (Foundation Press 6th ed. 2013): a law-student hornbook that cites to and is an abbreviated version of the multivolume treatise; a quick and ready introduction to administrative procedures.
- Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* (Michie Co. 2d ed. 1990): a collection of essays on federal-state issues; a much cited and thoughtful treatment by a leading scholar of the federal courts.
- Martin H. Redish, Suzanna Sherry, James E. Pfander, Steven S. Gensler & Adam Steinman, *Federal Courts: Cases, Comments and Questions* (West Publishing Co. 9th ed. 2022): a comprehensive casebook that includes the latest court decisions and excerpts from the scholarly literature.
- A. Benjamin Spencer, *Federal Rules of Civil Procedure: 2021–2022 Educational Edition* (West Publishing Co. 2021): a handy desk reference of rules and statutes.
- Laurence H. Tribe, *American Constitutional Law* (Foundation Press Co. 3d ed. 2000): an original synthesis from the author's orientation to the subject; a good resource for constitutional limits on federal-court jurisdiction; the author has since abandoned his plan for a second volume.
- Michael L. Wells, William P. Marshall & Gene R. Nichol, *Cases and Materials on Federal Courts* (West Publishing Co. 4th ed. 2020): up-to-date casebook by three leading federal courts scholars; emphasizes broad constitutional themes.
- *Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* (West Publishing Co. 8th ed. 2017): modestly intended as a hornbook for law-student use, but one of the most frequently cited texts in federal judicial opinions; includes references to the multivolume treatise that is one of Charles Alan Wright's great testaments as a scholar; if a library could buy only one federal courts volume, this would be it.
- Charles Alan Wright, John B. Oakley & Debra L. Bassett, *Federal Courts Cases and Materials* (Foundation Press 14th ed. 2018): traditional casebook that emphasizes jurisdiction and procedure; notes are sparse; mostly opinions; deftly teaches the subject of federal courts for lawyers.
- Larry w. Yackle, *Federal Courts: The Current Questions* (Carolina Academic Press 2017): comprehensive and introductory coverage of federal courts; written for students and beginning lawyers.

Books and Studies

Action Commission to Reduce Court Costs and Delays, American Bar Association, *Attacking Litigation Costs and Delay, Final Report of the Action Commission to Reduce Court Costs and Delay* (1984): proposed several intramural procedural reforms to make appellate procedure more efficient and less judge labor-intensive; relied on the belief that appellate judges could do more work, if they worked more efficiently.

*Administrative Office of the U.S. Courts, *Annual Reports of the Director of the Administrative Office of U.S. Courts*: detailed statistics; available over time for comparisons and trend analyses; the mother lode of stats; enough data to satisfy any federal-court wonk.

American Bar Association, *Standards Relating to Appellate Courts* (1994): comprehensive standards dealing with all aspects of appellate procedure.

American Bar Foundation, *Accommodating the Workload of the United States Courts of Appeals* (1968): expressed concerns for the growing appellate caseload; recommended various intramural procedural reforms to increase efficiency; contemplated splitting circuits and adding judgeships as the primary approaches to coping with future caseload growth.

American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* (1969): one of the earliest studies of the modern federal court system; recommended the logical straightforward proposition that narrowing the subject-matter jurisdiction at the district-court level would result in a decrease in the caseload demand at the appellate level.

Carl Baar, *Judgeship Creation in the Federal Courts: Options for Reform* (Federal Judicial Center 1981): a study of the steps in the decision making to create new federal judgeships.

*Thomas E. Baker, *Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals* (West Publishing Co. 1994): a comprehensive study by the author of this primer; surveys the literature on the courts of appeals; chronicles studies and proposal for reform; one of the most-cited books on the subject.

Deborah J. Barrow, Gary Zuk & Gerard S. Gryski, *The Federal Judiciary and Institutional Change* (Univ. Mich. 1996): a political science account of the partisan and institutional changes on the federal bench.

Lawrence Baum, *The Puzzle of Judicial Behavior* (Univ. Mich. 1999): a pioneering work in the field of judicial behavior.

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): tracks the debate over capping the size of the federal judiciary by limiting the number of authorized judgeships.

*Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale Univ. Press 1921): a classic account of how an appellate judge reaches a decision; written by an historic justice of the Supreme Court who previously had sat with great distinction on a state high court.

*Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, *Justice on Appeal* (West Publishing 1976): a classic account of appellate courts, their history and development; published after a national conference in 1975.

Joe S. Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project* (Federal Judicial Center 1985): describes the series of procedural innovations adopted by the Ninth Circuit from 1980 to 1982.

Joe S. Cecil & Donna Stienstra, *Deciding Cases Without Argument: An Examination of Four Courts of Appeals* (Federal Judicial Center 1987): a study of the summary nonargument calendar.

*Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* (W.W. Norton 1994): an insightful account of how appellate courts function; written by one of the leading appellate jurists of his generation.

Jonathan M. Cohen, *Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals* (Univ. Mich. 2002): analyzes how the courts of appeals adapted to increasing workloads; explores the idea of judicial culture in those courts.

Commission on Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (1973), as reprinted in 62 F.R.D. 223: the “Hruska Commission” report, part I; recommended various intramural reforms to improve the efficiency of appellate procedures.

Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change* (1975), as reprinted in 67 F.R.D. 195: the “Hruska Commission” report, part II; recommended the creation of a new national court of appeals to decide appeals referred from the Supreme Court and appeals transferred from the courts of appeals; the division of the Fifth Circuit and the creation of the Eleventh Circuit, in 1981, can be traced to this report.

*Commission on Structural Alternatives for the Federal Courts of Appeals, *Final Report* (1998): popularly known as the White Commission after its chair, Justice Byron White; congressionally created; reported on proposals to

divide the U.S. Court of Appeals for the Ninth Circuit; analyzed proposals for revising the appellate structure of all the courts of appeals.

Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (Stanford 2007): comprehensive study of judicial decision making; includes bibliographical references.

Department of Justice Commission on the Federal Judicial System, *The Needs of the Federal Courts* (1977): recommended some reductions of original jurisdiction; proposed the creation of administrative courts under Article I to hear appeals from federal agencies.

William Domnarski, *In the Opinion of the Court* (Univ. Ill. 1996): an exploration of the reporting and writing of judicial opinions.

Samuel Estreicher & John Sexton, *Redefining the Supreme Court's Role: A Theory of Managing the Federal Judicial Process* (N.Y.U. Press 1988): a comprehensive assessment of the federal appellate-court system, with an emphasis on redefining the role of the Supreme Court.

*Federal Courts Study Committee, *Judicial Conference of the United States, Report of the Federal Courts Study Committee* (April 2, 1990): this committee was appointed by Chief Justice Rehnquist at Congress's request in response to increasing delays in processing cases due to quickly increasing caseloads; the report sets out the committee's description of problems, and its proposed structural and managerial reforms to the federal court system; summarizes relevant figures underlying their proposals; a separate volume (Part III of the report) has more detailed analysis and background memoranda written by staff and consultants.

Federal Judicial Center, *Appellate Court Caseweights Project* (1977): an attempt to develop estimates of relative workload in the courts of appeals without detailed timekeeping by judges; the experiment had judges estimate the relative workload associated with various appeal types, and their estimates were used to calculate case weights; concluded that the weighted caseloads produced by this method were not useful measures of appellate workload; cautioned that the method could not be adequately assessed given the inconsistencies in the appellate-court statistical reporting.

Federal Judicial Center, *Central Legal Staffs in the United States Courts of Appeals: A Survey of Internal Operating Procedures* (1978): a discussion of the use of staff attorneys in each circuit, based on reports prepared by senior staff attorneys.

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

- *Federal Judicial Center, *The Federal Appellate Judiciary in the Twenty-first Century* (Cynthia Harrison & Russell R. Wheeler eds., 1989): as the title suggests, contemplates what the new century will bring for the federal appellate courts; an edited book of essays by lawyers, judges, and academics.
- Federal Judicial Center, *Origins of the Elements of Federal Court Governance* (Russell Wheeler ed., 1992): a helpful introduction to the institutions of governance within the Third Branch.
- Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court* (1972), *as reprinted in* 57 F.R.D. 573: the “Freund Committee” report; championed the creation of a new national court of appeals that would screen petitions for certiorari to the Supreme Court and decide conflicts among the circuits; the proposal was controversial and nothing came of it legislatively.
- Steven Flanders & James E. Langner, *Comparative Report on Internal Operating Procedures of United States Courts of Appeals* (Federal Judicial Center 1973): a description of procedures in six stages of the appellate process: notification, documentation, argumentation, decision, publication, and mandate; also describes procedures related to judicial conferences, councils, committees, and circuit executives; bar admission and regulation; court support personnel, staff attorneys, and libraries.
- *Bryan A. Garner, Carlos Bea, Rebecca White Berch, Neil M. Gorsuch, Harris L. Hartz, Nathan L. Hecht, Brett M. Kavanaugh, Alex Kozinski, Sandra L. Lynch, William H. Pryor, Jr., Thomas M. Reavley, Jeffrey S. Sutton & Diane P. Wood, *The Law of Judicial Precedent* (Thomson Reuters 2016): the first hornbook-style treatise on the doctrine of precedent in more than a century; the above list of coauthors—which includes two Supreme Court justices—demonstrates the intellectual firepower of this volume; in his foreword Justice Stephen Breyer writes that he is “confident that many others will find something to learn in its comprehensive explications.”
- Jerry Goldman, *Measuring a Rate of Appeal* (Federal Judicial Center 1973): preliminary study; out of date for current purposes.
- Arthur D. Hellman, *Unresolved Intercircuit Conflicts: The Nature and Scope of the Problem, Final Report: Phase I* (Federal Judicial Center 1991): reports on an empirical study of the uniformity in federal law across the circuits by a leading expert on the courts of appeals.
- Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision Making* (Univ. Va. 2006): investigates the circumstances when a judge is likely to write a separate concurring or dissenting opinion.

- Laural L. Hooper, Dean P. Miletich & Angelia Levy, *Case Management Procedures in the Federal Courts of Appeals* (Federal Judicial Center 2d ed. 2011): detailed consideration of intramural procedures of appellate case management, such as screening, the nonargument calendar, and decisions without published opinions.
- *Judicial Conference of the United States, *Long Range Plan for the Federal Courts* (1995): the Third Branch developed and adopted this long-range planning document; touches on all aspects of the federal courts.
- David E. Klein, *Making Law in the United States Courts of Appeals* (Cambridge Univ. 2002): explores the legal and behavioral facets of how the courts of appeals are situated as an intermediate court-of-error correction.
- 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 & Donald Songer, *Decisions on the U.S. Courts of Appeals* (Routledge 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.
- Marie Leary, *Comparative Study of the Taxation of Costs in Circuit Courts of Appeals Under Rule 39 of the Federal Rules of Appellate Procedure: Report to the advisory Committee on Appellate Rules of the Judicial Conference of the United States* (Federal Judicial Center 2011): describes the variations among the circuits in their rules and procedures; provides a comparative costs analysis.
- Marie Leary, *Study of Class Action Objector Appeals in the Second, Seventh, and Ninth Circuit Courts of Appeals: Report to the Advisory Committee on Appellate Rules of the Judicial Conference of the United States* (Federal Judicial Center 2013): study focused on the overall frequency of class-action objector appeals between 2008 and 2013 and their dispositions.
- 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.

Daniel J. Meador & Jordana S. Bernstein, *Appellate Courts in the United States* (West Publishing 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.

David M. O'Brien, ed., *Judges on Judging: View from the Bench* (Chatham House Publishers 1997): a fascinating collection of essays about appellate judging written by judges.

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, *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.

*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.

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 1981): 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): expressed the concern that the seemingly inexorable trend toward more appeals of greater complexity would overwhelm the courts of appeals; urged continued study; encouraged 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. Ct. Mgmt. 1981): study of judicial administration.
- G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (Oxford 2007): 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

- Stephen E. Arthur et al., *The Attorney's Guide to the Seventh Circuit Court of Appeals* (6th ed. 2018): written by a panel of lawyers; very detailed.
- David M. Axelrad, *Appellate Practice in Federal and State Courts* (Law Journal Press 2018): complete guide to the appellate process; edited and written by experienced and expert appellate lawyers.

*Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (LexisNexis 4th ed. 2010): 3 vols.; the most thorough, comprehensive, and up-to-date treatment of standards of review; separate treatment for civil, criminal, and administrative matters.

Michael L. Cioffi et al., *Anderson's Sixth Circuit Practice Manual* (LexisNexis 6th ed. 2003): written by attorneys for attorneys.

*Council of Appellate Lawyers, *Appellate Practice Compendium* (Dana Livingston ed., ABA Publishing 2012): a compilation of "insider's guides" to the Supreme Court of the United States, all the U.S. courts of appeals, and the fifty state-appellate-court systems; the guides are written by a "who's who" lineup of appellate lawyers.

Donald R. Dunner, Charles Gholz, J. Michael Jakes, George E. Hutchinson, Richard L. Rainey & Alissa K. Lipton, *Court of Appeals for the Federal Circuit: Practice and Procedure* (Matthew Bender 2020): covers procedures for patent and trademark cases on review in the Federal Circuit.

*Harry T. Edwards & Linda A. Elliot, *Federal Courts Standards of Review: Appellate Court Review of District Court Decisions & Agency Actions* (Thomson West 3d ed. 2018): 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 Appellate Practice* (Brian Netter et al. eds., Bloomberg BNA 3d ed. 2018): edited and authored by experienced and expert lawyers from the Mayer Brown law firm; guides practitioners through the federal appellate process; only available electronically online on Bloomberg Law.

Federal Judicial Center, *Law Clerk Handbook* (4th ed. 2020): revised and updated version of the original 1977 edition written by the late Alvin B. Rubin, Circuit Judge, U.S. Court of Appeals for the Fifth Circuit; a comprehensive manual of procedures in chambers.

Federal Judicial Center, *Maintaining the Public Trust: Ethics for Federal Judicial Law Clerks* (revised 4th ed. 2019): overview of law clerks' ethical responsibilities; includes additional resources.

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

Lissa Griffin, *Federal Criminal Appeals Manual* (Thomson Reuters 2019): covers all the issues presented on appeal from a federal criminal conviction, including jurisdiction, appealability, and standards of review.

- A Guide to Judicial and Political Review of Federal Agencies (Kathryn A. Watts, Michael Herz & Richard W. Murphy eds., ABA 2d ed. 2015): provides a thorough overview of the law of judicial and political control of federal administrative agencies.
- *David F. Herr & Eric J. Magnuson, *Federal Appeals: Jurisdiction & Practice* (Thomson Reuters 2022): a lawyer's guide to the federal appellate courts, their jurisdiction and procedures; up to date treatment of the case law; available online on Westlaw Edge.
- Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (LexisNexis Publishing 5th ed. 2005): 2 vols.; designed to guide the practitioner through the post-AEDPA world of habeas procedure (Anti-Terrorism and Effective Death Penalty Act); chapters 34-38 detail the appellate stages up to and including certiorari.
- *David G. Knibb, *Federal Court of Appeals Manual* (Thomson Reuters 7th ed. 2022): 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; available online on Westlaw Edge.
- Alex Kozinski & John K. Rabiej, *Federal Appellate Procedure Manual* (2014): provides insights into the Federal Rules of Appellate Procedure and appellate practice from inside the rule-making process.
- 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 far 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 far out of date to rely on, except for historical research.
- James C. Martin & Nancy Winkelman, eds., *Third Circuit Appellate Practice Manual* (Pennsylvania Bar Institute 2d ed. 2010): edited and written by a panel of appellate practitioners for the lawyer appearing before the Third Circuit.
- Robert J. Martineau, *Modern Appellate Practice: Federal and State Civil Appeals* (Bancroft-Whitney 1983 & Supps. to 1994): "modern" connotes the previous twenty-five years; covered both state and federal civil appeals; scholarly and practical; well researched, with extensive citations and cross-references; not being updated, however.

- Brian R. Means, *Federal Habeas Manual* (Thomson West 2018): addresses various aspects of federal habeas corpus litigation with emphasis on the Antiterrorism and Effective Death Penalty Act of 1996 and Supreme Court and Circuit Court decisions.
- Gordon Mehler, David C. James, John Gleeson & Alicyn Cooley, *Federal Criminal Practice: A Second Circuit Handbook* (LexisNexis 22d ed. 2022): covers all aspects of criminal appeals in the Second Circuit.
- 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 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 far out of date to rely on, except for historical research.
- Practitioner's Guide to the United States Court of Appeals for the Fifth Circuit (2021): distributed by the Clerk's Office to assist lawyers and pro se litigants.
- *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 which would provide a valuable and quick reference.
- *Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (2008): a 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 collaborated to create an instant classic.
- *Stephen M. Shapiro et al., *Supreme Court Practice* (Bloomberg BNA 11th ed., 2019): 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.
- 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 et al., *Federal Appellate Practice 9th Circuit* (Thomson Reuters 2018–19 ed.): 2 vols.; another good example of the many 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 far 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; selected presentations and addresses; this national conference brought together jurists, lawyers, and academics to consider the state of appellate courts both state and federal.

*American Academy of Appellate Lawyers, *Bibliography of Appellate Practice: Books, Manuals, and Articles*: comprehensive listing of online materials—with links—as well as print materials related to appellate practice, the Supreme Court, the U.S. Courts of Appeals, and the state appellate courts.

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

Annual Review of Criminal Procedure Decisions of the Supreme Court and the Courts of Appeals, Geo. L.J.: 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 of legislation like the Anti-Terrorism and Effective Death Penalty Act (AEDPA) on judicial review of immigration and criminal appeals.

Seventh Circuit Review, Chi.-Kent L. Rev.: semiannual 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.

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About the Author

Professor Thomas E. Baker has been a scholar of the federal courts for over four decades and was a founding member of the faculty at Florida International University College of Law in 2002. He clerked for Judge James C. Hill, then a member of the U.S. Court of Appeals for the Fifth Circuit, from 1977 to 1979. He served as a Judicial Fellow at the Supreme Court of the United States (1985–1986) and was selected for the Justice Tom C. Clark Judicial Outstanding Fellow Award. He then served as Acting Administrative Assistant for Chief Justice William H. Rehnquist (1986–1987). He was an associate reporter to the Federal Courts Study Committee (1989–1990). In 1995, he received a formal Commendation for Distinguished Service from the Judicial Conference of the United States for his service on the Committee on Rules of Practice and Procedure. He was a presenter at the Invitational Research Conference of the Commission on Structural Alternatives for the Federal Courts of Appeals (the White Commission) in 1998. Professor Baker has authored 14 books, including the leading casebook on appellate courts, and more than 300 scholarly articles. He is a fellow of the American Academy of Appellate Lawyers and a fellow of the American Bar Foundation and was elected a life member of the American Law Institute. The second edition of this primer was recognized by the *Green Bag 2d Almanac & Reader* as an “Exemplary Legal Writing.”

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